



We Too Belong

*A Resource Guide of Inclusive
Practices in Immigration and
Incarceration Law and Policy*

+PERSPECTIVES IN BELONGING



PUBLISHED BY

The Haas Institute for a Fair and Inclusive Society at the University of California, Berkeley brings together researchers, community stakeholders, policymakers, and communicators to identify and challenge the barriers to an inclusive, just, and sustainable society in order to create transformative change. The Haas Institute serves as a national hub of researchers and community partners and takes a leadership role in translating, communicating, and facilitating research, policy, and strategic engagement. The Haas Institute advances research and policy related to marginalized people while essentially touching all who benefit from a truly diverse, fair, and inclusive society.

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THIS RESOURCE GUIDE AND ALL THE PERSONAL PERSPECTIVES CAN BE ACCESSED AT [HAASINSTITUTE.BERKELEY.EDU/WETOOBELONG](https://haasinstitute.berkeley.edu/wetooBelong)

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ABOUT THE HAAS INSTITUTE

The Haas Institute for a Fair and Inclusive Society at UC Berkeley brings together researchers, organizers, stakeholders, communicators, and policymakers to identify and eliminate the barriers to an inclusive, just, and sustainable society and to create transformative change toward a more equitable nation. The Haas Institute for a Fair and Inclusive Society has a vision and strategy that seeks to promote the benefits that ensue from a truly diverse, fair, and inclusive society. Towards that vision, the Haas Institute advances research, communications, and policy related to people who are not afforded full membership in society—those who are marginalized.

The Haas Institute draws upon UC Berkeley's substantive transdisciplinary research and history of engaged scholarship. At the heart of the Haas Institute are seven clusters of impact-oriented research that focus on the most urgent areas of marginalized populations and policies, where, working collaboratively, we feel we can make the most immediate and enduring difference toward developing and sustaining a more equitable and inclusive society. Over 90+ faculty participate in the following seven clusters: Disability Studies, Diversity and Democracy, Diversity and Health Disparities, Economic Disparities, LGBTQ Citizenship, Race, Diversity, and Educational Policy, and Religious Diversity.

The Haas Institute connects the work of scholars, researchers, and thought leaders to the broader social justice community and community-based organizations. In addition to the seven clusters, the Institute has a dedicated staff that focuses on addressing policy issues and supporting interactions across our various stakeholders.

The Haas Institute approaches its research through the lens of Othering. Othering is a set of common processes that engender marginality and persistent inequality across any of the full range of human differences. Dimensions of Othering include, but are not limited to, religion, sex, race, ethnicity, socio-economic status (class), disability, sexual orientation, and skin tone.

To address Othering, we seek to promote Belongingness. Belonging means having a group's basic humanity recognized and respected, and includes the right to both contribute and make demands upon society and political institutions. Belonging means more than having access to resources; it means having a voice and being afforded the opportunity to participate in the design of social and cultural structures. Accepting a group's Belonging requires us to recognize differences while exploring commonality.

A primary goal of the Haas Institute is to produce scholarship that is relevant to, and can impact policy relevant to, various forms of inequality and marginality. To meet this goal, we seek to develop research paradigms with community partners through the Haas Institute network to define issues, develop and implement research agendas, and assess policy interventions. While community participation is frequently honored by individual scholars, the Institute's larger network is sustainable, institutionalized, and crafted to generate transformative change. This effort represents a paradigm shift in how scholarship is created, executed, and disseminated.

WHY THIS RESOURCE GUIDE

The most marginalized populations in the history of our society were those that were denied public voice or access to private space. Historically, women and slaves experienced this form of marginality. They could not vote, serve on juries, nor run for office, and they were also denied a private space to retreat to, free from surveillance or regulation. We refer to this dual denial of both public voice and private space as non-public/non-private space. Today, immigrants, the incarcerated and the formerly incarcerated, and to some extent the disabled, most visibly inhabit this marginalized social and spatial location in American society.

The formerly incarcerated may be barred from voting or participating in local affairs, denied public benefits and even basic rights. They are also subject to surveillance and harassment with little to no recourse. Undocumented immigrants enjoy virtually no privacy rights, and are subject to exploitation or reprisals from employers who may threaten to report them. Immigrants may also be more likely to be surveilled by federal law enforcement and targeted by local law enforcement on the basis of appearance through racial or ethnic profiling.

While the experiences of these populations differ in many significant respects, they share marginalized status within non-public/non-private space. Meanwhile, immigration enforcement has come to resemble traditional law enforcement—a phenomenon known as “cimmigration.”

As a result of many of these realities, we feel that we cannot fully explore one system without exploring the other. Conceptually, “[c]riminal and immigration law primarily serve to separate the individual from the rest of US society through physical exclusion and the creation of rules that establish lesser levels of citizenship.”¹ Procedurally, immigration enforcement looks and acts like a police force. Border Patrol, formerly made up of ranchers, railway mail clerks, and local marshals, is now a well-trained and uniformed force permitted to detain people, conduct searches, pursue people suspected of being undocumented, and even make arrests.²

Legally, greater and more punitive sanctions have been added to the government’s arsenal in punishing and deporting immigrants since the late 1980s. The number of crimes that trigger deportation has increased, and actions that used to merit only civil sanctions are now considered criminal offenses.³ This convergence between immigration and incarceration—the so-called “two Is”—calls for an examination of the ways in which the immigration and criminal enforcement systems target specific and highly racialized populations. This broader framing of immigration and incarceration together benefits the policies and practices that serve to promote inclusiveness and belongingness for populations marginalized through criminal and immigration law enforcement practices.

As this Resource Guide illustrates, the range of positive interventions for immigrants and formerly incarcerated individuals share strategic and substantive overlap, from the need to expand democratic inclusion for these populations to the improvement of services and service delivery.

Our Resource Guide is designed to present a menu of inclusive practices that adequately promote the civic participation of and provision of public services to immigrant, incarcerated, and formerly incarcerated individuals.

For those in state and local government who are interested in making their communities more inclusive, this resource guide can serve as a menu of promising practices and possible models, while also presenting potential pitfalls and challenges. First, it examines the national spectrum of immigration law enforcement for examples of both resistance and compliance. Second, it examines efforts to extend basic democratic norms to those touched by the immigration and incarceration systems. Finally, it investigates efforts to extend and expand public services to these populations.

LAW ENFORCEMENT

IMMIGRATION

Federal law shapes state and local law enforcement practices in ways that have the potential to promote inclusion or exacerbate marginality. In 1996, Congress inextricably tied immigration law to criminal law when it categorically subjected some crimes to deportation. Since then, programs housed within the Immigration and Customs Enforcement (ICE) have promoted information-sharing and cooperation between local law enforcement and immigration officials:

- » **287(G) PROGRAMS.** Deputized local law enforcement of federal immigration law if a Memorandum of Agreement was signed between federal and local officials.
- » **SECURE COMMUNITIES (S-COMM).** Required that biometric data (fingerprints) taken during routine law enforcement be instantaneously shared with federal immigration officials. Immigration and Customs Enforcement (ICE) would then issue a detainer (ICE detainer), requesting local law enforcement to detain the person up to 48 hours longer than otherwise permitted, in order to enable an ICE official to arrive and gain custody of an undocumented arrestee.
- » **PRIORITY ENFORCEMENT PROGRAM (PEP).** Replicated the Secure Communities process; however, it attempts to limit the criminal offenses that make an undocumented person eligible for deportation.

These programs have torn apart families of mixed immigration status through harsh rulings in deportation proceedings, wherein noncitizens, including children, have no right to counsel. Some states and municipalities

have limited their compliance with ICE detainees due to expense, concern for the family unit, constitutionally protected state autonomy, and general disapproval of the rampant deportation of non-violent, perhaps non-convicted individuals:

- » **STATE OF CALIFORNIA.** Gov't Code § 7282.5(a)(1)-(3)—Limits compliance with ICE detainees, statewide based upon conviction of specified crimes).
- » **ALAMEDA COUNTY, CA.** Limited compliance with ICE detainees based upon the nature of the alleged crime committed before eliminating cooperation with ICE detainees altogether.
- » **SANTA CLARA, CA.** Predicates ICE detainer enforcement on federal reimbursement.
- » **ORANGE COUNTY.** Prohibits compliance with ICE detainees; however, informs officials when the subject of the detainer request will be released from custody.
- » **NEW YORK: NEW YORK IS HOME ACT.** Proposed statewide legislation would possibly eliminate ICE detainer compliance, among many other practices.
- » **NEW YORK CITY.** Limits compliance with ICE detainees based upon the nature of the alleged crime committed.
- » **WASHINGTON, DC.** Limits compliance with ICE detainees to violent or dangerous offenders, also conditioned prior agreement from the federal government to reimburse for all costs incurred.

CIVIC PARTICIPATION

Restriction from the franchise is, perhaps, the most notorious barrier to civic participation in a democratic society. When members of immigrant, incarcerated, and formerly incarcerated populations are restricted from accessing the vote, they are prohibited from engaging with their communities on equal terms.

IMMIGRANT FRANCHISE

Opponents to inclusionary policies raise fears of disloyalty or mal-intent to keep immigrants, people convicted of crimes, and people formerly convicted of felonies disenfranchised; however these concerns are notably less salient at the local level. Both states and municipalities have proposed or passed legislation in acknowledgment of the injustice created by voting restrictions:

- » **NEW YORK STATE: NEW YORK IS HOME ACT.** Proposed legislation would provide path to state citizenship to documented and undocumented immigrants and entitled state citizens to vote in all state and local elections.
- » **NEW YORK CITY.** School board elections open to undocumented parent voters up until 2002.
- » **STATE OF CALIFORNIA.** (1) Passed legislation allowing undocumented noncitizens to obtain driver's licenses; (2) Passed legislation allowing undocumented noncitizens to obtain professional licenses; and (3) Proposed legislation to allow undocumented noncitizens to serve on juries (vetoed by Gov. Brown).
- » **CHICAGO, IL.** Permits parents to vote in school board elections, irrespective of immigration status.
- » **TAKOMA PARK, MD.** Permits noncitizens to vote in all local elections (supported by residents in an advisory referendum).

ACCESS TO COURTS

In addition to participation in the democratic process, access to the justice system is central to our understanding of a free and dignified existence; yet, there is no truly uniform rule regarding the right to sue. While the right to seek redress in court is generally available to immigrants, fear of retaliation by one's adversary has

a chilling effect on the filing of such suits. Anti-retaliation protection in the employment context exists at the federal level, and some municipalities have prohibited disgruntled landlords from reporting a tenant's undocumented immigration status to authorities as a means to avoid responsibility in a landlord-tenant conflict:

- » **MADISON, WI.** Prohibits landlords from reporting a tenant's immigration status in retaliation for enforcing tenant's rights.
- » **OAKLAND, CA.** Prohibits landlords from threatening to report on immigration status to force tenants to vacate.

INCARCERATED FRANCHISE

The federal constitution permits, but does not require, states to disenfranchise people with felony convictions. Despite evidence that re-enfranchisement helps people convicted of felonies to productively reintegrate with society and is correlated with lower recidivism rates,⁴ people with felony convictions in 12 states are disenfranchised for some period of time—up to their entire lives—even after the completion of probation and parole. Nineteen states re-enfranchise people with felony convictions after the completion of parole and probation, while four do so after the completion of parole. These restrictive policies are inconsistent with both international norms and our own goals of rehabilitative criminal treatment.

Progressive practice models from both state constitutional and international law have successfully preserved prisoners' dignity without compromising the integrity of the vote:

- » **STATE CONSTITUTIONAL PROTECTION.** Vermont and Maine limit prisoner disenfranchisement to those prisoners convicted of electoral fraud (Vermont const. art. 55 & Maine const. art. 2 sect. 1).
- » **INTERNATIONAL PROTECTIONS.** International Covenant on Civil and Political Rights (ICCPR); Canadian Court of Rights and Freedoms; European Court of Human Rights interpreting *Hirst v. United Kingdom*.

In the United States, prisoners also have limited rights when attempting to bring a lawsuit. The **Prison Litigation Reform Act (PLRA)** restricts prisoners' access to courts by refusing a waiver or payment plan of court fees after a prisoner has filed three suits deemed frivolous except in rare circumstances. Many states have enacted similar legislation affecting suits brought in state courts. Incarcerated individuals are among the most vulnerable in the country. Rather than supporting these individuals in preserving justice for themselves and others, state PLRAs further limit and disempower them.

PUBLIC SERVICES

Exclusion from public services along the axes of immigration and incarceration occur *de facto* and *de jure* at the federal, state, and local levels. Immigrants and the formerly incarcerated pay into municipal, state, and federal coffers, but unjustifiably receive limited government assistance in return. The confluence of limited services, ineffective delivery, and targeted exclusion make gaining access to services challenging, if not impossible.

IMMIGRATION

BENEFITS

Through passage of exclusionary policies, the federal government has supported a self-deportation doctrine, or the practice of making life so undesirable for immigrants in the US that they “voluntarily” leave. Furthermore, the Immigration and Nationality Act (INA) makes immigrants who are “likely to become a public charge” (LPC) ineligible for admission to the United States or the issuance of visas (8 U.S.C. § 1182(a)(4) (2013)) and

subjects immigrants to deportation by evaluating how many cash services they have received. The **Personal Responsibility and Work Opportunity Reconciliation Act** (PRWORA), as amended by the **Illegal Immigration Reform and Immigrant Responsibility Act** (IIRIRA), makes it illegal for undocumented immigrants to receive federally funded benefits beyond emergency Medicaid.

There is tremendous variety in the approaches to providing healthcare and cash welfare services to immigrants at the state level. In California, undocumented immigrants are eligible for some services; however, a labyrinth of eligibility standards and jurisdictional differences make it difficult to differentiate the services available from those that are not. T-visa and U-visa holders have expanded access to services in comparison to undocumented residents, albeit still lesser access than permanent residents and citizens.

EDUCATION

Federal law has not declared education to be a fundamental right; nevertheless, it prohibits restrictions from primary or secondary education based upon immigration status. Furthermore, Title VI of the Civil Rights Act of 1964 requires that school districts provide English language learners (ELLs) with adequate support to take advantage of their access to primary and secondary education. Unlike foundational education, higher education and the financial support structure students require in order to attend are never guaranteed. Under federal law, undocumented students are prohibited from having access to higher education at in-state tuition rates, unless the same benefits are made available to everyone in the country. After a failed national effort to remedy this prohibition through the DREAM Act, 18 states have successfully passed DREAM Acts that define residency for tuition purposes in terms that grant in-state tuition to undocumented students with certain long-term connections to the state. In effect, undocumented students without financial options are unable to attend public universities. Many private colleges and universities have come forward to welcome undocumented student applications and many students are eligible for a variety of institutional aid made available through private funding.

IDENTIFICATION CARDS AND DRIVER'S LICENSES

Local identification card programs enable immigrants to access much-needed public and private services and to communicate effectively with law enforcement when reporting crimes. Only 13 jurisdictions currently permit undocumented immigrants to obtain driver's licenses, none of which serves as a federally valid form of identification. Municipal ID programs vary greatly in design, with respect to what services they unlock and how widespread usage is encouraged. New York City incentivized adoption of the cards by providing discounts at cultural centers around the city. Municipal ID cards in New York City, Oakland, and San Francisco, among others, also enhance undocumented individuals' ability to open a bank account or access financial services:

- » **NEW YORK.** New York City's municipal IDs are valid identification for accessing bank services at participating banks around the city.
- » **CALIFORNIA.** (1) Oakland's IDs also function as a debit card, enabling cardholders to safely store cash; (2) San Francisco's IDs serve as valid identification for opening a checking account at participating banks around the city.

PROTECTIONS FOR EMPLOYEES

Federal law prohibits hiring of undocumented workers; yet, it is mostly silent on whether undocumented employees, once hired, are entitled to the benefits and protections afforded to other workers. Some state employment law is intended to protect workers irrespective of their immigration status.

A. EMPLOYEE RETIREMENT INCOME SECURITY ACT

In 1974, Congress passed the Employee Retirement Income Security Act (ERISA) to ensure solvency and proper management of private employer-offered pension, benefits, and welfare plans. It remains uncertain whether undocumented workers have a right to claim that an employer unlawfully withheld benefits, as no federal

decision has provided clarity to the rule. The only salient solution appears in unrelated California employment statutes, such as California Civil Code § 3339(a), which broadly declares that for the purposes of employment law, all workers shall be treated equally, regardless of immigration status.

B. DOMESTIC WORKERS

Society has consistently and historically undervalued the work of domestic workers, a population disproportionately comprised of immigrant women of color. Exclusion from widely enjoyed protections in the National Labor Relations Act (NLRA), Occupational Safety and Health Act, and parts of the Federal Labor Standards Act memorializes the subjugation of these workers and puts them at risk. Massachusetts, California, New York, Hawaii, and other states have proposed or passed policy solutions for this injustice. Despite differences in breadth and design, these policies generally extend to domestic workers the type of anti-harassment and overtime pay protections that are available to non-domestic workers in the federal legislation.

INCARCERATION

Despite federal acknowledgment of the importance of adequate reentry assistance, the Department of Justice leaves the task of providing reentry services to states, cities, and non-profit organizations.

BENEFITS

Confinement of an individual in a jail or prison for more than 30 days will stop payment of any federal benefits, with a special caveat for disability benefits. Federal law may also affect parental rights of confined persons. Under the **Adoption and Safe Families Act (ASFA)**, if a child is in foster care for 15 months in a 22 month period, the state is required to file for termination of parental rights. PRWORA further disenfranchised individuals formerly convicted of felonies with drug convictions by establishing lifetime bans on certain federal benefits unless states opt out of the ban. Many states have introduced legislation that maintains flexibility in administration of this ASFA rule, and some states have opted out of the PRWORA benefits ban by extending limited benefits, such as **Temporary Assistance to Needy Families (TANF)** and **Supplemental Nutrition Assistance Program (SNAP)**. Inmate's eligibility for Medicaid has increased in many states since the passing of the **Patient Protection and Affordable Healthcare Act (PPACA)**. However, states must exercise the option to expand their Medicaid programs, which benefit a broad population, including, among others, inmates.

EDUCATION

Inadequate education and low literacy rates have long been tied to analyses of criminal delinquency, as both cause and effect of juvenile encounters with the criminal justice system.⁵ Federal and state laws in 26 states have defined mandatory literacy requirements for federal and state prisoners. Despite the known social benefits of these literacy programs, the guiding law often serves as an unfunded mandate, leading to inconsistent implementation. In higher education, a new program will reintroduce limited Pell grants in prisons, which have been unavailable to prisoners since 1994. Pell grant defunding was responsible for major cut-backs in prison higher education. The new federal plan is to test out limited Pell funding to study the effects of increased educational opportunities on recidivism. The programs that survived without Pell grants can help inform the design of new programs receiving the new funding. Some examples are as follows:

- » **THE CONSORTIUM FOR THE LIBERAL ARTS IN PRISON:** network of nationwide private schools providing rigorous degree programs taught by faculty.
- » **NEW YORK. JOHN JAY COLLEGE OF CRIMINAL JUSTICE PRISON-TO-COLLEGE PIPELINE (P2CP):** provides college credits to students and helps them transition into study post-release.

HOUSING

Housing is another essential component to a formerly incarcerated person's physical and mental wellbeing as he or she reintegrates into society post-incarceration. Yet, people with criminal records may find themselves shut out of housing options. The significant shortage of available low-income housing, compounded by public agencies' right to deny housing based upon criminal records, leaves the formerly incarcerated vulnerable to rejection and homelessness. Moreover, conviction of certain crimes can force mandatory rejection or ejection from public housing for the convicted, or even other members of the convicted person's household in the instance of drug-related criminal activity. Municipalities around the country have come forward to ban housing discrimination based upon criminal records and to improve transition from incarceration to new housing.

Examples of passed or proposed housing protections for people convicted of felonies can be found in Newark, San Francisco, New York, Los Angeles, New Orleans, and Chicago. Unique anti-homelessness initiatives, like Portland's "tiny house" program, do not target the formerly incarcerated, but nonetheless benefit people convicted of felonies struggling to find housing.

- » **DEPARTMENT OF HOUSING & URBAN DEVELOPMENT:** HUD recently issued guidance prohibiting automatic rejection of tenant applications or housing assistance on account of criminal records.

IDENTIFICATION CARDS

The need for an identification card can present unique challenges for the formerly incarcerated individual. Driver's licenses, and other identification documents, may be lost during the course of incarceration or suspended for periods of time, beginning with the date of release, in the event of certain drug or other crimes. Incarceration may lead to confiscation and/or license suspensions, and reinstatement of a suspended license, regardless of confiscation, can result in hefty fines. As driver's licenses are often the only form of identification used by a person, a license suspension can inhibit a person's access to housing, employment, and financial services. Standard practices ought to eliminate confiscation of licenses and maintain non-driving-related operational uses of driver's licenses in the event of suspension.

EMPLOYMENT

Employment opportunities are crucial to prevent social inequity and reduce recidivism rates. So-called "ban the box" policies, similar to those appearing in the housing context, have appeared across the country to protect people with criminal records from experiencing discrimination in the job application process. These policies require employers to consider job credentials prior to conviction history and encourage consideration of the length of time passed since the conviction and its job-relatedness. Ban the box legislation also attempts to eliminate mandatory, up-front disclosures of criminal history to avoid the negative psychological effect such disclosures have on the formerly convicted person. Some states, including California, have further attempted to incentivize the hiring of ex-offenders by providing substantial tax incentives in exchange for those that employ former inmates. Criminal history may also inhibit a person from obtaining or maintaining a professional license, which is becoming required for more and more professions. Licensing boards have broad discretion when issuing licenses and can often find a conviction history incongruous with character requirements for a particular license.

CONCLUSION

This Resource Guide surfaces policy initiatives designed to create space for immigrant, incarcerated, and formerly incarcerated individuals within our social and cultural structures.

Immigration law, like criminal law, has trapped millions of individuals in a non-public/non-private margin, marked by an inflexible and lesser status that prohibits the members of these groups from engaging in civic life or sharing in the rights and benefits generally made available through public and private sources. Complex policy framework and public rhetoric have classified these individuals as “other,” thereby denying their needs and struggles, and prohibiting from finding voice in the public discourse.

For immigrants and the formerly incarcerated, the very act of living is presumed criminal. Unable to share their stories openly for fear of being “discovered,” these individuals carry with them the constant threat of non-acceptance and the burdens of exclusion.

Statutorily mandated prohibitions from access to work, services, housing, and education only exacerbate the circumstances that initially contributed to their marginalized status. The efforts of organizers have special relevance for these communities. Often barred from participating in the political process, immigrants and formerly incarcerated people are uniquely vulnerable to further disenfranchisement. The policies that serve to socially and physically isolate these populations make it all the more challenging to build much-needed coalitions and bring matters concerning these individuals before policymakers.

Immigration and criminal law policies disproportionately affect individuals based on race and ethnicity. While Blacks were estimated to make up 13.2 percent of the US population in 2014,⁶ they account for 37.8 percent of incarcerated people.⁷ Hispanics or Latino/as were estimated at 17.4 percent of the US population in 2014,⁸ but accounted for 33.8 percent of people behind bars.⁹ Moreover, immigration policies also have disproportionate effects on certain races and ethnicities. In 2013, 45.9 percent of foreign born individuals in the US were Latino/a, and 25.6 percent were Asian.¹⁰

A powerful advocacy base awaits those who embrace a holistic understanding of the marginalization and exclusion of these groups. Members of the immigrant population may also be affected, either directly or indirectly, by policies designed for the criminal justice system. Issue-based advocacy, whether focused on housing, education, or otherwise, must consider the unique positions of both immigrants and incarcerated or formerly incarcerated individuals when posing policy solutions.

Working effectively together requires that we understand the myriad of barriers confronting both populations and align ourselves in contemplation of a more inclusive society for all.

*LAW ENFORCEMENT
& IMMIGRATION*

Immigrants are uniquely vulnerable to the caprice of law enforcement, both because of legal status and general xenophobia. The fear that fuels the Othering of immigrants is contradicted by hard data: studies on immigration and homicide indicate that communities with high percentages of immigrants are not more dangerous for their residents, and in fact may actually be safer.¹¹ Nonetheless, the immigration law regime has developed to impose restrictions on prospective immigrants abroad (when applying for entry at US embassies), at the border (by checking for appropriate documents at ports of entry), and within (as a form of post-entry social control). Any noncitizen's legal residency in the US is considered a privilege subject to revocation, and undocumented immigrants lack even this protection. Indeed, scholars imagine immigrants' relationship to the United States as one of a social contract where immigrants are permitted to stay as long as they abide by social norms.¹² This form of monitoring plays into ideas of nationhood and sovereignty where the state controls whom it desires as citizens and who it permits to remain within its borders.

The American immigration and incarceration systems are two of the theaters in which this policing occurs. In 1996, Congress inextricably tied immigration law to criminal law when it passed the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) and made some crimes categorically removable offenses through amendments to the Immigration and Nationality Act (INA).¹³ Not only did IIRIRA reinforce and respond to societal fear of the "criminal alien," but it also gave rise to an expanded machinery of immigration law enforcement to respond to that perceived crisis.

Immigrant rights advocates, in the absence of meaningful comprehensive immigration reform and in response to draconian immigration enforcement policies, can change how the immigration and incarceration systems operate at the local and state levels to make American communities more inclusive.

IMMIGRATION

A. OVERVIEW: IMMIGRATION AND CUSTOMS ENFORCEMENT & LOCAL LAW ENFORCEMENT COOPERATION

The capacity of the federal government to enforce immigration law on a local level with the cooperation of local authorities depends on three programs housed within the Immigration and Customs Enforcement (ICE): the Criminal Alien Program (CAP), 287(g) programs, and the Priority Enforcement Program (PEP). CAP pre-dates IIRIRA and provided the initial framework of federal and local cooperation in immigration enforcement.¹⁴ The 287(g) programs are still in existence, but are currently less prevalent than the immigration enforcement program of information sharing between ICE and local law enforcement agencies known as Secure Communities. Notably, PEP has replaced the prior, ubiquitous Secure Communities program. Given this recent change, how PEP will work, whether 287(g) programs will regain prominence, or what immigration enforcement strategies ICE will undertake, remains unsettled.

1. 287(G) PROGRAM

In 1996 Congress authorized the devolution of immigration enforcement through IIRIRA.¹⁵ Specifically, INA § 287(g) authorizes the Attorney General to deputize state or local officials to enforce immigration laws.¹⁶ This authorization is conditional upon a written Memorandum of Agreement (MOA) between ICE and local authorities, as well as adequate immigration enforcement training for local authorities.¹⁷ ICE signs MOAs with city police departments, county sheriff offices and state correctional facilities.¹⁸ These MOAs effectively expand ICE's ability to enforce immigration law by making local law enforcement agencies instruments of their will. 287(g) programs were widely used—and criticized—for a little over a decade until Secure Communities became the primary tool of immigration law enforcement at the local level. As a result, over the past few years ICE has been allowing many of its MOAs to expire without renewal and as of July 2015, there were only 32 active MOAs nationwide.¹⁹

Previously the federal government also incentivized county cooperation through the State Criminal Alien Assistance Program (SCAAP), which reimbursed counties for prolonged detention costs. It did not reimburse costs for housing, feeding or providing medical care to detained noncitizens; in fact, it barely reimbursed any costs of prolonged detention. As of 2014 SCAAP has

been defunded because its reimbursement to counties was so minimal that it rendered the program ineffective.²⁰

2. PEP AND SECURE COMMUNITIES

On November 20, 2014, President Barack Obama announced a string of executive actions on immigration, which aimed to “crack down on illegal immigration at the border [and] prioritize deporting felons, not families[.]”²¹ As part of this policy and in response to severe criticisms,²² President Obama announced that a new immigration enforcement program, the Priority Enforcement Program (PEP), would replace Secure Communities. PEP outlines what the administration's deportation priorities are—namely noncitizens who have criminal histories, or who are deemed threats to national security or public safety. As of the writing of this Resource Guide, the implementation of PEP is too recent for any substantive analysis on its effect on immigrant communities; however, there are significant similarities between PEP and its predecessor, Secure Communities. A comparison of the two programs suggests ways in which PEP will commit some of the same mistakes, and engender similar controversies, as Secure Communities, and ways in which advocates can challenge the new program. First, a review of Secure Communities is necessary.

In 2008, ICE rolled out Secure Communities—initiated by the Bush administration—in 13 test counties.²³ Under the Obama administration, the program expanded to nationwide coverage, or 3,181 counties, in 2013.²⁴

Unlike 287(g) programs, which authorize federal authorities to share their enforcement power with local authorities, Secure Communities was a much more covert operation that relied on instantaneous electronic data-sharing between local criminal enforcement agencies and ICE.²⁵ Data traveled from local law enforcement to a regional ICE unit, then back to local law enforcement. Local officials shared fingerprints with the FBI and, in a Secure Communities jurisdiction, the FBI shared these fingerprints with the Department of Homeland Security (DHS). If DHS identified the fingerprints as belonging to an individual who could be removed for a certain crime, ICE would issue a detainer request pursuant to 8 C.F.R. § 287.7.²⁶ This request asked for the noncitizen's continued detention while ICE either confirmed removability or initiated removal proceedings.

Early on, states and counties tried to opt out of Secure Communities, but the federal government insisted that participation was mandatory.²⁷ For example, in 2011, New York and Illinois refused to renew their Memoranda of

Agreement (MOAs) regarding Secure Communities with ICE.²⁸ In response, ICE director John Morton stated that “an MOA is not required to activate or operate Secure Communities in any jurisdiction.”²⁹ States and counties were, perhaps, misled into thinking that participation in Secure Communities was voluntary and contingent upon an MOA.³⁰ DHS later elaborated on the nature of information sharing:

“[O]nce the information-sharing capability is activated for a jurisdiction, the fingerprints that state and local law enforcement voluntarily submit to the FBI to be checked against the DOJ’s biometric identification system for criminal history records are automatically sent to DHS’s biometric system to check against its immigration and law enforcement records. The United States government has determined that a jurisdiction cannot choose to have the fingerprints it submits to the federal government processed only for criminal history checks. Further, jurisdictions cannot ask that the identifications that result from DHS’s processing of the fingerprints not be shared with local ICE field offices in that jurisdiction.”³¹

Since local authorities were denied the ability to opt out of Secure Communities or prevent information sharing with ICE, a grassroots movement developed at the city and county level to limit ICE’s involvement with local law enforcement. In a pattern repeated across the United States, advocates for immigrant rights lobbied local politicians and elected officials, including prosecutors and sheriffs, to not honor ICE detainer requests.

This movement resulted in a number of victories in major metropolitan areas in the US major immigrant hubs like New York, Chicago, Seattle, and the San Francisco Bay Area drastically limited which ICE detainees they would honor. These and other cities and counties have employed various tools to limit cooperation with ICE. City councils and county boards of supervisors have voted on local legislation and sheriffs have issued local policies and orders doing the same. The limitations on ICE detainees ranged from complete separation of criminal law enforcement and civil law enforcement (where municipalities refused to honor any ICE detainees) to limitations on some misdemeanors, which left all felony and some misdemeanor convictions susceptible to ICE detainees.

The movement for local law enforcement not to honor ICE holds continued to grow in major cities. As of April 16, 2014, the mayor of Philadelphia signed an executive order to the Philadelphia police department and prisons, limiting ICE detainees to violent felonies, and only when the detainer is accompanied by a judicial warrant.³² This made it virtually impossible for Philadelphia police to honor any ICE holds because they are rarely, if

ever, accompanied by a warrant for a federal crime.

This movement has been framed in several ways. When seeking support from immigration restrictionists, a group traditionally uninterested in immigrant rights, advocates frame Secure Communities as a matter of federalism and funding: because the federal government does not have the authority to compel states to cooperate with immigration enforcement, states and counties should assert their right not to grant ICE’s detainer requests. After all, when counties and states choose to honor ICE’s request to detain an immigrant for more than the time required by criminal proceedings, the cooperating governments have to pay out of their own budget each extra day that the immigrant is detained.

For those sympathetic to immigrant rights, the movement is framed in terms of community safety and family unity. As a result of cooperation between local and federal law enforcement, undocumented immigrants fear that if they come into any contact with the police—even to report a crime—the police will turn them over to or alert immigration authorities. This fear may prevent them from contacting the police at all and will have a negative effect on local public safety and social welfare. Additionally, in many of the areas where these immigration enforcement programs are especially active, undocumented immigrants live in “mixed status” families, wherein some family members are undocumented while others are Lawful Permanent Residents (LPRs) or citizens. When the local police department or sheriff’s office reports immigrants to ICE for low-level crimes like public drunkenness, this may trigger a removal process whose impact affects the entire family. Consequently, immigration advocates have been trying for years, somewhat successfully, to shift the narrative from criminal alien to family unity—a concept that has the potential to reach those who are generally disinterested in immigrant rights.

