

# GENDERED (IN)SECURITY: MIGRATION AND CRIMINALIZATION IN THE SECURITY STATE

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## INTRODUCTION

Over the past decade, both immigrant rights and lesbian, gay, bisexual, transgender, and queer (LGBTQ) rights have been key issues in United States political and legal debates.<sup>1</sup> Yet, the two issue areas have rarely pub-

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<sup>1</sup> See, e.g., Kevin R. Johnson & Bernard Trujillo, *Immigration Reform, National Security After September 11, and the Future of North American Integration*, 91 MINN. L. REV. 1369, 1370 (2007); see also Kenji Yoshino, *The Gay Tipping Point*, 57 UCLA L. REV. 1537, 1537 (2009–2010):

*The Encyclopedia of Associations*, for instance, shows that the number of organizations devoted to gay causes has skyrocketed in recent decades. In 1970, there were no gay or lesbian associations listed; in 1980, there were 14; in 1990, there

licly intersected within these debates. The “war on terror”<sup>2</sup> has heightened the public debate around immigration, national security, and border control; however, LGBTQ concerns and a discussion of LGBTQ immigrants continue to be rhetorically separate from these immigration-focused conversations.<sup>3</sup> This rhetorical separation is especially problematic for those living at the intersections of different identities, including LGBTQ immigrants of color who live in poverty. As this Article will show, the separation ignores the ways in which individuals who do not fit the public description put forth by “rights-based”<sup>4</sup> organizations are the most negatively impacted by the laws and regulations that are being publicly challenged by these mainstream groups.<sup>5</sup>

Many critics have raised questions about increased acceptance of government surveillance for the purpose of national security.<sup>6</sup> “War on terror” law and policy reforms are justified as necessary to curb illegal border crossings and prevent future terrorist attacks. In 2010, the topic came to the fore-

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were 234; and in 2000, there were 327. A “gay tipping point” occurred in the United States in the latter decades of the twentieth century.

<sup>2</sup> See, e.g., 2001: US declares the War on Terror, BBC, [http://news.bbc.co.uk/onthisday/hi/dates/stories/september/12/newsid\\_2515000/2515239.stm](http://news.bbc.co.uk/onthisday/hi/dates/stories/september/12/newsid_2515000/2515239.stm) (last visited Mar. 6, 2012); see generally CHRISTIAN PARENTI, *THE SOFT CAGE: SURVEILLANCE IN AMERICA FROM SLAVERY TO THE WAR ON TERROR* (2003) (critiquing the erosion of privacy in the name of security). I put “war on terror” in quotations because I am persuaded by the critique that it is a strategic term which has been used to justify tightening surveillance of United States residents, reflecting generalized suspicion of and hostility toward certain immigrant groups while sustaining global wars abroad. See Johnson & Trujillo, *supra* note 1, at 1380.

<sup>3</sup> See generally RICHARD A. CLARKE, *AGAINST ALL ENEMIES: INSIDE AMERICA’S WAR ON TERROR* (2004) (describing the formulation of America’s “war on terror” that followed September 11 and the ways in which it has influenced immigration law and policy); JOEY L. MOGUL, ANDREA J. RITCHIE & KAY WHITLOCK, *QUEER (IN)JUSTICE: THE CRIMINALIZATION OF LGBT PEOPLE IN THE UNITED STATES* (2011) (explaining a rhetorical separation of LGBT issues and issues of policing and punishment).

<sup>4</sup> Rights-based reform efforts work to secure access to a benefit (already in place for other groups) for a marginalized group. Examples of rights-based reform efforts include the right to marry, the right to practice a certain religion, the right to education, the right to vote, and the right to be free from discrimination on the basis of sexuality and/or gender identity. Rights-based reform does not challenge underlying systemic subjugation that creates a world in which race, class, ability, sexuality, and gender dynamics allow for some people to access certain things while others cannot. As such, rights-based reform efforts work towards assimilation instead of dismantling. See generally Dean Spade, *Keynote Address: Trans Law & Politics on a Neoliberal Landscape*, 18 *TEMP. POL. & CIV. RTS. L. REV.* 353 (2008).

<sup>5</sup> See, e.g., DEAN SPADE, *NORMAL LIFE* 13 (2011) (explaining that access to certain privileges that help determine the distribution of life chances—such as whiteness, perceived able-bodiedness, employment, and immigration status—often offer some individuals degrees of buffering from the violence faced by people of color, people with disabilities, immigrants, indigenous people, prisoners, youth in foster care, and the homeless).

<sup>6</sup> See CLARKE, *supra* note 3, at xiii; see also Kathryn A. Sabbeth, *Towards an Understanding of Litigation as Expression: Lessons from Guantánamo*, 44 *U.C. DAVIS L. REV.* 1487, 1490 (2011).

front when Arizona passed Senate Bill 1070 (“SB 1070”),<sup>7</sup> a law that made the failure to carry immigration documents a crime and gave the police broad power to detain anyone suspected of being in the country illegally.<sup>8</sup> A national outcry emerged, with organizations and individuals from many sectors raising concerns about racial profiling, immigrant profiling, and the deputization of local law enforcement with immigration enforcement duties.<sup>9</sup> President Obama spoke out against the measure and urged the Department of Justice to file a lawsuit against the State of Arizona.<sup>10</sup> Other states also reacted—some condemned the measure,<sup>11</sup> while others passed similar “copycat” bills.<sup>12</sup>

<sup>7</sup> S.B. 1070, 49th Leg., 2d Reg. Sess. (Ariz. 2010), available at [https://www.azsos.gov/public\\_services/LegislativeFilings/PDFs/2010/49th\\_Legislature\\_2nd\\_Regular\\_Session/CH\\_113.pdf](https://www.azsos.gov/public_services/LegislativeFilings/PDFs/2010/49th_Legislature_2nd_Regular_Session/CH_113.pdf); see also Maria Marulanda, *Preemption, Patchwork Immigration Laws and the Potential for Brown Sundown Towns*, 79 FORDHAM L. REV. 321, 324 (2011) (discussing the need for greater federal-state cooperation in the immigration context to prevent the piecemeal redirection of immigrant flows in the face of stringent state or local laws).

