

**The Undergraduate
Law Review
at
The Ohio State University**

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ARTICLES

Cracked Justice: Cultural and Legal
Implications of the War on Drugs

Natalie LaRue
Georgetown University

The Development of the Alien Carceral State:
Explaining the Punitive Shift in Immigration
Detention Policies in the 1980s and 1990s
and Its Lasting Effects

Jacqueline Pecaro
Cornell University

*Parents Involved in Community Schools v.
Seattle School District: An Analysis*

Max Bugaric
Harvard University

EDITOR'S NOTE

Dear Reader,

The success of a civilization should be measured not by the wealth of its most prosperous citizens, but by the rights of its most marginalized groups. In this issue, we hope to help readers explore the legal struggles of demographic groups which still struggle to secure rights so many of us know as inalienable. From immigration to school segregation and the racial disparities of the war on drugs, our spring publication seeks to pick apart the constitutional, statutory, and case law that weighs in on some of the defining issues of our time.

I would like to thank the authors for their willingness to share their ideas with fellow undergraduate students and other readers. Their patience and eagerness to work with the editorial team were invaluable to making the journal as polished and fluid as possible. As students from an assorted collection of universities and academic disciplines, the authors whose articles are published herein bring to the discussion unique knowledge and perspectives – two elements which are vital to an informed conversation about any legal issue.

I would also like to thank my editorial team for their dedication and drive in working on the articles in this publication. The newly expanded team has demonstrated a commendable ability to learn how to work with complex writing in a short period of time.

For readers interested in more basic legal analysis from a variety of academic backgrounds, our blog is updated weekly with stories covering pressing legal issues and law school admissions – both topics that are constantly on the minds of pre-law students. The blog also contains interviews that we have had with distinguished legal professionals. In maintaining a constant stream of legal and pre-law dialogue, our aim is to engage undergraduate students around the country.

In the few years since the creation of the Undergraduate Law Review at The Ohio State University, we have witnessed the growth of our editorial team in both size and experience. We hope to continue learning how to most effectively bring issues of critical importance to a wide and diverse audience.

Very Respectfully,

A handwritten signature in black ink, appearing to read "Adam Scheps". The signature is stylized with a large initial "A" and a long, sweeping underline.

Adam Scheps
Editor-in-Chief

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MISSION STATEMENT

The Undergraduate Law Review at OSU was created with the intent of giving college students the opportunity to have their work published in a journal edited by fellow undergraduates. We hope to give students an outlet through which they can discuss and consider a variety of important legal issues. In addition, we aim to publish articles that are accessible to a wide audience and that encourage critical thinking, so as to reach many and inspire change.

CRACKED JUSTICE: CULTURAL AND LEGAL IMPLICATIONS OF THE WAR ON
DRUGS

Natalie LaRue

Georgetown University

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Abstract

It is no secret that America has the highest rate of incarceration in the world. The prison population is disproportionately made up of African Americans. This paper seeks to address these issues by posing and answering the following questions: why this is happening and what are the legal and cultural implications? This paper assesses the potential racial motivations behind the sentencing disparity between crack and powder cocaine. The research helps explain the larger, more sweeping issues with mass incarceration. Mostly based off of reports from the Sentencing Project, special reports to Congress, and books like Michelle Alexander's *The New Jim Crow*, it was found that African Americans are at a disadvantage at nearly every point in the criminal justice system as a result of both the implicit discriminatory culture of the United States and the explicit consequences of laws such as the Anti-Drug Abuse Acts. The war on drugs in the 1980s created an impassioned and anti-drug culture that treated addicts as criminals rather than as patients. Laws placed greater punishments on drugs associated with African Americans, and the cultural climate became ostracized. These punitive policies were further perpetuated by subsequent administrations. Despite crack and powder cocaine being biologically the same, they carry vastly different sentences. Although in recent years this disparity has been getting smaller, it is still a huge issue in America, and African Americans are still being disproportionately imprisoned. This paper concludes that issue of racial disparities in the criminal justice system could be mitigated by eliminating the sentencing disparities altogether, increasing trigger quantities, and ending mandatory minimums for low-level drug offenses.

Introduction

Americans tend to think that the disproportionate number of African Americans that are imprisoned can be explained by the race's greater propensity to commit crimes. In fact, this injustice is effectively a result of a racialized tough on crime movement, and has been perpetuated by a combination of social and institutionalized factors. More specifically, the 1986 and 1988 Anti-Drug Abuse Acts established excessively punitive policies for crack cocaine compared to powder cocaine and were the embodiment of the racialized nature of the criminal justice system that was spearheaded by this war on drugs. This paper analyzes this sentencing disparity – its roots, implications, and evolution – and the implications it has for the movement as a whole. The racial inequality in the criminal justice system that was largely established during the war on drugs can be explained by (1) the cultural climate of a more conservative America in the '80s and the social hysteria surrounding black men and drugs that came with it, and (2) the explicit consequences of specific laws, notably the crack versus powder cocaine sentencing disparity, that have charged African Americans with overtly harsher, longer, and more frequent sentences than other racial groups. A combination of the historical vision of African Americans as lesser people who are more prone to drug use and the tangible laws passed during the war on drugs have led to this inequality in our criminal justice system.

This sentencing disparity is indicative of the quiet, embedded racism that fueled the war on drugs and the anti-drug movement. The Anti-Drug Abuse Acts—which established this disparity in the '80s—had huge economic and social implications, and reveal a trend of implicit racism that pervades the entire criminal justice system as a result of the legal hangover of the war on drugs and the ideologies that it perpetuated. The Anti-Drug Abuse Act of 1986 created a 100:1 sentencing disparity between crack and powder cocaine, which was perceived as a way to disproportionately punish minorities, as minorities are more likely to use crack, and richer whites are more prone to using cocaine. After all, African Americans are incarcerated at “nearly six times the rate of whites,” yet there is no evidence that suggests that African Americans are more prone to violence or to committing crimes.¹ There are no shown “disproportionalities along racial or ethnic lines that would support commensurate racial disparities in the criminal justice system”.² On the contrary, the National Household Survey on Drug Abuse reported in 2000 that “white youth aged 12-17 are more than a third more likely to have sold illegal drugs than African American youth”.³

Table 1 (see appendix), a product of data via the Sentencing Project, shows how African Americans are at a disadvantage at every point in the criminal justice process. Although they are only 14% of monthly drug users, they are 37% of drug arrests and 56% of drug offenses. These numbers demonstrate that African Americans are being arrested more frequently and convicted at higher rates than they deserve, and at higher rates than other racial groups. If trends continue, one third of African American men born today can anticipate

¹ Marc Mauer and Ryan King, *A 25 Year Quagmire: The “War on Drugs” and Its Impact on American Society*, The Sentencing Project Publications 21 (2007).

² *Id.* at 9.

³ Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* 99 (2010).

spending time in prison.⁴ If they are not committing more crime, there has to be an explanation for why they are being imprisoned and sentenced at these absurdly high rates. A combination of a discriminatory culture that emerged from the war on drugs and the explicit consequences of these laws help to explain this discrepancy. In order to fully understand these factors, we must trace the evolution of the way that people perceived drugs, crime, and, ultimately, black men.

I. History of Drug Use and Policy

The United States has a long history of attempting to curb drug use, possession, and distribution. However, its drug policies were taken to the next level when President Richard Nixon proclaimed a national “war on drugs” in 1971, deeming drug abuse “public enemy number one”.⁵ Succeeding presidents followed in Nixon’s footsteps by perpetuating and exponentially heightening this movement of demonizing drugs, publicly shaming drug users, and frightening the American public. This movement created a dangerous dichotomy between ‘bad’ and ‘good’ people – drug users could only conceivably be bad people, and those who do not use drugs are inherently good. People began to view drug users as hopeless harms to society who could not control their urges. This thought became an inherent feeling in the new generation that, combined with America’s deep history of racism, hindered racial equality in the criminal justice system and elsewhere in society.

Ronald Reagan played a particularly large role in snowballing the movement. Reagan’s election itself can be seen as a movement away from the free and liberal days of the 1960s-70s and towards a more conservative cultural attitude. In the years preceding Reagan’s election and his anti-drug agenda, Americans were in fact consuming far fewer drugs and less alcohol.⁶ The Reagan administration harnessed the media to substantiate its agenda by changing “the public perception of drug use and the threat posed by illegal drugs”.⁷ Reagan pursued supply-reduction policies that sought to limit the amount of drugs available on the streets – the contrasting strategy is demand-reduction, which seeks to reduce demand for drugs via prevention and treatment programs, encompassing a more social welfare-based and rehabilitative view.⁸ Largely as a result of viewing the drug epidemic through a supply-reduction lens, Reagan portrayed the war on drugs as a real war, using military terms like “battle,” “war,” and “surrender” in his weekly radio addresses in the early 1980s.⁹ As a result, the media portrayed the drug problem as something like a war – something that can only be crushed using aggressive, militaristic tactics rather than adopting social programs. The war on drugs was somewhat linked to issues of gang violence, as gang membership rose in the 1970s-80s with demand for drugs.

⁴ Richard Hinojosa, Ruben Castillo, and Williams Sessions, *Special Report to Congress: Cocaine and Federal Sentencing Policy* 16 (2007).

⁵ Kenneth B. Nunn, *Race, Crime, and the Pool of Surplus Criminality: Or Why the War on Drugs Was a War on Blacks*: Iowa Journal of Gender, Race and Justice 381 (2002).

⁶ *Id.* at 383.

⁷ *Id.* at 381.

⁸ *Id.* at 382.

⁹ *Id.* at 381.

Additionally, media outlets described it as a “crisis” and an “epidemic” – “later shown to be exaggerated, to describe the impact of crack”.¹⁰ Social hysteria and the fear of African Americans grew, a new conservative cultural climate was formed, drug users were further ostracized, and thus the racial inequality of the criminal justice system bloomed. “[S]ensationalized news coverage about drug use during the 1980s” and the harsh drug laws “influenced state lawmakers in the 1980s and early 1990s”.¹¹ Laws like the Anti-Drug Acts seemed to purposely give higher sentences to drugs associated with African American culture. As a result, more black people were being arrested, the media broadcasted cases that involved African Americans, and so began a positive feedback loop. It is in this way that the new climate specifically ostracized African American drug users rather than all drug users. White drug users were viewed as an anomaly, whereas people came to expect African Americans to use drugs. This social influence was just as significant as specific drug policy laws in forming a conservative and highly anti-drug social climate.

Succeeding Reagan, the next two presidents, George H.W. Bush and Bill Clinton, both extended these punitive, drug-demonizing policies. Anti-drug spending and drug-related law enforcement budgets continued to grow as the anti-drug movement gained momentum. Clinton increased the anti-drug budget by 25% and “proposed expanded drug testing rules and intensified efforts towards drug interdiction and prosecution”.¹² Clinton in particular was tough on crime, and even took time off of the campaign trail to visit his home state, Arkansas, to reaffirm his tough on crime stance by supporting the execution of Ricky Ray Rector, a black man. This further perpetuated the coupling of African American culture with criminal activity. This event is also a testament to the great lengths that politicians were willing to go to in order to avoid being labeled ‘soft on crime,’ as the American public favored tough-on-crime policies and was more likely to vote for politicians with tough-on-crime, lock them up attitudes. All in all, regardless of who occupied the White House or even what party he represented, presidents during the war on drugs all pursued the same general anti-drug policies, many of which perpetuated racial inequality as a result of the cultural climate and social feeling of the time.

II. Social and Cultural Factors

Racial disparities in the criminal justice system – largely established as a result of the war on drugs – can first be explained by this cultural movement of conservatism and social fear that was exacerbated by anti-drug policies. African Americans were historically seen as lesser and more prone to violence and drug use, and politicians and presidents of this era capitalized on this fear and created a breed of moral panic. Although drug use was at record low, they still mobilized people to back these harsh policies by capturing their fear surrounding drugs, crime, and African Americans, respectively, and combining them into one. People who grew up during the war on drugs were exposed to politically motivated advertising, a sensationalized media, and political rhetoric demonizing drugs and portraying images of African Americans as example criminals. They were inundated with, at the very least, an

¹⁰ Mauer and King, *supra* note 1 at 2.