The new PEP immigration enforcement program undermines advocates’ attempt to shift this narrative. While the new enforcement priorities purport to focus on family unity, they continue the historical preference for deporting noncitizens who find themselves in the criminal justice system. For example, as was done in Secure Communities, the FBI will continue to share the biometric information it receives from local and state law enforcement agencies during an individual’s booking with DHS, which will then check for removable noncitizens. Under PEP ICE will discontinue the practice of issuing immigration detainees, except in limited circumstances. Nevertheless, immigration officials will still request to be notified when a noncitizen will be released, or is pending release. This will allow ICE to intercept, and likely remove, noncitizens who are processed through the criminal justice system, notwithstanding a criminal conviction, just as was done through Secure Communities. As a result, PEP similarly runs the risk of alienating immigrant communities and fostering continued distrust of law enforcement.



RAHA JORJANI

is the director of the Immigration Representation Unit with the Office of the Alameda County Public Defender, California. Raha offers a perspective about the challenges immigrants face in our criminal justice system and how these immigrants are “punished twice.”

“I find caging human bodies, particularly when we are disproportionately caging Black and Brown bodies, deeply offensive. There are immigrants who end up serving more time in immigration detention than they served for their original criminal conviction.”

I was born in Iran and came to the United States with my family in 1984. After earning a law degree at City University of New York, I worked for two years for the **Florence Immigrant and Refugee Rights Project**, a nonprofit that provides free legal services for indigent detained immigrants in Arizona. I later spent nearly seven years as a Clinical Professor at the UC Davis School of Law Immigration Law Clinic.

I have always been passionate about defending people accused of crimes and went to law school with the intention of becoming a prisoner’s rights attorney or a public defender. I became a defender of incarcerated immigrants after realizing that the United States imprisons people not only under criminal laws, but also under civil immigration laws.

In 2009, I began advising Alameda County’s public defenders on the immigration consequences of criminal convictions on a part time basis. In 2014, we created the **Immigration Representation Unit** at the Public Defender’s office, the first such effort in California to provide free legal representation to immigrants in both criminal and immigration courts under a county public defender umbrella.

While the US constitution guarantees a right to an attorney to people accused of crimes if they cannot afford to hire one, it gives no such right to immigrants who are facing deportation, even when they are detained. That means immigrants end up representing themselves or hiring an attorney at high cost, which proves to be an undue burden for low-income immigrants; the overwhelming majority of whom are people of color. I am fighting to change that.

The decision by the Alameda County Public Defender, Brendon Woods, to bring on a full-time immigration attorney who can provide even limited immigration removal defense has fundamentally shifted the way that we think about indigent defense of immigrants in California. For example, the San Francisco Public Defender also hired an immigration attorney to provide similar services. Since then, three other Bay Area counties have hired part-time or full-time immigration attorneys to advise their public defenders on immigration consequences of criminal convictions.

My hope is that this is just the beginning. Every public defender office should have access to an immigration attorney who is committed to monitoring and impacting outcomes for immigrants impacted by the criminal justice system.

Finally, we recently received a grant from the Rosenberg Foundation that will directly support efforts to ensure due process for immigrants convicted of crimes. When immigration and incarceration systems in the US intersect, immigrant clients are punished twice; once by the criminal justice system, and a second time by the immigration system. Ensuring due process means effective representation during criminal cases and access to legal representation in immigration court if clients are placed in removal proceedings once the criminal case is over. Immigrants in removal proceedings have very few due process protections under current US immigration laws and I want to work on changing that.

This focus at the intersection of criminal and immigration law is critical. Today, too many policies and practices seek to exclude individuals impacted by the criminal justice system, making immigrants convicted of crimes one of the most vulnerable groups facing exclusion, discrimination, and violence in our communities. Human Rights are basic fundamental rights deserved by all regardless of an individual's prior contact with the criminal justice system.

I find caging human bodies, particularly when we are disproportionately caging Black and Brown bodies, deeply offensive. Some immigrants end up serving more time in immigration detention on the basis of their criminal convictions than they served for their original criminal conviction. Furthermore, too many kids today have one or both parents incarcerated or deported. The idea of transforming the system to minimize incarceration and deportation means reuniting families who would otherwise be torn apart. Ultimately, this transformation is about securing healthy communities for all of us, not just some of us. And that's what I want to spend my days doing—working towards healthy communities. We all deserve that.

This perspective was modified from a Leading Edge Fellows profile on Raha Jorjani found on the website of The Rosenberg Foundation (leadingedge.rosenbergfound.org).

Moreover, PEP can result in prolonged detentions despite the discontinuance of ICE detainers. This can occur when law enforcement agencies expose noncitizens to lengthy release processes by waiting for ICE to show up to pick up a suspected noncitizen.³³ It is also concerning that PEP can result in the detention and removal of noncitizens who have committed no, or low-level, criminal offenses, even though the policy outlines priority categories of noncitizens who have committed purportedly violent offenses or are considered threats to public safety and national security. Secure Communities similarly prioritized so-called criminal aliens, but in practice deported many individuals based upon low-level offenses or infractions.³⁴

In the spirit of the grassroots movement begun in 2008 and in response to the draconian Secure Communities program, immigrants' rights advocates also pursued change at the state level.

Both California and Connecticut passed TRUST Acts, which mandate that counties limit the ICE detainers they will honor. In April 2014, a TRUST bill working its way through the Maryland legislature was shot down. In early 2014, two state senators and several representatives even introduced HB 2655 to the Arizona legislature,³⁵ but it has not gained significant traction. Massachusetts's TRUST bill—introduced in 2013—has also not passed as of July 2015.³⁶

Given the new PEP, which utilizes a notification system instead of a detainer system, the question of how relevant and valuable TRUST acts are remains unanswered. However, the efforts to limit and/or eliminate the cooperation of local law enforcement with ICE suggest ways in which advocates can challenge the new PEP policy and its potential to other and exclude immigrant communities.

3. CALIFORNIA

California's TRUST Act was a culmination of years of grassroots advocacy. The movement gained momentum in 2012, and in response the state legislature passed the original TRUST Act, which would have prohibited honoring all ICE holds except for noncitizens convicted of serious or violent felonies.³⁷ However, Governor Jerry Brown vetoed it due to a “fatal flaw” which would have required law enforcement to release noncitizens convicted of serious crimes like child abuse or drug sales that did not fall into the categories of serious or violent felonies.³⁸ Governor Brown vetoed the Act with the hope that ICE would soon implement changes to its detainer policies.³⁹ However, the changes ICE eventually made were merely facial, and advocates began redrafting the TRUST Act. AB 4, the TRUST Act as

amended, was signed into law on October 5, 2013 and went into effect on January 1, 2014.

California's TRUST Act was hailed as a major victory for immigrant rights. Preliminary data shows that the number of noncitizens held for deportation dropped by 44 percent on average among the counties surveyed.⁴⁰ These initial findings are significant because they indicate that many of the noncitizens who were detained through Secure Communities were low-level offenders.

California's TRUST Act states that state and local law enforcement can only cooperate with ICE holds in a number of circumstances. For example, cooperation is authorized if:

1. “The individual has been convicted of a serious or violent felony identified in subdivision (c) of Section 1192.7 of, or subdivision (c) of Section 667.5 of, the Penal Code.
2. The individual has been convicted of a felony punishable by imprisonment in the state prison.
3. The individual has been convicted within the past five years of a misdemeanor for a crime that is punishable as either a misdemeanor or a felony for, or has been convicted at any time of a felony for [a number of offenses including sexual abuse, assault, bribery and escape].”⁴¹

The TRUST Act also authorizes cooperation if the immigrant has been brought before a magistrate on any of those charges for which a conviction would permit cooperation (excluding domestic violence) if the magistrate makes a finding of probable cause.⁴² The Act also excludes from its protection immigrants who are registered on the California Sex and Arson Registry or, under some circumstances, immigrants who have “been convicted of a federal crime that meets the definition of an aggravated felony.”⁴³ It is notable that choosing to honor an ICE hold, even in these authorized circumstances, is discretionary and depends on county policy.

Once the TRUST Act is broken down, it is not quite as generous as some would have it seem. While the TRUST Act sets minimum standards for law enforcement agencies, many counties have built upon these standards so that their officers will only honor ICE holds in very limited circumstances.⁴⁴

A. ALAMEDA COUNTY

The Alameda County Sheriff's Office (ACSO) issued a General Order on January 1, 2014 to ensure that county law enforcement officials comply with the TRUST Act.⁴⁵ Because the TRUST Act is actually quite complicated, and the difference between honoring and not honoring an ICE hold is nuanced, ACSO chose to limit the honoring of ICE detainers even more than the TRUST Act requires in order to ensure full compliance. Starting in January 2014, Alameda County did not honor ICE holds placed on

immigrants who were convicted of a wobbler⁴⁶ misdemeanor within the last five years, a felony punishable by state imprisonment (except domestic violence convictions) or a felony listed in California Government Code § 7282.5(a)(3) (except domestic violence convictions). According to Alameda County Sheriff Greg Ahern, following the January 2014 order, the county held 80 percent less immigrants due to ICE detainees.⁴⁷ In July 2014, ACSO stopped accepting ICE detainees completely.⁴⁸

Alameda County's policy was surprising to some because Sheriff Ahern had been adamantly opposed to the TRUST Act as it made its way through the state legislature. However, Sheriff Ahern's General Order was a response to the changing tide in Alameda County. Since ICE implemented Secure Communities in Alameda County in 2010, immigrants' advocates had been working to gain support of local law enforcement and politicians. In November 2011, advocates obtained the public support of a Berkeley city council member, who then urged the City Council to resist Secure Communities' involvement in Berkeley's city jail.⁴⁹ Berkeley only received two ICE detainees on average per month, but the city's decision to restrict ICE detainees made a real difference in the lives of individuals and families. In October 2012, the City Council unanimously adopted a revised policy on immigration detainees, limiting them to serious and violent felonies.⁵⁰ Then, in April 2013 the Alameda County Board of Supervisors formally requested that Sheriff Ahern withdraw from Secure Communities.⁵¹ Although Sheriff Ahern only implemented this policy after the passage of the TRUST Act, it was supported by years of community activism at the grassroots and local government level.

In July 2015, following the fatal shooting of a woman in San Francisco, allegedly by an undocumented man,⁵² ACSO changed its detention policy. Now ACSO shares information with ICE information about detainees that it would "otherwise share with other law enforcement agencies."⁵³ ACSO also notifies ICE of the release of noncitizen detainees when "the Sheriff's Office believes the individual poses significant public safety concerns," even if ICE has not made a formal request for notification.⁵⁴ This means that law enforcement officers can now notify ICE of people who have no violent convictions.

B. SANTA CLARA COUNTY

Like Alameda County, Santa Clara County also has a policy that limits ICE cooperation beyond the requirements of the TRUST Act. Indeed, the county voted to stop honoring ICE detainees at the very beginning of the movement. In October 2011, the Board of Supervisors voted to end all cooperation with ICE. The board amended its Policy Manual to read that the county would only honor ICE detainees "so long as there is a prior written agreement with the federal government by which all costs incurred by the County in complying with the ICE detainee shall be reimbursed."⁵⁵ Santa Clara knew that ICE would

never reimburse the full cost of prolonged detention, as ICE could be forced to do so nationwide, and thus Santa Clara's initiative effectively ended cooperation on detainer requests. Santa Clara County and Cook County, Illinois stand alone as the only two counties with policies that predicate cooperation on reimbursement. Other counties usually honor ICE detainees, nonreimbursed, for serious or violent felonies.

G. ORANGE COUNTY

As of June 2014, Orange County has also ceased complying with ICE detainees.⁵⁶ However, the County will continue to call INS to inform it when the individuals who would be subject to such detainees are released, giving the federal government an opportunity to seize them as they leave the custody of the county sheriff.⁵⁷ Thus, Orange and similar counties may illustrate what the implementation of PEP might look like.

4. NEW YORK

Although some provisions of the **New York is Home Act**, a pro-immigrant bill that has been introduced into the New York Legislature, would function as a state-wide TRUST Act,⁵⁸ the great body of progress in New York has happened in New York City at the municipal level.

A. NEW YORK CITY

Over the past few years, New York City has launched a campaign through the Mayor's Office of Immigrant Affairs (MOIA) to focus on immigrants' needs in all five boroughs. Nearly 40 percent of New York City residents are foreign born,⁵⁹ and there is a robust community of non-profits advocating for their rights. NYC's limitations on ICE detainees have been a two-part process that advocates pushed forward. In 2011, the New York City Council amended Chapter One, Title Nine of the city's Administrative Code to include a new Section 131 limiting the impact of ICE detainees.⁶⁰ But there are five exceptions to the law when the immigrant:

"A. has been convicted of a covered crime; B. is a defendant in a pending covered criminal case; C. has an outstanding criminal warrant in the state of New York or another jurisdiction in the United States; D. is identified as a known gang member in the database of the national crime information center or any similar or successor database maintained by the United States; or E. is identified as a possible match in the terrorist screening database."⁶¹

In addition to limiting the honoring of ICE holds, the amendments also prohibited law enforcement from notifying ICE when it was releasing the immigrant,⁶² as well as ordered law enforcement to publicly report statistics on the number of ICE



AURORA GARCIA

is an organizer with California Partnership, a project of the Center for Community Change. Aurora shares her story of how her father's deportation in 2011 has affected her entire family in the years since.

“The struggle for justice for people in the immigration and incarceration systems often intersect. The fact of how my dad was detained and then deported is a perfect example of how these two systems intersect.”

I am 29 years old. I was born in Jalisco, Mexico, and moved to the US when I was just over two years old. My father is currently living in Tijuana, Mexico after he was deported in 2011. My mom became a Permanent Resident in 2013, after my brother petitioned her. I also have two younger US-born brothers.

Growing up, I was not aware that I or my parents were undocumented. When I was in middle school and was invited to participate in a leadership program in Washington, DC, my parents didn't allow me to accept or go. At the time, their explanation was that they lacked the necessary funds for me to participate in the program.

When I was in my junior year of high school and applying for college and the SAT, I asked my parents for my social security number to include in my applications. It was then that they had to explain to me about our situation. It was then I understood—they had never let me travel because they were afraid of what could happen if I did.

When I found out I was undocumented I felt like there was no point in trying to pursue my dreams and goals, that not only was my hard work in vain, but that there was no way I could even try to pursue my goals. I definitely felt like I was less than my friends and other students.

Around 6:10 am on July 21, 2011, I was woken up suddenly by my mother telling me that some men had handcuffed my dad, and that she was sure they were not cops. I immediately got up, and ran outside to the house to see my dad being shoved into an SUV. I knew it was ICE. My

mom wasn't sure what to do, knowing that she and I could also be detained. I demanded that they show me an arrest warrant, to show why they were detaining him and if they even had the right person. As they hopped into the SUV, they threw two arrest warrants for my dad. That was the last time I saw my dad.

I immediately started calling everyone I knew. By 10:00 am, I had already talked or met with a few lawyers. By 12:30, my younger brother, cousin, and uncle were heading towards the detention center with a lawyer to see my dad and look into what happened. They waited in line for about two hours. By the time it was their turn, the only record of my dad was that he was brought in but was no longer there. For hours I called anywhere I could think, including various detention centers to see if he was there. Nothing.

At about 7:00 pm, we had a collect call from Tijuana. It was my dad. He had just been dropped off by ICE. He had nowhere to go and no money with him, apart from a few cents, with which he was calling us. We found out that in 2001, he had attempted to adjust his immigration status through fraudulent lawyers. His case did not move forward, and he was tricked into signing voluntary deportation forms, which he never knew, since he didn't know English.

His deportation affected us all tremendously, starting with losing our main source of income, on top of enormous emotional and psychological distress. My younger brother has had the hardest time emotionally. My dad was devastated and frustrated. He constantly talked about committing suicide and made a couple of attempts. My dad continues to be very lonely and depressed. Our time apart has aged him and brought on illnesses.

My mother had not worked since I was a baby, and had no idea of what to do to move us forward. We lost our home, as my mom couldn't afford to make payments. We struggled to move forward without an additional source of income other than my own.

When it was time for me to go to college, I did not get any financial aid, but my mom was very supportive and hardworking and she helped me think of and execute all kinds of fundraisers in order to ensure that I had the money I needed for school. When my dad was deported, I used my networks to obtain some guidance, although at the time there wasn't much out there. I also didn't have the resources to get access to experts. I mostly had to figure things out on my own, some of that due it being very hard for my family to accept help, and also the fact that we have always been very limited in resources.

All of these events led me to my current work in as an organizer for **California Partnership (CAP)**, a project of the **Center for Community Change**. I've always had a passion to work on issues that impact low-income communities and CAP allows me to do that with diverse communities. I began organizing while I was an undergrad around immigration rights and I continued to engage after I graduated.

I know from personal and professional experience that the struggle for justice for people in the immigration and incarceration systems often intersect. My dad was accused of and treated like a criminal when he was detained and deported, even though he was only a hard-working family man.

detainers received, honored and not honored.⁶³ Unfortunately, Section 131 was repealed on June 30, 2015.

The exceptions to the law were so broad that they effectively only protected first-time offenders from ICE holds. Advocates continued to lobby and, in 2013, the City Council passed Local Laws Nos. 21 and 22, directed at the New York City Police Department and Department of Corrections, respectively. By identifying types of criminal convictions, the updated code explicitly expanded the prohibition on honoring ICE detainers to immigrants who had no prior felonies or no misdemeanors ten years prior to their arrest. Additionally, they specifically prohibit law enforcement from honoring ICE holds for the crimes of loitering for prostitution and driving without a license.⁶⁴

Additionally, under the former Bloomberg administration, the Mayor's Office of Immigrant Affairs (MOIA) launched several initiatives with the stated goal of integrating immigrant populations—from LPRs to undocumented immigrants—into the city. These include:

“educational campaigns to combat immigration fraud and improve health care access, coordinating city agencies in providing assistance to young immigrants applying for a federal deportation deferral program, encouraging immigrants to participate in English-language programs and become more involved in their children's schools, improving financial literacy and college readiness, supporting immigrant businesses and training new leaders in immigrant neighborhoods.”⁶⁵

In November 2014, Mayor Bill de Blasio signed into law Introductions 486A and 487A, dramatically limiting the City's compliance with overly broad federal immigration enforcement practices, except where there are public safety concerns.⁶⁶ Under Introduction 486A, the NYC Department of Correction (DOC) will no longer honor requests by ICE to detain an individual for up to 48 hours beyond their scheduled release unless (1) ICE provides a judicial warrant as to probable cause, and (2) the individual in question has been convicted of a violent or serious felony within the last five years, or is a possible match on the terrorist watch list. Introduction 487A requires the same of the New York Police Department. The new law also limits what information the City shares with ICE about immigrants in DOC custody, and prohibits ICE from maintaining operations at City facilities for the purpose of pursuing civil immigration enforcement.

Thus, by enacting programs to affirmatively reach out to marginalized immigrant populations and concurrently ameliorating the harmful impact of federal immigration enforcement at the city level, NYC is making progress towards inclusivity and against Othering. In particular, the amendment's prohibition

against notifying ICE of an immigrant's release is one step that will directly impact the implementation of the new PEP.

5. WASHINGTON, DC

Washington, DC is an interesting case study because it is a semi-autonomous district with the ability to set its own immigration policies without fear of clashing with a state legislature or constitution. According to the 2010 Census, 13.5 percent of the District's population is foreign-born and only thirty-eight percent of this population has naturalized citizenship.⁶⁷ According to a 2010 Pew Hispanic Center poll, about 25,000 undocumented immigrants live in the District.⁶⁸ The surrounding communities of Maryland and northern Virginia also have significant immigrant populations and non-profit organizations, like Ayuda and Casa de Maryland, which serve and organize immigrant populations in the entire District, Maryland and Virginia (DMV) region.

DC's resistance to Secure Communities exemplifies the success of strategic and long-term community organizing. On June 5, 2012, ICE activated Secure Communities in the District.⁶⁹ In preparation for the Secure Communities rollout, the DC Council began soliciting community feedback in January 2012.⁷⁰ However, this issue only reached the council after “two years of tireless community advocacy and organizing” by local groups.⁷¹ Advocacy groups like Ayuda, the National Day Laborer Organizing Network, and the National Immigration Project worked to build community support and capture the attention of local leaders. Consequently, on the very day Secure Communities was implemented, the council unanimously passed a bill that effectively barred local law enforcement cooperation with ICE.⁷²

DC's Immigration Detainer Compliance Emergency Amendment Act of 2012 generally follows the pattern of other municipal policies limiting ICE detainers. It limits honoring ICE detainers to prisoners charged with dangerous crimes and crimes of violence, or convicted of crimes within those categories within the past ten years.⁷³ However, the Act attaches an additional condition that, much like the language of Santa Clara County's policy, hinges cooperation on “a prior written agreement with the federal government by which all costs incurred by the District in complying with the ICE detainer shall be reimbursed.”⁷⁴ Thus, the Act effectively prevents local law enforcement from honoring any ICE detainers.

Given the significant similarities between PEP and Secure Communities, PEP also goes against the spirit of various TRUST Acts and TRUST-like policies that local and state jurisdictions have enacted. PEP and Secure Communities present the same underlying problems vis-à-vis immigrant communities: promoting a distrust of law enforcement, exposing agencies to potential liability due to prolonged detention, and prompting social costs to both local and state governments, as well as

to immigrants themselves. Therefore, to foster inclusiveness of immigrant communities, state and local governments will likely have to limit their participation in the latest iteration of the US immigration enforcement program much like was done in the aforementioned localities.

B. RACE TO THE BOTTOM: REPRODUCING FEDERAL IMMIGRATION LAW THROUGH STATE AND LOCAL ACTION

While the jurisdictions detailed above have made progress towards inclusivity by reforming their relationship with ICE, a number of other jurisdictions have leveraged the potential of local and state lawmaking to further exclude immigrants through harsh law enforcement policies. These “pioneers” come in different stripes: some have a local character while others have stepped up cooperation with federal law enforcement beyond honoring detainer requests. When they go too far, they risk alienating the federal government and law enforcement officials in addition to civil and immigrant rights advocates. They also invite litigation on a number of fronts. In addition to illustrating how local lawmaking can be used to pursue exclusion through the immigration and incarceration systems, these examples are cautionary tales for local jurisdictions.

1. MARICOPA COUNTY, ARIZONA

The state of Arizona gained notoriety with the passage of SB 1070 in April 2010 and the subsequent challenge of that statute at the US Supreme Court. Maricopa County, which includes Arizona’s state capital of Phoenix, is infamous for its anti-immigrant local laws and policies. More specifically, county sheriff Joe Arpaio became famous for his tough-on-crime and tough-on-immigrant policies, including the use of visible prisoner labor “chain gangs.” However, prior to these attention-grabbing events, Arizona had long assisted federal immigration enforcement in identifying, detaining, and removing undocumented immigrants.

The state of Arizona has an established 287(g) MOA between the Arizona Department of Corrections and ICE.⁷⁵ The MOA deputizes law enforcement authorities statewide to serve as federal immigration agents. Under this “jail enforcement” model, Department of Corrections employees have interrogated immigrants arrested on state or local charges and requested detainers on behalf of federal immigration authorities. Building upon the 287(g) program, in 2005 Governor Janet Napolitano

signed SB 1372 into law.⁷⁶ Framed as anti-human trafficking legislation, one focus of the new law was criminalizing coyotes;⁷⁷ trafficking for the purpose of forced labor or prostitution became a felony.⁷⁸ Maricopa County Attorney Andrew Thomas “developed a novel legal theory” based upon this law: immigrants found with smugglers could be charged with conspiring to “smuggle themselves.”⁷⁹ Thus, an entire system of arrest, detention and deportation of immigrants developed around this law and survived legal challenges before SB 1070 was even introduced.

In *Arizona v. United States*, the Supreme Court upheld Section 2(B) of SB 1070, a “show me your papers” provision which requires an officer to check any person’s immigration status when stopped, arrested or detained if the officer “reasonably suspects” the person is a noncitizen. Seen as the most damaging provision of the law, advocates decried the Supreme Court’s decision to strike down three other provisions but leave this one intact as “keeping the pointy end of the sword”—racial profiling. Even prior to SB 1070, the Department of Justice (DOJ) had launched an investigation of the Maricopa County Sheriff’s Office (MCSO) in 2011 and published its findings at the end of the year.⁸⁰ The DOJ report concluded that MCSO “engages in a pattern or practice of unconstitutional policing.”⁸¹ This included racial profiling of Latinos, unlawful stops, detentions and arrests of Latinos, and discrimination against Latino inmates with limited proficiency in English (LPE).⁸² The DOJ also found numerous incidents of excessive force against Latinos. All of this led to the DOJ’s conclusion that:

“MCSO has implemented its immigration enforcement program in a way that has created a ‘wall of distrust’ between MCSO officers and Maricopa County’s Latino residents – a wall of distrust that has significantly compromised MCSO’s ability to provide police protection to Maricopa County’s Latino residents.”⁸³

Based on the DOJ’s scathing findings, ICE took the unprecedented step of limiting its cooperation with Maricopa County. Then Secretary of Homeland Security Janet Napolitano terminated the 287(g) MOA with respect to Maricopa County and restricted MCSO’s access to Secure Communities’ information sharing infrastructure.⁸⁴ Information from county law enforcement is still transmitted electronically to ICE from Maricopa County, but information on individuals’ immigration status is not transmitted back to county officials. MCSO’s practices were so egregious that Janet Napolitano, by then DHS secretary, said, “Discrimination undermines law enforcement and erodes the public trust. DHS will not be a party to such practices.”⁸⁵

Despite the termination of the MCSO’s MOA with immigration offices, the department’s illegal operations continued. In one of many lawsuits against Sheriff Joe Arpaio and the MCSO, a



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is an attorney-activist who is working to increase access to the legal system for deaf and disabled individuals. Lewis founded and directs Helping Educate to Advance the Rights of the Deaf (HEARD), an all-volunteer nonprofit organization that develops innovative approaches to creating a universally accessible legal system.

“It is impossible to address the crisis of mass incarceration without addressing our systematic failure to provide equal access to justice for people with disabilities . . . We have to redefine ‘crime’ and reimagine ‘justice.’ What could justice look like if we applied a racial justice, economic justice and disability justice lens?”

My journey into the world of deaf wrongful conviction and abuse of prisoners with disabilities began during my internship at the Public Defender Service of the District of Columbia. During the course of my internship, we received a letter from a culturally Deaf man who was a native signer. Like many Deaf people, American Sign Language was his first language and he struggled with the English language. During the course of the investigation of a heinous crime, the District of Columbia Metropolitan Police Department interrogated him without an American Sign Language interpreter as required by federal disability rights law. Instead, an officer who allegedly knew how to fingerspell, spelled out each word during his hours-long interrogation. This “interrogation” and other cross-cultural misunderstandings landed this man in prison for the rest of his life. I began looking into his case and was shocked that no one had noticed any of the countless red flags. This was due to the supreme lack of

deaf/disability cultural competency within our justice and legal professions.

Later, I learned that during his detention, trial, and following his conviction, this man wrote countless letters to judges, attorneys and legal organizations pleading for assistance. These letters—written in this man’s best attempt English—were summarily dismissed or unanswered for years. It was 2007 when I began working on his case. He had been in prison since the early 1990’s. I am still working on his and numerous other possible deaf wrongful conviction cases, *pro bono*.

My struggle to locate culturally competent attorneys with the requisite knowledge and resources, and barriers that I encountered investigating innocence cases as a “mere concerned citizen,” led me to law school and to create **Helping Educate to Advance the Rights of the Deaf (HEARD)**. Obviously innocent deaf people pleading for me to provide advocacy to improve their prison conditions prior to me working on their innocence cases led me to expand the scope of the organization, develop a national database of deaf and blind prisoners, and to advocate prisoners with disabilities across the nation.

Astoundingly, in 2016, most departments of corrections still do not screen for or provide accommodations to prisoners for sensory disabilities, so abuse has gone unchecked for years and continues to go unchecked even today.

Our courts are equally unjust. As recently as April 2016 a defense attorney, prosecutor and judge forced a Deaf defendant’s sister—who was neither qualified nor certified (even if she was qualified and certified, would be barred by ethics from interpreting for someone to whom she was related)—to interpret during a formal hearing at which the defendant was sentenced to numerous years in prison. Sadly, this is not exceptional by any stretch of the imagination. I regularly receive stories about human and civil rights violations committed by the very people who are tasked with upholding and administering justice in courts around the nation.

For all of this (and more), I do not call the criminal legal system a “justice” system. My refraining from using the word “justice” to refer to this system is my attempt to avoid perpetuating the harmful myth that the legal system is just when all evidence points directly to the contrary. Though rarely discussed, it is not uncommon for deaf people and people with disabilities to be wrongfully convicted due to failures of officers, attorneys, and the courts to provide equal access to even the most basic rights that are guaranteed by the Constitution and long-standing federal disability rights laws. Then, once deaf and disabled people are institutionalized, they are physically and sexually assaulted, and subjected to depressing isolation and other forms of horrendous exploitation.

Indeed, Deaf prisoners customarily experience discrimination and terrible abuse in our prisons—punished for failure to obey oral commands that they cannot hear, for using sign language to communicate, for failure to follow rules that were never conveyed to them, for missing counts that they were unaware of, and for filing grievances about these persistent inequities. They are denied interpreter services, deprived of access to medical and mental health services, denied access to education and reentry programs, and cut off from access to even the most basic human interaction. All of this, coupled with the expensive and inaccessible telephone systems that make it near impossible for advocates and attorneys to provide support, and for deaf incarcerated individuals to keep in contact with advocates, friends and loved ones. In fact, there are several prisoners who I believe to be wrongfully convicted, but for whom I cannot investigate their cases because there are no videophones in the vast majority of our prisons and jails.

At HEARD, which is an all-volunteer organization, we have numerous priorities that span every phase of our criminal legal system for people with disabilities and deaf people. Some of

our current priorities include decriminalization of disability such that officers do not resort to violence when they come across individuals who do not immediately respond as “they should;” ensuring equal access to legal counsel, ending sexual and physical assault of deaf/disabled incarcerated individuals; and ensuring that deaf returned citizens have equal access to parole and probation to decrease the likelihood returning to carceral institutions.

As previously noted, another primary concern is equal access to telecommunications for deaf and disabled incarcerated individuals and their loved ones. I created and have led the **Deaf Prisoner Phone Justice Campaign** since 2012. Through this campaign, incarcerated and non-incarcerated individuals have been lobbying the Federal Communications Commission, Department of Justice and Federal Bureau of Prisons to take meaningful action to remedy the injustice of thousands of deaf and disabled individuals (and of incarcerated individuals with deaf or disabled loved ones) not having access to accessible telecommunications. Deaf and disabled prisoners are becoming depressed, suicidal and literally going mad simply because our prisons, the private prison phone companies and agencies that should be enforcing federal disability rights laws will not ensure that jail and prison telecommunications is accessible for all people.

While many have begun the important discussion surrounding about the harms our criminal legal system visits upon many communities, there is very little attention given to the injustices visited upon people with disabilities and deaf people by this system. And yet, people with disabilities are the most susceptible to unjust encounters within our legal system and represent the largest “minority” group within our prisons. Annually, more than half of the people killed by law enforcement are people with disabilities; children with disabilities are five times more likely to end up incarcerated than their non-disabled peers; and our jails and prisons are quite literally overflowing with people with disabilities—with studies showing that disabled people represent 60-80% of the prison population.

It is impossible to address the problem of mass incarceration without addressing the systematic failure to provide equal access to justice for people with disabilities and people who are Deaf, DeafBlind, DeafDisabled, and hard of hearing. Disability is the tie that binds—it is represented across race, socio-economic class, gender, sexual orientation, faith, and country of origin. For myriad reasons, Black people, people of color, indigenous and native nations, low and no income community members, and women, are all disproportionately represented in the class of disability.

Our communities experience common and overlapping oppressions that require an advocacy framework that cuts across identities and across movements. It is impossible to address the crisis of mass incarceration without addressing our systematic failure to provide equal access to justice for people with disabilities. We have to redefine “crime” and reimagine “justice.” What could justice look like if we applied a racial justice, economic justice, and disability justice lens?