<sup>8</sup> See, e.g., Randal C. Archibold, *Arizona Enacts Stringent Law on Immigration*, N.Y. TIMES, Apr. 24, 2010, at A1 [hereinafter Archibold, *Arizona Enacts Stringent Law*].

<sup>9</sup> See *id.*; see also Gustavo Arellano, *Arizona Boycott! A La Chingada With Arizona's SB 1070!*, VILLAGE VOICE, May 4, 2010, <http://www.villagevoice.com/2010-05-04/columns/arizona-boycott/>; Amy Goodman, *Boycotting Arizona's Racism*, HUFFINGTON POST (Apr. 29, 2010), [http://www.huffingtonpost.com/amy-goodman/boycotting-arizonas-racis\\_b\\_555896.html](http://www.huffingtonpost.com/amy-goodman/boycotting-arizonas-racis_b_555896.html); INCITE! LA Opposes Arizona's SB 1070, INCITE! WOMEN OF COLOR AGAINST VIOLENCE (May 4, 2010), <http://inciteblog.wordpress.com/2010/05/04/incite-la-opposes-arizonas-sb-1070/>; Stephen Lemons, *Barack Obama Weighs in on SB 1070, Calls Russell Pearce Bill "Misguided"*, PHOENIX NEW TIMES, Apr. 23, 2010, [http://blogs.phoenixnewtimes.com/bastard/2010/04/barack\\_obama\\_weighs\\_in\\_on\\_sb\\_1.php](http://blogs.phoenixnewtimes.com/bastard/2010/04/barack_obama_weighs_in_on_sb_1.php); *Union Calls off Arizona SB 1070 Boycott*, PHOENIX BUS. J. (Sept. 23, 2010), <http://www.bizjournals.com/phoenix/stories/2010/09/20/daily70.html>.

<sup>10</sup> The Executive Branch disapproved of the illegal profiling that SB 1070 seemed to encourage. See Archibold, *Arizona Enacts Stringent Law*, *supra* note 8 (detailing the President's criticisms of the bill and his concerns that it threatened to “undermine basic notions of fairness that we cherish as Americans”); see also Lemons, *supra* note 9 (quoting President Obama in describing the bill as “misguided” and irresponsible).

<sup>11</sup> Many state governors, including Republicans, publicly opposed Arizona SB 1070. For example, then-Governor of California Arnold Schwarzenegger stated, “I was also going to give a graduation speech in Arizona this weekend, but with my accent, I was afraid they would try to deport me.” *Arnold Schwarzenegger Jokes About Arizona in Emory Commencement Speech: They'd Deport Me*, HUFFINGTON POST (May 11, 2010), [http://www.huffingtonpost.com/2010/05/11/arnold-schwarzenegger-jok\\_n\\_571443.html](http://www.huffingtonpost.com/2010/05/11/arnold-schwarzenegger-jok_n_571443.html). Colorado Governor Bill Ritter stated, “I absolutely would veto Arizona's immigration bill were it to come to my desk,” calling the law “unconstitutional.” Jean Spencer, *Several Governors Come Out Against Arizona Law*, WALL ST. J., Apr. 30, 2010, <http://online.wsj.com/article/SB10001424052748703871904575216852938556716.html>. Illinois Governor Pat Quinn said the law wrongly “singles out American citizens because of their Hispanic surname or the way that they look,” and called the law “un-American.” Kristen Gosling, *Illinois Governor Pat Quinn blasts Arizona immigration law*, KSDK.COM (Apr. 30, 2010, 1:24 PM), <http://www.ksdk.com/news/local/story.aspx?storyid=201136>.

<sup>12</sup> Some states have proposed and rejected SB 1070 copycat legislation, including the following: California, Colorado, Iowa, Kansas, Kentucky, Mississippi, Nebraska, New Hampshire, South Dakota, Virginia, and Wyoming. A. ELENA LACAYO, NAT'L COUNCIL OF LA RAZA, ONE YEAR LATER: A LOOK AT SB 1070 AND COPYCAT LEGISLATION 8–10 (2011), available at <http://www.nclr.org/images/uploads/publications/AlookatSB1070v3.pdf>.

Most notably for the purposes of this Article, many local and national LGBTQ organizations, usually not outspoken on immigration, also joined the movement against SB 1070.<sup>13</sup> “Mainstream” LGBTQ organizations<sup>14</sup> had many reasons to be concerned. The anti-immigrant sentiment of SB 1070 presented a threat to immigration reform efforts focused on establishing family-based paths to immigration, primarily the United American Families Act (“UAF”),<sup>15</sup> as well as the movement against the Defense of Marriage Act (“DOMA”).<sup>16</sup>

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The following states are still considering passing similar legislation: Florida, Georgia, Illinois, Indiana, Michigan, North Carolina, Ohio, Oklahoma, Tennessee, and Texas. *Id.* at 11. As of January 2012, Alabama and South Carolina have successfully passed copycat legislation. *See id.*; *see also* H.B. 56, 2011 Reg. Sess. (Ala. 2011); S.B. 20, 119th Gen. Assemb., 1st Reg. Sess. (S.C. 2011). *See also* Seth Freed Wessler, *Mapping the Spread of SB 1070*, COLORLINES (June 24, 2010), [http://colorlines.com/archives/2010/06/mapping\\_the\\_nationwide\\_spread\\_of\\_arizonas\\_sb\\_1070.html](http://colorlines.com/archives/2010/06/mapping_the_nationwide_spread_of_arizonas_sb_1070.html) (explaining that by July 2010, twenty-one states had been discussing or had already introduced Arizona copycat bills).