¹¹ Nicole Porter and Valerie Wright, *Cracked Justice: The Sentencing Project Publications* 6 (2011).

¹² Nunn, *supra* note 5 at 382.

implicit bias that has served to perpetuate racism in the criminal justice system, but also in the general social realm. The birth of this biased and frightened social climate was largely a byproduct of legal change and political action.

In addition to the cultural climate and fear associated with the war on drugs and its evolution, racial inequality in the criminal justice system can also be attributed to some more explicit, legal factors. One of the most notable—and most potent—of these factors is the sentencing disparity between crack and powder cocaine, as it has largely contributed to the hasty surge of black prisoners and mass incarceration as a whole. This sentencing disparity is so telling because it is a well-documented example of many of the causes of racial disparities in the criminal justice system. It is important to look at the laws that created these disparities and other legal action related to this issue in order to understand the associated racism and the great impact it has had on the African American community. As crack's popularity grew due to increased media attention, it became cheaper, more accessible, and more prevalent in black communities, and thus African Americans became more affected by policies restricting this drug's use.

Len Bias was an African American and a star basketball player at the University of Maryland who died from a cocaine overdose in 1986.¹³ His death facilitated the passage of the 1986 Anti-Drug Abuse Act, which marks the government's movement away from a rehabilitative system and towards a punitive system, introducing excessively punitive mandatory sentences¹⁴. Influenced by Bias's death and the media attention that it received, the Anti-Drug Abuse Act of 1986 – which was followed by its sister legislation, the Anti-Drug Abuse Act of 1988 – tackled the issue of crack cocaine. This legislation created a 100:1 sentencing ratio between crack and powder cocaine, meaning that possession of five grams of crack cocaine with the intent to distribute carried the same five-year mandatory sentence as possession of five hundred grams of powder cocaine with the intent to distribute.¹⁵ These acts established mandatory sentences and mandatory minimum penalties for the possession of crack.¹⁶ Crack is the only drug that carries with it a mandatory sentence for first offense possession; this means that a “person convicted with possession of five grams of crack immediately gets a five-year prison term”.¹⁷ The maximum sentence for possession of any other drug is one year in prison. These laws have had huge effects on individuals, like Edward Clary, an 18-year-old African American who was caught with less than two ounces of crack but received ten years in federal prison.¹⁸ Clary challenged the legal disparity that caused his sentence to be so severe on the basis of randomness and discrimination, but, like “every [other] federal court to have considered these claims,” they were rejected, showing the injustice that is present from start to finish in the criminal justice process.¹⁹

¹³ Fraser C. Smith, *Lenny, Lefty, and the Chancellor: The Len Bias Tragedy and the Search for Reform in Big-Time College Basketball* 1 (1992).

¹⁴ *Id.* at 12.

¹⁵ William Spade, *Beyond the 100:1 Ratio: Towards a Rational Cocaine Sentencing Policy*, *Ariz. L. Rev.* 12 (1996).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Alexander, *supra* at 112.

¹⁹ *Id.* at 113.

III. Drug Use in the Eyes of the Law

These laws have been critiqued for being racist, as African Americans are more associated with crack and whites are more associated with powder cocaine. The two drugs have similar effects. However, the intensity and length of high are different, as crack is intense and quick while powder cocaine is not as intense and has a slower release. Save for this small difference, the two drugs are essentially the same, but in the eye of the law they are one hundred times different. Some people validated the extreme harshness of the sentencing disparity by citing crack's tendency to make people very violent. However, studies have linked this disparity in violence to the violence associated with the crack trade, and not the drug itself; the difference is not biological. Nonetheless, it is difficult to deny a racial component. In his 1995 book, "Malign Neglect: Race, Crime and Punishment in America," Michael Tonry lambastes the American government for the racism he perceives in the criminal justice system.²⁰ His theory is that the racial disparities present in the criminal justice system are due to a "calculated effort foreordained to increase [the] percentages of [African Americans in prison]," as the war on drugs took off in a time in which American drug use was on the decline, and its supply-reduction tactics often served to encourage racism within drug policy.²¹ In 1994, African Americans constituted 84.5% of the people convicted of crack possession, whereas whites constituted 10.3%. African Americans constituted 26.7% of powder cocaine possession convictions, whereas whites constituted 58%.²² From this data, we can conclude that African Americans are receiving longer prison sentences than white Americans. See Table 3 in the appendix for the statistics of the race of crack versus powder cocaine defendants.

The United States Sentencing Commission (USSC) was established in 1984 to oversee and evaluate sentencing guidelines and reduce arbitrary sentencing disparities. At first glance, this seems like a progressive, responsible policy in which the federal government covers its bases and tries to be as just as possible in the enforcement of their policies. However, the government has routinely ignored or rejected the USSC's expert advice. In this sense, its creation was just a façade, and has functioned as a way for the government to perpetuate this anti-drug climate that has led to increased racial inequality in the criminal justice system, and support for programs of this nature.

Throughout the years, the USSC has done extensive research that undermines the integrity of the foundation of the Anti-Drug Abuse Acts of 1986 and 1988 that are the foundation for the crack/powder cocaine sentencing disparity. The USSC has revealed that their foundation is based on "such assertions...[that] aren't supported by sound evidence—they were exaggerated or simply false".²³ For one, in 1995 they concluded that the violence associated with crack is due to its drug trade, not with the drug itself, and thus there is no biological reason for there to be a disparity.²⁴ A disparity in sentencing thus would be acceptable if the crime committed had been violent, but the biological drug itself should not

²⁰ Michael H. Tonry, *Malign Neglect—Race, Crime, and Punishment in America* 82 (1995).

²¹ *Id.* at 8.

²² Mauer and King, *supra* note 1, at 22.

²³ Hinojosa, Castillo, and Sessions, *supra* note 4 at 181.

²⁴ *Id.* at 310.

account for a disparity. In 2002, the USSC led a march towards revisiting cocaine policy.²⁵ This movement did not enjoy congressional support, and the law remained unchanged. This is, in part, a testament to the pervasiveness of the conservative culture surrounding the war on drugs and the general, extreme fear of drugs and crime with which people were inundated.

Conclusion

Although there are still huge issues regarding racial inequality within different facets of the criminal justice system, and even with the lingering crack/powder cocaine sentencing disparity, things have improved in a legal sense in recent years. Congress passed the Fair Sentencing Act (FSA) in 2010, which relaxed sentences for drug crimes and decreased the sentencing disparity to 18:1.²⁶ President Barack Obama said that the FSA would “help right a long-standing wrong by narrowing sentencing disparities between those convicted of crack cocaine and powder cocaine...it’s the right thing to do”.²⁷ Table 2 (see appendix), taken from the Sentencing Project’s report entitled “Federal Crack Cocaine Sentencing”, shows the impact of the FSA on sentence lengths.

In 1997, the USSC suggested that the sentencing disparity should be between a ratio of 2:1 and 15:1²⁸. It took 13 years for Congress to reduce the sentencing disparity, and even then, it was not in the range that the USSC suggested. America is making progress in realizing that its excessively punitive crack laws are unjust and detrimental to black communities. But even now – after the sentencing disparity has been in place for 29 years – it has not been realized enough. As Ta-Nehisi Coates has said, the new sentencing disparity is “only one fifth as racist as it used to be”.²⁹ Despite these marginal improvements on the federal level, there is a lot to be done on the state level. States retain the right to set their own sentencing disparities, and some states have done more to reduce the disparity than others. Connecticut, for example, “equalized penalties for crack and powder [cocaine] in 2005”.³⁰ Some state penalties are still more severe than 18:1, but no more than the original 100:1.³¹ Overall, tracing the evolution of the crack versus powder cocaine sentencing disparity and its effects, it can be concluded that the war on drugs has perpetuated racial inequality by allowing African Americans to be consistently arrested and sentenced at higher rates than other racial groups.

The three most common policy recommendations for eliminating racial disparities in the criminal justice system are: getting rid of sentencing disparities altogether; “increasing trigger quantities;” and “ending mandatory minimum sentences for low-level drug offenses”.³² Criminal justice reform has recently enjoyed bipartisan support, and is in the news today largely because of the impending heroin crisis. The war on drugs is historically based in mostly

²⁵ *Id.* at 181.

²⁶ Douglas A. Berman, *The Many (Opaque) Echoes of Compromise Crack Sentencing Reform*, 23 *Federal Sentencing Reporter* 167 (2011).

²⁷ Danielle Kurtzleben, *Data Show Racial Disparity in Crack Sentencing: U.S. News World Report* (2010).

²⁸ Mauer and King, *supra* note 1 at 24.

²⁹ Maia Szalavitz, *Crack Law: Not Only Cruel and Racist, But Also Scientifically Wrong: Huffington Post* (2010).

³⁰ Porter and Wright, *supra* note 11 at 4.

³¹ *Id.* at 1.

³² *Id.* at 13.

African American, lower-income neighborhoods because of its focus on crack and the harsh, zero tolerance penalties associated with it. Heroin use has skyrocketed mostly in white neighborhoods, with white people encompassing “90% of those who tried heroin for the first time in the last decade”.³³ If this crisis is treated differently than the crack crisis of the previous decades – which it already has been from both a cultural and legal perspective, as white families are seeking a softer war on drugs – there seems to be a strong correlation between race and drug policy. The war on drugs is still very real in black communities, however it does not seem to translate to white communities. Criminal justice reform – specifically these policies with strong racial correlations – requires Americans to be nondiscriminatory, but perhaps Americans will become more nondiscriminatory if these reforms pass; it is both a prerequisite for and consequence of being unprejudiced. If we can change the cultural climate surrounding crime and how people view others who have made careless yet ultimately forgivable mistakes, we can move towards a more rehabilitative and demand-reducing strategy that is humane and aligns with the democratic values that America holds so dear. If we do this, then perhaps the post-war on drugs racial inequality in the criminal justice system that was a result of public discrimination and explicit consequences of harsh sentencing laws, will dissipate.

³³ Katharine Q. Seelye, *In Heroin Crisis, White Families Seek Gentler War on Drugs*, N.Y. Times, Oct. 30, 2015 at 2.