We need to create disability solidarity within every movement, such that disability rights organizations are working to create racial justice and non-disability rights civil rights organizations working toward disability justice. Policywise, the same is true.

When will we see actual innocence legislation that is disability-responsive? When will we see appellate courts revisiting every conviction of a Deaf individual who had no access to legal counsel? When will we hold school districts accountable for not engaging in trauma-informed education that centers the whole humanity of our youth?

Until we can say NOW to each of these and many other similar questions, we will continue to see shameful injustice within our criminal legal system, and mass incarceration will continue to live here.

federal judge found the same pattern and practice of racial discrimination in May 2013; the judge later found that the practice continued even after he issued a preliminary injunction in 2011 to stop the practice.⁸⁶ In an effort to address the MCSO's problem with racial profiling, in October 2013, the same judge issued an order, which set strict restrictions on the MCSO, including a court-appointed monitor, mandatory video and audio recording of traffic stops, officer trainings, and "community meetings to mend relations between the office and the Latino community."⁸⁷ Yet, six months after the order, Sheriff Arpaio and his department showed no signs of stopping, leading to a scheduled civil contempt hearing for the sheriff.⁸⁸ As of November 2015, Sheriff Arpaio's contempt of court hearings were still ongoing.⁸⁹ In the meantime, the Ninth Circuit (the federal appellate court for the case) has affirmed the district court's findings of racial discrimination, and the remedies the judge ordered to repair these constitutional violations.⁹⁰ The case of Maricopa County illustrates the extent to which enforcement policies can alienate and negatively impact not only the immigrant community, but also those who are perceived as such, and serves as a cautionary tale for departments hoping to adopt similar policies.

2. CANADIAN BORDER COMMUNITIES, WASHINGTON

Although often neglected in discussions of the United States' immigration policy, the Canadian border also presents challenges to local communities and their immigrant populations. A particular scourge has been the utilization by many law enforcement agencies of a controversial program of requesting and receiving "interpreter" services from Border Patrol (BP).⁹¹ When BP agents are brought in by local law enforcement, whether it is to provide interpretation services or otherwise, it "breeds distrust between communities and the officers whose job is to serve and protect them."⁹² Hard-handed enforcement of immigration law within local law enforcement systems reinforce immigrants' societal position as suspect "others." Researchers with OneAmerica surveyed community members after one such incident and received survey responses in line with a representative quote: "For us, 911 as an emergency number is not possible; it no longer exists."⁹³

In dashboard-cam video filmed near Bellingham, obtained through public records request by the Northwest Immigrant Rights Project, one has an opportunity to get a first-hand look at what this kind of policy looks like on the ground. In a routine traffic stop, an officer with the Washington State Patrol (WSP) pulls over a vehicle under suspicion of speeding.⁹⁴ Speaking with her dispatcher, she says "He's not in custody, but . . . there's like zero understanding. Were you able to get hold of a translator? Just Border Patrol?" After BP agents arrive on the scene, they are quick to say "Oh, that looks familiar," and one of the agents begins questioning the vehicle's occupants in Spanish.

In a side conversation, a BP agent is heard talking with the WSP officer, and remarks that in "Bellingham, we're in a unique situation for the Border Patrol . . . We used to be a transportation hub, [we would perform] checks for public transport, but they pulled us off those duties since 9/11." The WSP officer replies, "Really?" "Yeah. Political . . . No, I'm dead serious, it's pretty bad. This is the only stuff we see now a days." The WSP replies, "Yeah, we see this stuff a lot," to which the BP agent replies "Yeah . . . we get the calls."

At that point in the video the BP agent who had been questioning the occupants returns, remarking that ". . . they're all wet." WSP takes the initiative, saying, "Well I'll leave it up to you guys . . . I mean, if you want the driver too that's fine. Either that or I can book him on the warrant," with the BP agent replying "We can put a detainer on this guy. It's not a big deal." WSP elaborates cooperatively again, "I mean, the bail I think is only two or three hundred dollars, so it's not that big of a deal on the warrant. It's only a misdemeanor anyway . . . just take the driver, I can cancel the booking. . . . But it's up to you if you want to take all four, that's fine . . . I'm not [inaudible] either way."

The next words come from one of the BP agents, who divulges the depth of cooperation between state law enforcement and the federal government by stating, "My boss wants you to take the driver and hit him with everything you can, that way when we get him, we can do even more to him." Perhaps even more telling is the last exchange in the video: "Well, I appreciate your coming out . . . we like to [call, but] . . . we just have to do it in a roundabout sort of way," "That's fine, that's great, we appreciate the calls." [sic]

Using this videotape as evidence, the Northwest Immigrant Rights Project and other advocates argued that the practice of BP interpretation assistance violates the Civil Rights Act.⁹⁵ In response to this wave of criticism, DHS issued guidelines instructing BP not to respond to interpretation requests by local law enforcement agencies, rather to refer them to other local interpreter services.⁹⁶ This change, while welcome, is problematic for two reasons. First, as can be seen from the dashboard camera video, cooperation between local law enforcement and BP is more extensive than simply providing interpreter services. The recorded exchange, routine in the speakers' own admissions, was more about facilitating deportation than language assistance.⁹⁷ From the start, providing interpreter services was only a cover; it was a "roundabout sort of way" for local law enforcement to bring federal resources and authority to bear on immigrant communities along the Canadian border.⁹⁸ Just because the guidelines prohibit officers from responding to interpreter requests does not mean that advocates should expect an end to this troubling species of federal cooperation.⁹⁹ Second, these non-public administrative guidelines are not based in concrete legislation and therefore BP interpretation support could be subject to re-introduction at any point—and would be

less likely to be done away with under an administration more hostile to the concerns of immigrant rights advocates.¹⁰⁰ Low funding for local law enforcement along the border, already cited as a reason for this practice, will continue to provide a degree of political cover for local reliance on BP.

The expansion of CBP involvement in local law enforcement reinforces and exacerbates a crisis of confidence in the law enforcement system. In a 2013 survey of Latinos living in the Southwestern United States, 44 percent of respondents said that they would be less likely to report being a survivor of a crime for fear of immigration-related reprisals against them or their family members.¹⁰¹ The process of othering that occurs through immigration law enforcement thus has deplorably tangible effects on the safety of American communities. It is only through inclusive policy reform and solidarity that this process can be reversed.

C. MINORS AND THE RIGHT TO COUNSEL IN THE IMMIGRATION SYSTEM

One particularly vulnerable group that does not escape the harsh consequences of immigration detention and removal is noncitizen minors. Approximately five percent of ICE deportations in the 2012–2013 fiscal year were teenagers (ages 15 to 19) and children (ages up to 15).¹⁰² Moreover, the government filed 62,363 removal cases against minors in the last two years alone and over seven thousand of those have already been ordered deported.¹⁰³ Much like adults, minors can find themselves in removal proceedings by being apprehended at the border or other ports of entry, or once they are already within the United States. With respect to minors who find themselves in the criminal justice system, juvenile adjudications and dispositions are not considered convictions for immigration purposes.¹⁰⁴

Nevertheless, minors' conduct can still lead to severe immigration consequences like removal. For example, minors tried in adult court will have convictions for immigration purposes, they may be referred to ICE for removal proceedings, and they may be subject to immigration detention during their removal proceedings.¹⁰⁵ To be sure, a minor does not have to be tried in adult court to face removal; mere admissions or findings of illegal conduct can lead to the same result.¹⁰⁶ Indeed, the government has held some minors in adult immigration detention facilities for abnormally extended periods of time.¹⁰⁷

Although minors are entitled to some protections while detained, those protections do not go far in ensuring basic access to justice for minors. Noncitizens, including minors, facing detention do not have a right to appointed counsel.¹⁰⁸ This leads

to disparities in the application of justice and harsh results in the immigration system. For example, data indicates that 88 percent of removal orders issued between July 2014 and March 2015 went to children without attorneys.¹⁰⁹ For years there have been numerous reports of minors, as young as age six, facing immigration judges alone in deportation proceedings.¹¹⁰

In a system that is considered only second to tax law in complexity, attorney representation is key to staying in the country.¹¹¹ Only 1.5 percent of noncitizens remain in the country in removal proceedings involving women with children without counsel, whereas 26 percent of these cases are won with the aid of counsel.¹¹² This disparity is starker in cases exclusively involving unaccompanied minors, where the government permitted 73 percent of children with counsel to remain in the United States, compared to 15 percent of children without an attorney.¹¹³ So-called rocket docket—a recent immigration directive dealing with the influx of child migrants¹¹⁴—further hinder a minor's access to immigration counsel and have been criticized by advocates and immigration judges alike for the due process concerns they raise.¹¹⁵ Rocket dockets are a form of expedited immigration court process that limits the amount of time child migrants have to find counsel and speeds up their cases considerably, resulting in a high number of deportations, many of which may not have resulted with counsel or additional time.¹¹⁶ There is also indication that geography could greatly impact whether or not a minor in removal proceedings will be ordered deported. Recent data shows that immigration judges in Texas, North Carolina, and Georgia, which have seen a rise in juvenile removal proceedings, are far more likely to issue deportation orders than other jurisdictions.¹¹⁷ Compounded by the fact that noncitizens often have no control over where they are detained, or where they face removal proceedings, geography becomes another critical factor in determining whether one remains in the country.

Minors present a different set of challenges and reveal additional injustices in the immigration system. Any efforts to produce inclusive policy reforms must take into account the most vulnerable populations, like child immigrants, particularly if they are unaccompanied. Some places have taken strides to address these issues and reveal starting points to begin providing access to fairness and justice for child immigrants.

1. CALIFORNIA AND WASHINGTON

Several organizations in California and Washington lead the fight to recognize the right of minors to have appointed counsel in the immigration context. While the right to appointed counsel is recognized in the criminal context, the INA denies noncitizens the same right in immigration proceedings.¹¹⁸ However, in 2014 the American Civil Liberties Union (ACLU) in Southern California, in conjunction with several other organizations in California and Washington, filed a class action law-

suit representing minors as young as 10 years old who would face their removal proceedings alone and without counsel.¹¹⁹ The complaint alleges that the government is “violating the US Constitution’s Fifth Amendment Due Process Clause and the [INA’s] provisions requiring a ‘full and fair hearing’ before an immigration judge [and] seeks to require the government to provide children with legal representation in their deportation hearings.”¹²⁰ Although the lawsuit is ongoing, *J.E.F.M* highlights a critical area in the immigration system where the most vulnerable are Othered and denied a basic right to counsel, and where there is room for inclusive reform and action.

Notwithstanding whether *J.E.F.M* will succeed in court, local, state, and national actors can address the representation needs of minors facing removal. Indeed, many areas have called for volunteer attorneys to aid unaccompanied minors in deportation proceedings.¹²¹ Recognizing the critical need itself, US government has also pledged \$9 million across two years to represent over a thousand unaccompanied minors in nine major cities, such as Dallas and Houston, TX.¹²² Similarly, the US Department of Justice provided \$1.8 million to legal organizations across the nation to provide aid to these minors.¹²³ Nevertheless, these new and short-term resources are still inadequate to address a minors’—unaccompanied or not—need for counsel in immigration court.

2. NEW YORK CITY

New York City is addressing the need to represent minors in a different way. The city council, in response to the inadequate support by the federal government to take action to provide counsel to minors facing deportation, created the Unaccompanied Minors’ Initiative. This initiative, funded in part by its own legal aid funds, aims to assist all unaccompanied children in removal proceedings.¹²⁴ By July 2015, the “public-private partnership” had trained 5,000 lawyers and volunteers, provided screenings for over 1,600 immigrants, taken 648 cases, secured legal representation and critical social services to every unaccompanied child appearing at the surge and regular juvenile dockets at the New York City immigration court, and won 14 asylum applications to date.¹²⁵ Although the program’s focus remains on unaccompanied minors, the city has taken progressive steps to increase the access to fairness and justice for this vulnerable group. Thus, this groundbreaking and collaborative initiative serves as an example for other cities and localities nationwide.

*CIVIC
PARTICIPATION*

One of the most infamous and repeated acts of exclusion in our nation's history has been the restriction of the franchise. Although it is not the only avenue to civic participation, the right to vote also represents membership in and responsibility for the community. The inclusivity of the nation's history is often judged by the watermarks of the rising tide of the franchise. Likewise, those who fear progressive change have fiercely fought to police and restrict its boundaries. The extension of the right to vote is more than symbolic, and by allowing marginalized groups to participate in the civic community governments can create meaningful change. Beyond the right to vote, civic participation presents an opportunity—both for inclusion and exclusion—that cannot be ignored.

Resident immigrants, with or without legal status, have no formal say in the administration of their communities. However, they have as much at stake, and likely many of the same interests, in such decisions as any of their non-immigrant neighbors. Even the federal government recognizes the right of all immigrant children to a primary and secondary education, but what is the content of that right if parents have no say in school board elections? The Obama administration contends that the registration of students' immigrant status discourages school attendance so severely that it violates the Constitution. Surely blocking immigrant families from meaningful participation in school administration creates a similar sense of exclusion; which leaves the question, what level of exclusion is acceptable? Local and state governments—and their people—can make schools and other local institutions more inclusive by opening avenues of participation to all residents regardless of their immigration status.

For the incarcerated, some argue that the franchise will lead to the devolution of the rule of law as a result of politicians pandering to prison voters by compromising the criminal justice system. This characterization is not only antagonistic, but it also posits an unpalatable corollary that may actually be true. If the population of prisoners is so great that their factionalized influence can exert strength on the electorate, as some fear, that says more about the crisis of mass incarceration in the United States than anything else. When people who committed felonies are allowed to vote, they are less likely to reoffend.¹²⁶ Moreover, the isolation that results from disenfranchisement harms public safety and can make people convicted of felonies more likely to commit crimes. Thus, barring perhaps treason and some electoral-related offenses, the continuation of policies disenfranchising people convicted of felonies erodes, rather than supports, the foundations of American democracy.

Where people have been shut out, governments must act to open the door. The consequences of a continuing failure to act are too dire. In the words of Frederick Douglass, “[i]f nothing is expected of a people, that people will find it difficult to contradict that expectation.”¹²⁷ Such wasted potential is, has, and will always be indefensible.

IMMIGRATION

A. APPROACHES TO FRANCHISE AND THE RIGHT TO SUE

The concept of “citizenship” is a historical creature; over time, in the United States and globally, a citizen’s rights, privileges and duties have shifted in response to social conditions. For example, while the right to vote is now closely tied with citizenship in both the laws of the states and in political rhetoric, the franchise was most closely tied to race, sex and property for the bulk of the nation’s history.¹²⁸ Indeed, from the nation’s inception, approximately “twenty-two states and territories permitted noncitizens to vote over a 150-year period” that extended into the 20th century.¹²⁹ In 1874, the US Supreme Court noted that citizenship had, for a long time, not been a prerequisite for voting and then cited to nine states that allowed noncitizens to vote at the time.¹³⁰ These states only began to limit and eliminate these rights after large numbers of Eastern and Southern Europeans began to immigrate into the United States, underlining the racialized history of the franchise and its relation to citizenship.¹³¹

Like those disenfranchised in the past, today’s immigrant non-citizens are excluded from civic participation in much of the nation’s public life. This excluded status labels immigrants as “other” and stunts the cohesive potential of local communities. Opponents of immigrant civic participation raise the specter of disloyalty: they argue that immigrants, because of their supposedly divided loyalties, would vote against American national interests. Even conceding this point at its most abstract level, it provides no basis for blocking resident immigrants from voting in local and state elections. At the local level, every resident has many of the same aspirations. For example, all immigrant parents want quality local public schools just like their U.S-citizen neighbors. Permitting them to vote simply allows them to exercise the democratic process to express this desire.

States and localities across the country have recognized this problem and acted to make their communities more inclusive by enhancing opportunities for immigrant civic participation. As of January 2016, 12 states, as well as Puerto Rico and Washington DC, issued driver’s license without limitation based upon immigration status.¹³² Some have made attempts to decouple some avenues of civic participation from the status of ones’ national citizenship, while other more radical proposals focus on a robust conception of state citizenship. Progress towards inclusion of noncitizens must be sustainable. This necessitates that advocates consider potential political backlash and federal legal

obstacles and design strategies in keeping with those challenges in order to build inclusive communities.

1. NEW YORK

A. NEW YORK CITY SCHOOL BOARD ELECTIONS

As will be detailed in a later section, the Supreme Court has recognized that the Equal Protection Clause of the Fourteenth Amendment prevents public schools from denying noncitizens access to a primary and secondary education. But what content does this right have if these children’s parents and other noncitizen parents have no voice in local and state educational decisions? New York City’s public school system was, until a decade ago, a leader in leveraging civic participation to make the educational system more inclusive.

New York State election law requires that voters in all elections be United States citizens;¹³³ however, the law also provides that “[w]here a specific provision of law relating to the registration of voters exists in any other statute, which is inconsistent with the provisions of this article, such provision shall apply.”¹³⁴ Thus, up until 2002, New York Education Law provided that community school board elections were open to all parent voters regardless of whether or not they were United States citizens, and was not in conflict with state election law.¹³⁵

However, an institutional overhaul of the city’s administrative structure put an end to this policy. In 2002 the New York legislature shifted authority over the city’s school to the mayor’s office. While the school boards had previously been elected by their constituent residents, regardless of US-citizenship, they are now appointed by the mayor.¹³⁶ In 2009 this authority was reauthorized for six more years.¹³⁷ Although this institutional shift resulted in the end of one of the few avenues of civic participation open to noncitizens, recent proposals in the New York legislature are even more ambitious than the previous status quo and would do even more to enhance inclusion of immigrants.

B. NEW YORK IS HOME ACT

Motivated by the myriad of harmful effects that a broken federal immigration system has on communities, immigrants’ rights advocates were successful in introducing the New York is Home Act (NYHA) to the New York Senate and Assembly in order to broaden the base of citizenship.¹³⁸ The act would do this by defining explicitly the requirements for becoming a citizen of New

York State as well as the meaning of that status by securing certain rights for state citizens.¹³⁹ In order to do so, the bill would rely on a legal doctrine with a troubled history.¹⁴⁰

Chief Justice Taney's infamous *Dred Scott* opinion in 1857 is remembered for the race-line it placed on US citizenship and, in some historians' minds, for contributing to the inevitability of the Civil War.¹⁴¹ The *Dred Scott* prohibition on African American US citizenship was reversed by the Civil Rights Act of 1866 and the postwar amendments to the Constitution; however, the decision remains good law on another point: the distinction between national and state citizenship.¹⁴² The Court held that Scott was a citizen of the state of Missouri, and so preserved the federal courts' authority to hear the case under diversity of citizenship, while at the same time it declared that his race barred him from ever holding US citizenship.¹⁴³

Beyond jurisdictional issues, the concept of state citizenship has historically held little meaning in the legal history of the nation with the demise of the Calhounian concept of state citizenship.¹⁴⁴ Thus, by attaching rights and responsibilities to state citizenship, the NYHA steps into uncharted waters—but not without legal authority, as Supreme Court precedent and the text of the Constitution support the conclusion that state citizenship can exist independently of US citizenship. By giving content to this already-established status, the Act may avoid legal troubles that other proposals to provide immigrant access to civic participation may invite.

In order to become a New York citizen under the Act, an individual would have to be able to present proof of identity, reside in the state for three years and pay state taxes for three years.¹⁴⁵ Further, a prospective citizen would have to pledge to uphold the laws and Constitution of New York and to continue paying state taxes.¹⁴⁶ State citizenship would confer on an individual the right to vote in all state and local elections, to serve in public office and obtain professional licenses¹⁴⁷; however, unlike other state-level immigration laws, such as S.B. 1070 in Arizona that were found to conflict with federal immigration policy, the NYHA attempts to head off conflicts with federal law. The text explicitly states that the act does not provide any work authorization or other benefits that an individual would be barred from receiving by federal immigration law.¹⁴⁸ In the words of one of its drafters Peter Markowitz, the legislation has been “carefully crafted to respect the unique province of the federal government. As misguided and brutal as the federal immigration regime is, New York cannot alter federal deportation policy.”¹⁴⁹

In the absence of comprehensive immigration reform, enhancing the rights of state citizenship is the strongest position that states can take to affirm a position of inclusivity towards immigrant populations. Proposals focused at the local level run the risk of being shut down by the state government, but starting from a place of cooperation may prevent such intervention.

Similarly, state-level immigration laws may invite scrutiny in the federal courts on the grounds that they are superseded as evidenced by the laws passed in Alabama and Arizona. Although there are some problematic sections of the NYHA in this regard,¹⁵⁰ its drafters seem to have avoided the grounds that led the Supreme Court to invalidate portions of S.B. 1070.¹⁵¹ The New York is Home Act is evidence of the idea that reform at the state-level has the potential to provide sustainable civic participation for immigrant noncitizens where the federal government lacks the will and local actors lack sufficient authority.

2. CALIFORNIA

A. SAN FRANCISCO – MEASURE F

On May 18, 2004, Matt Gonzalez, Supervisor for the City of San Francisco, introduced a ballot initiative that would have allowed noncitizens with children enrolled in San Francisco public school to vote in school board elections.¹⁵² Called Measure F, it was put on the November 2004 ballot and failed by a margin of 2.9 percent.¹⁵³ If the electorate had approved it, the measure would have amended the city charter regarding vote qualifications “to permit both documented and undocumented noncitizen parents to vote in San Francisco school board elections.”¹⁵⁴ To quantify the impact this would have had, thirty seven percent of the city's population was not born in the United States and sixteen percent are non-citizens, with the vast majority coming from Asia (61 percent) and Latin America (21 percent).¹⁵⁵ Immigrant populations disproportionately represent San Francisco public schools, like those of many other major cities.¹⁵⁶

The failure of Measure F follows the fall of a similar proposal in 1996 sponsored by Supervisor Mabel Teng.¹⁵⁷ Supervisor Teng sponsored a proposal to allow noncitizen parents to vote in school board election and noncitizen community college students to vote for City College Trustees.¹⁵⁸ Her proposal dissipated among questions of constitutionality and developments affecting the election of the Board of Supervisors.¹⁵⁹ A few months later, a Bay Area group calling itself the Immigrant Rights movement submitted a ballot initiative that would have allowed noncitizens to vote in all of San Francisco's citywide elections.¹⁶⁰ The city attorney challenged this proposal in court before it had the opportunity to gather enough signatures to qualify for the ballot.¹⁶¹ A San Francisco Superior Court judge ruled against the proposed ballot measure, holding that a change in voting requirements requires an amendment to the state constitution.¹⁶² As it was the city that called the measure infirm, there were no home rule city charter arguments presented.¹⁶³ However, the people's authority to pass such initiatives may have an infirm legal basis.

An analysis of the constitutionality of such a measure properly begins with the people's right to legislate through initiative. This inherent right is reserved to the people, from whom the

government's authority is derived, rather than delegated by the state.¹⁶⁴ This is true at the local and the state levels.¹⁶⁵ When the people exercise this right, they act in a legislative capacity, and therefore their authority is generally co-extensive with that of the standing legislature.¹⁶⁶ Thus, conflicting laws passed previously by the legislature can be repealed by implication once an initiative is approved.¹⁶⁷ It follows that the power of initiative is bound by the same constitutional requirements as acts of the legislature.¹⁶⁸ Therefore, if the legislature of the state of California would be within its authority to enfranchise noncitizens, the people would have the same authority to do so through an electoral initiative.¹⁶⁹

The analysis then turns to the legislature's authority to enact such enfranchisement legislation under the state constitution. The relevant section states that "[a] United States citizen 18 years of age and resident in this State may vote,"¹⁷⁰ and the election code provides that "[e]very person who qualifies under Section 2 of Article II of the California . . . may vote at any election held within the territory within which he or she resides and the election is held."¹⁷¹ School board elections are subject to the same requirements as statewide elections.¹⁷²

Some argue that these requirements are a floor, and do not necessarily bar the kind of enfranchisement legislation envisioned by immigrant rights activists. Under such a view, both the legislature and the people through initiative would have the authority to enfranchise noncitizens.¹⁷³ As well, such an interpretation of the law would render the Superior Court's reasoning invalid in the matter of Measure F.¹⁷⁴ One possible stumbling block would be the expansionist argument: if the legislature can extend the franchise beyond citizens under the current constitution, what would stop them from enfranchising non-residents of the state? In addition, precedent from the late 19th century in state law would seem to foreclose the interpretation sought by advocates.¹⁷⁵

In *Spier v. Baker*, the propriety of an act of the California legislature was before the California Supreme Court.¹⁷⁶ The act dealt with registration and eligibility for elections, and one provision of the act extended the franchise beyond the purported constitutional floor.¹⁷⁷ The court held that this was an improper exercise of the legislature's authority:

*"That is, the legislature has attempted to extend the right of suffrage to certain classes of citizens outside of those classes mentioned in the constitution. If the legislature has such power, it could extend the right to aliens, to minors, to women. It has no such power. The legislature can no more extend the right of suffrage to persons not included in the constitutional provision than it can deprive persons there included of the right."*¹⁷⁸

Although the franchise has been extended to women since *Spier*, this was done through amendment to the constitution and not through legislation.¹⁷⁹

Municipal legislation, through the California Home Rule constitutional provisions, may also be a way to accomplish noncitizen enfranchisement. In California, charter cities are empowered to pass legislation regulating "municipal affairs." What qualifies as a municipal affair is heavily litigated, however school administration is an area that California courts have consistently ruled to not be "municipal" in nature, meaning that general state law controls.¹⁸⁰ However, for non-school related municipal elections, Home Rule could possibly allow charter cities in California to enfranchise non-citizens under a reading of the constitution providing voting rights to US-citizens as a floor, rather than a ceiling, to the franchise.

B. STATEWIDE EFFORTS

In October 2013, Governor Brown signed into law many new immigrant protections and rights, although he did so while vetoing immigrant participation in juries.¹⁸¹

NEW PROTECTIONS

Assembly Bill 263 amended the California Labor Code by adding new protections for immigrant workers against retaliation based on immigration status.¹⁸² Beginning January 1, 2014, the California Labor Code allows for the suspension of business licenses for employers who retaliate against workers who exercise their rights by threatening to report their immigration status to immigration authorities.¹⁸³ Senate Bill 666 amends the California Business and Professional Code to discipline, suspend or disbar attorneys who threaten to report immigrant workers involved in an administrative or civil proceeding because the individual has exercised a right related to employment.¹⁸⁴ Assembly Bill 524 clarifies that a threat to report any individual's immigration status or suspected immigration status in order to obtain his or her property may constitute Criminal Extortion.¹⁸⁵ The previously vetoed TRUST Act made a triumphant return as it was signed into law on October 5, 2013.¹⁸⁶

LICENSING

After years of introduction and re-introduction, Assembly Bill 60 was signed into law and allows undocumented residents of California to obtain valid driver's licenses while maintaining that these licenses are not work authorization documents.¹⁸⁷ Spurred on by the case of Sergio C. Garcia, an undocumented immigrant who passed the bar exam but was nevertheless denied entry to practice, Assembly Bill 1024 allows undocumented immigrants to be admitted as Attorneys at Law in the State Bar of California.¹⁸⁸ The passage of Assembly Bill 1024 prompted the California Supreme Court to rule for Sergio C. Garcia in his challenge seeking admission to the State Bar.¹⁸⁹ Senate Bill 1159 followed, eliminating immigration status as a barrier to numerous

other types of professional licenses.¹⁹⁰

JURY PARTICIPATION

Assembly Bill 1401 would have permitted lawful permanent residents to serve on California State Courts' juries.¹⁹¹ In a statement justifying his veto, Governor Brown wrote, "Jury service, like voting, is quintessentially a prerogative and responsibility of citizenship . . . [t]his bill would permit lawful permanent residents who are not citizens to serve on a jury. I don't think that's right."¹⁹² Governor Brown vetoed this bill and restrained the inclusive potential of voting and jury service by excluding non-citizens from accessing these rights.

3. CHICAGO, ILLINOIS

In the late 1980s, civil and immigrants' rights activists began exerting pressure on the Chicago public school system to reform, and after an educators' strike in 1987 the government convened an Education Summit to address these concerns.¹⁹³ At that meeting, advocates pushed for changes to make the school system more inclusive towards immigrants, specifically by giving the Local School Improvement Councils, which already allowed noncitizen residents to participate as advisors, more control over local school policy decisions.¹⁹⁴ When the Chicago School Reform Act passed in 1988, it established local school councils for every school in the city. All parents, including noncitizens, are now welcome to participate and vote, as well as run for election as parent and community representatives.¹⁹⁵ These positions make up the majority on the councils, versus the teacher and administration representatives, which are appointed by the Board of Education.¹⁹⁶ Like in post-Bloomberg New York City, the Board of Education has been controlled by the mayor's office since 1995.¹⁹⁷ But, because of the delegated authority of the local school councils, there is still space for direct democracy in the public school system, and in Chicago noncitizens have a seat at the table.¹⁹⁸

4. MARYLAND

Maryland's legal structure allows a great degree of flexibility at the local level, and it is no coincidence that municipalities in that state have been national pioneers in electoral inclusiveness. There is a citizenship requirement for voting in the Maryland constitution, but that provision does not apply to municipal governments other than the City of Baltimore.¹⁹⁹ Beginning in 1918, a number of local governments in Maryland have acted to enfranchise noncitizens for the purposes of local elections. One of the most noted examples is the city of Takoma Park, located on the border of Maryland and the District of Columbia. The city has allowed non-citizens to vote in local elections since 1993,²⁰⁰ and in 2013 the city rolled out another set of election reforms that enfranchised residents aged 16 and 17 as well as paroled individuals convicted of felonies.²⁰¹

The original change to the charter followed several months of debate and controversy over the city council redistricting process.²⁰² The City Task Force found that its new wards had equal numbers of residents, as required by law, but that some wards had far more eligible voters than others because some contained a large alien population.²⁰³ This imbalance focused attention on two facts: the votes of citizens in wards with high citizen populations were worth much less than votes of citizens in wards with high numbers of aliens; and many city residents with all of the obligations of Takoma Park citizenship lacked the right to vote.²⁰⁴

The Council put the question of whether residents of Takoma Park that are not US citizens should be allowed to vote in Takoma Park Elections up to a non-binding referendum.²⁰⁵ On November 5, 1991, the referendum passed by a vote of 1,999 to 1,107, but because it was merely advisory, debate continued.²⁰⁶ On February 10, 1992, the Takoma Park City Council adopted, by a vote of 5 to 1, a charter amendment removing the requirement that voters and candidates for public office in Takoma Park be US citizens to vote in their elections.²⁰⁷ On March 17, 1992, after surviving challenges in the Maryland state legislature,²⁰⁸ Takoma Park became the largest municipality in the United States to adopt complete noncitizen voting.²⁰⁹

This policy of electoral inclusivity has survived challenges. In the 1990s, after a number of local governments enfranchised non-citizens, anti-immigrant backlash in the state legislature led to the introduction of a bill that would bar such enfranchisement by the state's municipalities, but that bill failed to gain traction.²¹⁰ In the new wave of anti-immigrant fervor another similar bill was introduced into the Maryland legislature, but it too was defeated.²¹¹ Although municipal governments in Maryland were able to enfranchise non-citizens on their own, the implementation and longevity of this policy has thus depended on, at the very least, a permissive attitude from the state government. Short of actual cooperation, this mix of tacit and active support has allowed non-citizen enfranchisement to continue in Maryland.

5. EUROPE

A reconsideration of noncitizen voting has occurred across Western Europe, growing out of—and in some cases branching off from—the cause of continental unity. As amended by the Treaty of Lisbon, the Treaty on the Functioning of the European Union (TFEU) provides some benefits, via reciprocity, to EU-foreigners living in other member-states. Article 20, 2(b) and Article 22, 1 allow all citizens of the EU to vote and stand for election in municipal elections in all EU nations.²¹² A strange picture resulted from this reciprocity: some, but not all, foreigners now had the right to vote. In response to this peculiarity, Luxemburg, Lithuania, Slovenia and Belgium joined Sweden, Denmark, Finland, and the Netherlands in allowing all resident

foreigners, no matter their country of origin, to vote in local elections. Other permutations also exist within the EU-countries, such as the United Kingdom’s policy of enfranchising all Commonwealth citizens for all national elections. In sum, non-citizen voting, in one form or another, is exceedingly common among other Western nations as it once was in the United States. While noncitizen enfranchisement will not change the landscape overnight, as anti-immigrant backlash across Europe indicates, it is an important step towards a more equal and inclusive conception of the nation-state.