<sup>13</sup> *See, e.g.*, Shelley Ettinger, *Boycotting Arizona: Authors Cry Out Against SB 1070*, LAMBDA LITERARY (May 12, 2010), <http://www.lambdaliterary.org/features/oped/05/12/boycotting-arizona/>; *see also* Press Release, Stonewall Democrats of Denton Cnty., Resolution Condemning Arizona SB 1070 (June 7, 2010), available at <http://www.stonewalldemocratsfordentoncounty.org/?p=262>; Press Release, Nat’l Gay & Lesbian Task Force, LGBT Rights Groups and Allies Join Outcry Against Anti-Immigrant Measure in Arizona (June 7, 2010), available at [http://www.thetaskforce.org/press/releases/pr\\_af\\_060710](http://www.thetaskforce.org/press/releases/pr_af_060710) (listing the dozens of prominent LGBTQ organizations and allies that spoke out against SB 1070).

<sup>14</sup> I refer to the “mainstream” LGBTQ movement as the political and legal organizations that work to secure civil rights for gay and lesbian Americans. Traditionally, this work has centered on advocating for same-sex marriage legislation, antidiscrimination laws on the basis of sexual orientation, and the repeal of “Don’t Ask, Don’t Tell” and anti-sodomy laws. *See, e.g.*, MOGUL ET AL., *supra* note 3, at xii (stating, “Yet beyond the efforts of mainstream LGBT organizations to frame LGBT people as victims of crime entitled to the full protection of the law, and to strike down sodomy laws, queers have largely been absent from national debates around policing and punishment.”); *see generally* JASBIR K. PUAR, *TERRORIST ASSEMBLAGES: HOMONATIONALISM IN QUEER TIMES* (2007) (examining the ways in which configurations of sexuality, race, gender, nation, class, and ethnicity are realigning in relation to contemporary forces of securitization, counterterrorism, and nationalism; also examining how liberal politics incorporate certain queer subjects into the fold of the nation-state, through developments such as the legal recognition inherent in the overturning of anti-sodomy laws and the proliferation of more mainstream representation).

<sup>15</sup> The Uniting American Families Act (“UAF”) is pending legislation that, if passed, would allow a U.S. citizen or permanent resident to sponsor their same-sex partner for immigration to the U.S., a right which is currently denied. H.R. 1547, 112th Cong. (2011–2012); *see also Bill Summaries*, IMMIGRATION EQUAL. ACTION FUND, <http://immigrationequalityactionfund.org/legislation/summaries/> (last visited Mar. 6, 2012).

<sup>16</sup> 1 U.S.C. § 7 (2011). DOMA states:

In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word “marriage” means only a legal union between one man and one woman as husband and wife, and the word “spouse” refers only to a person of the opposite sex who is a husband or a wife.

*Id.*; the second section of DOMA reaffirms the power of the states to make their own decisions about marriage, stating that no State shall be required to give effect to any same-sex marriage legally performed in another state. *Federal Defense of Marriage Act*

The concerns raised about SB 1070 exposed a growing awareness in the United States about anti-immigrant bias and racial profiling, including in LGBTQ politics and from LGBTQ advocates. However, an analysis of the complex web of immigration laws and regulations that are emerging and its intersections with LGBTQ issues is lacking. While President Obama has spoken out against SB 1070, his administration has simultaneously implemented several new policies and practices that have caused a significant *increase* in deportations during his presidency.<sup>17</sup> The passage of SB 1070 perversely distracted attention from the large-scale profiling permitted and perpetuated through other law and policy reforms emerging during the Obama Administration, such as Secure Communities,<sup>18</sup> as well as legislation put forward prior to Obama's administration including Section 287(g) of the Immigration and Naturalization Act ("INA"),<sup>19</sup> and the Criminal Alien Program.<sup>20</sup> The success of the litigation against SB 1070 is less a sign of pro-

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(DOMA), DOMA WATCH, <http://www.domawatch.org/about/federaldoma.html> (last visited Mar. 6, 2012).

<sup>17</sup> The Obama Administration has deported a record number of undocumented immigrants since President Obama took office in 2008. *See, e.g.*, Shankar Vedantam, *U.S. Deportations Reach Record High*, WASH. POST, Oct. 7, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/10/06/AR2010100607232.html>.

<sup>18</sup> *See* U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, *Secure Communities* (2008), [http://www.ice.gov/secure\\_communities/](http://www.ice.gov/secure_communities/) (last visited Mar. 6, 2012) [hereinafter *ICE Secure Communities*].

<sup>19</sup> The Section 287(g) program, one of Immigration Customs Enforcement's ("ICE") top partnership initiatives, allows a state and local law enforcement entity to enter into a partnership with ICE, under a joint Memorandum of Agreement ("MOA"). The state or local entity then receives delegated authority for immigration enforcement within its jurisdictions. *See* 8 U.S.C. § 1357(g) (2012); *see also* U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, *Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act*, <http://www.ice.gov/287g/> (last visited Mar. 6, 2012) [hereinafter *ICE Delegation of Immigration Authority Section 287(g)*] (discussing joint Memorandum of Agreement protocol); U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, *Factsheet: Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act*, <http://www.ice.gov/news/library/factsheets/287g.htm#signed-moa> (last visited Mar. 6, 2012) ("The 287(g) program is one component of the ICE ACCESS (Agreements of Cooperation in Communities to Enhance Safety and Security) program, which provides local law enforcement agencies an opportunity to team with ICE to combat specific challenges in their communities."). *See id.* for a complete list of existing MOAs.

<sup>20</sup> *See Criminal Alien Program*, U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, <http://www.ice.gov/criminal-alien-program> (last visited Mar. 6, 2012) [hereinafter *ICE Criminal Alien Program*] (this program provides support in the investigation, arrest and removal of aliens who are incarcerated). ICE's website explains:

The Criminal Alien Program provides ICE-wide direction and support in the identification and arrest of those aliens who are incarcerated within federal, state and local prisons and jails, as well as at-large criminal aliens. It is incumbent upon ICE to ensure that all efforts are made to investigate, arrest and remove individuals from the United States by processing the alien expeditiously and securing a final order of removal for an incarcerated alien before the alien is released to ICE custody.