Appendix

Table 1

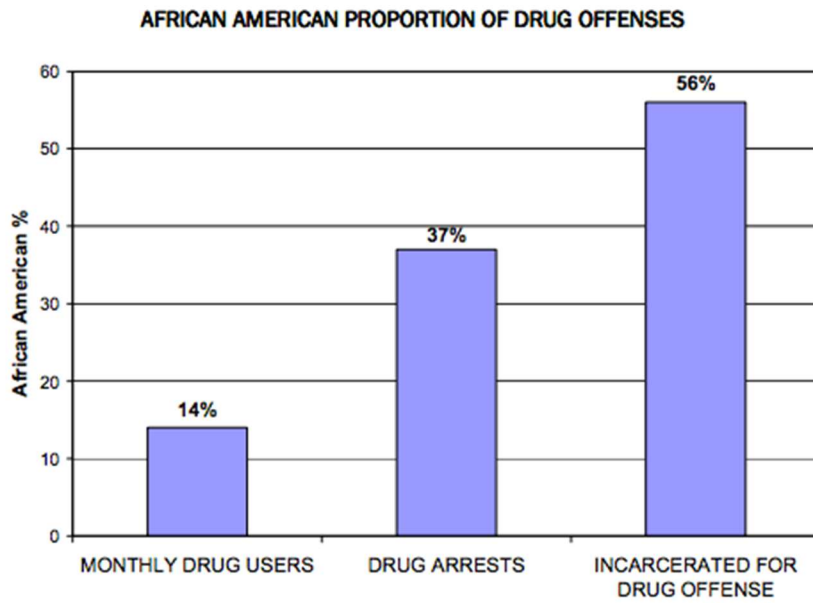
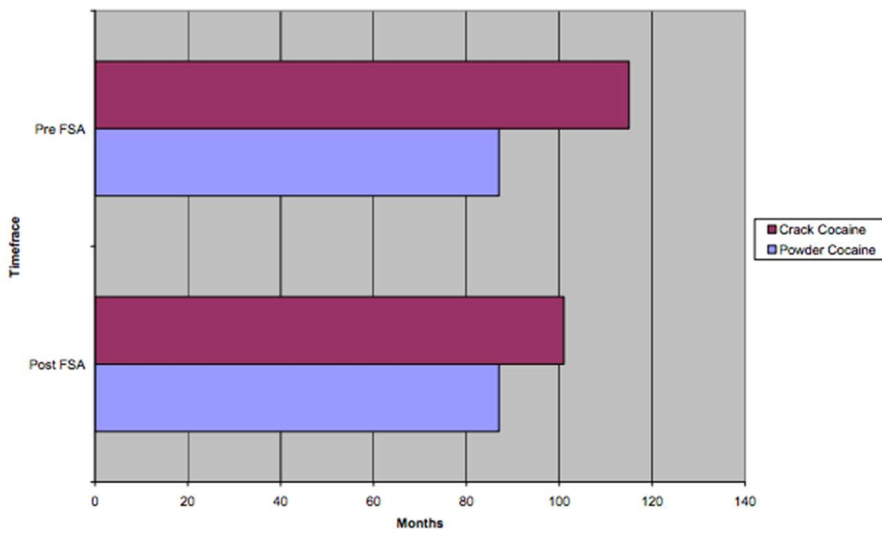


Table 2

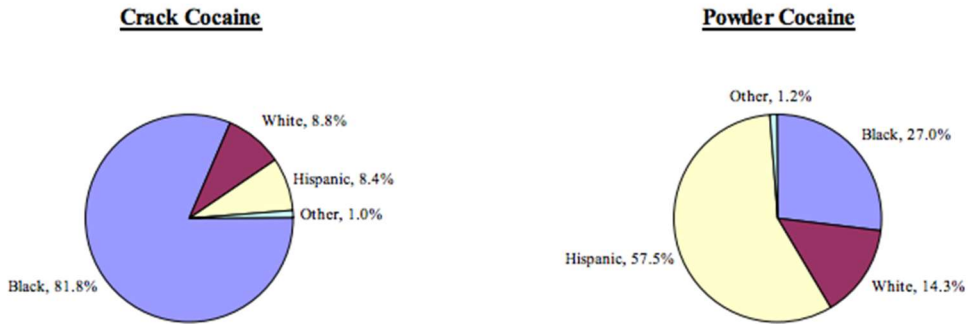
Figure 1: Average Sentences for Crack Cocaine and Powder Cocaine



SOURCE: U.S. Sentencing Commission, 2009 Sourcebook of federal Sentencing Statistics and Prison Impact Model, FY2009 datafile

Table 3

Figure 3: Race/Ethnicity of Cocaine Defendants



SOURCE: U.S. Sentencing Commission 2006 Datafile, USSCFY06.

Tables 1, 2 & 3 are attributed to the following source:

Mauer, Marc, and Ryan King. "A 25-Year Quagmire: The "War on Drugs" and Its Impact on American Society." The Sentencing Project Publications, Sept. 2007. Web.

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THE DEVELOPMENT OF THE ALIEN CARCERAL STATE: EXPLAINING THE
PUNITIVE SHIFT IN IMMIGRATION DETENTION POLICIES IN THE 1980s AND 1990s
AND ITS LASTING EFFECTS

Jacqueline Pecaro

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Abstract

Understanding how the U.S. immigration detention system transitioned from a screening tool to a punitive deterrent requires examining the 1965 amendment to the Immigration and Nationality Act (INA) and U.S. intervention abroad, both of which caused a shift in immigrant composition, a massive influx of immigrants, job shortages, and economic recessions and insecurity in the 1980s and 1990s. The 1965 amendment to the INA replaced the national origins quotas with a preference system designed to reunite immigrant families and attract skilled immigrants to the U.S. The amendment caused a shift from predominantly European immigrants to Asian, Central American, and South American immigrants because it no longer discriminated against non-European countries. At the same time the elimination of the quota system took effect, U.S. hostilities with and intervention in Latin America and the Caribbean also increased the flow of immigrants from these countries to the U.S. The recessions and job losses of the 1980s and 1990s, especially in the manufacturing and factory sectors, compounded the growing fear of immigrants as there were more people and fewer jobs available. These permissive conditions generated consensus around feelings of concern and hostility towards immigrants based on disproportionate information, that when triggered by rising crime and drug trafficking in New York City in the 1980s in predominantly immigrant neighborhoods and the World Trade Center bombings, led to punitive policies, such as the Anti-Drug Abuse Act in 1988 and the Anti-terrorism and Effective Death Penalty Act. These two laws marked the beginning of the alien carceral state that continues today, where Immigration and Customs Enforcement and private corporations detain illegal immigrants.

Introduction

Before the 1980s and 1990s, immigration detention centers in the United States were the exception to how the U.S. handled immigrants. Detention centers were used as screening sites where predominantly European immigrants were investigated and briefly held, with exceptions for Chinese and Japanese immigrants. During the 1980s, the Immigration and Naturalization Service's (INS) budget grew from \$15.7 million to more than \$149 million, giving INS the capacity to detain more than 6,000 individuals at a time.³⁴ Additionally, the average length of detention increased from less than four days in 1981 to 54 days by 1991.³⁵ The President's Fiscal Year (FY) 2016 budget requested \$1.345 billion for the Department of Homeland Security (DHS) to detain over 34,000 illegal immigrants at a time. Detention centers are now commonplace and used as tools of deterrence because every alien is perceived as a threat to U.S. national security.

Understanding how the U.S. immigration detention system transitioned from a screening tool to a punitive deterrent requires examining the 1965 amendment to the Immigration and Nationality Act (INA) and U.S. intervention abroad, both of which caused a shift in immigrant composition, a massive influx of immigrants, job shortages, and economic recessions and insecurity in the 1980s and 1990s. These historical antecedents created two of the permissive conditions to an anti-immigrant moral panic by generating concern and hostility toward immigrants. The physical manifestation of large numbers of non-American looking immigrants coming to the U.S. in unprecedented levels during the 1980s and 1990s sparked fear that immigrants threatened U.S. social, cultural, and racial order as well as Americans' economic welfare.

Politicians response to increasing Americans' fears contributed to the growing public unease and antagonism toward immigrants, exacerbating anti-immigrant sentiment via symbolic politics. Symbolic politics generated disproportionate information about immigrant criminality, the number of illegal aliens in the U.S., and their effect on Americans' well-being. Vernacular such as "invasion," "alien," and "crossing the border," appealed to and reinforced public emotions and fears, and encouraged irrational thinking, which granted politicians additional power. These permissive conditions needed a volatile trigger to manifest as a moral panic. Drug crime in immigrant neighborhoods in New York City in the 1980s and the 1993 World Trade Center bombings provided that trigger. The moral panic led to a call for punitive action in the 1980s and 1990s to reverse or combat the perceived immigration problem through increased detention of illegal immigrants, which provided Americans a perceived level of security against the "immigrant threat."³⁶ Detention centers allowed politicians to visibly show constituents their efforts to solve the immigration problem, leading to the mass incarceration of illegal immigrants that continues today due to the profitability of privatization and the perpetuation of fear.

³⁴ American Civil Liberties Union, *Justice Detained: Conditions at the Varick Street Immigration Detention Center* (New York: American Civil Liberties Union, 1993), 1.

³⁵ *Id.*

³⁶ Nachman Ben-Yehuda and Erich Goode, "Moral Panics: Culture, Politics, and Social Construction," *Annual Review of Sociology* 20, 149 (1994): 31.

I. Historical Background: Immigration Detention Before the 1980s

In spite of wartime and racism, from the 1700s to the 1980s, immigration detention was the exception to how the U.S. handled immigrants. The Alien Enemies Act of 1798, the first authorization for emergency detention, applied only to enemy aliens during wartime, invasion, or threatened invasion.³⁷ Subsequent immigration detention policies authorized screening to allow only the most “pure” immigrants, Europeans, into the U.S., and internment for racial and security threats, which were ultimately stopped or restricted by the U.S. Supreme Court under habeas corpus and due process.³⁸

Through the 1870s, public opinion toward non-European immigrants deemed dangerous, burdensome, or not integrating into the community, became hostile; however, federal judicial opinions still reflected a strong preference for open migration.³⁹ In *Henderson v. Mayor of New York*, the Supreme Court noted the need to separate out the desirable from undesirable immigrants, but states could not do so if it impeded the flow of labor.⁴⁰ Desirable immigrants included those that the government believed would positively contribute to society.⁴¹ In response to the Court’s decision, Congress passed the 1882 Act to Regulate Immigration, which created federal reception facilities to supervise and provide care for immigrants at ports of debarkation.⁴²

Until the Immigration Act of 1891, no federal statutory legal basis for detention existed and states controlled immigration through police, anti-destitution, and public health powers.⁴³ Transition to federal control over immigration reflected the failures of state inspections to adequately select immigrants according to the federal government’s criteria of “pure” and desirable immigrants, which excluded criminals, security threats, and most non-European immigrants.⁴⁴ The 1891 act allowed officers to detain aliens to allow proper time for a thorough inspection, resulting in the opening of the first detention center on Ellis Island in January of 1892.⁴⁵ The act also expanded the list of excludable immigrants to include polygamists, persons convicted of crimes of moral turpitude, and those suffering loathsome or contagious diseases.⁴⁶ Noticing that the examinations were not fulfilling their screening purpose, Congress passed the Immigration Act of 1893, which required detention to administer the inspection and eliminated officers’ discretion to determine the necessity and suitability of detention.⁴⁷

Between 1900 and 1920 the U.S. admitted over 14.5 million immigrants, creating apprehension about mass immigration which led to a change in public opinion from a historically open attitude to a more restrictive one.⁴⁸ As a result, in the 1903 Immigration Act,

³⁷ U.S. Citizenship and Immigration Services, *Overview of INS History* (Washington, D.C.: USCIS History Office and Library, 2012), <https://www.uscis.gov/sites/default/files/USCIS/History%20and%20Genealogy/Our%20History/INS%20History/INSHistory.pdf>.

³⁸ *Id.*

³⁹ Daniel Wilshner, *Immigration Detention: Law, History, Politics* (Cambridge: Cambridge University Press, 2012), 9.

⁴⁰ *Id.* at 9-10.

⁴¹ *Id.*

⁴² *Id.* at 10-11.

⁴³ *Id.* at 11.

⁴⁴ *Id.* at 12.

⁴⁵ *Overview of INS History* at 4.

⁴⁶ *Overview of INS History* at 4.

⁴⁷ Wilshner, *Immigration Detention* at 15.

⁴⁸ *Overview of INS History* at 6.