6. ACCESS TO COURTS

One’s rights are inextricably tied to the ability to enforce those rights.²¹³ Restriction from free speech, equal protection, and due process not only limit an individual’s status and life experience in the United States, but also distinctly shape that person’s way of thinking and engaging with the world.²¹⁴ Access to the courts, not only for constitutionally protected rights, but also the legally enforceable rights appearing in state and municipal code and common practice, is central to our understanding of a free and dignified existence; yet, there is no truly uniform rule regarding the right to sue. An undocumented immigrant may discover his or her ability to sue for contract and tort injuries varies depending upon jurisdiction.²¹⁵

The Supreme Court case *Yick Wo v. Hopkins*, indicates that the Fourteenth Amendment due process covers any person within the United States territorial jurisdiction; however, as that case involved only legal immigrants, the holding does not necessarily extend to undocumented persons.²¹⁶ Justice Field’s concurrence in *Wong Wing v. United States* addressed the basis for applying Fifth Amendment due process to an undocumented alien, stating that because the immigrant “owes obedience to the laws of the country in which he is domiciled . . . as a consequence, he is entitled to the equal protection of those laws.”²¹⁷ Generally, personal injury victims have been more sympathetic plaintiffs than those seeking redress under contract principles.²¹⁸ Unlike relationships rooted in contract—wherein risks are bargained for—there is no such guarantee that a victim has intentionally come into contact with a *tortfeasor* (civil wrongdoer) or contemplated his or her immigration status as a “pre-requisite” to enter into that contact.

In the employment context, it has been determined that employers owe both a common law duty of care and contractual duty (where applicable) to undocumented workers. Immigration and Customs Enforcement (ICE) and the Department of Labor (DOL) signed a memorandum of understanding, which acknowledges that reports of undocumented workers shall not be made for an improper purpose.²¹⁹ Both ICE and the DOL agree that employer’s reports on immigration status cannot be made in attempt to retaliate against an individual suing for protection under the labor laws.²²⁰ Although the federal Fair Labor Standards Act (FLSA) has been interpreted by numerous circuit courts to apply equally to all employees regardless of immigration status,²²¹ many states have gone further to ensure that undocumented workers are entitled to the wage and hour protections listed in the FLSA,²²² however, due to the *Hoffman Plastic Compounds* decision of 2002, wherein the Supreme Court denied back pay as a remedy in an employment case brought by an undocumented worker, some questions remain regarding the type of remedies available to undocumented plaintiffs in the employment context.²²³ While the nature of remedy for Title VII and other claims are clearly legal in nature, organizers can nonetheless support the implementation of statewide policies that further protect undocumented employees from retaliation and encourage them to assert their rights in courts of law.

Local ordinances and state law may be enacted to protect undocumented immigrants from retaliation for exercising their rights in other contexts, as well. For example, in some jurisdictions, landlords are prohibited from reporting on the immigration status of a tenant in response to the tenant’s lawful exercise of his or her rights under applicable code or membership in a tenant’s association or union.²²⁴ In addition to preventing retaliation, local ordinances may also prohibit a landlord from threatening to report on a tenant’s immigration status in an effort to force the individual to vacate a unit.²²⁵



EURYDICE GALKA

APARNA SHAH

is the Executive Director of Mobilize the Immigrant Vote (MIV), a statewide, multi-ethnic coalition of community-based immigrant and refugee organizations working to increase their communities' participation in elections and advance broader community and systems change.

“There are many places in which the conversation around mass deportation doesn’t include mass incarceration, and vice versa, though the structural racism that underlies one system is part and parcel of the other. We know that these issues are wedges which are used to separate and divide our communities.”

Both of my grandmothers were very strong women. I grew up with stories of these women, one Pilipina and the other Indian, who faced tremendous challenges with great strength and determination to hold their families together and create a better future for their children. I was born in the Philippines, lived in India until I was six, and then came to the US with my parents. In the US, I grew up with family members with mixed immigration status. I knew our different stories from very early on. I also knew that we were all family and that our shared history, blood, and love bound us together no matter what.

Through all these early experiences in my life, I gained awareness of our varied yet shared migration stories. I know the sense of longing that comes with migration. As I’ve started my own family, the US has increasingly felt like home. This is what it can mean to be an immigrant, the daughter of immigrants, and now a mother with a son born and raised in this country. All these truths exist together.

In my professional life I’ve worked primarily with immigrant and refugee families within multiracial communities, and over time have focused on where and how our communities can change, lead, and re-imagine systems and structures of power.

I was fortunate to work in reproductive justice, work that gave me a political analysis and theory of change that aligned with my experience and values. In 2009, I joined **Mobilize the Immigrant Vote (MIV)**, a multiracial California alliance of immigrant and refugee-led organizations. Only now can I see the unintended but clear progression of my work from youth organizing to alliance-building and national movement-building to building the political muscle of our communities.

Our work at MIV is aimed at giving communities not just access to the vote but also to governing, with full dignity, self-determination, and freedom for all our communities. We are working to create the vision and infrastructure for a just and inclusive society. We mobilize around progressive political change, and lead with cultural and narrative shifts which are needed to seed the ground for the systemic changes our communities need and want. We execute our campaign and field work set firmly in our shared vision of a country and world that our communities want and deserve.

Last year we launched the **Until We Are All Free** initiative in partnership with **CultureStrike** and **Black Alliance for Just Immigration**, an initiative where we seek to challenge racism, mass incarceration, and mass deportation, in order to create a world where all people are truly free. We build solidarity that centers Black lives across movements. We create pathways and tools for our communities to envision and manifest a world where all communities—Black, indigenous, immigrant, refugee, transgender, differently abled—are visible, valuable, and free.

Currently, anti-immigrant and anti-refugee rhetoric is extreme, dehumanizing, and in some cases violent. We have to collectively move into a place of wholeness and belonging that includes all of us. A key point in this moment is that “demographics are not destiny.” We have seen serious demographic shifts. For those with wealth, power, and privilege, there is great fear involved around loss of the status quo and the power and privilege inherent in that.

How do we move into a place of really seeing and valuing each other? That question is critical to our analysis of what it takes to create a world in which all our communities can really thrive.

Policy priorities we are pursuing focus on mass incarceration, deportation, detention, and the way these systems have broken down the fabric of our communities. There are many places in which the conversation around mass deportation doesn’t include mass incarceration, and vice versa, though the structural racism that underlies one system is part and parcel of the other. We know that these issues are wedges which are used to separate and divide our communities.

Ending the systems of mass incarceration and mass deportation and detention requires us to move from punishment and isolation towards solutions that are defined and led by those most impacted. This presents an opportunity for us to explore what restorative justice looks like on a large scale. We are stronger when we all have a voice. Our communities are not the counter narrative, we are the narrative.

There is something about the spirit and opportunity of our country that has resonated for generations of people coming here to create a better life for the generations that come after, that is very much who we are.

All people deserve dignity and inclusion no matter where we are born and whether we have the right kind of papers. This is what it means to connect with our own and each other’s full humanity. Our policies, power structures, and everyday lives must reflect our shared humanity. If we want to not just recognize but be true to who we are as a whole society, we must fully embrace immigrant and refugee communities.

The fight against ongoing state violence, police brutality, profiling, detention, incarceration, and exclusion is being waged on many fronts. A movement is building to end private detention centers and prisons, and to end family detention where mothers and children are held indef-

initely, youth solitary confinement, and deportations completely. In some cities and localities we are starting to see the results of massive organizing efforts to hold police officers as well as border patrol agents accountable for brutalizing and killing our people. Communities and organizers have been pushing back against ICE (Immigration and Customs Enforcement) raids which target undocumented communities and leave families devastated.

The intersection of immigration and incarceration exists at many levels. Immigration enforcement and law enforcement in this country are becoming increasingly more linked, reflecting increased militarization of our cities and our nation. We are separated from our families, isolated through shame and stigma, and stripped of our humanity. Our communities' very bodies are in danger and in many cases it truly is a matter of life and death.

This intersection exists because of structural racism, and anti-immigrant and anti-refugee sentiment. It exists because of the pursuit of corporate profits and because of state violence on our bodies. It exists because those in power can decide who is valuable and who is not, and who is disposable and who is not. It also manifests from damaging narratives around good immigrants and bad immigrants, families versus felons, and model minorities. These narratives intentionally create and reinforce wedges within immigrant and refugee communities themselves, between immigrant and refugee communities and Black communities, and between immigrant and refugee and US-born communities.

In addition to mass incarceration, deportation, detention, income inequality continues to impact our communities deeply. We must continue to support state and local fights for minimum wage, workers protections and rights including a Domestic Workers Bill of Rights here in California, and renters protection and progressive zoning policy development to address the housing crises and gentrification across the country.

And in the midst of our defensive battles against attacks on female, queer, and transgender bodies, gender identity, and sexual orientation, we have to continue to put forth a vision of a society where we value and hold all of our communities and determine the political and cultural pathways to achieve our vision.

We must invest in permanent infrastructure in immigrant and refugee communities to build multiracial power. This has to happen within communities themselves, and at state and national levels. We believe in long-term movement building and electoral organizing as one interwoven strategy. Whether or not there is an election, we go back to our communities year in and year out, in all our different languages, to engage around policies and legislation at community and state levels. We build relationships, trust, and leadership in our communities.

Successful tactics and strategies often start with a set of shared values and a shared vision. Whether we are fighting a proactive or defensive campaign, it's ultimately about what we are trying to build over a long arc. We don't start with data points and policies, but with what we all care about: family, opportunity, the common good. Then from that place we try to understand what is required to build a state, country, and world that does not yet exist and what alternative systems and structures will get us there. When we lead with vision and values we are able to imagine new worlds and build the relationships that will forge that new world together.

INCARCERATION

A. APPROACHES TO FRANCHISE AND THE RIGHT TO SUE

A host of burdens are placed upon those who have been incarcerated, but disenfranchisement is one of the most explicit signals that individuals convicted of felonies should expect to remain in exile from society.²²⁶ Once touched by the indelible ink of the criminal justice system, individuals are told unequivocally: “You are no longer a part of ‘us.’”²²⁷ The disenfranchisement of prisoners and people formerly convicted of felonies is just the latest generational and tactical expression of a historical goal; from enslavement and intimidation to poll taxes and tests, American society has long denied the vote along racialized lines.²²⁸ We should be disgusted, but not shocked, at the resulting mass of African Americans denied the right to vote.²²⁹

As Michelle Alexander eloquently states (and, page by page, demonstrates) in her book *The New Jim Crow*, the parallels between the current racialized criminal justice system and historical structures of racial domination in the United States are non-obvious only to those whose lives are not touched by incarceration.²³⁰ Like slavery and Jim Crow before it, the current system is effective because it has been tailored to contemporary social conditions such as our national obsession with colorblindness.²³¹ In 2007 the total number of African Americans convicted of felonies equaled a quarter of all African American men, a figure that hints at the decimation of the African American electorate that is a result of mass incarceration.²³² As well, the infamous “three-fifths” clause of the original Constitution is echoed in the inflated power of voters in districts containing prisons.²³³ The racial caste system re-composited by a national policy of mass incarceration stands as an enormous barrier to a fair and inclusive society, and rights advocates must do more than chip away at its corners in order to realign the conversation towards principles of equity.

In 12 states, people formerly convicted of felonies are disenfranchised for some period of time—up to their entire life—even after the completion of probation and parole. Nineteen states re-enfranchise individuals convicted of felonies after the completion of parole and probation, while four do so after the completion of parole. Two states do not disenfranchise prisoners—let alone individuals formerly convicted of felonies, individuals on parole or individuals on probation—while 14 only disenfranchise prisoners. The ultimate goal of an inclusive society would be to enfranchise all who have been disenfranchised through

the incarceration system—perhaps with the exception of those convicted of treason or electoral fraud—but the strategies will be different between and within each of the five categories described above. Nonetheless, a combination of local action and national traction can create progressive change.

1. INDIVIDUALS FORMERLY CONVICTED OF FELONIES

*Richardson v. Ramirez*²³⁴, and its interpretation of the Fourteenth Amendment exceptions to the prohibition on disenfranchisement, stands as the law of the land. The states have the authority to disenfranchise people convicted of felonies; however, they have a great deal of flexibility of whether and how they exercise that authority.²³⁵ Some automatically restore voting rights after parole or probation has been completed, while others continue to deny the vote to people formerly convicted of felonies for years or a lifetime.²³⁶ In between, and even within those categories, the effective rate of disenfranchisement is also affected by the difficulty of obtaining restoration of voting rights and a lack of knowledge on the part of people convicted of felonies of the possibility of re-enfranchisement.²³⁷ Even when individuals formerly convicted of felonies have re-enfranchisement available to them, voter registration volunteers report that prisoners are discouraged from seeking the vote for fear of coming into contact with the government that imprisoned them in the first place.²³⁸ Given that disenfranchisement is a powerful, historical and racialized symbol of separateness and exclusion, the cause of inclusivity is best served when discretion is exercised.

Research by John Pinkard suggests that the desire among those most directly affected by incarceration to participate in the franchise depends on the severity of local disenfranchisement laws.²³⁹ In his case studies of three states’ prison populations, the prisoners living in states with more restrictive laws reported higher levels of desire to vote as well as higher levels of belief in the efficacy of their vote.²⁴⁰ People convicted of felonies who become re-enfranchised experience “validation, even pride” in the fact that, once more, their voice can be counted.²⁴¹ They are not wrong; People formerly convicted of felonies in Florida could well have tipped the scales of the disputed 2000 presidential election.²⁴² This is both of a symptom of the Othering that occurs within the incarceration system as well as an opportunity to reach out to those who are, in the words of Michelle Alexander, “locked up or locked out of mainstream society.”²⁴³ Allowing those formerly convicted of felonies to vote will help change the conversation from one of exclusion to one of integration and rehabilitation.



SYYEN HONG

is a currently incarcerated individual held at San Quentin Prison in California. He was convicted and received a life sentence at age 17 for participating in a gang-related drive-by shooting. Today, he is 38 years old and anticipating his release from prison. This is Syyen's story of growing up an immigrant in the US and being behind bars for over 21 years.

"I believe that people can change. If an individual makes a change in their lives and works towards becoming a productive citizen, they should be given a second chance. Even though I can never undo the harm that I've caused, I can at least make positive contributions to society and use my life experience to help many people."

I was born in Cambodia in a Khmer Rouge labor camp. During the four-year reign of the Khmer Rouge, it is estimated that two million Cambodians perished from starvation or illness, or were murdered by the regime. My family and I were fortunate to escape to Thailand, where we resided in refugee camps.

I was three years old when I first set foot in the United States. Sponsored by a Mormon family, my family landed in Salt Lake City, Utah in 1980. For reasons unknown to me, my father didn't come along and is still living in Cambodia. My mother remarried when I was five. I was happy to have someone to call my father. Yet two years later, when my younger brother was born, I realized he was not really my father, because of the difference in the way my new brother and I were treated.

I had a rough transition when I started kindergarten. English was not my first language and I didn't look like the rest of the kids in my class. After five years in Utah, my mother decided to move to Long Beach, California to be close to other relatives. Long Beach was totally different from Salt Lake City. We lived in a cramped house with 16 people. My mother relied

on government assistance. I went from sharing a room with my older sister to sleeping on the living room floor with 10 other relatives.

I grew up in an area of Long Beach where there were a lot of gangs and criminal activities. During that time, the Cambodian and Mexican gangs were constantly at war. When I was nine, I was exposed to the gang lifestyle by my uncle Chuck, who was eight years older than me and a gang member. One day, my uncle rounded up a group of about 15 people, armed with nunchucks, knives, bats, and clubs, to retaliate against some others who they believed stole some of our bicycles. My uncle told me to remain at home, but I didn't heed his order. Instead, I followed closely behind, not wanting to miss the action. I felt that the gang had power and I wanted to be a part of it.

In 1992, after rival gang members shot at my grandparents' home, they decided to move to Las Vegas and my mother decided to move us to Whittier, California. I never adjusted in Whittier. I didn't have many friends except for a Filipino guy named Eddie, who was from Sacramento. In 1995, my uncle Steve, who was three years older than me, came to live with us in Whittier. I looked up to Steve, who was also a gang member. Our uncle-nephew relationship evolved into a two-man gang. Steve and I bought, sold, and used drugs together.

On March 21, 1995, Steve came to pick me up from school. A parade of vehicles drove up, members of the local rival gang. One of them flashed a gang sign at Steve, and he replied by flipping a middle finger at them. They rushed at us. I remember fighting with three of them and found myself on the ground, curled into a ball to protect myself from being stomped to death. Eddie saw the commotion and came to our aide. The fight lasted for a few minutes, and stopped when someone shouted, "The cops are coming!"

I was angry and wanted retaliation. The following day, I drove around town, with Steve in the passenger's seat with a loaded shotgun. Nothing happened that day. The next day, at about three in the afternoon, on March 23, 1995, we drove around again. With Steve in the passenger's seat and Eddie in the backseat, we went looking for those who had assaulted us days earlier. School was out. I spotted a guy named Chuy that attended my school. I didn't care that he was walking with other students. He was a member of the rival gang that I hated. Someone was going to pay for all the times I was bullied. Someone was going to pay for all the times I was called names. Someone was going to pay for all the times I was shot at. It was finally my turn to make a statement. As I drove near the students, I pulled the car near the curb and Steve opened fire upon the group.

Immediately afterwards, we drove to San Pedro, a city fifty miles away. The next day I found out that a guy named Richard was killed in our attack, and three others were injured. I knew Richard because we had shared a few classes together during my freshman year. He was not involved in the original fight, and he was not a gang member.

It dawned on me that I was responsible for killing an innocent person. My conscience told me that I should turn myself in, but I was too much of a coward. I went home and told my parents that Steve and I had got into an altercation with Mexican gang members and there was a chance that they were going to retaliate. I never told them that we had killed someone. They agreed to let me go to Las Vegas to stay with my grandparents until everything settled down.

Eight days after the shooting, Steve and I were arrested by the Los Angeles homicide division and the Las Vegas FBI. I was eventually convicted of second degree murder, under the aiding and abetting law, and sentenced to 15 years to life. Steve was convicted of first degree murder and was sentenced 25 years to life. Eddie was released on the condition of testifying against Steve and me.

During the first years of my incarceration, I didn't have time to think about why I came to prison. I was too busy trying to survive. I was assaulted and participated in riots and assaulting other inmates. I had no hope of ever getting out and behaved recklessly. I became a worse criminal in prison than when I was living in society. I sold, used, bought, and smuggled drugs and other contraband. I fought and assaulted others.

Despite my behavior, my mother and sister have supported me throughout the 21 years of my incarceration. It was my faith in God and having that family support that kept me from losing all hope. In 2011, I made a commitment to follow Christ and from then, I have been on the path of rehabilitation.

I served as Secretary for the **Criminals and Gang Members Anonymous**, a self-help group that assists inmates in addressing their destructive gang and criminal behavior. I am one of the original founding members of this group at San Quentin, but it is now available in more than 20 institutions. Through this program I have come to understand the factors that led to my gang and criminal lifestyle.

I was denied parole three times due to my prison conduct, but on March 3, 2016, I went before the parole board and was found suitable for parole.

I also had a detainer from the Immigration Custody Enforcement (ICE), which was recently lifted, and I was declared a U.S. citizen. I had a friend through the **Restoring Our Original True Selves (ROOTS)** program, who is an immigration lawyer, who helped me file a petition proving that I am a derivative citizen through my mother.

The lives of many of my friends have been deeply affected by the immigration system. I have friends who have been deported to Cambodia, and some of them don't even speak the language because they have been in the US for most of their lives. Yet some will never be reunited with their families in the US. Having been affected by the issue of deportation myself, I plan to be a voice for those who are unable to speak out on their own behalf.

I am expected to be released in August. Upon my release, I want to enroll in San Francisco State University and pursue a B.A. through a program called **Project Rebound** that helps the formerly incarcerated get accepted into the university. I have written an autobiography which I hope will become published, and I want to use any profits from my story to support victims' rights unions and troubled youth programs, especially those that are geared towards anti-gang violence.

I have been incarcerated for a little over 21 years. By the lifestyle that I led, I should have been dead or on death row. But I believe that people can change. If an individual makes a change in their life and works toward becoming a productive citizen, they should be given a second chance. I have harmed a lot of people because of my careless actions. I held a lot of anger and resentment and didn't know how to deal with it. As a result, I committed a tragic and senseless crime in which an innocent seventeen-year old high school student was killed while walking home from school. I understand that, to this day, the community of Whittier is still affected by what I did.

Even though I can never undo the harm that I've caused, I can at least make positive contributions to society. I can use my life experience to help many people. I have been a victim and perpetrator. Today, I can truly say that I am victor.

A. FEDERAL

Although states are authorized by the Constitution and the Supreme Court to disenfranchise people formerly convicted of felonies, the federal government can still play a part in re-enfranchising those people. Bills from both major political parties have been proposed in the Senate to automatically enfranchise people formerly convicted of felonies for federal elections.²⁴⁴ Although the Democratic bill is less discriminate than the Republican, which is sponsored by Kentucky Senator Rand Paul, both go a long way towards re-enfranchisement.²⁴⁵ Even though both bills are confined to federal voting rights, the passage of such legislation will force the states to re-evaluate their own disenfranchisement policies, given the fact that most state elections share ballot space with federal elections, or perform costly changes to electoral administration to provide people formerly convicted of felonies with their own separate ballot forms.²⁴⁶ In light of the move by other states towards automatic restoration, it is likely that at least some states would use the opportunity to align their own disenfranchisement policies with the federal government for the sake of ease of administration.

B. KENTUCKY

Kentucky is one of the toughest places to be a person formerly convicted of a felony. Under the Kentucky Constitution, any felony, even Class D felonies that can carry as little a penalty as a one-year imprisonment, triggers a loss of voting rights that cannot be expunged without receiving a pardon from the governor.²⁴⁷ Unlike automatic restoration, a requirement that individuals formerly convicted of felonies must petition the governor's office for re-enfranchisement produces lackluster and arbitrary results. A number of attempts to amend the state's constitution to permit automatic voting rights restoration for some individuals convicted of felonies have passed through the Democrat-controlled Kentucky House of Representatives, but they have consistently failed in the State Senate. Fortunately, that may be in process of changing.

In November 2015, outgoing Kentucky Governor Steven Beshear issued an executive order re-establishing the franchise for people convicted of nonviolent felonies.²⁴⁸ Estimates are that about 140,000 people will immediately benefit from the order, with an additional 30,000 people in the coming years.²⁴⁹ As an executive order, Governor Beshear's plan may be easily overturned by a future governor. Civil rights and grassroots organizations have welcomed the executive order, and have made it clear they will continue to push the legislature to put a constitutional amendment to popular vote in order to guarantee the franchise to formerly incarcerated people in the state.

C. FLORIDA

Florida's laws disenfranchising individuals convicted of felonies are very similar to Kentucky's in their harshness. Civil

rights advocates and community organizers have set their eyes on pursuing reform in that state in the coming election cycles. If there is reform at the federal level and in other states between now and then, it is likely that such efforts would be more favorably received.

D. INTERNATIONAL

Among its closest allies, the United States stands out for its discriminatory disenfranchisement policies. In the very few European nations where some people convicted of felonies lose the right to vote, the action is so narrowly tailored that, at most, the number disenfranchised is in the hundreds.²⁵⁰

International commitment to rehabilitative criminal justice has not found a warm reception in the US. The federal government has been notoriously hostile to international human rights treaties and organizations, but felony disenfranchisement violates even the limited agreements that the Senate has ratified. Through the Supremacy Clause, these laws have become the law of the land and apply to the states as well as the federal government. Although there is no private cause of action for violations of these international laws, it is clear that the states that practice disenfranchisement of individuals convicted of felonies, especially in its most permanent forms, are in violation of the International Covenant on Civil and Political Rights (ICCPR). In 1992 the Senate ratified the ICCPR subject to a number of reservations, understandings and declarations (RUDs). Article 10 paragraph three of the ICCPR states that "the penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation."²⁵¹ The label of "Corrections" in many states gives the illusion that the American legal system shares this understanding; however, permanent revocation of the right to vote from individuals formerly convicted of a felony is irreconcilable with the goals of reformation and rehabilitation.

Thurgood Marshall's dissent in *Richardson v. Ramirez* underscored this principle. As the justice described, when the case—brought by individuals formerly convicted of felonies challenging election officials' refusals to allow them to register to vote—reached the California Supreme Court the court found that such a policy of disenfranchisement triggered strict scrutiny review (a position reversed by the US Supreme Court).²⁵² The onus then turned to the State of California to justify the disenfranchisement of individuals formerly convicted of felonies. The Secretary of the State of California declined to do so, and on appeal supported the plaintiffs formerly convicted of felonies.²⁵³ In a brief filed with the Supreme Court, the Secretary stated

"[i]t is doubtful . . . whether the state can demonstrate either a compelling or rational policy interest in denying former felons the right to vote" at least in part because "the de-

...nial of the right to vote to [people formerly convicted of felonies] is a hindrance to the efforts of society to rehabilitate former felons and convert them into law-abiding and productive citizens.”²⁵⁴

Unlike most states, California listened, at least in part²⁵⁵: “California automatically restores the voting rights of formerly incarcerated people upon release from prison and completion of parole.”²⁵⁶ California needs to do more to comply with this section of ICCPR, as should all states with even more restrictive disenfranchisement policies. Even the relevant RUDs²⁵⁷ do not avoid this conflict. The relevant section states that “[t]he United States further understands that paragraph three of Article 10 does not diminish the goals of punishment, deterrence, and incapacitation as additional legitimate purposes for a penitentiary system.”²⁵⁸ The addition of these other goals of incarceration does not supplant the primacy of rehabilitation and reintegration. By standing as a significant barrier to “reformation” and particularly to “social rehabilitation” (by Othering people formerly convicted of felonies), disenfranchisement of those convicted of felonies runs directly counter to the text of Article 10, reservations and all.²⁵⁹

By removing this impediment to rehabilitation, the states would not only align themselves with the cause of human rights but also with the cause of inclusion. Doing so would give the formerly incarcerated a greater stake in the administration of their communities through the democratic process. In the words of one Maryland inmate: “I have made a mistake in my life. My vote may be the one to help change things in my children’s life.”²⁶⁰ Reforming the states’ felon disenfranchisement laws would be a large step in the right direction; a step towards inclusivity and away from racialized political exclusion.

2. PRISONER DISENFRANCHISEMENT

The opportunity to leverage civic participation in order to make our communities more inclusive extends into the prisons: the currently incarcerated can also stand to benefit from access to the franchise. Although it may appear at first blush a radical proposal, there are examples within our own nation and other industrialized nations where prisoners are not subject to blanket disenfranchisement, and of high courts ruling that such policies are contraventions of human rights.

Taken in sum, these examples highlight the social rehabilitative potential of the vote while at the same time underscoring the danger of disenfranchising prisoners in the era of for-profit prisons and racialized mass incarceration. Not only does enfranchising prisoners enhance the safety of communities and reduce rates of recidivism, it also helps to defang the exclusive potential of the incarceration system.

A. VERMONT

No prisoner in Vermont is denied the right to vote based on their incarcerated status, but this is the result of historical happenstance rather than modern activism. Vermont’s state constitution, dating back to 1793, states that: “Any elector who shall receive any gift or reward for the elector’s vote, in meat, drink, moneys or otherwise, shall forfeit the right to elect.”²⁶¹ The provision is narrow, and has been interpreted to mean that only those convicted of electoral fraud can be denied the right to vote in elections held in the state.²⁶² Given the extreme rarity of such convictions, in Vermont and elsewhere, the effective prisoner disenfranchisement rate in the state is zero.²⁶³

An attempt in the 1790s to outlaw prisoner voting was quashed by the state’s early constitutional authorities, and another effort in the 1980s was summarily defeated with reference to that decision.²⁶⁴ Although campaigning or political activity is not allowed in the state’s prisons, many prisoners are nonetheless eager to participate. In the run-up to the 2008, Elliot Russell, incarcerated at the time in Vermont, said, “A lot of guys feel, being in jail, we get treated beneath other people when in fact we can be treated as equals . . . I’m glad I get to vote . . .”²⁶⁵ Thus, while the Vermont experience may not shed light on the best possible means to achieve prisoner enfranchisement in other states, it does stand as an example of the potential of the right to vote to transform lives and perspectives.

B. MAINE

Like Vermont, Maine’s constitution provides only that “[t]he Legislature may enact laws excluding from the right of suffrage, for a term not exceeding 10 years, all persons convicted of bribery at any election, or of voting at any election, under the influence of a bribe,” once again effectively barring the disenfranchisement of all prisoners.²⁶⁶ However, there is another lesson that can be learned from Maine’s experience with prisoner voting: how to consistently resist challenges to prisoner enfranchisement.

The latest wave of disenfranchisement activism occurred in 2013—the sixth time since 1999—in the form of a proposed constitutional amendment to prohibit prisoners convicted of Class A felonies²⁶⁷ from voting.²⁶⁸ The media focused on impassioned testimony from the families of murder victims who questioned why prisoners convicted of murder should be allowed to vote when their victims could not.²⁶⁹ Opponents questioned the benefits of the amendment in light of the great potential harm, which could result. Not only would revoking the voting rights of such prisoners make them that much more isolated from and dangerous to the communities of Maine, it would also have stood in the way of one of the basic purposes of punishment: rehabilitation. One such opponent, a veteran and former police chief, recounted that in his experience, “maintaining the dignity of the human being is of utmost importance for a person to

accept responsibility for his or her actions,” and exercising the right to vote is one of the few ways prisoners can exercise civic responsibility while they are isolated from the outside world.²⁷⁰

Even in the face of impassioned—and, frankly, sympathetic—arguments on the other side, Maine continues to allow prisoners to vote. By countering the logic and underlying assumptions of the arguments in favor of disenfranchisement, the debate in Maine demonstrates that both politicians and the public are open to reasoned arguments in favor of voter enfranchisement (even if it is easier to defend the status quo than it is to push for change).

C. CANADA

In 2002, the Canadian Supreme Court ruled that prisoners have the right to vote under section 3 of the Canadian Charter of Rights and Freedoms.²⁷¹ The Chief Justice, writing for the majority, stated that, “The right to vote, which lies at the heart of Canadian democracy, can only be trammelled for good reason. Here, the reasons offered do not suffice.”²⁷² The court considered the government’s justifications for prisoner disenfranchisement, further punishment and instilling respect for the rule of law, but was unconvinced.²⁷³ In fact, the Chief Justice noted that: “Denying citizen law-breakers the right to vote sends the message that those who commit serious breaches are no longer valued as members of the community . . . ,” which actually undermines respect for the rule of law.²⁷⁴ These arguments parallel those advanced by American advocates, both in Maine and Vermont defending prisoner enfranchisement and those pushing for change in other states.

D. EUROPE

In Europe, most nations either allow all prisoners to vote or disqualify only a small percentage, and the nations that place restrictions on prisoner voting are generally confined to the former Soviet-bloc countries in the East.²⁷⁵

Indeed, some nations like Germany actively encourage prisoners to exercise their right to vote.²⁷⁶ Prisoners vote either in the district of their previous residence or the institution in which they are incarcerated.²⁷⁷ Both methods have their attractions—to maintain ties to prisoners’ homes or pooling constituents with similar interests—but both acknowledge the inherent human right of prisoners to participate in civic life despite their current incarcerated status.

The European Court of Human Rights’ (ECtHR) decision in *Hirst v. United Kingdom*, in line with the Canadian line of cases outlined above.²⁷⁸ The plaintiffs in *Hirst* were British prisoners who had been denied the right to vote, and petitioned the ECtHR after seeking relief and appealing through their own national legal system.²⁷⁹ The United Kingdom was a signatory to the European Charter on Human Rights, and the plaintiffs argued that the British policy of blanket disenfranchisement

violated Article 3, Protocol Number 1, which provides that parties to the agreement

“ . . . undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.”²⁸⁰

The ECtHR sided with the prisoners, stating first that, “[i]n the twenty-first century, the presumption in a democratic State must be in favo[r] of inclusion, as may be illustrated . . . by the parliamentary history of the United Kingdom and other countries where the franchise was gradually extended over the centuries from select individuals, elite groupings or sections of the population approved of by those in power.”²⁸¹ The court then held that the blanket ban did violate Article 3, Protocol Number 1, given that the government had not met its burden to overcome the presumption in favor of inclusion, leaving the law arbitrary and over-inclusive.²⁸²

The United Kingdom, once frequently called before the ECtHR mainly in regards to its policies in Northern Ireland including the interrogation techniques employed at the infamous “H-Blocks” at Long Kesh, has not complied with the ruling. Prime Minister David Cameron has railed against the perceived imposition by the European court, and, when speaking with workers at a tea factory, stated that prisoners “damn well shouldn’t” have the right to vote.²⁸³

It should be noted that, while the United Kingdom has come under pressure from the European Council to make progressive change to its prisoner enfranchisement laws, this prohibition ends once a prisoner has been released. In contrast, policies that disenfranchise people formerly convicted of felonies in the United States can, in some cases, disenfranchise for life. It is remarkable that, even in comparison to the European lightning rod of prisoner voting rights, the United States is still relatively backwards on this issue of basic civil rights in a democracy.