*Id.* The Criminal Alien program leads to putting an "immigration hold" on people, whereby undocumented people go directly from local jails to immigration detention facilities. *See* NAT'L IMMIGRATION FORUM, *IMMIGRANTS BEHIND BARS: HOW, WHY, AND*

gress than it is an instance of what Derrick Bell termed “interest convergence,” which posits that marginalized groups can only affect social change when their interests converge with the interests of the privileged.<sup>21</sup> Gains from these alliances may quell particular instances of racism, but only in a way that maintains conditions and arrangements that are harmful to people of color. Bell explains this theory through the case of *Brown v. Board of Education*,<sup>22</sup> examining the ways in which white fear of black anger and disillusionment was one factor that led to the pivotal decision.<sup>23</sup> Thus, a desire to preserve the white supremacist status quo from the potential challenge of widespread black anger was one reason why the Supreme Court permitted the legal challenge to segregation in public schools to succeed.<sup>24</sup> Bell goes on to explain that while the decision in *Brown* is an important one, its implementation did more to quell dissent than challenge the status quo.<sup>25</sup> Similarly, LGBTQ organizations have been generally silent on immigration issues, and their opposition to SB 1070 has not been accompanied by nor resulted in a sustained shift toward supporting immigrants, LGBTQ or otherwise. As such, these organizations’ opposition to SB 1070 threatens to prove little more than another exceptional event that leaves existing power structures intact.

Although little statistical data exists, advocates who work at the intersection of LGBTQ and immigrant justice understand that LGBTQ immigrants, especially transgender and gender-nonconforming immigrants, are particularly vulnerable to profiling<sup>26</sup> and anti-immigrant bias,<sup>27</sup> and are likely

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HOW MUCH? 3 (2011), available at [http://www.immigrationforum.org/images/uploads/2011/Immigrants\\_in\\_Local\\_Jails.pdf](http://www.immigrationforum.org/images/uploads/2011/Immigrants_in_Local_Jails.pdf).

<sup>21</sup> Derrick A. Bell, Jr., Comment, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980).

<sup>22</sup> 347 U.S. 483 (1954).

<sup>23</sup> Bell, *supra* note 21, at 523.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> LGBTQ people, and trans women in particular, are commonly profiled by the police as engaging or intending to engage in prostitution. While some trans people, like some non-trans people, actually do engage in prostitution, this stereotype is perpetuated for all trans people in society. Like the targeting of other marginalized communities, this stereotype is also legitimized by the State and particularly the police, often through false arrests. See AMNESTY INT’L USA, STONEWALLED: POLICE ABUSE AND MISCONDUCT AGAINST LESBIAN, GAY, BISEXUAL AND TRANSGENDER PEOPLE IN THE U.S. 16 (2005), available at <http://www.amnesty.org/en/library/asset/AMR51/122/2005/en/2200113d-d4bd-11dd-8a23-d58a49c0d652/amr511222005en.pdf> [hereinafter STONEWALLED]:

Transgender individuals are often the subject of intense police scrutiny and [Amnesty International] heard many reports of transgender women being stopped by police and questioned about their reason for being on the street and where they were going, often under the pretext of policing sex work, even when those stopped were engaging in routine daily activities such as walking a dog or going to a local shop.

*Id.* at 21; see also April Walker, *Racial Profiling—Separate and Unequal, Keeping the Minorities in Line—The Role of Law Enforcement in America*, 23 ST. THOMAS L. REV. 576, 604 (2011) (explaining “[i]ncreased incidents of police brutality apply to any groups of people deemed to be ‘the other,’” and that this standard also applies to mem-

to experience particularly harmful consequences of the merger of criminal and immigration enforcement.<sup>28</sup> In this Article, I will show how the aberrant outcry by the mainstream LGBTQ community against only one of the many discriminatory immigration laws ignores the ever-present criminalization of LGBTQ immigrants as part of the acceptable status quo. Part I will examine the experiences of low income transgender and gender-nonconforming<sup>29</sup> immigrants of color who face disproportionately high rates of profiling on a daily basis,<sup>30</sup> suffer unspeakable violence and harassment and discrimination in jails and prisons, and, as a result of plea bargaining to avoid incarceration, are subject to deportation as a collateral consequence of the “war on terror.” Part II will describe the legal landscape of harsh and draconian immigration laws implemented in the wake of September 11, 2011. I will examine how

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bers of LGBT communities). Walker continues, “[t]he general idea is disturbingly summed up by a Los Angeles police officer quoted in the 1991 Christopher Commission Report, which states, ‘it’s easier to thump a faggot than an average Joe. Who cares?’” *Id.* (citing WARREN CHRISTOPHER, INDEP. COMM’N ON THE LOS ANGELES POLICE DEPT’ 91 (1999)). See generally Andrea J. Ritchie & Joey L. Mogul, *In the Shadows of the War on Terror: Persistent Police Brutality and Abuse of People of Color in the United States*, 1 DEPAUL J. SOC. JUST. 175 (2008) (presenting specific examples in which people of color were systematically and routinely unconstitutionally targeted by local law enforcement).

<sup>27</sup> See, e.g., Pooja Gehi, *Struggles from the Margins: Anti-Immigrant Legislation and the Impact on Low-Income Transgender People of Color*, 30 WOMEN’S RTS. L. REP. 315, 326 (2009) [hereinafter Gehi, *Struggles from the Margins*]; Deborah A. Morgan, *Not Gay Enough for the Government: Racial and Sexual Stereotypes in Sexual Orientation Asylum Cases*, 15 L. & SEXUALITY 135 (2006) (examining racism and homophobia in the asylum application process); Victoria Neilson, *Homosexual or Female? Applying Gender-Based Asylum Jurisprudence to Lesbian Asylum Claims*, 16 STAN. L. & POL’Y REV. 417, 431 (2005); C.T. Turney, *Give Me Your Tired, Your Poor, and Your Queer: The Need and Potential for Advocacy for LGBTQ Immigrant Detainees*, 58 UCLA L. REV. 1343, 1348 (2011) (explaining the need for advocacy for better conditions for LGBT immigrant detainees).