Congress authorized summary arrest and detention to deport categories of politically undesirable aliens during peace and wartime.⁴⁹ The purpose of immigration detention was not to restrict immigration, but to sift it, separate desirable from undesirable immigrants (people with diseases, contract laborers, and polygamists), and to allow only those with certain physical and moral qualities deemed as beneficial into the U.S.⁵⁰ As immigration detention policy control transferred from the states to the federal government, the criteria of undesirable immigrants expanded.⁵¹ However, even with detention of undesirable aliens, in 1907, a peak immigration year, there were only 195,540 detentions out of 1,123,844 arrivals.⁵² Detention in most cases was followed by admission, and Congress's legislative efforts to prevent entry by undesired immigrants were undermined by the use of discretionary release from detention on bond.⁵³ Detention was viewed in bureaucratic terms, seen as a necessary part of selection and care of aliens arriving at the border, was generally brief, and did not attract jurisprudential attention.⁵⁴ It allowed for detailed questioning and for immigrants to send for financial or other help from relatives or community groups.⁵⁵

Throughout this period, immigrants came predominantly from European countries.⁵⁶ Not unsurprisingly, immigration was viewed as beneficial to the U.S. because it provided an additional labor source and immigrants would assimilate into U.S. culture by "acquiring whiteness."⁵⁷ However, when the number of immigrants started to increase, Americans began to fear that immigrants would take U.S. jobs, and started to develop more restrictive views on immigration.⁵⁸ Even with this fear, detention was sparse and used briefly to inspect people to prevent morally and physically inferior people from coming to the U.S.; most immigrants were welcomed.⁵⁹

During both World War I and II, the U.S. government invoked the Alien Enemies Act of 1798 to detain immigrants the government perceived as threats to U.S. security and "enemies," and immigration detention began to fall under both war and immigration powers.⁶⁰ Wars created a distinction between "enemy aliens" and "friends," but outside of wars, aliens were not generally subject to controls on movement.⁶¹ The outbreak of World War I decreased the immigrant population coming from Europe to the U.S.; however, Europeans still remained the largest immigrant population in the U.S. and mass immigration resumed after World War I.⁶² Responding to public fear resulting from mass immigration after World War I, Congress passed the Immigration Acts of 1921 and 1924, creating a national origins system which limited immigration by placing a quota on each nationality based on its representation in past U.S.

⁴⁹ *Overview of INS History* at 6.

⁵⁰ Wilshner, *Immigration Detention* at 12.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.* at 16-17.

⁵⁴ *Id.* at x.

⁵⁵ *Id.* at 13.

⁵⁶ *Id.*

⁵⁷ Matthew Frye Jacobson, *Whiteness of a Different Color: European Immigrants and the Alchemy of Race* (Cambridge: Harvard University Press 1999) at 300.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Overview of INS History* at 6.

⁶¹ *Id.* at 1.

⁶² *Overview of INS History* at 6.

census figures, specifically limiting migration from Asian countries.⁶³ Immigration remained relatively low following World War II because the national origins system remained in place, with the exception of increased German immigration due to deteriorating economic and governmental conditions in Germany following the war.⁶⁴

Two detention exceptions emerged before the 1980s that foreshadowed the progression of immigration detention. A racist panic caused by an influx of Chinese laborers in the 1880s prompted Congress to pass strict, arbitrary measures to keep out and expel Chinese immigrants in 1882.⁶⁵ Americans saw Chinese immigrants taking US jobs and stereotyped them as degenerate heroin addicts whose presence encouraged prostitution, gambling, and other immoral activities.⁶⁶ The mean stay was around 10 days, and only 8% were detained longer than a month due to the Supreme Court setting a limit of two months in the absence of “just cause” for further detention.⁶⁷ Similarly, after the Japanese attack at Pearl Harbor, President Franklin Roosevelt issued Executive Order 9066 in 1941 calling for the detention of over 120,000 Japanese immigrants on the West Coast in internment camps to provide for national security.⁶⁸ The average stay lasted four years.⁶⁹ The government justified the internment as a “military necessity” to protect against perceived domestic espionage, sabotage, and the few known Japanese-American spies in the U.S.; however, it was mostly racially motivated because Asians were considered an “undesirable race.”⁷⁰

After the heightened national security scare of the late 1940s and early 1950s, detention nearly disappeared with the help of the 1952 INA, which gave the government a six-month limit on detention to effect expulsion after a final order.⁷¹ In practice, detainees were not held longer than six months after a final deportation order until reforms in the 1990s.⁷² As a whole, immigration detention before the 1980s was infrequent, short in duration, and used primarily to screen morally unfit, diseased, or certain racial and working class groups from entering the U.S.

II. Permissive Conditions Leading to Moral Panic: Concern and Hostility: Shift of Immigrant Demographics and Increase in Illegal Immigration

In the 1960s, Civil Rights activists and other countries criticized the U.S. for working toward domestic equality while having racist and discriminatory quotas on immigration.⁷³ Under domestic and foreign pressure for immigration reform, President John F. Kennedy called for the eradication of the quotas.⁷⁴ After Kennedy’s assassination, President Johnson invoked Kennedy’s

⁶³ *Id.* at 7.

⁶⁴ *Id.* at 9.

⁶⁵ Wilshner, *Immigration Detention* at 18.

⁶⁶ *Id.*

⁶⁷ *Id.* at 22-23.

⁶⁸ “Internment History,” Public Broadcasting Service (PBS), accessed March 20, 2016, <http://www.pbs.org/childofcamp/history/>.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ Wilshner, *Immigration Detention* at 66.

⁷² *Id.* at 65.

⁷³ “LBJ on Immigration,” LBJ Presidential Library, accessed March 20, 2016, <http://www.lbjlibrary.org/lyndon-baines-johnson/timeline/lbj-on-immigration>.

⁷⁴ “U.S. Immigration Since 1965,” History, accessed March 20, 2016, <http://www.history.com/topics/us-immigration-since-1965>.

memory and vision to pass the 1965 INA amendment.⁷⁵ The Democratic president and Congress framed immigration to the U.S. as beneficial and desirable as long as immigrants possessed relationships to current U.S. citizens and certain skills that benefited the U.S. economy.⁷⁶

The 1965 amendment to the INA replaced the national origins quotas with a preference system designed to reunite immigrant families and attract skilled immigrants to the U.S. The amendment also increased the caps on immigration for individual countries.⁷⁷ The amendment caused a shift from predominantly European immigrants to Asian, Central American, and South American immigrants because it no longer discriminated against non-European countries.⁷⁸ The lift of the quota system, combined with economic prosperity in Europe in the 1960s, led to a decline in the relative and absolute number of Europeans immigrating to the U.S.⁷⁹ According to U.S. Census data, between 1930 and 1990, the percentage of the foreign-born population from Europe decreased by 60.1%, while the foreign-born populations from Asia, Latin America, and Africa increased by 24.4%, 38.7%, and 1.8% respectively.⁸⁰ The 1965 amendment also granted INS the administrative authority to detain aliens during the process of removing them from the U.S.⁸¹ INS managed and oversaw federal immigration detention and detained aliens to ensure they appeared in court for immigration hearings and complied with removal orders issued by immigration courts.⁸²

At the same time the elimination of the quota system took effect, U.S. hostilities with and intervention in Latin America and the Caribbean also increased the flow of immigrants from these countries to the U.S. The U.S. provided annual aid to the Haitian government during the repressive presidencies of François “Papa Doc” Duvalier and his son, Jean-Claude Duvalier, from 1957 to 1986 and during the military coups that followed in the 1990s.⁸³ As a result of the brutal conditions in Haiti during that time, boatloads of Haitians came to the U.S., specifically to Florida.⁸⁴ Additionally, housing and job shortages in Cuba, caused by a failing Cuban economy and the liberal U.S. policy granting lawful permanent residence to Cuban refugees, angered Fidel Castro and prompted him to empty Cuban jails and send boats of prisoners to the U.S. in 1980. The Mariel Boatlift resulted in a huge influx of Cuban immigrants to Florida. Floridians witnessed an unprecedented, massive, and swift increase in the number of Cuban immigrants who were convicted felons and previously held in jails which, combined with overcrowding in Florida, forced President Jimmy Carter to enact a new policy of mandatory detention pending asylum decisions for all Cubans and Haitians without Congressional approval or proper administrative notifications.⁸⁵

Direct U.S. intervention abroad also affected immigration flows from Central and Latin America and the Caribbean. During the Cold War, the U.S. government cited attempts to stop the

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ Immigration and Customs Enforcement (ICE) now carries out that authority. ACLU, *Justice Detained*, 3.

⁸² *Id.*

⁸³ “Haitian Immigration,” In Motion: The African-American Migration Experience, accessed May 7, 2016, <http://www.inmotionaame.org/print.cfm;jsessionid=f8302348531462722630943?migration=12&bhcp=1>.

⁸⁴ *Id.*

⁸⁵ Wilsher, *Immigration Detention* at 67.

spread of communism as justification for intervening abroad.⁸⁶ President Ronald Reagan authorized military intervention in Central and Latin America and the Caribbean to overthrow “communist” regimes which were unsympathetic to U.S. capitalist interests.⁸⁷ The resulting turmoil from U.S. intervention forced refugees to flee their home countries to the U.S. because of violence and persecution. In 1981, President Reagan and the Central Intelligence Agency financed, trained, armed, and advised the Contras, a Nicaraguan guerrilla force fighting against the socialist Sandinista regime in Nicaragua.⁸⁸ The Contras tried to undermine the Sandinistas’ attempts to modernize Nicaragua through violence and by destroying power plants, water treatment facilities, and other infrastructure projects, stunting social and economic progress in Nicaragua.⁸⁹ The American-backed Contras made living conditions in Nicaragua more unbearable, hostile, and dangerous than they had been under the Sandinistas; as a result, Nicaraguan immigration to the U.S. rose from 16,100 in 1970 to 168,700 in 1990.⁹⁰

Similarly, U.S. intervention in Mexico through the North Atlantic Free Trade Agreement in 1993, meant to foster trade liberalization and reduction of tariffs between the U.S., Canada, and Mexico, and ultimately lead to economic growth, was another factor that affected immigration.⁹¹ President Bill Clinton and the Democrat majority in both houses of Congress hoped that passage of NAFTA would help to grow the Mexican economy enough to create more competitive jobs in Mexico, thus reducing the flow of undocumented Mexican immigrants into the U.S.⁹² However, U.S. businesses in Mexico and tariff reductions drove rural Mexicans out of work into cities that were overcrowded, crime-ridden, and impoverished, resulting in Mexicans coming to the U.S. in search of employment.⁹³ In an effort to curb the increased illegal immigration from Mexico that resulted from NAFTA, President Clinton established “Operation Gatekeeper” to increase the border patrol in the San Diego Sector and California and Mexico borders, but the measure ultimately failed due to lack of both resources and personnel to handle the flow of immigrants coming across the border.⁹⁴

The percent of the U.S. foreign-born population in the U.S. rose from 4.7% in 1970 to 7.9% in 1990.⁹⁵ At the same time of this increase, the complexion of immigrants changed.⁹⁶ Ironically and unintentionally, the 1965 INA amendment, which hoped to eliminate the racist and discriminatory quotas on immigration, contributed to the racism that defined immigration in the 1980s and 1990s. Before the 1965 amendment to the INA, the majority of immigrants

⁸⁶ “Ronald Reagan: Foreign Affairs,” University of Virginia Miller Center, accessed March 20, 2016, <http://millercenter.org/president/biography/reagan-foreign-affairs>.

⁸⁷ Monica W. Varsanyi, “Rescaling the ‘Alien,’ Rescaling Personhood: Neoliberalism, Immigration, and the State,” *Annals of the Association of American Geographers* 98, no. 4 (2008): 877, accessed February 20, 2016.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ “Central American Immigrants in the United States,” Migration Policy Institute, accessed May 11, 2016, <http://www.migrationpolicy.org/article/central-american-immigrants-united-states-0>.

⁹¹ “The Immigration Debate: NAFTA Overview and Its Effects on Undocumented Immigration,” University of Michigan, accessed March 20, 2016, http://www.umich.edu/~ac213/student_projects07/global/nafta.html.

⁹² *Id.*

⁹³ Robert E. Scott and David Ratner, “NAFTA’s Cautionary Tale: Recent history suggests CAFTA could lead to further US job displacement,” *Economic Policy Institute* 7, no. 20 (2005): 1, accessed February 20, 2016.

⁹⁴ “Background to the Office of the Inspector General Investigation,” U.S. Department of Justice, accessed May 7, 2016, <https://oig.justice.gov/special/9807/gkp01.htm>.