3. ACCESS TO COURTS

Incarcerated individuals must overcome special barriers when seeking redress in the courts for various violations of their rights. Access to the federal court system for those in prison or jail is limited under Prison Litigation Reform Act (PLRA).²⁸⁴ The provisions of the PLRA apply to all covered individuals irrespective of age.²⁸⁵ The PLRA requires prisoners to pursue any and all administrative remedies through the facility’s grievance process before reaching the court.²⁸⁶ Incarcerated individuals must also pay full court fees, although indigent individuals are entitled to pay out the fees over time.²⁸⁷ After three suits deemed frivolous, malicious, or as having failed to state a claim by the court, an incarcerated individual will be barred from proceeding on an

installment fee plan unless under “imminent danger of serious physical injury.”²⁸⁸ An additional requirement of the PLRA is that those seeking recovery for a mental or emotional injury must also prove a physical injury in order to prevail.²⁸⁹ The law also limits attorney’s fees awards, even for meritorious claims.²⁹⁰

The PLRA is limited to suits that would arise in federal court. State litigation is therefore unaffected by the statute. Unfortunately, most states have adopted parallel legislation to limit an incarcerated person’s ability to bring claims in state court under state law, as well.²⁹¹ The National Association of Attorneys General had encouraged states to adopt such legislation to avoid a sizable shift of litigation from federal to state courts.²⁹² When it comes to the frivolity of suits, a delicate balance ex-

ists; states intend to encourage appropriate use of the courts, which has been interpreted to mean both enabling private individuals to exercise their rights and keeping the docket clear of inadequate suits in order to keep the courts available for non-frivolous, non-malicious filings. Despite the legitimate concerns of the legislatures in that regard, the existence of state PLRAs fails to accomplish its goals in a just way. The states have not sufficiently explored “[t]he obvious truth—that prisoners file a lot of lawsuits because they are subjected to a lot of unjust treatment.”²⁹³ Incarcerated individuals are among the most vulnerable in the country; yet, rather than support them in preserving justice for themselves and others, state PLRAs further limit and disempower them.



MARLON PETERSON

is the founder of Precedential Group Social Enterprises, a social justice organizational consultancy with community programming, and SpreadMassLOVE. Marlon shares his story of his 10 years of being incarcerated, the work he did while on the inside, and his efforts since release focused on spreading mass love in an era of mass criminalization.

“People like me have a lot to contribute. There are 60-70 million Americans with a criminal record. We have to face it at some point. We don’t want to dismiss a huge population like this. Whether it be in colleges or in certain occupations or even in the vote, we have to be more inclusive of these populations, because they are a huge segment of our population.”

My family is from Trinidad, and I was born in Brooklyn, part of my family’s first generation born in the US. I’m the youngest of three. I was a good student as a child—on the honor roll in elementary school. But then a few traumatic things happened in our family, and all the academic accolades stopped coming. I began hanging on the streets more. I just barely graduated from high school. One year later I was arrested for the first time for hopping a turnstile and a year after that I was arrested for an attempted robbery that resulted in the death of two people. I was the look out. I was originally charged with first-degree murder, but that was reduced, and I was sentenced to 12 years in prison.

I spent ten years, two months, and seven days in prison. During that time I got a degree in criminal justice and participated in a number of different programs, including some that I led myself from inside prison. I was released in December of 2009 and started a mentoring program at a school in Brooklyn. I enrolled in NYU for a Bachelor’s Degree in Organizational Behavior. During my time in school I was working full-time as a violence interrupter, working

against gun violence in my old neighborhood. I also started another youth program to train youth to become organizers around issues of anti-gun violence. I worked with another agency that dealt with trauma that is associated from being both in front of and behind a gun. I now work on many of these same issues through an organization I founded called the Precedential Group, where we works with organizations doing social justice to help them achieve their goals.

In 2015, I won a Soros Fellowship, where I examine and work on issues of community violence as well as police violence in our communities.

My personal experience with the American incarceration system was hellish. Not because of any sort of physical violence inflicted on me, but rather the emotional strains of it. That included seeing how people are treated by officers, how they verbally and physically abused people by using their authority, and how folks inside suffer—while also knowing that could be you at any point in time. We were constantly infantilized and dehumanized. Every minute was a constant struggle for sanity. That's why I say hellish.

On the flip side, any positive experience I had was because of being able to create good experiences for ourselves while we were on the inside. Through one program, I helped men prepare for release. Another was a program I started where 12 students from Vassar College came into the prison to directly engage with 12 men from the facility. Part of that work was engaging in discussion on a wide range of topics related to social justice, including affirmative action and gay rights. It was really transformative to help engineer and be part of this work. One pivotal moment involved a relationship I had with a teacher friend of mine, who taught middle school. She asked me to write a letter to her students with words of wisdom based on my experience, which I did. This turned into an ongoing correspondence program where we wrote each other every two weeks. That experience, in dialogue with those kids, truly shifted my trajectory, and affected what I wanted to do after my release. Instead of being an electrician, I shifted to writing, lecturing, and teaching.

When I left prison, and re-integrated into society, I was thankful that my parents were still there and that I still had siblings. I had a home to come back to and a bedroom to sleep in. It was enough. The networks I had were those that I created from the programs I was involved in while in prison. None of the help was really financial. People helped me with simple things like how to send an email, use Facebook, or navigate certain spaces. That's what my support looked like. I didn't have kids and wasn't married and had no bills to pay, so I had the space to do all that.

When I was incarcerated, I learned that by teaching others, I myself learned many life skills. I had a lot of practice preparing for release. I already had a resume and I knew how to turn around talk, which means how to address issues of incarceration in my past.

I still needed to learn a lot about the way people communicate and technology, but I created enough trust with people that they helped me learn these things. My success is actually in collaboration with other people, it is not an individual success. A lot of people helped me be successful. The support I had when I came home, such as not having to find a home or immediate bills to pay, was a game changer.

When I was released, I applied for an intensive academic summer program at Vassar College called **Exploring Transfer in New York** and was accepted. I met a woman there who encouraged me to apply to Columbia and other places, by asking me, "Why are you not applying anywhere and everywhere?" I just couldn't imagine going to any place like Columbia. But then I thought, "Shoot let me try this thing." I had to take the SAT to apply. I, a 30-something year old man, was taking the test with a bunch of teenagers.

I received a tentative acceptance to NYU. The admissions council wanted to meet with me. I went and it felt like I was in a parole hearing. They wanted to hear about my past—it was obvious they wanted to make sure they felt safe around me. I'm sure they don't do this with all their students. They knew I was formerly incarcerated, and wanted to make sure I wasn't a danger.

I was accepted and went to NYU. I was with many folks there that were definitely oblivious to the prison experience, which made me feel like I had this big secret. That was uncomfortable. But the knowledge and the exposure I got there was valuable. But schools and universities have a long way to go before they have a real atmosphere of inclusion—and not just for formerly incarcerated people, but for people of color in general.

The inclusion of prisoners and former prisoners is important for our society for a very simple reason—because people who are in prison are people. That's it. They're people. People are in the military, people have disabilities, people with different gender orientations, or sexual preferences—people are people.

And people like me have a lot to contribute. There are 60-70 million Americans with a criminal record. We have to face it at some point. We don't want to dismiss a huge population like this. Whether it be in colleges or in certain occupations or even in the vote, we have to be more inclusive of these populations, because they are a huge segment of our population.

Lastly, inclusion is also an issue of racial inclusion. Because criminal justice is so racialized, inclusion means as a society we are reckoning with our problem of race. If we're not being inclusive of people who are formerly incarcerated, we're not being honest about our race.

I am also the co-founder of **SpreadMassLOVE** with Piper Anderson. In our work, we talk about how people who are impacted by mass criminalization often temper their love because of mass incarceration. Visiting floors, fear of deportation, and so on pushes people to consider the system before they can consider each other. People normalize incarceration as a part of the family. Kids are traumatized and illogically rationalize that their separated loved one doesn't love them.

The reason we co-created SpreadMassLove is to serve as a platform for people impacted by mass criminalization to explore the nuances of their relationships with the people in their lives. SpreadMassLove is not an organization, but a place to share the hurt, resilience, and pain of the love in the era of mass incarceration. Our work lifts up stories from people impacted by these systems. Naturally our work also intersects with issues of immigration. The immigration system is another web of loss and it is a part of our society's mass criminalization. Crimmigration is another part of our lives that increasingly impacts love and relationships beyond borders.

*PUBLIC
SERVICES*

One of government's most essential functions is to provide services for the general welfare of its constituents. When governments exclude marginalized groups from these services, they reinforce the exclusivity of their communities and reinforce the status of members of such groups as "other." As Martin Luther King, Jr. once said, a government's budget is a moral document. Exclusion along the axes of immigration and incarceration occur *de facto* and *de jure* at the federal, state, and local levels.

At every level—wherever there is discretion to deny—immigrants and those marked by contact with the incarceration system are, more often than not, shut out from receiving public benefits. This has developed as the status quo in spite of the contributions of both groups to the economic well being of the country. Undocumented immigrants alone pay 6.4 percent of their income in state and local taxes, a total of \$2.2 billion in California in 2010.²⁹⁴ Many undocumented immigrants also pay federal income taxes—often on another person's social security number—despite receiving little to no federal assistance. Some immigrants have obtained individual tax identification numbers (ITIN) numbers through the IRS, which allows them to file a federal income tax return without a social security number.²⁹⁵ In some instances ITIN numbers can be used for additional purposes, including "opening an interest-bearing bank account, in employment dispute settlements, or for obtaining a mortgage."²⁹⁶

Even in the absence of federal immigration reform, which would bring increased revenue for all levels of government, it is morally indefensible that the governments to which immigrants pay taxes exclude them from the provision of services.²⁹⁷ Not only have most prisoners also paid their share of taxes, over the course of their imprisonment they are often compelled to work in prison for as little as \$3 a day or 25 cents per hour.²⁹⁸ When former prisoners are released from prison, they are barred from receiving most forms of public assistance, including a permanent ban on Temporary Assistance for Needy Families (TANF) for those convicted of drug-related felonies.²⁹⁹ Social rehabilitation and reintegration—let alone the financial savings and enhanced public safety that comes with lower recidivism rates—would be better served by opening public services to those who are incarcerated.

IMMIGRATION

Anti-immigrant movements have sought to condition access to vital services on nationality and immigration status.³⁰⁰ In this spirit, a number of prominent voices in the national discussion on immigration reform call for a shift in focus towards “self-deportation.” Candidate Mitt Romney famously threw his rhetorical weight behind the doctrine during a 2012 Republican primary debate, saying the answer to illegal immigration is to make conditions for immigrants so poor in the United States that “people decide they can do better by going home because they can’t find work.”³⁰¹ The doctrine of self-deportation, or “attrition through enforcement,” has been influential in forming policy across the United States, and was part of the national Republican platform in 2012.³⁰²

Kris Kobach, a lawyer for the Immigration Reform Law Institute,³⁰³ sells the doctrine of self-deportation as a rational response on the part of undocumented immigrants to strictly enforced existing federal immigration law and limited employment opportunities.³⁰⁴ Kobach offers two case studies as proof of the doctrine’s value: the National Security Entry-Exit Registration System (a post 9/11 registration and monitoring system criticized for discriminating against Muslim and Arab immigrants that Kobach helped implement as a lawyer in the Bush administration)³⁰⁵ and Arizona (where recent immigration legislation has received well documented scrutiny from the judiciary and Department of Justice).³⁰⁶ Kobach was influential in the drafting process for anti-immigrant laws nationwide at municipal and state levels, including in Arizona and Alabama.³⁰⁷

Immigrant access to services must be protected and, where possible, expanded in order to build a more inclusive society based around human dignity. This offensive and defensive movement must be supported at all levels of government, from executive guidelines from the federal government down to county ordinances.

1. FEDERAL LAWS

A. PUBLIC CHARGE DOCTRINE

An important starting point for understanding service provision to undocumented immigrants and visa holders is the “Public Charge” doctrine. The Immigration and Nationality Act (INA) makes immigrants who are “likely to become a public charge” (LPC) ineligible for admission to the United States or the issuance of visas³⁰⁸ and subject to deportation.³⁰⁹ In making a determination of LPC status, United States Citizen and Immigration Service (USCIS) considers TANF, Supplemental Security

Income (SSI) and local and state cash assistance programs, as well as Medicaid expenditures for long term non-rehabilitative care.³¹⁰ Generally, Medicaid, Children’s Health Insurance Program (CHIP), Supplemental Nutrition Assistance Program (SNAP), Women, Infants and Children Program (WIC) and other non-cash services are not counted against immigrants.³¹¹ The simple act of receiving cash assistance is not dispositive in LPC determination, and immigration officers are required to take a number of factors into consideration. Regardless, an LPC determination holds the high price of legal status forfeiture. Not all undocumented immigrants will be interested in obtaining visas or green cards, and so this qualification will be somewhat less important to understanding their access to public service provision. A number of services such as housing assistance, job training and healthcare do not attract LPC scrutiny, and providing access to these services alone has immense value.³¹²

B. PRWORA

The Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA), as amended by the Illegal Immigration Reform and Immigrant Responsibility Act (IRRIRA), makes it illegal for undocumented immigrants to receive federally funded benefits beyond emergency Medicaid.³¹³

Further, most “Qualified Aliens,” including most LPRs, are also barred for five years after attaining legal status from receiving most federally funded benefits.³¹⁴ The states are unable to extend their own benefits to undocumented immigrants without doing so explicitly. Federally funded programs, such as Section 8 public housing subsidies and Medicaid, which are administered on the state level, cannot be altered to include undocumented immigrants. IRRIRA also prevented in-state tuition from being offered to undocumented immigrants in higher education based exclusively upon their present residency in the state.³¹⁵

Under the November 20, 2014 Executive Order, the legal status for those immigrants no longer eligible for deportation may entitle them to some added benefits.³¹⁶ While the new deferred-action status of these immigrants is not expected to offer eligibility for Medicaid, there is a possibility the federal government will permit these immigrants to receive Medicare, if they meet other eligibility requirements.³¹⁷ Twenty-nine percent of undocumented immigrants are currently enrolled with private insurers and with legal authorization to work in the country, more are expected to find employment with benefits packages.³¹⁸ Under federal law, undocumented immigrants are not eligible for the public Healthcare Marketplace established under the Affordable Healthcare Act³¹⁹.

C. REAL ID

Identification cards, when accessible to undocumented immigrants, allow communities' residents to access financial services and interact with police and other officials as well as foster a sense of belonging.³²⁰ Many states and localities have been discouraged from undertaking reform to identification eligibility standards and procedures by the passage in 2006 of the REAL ID Act. The Act mandates that a driver's license must prove the holder's immigration status in order to qualify as valid identification. In theory, the Act seriously constrains the ability of states to issue identification cards to undocumented immigrants; however, several states have challenged the validity of the law by moving forward with proposals to make drivers' licenses available to all³²¹. These proposals include special documentation requirements for immigrants without legal status in order to ensure the process is fraud-proof. As the legality of these programs are suspect, other states may wait to observe the success of the current state laws before proceeding to implement similar legislation in their jurisdictions.

D. DEVELOPMENT, RELIEF, AND EDUCATION FOR ALIEN MINORS (DREAM ACT)

The DREAM Act, first introduced before the Senate in 2001, failed despite numerous attempts at passage over the course of a decade. The DREAM Act, in its most recent iteration, proposed to grant conditional permanent residency to eligible undocumented people and repeal the prohibition on offering residency-determined in-state tuition to undocumented immigrants, unless extending that benefit to all US citizens.³²² State DREAM Acts have been able to operate despite IRRIRA's restriction by defining residency by attendance in an in-state high school and other similar requirements that can be applied equally to everyone without creating an open-door policy that would eliminate an out-of-state tuition altogether.³²³ Most recently, in 2015, the College Options for DREAMers Act was introduced by Senator Dick Durbin of Illinois and Senator Mazie Hirono of Hawaii, proposing to grant access to financial aid and "restoration of state option to determine residency for purposes of higher education."³²⁴

2. STATE LAW (PRIMARY, SECONDARY, HIGHER EDUCATION)

A. PRIMARY AND SECONDARY EDUCATION

One of the most troubling threads in the corpus of self-deportation policy has been in regards to education. The doctrine's apologists argue that the policies they advocate are simply re-statements and implementations of federal immigration policies, but Alabama House Bill 56's education provisions undeniably conflicted with the spirit of Supreme Court jurisprudence

securing the rights of undocumented immigrant children to primary and secondary education.³²⁵ In Alabama, one co-sponsor of House Bill 56 boasted that the law attacked "every aspect of an illegal alien's life" in order to "make it difficult for them to live here."³²⁶ Not long after its passage, a number of parties, including by the US Department of Justice, filed lawsuits challenging the law.³²⁷ The Eleventh Circuit invalidated a number of controversial sections of House Bill 56, using both the Supremacy Clause (drawing off of *United States v. Arizona*) and the Equal Opportunity Clause.³²⁸

Following the Supreme Court precedent of *Plyler v. Doe*, the circuit applied intermediate review and held that many of the challenged sections were unconstitutional.³²⁹ A settlement was reached between the DOJ and Alabama to end the litigation, with the state agreeing not to implement the challenged sections,³³⁰ but it is unclear whether the court reading of the *Plyler* precedent³³¹ would have survived review in the Roberts Court³³². The *Plyler* Court took pains to distinguish education from other social services and benefits,³³³ and averred to respect the precedent set by the Court in *San Antonio Independent School District v. Rodriguez* that education is not a "fundamental right."³³⁴

PLYLER V. DOE

In 1975, the legislature of Texas amended Section 21.301 of the Texas Educational Code to block state funding for the education of children not "legally admitted" to the country, and to authorize public schools to keep those same children from attending.³³⁵ A class action lawsuit was brought in the Eastern District of Texas on behalf of children who had been unable to establish their legal residency.³³⁶ The court held that the children were entitled to make a claim based on the Equal Protection Clause of the Fourteenth Amendment, despite their legal status,³³⁷ but avoided the issue of which judicial standard of review should be applied given that the law was not even "supported by a rational basis" and granted the plaintiff's motion for a permanent injunction.³³⁸ On appeal, the Fifth Circuit affirmed the injunction and the court's reasoning on the Equal Protection Clause.³³⁹ A group of related cases had also been brought against the state of Texas challenging the constitutionality of the revisions to Section 21.301.³⁴⁰ They were consolidated into one case to be heard before the Southern District of Texas, which also held that the law violated the Equal Protection Clause.³⁴¹ But, the Southern District went one step further and held that "the absolute deprivation of education should trigger strict judicial scrutiny" and that the State's interest in fiscal integrity was not a compelling government purpose.³⁴² The Fifth Circuit, shortly after affirming the district court's injunction in *Plyler*, also affirmed this ruling.³⁴³ The Supreme Court, in granting certiorari, consolidated the two lines of cases.³⁴⁴

The threshold issue before the Court was to determine the standard of review the Court should apply to the Education Code amendments. The Court held that strict scrutiny was in-



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is the executive director of Transgender, Gendervariant, Intersex Justice Project (TGI Justice Project), a group of transgender, gender variant and intersex individuals inside and outside of prisons, jails, and detention centers who are working to create a united family in the struggle for survival and freedom.

“I’ve had numerous acts of violence inflicted upon me by police and other representatives within the criminal justice system. Usually the first thing that comes with that is misgendering us. That is the beginning of the process of abuse and the trauma. It’s important to note that the act of misgendering always comes before a physical attack.”

I moved to San Francisco in 1997. When the economy tanked in 2008, I panicked and made the decision to sell drugs to survive. I ultimately spent four years in federal prison for this decision.

While I was in custody, I made it my business to do outreach with trans people, to explore how we can stop the cycle of incarceration by identifying behaviors that put us here and the barriers that we face outside to create a better quality of living. While I had previously worked with the TGI Justice Project (in fact, I had moved to San Francisco to be mentored by Miss Major, TGI’s former executive director), it wasn’t until after those four years in prison that I decided to focus solely on the support for trans people getting out of being incarcerated and creating a better life for ourselves.

Trans and gender nonconforming individuals face a unique form of violence that is based solely on their gender orientation. It’s always been about somebody else not being comfortable with a trans individual’s gender orientation. It’s not like we’re inciting violence towards others.

People use the “I didn’t know defense” and that’s bullshit. People are aware of who we are, it’s a matter of people making the decision that they want to be in some type of relationship with us, and then they change their mind.

A big part of this culture of heteronormativity is what leads to violence. Once, I was in Atlanta, minding my own business, and there was this man and woman nearby. The woman started to make negative, transphobic comments towards me. I felt like she was trying to incite her boyfriend to commit violence towards me, but her boyfriend was saying, “Why you harassing that person? That person isn’t bothering anyone.” She was upset with him because he didn’t agree with her harassing me. He would not go along with her heckling me. People perpetuate violence towards us because of their own ignorance and prejudice towards us, but they also incite others to be violent towards us.

I’ve also had numerous acts of violence inflicted upon me by police and other representatives within the criminal justice system. Usually the first thing that comes with that is misgendering us. People make it their business to use the wrong gender. That is the beginning of the process of abuse and the trauma. It’s important to note that the act of misgendering always comes before a physical attack.

While there is much discussion about violence towards trans folks on an individual level, looking at the system is important. And the incarceration system begins with the correctional officer. Correctional officers treat trans people very poorly and show prejudice and hate towards us with no concern for our safety. Having people search your body and laugh at your body and make fun of your body parts, calling you he/she/it — that’s a verbal attack. It brings up anxiety and panic and a sense of unsafety.

Officers would put us in a cell with people who have already expressed that they will hurt us. Their behavior puts us at risk in other ways, especially from other inmates, who begin to realize that they can get things if they’re not nice to us. If a straight guy was cool with a trans person and we got along, that will change once they realize that hanging out with us will make them lose favors that they might get otherwise. Then they stop being cool with us. Once the other inmates see how poorly the officers see you, it makes you a target and that can lead to physical attacks. Inmates may think they would be doing the officer a favor by violating you physically or sexually.

While I was serving time, I worked as a referral liaison to the TGI Justice Project. We got people involved in political education and empowerment, taught about the criminal justice system and how to not put ourselves at risk for becoming incarcerated in the future. Because of the constant misgendering by correctional officers, I wrote to a federal judge, explaining how language affects us. The judge sent federal marshalls to the jail and forbade them from misgendering trans people. I filed complaints and shared my story and advocated for culturally competent health care for trans people. Anything I could do to be supportive and awaken the trans community to use whatever little power we might have, I did.

After doing my time, I set two goals for myself: to work for TGI Justice and to one day become the executive director of the organization, continuing Miss Major’s work. Miss Major is my mother, my role model, and the one who taught me how to fight, how to find my voice, and how to use that voice.

And now here I am, the executive director of TGI Justice Project. We’re working to create job opportunities, build leadership development, and fighting for economic justice. A recent example is when the city and county of San Francisco gave a strong recommendation that each organization receiving city and county funding should reflect the local demographics. The staff should reflect the population because that’s a population they serve in

large numbers. We're trying to enforce rules like that and call out different organizations and entities to make sure that's happening. This is not only to focus on safety for trans people, but also economic justice.

The biggest challenge facing formerly incarcerated trans folks is access to mental health care. There is not an easy pipeline from prison to mental health care. If someone's in prison, therapy is not always a safe place to be, because if you have problems, often the only solution is to lock you up. When you get out, it's very hard for many people to open up because they've been conditioned to fear being placed in the Secure Housing Unit (SHU) in prison. SHU is the same place you go if you have a disciplinary problem. If you've been sexually assaulted, you go to the same SHU, with the same rules and regulations as those who are getting punished. Officials say they use it for our protection, but it's a form of punishment. Working on access to mental health care is critical for the fight for justice for trans people.

When it comes to the intersection of mass incarceration and immigration, I think both systems should be fought together, hand in hand. If we don't dismantle both systems at the same time, it's impossible for us to abolish the systems of oppression that do not let people get back on their feet. They are both spiraling systems that needs to be dismantled altogether and at the same time.

appropriate given that education is not a “fundamental right” and that the children’s legal status was not a “constitutional irrelevancy” and therefore the law’s discrimination was not based on a suspect classification.³⁴⁵ Justice Blackmun, writing for the majority nine years earlier in *San Antonio Independent School District v. Rodriguez*, had set the Court’s precedent that the right to education was not the kind of fundamental right for which the deprivation thereof triggers strict scrutiny review.³⁴⁶ But in *Plyler* Blackmun joined the majority, which held that although not fundamental, the right to education was so important that depriving it from an entire class of children could lock them into to a perpetual “underclass” of poverty and exclusion.³⁴⁷ Thus, before a government can exclude an entire class of children from the public school system they must show a “substantial government interest” behind the law, and that the law’s application bears “a “fair and substantial relation” to that interest.³⁴⁸

The Court rejected the state’s argument that the children’s immigration status alone supplies a basis for excluding them from public services, and instead considered and rejected three possible state interests behind the amendments. First, the law was considered as a mechanism for mitigating the effects of an influx of immigrants.³⁴⁹ Even if such waves of immigration place burdens on local economies, a premise the Court challenged, the majority held that because immigrants come to the United States primarily for jobs, and not to benefit from free primary education for their children, excluding undocumented immigrants from the public school system would not discourage immigration.³⁵⁰ Second, the law was considered as a response to the “special burdens” that the children impose on the schools.³⁵¹ The Court pointed to the District Court’s finding that overall quality of education would not improve as a result of any savings from excluding the children and, furthermore, the government had not justified their targeting of this class of children given that whatever “special” needs they may have are indistinguishable from those of many legal resident children.³⁵² Finally, the Court rejected the state’s argument that the exclusion was justified because the children would be less likely to remain and use their education within Texas as overly speculative in light of the tangible costs of exclusion.³⁵³

Plyler embraced, rather than overturned, *Rodriguez*, and thus despite their apparent incongruence both cases must be applied together.³⁵⁴ In the United States legal system an individual’s right to education generally is not fundamental; however, in the specific instance that a law creates an absolute deprivation of the right to receive an education, heightened scrutiny will apply.³⁵⁵ Thus, for example, the methodology that decides a school district’s relative levels of school funding is subject only to rational basis review,³⁵⁶ whereas, House Bill 56, analyzed by the Eleventh Circuit in *Hispanic Interest Coalition*, was subject to heightened scrutiny. A jointly-issued Dear Colleague letter from the Department of Education and Department of Justice

advises local school districts that the Civil Rights Act of 1964 and *Plyler*, among other federal laws, guarantee equal access to primary and secondary education.³⁵⁷ In order to give effect to this right, policies that “chill or discourage”³⁵⁸ participation and inclusion of undocumented children are prohibited, and school districts are barred from requesting birth certificates from their students.³⁵⁹

HISPANIC INTEREST COALITION V. BENTLEY

Although it is unclear the circuit’s reasoning would withstand review, it is in line with the Obama administration’s position on immigration and education.³⁶⁰

In *Hispanic Interest Coalition*, the Eleventh Circuit gave voice to the inclusive spirit of *Plyler* when it applied the Court’s reasoning to a law that it held “significantly interferes” with the right.³⁶¹ Section 28 of House Bill 56 mandated that all public elementary and secondary schools in Alabama determine and record the immigration status of newly enrolled students by reference to their birth certificate.³⁶² If the certificate shows that the child was born outside of the United States or is unavailable altogether, the burden shifts to the child’s family to prove that they are lawfully present in the country.³⁶³ The “special impact” challenged in *Hispanic Interest Coalition*, was not the furnishing of the birth certificate,³⁶⁴ but rather the compelled disclosure of immigration status.³⁶⁵ State officials argued that the provision had not targeted undocumented immigrants, pointing to the fact that every newly enrolled student was subject to the same procedures. The court was not persuaded by the State’s position in light of House Bill 56’s stated goal of “assessing the population of students who are aliens not lawfully present in the United States.”³⁶⁶

Rather than distinguish the enrollment procedures mandated by Section 28, the court analogized the deterring effect of the procedure to the *per se* exclusion that the Court faced in *Plyler*.³⁶⁷ The court noted that government knowledge of a family’s or an individual’s undocumented status creates “an increased likelihood of deportation or harassment” and that requiring such disclosure “upon enrollment in school significantly deters undocumented children from enrolling in and attending school, in contravention of their rights under *Plyler*.”³⁶⁸ In reaching this conclusion the court emphasized that, although the law contained provisions that restricted the dissemination and use of the information obtained during enrollment, these provisions were made “ineffectual” by federal laws that compelled Alabama to disclose or provide unrestricted access to the information.³⁶⁹

Having determined that Section 28 “substantially burden[ed] the rights secured by *Plyler*,” the court then turned to the question of whether the provision “furthers some substantial state interest.”³⁷⁰ This section of the opinion is not particularly enlightening, given that Alabama’s state officials only defend-

ed the law under a rational basis standard, and because it was the state's burden to show that the provision furthered such an interest the court noted that this failure was dispositive.³⁷¹ The opinion does go on to note that it is difficult to imagine how the data could be used to serve any government interest given the above mentioned deterrent to family participation in the enrollment procedures.³⁷²

EQUAL OPPORTUNITIES IN EDUCATION ACT

In 1974 the Supreme Court held in *Lau v. Nichols* that adherence to Title VI of the Civil Rights Act of 1964, which prohibits discrimination based on national origin, requires that school districts provide English language learners (ELLs) with adequate support to take advantage of their right to a primary and secondary education.³⁷³ Shortly thereafter, Congress implemented the court's decision in an amendment to the Equal Educational Opportunities Act (EEOA) that prohibits denial of education based on "the failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs."³⁷⁴

BEYOND PLYER

At present, the protection of a right to education for undocumented children is vulnerable to new interpretation under future administrations. Implementation of the Plyler decision has been limited to executive Dear Colleague guidelines and litigation by the Department of Justice. As well, the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA), which severely restricted public welfare funding for immigrants, included a provision explicitly stating that "[n]othing in this title may be construed as addressing alien eligibility for a basic public education as determined by the Supreme Court in [Plyler]."³⁷⁵ The inclusivity of America's schools—and the preemptive power of federal law—could be put on more solid footing by an amendment to the EEOA that bars school districts from taking action that denies equal access to primary and secondary education based on a child or their family's immigration status. This would effectively implement both Plyler and Hispanic Interest Coalition, examples of both explicit and implicit denial (or "chilling" of participation)³⁷⁶ of immigrant access to education.

B. HIGHER EDUCATION

Despite the widely recognized value of education, only an estimated five to ten percent of undocumented students were attending post-secondary education as of 2013.³⁷⁷ This low percentage is a result of policies that operate as effective barriers to entry, including prohibitions on enrollment to ineligibility for financial aid. In response to failed attempts to pass the federal DREAM Act, which would have taken down many of the barriers undocumented college applicants face, states have enacted their own DREAM Act types of legislation. As of early 2015, "at least" 18 states have enabled undocumented immigrants who

meet other criteria regarding their presence and relationship with the state to pay in-state tuition at the public colleges and universities.³⁷⁸ "At least five states" expressly make financial aid available to these students.³⁷⁹ At least three states ban undocumented immigrants from enrolling in state-provided post-secondary education.³⁸⁰ Seven states have DREAM Act policies promulgated by administrative agencies, half granting in-state tuition to qualifying undocumented students and the rest denying in-state tuition.³⁸¹ As many as ten states have no statute on record pertaining to this issue and the expansion of existing DREAM Acts may soon be a reality.³⁸²

The Deferred Action for Childhood Arrivals (DACA), which does not confer lawful status on eligible undocumented immigrants,³⁸³ grants temporary deportation relief and allows beneficiaries to obtain work authorizations. DACA may also make those individuals eligible for in-state tuition depending upon interpretation.³⁸⁴ A Maricopa County judge declared that DACA beneficiaries are legally present and entitled to in-state tuition, if meeting other criteria.³⁸⁵ The Maricopa County decision came down in Arizona, a state expressly barring undocumented immigrants from receiving in-state tuition, generally.