<sup>28</sup> See, e.g., STONEWALLED, *supra* note 26, at 2 (explaining that their findings “[s]trongly indicate that police abuse and the forms [it] takes are often specific to the different aspects of the victim’s identity, such as sexual orientation, race, gender or gender identity, age or economic status”). Identities are complex, multi-layered, and intersectional, such that a person may be targeted for human rights violations based on a composite of identities that the person seems to represent. For example, a lesbian woman who is black may not only be a target of police abuse because of her sexual orientation but also because she is a woman of color. The targeting of lesbian, gay, bisexual, and transgender people for discriminatory enforcement of laws and their treatment in the hands of the police needs to be understood within the larger context of identity-based discrimination, and that interplay between different forms of discrimination—such as racism, sexism, homophobia, and transphobia—creates the conditions in which human rights abuses are perpetuated.

<sup>29</sup> I use the term *transgender* or *trans* and/or *gender-nonconforming* to refer to people who have a gender identity or gender expression different from that traditionally associated with their assigned sex at birth. People use many different terms to describe their gender identity and expression, all of which should be respected. Some examples from my experience include femme, queen, cross dresser, transsexual, genderqueer, FTM, MTF, A.G., man, woman, or trans. I use the terms transgender and trans because they are often understood as umbrella terms that encompass many different gender identities. Trans women are people who now identify as women. Trans men are people who now identify as men.

<sup>30</sup> See MOGUL ET AL., *supra* note 3, at xii.

the “war on terror” has resulted in the further marginalization of already subjugated groups in the name of national security. Part III will examine how the vehement condemnation of SB 1070 and the rallying of the mainstream LGBTQ community against this bill exhibited characteristics of Derrick Bell’s interest convergence theory because a wide variety of groups felt that their own civil liberties, or the rights of others, were being violated and simultaneously rose up against the legislation. In essence, I argue in Part III, the initial victory against SB 1070 was won because the whole country paid attention and joined in the fight against Arizona’s bill.<sup>31</sup> Employing Alan Freeman’s “perpetrator model,” I explore how, in winning this small victory and railing so vocally against this one particularly publicized threat to civil rights, the rest of the discriminatory criminal immigration system was thereby legitimized. Many other discriminatory immigration bills exist, yet they are not challenged with the same fervor as was SB 1070. This small-scale, targeted mobilization against a single perpetrator-of-sorts, combined with the traditional rights-based debates<sup>32</sup> of the mainstream LGBTQ community, implicitly condones the wide-spread prevalence of racial and gender-nonconformity profiling, as well as other draconian immigration laws which disproportionately affect LGBTQ immigrants of color.

#### I. CRIMINALIZATION OF TRANSGENDER IMMIGRANTS OF COLOR

The United States has a long history of hyper-criminalization, disproportionate imprisonment, and law enforcement profiling of people of color.<sup>33</sup> As Andrea Ritchie and Joey Mogul explain, “Since the advent of the first state-sponsored police forces in the United States—slave patrols—racialized policing has been a feature of the American landscape. Indeed, racial profiling and police brutality have their roots in enforcement of Slave Codes, and later Black Codes and Jim Crow segregation laws.”<sup>34</sup> Many scholars view the criminal punishment system as it exists today as an extension of slavery as it existed throughout the history of the United States.<sup>35</sup>

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<sup>31</sup> At this moment, it is unclear what will happen with SB 1070 as Arizona recently appealed and was granted leave to argue its merits before the United States Supreme Court. See Lawrence Downes, *When States Put Out the Unwelcome Mat*, N.Y. TIMES, Mar. 10, 2012, <http://www.nytimes.com/2012/03/11/opinion/sunday/when-states-put-out-the-unwelcome-mat.html>.

<sup>32</sup> See *supra* note 4 and accompanying text.

<sup>33</sup> See, e.g., GLOBAL LOCKDOWN: RACE, GENDER, AND THE PRISON INDUSTRIAL COMPLEX 81 (Julia Sudbury ed., 2005) (discussing the disproportionate incarceration of marginalized groups in the United States and globally using a transnational feminist framework).

<sup>34</sup> Ritchie & Mogul, *supra* note 26, at 177.

<sup>35</sup> See ANGELA Y. DAVIS, ARE PRISONS OBSOLETE? 22–39 (2003). Davis explains:

Particularly in the United States, race has always played a central role in constructing presumptions of criminality. After the abolition of slavery, former slave states passed new legislation revising the Slave Codes in order to regulate the behavior of free blacks in ways similar to those that had existed during slav-

Gender policing has also been a key part of illegitimate profiling throughout history.<sup>36</sup> While the data on discrimination and profiling of LGBTQ communities is underdeveloped,<sup>37</sup> several recent reports have yielded findings of employment discrimination,<sup>38</sup> housing discrimination,<sup>39</sup> and incarceration rates<sup>40</sup> significantly disproportionate to rates within the general population. This data suggests a prevalence of an unconscious bias,<sup>41</sup> one that influences law enforcement norms.<sup>42</sup> While “unconscious bias” theory reveals the ways in which people with certain marked identities such as poverty, race, gender expression, and sexuality are policed in a way

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ery. . . . Thus vagrancy was coded as a black crime, one punishable by incarceration or forced labor, sometimes on the very plantations that previously had thrived on slave labor.