⁹⁵ Alan Greenblatt, “Immigration Debate: Can politicians find a way to curb illegal immigration?” *CQ Researcher*, accessed March 20, 2016, <http://library.cqpress.com/cqresearcher/document.php?id=cqresrre2008020100>.

⁹⁶ *Id.*

coming to the U.S. were European. The dropping of the quota system allowed for immigrants previously denied entry to the U.S., such as Asians and Latin Americans, to immigrate to the U.S. in larger numbers, outnumbering European immigrants. Americans, fearing that European immigrants would take their jobs and disrupt the U.S. social and cultural order, isolated immigrants into their own communities. But the European immigrants tended to assimilate into American life and culture by “acquiring whiteness” because of the similarities in the European and American ways of life and similar fair skin of Americans and Europeans.⁹⁷ Acquiring whiteness refers to the efforts of European immigrants to essentially mimic the lives of American citizens to blend into the U.S.⁹⁸

Although U.S. intervention abroad and U.S.-backed organizations caused persecution of individuals and destruction of economies, these atrocities did not preoccupy the U.S. since they posed no immediate ramifications to U.S. goals of deposing anti-American communist governments and ensuring a well-functioning U.S. economy. However, by creating unlivable conditions in these countries, the U.S. essentially invited immigrants to come to the U.S. since they could not stay in their home countries any longer.⁹⁹ The U.S. therefore helped create the conditions for mass migration from Central and Latin American countries and the Caribbean.¹⁰⁰ Americans perceived the new immigrants coming from Central and Latin America, the Caribbean, and Asia as inferior because of their race and worried that the massive increase in their migration would change the white face of America, threaten the social order, and potentially have ramifications for employment competition.¹⁰¹ The post-1965 INA and post-intervention immigrants looked physically different from Americans and were perceived as not able nor willing to assimilate, making it easier to forever distinguish the immigrant from the U.S. citizen.¹⁰² The physical manifestation of large numbers of immigrants who looked different from American citizens generated fear in the American public regarding immigration, as seen in Florida, laying the foundations for the permissive conditions of an anti-immigrant moral panic.¹⁰³

III. Concern and Hostility: Loss of Jobs and Economic Recession

The recessions and job losses of the 1980s and 1990s, especially in the manufacturing and factory sectors, compounded the growing fear of immigrants. The 1980s began with two economic recessions followed by the longest peacetime expansion America had ever seen in service and retail trade jobs.¹⁰⁴ Contrastingly, as a result of the recessions, factory jobs dropped from about 23% to 18% within the decade.¹⁰⁵ Between June 1979 and July 1980, manufacturing firms lost 1.4 million jobs, only 40% of which were recovered before the recession of 1981 and 1982 began.¹⁰⁶ The recession caused manufacturers to eliminate 2.3 million jobs, or 10% of the

⁹⁷ Jacobson, *Whiteness of a Different Color*, 93.

⁹⁸ *Id.*

⁹⁹ Varsanyi, “Rescaling the ‘Alien,’ Rescaling Personhood,” 877.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² Jacobson, *Whiteness of a Different Color*, 300.

¹⁰³ *Id.*

¹⁰⁴ Lois M. Plunkert, “The 1980’s: A Decade of Job Growth and Industry Shifts,” *Monthly Labor Review* 113, no. 9 (1990): 3.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 9.

work force, and the recovery only added two-thirds of the jobs lost after the recessions.¹⁰⁷ The economic recession in the early 1990s was mild in terms of job loss compared to that of the recessions in the early 1980s, but still dealt a significant blow to manufacturing and factory jobs.¹⁰⁸ Manufacturing jobs, which had been scaled back in the late 1980s, fell by 3.2%. Additionally, factory employment decreased by 9.2% between January 1989 and September 1993.¹⁰⁹ At the same time that manufacturing and factory jobs and wages decline, the labor force grew by 2.5 million, meaning more people were competing for fewer lower-wage, lower-skill jobs, jobs which immigrants could perform.¹¹⁰

Combined with the increase in immigrants and shift in immigrant demographics from European to predominantly Asian, Caribbean, or Central and Latin American ethnicities, the recessions and job shortages made anti-immigrant sentiment and fear more potent. In a failing economy where jobs were scarce, immigrants posed a direct threat to the working Americans' economic well-being. The vulnerability that resulted from economic insecurity translated into Americans perceiving themselves as vulnerable to immigrants.¹¹¹ U.S. citizens, especially the middle- and lower-classes, were losing their jobs or being paid less while immigrants, who were willing to work for less, continued to come to America in greater numbers than ever before.¹¹² The lower on the socioeconomic ladder an American was, the greater their tendency to demonize immigrants became. The lowest-class feared that they could be "pushed out" of American society and the workforce by immigrants who were willing to do their jobs for less money.¹¹³ Americans perceived the loss of jobs and economic recession coupled with the increase in immigrants in the U.S. as a direct threat to their own livelihoods and potential to thrive. Immigrants were no longer feared for just being different and plentiful, but also hated for "stealing" U.S. jobs which led to a new political climate, one where immigrants were framed as a problem by endangering the welfare of Americans. This added to the growing permissive conditions of an anti-immigrant moral panic.

IV. Consensus and Disproportionality

Bottom-up and top-down responses to the shift in immigrant composition, increased illegal immigration, and economic insecurity for working Americans in the 1980s and 1990s generated a consensus that illegal immigration was a problem. To become a recognizable phenomenon, moral panics require a consensus that the problem is real, poses a threat, and should be rectified among the public.¹¹⁴ The physical presence of immigrants in society generated fear and apprehension in Americans because Americans perceived Asian and Latin American immigrants in large numbers coming to the U.S. as crime-ridden, "dirtying" white U.S. culture, and taking U.S. jobs in a recession. Heightened anxiety over others' behavior and how their actions affect society is verifiable in the form of both an observed and measurable

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 7.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 3.

¹¹¹ Devon Johnson, "Punitive Attitudes on Crime: Economic Insecurity, Racial Prejudice, or Both?" *Sociological Focus* 34, no. 1 (2001): 36.

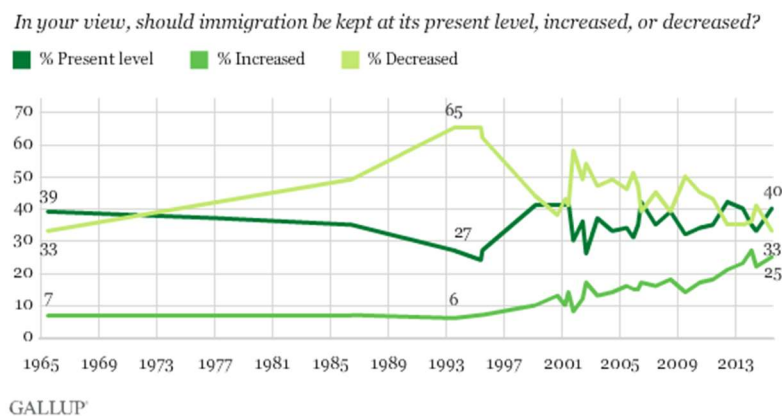
¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ Michael Welch, *Detained: Immigration Laws and the Expanding I.N.S. Jail Complex* (Philadelphia: Temple University Press, 2002), 22.

manifestation, such as public opinion polls, public commentary in the form of media attention, proposed legislation, and social movement activity.¹¹⁵ In 1993, a *Newsweek* poll found that 60% of Americans believed that immigrants were harming the nation by changing how U.S. society operates and taking U.S. citizens' jobs.¹¹⁶ According to data gathered by Gallup, from 1965 until the late 1990s, public opinion toward immigration into the U.S. grew increasingly negative, especially in the mid-1980s.¹¹⁷ In 1994 and 1995, 65% of Americans agreed that immigration should be decreased, compared to the 33% of Americans in 1965 who thought immigration should be decreased.¹¹⁸

Figure 1: Public Opinion on Immigration



Between 1986 and 1994, the percentage of Americans who believed that immigrants cause problems in the U.S. increased from 44% to 53%.¹¹⁹ The data demonstrates an increasing consensus over the apprehension about immigration and animosity towards immigrants just as the composition of immigrants changed, immigration increased, and the U.S. experienced job losses and economic recessions. California, Florida, and Texas exhibited more unease over legal and illegal immigration in the early and mid-1990s than other states. A larger number of immigrants came and settled in those states, causing residents to perceive immigrants as greater and more immediate threats to their communities and economies.¹²⁰ A *Los Angeles Times* survey found that 86% of California residents thought illegal immigration into California was a “major” or “moderate” problem, and 47% felt the same about legal immigration.¹²¹ Similarly, 95% of respondents to an *Orlando Sentinel* survey supported a ban on all immigration for 5 years.¹²²

Concern manifested itself as “otherization” of immigrants and generated enmity towards immigrants because they were constructed as the enemy of respectable society because their behavior was viewed as threatening to the values, interests, and social order of the U.S. Politicians reinforced the anxiety and antagonism regarding illegal immigrants through symbolic politics by using language that constructed immigrants as foreign, hostile, and dangerous. Even when immigrants came primarily from Europe, the language surrounding immigration always

¹¹⁵ *Id.* at 11.

¹¹⁶ *Id.* at 23.

¹¹⁷ “Immigration,” Gallup, Inc., accessed March 20, 2016, <http://www.gallup.com/poll/1660/immigration.aspx>.

¹¹⁸ *Id.*

¹¹⁹ Renatta Defever and Francine Segovia, “The Poll-Trends- American Public Opinion on Immigrants and Immigration Policy,” *Public Opinion Quarterly* 74, no. 2 (2010): 380.

¹²⁰ Welch, *Detained* at 23.

¹²¹ *Id.*

¹²² *Id.*

framed it as an “invasion,” at least until the immigrants assimilated, which portrays the U.S. as a victim of a serious and unwanted threat.¹²³ After the 1980s and shift in immigrant composition, the invasion rhetoric consistently defined immigration.¹²⁴

Even beginning in 1798, politicians and citizens referred to immigrants as “aliens,” indicating their foreign and lesser nature, constructing them as non-human, and reinforcing their status as non-citizens and the distance between U.S. citizens and the “out group.” Similarly, politicians invoked terms such as “crossing the border” to symbolically demonstrate “otherization,” where the border became a frontier of identity, solidarity and security, law and order, and military confrontation and created a friend and foe division where the enemy is normally found outside of the territory.¹²⁵ Americans also began casting immigrants, especially non-European immigrants, such as Chinese and Mexicans, as drug criminals and dangerous to society by luring unsuspecting women and children into drug addictions and inciting violence.¹²⁶ Through political symbols, politicians constructed immigrants as dangerous, foreign, and enemies.

Politicians’ use of symbolic politics influenced how the public perceived the immigration threat and led to disproportionality about the status of immigrants in the U.S., their criminality, and their ability to affect American society and economy. This rendered the perceived danger as greater than the potential harm. People tend to only believe that which supports their views, and their views about immigration were based on irrational fear generated through symbols. Political symbols bring out particular meanings and emotions in concentrated form which the members of a group create and reinforce in each other; so, despite the estimated veracity of the information reported, it will fit as evidence to support people’s preconceived hopes and fears.¹²⁷

In a 1993 public opinion poll, 68% of Americans believed the majority of immigrants in the U.S. were here illegally, while only 17% believed that the majority of immigrants in the U.S. were here legally.¹²⁸ At that time, the U.S. immigrant population numbered 19.8 million, 3.5 million of which were illegal.¹²⁹ Therefore, the majority of immigrants resided in the U.S. legally, however, people believed information being fed to them at the time by politicians and the media, citing that the U.S. had a massive illegal immigration problem. This information substantiated their beliefs and there was no intent to check their convictions against facts because politicians already effectively constructed immigrants as aliens.¹³⁰ The media also perpetuated incorrect information about immigrants, their status in the U.S., and their behavior by acting as a political tool through broadcasting sound bites of political figures giving speeches rich with anti-immigration sentiment.