Individual colleges/universities and schools have initiated their own DREAM Acts where no guiding law exists.³⁸⁶ Private organizational and individual donations have grown the list of non-governmental scholarship funds available to undocumented students.³⁸⁷ These institutional and individual actions, although helpful, do not alleviate the need for clear, legislative measures to deliver educational access, waivers from non-resident tuition, and access to financial aid. Public institutions of higher education have long been centers for progressive thought, while also paving the way for students to attain meaningful employment after graduation. Barring undocumented students from higher education, whether by express denial of enrollment or by denial of the financial resources to attend, artificially reduces the country's talent pool and the opportunities for individuals.

Many private colleges and universities have publicly declared that admissions will not exclude students based upon immigration status.³⁸⁸ Several of the most prestigious universities in the country have identified as welcoming of undocumented applicants.³⁸⁹ Financial aid should be and is available to undocumented students at private colleges and universities. According to the National Association of Student Financial Aid Administrations, roughly 90 percent of private post-secondary schools admit undocumented students and some form of private financial aid is available at 60 percent of those institutions.³⁹⁰ Private institutions are known to offer more in terms of aid than public institutions because of concerns over conflict with federal law regarding dispersal of certain public funds.³⁹¹ Private schools do not have to proceed with such caution when administering institution scholarships, as they generally are not using federal funds in order to promulgate those programs.

Prohibitive law with respect to higher education also likely prevents this undocumented population from qualifying for meaningful employment that would provide higher wages and a higher tax-base for the state. To improve clarity through uniformity and ensure justice, an all-encompassing federal DREAM Act would be ideal. While states may have reason to manage financial aid uniquely according to their own existing programs, immigration status should not trigger special limitations in aid access or availability.

3. CALIFORNIA: HEALTHCARE AND LICENSING

Undocumented immigrants are eligible for some services in California; however, a labyrinth of eligibility standards and jurisdictional differences make it difficult to differentiate the services that available from those that are not. Nonetheless, California offers undocumented immigrants and certain visa holders access to certain state services based on their legal status, as do a number of California's counties.³⁹²

A. STATE SERVICES FOR UNDOCUMENTED IMMIGRANTS

Undocumented immigrants are eligible for Emergency Medi-Cal, Medi-Cal Prenatal Care, the Access for Infants and Mothers (AIM) program, publicly funded breast and cervical cancer programs³⁹³ and Medi-Cal Long Term Care (via court order).³⁹⁴ Children of all statuses are eligible for California Child Services and newborns are eligible for Medi-Cal with no family income limit for the first year of life.³⁹⁵

B. COUNTY SERVICES FOR UNDOCUMENTED IMMIGRANTS

California's welfare system includes a degree of delegated authority, as seen in two programs reserved to be implemented by the counties: general assistance/general relief and county healthcare services.

GENERAL ASSISTANCE/GENERAL RELIEF

General assistance and general relief programs provide cash assistance to individuals struggling with poverty. The average recipient has no income and lives alone. Eligibility and payment standards are entirely set at the county level, but one representative county might be Alameda. In Alameda County, the maximum individual monthly grant is \$336, and applicants cannot have more than \$1000 in personal property.³⁹⁶ Any amount received through the general assistance program is considered a loan, and a repayment agreement is signed as a condition of eligibility for receiving the assistance.³⁹⁷

COUNTY MEDICAL SERVICES

California's counties also administer a number of their own

healthcare services, and they determine eligibility requirements for these programs. Thirty-five predominately rural counties pool their resources together into the County Medical Service Program, and undocumented immigrants can only obtain emergency services from these counties' programs.³⁹⁸ The 24 other counties operate their own programs, 36 in total.³⁹⁹ Of the 36 programs, 12 offer full services to undocumented immigrants, one offers only emergency services and one only offers non-emergency services.⁴⁰⁰ Twenty-one of these programs, on the other hand, offer no services to the undocumented.⁴⁰¹

C. STATE SERVICES FOR T-VISA AND U-VISA HOLDERS

In 2006 Governor Schwarzenegger signed State Bill 1569 into law, which provides social services access to applicants for and holders of T-Visas⁴⁰² and U-Visas.⁴⁰³ These services include: CalWORKS, CAPI, food stamps, Medi-Cal and a number of other general and refugee-specific benefits to which undocumented immigrants and other non-LPR visa holders do not have access.⁴⁰⁴ Recipients are eligible for one year, after which they will become ineligible if they have not filed a visa application or have at any time received a final denial of their application.⁴⁰⁵ Once their status has been federally certified, they are also then eligible for mainstream state and federal benefits for refugees as was already the case beforehand.⁴⁰⁶

D. MUNICIPAL AND STATE IDS/ DRIVER'S LICENSES

Most of the jurisdictions experimenting with municipal identification cards are located in the state of California.⁴⁰⁷ Municipal IDs have been in operation since 2007 in San Francisco, and allow individuals to receive identification cards to access local businesses and municipal services, as well as provide identification to police and other government agents.⁴⁰⁸ Original documentation from other countries such as Mexico or Guatemala can be used to verify an applicant's identity, allowing even the undocumented to obtain the cards.⁴⁰⁹ One issue with the programs, which has confronted other jurisdictions like New York City, is how to encourage widespread adoption of the identification cards. If only undocumented immigrants obtain the cards, there is more likely to be an association of a particular status based on possession of municipal identification.

With the support of the city's mayor and city council, Oakland has implemented a unique program of issuing dual municipal identification and pre-paid debit cards that all residents, regardless of immigration status, have access to.⁴¹⁰ The card allows undocumented immigrants to prove their identities to police, hopefully contributing to an atmosphere of safety where the undocumented can participate more meaningfully in their communities.⁴¹¹ One way to encourage more widespread adoption can be seen in Oakland's optional debit card functionality of the

card. Immigrants are not the only ones without access to such services, and the greater diversity of the card's users the better. Without universal adoption this will continue to be a problem going forward.⁴¹²

As said, the card will have a debit function—with fees for services, purchases and withdrawals, which will give municipal ID holders access to bank services that they may not otherwise be able to obtain.⁴¹³ Understandably, some individuals consider the cards to be exploitive, as the fees associated therewith are greater than other pre-paid debit cards; however, undocumented immigrants' reliance on keeping large amounts in cash makes them more vulnerable to predatory crimes such as robbery and burglary.⁴¹⁴ In fact, the violent robbery or attempted robbery of illegal immigrants have motivated some municipalities in their decision to issue a municipal ID program.⁴¹⁵ The unattractiveness of the cards' fees in Oakland may discourage non-documented residents from adopting the card if their primary use of the ID would be as a debit card. Despite these well-reasoned concerns, lack of access to bank and other services is an impediment to everyday tasks and contributes to isolation from society. For many, these cards will help equalize access to certain services among all Oakland residents. Furthermore, the optionality of the debit features of the card allows residents to choose whether the fees are worth the services, considering their circumstances.

In 2013 California passed AB 60, thereby providing a means to obtain a drivers license to hundreds of thousands of undocumented residents.⁴¹⁶ The law went into effect on January 1, 2015 and to date has provided 217,000 drivers licenses to AB 60 applicants.⁴¹⁷ Drivers license demand is high and many more applications have been received than actual licenses issued. AB 60 applicants are still required to pass the requisite tests and provide proper documentation proving their identity and residency in California before the government issues a license.⁴¹⁸ Despite the access these new licenses provide to undocumented immigrants, those with past criminal and negative immigration history are cautioned against applying, as they may run the risk of exposing themselves to federal officials and face harsh crimmigration consequences.⁴¹⁹ As a result, this subgroup is likely to remain excluded from this important benefit, highlighting the extensive reach of the crimmigration system and need for broader reform.

4. NEW YORK (LICENSING)

New York City has launched a municipal ID program (IDNYC), with the goal of making the city and municipal government more inclusive of all of its residents.⁴²⁰ Eligibility is conditioned only upon proof of identity and proof of residency.⁴²¹ The requirements are broad, specifying both qualifying domestic and foreign identity documents, as well as numerous documents for proof of residency, including utility bills, leases, and other

documents.⁴²² The local law also provides a catch-all provisions, permitting the administering agency to rely upon, “[a]ny other documentation that the administering agency deems acceptable,” for the purpose of establishing proof of residency.⁴²³

Despite its inclusive purpose, the city is proceeding with caution.⁴²⁴ At the encouragement of city police concerned over identity theft and fraud, unless and until changes are made, the city will store the personal information used by undocumented immigrants for two years after their application process.⁴²⁵ However, the city has declared an express interest in maintaining card holder privacy apart from disclosures required by federal or state law.⁴²⁶ In reference to law enforcement, the administering agency will not disclose applicant or cardholder records unless served with a judicial warrant or subpoena.⁴²⁷ Unfortunately, the local law itself does not limit compliance with subpoenas to particular causes of action, which raises the question of whether a backdoor has been left open for obtaining this information as part of even minor civil suits.

The de Blasio administration was sensitive to the concern that the ID cards, which are intended to help undocumented New Yorkers, to become another way of finding and identifying them.⁴²⁸ Achieving widespread adoption, a common problem in the crafting of municipal ID policies across the country, has been one of the challenges for the municipality. Unlike Oakland's model of pre-paid debit functionality as a way to attract non-immigrants shut out from banking services, the municipal IDs increase access to banking services in New York City by serving as official identification at participating banks and credit unions.⁴²⁹ Concerns over increased fees are irrelevant in this context, as the cardholders are granted the same access and terms anyone else opening a credit or checking account at those financial institutions. New Yorkers with and without alternative forms of ID are further incentivized to apply for the municipal ID card by a variety of cultural and lifestyle perks, such as one-year free memberships and associated discounts at 33 cultural institutions around the city, including museums, botanical gardens, zoos, performing arts centers, and concert halls.⁴³⁰ The IDs can also double as library cards and offer entertainment and recreation center discounts, as well as medical prescription discounts at ninety-five percent of the pharmacies across the city.⁴³¹

The program has been successful, and more than 670,000 IDs have been issued since implementation in January 2015.⁴³² Though the administration cannot know for sure how many immigrants have obtained the IDs, it believes, based on neighborhood data, that immigrants have substantially adopted them. Unfortunately, some of the big banks have not yet accepted the IDs, keeping the options for banking services limited for undocumented immigrants, who must turn to expensive and unsafe options like check cashing services or keeping cash at home.⁴³³ These banks are rejecting the IDs even though federal regula-

tors have decided that they are valid proof of identification to open bank accounts. NYC will address the problem with the banks, and it is hopeful that they will come around. In any case, with these IDs, access to governmental buildings, financial activities, and cultural programming opens up for undocumented immigrants, helping to alleviate the class divide in the city.

5. EMPLOYMENT

A. DOMESTIC WORKERS

Domestic workers have long been an instrumental part of society, yet both society and the legal system have consistently and historically underappreciated and undervalued the work of domestic workers. Indeed, with origins in imperialism, colonialism, slavery, and globalization, it is no wonder that domestic work has long been performed, almost exclusively, by some of the most marginalized and Othered populations of society: women, particularly women of color, immigrant women, and more specifically, immigrant women of color.⁴³⁴

In addition to developing from structures and institutions inextricably tied to the oppression of racial minorities, lower class people, migrants, and women, domestic work is unique in that it drives the economy by freeing up middle- and upper-class labor, yet still remains largely invisible, as the work is relegated to an exclusively private sphere (the home).⁴³⁵ Moreover, the reputation of being women's work and the association with historically unpaid household chores delegitimizes domestic work—it is not considered “real work,” and is rarely, if ever, considered in economic analyses and measures, like the national gross domestic product.⁴³⁶ With this historical context and status as illegitimate work, those who benefit from domestic labor can easily ignore and undervalue this invisible work.

As such, it is not surprising that laws affording laborers employment rights substantially and significantly exclude domestic workers from their protection. For example, “the 1935 National Labor Relations Act [NLRA], which guarantees workers’ rights to form unions, choose representatives, and bargain collectively, does not apply to ... domestic workers.”⁴³⁷ Furthermore, because domestic workers’ do not work for enterprises with several employees, federal anti-discrimination law does not apply to them.⁴³⁸ Similarly, domestic workers lack access to the protections of the Occupational Safety and Health Act (OSHA)—a law that does not apply to employers of workers who perform household chores.⁴³⁹ Live-in domestic workers are particularly at-risk, as the Fair Labor Standards Act (FLSA), which established the federal minimum wage and overtime pay, among other standards, exempts these workers from receiving overtime pay.⁴⁴⁰

The interplay of a gendered, racist, and classist historical context, with the lack of legal protections for workers, and an

exclusively private arena where workers perform their labor, create unique issues that domestic workers face. For example, working in a private home, for an employer who may regard a worker as part of the family and domestic work as informal or not “real work,” may add to the difficulty of asserting one’s rights (few as they may be), or of negotiating with employers for better working conditions.⁴⁴¹ In addition to the lack of a recognized right to unionize and collectively bargain, having such a private space as one’s workplace further impacts any opportunity to organize with fellow domestic workers, as they tend to be isolated from other workers.⁴⁴² Moreover, given the private workplace, domestic workers are rarely treated in accordance with basic workplace standards to which other employers and professions are held given the lack of government monitoring or regulation.⁴⁴³ The private workplace presents many more problems for domestic workers. For instance, the people who hire domestic workers often do not consider themselves employers, or their homes a workplace. This may result in a lack of boundaries or formalities between the employer and employee, and may lead to employer abuses. Many domestic workers lack a formal employment agreement, and report a flat rate (often extremely low) wage for work no matter the hours worked and essentially being on-call for their employer.⁴⁴⁴ Those who do have a formal employment contract many times still deal with an employer who fails to abide by the agreement.⁴⁴⁵ Employers may also fail to pay a worker on time, or consider favors and hand-me-downs as a form of payment. Furthermore, these employers may have the misperception that their homes are unequivocally safe and may have trouble noting the hazards, such as overexposure to chemical cleaning agents, domestic workers confront in their work.⁴⁴⁶

The lack of a formal legal status allows for an even more precarious situation for undocumented domestic workers. For example, like in many other professions, undocumented workers may fear voicing their complaints about working conditions out of fear of an employer’s retaliation, such as the disclosure of their immigration status. And, in the case of domestic workers, undocumented workers tend to be paid less than other workers in an already low-wage occupation.⁴⁴⁷

Immigrant women make up a large portion of the domestic worker population. According to one report, 46 percent of domestic workers are foreign-born and 35 percent are non-citizens.⁴⁴⁸ However, undocumented workers may be largely unaccounted for given a fear of deportation and a reluctance to report their immigration status, and likely represent a much higher portion of domestic workers than officially reported.⁴⁴⁹

Therefore, any effort to take marginalized workers out of the private and potentially oppressive sphere of the home-workplace, to recognize their labor, and to extend employment protections afforded to other workers must take into account the many immigrants who make up a substantial portion of the

domestic worker population. Similarly, enfranchising a group of workers long ignored and kept behind closed doors would partly address issues relating to the marginalization of the immigrant community itself.

Groups of domestic workers nationwide are working hard to improve their working conditions, employment rights, and labor protections. To date six states have adopted variations of a Domestic Workers Bill of Rights, and the Illinois state legislature is considering adopting its own bill of rights.⁴⁵⁰ In general, the rights do not cover casual babysitters, but represent the start of a movement to recognize the hard work, dignity, and value of an occupation long overlooked.

MASSACHUSETTS

Although not the first in the nation, the state of Massachusetts recently enacted their version of a domestic worker's bill of rights. The law went into effect on April 1, 2015.⁴⁵¹ The bill defines a domestic worker as, "any individual, whether an independent contractor or an employee, who provides any service of a domestic nature within a household, including housekeeping, cleaning, childcare, cooking, home management, or caring for the elderly or ill."⁴⁵² Under the law an employer is, "any person or entity who hires a domestic worker to provide services within a household, whether the person has an ownership interest in the household or not."⁴⁵³ These broad definitions ensure that the law's protections capture the most workers, irrespective of their immigration status.⁴⁵⁴ Importantly, the law places the responsibility on the employer to advise, via formal notice, a worker of their rights under the new law.⁴⁵⁵

Arguably the most forward-looking and progressive of the existing bills, the Massachusetts law extends the most generous protections for domestic workers out of the bills that currently exist.⁴⁵⁶ Filling in the gap created by a lack of recognition at the federal level, the Massachusetts law guarantees the right to a minimum wage, overtime, breaks, sick time and leave, and other typical employment benefits like social security.⁴⁵⁷ The law also covers domestic workers under their anti-discrimination laws. In addition, the law addresses many of the unique issues domestic workers face in their employment. For example, domestic workers have a right to privacy, may not have their pay deducted if they are required to be live-in workers, and perhaps most importantly, require employers to keep payroll and time-keeping employment records for at least three years.⁴⁵⁸ As the most protective bill, the Massachusetts law serves as a model and a baseline of the types of legal protections and rights domestic workers should receive.

CALIFORNIA, NEW YORK, AND HAWAII

Three other states have legislated their own protections for domestic workers irrespective of their immigration status. The California Domestic Worker Bill of Rights entitles domestic workers who are personal attendants to overtime pay.⁴⁵⁹

In general, personal attendants are domestic employees who work at private households in the care of children, the elderly, or the disabled.⁴⁶⁰ Specifically, personal attendants must receive overtime pay after working nine hours in a day, or 45 hours in a week.⁴⁶¹ Passed and approved by the governor in 2013, the California law is only in effect until 2017, though a bill was recently introduced in the state Senate to delete the repeal date of 2017.⁴⁶² Domestic workers who are not personal attendants continue to be entitled to regular overtime protections under Wage Order No. 15 of the state's Industrial Welfare Commission, which regulates domestic workers' hours worked and wage claims.⁴⁶³

In 2010, New York became the first state to pass a law extending employment rights and labor protections to domestic workers.⁴⁶⁴ Considerably broader than the California version, the New York law guarantees overtime pay, rest days, and protects workers from sexual, racial, national origin, gender-based, or religious harassment via a special cause of action under New York's human rights law.⁴⁶⁵ Notably, the law commissioned the state to investigate the feasibility of extending the right to unionize to domestic workers;⁴⁶⁶ however, domestic workers have not yet gained this right. Hawaii, the second state to enact a domestic worker law, guarantees minimum wage and overtime pay to workers and provides protection from harassment.⁴⁶⁷ Similarly, Oregon and Connecticut have recognized similar rights and protections for domestic workers, though the Connecticut Domestic Worker Bill is narrower than the others.⁴⁶⁸

Domestic workers' bills of rights are novel and it remains to be seen how states will enforce the laws as well as the effect the laws will have on their intended beneficiaries. Given preconceived notions about the legitimacy of domestic work, lack of regulation, and the oppressive history of the occupation's development, the bills of rights are only the first step in empowering and protecting domestic workers. States and stakeholders alike will likely have to continue to work to ensure that the laws are enforced, and that societal and employer attitudes about domestic workers are transformed in order to provide real and equitable change.⁴⁶⁹

B. ERISA (EMPLOYEE RETIREMENT INCOME SECURITY ACT): FEDERAL AND STATE APPLICATION

In 1974, Congress passed the Employee Retirement Income Security Act (ERISA) to ensure solvency and proper management of private employer-offered pension, benefit, and welfare plans.⁴⁷⁰ ERISA entitled employees to recover benefits due to them.⁴⁷¹ There is also a fiduciary duty on behalf of the trustee of ERISA funds to ensure the money therein is being maintained and distributed in a prudent manner.⁴⁷² It remains uncertain whether undocumented workers have a right to claim an employer unlawfully withheld benefits.⁴⁷³ The uncertainty is

steeped in federal legislation that prohibits employers from hiring undocumented workers.⁴⁷⁴

FEDERAL APPLICATION

No federal decision has clarified undocumented worker rights under ERISA; however, the legislation has been analogized to oppositely interpreted laws.⁴⁷⁵ In *Hoffman Plastic Compounds*, the Supreme Court decided that a petitioner did not have a right to back pay where the petitioner was an undocumented immigrant and the National Labor Relations Board (NLRB) had found that the petitioner's employer laid him off in violation of the National Labor Relations Act.⁴⁷⁶ The decision largely relied upon federal law prohibiting employers from hiring undocumented workers.⁴⁷⁷ Conversely, the Department of Labor Wage and Hour Division (WHD) has determined that for the purposes of the Fair Labor Standards Act (FLSA), undocumented workers are entitled to the same wage and hour provisions as other workers and further noted the fact that the employee in the NLRB case law had presented false documents, thereby committing a fraud.⁴⁷⁸ The DOL has expressly distinguished the law in *Hoffman Plastic Compounds* from the FLSA and the Migrant Seasonal Agricultural Worker Protection Act (MSPA), both of which are enforced by the DOL.⁴⁷⁹ More specifically, the DOL found undocumented workers, who otherwise qualified, to be "employees" as defined by the statutes.⁴⁸⁰ Nearly eight years after issuing this statement, the DOL has yet to address the effect of *Hoffman Plastic Compounds* on ERISA.

One article in the *Benefits Law Journal* considered an analogy between ERISA and federal benefit plans, from which undocumented workers are expressly prohibited.⁴⁸¹ However, private contributions are purposely governed under ERISA, a separate statute, and are subject to government oversight, not government dispersal. A clarification of the federal law is necessary to correct confusion and calm concern by ERISA trustees as to their fiduciary duties under the plan. Because a fiduciary duty exists between the trustee of a pension plan and its participants, a trustee may be concerned that permitting undocumented workers to collect on a pension plan equates to a breach with respect to the remaining plan participants.⁴⁸²

While waiting for federal clarification, states must pass legislation to further protect its undocumented working population. For example, California's employment laws, have held successfully against challenge and would likely protect any ERISA-covered plan in its jurisdiction, regardless of whether the participant was undocumented.

STATE APPLICATION

On November 6, 2014, in *Bay Area Roofers Health v. Sun Life Assurance Company*, a district court in California considered whether an undocumented employee had a right to be reimbursed for medical expenses under both ERISA and California employment law. The reimbursement, according to the employer, was to be made through a stop-loss insurance policy provider that refused to pay on the basis that the employee's paperwork contained an invalid or fraudulent social security number. The insurer claimed that its insurance plan only covered "employees," which would not contemplate undocumented workers under federal law.⁴⁸³ The court addressed the California legislature's passing of Senate Bill 1818 in response to the decision in *Hoffman Plastic Compounds*. The bill "expressly makes the worker protection provisions of state employment and labor laws available to all workers 'regardless of immigration status.'"⁴⁸⁴ *Bay Area Roofers Health* analogizes to the benefits in *Salas v. Sierra Chemical Company*,⁴⁸⁵ which were governed under the Fair Employment and Housing Act.⁴⁸⁶ The *Bay Area Roofers Health* court was also influenced by the decision in *Incalza v. Fendi*, wherein the Ninth Circuit upheld a California law, which requires all employment, civil rights, and housing law to be enforced without regard to an individual's immigration status.⁴⁸⁷ Unfortunately, the specter of preemption may sometimes intimidate states from passing protective legislation for undocumented workers. The court in *Incalza* clarified that "[t]ension between federal and state law is not enough to establish conflict preemption."⁴⁸⁸ California law does not appear to conflict with the enforcement of employee benefit protections, as the law would require an undocumented worker to obtain his or her benefits, but would not require the rehiring of an employee terminated due to the person's immigration status.⁴⁸⁹



MADIHA KHAN

is a senior at UC Berkeley studying Philosophy. Madiha shares her personal perspective as an undocumented student and how the Deferred Action for Childhood Arrivals (DACA) has affected her life.

“I am able to drive my car now with a legal drivers license. This has given me peace of mind because even if I get pulled over I won’t be treated like the Other. Documentation is a luxury that I now can access.”

My parents are from Pakistan, but I was born in Dubai, where I lived until I was about six years old. I immigrated to the US in 1999 to join my dad, who was already here working. My mom and I came on a visitor’s visa. We wanted to stay together as a family, so we over-stayed. We received bad legal advice from some Pakistani attorneys who told us that it would be really hard to return to the US, so we should just stay on our Visitors Visa. One of our lawyers told our parents that if you just stay, they’ll pass legislation to allow you to stay legally. That is how we ended up becoming undocumented.

I didn’t know I was undocumented until I was older. Growing up, there were different things that American children were allowed to do that I wasn’t allowed to do, like driving. At that time I thought it was because my parents were South Asian and stricter on women. I discovered the truth when I was applying to college, though. I used my dad’s Social Security Number and thought it was mine. The University of California returned my application, and said it wouldn’t be complete until I had a valid number.

That's how I found out. I cried for hours, mostly because I was thinking of the future, not sure anymore if I could work or go to school. So I just assumed I could no longer do the things I wanted to. My parents were concerned as well, since they immigrated here for the sake of me coming to school and they were really concerned about my college education. They had been trying to file paperwork for years, but kept getting denied. When that time of me going to college came around, it was really stressful for all of us.

I did some research and learned about AB 540, which is a program that allows undocumented students who attended high school in California for at least three years, and graduated, to pay resident tuition fees at California public universities. This was a huge relief. I looked at the closest community colleges to attend. I wasn't able to get federal funding for my education, but my parents were able to pay resident fees. I also worked under the table for a while. My boss kept asking me for my SSN but I kept saying I would get it to her later, and after a while they stopped asking. I found a few scholarships available, but most undocumented scholarships were for Latinx students so I wasn't able to apply for that many.

Berkeley was always my dream school. The undocumented student program at Berkeley was also a big draw. Berkeley has one of the largest undocumented student programs, with the most resources. I knew there was a community here that I could always go to.

Being undocumented wasn't always a huge part of my life. But after I found out, it was always a lingering thought, such as when I was driving. My mom drove me around for 10 years, taking constant care to hide from the police, while following all the rules. But there came a point, when my mom fell ill, where I needed to drive myself. And I always had that fear, that if they catch me I'll get deported (I received a deportation order while I was in high school). I once got a rolling stop ticket while I was driving illegally and thought the officer had grounds to deport me, but he just gave me a ticket. I was shaking because I was so scared.

But this fear had another side—it made me want to do better in school, because I realized I wanted to be an undocumented advocate for other students.

At first, it was really hard finding a community in college, as I felt that, as an Asian/Pacific Islander person, I didn't quite fit in with "the usual" undocumented identity. But I also felt I didn't fit into the Pakistani community, being so Americanized as well as non-Muslim. However, once I met other individuals from the Undocumented Student Program at UC Berkeley, I really found a community, as well as a constant support system.

I do think a lot of students have become complacent recently because we're so used to being used to having the luxury of campus resources available to us, of having the "DREAMer" narrative. It feels that others like to support us because, even though we are undocumented, we are looked at as good students. We are the "successful" undocumented individuals, so many give us a pass. We have the luxury of that narrative.

But I think we may have become unattuned to the undocumented voices outside of our own student community. Many of us have stopped being activists for the rest of community and only being advocates for ourselves, for example, pressuring the chancellor to send more money to undocumented programs. But very rarely do we see undocumented students go out in the larger world to have a voice for those who aren't heard. My mother is still undocumented and doesn't have DACA. People like her are forgotten.

I deal with anxiety issues, so especially during the time of my deportation hearing, I was going to UC Berkeley's health center to find support for my mental health. But I didn't really have other support aside from legal support.

Now that I have DACA, it's a complete 180. Last year after I first got into Cal, I applied to an internship in City Hall to get in touch with undocumented community, called Dream SF. It's

a program that seeks to employ undocumented folks so they can work in an interest that relates to undocumented issues. I was part of pilot program after DACA came out. I was able to legally work in City Hall. There, I had the opportunity to work on policy issues that affect undocumented individuals and lobby for greater aid to undocumented folks. It was a great opportunity for me.

Now I am able to drive with a legal drivers license. This has given me peace of mind because even if I get pulled over I won't be treated like the Other. Documentation is a luxury that I now can access. I can even apply to jobs, because of DACA.

I believe inclusion is really important for a society as it shows philanthropic values. When you have individuals that actively seek to create an open and inclusive space for others, it shows that a society is open-minded and also allows opportunity for growth. As opposed to assimilation, inclusion allows for the creation of a diverse culture. If we continue to block and reject the entrance of immigrants into our society—which is very hypocritical—we hinder the growth and potential of all that our society may be able to accomplish while turning our backs on the same species. Societies are too wrapped up in identifying their differences whereas we should embrace and appreciate the new addition into our membership. Inclusion ensures our growth, whereas bigotry and hate stunt it.

INCARCERATION

1. THE GOVERNMENT'S STANCE ON PRISONER REENTRY

Despite the political nature of dedicating public funds to help people with records, the federal government seems clearly in favor of helping people leaving incarceration reenter their communities. The Department of Justice, on its Prisoner and Reentry webpage, states, "Assisting ex-prisoners in finding and keeping employment, identifying transitional housing, and receiving mentoring are three key elements of successful re-entry into our communities."⁴⁹⁰ The issue of reentry, however, is framed as a task for community initiatives and faith organizations. Non-governmental programs, faith-based and not, have been crucial players in providing reentry services. Despite their efforts, non-profits alone cannot solve the problems of reentry without positive legislation and review of existing policies.

While statements on behalf of the government are important in generating popular support for reentry, the harm of counterproductive policies far outweigh the benefits of lip service. Furthermore, most of the language supporting reentry initiatives is framed in terms of public safety (i.e., reentry programs lowering recidivism) without any acknowledgement of the social justice issues that undergird conversations about reentry – issues of class, race, education, immigration status, gender, law enforcement practices, and the overall criminal justice system. The Department of Justice states on its Prisoner and Reentry webpage that most people who have been incarcerated have come from "communities which are often impoverished and disenfranchised neighborhoods with few social supports and persistently high crime rates."⁴⁹¹ However, the DOJ spins the conversation about crime as one about individuals giving in to temptation rather than one about societal injustices.⁴⁹² The DOJ would do well to articulate just how those "pressures and temptations" are generated by a society of great inequality undergirded by structural racism and classism. The DOJ gives no mention of the over-criminalization of Black and Hispanic persons and the under-criminalization of white persons,⁴⁹³ a fact which cannot be ignored in any conversation about criminal justice policy.

Additionally, the federal government leaves reentry policy innovation to the states, cities, and community programs. While the federal government makes many millions of dollars available to reentry programs throughout the country, there are few federal-run reentry programs. While the lack of federal programming is not necessarily a problem, there is a problem with the federal government's unwillingness to step in and provide basic assistance to reentering people in states, cities, and communities that fail to do so. Furthermore, certain protections, such as anti-discrimination protection, ought to be implemented as federal pol-

icy. Additionally, state laws that directly counteract the reentry effort, such as not allowing someone with a drug conviction to work at a school,⁴⁹⁴ further frustrates reentry initiatives. As this Resource Guide was in its final stages, the US Senate announced a bipartisan plan to alleviate the country's mass incarceration problem and start fixing the criminal justice system. The main goals of the bill are to cut mandatory prison sentences for non-violent crimes, promote more early releases, and institute programs to better prepare people reentering society.⁴⁹⁵ The bill would change mandatory minimum sentences for qualified cases from 15 to 10 years, 20 to 15 years, and from life imprisonment to 25 years for three-strike cases.⁴⁹⁶ In addition, it would virtually prohibit solitary confinement in juvenile facilities.

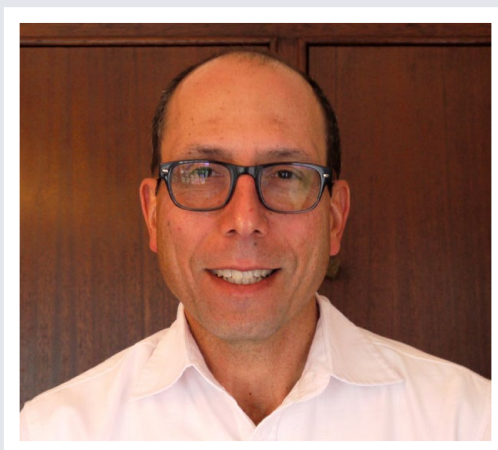
While the proposal is not as bold a reform as the criminal justice system needs, activists welcome it as a realistic option from a Congress that has been marked by stalemate and inaction, and as the first meaningful reform of the criminal justice system in generations. The bill may go up for full congressional consideration in 2016.