*Id.* at 28–29. In fact, to this day prisoners are paid almost nothing for working extremely long hours and therefore sustaining many large corporations. See, e.g., *US Prison Labor and US Corporations*, DEMOCRACY NOW! (Apr. 25, 1997), [http://www.democracynow.org/1997/4/25/us\\_prison\\_labor\\_and\\_us\\_corporations](http://www.democracynow.org/1997/4/25/us_prison_labor_and_us_corporations); see also SASHA ABRAMSKY, *AMERICAN FURIES: CRIME, PUNISHMENT AND VENGEANCE IN THE AGE OF MASS IMPRISONMENT* 129 (2007) (describing prisons as “storehouses of the living dead”).

<sup>36</sup> Ritchie & Mogul, *supra* note 26, at 177–78.

<sup>37</sup> *But see* STONEWALLED, *supra* note 26 (presenting a detailed account of the human rights abuses suffered by members of the LGBTQ community at the hands of police officers).

<sup>38</sup> See, e.g., Jessica M. Xavier & Ron Simmons, *The Washington Transgender Needs Assessment Survey*, GENDER.ORG, <http://www.gender.org/vaults/wtnas.html> (last visited Mar. 6, 2012) (finding that forty percent of participants in a Washington, D.C. transgender survey did not have a high school diploma, forty-two percent were not employed in paid positions, forty-seven percent did not have health insurance, and thirty-nine percent did not have a primary care physician).

<sup>39</sup> See *Systems of Inequality: Poverty and Homelessness (Flowchart)*, SYLVIA RIVERA LAW PROJECT, [http://www.srlp.org/files/disproportionate\\_poverty.pdf](http://www.srlp.org/files/disproportionate_poverty.pdf) (last visited Mar. 6, 2012) [hereinafter “SRLP” *Poverty and Homelessness (Flowchart)*] (depicting the interplay between barriers to education, poverty, inadequate health care, and homelessness and the resulting cycle which keeps many trans individuals in unequal and vulnerable situations); see also U.S. DEP’T HOUS. & URBAN DEV., *LGBT DISCRIMINATION STUDY* (2010), available at [http://portal.hud.gov/portal/page/portal/HUD/LGBT\\_Discrimination\\_Study](http://portal.hud.gov/portal/page/portal/HUD/LGBT_Discrimination_Study) (announcing the launch of a “ground-breaking national study” of housing discrimination against LGBT individuals, the first federal study of its kind).

<sup>40</sup> See “SRLP” *Poverty and Homelessness (Flowchart)*, *supra* note 39; *LGBT Youth Face High Rates of Homelessness and Incarceration*, THE CURVATURE (June 22, 2010), <http://thecurvature.com/2010/06/22/lgbt-youth-face-high-rates-of-homelessness-and-incarceration/> (discussing the disproportionately high rates of LGBT youth who are homeless or incarcerated).

<sup>41</sup> See, e.g., Janet Bond Arterton, *Unconscious Bias and the Impartial Jury*, 40 CONN. L. REV. 1023, 1025–29 (2008) (describing the development of the Supreme Court’s recognition of unconscious bias); Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1498–1528 (2005) (discussing studies demonstrating that subjects exhibited unconscious bias based on race); Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 DUKE L.J. 345, 347 (2007) (describing the process of unconscious bias and jury misremembering of facts because of racial stereotyping).

<sup>42</sup> See MOGUL ET AL., *supra* note 3, at 23 (commenting on the “persistent melding of homosexuality and gender-nonconformity with concepts of *danger, degeneracy, disorder, deception, disease, contagion, sexual predation, depravity, subversion, encroachment, treachery, and violence*. It is so deeply rooted in U.S. society that the term *stereotype* does not begin to convey its social and political force.”).

that is not universal, it does not address the history of policing and punishment that is directly related to power, white supremacy, and maintaining the status quo. In certain ways, immigration enforcement based on profiling through the devolution of criminal and immigration law illustrates this insidious underlying agenda of criminalization more clearly. Although the civil rights movement in America has eradicated most race-specific discriminatory laws, the devolution of immigrant and police profiling has allowed profiling based on race (and poverty, gender expression, and sexuality) to continue.<sup>43</sup> And, while such profiling occurs all the time, the legal system deems itself to be grounded in equal protection. The ways in which criminal immigration laws disproportionately affect transgender people of color is a striking example of why equal protection under the law is not indicative of reality.

#### A. *Cycles of Poverty*

Due to a combination of factors, including discrimination, family rejection, and denial of social services, transgender people—especially transgender people of color—are more likely than others to be poor.<sup>44</sup> This increases their vulnerability to state violence. The systemic discrimination and marginalization that transgender people face throughout their lives result in disproportionate poverty, housing insecurity, criminalization, and vulnerability to premature death.<sup>45</sup> From an early age, transgender people are more likely to be kicked out of their homes, forced out of school, shut out of jobs, and denied healthcare, which makes them far more likely to be homeless, poor, and/or eventually incarcerated.<sup>46</sup> In a recent study, the National Center for Transgender Equality and the National Gay and Lesbian Task Force found that transgender individuals were discriminated against on a wide scale, but that for transgender individuals of color, “the combination of anti-transgender bias and persistent, structural racism was especially devastat-

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<sup>43</sup> This is not to say that disparate race-based policing has not happened since the civil rights era. Rather, such policing happens all the time. Through legitimizing the increased policing of perceived immigrants, however, this fact is clearly brought to light. See generally MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010) (comparing how the modern U.S. criminal justice system—through the targeting of black men in the War on Drugs and the decimating of communities of color—functions as a system of racial control similar to Jim Crow, despite its formal adherence to the principle of colorblindness).

<sup>44</sup> See SRLP *Poverty and Homelessness (Flowchart)*, *supra* note 39; see also JAIME M. BRANT ET AL., NAT'L CTR. FOR TRANSGENDER EQUAL. & THE NAT'L GAY & LESBIAN TASK FORCE, *INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY* (2011), available at [http://www.thetaskforce.org/downloads/reports/reports/ntds\\_full.pdf](http://www.thetaskforce.org/downloads/reports/reports/ntds_full.pdf) [hereinafter *INJUSTICE AT EVERY TURN*].