The more immigration is politicized, the more distorted and oversimplified it becomes through politicians’ use of symbolic politics to appeal to Americans’ emotions and irrationality.¹³¹ Politicians address the public through symbolic politics because symbols are easily understood and bestow more power upon politicians through the public’s tendency to

¹²³ Jacobson, *Whiteness of a Different Color* at 93.

¹²⁴ *Id.*

¹²⁵ Wilshner, *Immigration Detention* at 7.

¹²⁶ *Id.*

¹²⁷ Edelman, *The Symbolic Uses of Politics*, 11-13.

¹²⁸ Defever and Segovia, “American Public Opinion on Immigrants and Immigration Policy,” 379.

¹²⁹ *Id.*

¹³⁰ *Id.* at 7.

¹³¹ Welch, *Detained* at 28.

become irrational due to fear.¹³² Language invoked by politicians, such as “invasion,” “alien,” and “crossing the border,” reinforced the developing fear in the American public caused by an increased visibility of immigrants and economic insecurity. Thus, despite the data on legal immigration and criminal aliens, people only believed what politicians told them because it fit with how they already viewed immigrants: as outsiders, invaders, aliens, and criminals.

V. Volatility: Two Triggers

Before the 1980s, tensions between immigrants and U.S. citizens existed, but did not erupt into the punitive policies passed in the 1980s and 1990s. The composition and number of immigrants before versus after the 1980s partially explains the lack of a moral panic before the 1980s; however, racial differences and a growing immigrant population pose little direct threat to Americans’ well-being and day-to-day life without factoring in the economy. Moral panics fluctuate with the perception of an economic threat.¹³³ The addition of an immigrant economic threat solidified the conditions that ultimately led to an anti-immigrant moral panic and the punitive policies of the 1980s and 1990s.¹³⁴

The shift in immigrant composition, a massive increase in immigration, job losses, economic recession, and political response all occurred relatively quickly within the span of 30 years and laid the foundation for a consensus over hostility and concern and disproportionality to develop over illegal immigration. However, just the presence of these conditions did not lead to the eruption of an anti-immigrant moral panic. Moral panics erupt quickly, although the problem may lie dormant for long periods of time, as immigration did until the 1980s.¹³⁵ Although an economic threat provided a missing link to the permissive conditions of a moral panic, the pre-1980s immigration debate also lacked a trigger for the conditions to manifest as an anti-immigrant moral panic. Two separate triggers occurred in the 1980s and 1990s that consolidated anti-immigrant sentiment around punitive policies.

Rising crime and drug trafficking in Washington Heights in New York City in the 1980s led citizens to call on law enforcement and politicians to make their neighborhoods safe again.¹³⁶ Washington Heights consisted primarily of immigrants from the Dominican Republic.¹³⁷ Responding to the fear of his constituents and the “tough-on-crime” rhetoric pervading the Republican Party at the time, Republican Senator Alfonse D’Amato of New York commissioned the Government Accountability Office (GAO) to conduct research on criminal alien activity in 1986.¹³⁸ The GAO found that most arrested felons were aliens, and most and potentially all were released by local law enforcement without any INS screening.¹³⁹ The report also showed how the INS failed to prevent reentry of the few aliens it did remove.

In responding to the perceived dangers of rising drug abuse in the U.S., specifically crack-cocaine, and upper and middle-class Americans’ fear of drug users, President Ronald

¹³² Edelman, *The Symbolic Uses of Politics* at 6.

¹³³ Welch, *Detained* at 30.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ “Drug Problems And Crime Of The 1980’s and 1990’s,” City College, accessed May 7, 2016, <https://macaulay.cuny.edu/eportfolios/berger2011/washington-heights/problems-of-washington-heights/drug-problems-of-the-1980s-and-1990s/>.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

Reagan and a Democratic Congress passed the Anti-Drug Abuse Act in 1988, which established a mandatory minimum sentence for possession of crack-cocaine.¹⁴⁰ With the new GAO findings, Congressional Republicans also pushed for the Anti-Drug Abuse Act to target and address the perceived growing criminal alien problem that threatened U.S. neighborhoods and social order and cited the INS' inability to handle the perceived problem.¹⁴¹ Part of the act amended the INA to enact the first mandatory detention provision for illegal immigrants convicted of aggravated felonies.¹⁴² The amendment to the INA created new grounds for deportation of immigrants convicted of an aggravated felony, murder, and drug and firearms trafficking.¹⁴³ It subjected immigrants convicted of an aggravated felony to mandatory custody without the possibility of bond.¹⁴⁴ Previously, immigrants involved in removal proceedings were not detained unless they were found to be a flight or security risk.¹⁴⁵ If they were a flight or security risk, they were still eligible for release on bond.¹⁴⁶ Beginning in the late 1980s and coinciding with the "War on Drugs," the Bush administration launched a major campaign to deport ex-offenders.¹⁴⁷

Historically, immigration and terrorism existed in separate spheres. Americans harbored unease and antagonism towards illegal immigrants because immigrants posed a cultural, ethnic, social, and economic threat, but not a direct threat to an American's life. The 1993 World Trade Center bombings re-cast immigrants as a national security threat.¹⁴⁸

After the 1993 World Trade Center bombings, anti-immigrant sentiment focused on Muslims and identified every Muslim as a potential terrorist.¹⁴⁹ The fear over the World Trade Center bombings led Americans to believe that immigrant terrorists orchestrated the Oklahoma bombings in 1995, even though they were revealed as a domestic terrorist attack.¹⁵⁰ The 1993 bombings led to the realization that the U.S. was not immune from international terrorism and distorted the perception of all immigrants as terrorists and potential threats to national security.¹⁵¹ Responding to the fear after the two bombings, President Clinton and a Republican Congress passed the 1996 Anti-terrorism and Effective Death Penalty Act (AEDPA), which required the mandatory detention of non-citizens and deportable immigrants convicted of a wide range of offenses, including minor drug offenses and suspected terrorism.¹⁵²

With the new construction of immigrants as national security threats, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) in 1996 to streamline and strengthen U.S. immigration laws to make the U.S. seem less vulnerable to immigrant attacks.¹⁵³ Before IIRIRA, the classification of illegal immigrants was based on their manner of arrival to the U.S. "Excludable aliens" were those apprehended trying to enter the U.S. without

¹⁴⁰ Alina Das, "Immigration Detention: Information Gaps and Institutional Barriers to Reform," *The University of Chicago Law Review* 80, no. 1 (2013): 147.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ ACLU, *Justice Detained* at 4.

¹⁴⁸ *Id.* at 29-30.

¹⁴⁹ Welch, *Detained* at 18.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² "Analysis of Immigration Detention Policies," American Civil Liberties Union, accessed February 25, 2016, <https://www.aclu.org/analysis-immigration-detention-policies>.

¹⁵³ "Illegal Immigration Reform and Immigrant Responsibility Act of 1996" (PL 104-208, 30 September 1996).

permission.¹⁵⁴ “Deportable aliens” already entered the U.S. and were here in violation of the law.¹⁵⁵ “Ex-offenders,” immigrants with criminal convictions, fell into either category.¹⁵⁶ After IIRIRA, “excludable aliens” became inadmissible, which expands upon the excludable category, making more illegal immigrants removable.¹⁵⁷ The “deportable alien” category stayed the same, and the “ex-offenders” label became “criminal aliens.”¹⁵⁸ IIRIRA further expanded the list of offenses for which mandatory detention was required and the definition of “aggravated felonies” to include misdemeanors under state law, and increased the categories of crimes for which mandatory detention could be imposed.¹⁵⁹ IIRIRA also combined deportation and exclusion proceedings into removal proceedings by replacing the term “entry” with “admission.”¹⁶⁰ Both “inadmissible” and “deportable aliens” now fall under the umbrella of removal proceedings.¹⁶¹

VI. Moral Panic and Punitive Solution: Tough on Illegal Immigration

Moral panics typically manifest themselves in strengthening the social control apparatus of a society through tougher or more renewed rules, longer sentences, and more intense public hostility.¹⁶² Politicians needed a physical way to demonstrate to their constituents that they were working toward correcting the perceived illegal immigration and now national security threat. Detention centers presented a visible way for politicians to show that they were “controlling” the problem. The shift to tougher detention laws for illegal immigrants parallels the tough on crime movement in domestic U.S. politics that began in the late 1960s. The domestic tough on crime rhetoric and policies employed first by conservatives resulted in stricter punitive policies that increased jail time and enacted mandatory minimum sentencing as a response to the public’s fear of rising crime and call for a solution.¹⁶³ The media facilitated a fictitious crime rise through biased coverage of highly visible crimes, and politicians alluded to rising crime in their campaigns.¹⁶⁴ Thus, the perception of officials acting to decrease the crime rate through increased funding to prisons and law enforcement and symbolic rhetoric condemning “felons” and “drug abusers” became more important than the actual crime rate.¹⁶⁵ Similar to prisons, immigration detention centers functioned as political symbols to create and sustain an “us versus them” mentality by physically separating immigrants deemed criminal or unfit for assimilation into U.S. society.

Similar to the electoral incentives politicians received for being “tough on crime,” politicians also received electoral benefits from being “tough on illegal immigration.”¹⁶⁶ By creating tougher detention laws, the politicians who voted in favor of the Anti-Drug Abuse Act of 1988, AEDPA, and IIRIRA perpetuated society’s fear of immigrants because people saw the

¹⁵⁴ ACLU, *Justice Detained* at 3.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ INA § 237(a)(1)(A)

¹⁵⁸ INA § 236(c)(1)(A)

¹⁵⁹ “Analysis of Immigration Detention Policies.”

¹⁶⁰ Sonia Chen, “The Illegal Immigration Reform and Immigrant Responsibility Act of 1996: Another Congressional Hurdle for the Courts,” *Ind. J. Global Legal Stud.* 8 (2000): 181.

¹⁶¹ *Id.*

¹⁶² Ben-Yehuda and Goode, “Moral Panics: Culture, Politics, and Social Construction,” 31.

¹⁶³ Wilshner, *Immigration Detention* at 234.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

emergence of tougher laws as indicating that the illegal immigration problem was out of control. Following the partisan distribution of the domestic tough on crime approach, supporters of the punitive immigration bills in the 1980s and 1990s were also predominantly Republican, while the opponents were predominantly Democrat.¹⁶⁷

During the 1980s and 1990s, it paid off politically to look and act “tough on crime” because Americans viewed murders, robberies, drug abuse, and violence as immediate threats to their lives.¹⁶⁸ After the Congressional and GAO report on criminal aliens and the 1993 World Trade Center bombings, Americans began to view illegal immigrants in the same threatening vein, as a serious danger to their lives, with the only solution being to lock immigrants away and send them back to their countries.

The construction of immigrants as criminal and undesirable by U.S. citizens and politicians resulted from the change in immigrant composition, increased immigration, and economic insecurity that manifested as a moral panic when triggered by Congressional research into New York City immigrant drug crime and the 1993 World Trade Center bombings. The moral panic that resulted from perceived fears and threats over immigration lead policymakers to institute punitive policies to quell this fear. The Anti-Drug Abuse Act of 1988, AEDPA, and IIRIRA increased the number of immigrants within the detention center system by expanding the categories of immigrants eligible for detention and led to the current alien carceral state.

VII. The Present Alien Carceral State: Mass Incarceration of Illegal Aliens: Stated Purpose of Detention Centers

After the rise of detention centers and mass incarceration of illegal immigrants as a result of punitive policies in the 1980s and 1990s, the purpose of detention centers moved away from screening and minor security threats during wartime to protecting the security of the U.S. from perceived security threats during both war and peace time and acting as a deterrent to control borders and migration. Aliens are now viewed as a permanent threat to national security.¹⁶⁹ Government officials speak of detention centers as promoting “border control” or protecting “territorial sovereignty” by deterring some potential migrants from attempting unauthorized entry.¹⁷⁰ The government believes that the fear of detention and deportation afterwards will convince immigrants to not come to the U.S. illegally.¹⁷¹ Jeh C. Johnson, the secretary of DHS publicly acknowledged that, “I believe [detention centers are] an effective deterrent.”¹⁷² Extended detentions, motivated by a hostile political climate, have been used to deter irregular migration and intern aliens convicted of crimes post-sentence.¹⁷³

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 334.