2. SPECIAL CHALLENGES FACED BY FORMERLY INCARCERATED MOTHERS

The number of women in prison increased by 646 percent between 1980 and 2010, rising from 15,118 to 112,797.⁴⁹⁷ Additionally, from 1991 to 2007, the number of incarcerated mothers increased by 122 percent, compared to a rise of 76 percent for incarcerated fathers.⁴⁹⁸ About 75 percent of women are incarcerated for nonviolent property and drug crimes;⁴⁹⁹ 80 percent have, on average, 2.4 children, with 10 percent of their children placed in foster care.⁵⁰⁰

Many public policies impose heavy, sometimes unsurmountable barriers on the family relationships of incarcerated individuals. For example, the Adoption and Safe Families Act (ASFA) of 1997 authorizes termination of parental rights when a child has lived in foster care for 15 out of 22 continuous months. The average prison sentence exceeds 22 months, and therefore incarcerated parents dependent on foster care for their child's care are at risk of losing custody.⁵⁰¹ Loss of parental rights disproportionately affects mothers in prison, who are five times as likely as men to report having children placed in a foster home.⁵⁰²

When parental rights are terminated, it is virtually impossible to restore them. However, even when a formerly incarcerated woman has not lost her parental rights, it is very hard to regain custody of their children upon leaving jail. To do so, women must often find a job that pays well enough to support themselves and



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"I believe the solution is the same for ending both mass incarceration and mass deportations—a one, two punch of dignity and rationality."

I see mass incarceration as distinct from earlier periods of American incarceration practices in three dimensions. Firstly, the quantum shift in the scale of incarceration from about 100 Americans imprisoned for every 100,000 people, to over 400 per 100,000 in the population. Changes of this scale in large social institutions almost always indicate some kind of fundamental change in society.

Secondly, a shift in the administration of imprisonment from individualized sentencing (where prison is a selective process) to a collective process where whole groups are deemed presumptively appropriate for incarceration (drug sellers, parole violators, etc.) Of course we've had episodes of that in the past, like the convict leasing system that prioritized imprisonment for African Americans as a way of replacing slavery, but never on a national basis, and not since we adopted the legal structure of equal citizenship in the 1960s by ending Jim Crow.

Thirdly, a qualitative shift from the post-World War II emphasis on rehabilitation and a corresponding emphasis on investing in improved prison conditions, to a commitment to an extreme form of incapacitation with a corresponding emphasis on warehousing as many people as possible in prisons that are overcrowded, lacking in programs or even decent health care, and increasingly degrading. Some historians would say I'm painting too nice a picture of pre-mass incarceration conditions, but even so, the degree of shift is undeniable.

I've seen some significant action to reform the situation, especially related to extreme isolation prisons, which typically keep prisoners in their cell 24 hours a day, with perhaps one hour a day out to shower or "exercise" in an open air version of the same cell space. These prisons are often held up by prison managers as an exceptional tool that allows them to isolate dangerous prisoners and keep other prisons more open for programming. However, in California and in many other states they have become a structural part of an entire prison regime based on warehousing people, these are extreme versions of what is at its core a deeply inhumane approach to imprisonment. Thus the effort to end and outlaw this form of imprisonment is much more important than even the large scale of these prisons would suggest—eliminating them would force deep changes in entire prison systems.

Fortunately there have been some major steps toward this goal, and the pressure is coming from multiple fronts. Perhaps the most praiseworthy comes from prisoners themselves. In recent years, supermax prisoners in California mounted hunger strikes that spread through the entire prison system—in 2013 some 30,000 prisoners were rejecting meals at one point—which brought considerable public attention and even legislative hearings. Lawsuits against supermax prisons are achieving significant success with both New York and now California settling lawsuits challenging prolonged confinement in supermax units. Additionally, a growing amount of media attention to supermax is raising public awareness, and given the current climate of reform, this is laying the groundwork for further advances toward ending this practice.

The second front of action is toward reducing reliance on prison in the first place. In this way, California, forced by the Supreme Court in *Brown v. Plata* to reduce its prison population by about 40,000 people, is probably the national leader having adopted a body of laws that prevents trial courts from sentencing most low-level felonies to terms of imprisonment.

The third front is clemency, or executive action, to free current prisoners. This is important both to relieve overcrowding and as a starting point for sentencing reform by exposing the folly of current sentences. President Obama can claim the lion's share of credit with his high visibility clemency program for federal prisoners serving prolonged sentences for nonviolent drug crimes. The problem here is that the President's clemency program has released fewer than 100 prisoners, out of more than 30,000 who might meet his criteria.

While much progress has been made toward delegitimizing long, or any, prison terms for drug crimes, virtually none has been made toward shaking the commitment to long prison terms for more serious or violent crime. Yet the very same criticisms apply. While some prison may be warranted in the case of criminals that cause or threaten serious injury to other people, and may be justified in the case of serious property crimes when lesser sanctions have no impact, there is no penological justification for the very long sentences that crimes like burglary, robbery, and murder now attract.

Take murder: few would doubt that someone who intentionally kills another person without legal justification should be removed from the community for some time—but for how long? In the civilized world, almost no one serves more than 25 or 30—indeed, in most of the world 10 or 15 years is not atypical for murder. Yet in California, those lucky enough to win parole have typically served 30 or more years. I would like to see states adopt a 20-year limit on how long someone can be held in prison without specific reasons to believe that they pose a continuing threat. For lesser crimes, sentences should rarely be more than 5 years. There is very little evidence of deterrent effects beyond a few years, and the natural desistance from crime that almost invariably comes with aging means that incapacitating someone for decades is pointless.

When it comes to immigration, many now note that our country's immigration enforcement resembles typical law enforcement, and that our immigrant communities are being overly

criminalized. I consider mass deportation and the routine use of detention to support it, an integral part of mass incarceration and just as urgent a priority for uprooting and outlawing. Indeed, because violence is such a powerful and capacious concept that tends to link very different things, the rise of global terrorism since September 2001 has added considerably to the fear of immigrants, even though it has nothing to do with it.

I believe the solution is the same for both ending mass incarceration and mass deportations—a one, two punch of dignity and rationality. Dignity is the first punch. As long as the victims of mass incarceration or deportation are denied their essential human dignity, anything can be justified in the name of “security.” As with prisoners, we need to bring out the stories of how deportation of immigrants ravages children, families, and communities, denying them the presence of individuals that provide essential contributions to their humanity. We need to insist that whatever measures are taken in response to either crimes or violations of the immigration laws, that those measures respect the human dignity of those subject to enforcement and those connected to them. The second punch is rationality. While people of reason can differ on what our immigration policies should be, there is no rational justification for the mass reliance on deportation and detention we adopted in the 1990s.

One of the most encouraging signs is the fact that the growing movements against mass incarceration and mass deportation are increasingly aligning and coordinating. It is easy to imagine that those fighting deportations would emphasize their innocence of any crimes (in the first wave of big demonstrations against deportations a few years ago, slogans like “we are not criminals” were commonly seen). And likewise, those fighting mass incarceration might easily see benefit in the nation’s fear-based politics turning to the borders. But instead, understanding the common ground of dignity can support both struggles, I have seen clear evidence that activists in both causes are refraining from strategies that would demonize the Other, and instead are seeking a common vision of a more just and inclusive society.

their children, attend parenting and substance abuse programs, and study basic life skills.⁵⁰³ Housing presents a special barrier, since women must be able to provide housing for their children in order to regain custody. The women who need housing when they leave jail are usually placed in temporary shelters, which often present unstable environments for children. If they have felony convictions, they do not qualify for public housing and often do not have anyone with whom to live.⁵⁰⁴

Moreover, the federal **Personal Responsibility and Work Opportunity Reconciliation Act** (PRWORA) of 1996 imposes a lifetime ban on cash assistance and food stamps for people convicted of a drug offense, unless a state opts out of the requirement.⁵⁰⁵ Women denied food stamps, housing, or employment assistance “become limited in their ability to reintegrate and maintain stable households, thus diminishing the likelihood of regaining custody of their children.”⁵⁰⁶ States and nonprofit organizations should focus on improving transitional housing for formerly incarcerated women, on creating more drug rehabilitation programs, and on assisting women find stable employment. Furthermore, activists should exert political pressure to revert the nefarious effects of ASFA and PRWORA on the family reunification prospects of formerly incarcerated individuals.

3. EDUCATION

A. PRIMARY AND SECONDARY EDUCATION

Inadequate education and low literacy rates have long been tied to analyses of criminal delinquency, as both cause and effect of juvenile encounters with the criminal justice system.⁵⁰⁷ Both access to educational services and the quality of those services have been of interest to researchers of incarcerated and formerly incarcerated populations. As stated in the landmark education case, *Plyer v. Doe*, “[p]ublic education is not a ‘right’ granted to individuals by the Constitution.”⁵⁰⁸ Despite the protection extended to undocumented immigrants in *Plyer*, no general compulsory education scheme was federally mandated; therefore, states have elected to design their own compulsory education laws.⁵⁰⁹ By 1918, every state had enacted some form of compulsory education law, which would apply equally to populations of specified ages within and outside of correctional facilities.⁵¹⁰ Another important legal doctrine guiding education within correctional settings is IDEA, the **Individuals with Disabilities Education Act** (IDEA), which ensures all states provide youth with disabilities receive “a free appropriate public education.”⁵¹¹ This deserves special mention, as incarcerated juveniles are “three to five times” as likely to qualify for special education prior to incarceration than the general public.⁵¹²

Additionally, federal code, as well as law in 26 states, has defined mandatory literacy requirements for federal and state prisoners.⁵¹³ Mandatory literacy requirements have effect on all

prisoners, juvenile and adult alike. The prison population literacy rate is significantly lower than the general population.⁵¹⁴ Despite the obvious social benefit of these generally GED-centric literacy programs, the guiding law often serves as an unfunded mandate—leading to inconsistent implementation.^{515/516} The Federal Bureau of Prisons, as well as some state agencies, operates both mandatory literacy and English as a Second language programs to inmates with limited literacy and limited English proficiency.⁵¹⁷ Voluntary adult education programs including lifestyle courses, parenting classes, artistic classes, and others are also sometimes offered, although their presence varies greatly among facilities. Vocational programs have also been implemented in many institutions. As of one study in 2000, 56 percent of state prisons and 94 percent of federal prisons implemented vocational programs.⁵¹⁸ Participant vocational training recipients from the same study reported training to include reading, writing, and communication instruction, with nearly one third of trainees also receiving some mathematical instruction. According to the 2003 National Assessment of Adult Literacy Survey, twenty-nine percent of the overall number of interviewed inmates received vocational training, but more inmates were on waiting lists than actually enrolled.⁵¹⁹

B. HIGHER EDUCATION

Higher education for incarcerated populations has drawn significant attention from those seeking reform.⁵²⁰ The presence of higher education options for the incarcerated is often dependent on funding. Subsequent to the passing of Title IV of the Higher Education Act, Pell Grants became available to inmates and by 1982 college programs for the incarcerated were available in 90 percent of states.⁵²¹ The 1994 crime bill included an amendment to the Higher Education Act, which eliminated incarcerated people in prisons, but not jails, from qualifying for Pell Grants and has since had a devastating effect on funding and general availability for higher education within institutions.⁵²² Subsequently, the 350 degree programs in operation in prisons in 1994 dropped to only 12 programs by 2011.⁵²³ As of July 31, 2015, the federal government announced the Second Chance Pell Pilot Program, which will reintroduce Pell grants for prisoners as a test to track the grants’ effects on lower recidivism.⁵²⁴

The relationship between higher education, recidivism, and overall community benefit is widely documented. Higher education is a necessity for employment in the country’s increasingly professional labor market and reintegration of former inmates into the workforce.⁵²⁵

C. PROGRESSIVE PRACTICES

CALIFORNIA

Despite the importance of higher education and employment for recidivism rates, only 28 percent of California’s eligible pris-

on population was enrolled in college courses in 2014. Challenges vary for the jail and prison populations. Educational programming in the county-run jail system has long been more limited than state prisons, due in part to short sentences and overcrowding.⁵²⁶ One solution being implemented is to have jail-based courses operate parallel to a nearby community college, so inmates can seamlessly continue attending classes once released. Other colleges offering jail-based programs have designed modular schedules, ranging from one week to several months.⁵²⁷ California is home to numerous post-incarceration programs, essential for successful reentry, designed to help students with conviction histories receive stipends for their transportation, meal, textbook, and/or housing needs.⁵²⁸ Other programs offer tutor, mentoring, and support navigating administrative offices regarding registration and financial aid.⁵²⁹

The prison population in California has faced its own unique challenges, largely stemming from underfunding. The loss of Pell Grants, which mostly funded private college programs, as well as budget cuts for prisons and the community colleges, nearly eliminated in-person college programming in prisons. As a result, where programs were able to continue, they largely shifted to the distance-learning variety, which relies heavily on outdated paper and video correspondence that does not facilitate solid communication between instructors and students.⁵³⁰ Of the 28 college programs offered through California's correctional system, San Quentin houses the only remaining in-class program, a non-profit partnership with Patten University.⁵³¹ Moreover, the community college system only recently gained the legal right to provide in-class instruction in prisons, which was already permissible in jails.⁵³² The new bill, SB 1391, also increased reimbursements to community colleges for for-credit programs.⁵³³

NEW YORK

Prison higher education programs vary in scope and focus throughout the state. Private and public colleges in New York have come forward to bring college education to incarcerated men and women.⁵³⁴ Bard College's **Bard Prison Initiative** (BPI) currently enrolls 300 full-time students in six medium and maximum prison facilities in New York State.⁵³⁵ While about 68 percent of released prisoners are re-arrested within three years of release nationwide, with half of those individuals returning to prison, less than two percent of BPI graduates have been re-incarcerated.⁵³⁶ Bard offers a broad liberal arts curriculum, taught in-person by faculty of Bard College and other local colleges and universities. The courses taught in prisons are identical to those taught at the college, making for competitive admission and challenging studies. Occasionally writing workshops are offered, but students must largely prepare for the exam and the rigors of the courses on their own. Alumni have attained undergraduate and advanced degrees and work in various fields, sometimes in leadership roles, throughout

the region. Students and staff report a positive and supportive community has grown out of the program.⁵³⁷ Due to the lack of public funding, the program is almost entirely funded by private individual and institutional donations.⁵³⁸

John J. College's **Prison-to-College Pipeline** (P2CP) serves the dual purpose of bringing college courses to prisoners and also fostering relationships between students studying within and outside of prison.⁵³⁹ In conjunction with Hostos Community College and the Otisville Correctional Facility, Otisville students participate in weekly classes taught by John. J. and Hostos faculty and bi-weekly lifestyle seminars. As of 2015, under 10 percent of 21 enrolled students who completed their sentences have returned to prison.⁵⁴⁰ The program addresses a variety of reentry issues and, therefore, provides much more than college credit, aiming to help students transition into employment and continued study after release.

Cornell University hosts the **Cornell University Prison Education Program**, which allows Cornell faculty, some professional and advanced degree students, and fellows to teach courses the Cayuga Community College associates degree program.⁵⁴¹ Admission is competitive and struggling students have the option of taking non-degree courses to help prepare for the admissions exam. Fifteen for-credit courses were offered in the spring 2015 term.⁵⁴² The program charges neither tuition nor fees and educators receive either a small stipend or school credit for their time. These low-cost or well-funded programs are necessary, considering the political controversy that sabotaged Governor Cuomo's effort to bring state funding back into prison higher education is likely to persist.⁵⁴³

FUTURE PROGRESS IN PROGRAMMING

Although evaluation of the success of prison education generally focuses on recidivism,⁵⁴⁴ some propose widening that conversation to consider continued study post-incarceration as another benefit.⁵⁴⁵ The emphasis on the relationship between education and recidivism is none-the-less understandable, as a RAND Corporation study indicates a 43 percent reduction in recidivism for educational programming recipients.⁵⁴⁶ Successful programs have incorporated a variety of strategies that should be synthesized into the curriculum model and implementation strategy that can serve the widest range of inmates in a given institution. In order to ensure that students in correctional settings are receiving their best education, it is imperative to acknowledge individual needs, as well as to understand the general needs of the population.⁵⁴⁷

Improved collaboration between educators, social workers and other treatment specialists may provide better insight into root causes of students' learning or behavioral challenges and better inform educators how to manage student education, particularly for special needs students.⁵⁴⁸ The importance of in-person education, offering both challenging coursework, as well

as lifestyle and reentry support is ideal, as inmates will need to translate their education into employment in order to remain independent post-release. Bard-based program, **The Consortium for the Liberal Arts in Prison**, is an excellent example of a national network of private institutions sharing ideas and a commitment to prisoner education;⁵⁴⁹ however, the Consortium's rigorous academic programs cannot operate as the sole source of higher education. In conjunction with programs like the Consortium, institutions must take up the task of providing tutoring and support so that students who did not receive the strongest primary and secondary education are not then excluded or poised for failure if accepted.

D. UNDERSERVED GROUPS IN PRISON

The prison population is comprised of numerous differently situated individuals. Two groups have been of particular interest to researchers with respect to educational access in prisons—women and individuals with special needs.⁵⁵⁰ Women in prison have historically been offered less education programs than their male counterparts.⁵⁵¹ Some state correctional departments have attributed this reality to the need for efficient funding; it is more economical to initiate educational programs in male facilities with greater numbers of inmates.⁵⁵² Others suspect inadequate programming for women has resulted from the diminished likelihood that women will complain, file lawsuits, or riot in response to prison policies.⁵⁵³ To exacerbate the issue of underserved women in prison, those educational programs offered are often designed on a male-centric model, meaning gender-stereotyped curriculum and limited family care classes.⁵⁵⁴

Individuals with special needs also face additional challenges. These challenges start even before they are arrested. Children with special needs are overrepresented in prison populations. In fact, experts have indicated that the lack of educational and mental health resources is a major contributor to the school-to-prison pipeline phenomenon.⁵⁵⁵ At least one in three juveniles arrested has an emotional or a learning disability.⁵⁵⁶ Some researchers estimate this figure may be as high as 70 percent.⁵⁵⁷ Across the country, students with emotional disabilities are three times more likely to be arrested before leaving high school than the general population.⁵⁵⁸ In the landmark case *Green v. Johnson* (1981), the US District Court of Massachusetts ruled that students with disabilities do not forfeit their rights to an appropriate education because of incarceration.⁵⁵⁹ However, the provision of special education services to incarcerated children throughout the country has proven unsatisfactory. The challenges include “transience of the student population, conflicting organizational goals for security and rehabilitation, shortages of adequately prepared personnel, and limited interagency coordination.”⁵⁶⁰

4. HOUSING

The importance of housing to a successful reentry can hardly be overstated. Housing is the foundation for healthy reintegration into the community. Ensuring that people released from prison or jails have safe and affordable housing is a prerequisite to finding both stable employment and reducing homelessness and recidivism. Research shows that individuals who cannot find stable housing are more likely to engage in criminal activity than those who do.⁵⁶¹

Apart from the practical concerns of reducing recidivism and aiding the job search, housing is also a necessity that no one ought to be denied. Housing provides both physical shelter from the elements and a private space, which can contribute to a sense of emotional stability and security. The current reality is that housing is not always readily available, especially in the urban spaces⁵⁶² to which most people return after being incarcerated.⁵⁶³

In April 2016, the Department of Housing and Urban Development issued critical guidance on federal fair housing law relating to ex-offenders and formerly incarcerated persons.⁵⁶⁴ This guidance interprets the Fair Housing Act and makes clear that landlords and housing agencies cannot automatically refuse to rent to prospective tenants or applicants on the basis of a criminal record, but that any criminal conviction must be justifiably related to the housing decision. The guidance critically emphasizes how criminal records become an unnecessary and harmful barrier to stable housing, and that for individuals “released from prisons and jails, the ability to access safe, secure and affordable housing is critical to their successful reentry to society.”⁵⁶⁵

A. LITIGATION UNDER THE FAIR HOUSING ACT

There has been recent advocacy action in the court system to advance the rights of people with criminal records with respect to housing. **Fortune Society**, a social services group for people recently released from incarceration, filed a lawsuit against the owner and managers of Sand Castle, a large housing complex in Queens, New York with a widely-known blanket ban on renting to people with a criminal record. Fortune Society is alleging that this type of blanket ban is discriminatory on the basis of race and sex (and therefore in violation of federal fair housing law) because it disparately impacts Black and Latino men.⁵⁶⁶ Even though the Supreme Court ruled that disparate impact claims are cognizable under the Fair Housing Act in June 2015,⁵⁶⁷ advocates may struggle to wage war in the courtroom on behalf of people with records. Fortune Society's case is a good example why: here, Sandcastle Towers has a policy in place disallowing people with records from becoming tenants, and the company has been upfront with its blanket ban. Absent a clear blanket ban, advocates may struggle to prove discrimination based on criminal records.

Given the current uncertainty of the power of the Fair Housing Act to protect people with records, advocates should work outside the courtroom to ensure that people with records have access to housing. While the Fair Housing Act is federal law, it sets a floor, not a ceiling, for protections against discrimination. States have passed their own anti-discrimination legislation. California, for example, passed the Unruh Civil Rights Act in 1959, which includes ancestry and medical condition as well as the statuses protected federally.⁵⁶⁸ In order to protect people with criminal records, advocates may find better results lobbying municipal lawmakers and state legislatures to expand housing protections to people with records than pursuing anti-discrimination lawsuits.

B. FEDERAL POLICY ADDRESSING AFFORDABLE HOUSING ACCESS FOR PEOPLE WITH RECORDS

The state of federal policy dealing with affordable housing access for people with a criminal history is grim. The first major problem is that there is a severe affordable housing shortage.⁵⁶⁹ One report cites that there are only 30 available rental units for every 100 extremely low income households, and 57 available rental units for every 100 very low income households (extremely low income is defined as earning 30 percent or less of the area median income; very low income is defined as earning 50 percent or less of the area median income).⁵⁷⁰ Section 8 waitlists are years long across the country.⁵⁷¹ Given the high rate of poverty among people with records,⁵⁷² many would qualify for public housing or Section 8 vouchers based on income alone.

However, people with criminal histories face a daunting uphill battle in accessing public housing or vouchers, since the waitlist for vouchers is so long, and since federal law gives public housing agencies discretion to reject anyone with a criminal record. Public housing agencies can choose to accept people with many types of criminal records, at their discretion, but in some instances federal law obligates public housing agencies to reject applicants with criminal histories.⁵⁷³ An applicant must be rejected if s/he:

- » Was convicted of the manufacture of methamphetamines on public housing premises.
- » Has a sex offense conviction and/or is registered under the sex offender lifetime registration requirement.⁵⁷⁴

Additionally, if a household member has been evicted from public housing for having committed a drug-related crime, no member of the household can be housed in public housing for three years. (That three-year period can be shortened if the ex-offender completes an approved rehabilitation program.) After the three-year wait, the household has to get back on a waitlist, so the mandated 3-year loss of affordable housing will likely be experienced as far longer.⁵⁷⁵

Moreover, public housing agencies are permitted to evict lessees or reject applicants if the applicant, or even a member of the applicant's family, is:

- » Convicted of a crime.
- » Caught engaging in any drug-related criminal activity.
- » Caught engaging or has engaged in any violent criminal activity, or in any other criminal activity that would affect other tenants' health, safety, or right to peaceful enjoyment of the premises.⁵⁷⁶

Furthermore, the Supreme Court in *Department of Housing & Urban Development v. Rucker* held that federal law "requires lease terms that give local public housing authorities the discretion to terminate the lease of a tenant when a member of the household or a guest engages in drug-related activity, regardless of whether the tenant knew, or should have known, of the drug-related activity".⁵⁷⁷ In *Rucker*, two tenants moved for an injunction on their eviction. One tenant's grandchildren were caught selling marijuana on the public housing premises. The other tenant's daughter, who lived with the tenant, was caught with drugs off of the public housing property.⁵⁷⁸ Although neither tenant had reason to know of their family members' drug use, both were legally evicted. This strict liability interpretation of federal code, combined with draconian anti-drug and anti-ex-offender laws, not only make it exceedingly hard for people with records to obtain public housing, but they also put entire families at risk of having their applications rejected or even being evicted.

C. MUNICIPAL ACTION AFFECTING PEOPLE WITH CRIMINAL RECORDS

NEWARK, NEW JERSEY AND SAN FRANCISCO, CALIFORNIA

Newark, NJ in 2012 adopted an ordinance that protects people with records from housing discrimination. Similarly modeled to "Ban the Box" policies discussed earlier, Newark's ordinance requires landlords to wait to run a background check on an applicant until after the applicant has submitted a formal application. Additionally, the ordinance sets out "Required Considerations" for landlords, essentially an array of mitigating factors, such as rehabilitation of the applicant, the nature of the crime and its indication of tenant suitability, time past since the offense, and the circumstances of the offense. Applicants are given an opportunity to submit information on their behalf attesting to these factors. Landlords, should they choose to deny an applicant based on her criminal record, are required to explain their decision in writing to the applicant within 10 days of the decision, and specifically reference the "Required Considerations" in the ordinance. Landlords are not allowed to consider certain convictions, such as those that were expunged or adjudicated when the applicant was a juvenile.⁵⁷⁹

San Francisco's Fair Chance Ordinance, which took effect in August 2014, is extremely similar to Newark's ordinance, but only applies to affordable housing providers.⁵⁸⁰ San Francisco would do well to expand this policy to all housing providers.

Unfortunately, the Newark and San Francisco ordinances will be ineffective against federal law preventing affordable housing renters to rent to people with certain convictions. Moreover, they will do nothing to fill the housing gap. While the laws are an important step in protecting people with records from discrimination (requiring landlords to submit a detailed statement of denial is an important deterrent to landlords' rejecting people with records without a strong reason why), they ultimately are not nearly powerful or comprehensive enough to ensure that people with records will have an easy housing hunt.

NEW YORK CITY

The New York City Housing Authority (NYCHA) has been working with the Vera Institute to devise a plan to help people with records become eligible for public housing. Together, the organizations have initiated a pilot program that reunites people leaving prison with their family members living in NYCHA public housing. Those leaving prison are vetted by the program and must demonstrate, among other things, a strong motivation to change, in order to be accepted into the program. Once accepted, participants are given temporary permission to live in public housing, with their family members, for up to two years. Upon successful completion of the program, the former inmate can be included in their family's lease and live with them on a permanent basis. Participants in this program will receive broader reentry services in addition to housing.⁵⁸¹

This program has largely been considered a success.⁵⁸² Chicago, Los Angeles, and New Orleans, as of 2014, were considering similar programs.⁵⁸³ It has the potential to combat the draconian anti-offender laws governing public housing providers, and brings a needed well-rounded approach to reentry by ensuring that participants have housing as well as case management support. However, it only deals with former inmates' access to public housing, and only applies to inmates who have family in public housing. Those without families or who are estranged from their families are left out to dry, as are those who were convicted but not sentenced to incarceration. Furthermore, it fails to address the housing shortage and ignores issues of discrimination by private landlords that people with records may face should they no longer qualify for public housing. Nonetheless, this policy is easily repeatable in other cities across the country, is very low-cost, and should be part of any city's plan to aid people with records in finding housing.

PORTLAND, OREGON

Portland's "tiny house" plan is meant to deal with homelessness, not the housing shortage that people with records face. But indirectly, of course, this plan could help people with records, as

so many former inmates find themselves homeless. In Minnesota, for example, 47 percent of the homeless population in 2012 had a criminal record.⁵⁸⁴ This plan is also far from realization. As of August 2014, the city seemed behind the idea politically, but implementation may take a long time, and the city's financial role in building tiny houses is still to be decided.⁵⁸⁵ In Eugene, Oregon, a tiny house village has already been built, providing shelter to homeless and low-income people.⁵⁸⁶

Tiny houses are lauded as offering people more privacy, more cleanliness, and more autonomy than traditional homeless shelters.⁵⁸⁷ They can also be more quickly and affordably built than traditional affordable housing complexes⁵⁸⁸ and are even cheaper to erect than emergency homeless shelters, which don't offer their occupants plumbing.⁵⁸⁹ The Mayor's Office recognizes that lack of housing is often a barrier to employment, and hopes that by providing the city's homeless population with a place to live, those homeless people who are also jobless will be able to find work.⁵⁹⁰

Portland's implementation of this plan should be given careful attention by advocates. If done correctly, it could serve as a model to the rest of the nation as a cost-effective, economically stable way for local governments to fill the affordable housing gap. But Portland should ensure that tiny houses are placed near public transportation, provide easy and cheap access to amenities like clothes washers, offer their occupants access to pleasant and maintained green space, and above all do not become isolated ghettos. Furthermore, Portland should include an ordinance like San Francisco's or Newark's with its tiny house plans to protect homeless people with criminal records from being refused access to tiny houses.

D. STATE ACTION AFFECTING PEOPLE WITH CRIMINAL RECORDS

Some states have chosen to combat former-inmate homelessness by requiring that inmates have a home to return to before they can be released. Depending on implementation, it can serve as a regressive policy or a progressive one.

IDAHO

Idaho requires that, in order for offenders to be released from parole, they have a verifiable address; however, there is no robust reentry program helping inmates or parolees find housing and no guarantee that inmates leaving prison will be given transition funds to help them find housing.⁵⁹¹ This policy combined with the lack of well-regulated reentry support for parolees and inmates may do little to combat homelessness and much to extend time in parole. On a federalist note, Idaho is a largely rural state without the same housing shortage seen in states with denser populations. The unsheltered homeless population in 2014 is calculated at 636 persons; the total number of homeless persons in 2014 is 2104; only 12 percent of the total homeless

population is chronically homeless.⁵⁹² Therefore, while Idaho's policy is highlighted as a regressive one, the state's needs around homelessness are very different from that of many other states. Thus, focusing advocacy efforts on changing Idaho's housing policy for people being released is perhaps a poor use of resources. Featuring Idaho in this way is meant as a cautionary example of what not to do in states who deal with larger numbers of homeless people, rather than a call to action for Idaho advocates, whose time is better spent responding to the needs of Idaho, as opposed to the needs of the nation at large.

ILLINOIS

Illinois has made a pledge not to release any inmate to homelessness. In order to realize this goal, Illinois has developed Placement Resource Units (PRUs), which help inmates who need it find housing and other needed transition services. PRUs may pay for up to three months of housing for former inmates who qualify. However, given the number of inmates that Illinois releases each year, and the shortage of resources for PRUs, only a small number of inmates are benefitted by Illinois' policy.⁵⁹³ While the infrastructure design in Illinois seems progressive, its implementation is not robust enough.

E. PROGRESSIVE POLICY PRACTICES

Housing aid should follow an expanded and robust version of Illinois' model: upon release from prison, people without housing get placed immediately in temporary housing. In order to motivate people to make a full reentry and get permanent housing of their own, the organization running the housing facilities should require people to be actively looking for permanent housing. The organization should also help them navigate the bureaucracy involved in accessing affordable housing, and apply for jobs and public benefits.

Due to the necessity of having housing available immediately upon release from prison, people who do not have a home to return to or who are not taken into a program like that described above should be provided with hotel vouchers for the average length of time it takes someone in that city to find housing. If people are returning to a place with a tight renter's market (such as Miami, New York City or the Bay Area), they will need access to hotel vouchers for a longer period of time. As a prisoner's release date gets closer, s/he needs to be allowed to actively look for housing, including leaving the prison in plain clothes (with a chaperone, if necessary) to meet landlords and visit houses and apartments. She should be provided assistance in filling out rental applications, and social workers or parole officers who have worked with her/him should offer themselves as references. The enormous hurdle of having to report income will remain if the person being released does not have employment upon release; therefore, in order for such a program to be effective, a job search should be initiated in conjunction with the housing search.

Any of these efforts will be seriously undermined if federal law is not passed that protects people with criminal records from discrimination. This federal law should be modeled after Newark's, providing for denial of housing based on a criminal history only in narrow circumstances and only when the applicant shows no indication of rehabilitation. New York City's focus on allowing former inmates into public housing should be adopted nationwide. Furthermore, given the current reality of the housing shortage, Portland's effort to provide low-income people with homes, as well as making a full effort to sort out the practical details of implementation, needs to be seriously considered across the country as an affordable way for cities to fill the housing gap.

5. IDENTIFICATION CARDS

Access to identification cards is a threshold issue for people released from incarceration: without proper ID, people cannot access housing, employment, financial resources, and social services. An inmate may never have had identifying documents or they may have been lost during the course of incarceration.⁵⁹⁴ Furthermore, in several states, drug crimes trigger a mandatory license suspension, beginning on the day that the incarcerated person is released.⁵⁹⁵ In certain situation, in certain states, a driver's license will be confiscated by the police for a moving violation that would trigger license suspension. In California, for example, police will immediately confiscate a driver's license if the driver's blood alcohol concentration (BAC) level is over 0.01 and the driver is on DUI probation, if the driver's BAC level is 0.04 and is driving a commercial vehicle, if the driver's BAC level is 0.08 and is driving a non-commercial vehicle, or if the driver refuses to consent to a BAC test.⁵⁹⁶ Many people use their driver's license as their only form of official identification, so confiscation means that they are left without an ID card. Additionally, there are many fees associated with reinstating a suspended license, even if it was never confiscated,⁵⁹⁷ and for recently released people (who have been unable to work due to their incarceration) the cost of reinstating a license could be prohibitive.