<sup>45</sup> *INJUSTICE AT EVERY TURN*, *supra* note 44, at 2–8.

<sup>46</sup> See SRLP *Poverty and Homelessness (Flowchart)*, *supra* note 39; see also Sharon Stapel & Ash Hamond, *Shoulder to Shoulder, Ending the Violence*, HUFFINGTON POST (Dec. 30, 2010), [http://www.huffingtonpost.com/sharon-stapel/shoulder-to-shoulder-endi\\_b\\_802612.html](http://www.huffingtonpost.com/sharon-stapel/shoulder-to-shoulder-endi_b_802612.html).

ing.<sup>47</sup> Respondents, who are predominantly people of color, reported living in extreme poverty and reported alarming rates of losing a job due to bias (fifty-five percent), harassment/bullying in school (fifty-one percent), physical assault (sixty-one percent), sexual assault (sixty-four percent), or attempted suicide (forty-one percent).<sup>48</sup>

This pervasive discrimination also causes transgender people of color to be more likely to engage in criminalized work in order to meet their basic needs.<sup>49</sup> These crimes are often poverty-related “survival crimes,”<sup>50</sup> including turnstile jumping,<sup>51</sup> dealing and/or possession of drugs<sup>52</sup> (or prescription controlled substances), welfare-related crimes,<sup>53</sup> petty theft,<sup>54</sup> and loitering.<sup>55</sup>

<sup>47</sup> INJUSTICE AT EVERY TURN, *supra* note 44, at 2.

<sup>48</sup> *Id.*

<sup>49</sup> See Dean Spade, *Compliance is Gendered: Struggling for Gender Self-Determination in a Hostile Economy*, in TRANSGENDER RIGHTS 217, 219 (Paisley Currah et al. eds., 2006) (describing the ways in which gender-nonconforming people encounter discrimination in welfare and Medicaid offices, hearings, and job sites, leading to a disproportionate number of transgender people engaging in criminalized work such as prostitution in order to meet their basic needs, which then results in large numbers of gender transgressive people in the criminal and juvenile justice systems); see also Pooja S. Gehi & Gabriel Arkles, *Unraveling Injustice: Race and Class Impact of Medicaid Exclusions of Transition-Related Health Care for Transgender People*, 4 SEXUALITY RES. & SOC. POL'Y J. 7, 12–14 (2007) (providing an in-depth examination of the ways in which exclusions for coverage of transition-related health care impact transgender individuals ability to access identification, jobs, housing, and safety, all of which lead to a cycle of criminalization and incarceration). See generally SRLP *Poverty and Homelessness (Flowchart)*, *supra* note 39; *Systems of Inequality: Criminal Injustice (Flowchart)*, SYLVIA RIVERA LAW PROJECT, [http://srlp.org/files/disproportionate\\_incarceration\\_0.pdf](http://srlp.org/files/disproportionate_incarceration_0.pdf) (last visited Mar. 8, 2012); *Trans Immigrants Disproportionately Subject to Deportation and Detention, Suffer Special Gender-Related Harms in these Processes*, SYLVIA RIVERA LAW PROJECT, <http://srlp.org/files/disproportionate%20deportation.doc> (last visited Mar. 8, 2012).

<sup>50</sup> Cf. Rudy Estrada & Jody Marksamer, *Lesbian, Gay, Bisexual, and Transgender Young People in State Custody: Making the Child Welfare and Juvenile Justice Systems Safe for All Youth Through Litigation, Advocacy, and Education*, 79 TEMP. L. REV. 415, 420 n.26 (2006) (“LGBT youth living on the streets often end up in the juvenile justice system following an arrest for committing nonviolent survival crimes like prostitution and shoplifting.”); Gehi, *Struggles from the Margins*, *supra* note 27, at 322–23 (noting that immigration laws are particularly detrimental to poor people because they are more likely to commit survival crimes); Deseriee A. Kennedy, *Children, Parents & the State: The Construction of A New Family Ideology*, 26 BERKELEY J. GENDER L. & JUST. 78, 88–89 (2011) (describing survival crimes as acts made necessary by poverty).

<sup>51</sup> See T. Erzen, *Turnstile Jumpers and Broken Windows: Policing Disorder in New York City*, in ZERO TOLERANCE: QUALITY OF LIFE AND THE NEW POLICE BRUTALITY IN NEW YORK CITY 19 (A. McArdle & T. Erzen, eds., 2001) (discussing how policy of policing minor crimes such as turnstile jumping disproportionately affects certain communities and the poor).

<sup>52</sup> For transgender people, access to healthcare is often a crisis which sometimes leads to people accessing the street drug economy to pay for the healthcare that they need because it is not covered by any kind of state-based insurance plans. See Gehi & Arkles, *supra* note 49, at 11.

<sup>53</sup> See generally Kaaryn Gustafson, *Criminal Law: The Criminalization of Poverty*, 99 J. CRIM. L. & CRIMINOLOGY 643 (2009) (explaining the ways in which welfare recipients are criminalized due to poverty and stereotyping).