¹⁷¹ *Id.*

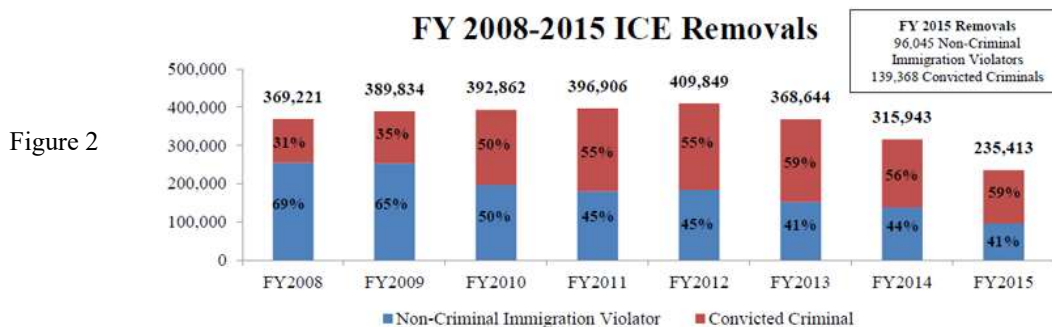
¹⁷² Julia Preston, “Detention Center Presented as Deterrent to Border Crossings,” *New York Times*, December 15, 2014, accessed March 20, 2016, http://www.nytimes.com/2014/12/16/us/homeland-security-chief-opens-largest-immigration-detention-center-in-us.html?_r=1.

¹⁷³ Wilshner, *Immigration Detention* at 28.

VIII. Who Is Detained and for How Long?

As a result of the punitive immigration policies of the late 1980s and early 1990s, the categories of immigrants subject to detention expanded, leading to more immigrants entering detention centers. After the September 11th terrorist attacks, detention of foreigners became more widespread as alienage became an important legal and political tool to support extraordinary detention measures against suspected terrorists, which grew to encompass all immigrants.¹⁷⁴ September 11th gave immigration authorities wide and potentially indefinite powers to detain immigrants while seeking the removal of aliens when some evidence suggested that they were security threats.¹⁷⁵ In response, Congress passed the U.S. PATRIOT Act in 2001, which allowed for specific statutory powers to provide for independent detention. Section 412 of the act amended the INA so a certified immigrant by the Attorney General can be taken into custody and held until removed from the U.S.¹⁷⁶

Currently, there are 205 active immigration detention facilities.¹⁷⁷ From 2001 to 2013, the number of immigrants passing through detention centers rose from 204,459 to 440,557.¹⁷⁸ The average number of daily beds occupied in immigration detention centers increased from 18,000 in 2004 to the current capacity of 34,000 beds as of FY2016.¹⁷⁹ According to Immigration and Customs Enforcement (ICE), the types of aliens in detention centers shifted between FY2008 and FY2015 from 69% to 41% non-criminal immigration violators and 31% to 59% convicted criminals, respectively.¹⁸⁰ Now, the majority of illegal immigrants detained and removed from the U.S. have a criminal conviction that led to their detention and ultimate removal. The removals in the figure include seizures of illegal immigrants both at the border and within the U.S.¹⁸¹ For apprehensions within the U.S., 91% of the aliens caught were previously convicted of a crime.¹⁸² Criminal aliens, who after serving their sentences in a state or federal prison, are subject to further detention pending their removal proceedings.¹⁸³



¹⁷⁴ Wilshner, *Immigration Detention*, 213.

¹⁷⁵ *Id.* at 233.

¹⁷⁶ *Id.* at 238.

¹⁷⁷ “United States Immigration Detention,” Global Detention Project, accessed March 20, 2016, <http://www.globaldetentionproject.org/countries/americas/united-states>.

¹⁷⁸ *Id.*

¹⁷⁹ “Budget-in-Brief: Fiscal Year 2016,” 5.

¹⁸⁰ U.S. Immigration and Customs Enforcement, *ICE Enforcement and Removal Operations Report Fiscal Year 2015* (Washington, D.C.: Government Printing Office, 2015), <https://www.ice.gov/removal-statistics>.

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ ACLU, *Justice Detained* at 4.

According to the Syracuse Transactional Records Access Clearinghouse, between November and December of 2012, 40% of 66,305 detainees remained in a detention center for between 0 and 3 days.¹⁸⁴ Fourteen percent stayed between 4 and 14 days, 16% stayed between 15 and 30 days and 31 to 61 days each, 6% stayed between 61 to 90 days, 5% stayed between 91 and 179 days, and only 3% stayed more than 180 days.¹⁸⁵ The average detention stay nationally between November and December of 2012 was 31 days with a median of 11 days.¹⁸⁶

A. Cost

While close supervision of a released immigrant costs about \$12 per day per capita, incarceration costs on average \$95 per day per capita.¹⁸⁷ Immigration detention centers cost the government \$1.2 billion per year, with the budget increasing every year.¹⁸⁸ DHS's budget for bed space skyrocketed from \$641 million in 2005 to \$945 million in 2006.¹⁸⁹ As the number of detained immigrants increases and private corporations cut costs to services and maintenance, profits continue to rise at the expense of the taxpayer.¹⁹⁰ Taxpayers pay around \$130 billion per year to maintain the immigration detention system.¹⁹¹

The President's FY2015 Budget requested \$1.3 billion to supervise 60,000 illegal aliens per day for 30,539 detention beds and \$1.8 billion to provide safe, secure, and humane detention of removable aliens who are held in government custody because they present a flight risk, a risk to public safety or are subject to mandatory detention.¹⁹² The President's FY2016 Budget Request increased supervision to 87,000 immigrants per day, requesting \$1.395 billion to support 34,000 adult detention beds for higher risk individuals and \$3.3 billion to provide safe, secure, and humane detention and removal of removable individuals in government custody.¹⁹³ Therefore, the current daily average cost to taxpayers per immigrant detainee is about \$112.¹⁹⁴

Conclusion

Moral panics occur suddenly, and thus policies and legislation are often made in haste, driven more by emotion than rational decision-making. Typically, after a moral panic concludes, a re-assessment of the supposed threat forces the observer to recognize that the fear and apprehension were exaggerated or misplaced because the threats were culturally and politically

¹⁸⁴ "Legal Noncitizens Receive Longest ICE Detention," TRAC Immigration, accessed March 20, 2016, <http://trac.syr.edu/immigration/reports/321/>.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ Riddhi Mukhopadhyay, "Death in Detention: Medical and Mental Health Consequences of Indefinite Detention of Immigrants in the United States," *Seattle J. Soc. Just.* 7 (2008): 703.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² "Budget-in-Brief: Fiscal Year 2015," U.S. Department of Homeland Security, (Washington, D.C.: Government Printing Office, 2015), accessed February 25, 2016, <https://www.dhs.gov/sites/default/files/publications/FY15BIB.pdf>, 13.

¹⁹³ "Budget-in-Brief: Fiscal Year 2016," 5.

¹⁹⁴ $(\$1.395/365 \text{ days})/34,000 \text{ detention beds} = 112.41$.

constructed by the human imagination to inspire fear for a political purpose.¹⁹⁵ This realization has not occurred yet for some Americans and policymakers for immigration or detention policies because of the ingrained use of symbolic politics and the privatization incentives.

ICE's need for staff to handle the influx of immigrants outweighs its capacity, and thus ICE outsources to private companies.¹⁹⁶ Privatization has "locked in" punitive immigration policies. In 2010, Corrections Corporation of America (CCA) and the GEO Group, Inc. (GEO) reported annual revenues of \$200.4 million and \$234 million respectively from ICE detention center facilities. Between 2001 and 2011, CCA spent \$18 million and GEO spent \$2 million lobbying DHS, the Department of Justice, both houses of Congress, and the Office of Management and Budget, to name a few.¹⁹⁷ CCA and GEO also spent \$2,223,941 on political campaigns in 2010, up from the \$840,885 the private corporations donated to political campaigns in 2002.¹⁹⁸ Privatization incentivizes states and private corporations that profit from running detention centers, and these private corporations donate to politicians, further inducing stricter and more punitive detention policies and uses of symbolic politics to perpetuate American fears. The punitive immigration detention policies of the 1980s and 1990s continue to structure immigration detention because politicians continue to exacerbate the fear of illegal immigrants because it benefits them and the private corporations that help ensure their reelection.

From 1990 to 2007, the number of illegal aliens in the U.S. grew from 3.5 million to 12.2 million.¹⁹⁹ Since 2007, the population has slightly declined and remains stable at the 2014 number of 11.3 million unauthorized immigrants in the U.S.²⁰⁰ The development of animosity and anxiety over illegal immigrants stems from the 1965 INA amendment and U.S. intervention abroad, which shifted the composition of immigrants from predominantly European to Latin and Central American and led to increased immigration, and economic recessions and job losses in the 1980s and 1990s, which increased economic insecurity of working Americans.

These events combined with symbolic political rhetoric negatively constructing immigrants laid the foundation for an anti-immigrant moral panic. Increased drug crime in New York City and subsequent Congressional research as part of the "War on Drugs" in the 1980s and the 1993 World Trade Center bombings triggered the moral panic, allowing consensus over hostility and concern and disproportionality over immigrants' status, criminality, and effect on the U.S. to converge. The triggers solidified immigrants' construction as not only detrimental and damaging to U.S. social and cultural order and economy, but also to the safety of U.S. neighborhoods and national security. The resulting moral panic led to a call for punitive policies to respond to the perceived threat of illegal immigrants through tougher detention laws that increased who could face detention and for how long. Even if detention centers do not actually function to deter illegal immigrants, they appear to provide a perceived level of security against

¹⁹⁵ Ben-Yehuda and Goode, "Moral Panics," at 150-151.

¹⁹⁶ Michael Flynn and Cecilia Josephine Cannon, "The privatization of immigration detention: Towards a global view," *available at SSRN 2344196* (2009), 15.

¹⁹⁷ "The Influence of the Private Prison Industry in the Immigration Detention Business," Detention Watch Network, accessed March 20, 2016.

<http://www.detentionwatchnetwork.org/sites/default/files/reports/DWN%20Private%20Prison%20Influence%20Report.pdf>.

¹⁹⁸ "Gaming the System: How the Political Strategies of Private Prison Companies Promote Ineffective Incarceration Policies."

¹⁹⁹ "Unauthorized Immigrant Population Stable for Half a Decade," Jeffrey S. Passel and D'Vera Cohn, accessed February 25, 2016, <http://www.pewresearch.org/fact-tank/2015/07/22/unauthorized-immigrant-population-stable-for-half-a-decade/>.

²⁰⁰ *Id.*

the perceived illegal immigrant threat. People are willing to pay for immigration detention centers because the fear of immigrants still exists due to politicians perpetuating the construction of immigrants as security threats because it benefits them electorally and economically.

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PARENTS INVOLVED IN COMMUNITY SCHOOLS V. SEATTLE SCHOOL DISTRICT:
AN ANALYSIS

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Abstract

In *Parents Involved in Community Schools v. Seattle School District*, Justice Breyer’s “antisubordination” argument – as Mark Graber describes it – clashes with the proper application of precedent—the plurality’s critique of that part of his opinion is thus justified.²⁰¹ His strict scrutiny analysis, however, does not suffer from this problem; in other words, it is cognizant of the concrete jurisprudential foundations related to the issue. Hence, *Parents Involved* should have been decided on the basis of Breyer’s strict scrutiny analysis. The language and original intent of the Fourteenth Amendment, however, are unreliable guides at best, providing no clear answer as to whether the student assignment plans are constitutional.