A. ALABAMA: REGRESSIVE POLICY

The most restrictive type of policy is for the Department of Corrections (DOC) to not issue people an ID upon release, and for the state not to honor the person's DOC identification documents (typically, prison release documents or an inmate identification card). In Alabama, for example, "the Department of Corrections shall provide minimum documentation for identification, including a social security card, necessary to obtain employment."⁵⁹⁸ However, in order to be issued a state ID from the DMV in Alabama, a person must show an additional form of identification as well as their social security card. Prison release documents and inmate identification cards are not accepted by the DMV as additional identification.⁵⁹⁹ Therefore, recently re-

leased people find themselves between a rock and a hard place in states like Alabama: the DOC is required to provide identification documents, but not sufficient identification to obtain a state-issued ID, which may be required to gain employment or access to housing services.

B. LOS ANGELES COUNTY: PROGRESSIVE POLICY

Los Angeles County has taken an active role in ensuring that people released from jail have the identification documents that they need. In December 2013, the Board of Supervisors voted to direct several county departments to provide vital records to ex-offenders.⁶⁰⁰ In January 2014, the Board voted to study the feasibility of placing DMV workers at county jails and probation facilities to assist incarcerated individuals who do not have identification cards.⁶⁰¹ Advocates in Los Angeles County supported the measure, citing people's need to access resources as soon as they are released from jail, and the decreased recidivism rate among people who are given ID cards upon release. A task force has been put together to develop successful implementation, and the County is working with DMV to streamline the process. This kind of policy, provided that implementation is successful, seems ideal for ensuring that no one leaves incarceration without state-issued identification. Counties manage California jails, but the state manages prisons; therefore, if this policy is successful, California would do well to also adopt it at the state level.

C. PROGRESSIVE POLICY PRACTICES

An ideal policy regarding identification cards for people with records would be to eliminate the practice of confiscation upon incarceration. Currently, inmates are given a prison identification card when they are admitted, resulting in an added bureaucratic procedure and added cost to the taxpayers. This could be easily omitted requiring inmates to carry their state-issued ID with them at all times. In the event that someone does not have a state-issued ID, the jail or prison could issue him or her an identification card. Under this model, former inmates would not face any barriers to having their state-issued IDs returned to them or reissued. Because driver's licenses are so often the only form of state-issued ID that someone carries, they should never be confiscated in the course of a suspension. Not only does this prevent someone from using her license for identification purposes (such as buying guns, alcohol, cigarettes, tickets to an R- or X-rated movie, or proving their identity for myriad reasons), but also it does nothing to prevent her from driving. Driving with a suspended license is illegal whether the driver has the suspended license on hand or not. Licenses don't open car doors and turn on ignitions. Thus, physically removing a driver's license does nothing to advance the interests of the state in keeping dangerous drivers off the road and only hurts the interests of the individual by removing their primary form

of state-issued identification and all of the rights to access that the ID carries.

6. IMPACT ON FEDERAL BENEFITS

Confinement of an individual in a jail or prison for more than thirty days will stop payment of any federal benefits, with a special caveat for disability benefits.⁶⁰³ In addition to one's ineligibility for ongoing benefits during confinement, any amount owed to the incarcerated person predating their confinement cannot be retained by the individual until his or her sentence is completed.⁶⁰³ Retroactive payments for the period of incarceration are never permitted.⁶⁰⁴ To assist the government in the administration of these prohibitions, correctional institutions are given monetary incentives to identify inmates improperly receiving benefits.⁶⁰⁵ Special rules govern benefits disbursed to veterans, depending upon the nature of the crime and sentence (<http://www.benefits.va.gov/persona/veteran-incarcerated.asp>.) The prohibition on receipt of federal benefits hurts not only the incarcerated, but their families. Reliance upon benefits flowing through the incarcerated person can leave spouses and children exceptionally vulnerable. States can avoid subjecting spouses and children of incarcerated individuals by ensuring their access to state-originated benefits.

Federal law may also affect the rights of confined persons in their capacity as parents. Under the Adoption and Safe Families Act, if a child is in foster care of fifteen months in a twenty-two month period, the state is required to file for termination of parental rights.⁶⁰⁶ The law maintains important exceptions that provide flexibility in terms of the mandatory filing rule where the child is being well cared for by a relative or there is a compelling reason not to file.⁶⁰⁷ As of 2010, twenty-eight states reiterated the exceptions in their own legislation.⁶⁰⁸

The Personal Responsibility and Work Opportunity Reconciliation Act further disenfranchised people formerly convicted of felonies with drug convictions by establishing lifetime bans on certain federal benefits unless states opt out of the ban.⁶⁰⁹ Thirteen states have opted out of the ban on receiving cash benefits through the Temporary Assistance for Needy Families program (TANF); however, the remaining states continue to enforce the ban in its entirety or an amended version thereof.⁶¹⁰ The District of Columbia and eighteen states allow people formerly convicted of felonies with drug convictions to obtain benefits under the Supplemental Nutrition Assistance Program.⁶¹¹ The remaining states have either kept the ban or amended it to provide SNAP assistance if other conditions are met.

Inmate's eligibility for Medicaid has increased in many states since the passing of the **Patient Protection and Affordable Healthcare Act** (PPACA or "the Act"). As of June 2014, twenty-seven states had exercised an option under the Act, which expands eligibility to the program for any individual earning

up to 133 percent of the federal poverty level.⁶¹² States were incentivized to expand their programs by being offered initial increases in federal matching funds.⁶¹³ The new rules regarding eligibility have opened states up to the possibility of using Medicaid funds provided by the state to otherwise eligible inmates. Federal funds have and can continue to be used through Medicaid for inmates for special care, in medical facilities or care for pregnant women.⁶¹⁴ The debate is ongoing whether expanding affordable medical programs will transcend the aim of keeping individuals healthy by also contributing to the anti-recidivism efforts throughout the nation.⁶¹⁵ Twenty-two states have not opted to expand their Medicaid programs, leaving some low-income people, including inmates, ineligible for either Medicaid or lower cost tax credits on the Marketplace. Maintaining Medicaid eligibility during one's sentence would ease any upset in coverage post-release. The expanded Medicare states are moving in the right direction. Isolation from non-incarcerated individuals is a central component of criminal sentencing; however, the aims and goals of our corrections system demands planned reentry, much of which depends on access to essential services upon release.

7. EMPLOYMENT

Many policy organizations consider employment to be one of the most crucial factors in preventing recidivism. There are several major efforts to ameliorate employment opportunities for people with records. Some are targeted specifically at currently incarcerated people (in-prison education and job training, discussed above), some are targeted at people recently released from incarceration, and some at anyone with a conviction history. A 2006 survey looked at studies conducted to assess the effect on recidivism of employment services for recently released people. Dishearteningly, the survey found low or no correlation between employment and recidivism for recently released people; however, many of the studies surveyed were from the 1970s, and jobs programs have changed since then. The survey recommended designing jobs programs that take a holistic view of a person's situation, and include drug treatment, housing, family therapy, and counseling where appropriate. The general findings of the survey were that employment is necessary, but not sufficient to reducing recidivism.⁶¹⁶ Reduction in recidivism is only one way of analyzing the worth of employment programs for people with records. The goal of improving social equity by addressing barriers to employment has worth, as well. People with a history of conviction, regardless of how old or minor the conviction is, face barriers to employment.⁶¹⁷ Several major initiatives focus on giving people with records a fair shot at employment.

A. "BAN THE BOX" HIRING AND OCCUPATIONAL LICENSE POLICIES

"Ban the box" policies, which have generated support across

the United States as well as in Europe, aim to give people with records a fair chance at getting a job. The "box" referred to is the question on initial employment applications, which typically ask candidates if they have a criminal history, and ask that they check a "yes" or a "no" box in response. "Ban the box" is a bit of a misnomer, however: advocates are not asking employers to never inquire into a candidate's criminal history, but rather to wait to do so until after the candidate has at least been determined minimally qualified for the job. Ideally, advocates would like employers to wait until a candidate has been given a conditional offer of employment before asking about her criminal history.⁶¹⁸

"Ban the box" policy is designed to address three issues. First, applicants with a criminal history are often rejected before they are even considered for the position, and before their criminal history is examined. A checkmark in the "yes" box on an application often causes employers to throw away the application without further consideration. By requiring employers to consider job credentials before criminal history, policy-makers hope that employers will be more willing to overlook a qualified applicant's criminal history. Second, the policy will hopefully encourage employers to consider the length of time since an applicant's conviction as well as the job-relatedness of the conviction. While the EEOC Guidance states that blanket bans on hiring people with records is a violation of Title VII,⁶¹⁹ many employers have a de facto ban on such hires because they throw away any application with a box checked "yes." Lastly, advocates hope that "ban the box" will have an effect on applicants with records themselves.⁶²⁰

Dorsey Nunn, the executive director of Legal Services for Prisoners with Children and the founder of *All of Us or None*, who himself was convicted of first-degree murder when he was 19, explains that the "box" tells people with records that as far as the law is concerned, they are only "three-quarters of a human being."⁶²¹ Knowing that they will have to disclose a conviction history can make people not bother applying in the first place, regardless of their qualifications for the position. People struggle with the stigma that a record generates, as well as the feeling that it is not worth the time—after being turned down over and over again, many people with records lose hope that an employer will ever look past the "box."

An additional way that people with records are excluded from the job market is through the requirements of occupational licenses.⁶²² Licensing laws have been expanding for the last 50 years. Less than five percent of the working population in the United States needed a license for their jobs in the 1950s. By 2000, that number had increased to at least twenty percent.⁶²³ Professions requiring a license vary state by state, but in order to practice a licensed profession, a worker must be approved by a licensing board. Typically, applicants must meet two components to receive a license, the competency component and the

character component.⁶²⁴ Although not all licensing laws explicitly ban anyone with a record from eligibility, a conviction history often causes an applicant to fail the character requirement.⁶²⁵ To meet the character component, an applicant typically must demonstrate “good moral character.”⁶²⁶ Because this language is so ambiguous, it is difficult to apply to an applicant. Legislative or judicial guidance on how to interpret the “good moral character” requirement is lacking, so licensing boards get to exercise a lot of discretion in evaluating an applicant’s character.⁶²⁷

“[O]ne definition has been generally accepted by the courts and licensing agencies: if a person has committed a crime, that person lacks the requisite good character for a license.”⁶²⁸ Without a license, a worker may be assessed penalties or fines for operating without a proper license, her violation could constitute an administrative or even a criminal offense, and/or s/he will be unable to enforce a contract taken under the presumption of that license.⁶²⁹ For example, in many states, midwives must have a license in order to practice. If an unlicensed midwife has a client who refuses to pay her bill, the midwife will be unable to seek legal action against the client. The agreement to pay for services is a contract between the client and the midwife, but without a license, the midwife cannot enforce the contract.

MINNESOTA: PROGRESSIVE BAN-THE-BOX POLICY

Minnesota passed a comprehensive “ban the box” policy in 2013. The legislation was the result of a bipartisan effort to provide people with records an equal shot at employment. The Minnesota policy is one of the most inclusive and wide reaching of any policy in the country. The policy applies to both the public and private sector, and requires employers to wait until after a candidate has had an interview or just before the employer makes a conditional offer to ask for a candidate’s conviction history. In order to support implementation of the legislation, the Minnesota Department of Human Rights prepared educational material for employers.⁶²⁹ Five other states, Hawaii, Illinois, Massachusetts, New Jersey, and Rhode Island, also have a statewide “ban the box” law that applies to the private sector as well as the public sector. Washington, DC has a city-wide policy that applies to the public and private sector.⁶³⁰

CALIFORNIA: PROGRESSIVE BAN-THE-BOX POLICY⁶³²

California also passed “ban the box” legislation in 2013. Unlike Minnesota, California’s law only applies to public sector employers. Additionally, employers can ask about a candidate’s criminal history as soon as she is determined minimally qualified.⁶³³ Delaware, Connecticut, Colorado, New Mexico, Nebraska, Maryland, and Connecticut all have similar laws. Some of those states have, to varying degrees, expanded their ban the box law to licensing agencies as well.⁶³⁴ This model will be explored further in the context of occupational licenses infra. California’s narrow law is meant to operate as a floor, not a ceiling. Many cities and

counties within California have chosen to go beyond the minimum requirements of the law. For example, the **City of Richmond**, which enacted its “ban the box” law prior to California’s statewide law, prohibits inquiries into a candidate’s conviction history at any point in the application process unless they are required by federal or state law or the position is considered “sensitive.” The policy has been implemented beyond the public sector to apply to any company with more than 10 employees doing business with the City, and that company’s subcontractors.⁶³⁵

NEW YORK: PROGRESSIVE OCCUPATIONAL LICENSE POLICY

New York has worked to make occupational licenses more accessible for people with records by effectively eliminating the “good moral character” requirement. Under New York Section 752, occupational licensing boards are barred from using an applicant’s conviction history to find a lack of good moral character.⁶³⁶ In order to ensure public safety while still promoting access to the job market for people with records, licensing boards are allowed to consider the job-relatedness of an applicant’s criminal history. In this assessment, licensing boards are to consider “[t]he bearing, if any, the criminal offense or offenses for which the person was previously convicted will have on his fitness or ability to perform one or more such duties or responsibilities”⁶³⁷ as well as how long ago the offense was committed, the applicant’s age at the time of the offense, the seriousness of the offense, and few other limiting factors.⁶³⁸ Importantly, licensing boards must consider any information provided by the applicant regarding her rehabilitation and good conduct.⁶³⁹ This requirement allows someone with a record to get a job even if his or her convictions are related to the job sought, provided that she can demonstrate that she has rehabilitated.

People who have drug convictions often face even more restrictions when seeking an occupational license than those with other sorts of convictions.⁶⁴⁰ For example, some states mandate that conviction history may never be the only ground to refuse to renew or grant a license, except in the case of drug convictions.⁶⁴¹ Moreover, in many specific industries, federal law requires that anyone with a drug offense be excluded from employment. Jobs in law enforcement or in schools are completely closed to people with drug convictions in all states.⁶⁴² Counter-intuitively, while most people would consider murder or kidnapping a more serious offense than drug possession, manufacture, or distribution, people convicted of murder and kidnapping face less severe collateral consequences than drug offenders. In fact, drug offenses carry more and harsher collateral consequences than any other type of offense.⁶⁴³ While people with drug convictions face barriers to occupational licensing, they are also ineligible for certain welfare benefits or federal student loans.⁶⁴⁴ Operating together, the web of collateral consequences that attach to a drug conviction make it “virtually impossible” for drug offenders to reenter society.⁶⁴⁵

INDIANA: REGRESSIVE OCCUPATIONAL LICENSE POLICY

A salient example of occupational licensing policy that seems overly harsh is Indiana, where even marijuana, paraphernalia, and class IV- and V-controlled substance charges are sufficient reasons to deny any occupational license.⁶⁴⁶ While Indiana's statute affirmatively states that a criminal conviction may not be the cause of a denial of an occupational license, the statute makes an exception for drug convictions, and only drug convictions.⁶⁴⁷ Indiana extends this exception to drug possession convictions as well as trafficking and sales.⁶⁴⁸ Under the Indiana Code, a licensing board "may suspend or revoke a license" for possession of a schedule I, II, III, or IV controlled substance, including possession of marijuana or drug paraphernalia.⁶⁴⁹ Additionally, a licensing board "shall revoke or suspend a license" if a licensee is convicted of dealing in a class I, II, III, IV, or V controlled substance, including marijuana.⁶⁵⁰ Appetite suppressants containing low amounts of stimulants with little abuse potential, as well as many anti-anxiety medications (like Valium) are class IV drugs; class V drugs include anti-seizure medication, anti-diarrheal medication, and cough medicine containing very low amounts of codeine (like Robitussin).⁶⁵¹

It is important to highlight the severity of collateral consequences that people with drug convictions face because so many Americans have a drug conviction. In 2008, an estimated 251,400 state-prison inmates were serving time for drug offenses.⁶⁵² An additional 95,079 drug offenders were serving time in federal prison.⁶⁵³ Moreover, these numbers include only people sentenced to at least one year in prison for a drug offense, so these figures do not even communicate the full number of people who were convicted of a drug crime in 2008.⁶⁵⁴ Everyone with a drug conviction – regardless of how much time they served, or even if they served no time – must cope with all of the collateral consequences attached to their conviction.

COLORADO: COMPREHENSIVE PROGRESSIVE POLICY

Several states have addressed the barriers to occupational licenses that people with records face through "ban the box" legislation. Colorado has the strongest law, mandating that licensing agencies deal with applicants' conviction histories in the same way that state agencies must: criminal records cannot be considered until the applicant has been determined a finalist for the position or a conditional offer has been made.⁶⁵⁵ The language of the law is a bit unclear: the first part of the legislation explains when state agencies are permitted to inquire into a candidate's conviction history ("The agency shall not perform a background check until the agency determines that an applicant is a finalist or makes a conditional offer of employment to the applicant"⁶⁵⁶); the second part of the law simply extends those requirements to state licensing agencies without changing the language.

The problem with this language is that licensing agencies do not select final candidates or give conditional offers. The intent of the Colorado legislature seems to be to require licensing agencies to wait to perform a background check on applicants until after the applicant has been deemed professionally qualified for the license sought. As more states move forward with "ban the box" legislation that includes occupational licenses, their legislatures would do well to ensure that the language of the new laws are clear.

OTHER PROGRESSIVE POLICIES

Eighteen states have enacted some form of "ban-the-box" policy for the hiring process.⁶⁵⁷ Among the states, the policies include variations in design. Of these states, private employers are categorically barred from questioning about conviction history on job applications in seven jurisdictions: Hawaii, Illinois, Massachusetts, Minnesota, New Jersey, Oregon, and Rhode Island.⁶⁵⁸ For example, Massachusetts further prohibits consideration of detention history not resulting in conviction, first-time misdemeanor offenses, or misdemeanor convictions, or the resulting sentence, if any, more than five years old at the time of seeking employment.⁶⁵⁹ Additionally, the state requires that applicants be informed if the board makes an adverse decision due to an applicant's criminal history and be provided with a copy of the report.⁶⁶⁰ Local and county policies have also limited initial inquiry into a public and/or private applicants' criminal histories.⁶⁶¹

While the occupational licensing legislation outlined above was part of broader "ban the box" legislation, some states have reformed licensing laws in legislative action independent of other "ban the box" policy. In New Hampshire, for instance, HB 1386, signed by the governor on August 1, 2014, prevents licensing boards from denying applicants a license solely because of their conviction history.⁶⁶² Additionally, licensing boards must take into account the nature of the crime, whether there is a "substantial and direct relationship" between the crime and the occupation sought, and may take into account evidence of rehabilitation, and the amount of time passed since the crime was committed.⁶⁶³

As discussed in the housing section, an ideal policy would be to include criminal history as a federally protected status for both housing and employment (including occupational licensing). Politically, it would be harder to sell criminal history as a fully protected status for employment than for housing because unlike housing, different jobs have different duties, some of which may seem too risky for a person convicted of a specific crime to perform. However, some categorical protections could be put in place: arrests not followed by convictions, low-level misdemeanors, and juvenile convictions all should be fully protected. For high-level misdemeanors and felonies, the default rule should be that employment discrimination based on those convictions is prohibited, with exceptions made for job-relatedness.

The definition of job-relatedness will need to be narrow and clear-cut, with specific elements of the conviction correlating to specific job duties that the applicant will perform.

B. TAX INCENTIVES

Some legislation has attempted to incentivize employers to hire former inmates with tax incentives. The federal government provides a tax credit of up to \$2,400 dollars for employers who hire people with felony convictions.⁶⁶⁴ Some states, including California, Illinois,⁶⁶⁵ Iowa,⁶⁶⁶ Louisiana, Maryland, and Texas, have offered additional tax incentives for ex-offender hires.⁶⁶⁷ Even after narrowing the tax credit program in California, the state has maintained a sizeable tax incentive for ex-offender hires for the first five years of employment. In California, an employer of a qualifying individual can receive up to 50 percent of the employee's wages in tax credits the first year of employment, 40 percent the second year, thirty percent the third year, twenty percent the fourth year, and ten percent the fifth year, so long as the amount earnable for a given year is no more than 150 percent of the minimum wage.⁶⁶⁸ Typically these programs are limited to hires within the first few years of release from incarceration. Not every statute conditions eligibility on incarceration, but may only require a prior qualifying conviction beyond a misdemeanor.⁶⁶⁹ While some states have yet to adopt a state-based incentive or have allowed their ex-offender tax credit programs to expire, such hires may still qualify for other types of tax incentives, some of which encourage hires within specified geographic zones or low-income populations.⁶⁷⁰

8. HEALTH CARE

People in prison and jail have a constitutional right to medical treatment under the Eighth Amendment, and yet they have inadequate and unequal access to healthcare. For instance, in 2006, a federal court found that California's prison system had an average of 65 preventable deaths per year, which the court ruled to constitute cruel and unusual punishment.⁶⁷¹ In that case, the court decided to take the provision of medical services to inmates out of the control of the state.

Currently, nearly 2.2 million inmates (almost one percent of all adults) are incarcerated and must rely on the prison or jail for health care.⁶⁷² Inmates have high rates of chronic medical conditions, especially viral infections, mental illness and substance abuse. In 2009, 38.5 percent of federal inmates, 42.8 percent of state inmates, and 38.7 percent of local jail inmates had at least one chronic medical condition.⁶⁷³ When adjusted for age, the prevalence of diabetes, hypertension, and persistent asthma appears to be higher for inmates than for the general population.⁶⁷⁴ Alarming, the prevalence of HIV was double that of the noninstitutionalized population.⁶⁷⁵

The same 2009 study shows that among inmates with a per-

sistent medical problem, 13.9 percent of federal inmates, 20.1 percent of state inmates, and 68.4 percent of local jail inmates had received no medical examination since incarceration.⁶⁷⁶ The study also shows that many inmates stop taking necessary prescription medication when they entered jail or prison.⁶⁷⁷ The only health outcome improvement for incarcerated individuals is with regard to the treatment of schizophrenia and bipolar disorder, for which the proportion of treatment actually increased after incarceration.⁶⁷⁸ However, this figure may reflect the lack of available mental health treatment prior to imprisonment. In fact, the largest mental institutions in the US are urban jails.⁶⁷⁹

It is possible to improve healthcare outcomes for people in jails and prisons. For instance, some measures could include "decreasing incarceration rates; making health care systems in prison nonprofit and autonomous from prison authorities; increasing communicable disease education, prevention, and treatment; making condoms available; improving care for chronic conditions; providing targeted cancer screening; increasing the availability of addiction and mental health treatment; providing better supervision to reduce physical and sexual assault; maintaining Medicaid eligibility for inmates; and improving the planning of inmates' discharge and facilitating their reintegration into the community."⁶⁸⁰

Improving healthcare outcomes for inmates is not only a constitutional and human right imperative, but it is also important from a public health standpoint, since the vast majority of inmates returns to society after they complete their sentences. In 2012 alone, 637,411 people were released from state and federal prisons,⁶⁸¹ and the number should be much higher when including local jails.

One 2008 study estimated that 49 percent of men and 67 percent of women had chronic physical health conditions requiring long-term management and care at the time of their release from state or federal prison.⁶⁸² Moreover, 84 percent of men and 92 percent of women reported at least one physical health, mental health, or substance abuse problem, and large shares (39 percent of men and 62 percent of women) had multiple types of health conditions.⁶⁸³

Returning prisoners' capacity to access community-based care for their chronic health conditions was limited by a lack of health insurance. Though inmates may have had health insurance prior to incarceration, their benefits are likely suspended or terminated during incarceration. The majority of people with physical health conditions were uninsured eight to ten months after release from prison.⁶⁸⁴ This results in a situation where health could deteriorate and hinder reentry success.

These poor results may be improving. The expansion of healthcare options for the poor under the Affordable Care Act has important implications for getting formerly incarcerated people into community based health systems that can help them

stay out of prison. Health care reform opens up the possibility for formerly incarcerated people to become eligible for Medicaid. As a challenge, expanding Medicaid eligibility could lead to increased demand for county health care services that are already stretched thin.⁶⁸⁵ The Medicaid expansion population is expected to include individuals with a high demand for mental

health care and alcohol and drug treatment. Therefore, investing in “health homes” and other integrated case management systems, as well as developing strategies for enrolling in or reinstating Medicaid benefits for the reentry population will be paramount.⁶⁸⁶

ENDNOTES

ENDNOTES

- 1 Juliet P. Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 *Am. U. L. Rev.* 367, 381 (2006).
- 2 *Id.* at 388.a
- 3 *Id.* at 383-84.
- 4 Susan Greenbaum, *Restore voting rights to ex-felons*, *Aljazeera America* (Feb. 2, 2016 5:50 PM), <http://america.aljazeera.com/opinions/2014/2/voting-rights-felon-disenfranchisemetericholdercriminaljustice.html>; see also Jean Chung, *Felony Disenfranchisement: A Primer*, *The Sentencing Project*, http://sentencingproject.org/doc/publications/fd_Felony_percent20Disenfranchisement_percent20Primer.pdf (last updated Aug. 2015); Christopher Uggen & Jeff Manza, *Voting and Subsequent Crime and Arrest: Evidence from a Community Sample*, 36 *Colum. Hum. Rts. L. Rev.* 193-215.
- 5 See, e.g., William Drakeford, *The Impact of an Intensive Program to Increase the Literacy Skills of Youth Confined to Juvenile Corrections*, 53(4) *Journal of Correctional Education* 139-44 (2002).
- 6 U.S. Census Bureau, *QuickFacts—United States*, <http://www.census.gov/quickfacts/table/PSTo45215/oo> (last visited Fe. 1, 2016).
- 7 Fed. Bureau of Prisons, *Statistics—Inmate Race*, https://www.bop.gov/about/statistics/statistics_inmate_race.jsp (last updated Dec. 26, 2015).
- 8 See U.S. Census Bureau, *Ibid.*, 6.
- 9 Fed. Bureau of Prisons, *Statistics—Inmate Ethnicity*, https://www.bop.gov/about/statistics/statistics_inmate_ethnicity.jsp (last updated Dec. 26, 2015). While the terms “White” and “Black” refer to race, “Hispanic or Latino” refers to ethnicity. Therefore, the statistic presented here includes Hispanics or Latino/as who self-reported as White.
- 10 Migration Policy Inst., *United States—Demographics & Social*, <http://www.migrationpolicy.org/data/state-profiles/state/demographics/US> (last visited Feb. 1, 2016). The number of Hispanics or Latino/as includes individuals self-reporting as White. These numbers include foreign-born individuals living in the United States legally as well as undocumented individuals.
- 11 See Corina Graif & Robert Sampson, *Spatial Heterogeneity in the Effects of Immigration and Diversity on Neighborhood Homicide Rates*, *Homicide Stud.* 242 (2009).
- 12 See, e.g., Frank D. Bean et al., *Immigration and the Social Contract*, 78(2) *Social Science Quarterly* 249-68 (1997).
- 13 8 U.S.C. §§ 1221-1232 (2006 & Supp. V 2011). “Removability” is a term of art in immigration law that includes sub-terms. “Deportability” refers to those who have been legally admitted to the United States (including lawful permanent residents (LPRs) and non-immigrant visas (NIVi). “Inadmissibility” refers to those seeking admission to the country and those who have entered the country without authorization (undocumented immigrants/entries without inspection (EWI)s).
- 14 This section will not focus on CAP because not much is known about how the program officially operates. CAP is the technologically unsophisticated predecessor to Secure Communities. While Secure Communities relies on instantaneous data sharing, CAP relied on authorities within jails or prisons to interview noncitizens and report them to ICE.
- 15 Experts and advocates have attributed substantial financial and human costs to the passage of IIRIRA. In particular, IIRIRA is credited with causing a boom in mandatory detention and deportation, financial burdens on taxpayers, and disproportionate immigration consequences, compared to the underlying crimes under which noncitizens are deported. See Judy Rabinovitz, *Ending the Laws that Fuel Mass Detention and Deportation*, *ACLU* (Oct. 20, 2011, 3:00 PM), <https://www.aclu.org/blog/immigrants-rights/ending-laws-fuel-mass-detention-and-deportation>; see also *Forced Apart: Families Separated and Immigrants Harmed by United States Deportation Policy*, *Human Rights Watch*, at 6-7 (July 16, 2007), <https://www.hrw.org/report/2007/07/16/forced-apart/families-separated-and-immigrants-harmed-unit-ed-states-deportation..>
- 16 Dan Kesselbrenner & Lory D. Rosenberg, *Immigr. L. & Crimes* § 8:6 (2015).
- 17 For an overview of 287(g) programs, see *Delegation and Divergence: A Study of 287(g) State and Local Immigration Enforcement*, *Migration Pol’y Inst.* (Jan. 31, 2011), <http://www.migrationpolicy.org/multimedia/delegation-and-divergence-287g-state-and-local-immigration-enforcement>.
- 18 *Fact Sheet: Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act*, *Immigr. & Customs Enforcement*, <http://www.ice.gov/news/library/factsheets/287g.htm#signed-moa> (last visited July 2, 2015).
- 19 *Id.*
- 20 See Erin Kelly, *Congress Cuts Funds for Jailing Undocumented Immigrants*, *USA TODAY* (Jan. 16, 2015, 6:57 PM), <http://www.usatoday.com/story/news/politics/2014/01/16/undocumented-immigrant-incarceration/4536453/>.
- 21 *Executive Actions on Immigration*, *U.S. Citizenship & Immigr. Services*, <http://www.uscis.gov/immigrationaction> (last visited Feb. 2, 2015) [hereinafter USCIS Executive Actions].
- 22 See Memorandum from Jeh Charles Johnson, Secretary, on *Secure Communities to Thomas S. Winkowski, Acting Director, U.S. Immigration and Customs Enforcement*, (Nov. 20, 2014), available at http://www.dhs.gov/sites/default/files/publications/14_1120_memo_secure_communities.pdf [hereinafter SCOMM memo].
- 23 Secure Communities did not replace 287(g) cooperation; rather, the programs complement one another.
- 24 *Secure Communities: Activated Jurisdictions*, *U.S. Immigr. & Customs Enforcement* (2013), available at <http://www.ice.gov/doclib/secure-communities/pdf/sc-activated.pdf>.
- 25 Aarti Kohli et al., *Secure Communities by the Numbers: An Analysis of Demographics and Due Process*, *Chief Just. Earl Warren Inst. on L. & Soc. Pol’y* 1 (2011), available at https://www.law.berkeley.edu/files/Secure_Communities_by_the_Numbers.pdf.
- 26 These requests are commonly known as “ICE detainers” or “ICE holds.” ICE issues these as soon as it identifies a potentially removable noncitizen, whether or not they have actually been convicted of the crime leading to a finding of removability.
- 27 Julián Aguilar, *Feds: Secure Communities Not Optional*, *Tex. Trib.*, Aug. 5, 2011, <http://www.texastribune.org/2011/08/05/feds-secure-communities-staying-place/>.
- 28 Elise Foley, *Secure Communities Agreements Canceled, Participation Still Required*, *Huffington Post*, Aug. 5, 2011, http://www.huffingtonpost.com/2011/08/05/secure-communities-update-department-of-homeland-security_n_919651.html.
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32 Phila. Exec. Order No. 1-14 (Apr. 16, 2014), available at http://www.phila.gov/ExecutiveOrders/Executive_percent20Orders/EO_percent201-14.pdf.

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The most marginalized populations in the history of our society were those that were denied public voice or access to private space. They could not vote, serve on juries, nor run for office, and they were also denied a private space to retreat to, free from surveillance or regulation.

We refer to this dual denial of both public voice and private space as non-public/non-private space. Today, immigrants, the incarcerated and the formerly incarcerated, and to some extent the disabled, most visibly inhabit this marginalized social and spatial location in American society.

As this Resource Guide illustrates, the range of positive interventions for immigrants and formerly incarcerated individuals share strategic and substantive overlap, from the need to expand democratic inclusion for these populations to the improvement of services and service delivery.

Working effectively together requires that we understand the myriad of barriers confronting both populations and align ourselves in contemplation of a more inclusive society for all.