²⁰¹ Choper, Jesse H., et al. *Constitutional Law: Cases, Comments, and Questions*. 12th ed. St. Paul: West Academic, 2015. Print. 1410.

I. The Plain Meaning of the Equal Protection Clause

The Equal Protection Clause dictates that “[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”²⁰² The apparent directness of the language is misleading, as the meaning of “equal protection of the laws” is unclear even in a political and jurisprudential vacuum. The Oxford English Dictionary defines “equal” (when pertaining to laws) as “[a]ffecting all objects in the same manner and degree; uniform in effect or operation,” but “often passing into . . . [f]air, equitable, just, impartial.”²⁰³ Establishing what is “fair” or “just” necessarily involves the use of normative judgment, and, as the maintenance of the “separate but equal” doctrine for over fifty years shows, even “same manner and degree” was once understood very differently.²⁰⁴ It is thus discernible how language could have a rather unclear bearing on the constitutionality of the student assignment plans in *Parents Involved*. One might argue (as Chief Justice Roberts does)²⁰⁵ that all racial classifications are suspect because they do not “[a]ffect[] all objects in the same manner and degree,” but doing so disregards the question of whether a law might nonetheless be “just” or whether differential treatment actually can make a certain law just.²⁰⁶

However, taking the Equal Protection Clause to *require* “justness” or “fairness” is problematic from both a semantic and practical standpoint. First, although the argument that the Equal Protection Clause imposes on the government an affirmative duty to act justly, fairly, and equitably is not without merit, it is inconsistent with the fact that the operative sense of the clause is negative: “*No State shall . . . deny to any person within its jurisdiction the equal protection of the laws*” (emphasis added).²⁰⁷ Second, if “equal” means “[f]air, equitable, just, impartial,” impartiality might clash with the aforementioned duty to ensure fair, just, and equitable treatment (which may require privileging specific groups of people).²⁰⁸ Finally, the number of cases that would arise under a “fairness” conception of the Fourteenth Amendment would overwhelm the judiciary and impermissibly endow it with the unprecedented power to say that a law is unconstitutional because it seems generally unfair.

Therefore, where a “same manner” view is too rigid, the “fairness” conception is far too flexible.²⁰⁹ In more concrete terms, to have an “interest in achieving racial ‘diversity’” seems just, in light of past discrimination, *de jure* or not, but the language of the Fourteenth Amendment does not definitively support that view.²¹⁰ Conversely, Chief Justice Roberts’ position – which Graber terms “anti-classification” – might seem to be the most impartial approach, but it is justified only by an overly narrow reading of “equal.”²¹¹ The justices therefore acted prudently in not relying upon the language of the Fourteenth Amendment as the main justification for their views—different dictionaries define “equal” differently, and these definitions are easy to twist. To

²⁰² *U.S. Constitution*, Amend. XIV, Sec. 1.

²⁰³ “Equal, adj. and n.” *OED Online*. Oxford University Press, December 2016. Web. 4 February 2017.

²⁰⁴ *Id.*; Fallon, Richard H. *The Dynamic Constitution: An Introduction to American Constitutional Law and Practice*. 2nd ed. Cambridge: Cambridge University Press, 2013. Print.

²⁰⁵ “The way to stop discrimination on the basis of race is to stop discriminating on the basis of race” (*Parents Involved*, Roberts, 748).

²⁰⁶ Oxford English Dictionary, *supra*.

²⁰⁷ U.S. Const., amend. XIV, sec. 1, *supra*.

²⁰⁸ Oxford English Dictionary, *supra*.

²⁰⁹ *Id.*

²¹⁰ *Parents Involved in Community Schools v. Seattle School District*, 551 U.S. 701 (2007). Breyer, 838.

²¹¹ Choper, *supra*.

predicate the interpretation of so important an amendment on so pliable an approach would be tantamount to removing the “filter of legal argument” through which inevitably “ideological arguments” must be run.²¹²

II. Original Intent of the Fourteenth Amendment

The original intent of the Fourteenth Amendment is similarly unhelpful with regard to the issue in *Parents Involved*. As Richard H. Fallon explains: “By all accounts, the principal purpose of the Fourteenth Amendment... was to protect former slaves and their descendants against the most invidious forms of state discrimination. ... [A]lmost no one appears to have thought that the Fourteenth Amendment barred state and local government from operating racially segregated public schools.”²¹³ Cass R. Sunstein, citing Charles L. Black, notes that

The question of the ‘intent’ of the men of 1866 on segregation *as we know it* calls for a far chancier guess than is commonly supposed, for they were unacquainted with the institution as it prevails in the American South today. To guess their verdict upon the institution as it functions in the midtwentieth century supposes an imaginary hypothesis which grows more posterous as it is sought to be made more vivid (emphasis in original).²¹⁴

Assessing the constitutionality of racial balancing (absent a legal mandate to remedy past wrongs) in the context of original intent would thus seem primarily to involve guessing rather than historical analysis. Furthermore, *Brown* itself describes the “nature of the Amendment’s history” as “inconclusive” and declares that public education must be “consider[ed] ... in the light of its full development and its present place in American life throughout the Nation.”²¹⁵ Given that at the very core of the debate in *Parents Involved* is a disagreement over the “legacy of *Brown*,” it is difficult to see *why* original intent should play a decisive role.²¹⁶ Even if Judge Michael McConnell’s contention that “racial segregation was inconsistent with the original meaning of the Fourteenth Amendment” is accepted as true, it cannot act as a helpful guideline in *Parents Involved*, as the issues do not involve segregation *per se*.²¹⁷ As mentioned, original intent analysis would hence necessitate a great deal of speculation, at which point it again becomes doubtful that the filter of legal argument remains in place, or, at least, functions properly.

III. De Jure and De Facto Segregation: The Limits of Judicial Authority

In *Parents Involved*, the Court considered the question of “whether a public school that had not operated legally segregated schools or has been found to be unitary may choose to classify students by race and rely upon that classification in making school assignments.”²¹⁸ In his dissent, Justice Breyer frames the issue in terms of *Swann v. Charlotte-Mecklenburg Board of Education*: he notes that the “race-conscious desegregation measures that the Constitution *permitted*, but did

²¹² Fallon, Richard H. “Race and the Constitution, Part II.” Lowell Hall, Cambridge, MA. 10 September 2015. Lecture.

²¹³ Fallon, *supra* at 153-4.

²¹⁴ Sunstein, Cass R. “Black on Brown.” *Virginia Law Review* 90.6 (2004). *HeinOnline*. Web. 4 February 2017. 1651.

²¹⁵ *Brown v. Board of Education*, 347 U.S. 483 (1954). 483, 492-493.

²¹⁶ Fallon, Richard H. “School Desegregation and Related Issues.” Lowell Hall, Cambridge, MA. 15 September 2015. Lecture.

²¹⁷ Sunstein, *supra* at 1659.

²¹⁸ *Parents Involved*, *supra* at 711.

not *require*” (emphasis in original) in *Swann* were “similar to those at issue here.”²¹⁹ It may very well be the case that the measures were similar, but the context was different; as the plurality opinion correctly observes, the “distinction between segregation by state action and racial imbalance caused by other factors has been central to our jurisprudence in this area for generations.”²²⁰

Swann consequently cannot be interpreted in a way supportive of Justice Breyer’s view, as it considered only the question of de jure discrimination: “The objective today remains to eliminate from the public schools all vestiges of *state-imposed segregation*” (emphasis added).²²¹ Quite simply, in Seattle, “official discrimination was never proved nor admitted,” and in Jefferson County, schools were “found to be unitary.”²²² Lowering the standard of proof so that a 1956 “memo” was enough to prove de jure segregation would create a slippery slope where de facto would easily become de jure segregation.²²³ Even though eliminating de facto segregation would be desirable, the Constitution does not require it, and as the Court stated in *Swann*, “it is important to remember that judicial powers may be exercised only on the basis of a constitutional violation.”²²⁴ *Remedial judicial authority does not put judges automatically in the shoes of school authorities whose powers are plenary. Judicial authority enters only when local authority defaults*” (emphasis added).²²⁵

Furthermore, the judiciary as an institution is ill-equipped to assume the role of a nationwide school authority (nor was it intended to do so). Due to the many practical problems involved in doing so, courts would not be able to fashion effective remedies for de facto segregation. The fact that Chief Justice Warren, as Graber writes, “in private, made clear that his commitment was to an anti-subordination conception of equal protection that forbade uses of racial classifications to disadvantage minorities rather than an anti-classification conception that forbade uses of race under any circumstances” is indeed a “rather weak reed to hang the strong antisubordination theory necessary to sustain the dissents in *Parents Involved*,” especially if the Court is to continue to properly adhere to *stare decisis*.²²⁶

IV. Justice Breyer’s Application of Strict Scrutiny

Whereas Justice Breyer’s anti-subordination argument is not supported by precedent, his strict scrutiny analysis is. In applying the test, Breyer is much more faithful to relevant *Brown* and post-*Brown* principles than the Court. This is particularly true of Breyer’s analysis of the “democratic element” inherent in the “interest in achieving racial ‘diversity’”: “[T]here is a democratic element: an interest in producing an educational environment that reflects the ‘pluralistic society’ in which our children will live... [T]his Court from *Swann* to *Grutter* has treated these civic effects as an important virtue of racially diverse education.”²²⁷ The excerpt from *Swann* quoted in a different part of his opinion indeed supports this view: “School authorities are

²¹⁹ *Id.*, Breyer at 803.

²²⁰ *Id.*, Roberts at 736.

²²¹ *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971). 15.

²²² Choper, *supra* at 1399; *Parents Involved*, *supra* at 711.

²²³ *Parents Involved*, *supra* Breyer at 820.

²²⁴ Citing *Milliken v. Bradley*, the Court points out that “the Constitution is not violated by racial imbalance in the schools, without more” (*Parents Involved* 721).

²²⁵ *Swann*, *supra* at 16.

²²⁶ Choper, *supra* at 1410.

²²⁷ *Parents Involved*, *supra* Breyer at 838, 840-1.

traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. *To do this as an educational policy is within the broad discretionary powers of school authorities*” (emphasis in original).²²⁸ Furthermore, the bearing of *Brown* on the question of the democratic element must not be disregarded: within the framework of “intangible considerations”, the Court remarks that “[t]o separate [children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.”²²⁹ Common sense dictates that this is also true in the case of de facto segregation or even racial imbalance, notwithstanding that “[t]he impact is greater when it has the sanction of the law.”²³⁰

As for narrow tailoring, Breyer avers that “the manner in which the school boards developed these plans itself reflects ‘narrow tailoring’. Each plan was devised to overcome a history of segregated public schools. Each plan embodies the results of local experience and community consultation.”²³¹ The above quote from *Swann* is important in this context as well, as courts are not as well predisposed as school boards to say what policy would be effective; thus, narrow tailoring should be assessed in this context of deference to school authorities. The plurality contends that the plan is not narrowly tailored, but does not offer much to support that view, with the exception of *one* high school where “enrolling students without regard to their race yield[ed] a substantially diverse student body under any definition of diversity.”²³²

Conclusion

Even though the constitutionality of the school plans should in any case have been assessed under strict scrutiny – if for no other reason because Justice Breyer’s anti-subordination view is not sufficiently justified by precedent – the Court’s conclusion was faulty. Justice Breyer’s conceptually correct view is vindicated by precedent, most notably *Brown*, and should thus have prevailed.

²²⁸ *Id.* at 804-5.

²²⁹ *Brown, supra* at 494.

²³⁰ *Id.*; Goodwin Liu writes: “Tellingly, the forty-one-page plurality opinion in *Seattle/Louisville* contains only one quotation from *Brown*: a paltry sentence fragment: ‘The impact of segregation is greater when it has the sanction of law’—that omits the crucial adjacent words locating the illegality of segregation in the detrimental effects on black children” (cited in Choper 1409).

²³¹ *Parents Involved, supra* Breyer at 848.

²³² *Id.*, Roberts at 728.

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