<sup>54</sup> Poor people also occasionally have to steal small amounts of food, medical care, or clothing because they either cannot access welfare benefits or their benefits are insufficient to sustain their and their families’ needs. See SYLVIA RIVERA LAW PROJECT, IT’S

B. *Walking While Trans: Police Profiling and Fourth Amendment Stops*<sup>56</sup>

While some transgender people do engage in criminalized work to survive, transgender people are also commonly profiled by the police as criminals whether or not they are actually committing any crimes. As Amnesty International explains:

Reports indicate that failure to adhere to gender expectations contributes to arbitrary arrest and detention of transgender and gender variant people. [Amnesty International] has heard reports of widespread profiling of transgender women as sex workers, inappropriate and selective targeting of transgender and gender variant individuals to produce identification and “prove” their gender identity; and selective “policing” of the use of bathrooms designated as male or female.<sup>57</sup>

Over the past few decades even the mainstream U.S. media has acknowledged the existence of racial profiling. From the infamous Rodney King beating in the 1990s<sup>58</sup> to the profiling and false arrest of prominent scholar/professor Henry Louis Gates of Harvard in 2011,<sup>59</sup> the fact that police profile people of color is a phenomenon that is difficult to deny.<sup>60</sup> For transgender

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WAR IN HERE: A REPORT ON THE TREATMENT OF TRANSGENDER AND INTERSEX PEOPLE IN NEW YORK STATE MEN'S PRISONS 15 (2007) [hereinafter *IT'S WAR IN HERE*] (citing Alexander L. Lee, *Gendered Punishment: Strategies to Protect Transgender, Gender Variant & Intersex People in America's Prisons* (2003), available at [http://www.srlp.org/documents/alex\\_lees\\_paper2.pdf](http://www.srlp.org/documents/alex_lees_paper2.pdf)).

<sup>55</sup> *Id.*

<sup>56</sup> Throughout the Article, I refer to a “Fourth Amendment stop” as that which requires only a “reasonable, articulable suspicion that crime is afoot,” under the standard set forth in *Terry v. Ohio*, 392 U.S. 1, 30 (1968). See *infra* note 68 and accompanying text.

<sup>57</sup> STONEWALLED, *supra* note 26, at 18–19.

<sup>58</sup> See generally READING RODNEY KING/READING URBAN UPRISING (Robert Gooding-Williams ed., 1993) (exploring race in America in the aftermath of the Rodney King beating).

<sup>59</sup> See, e.g., Abby Goodnough, *Harvard Professor Jailed; Officer is Accused of Bias*, N.Y. TIMES, July 20, 2009, <http://www.nytimes.com/2009/07/21/us/21gates.html>. For an excellent analysis of Gates’ arrest and the ensuing controversy, see generally CHARLES J. OGLETREE, JR., THE PRESUMPTION OF GUILT: THE ARREST OF HENRY LOUIS GATES JR. AND RACE, CLASS, AND CRIME IN AMERICA (2010) (examining race and class after a black Harvard University professor was arrested while trying to enter his own home).

<sup>60</sup> For an in-depth examination of race and the Fourth Amendment, see I. Bennett Capers, *Rethinking the Fourth Amendment: Race, Citizenship and the Equality Principle*, 46 HARV. C.R.-C.L. L. REV. 1, 12 (2011):

Simply put, our current Fourth Amendment jurisprudence is flawed. After all, one method for judging this jurisprudence is to look to the effect that the jurisprudence has had on minorities and on the promise of equal citizenship. Here, the fact that our current Fourth Amendment jurisprudence now fosters an atmosphere in which racial profiling is often unremarkable and juridically tolerated, and in which racial minorities perceive themselves to be second-class citizens, evidences the current Court’s retreat from concerns about equality and citizenship.

people living in poverty who also identify as people of color or are perceived as immigrants,<sup>61</sup> particularly those with psychiatric or physical disabilities,<sup>62</sup> policing stops are almost inevitable. Transgender people of color often even describe the consequential arrests stemming from these police interactions as “walking while trans.”<sup>63</sup> New “war on terror”-based legislation such as SB 1070,<sup>64</sup> Secure Communities,<sup>65</sup> and Section 287(g)<sup>66</sup> that “legalize” criminal stops and arrests on the basis of race serve only as tools to increase the vulnerability that marginalized transgender communities already encounter at the hands of local law enforcement.

The legal standard for law enforcement to stop and interrogate people on the street is so vague and deferential that it offers no protection against such discrimination.<sup>67</sup> For example, pursuant to the Fourth Amendment, lo-

<sup>61</sup> See Gustafson, *supra* note 53 (describing how people on welfare are scrutinized by law enforcement).

<sup>62</sup> See 42 U.S.C.A. § 15601(3) (2006) (“America’s jails and prisons house more mentally ill individuals than all of the Nation’s psychiatric hospitals combined.”).

<sup>63</sup> “Walking while trans,” a play on the well-known phrase “driving while black,” is a term used by clients of Sylvia Rivera Law Project (“SRLP”) to describe the intense police scrutiny trans people of color experience while walking on the streets of New York City. Many of my clients are stopped for no reason other than their perceived gender-nonconformity, and as a result, are charged with a range of survival crimes such as loitering for the purposes of prostitution, obstruction of government conduct, disorderly conduct, or lewd conduct. See also MOGUL ET AL., *supra* note 3:

Transgender women, particularly transgender women of color, are so frequently perceived to be sex workers by the police that the term *walking while trans*, derivative of the more commonly known term, *driving while Black*, was coined to reflect the reality that transgender women often cannot walk down the street without being stopped, harassed, verbally, sexually and physically abused and arrested, regardless of what they are doing at the time.

*Id.* at 61.

<sup>64</sup> S.B. 1070, 49th Leg., 2d Reg. Sess. (Ariz. 2010).

<sup>65</sup> See ICE *Secure Communities*, *supra* note 18.

<sup>66</sup> See 8 U.S.C. § 1357(g) (2012).

<sup>67</sup> See, e.g., *Virginia v. Moore*, 553 U.S. 164, 171 (2008) (holding that when an officer has probable cause to believe a person committed even a minor crime in his presence, arrest is reasonable, and someone under arrest can be searched); *Whren v. United States*, 517 U.S. 806, 806 (1996) (“The temporary detention of a motorist upon probable cause to believe that he has violated the traffic laws does not violate the Fourth Amendment’s prohibition against unreasonable seizures, *even if a reasonable officer would not have stopped the motorist* absent some additional law enforcement objective.”) (emphasis added); see also Walker, *supra* note 26, at 595 (internal quotation marks omitted):

A person’s race, ethnicity, or national origin, may motivate police conduct. . . . The term ‘DWB’—Driving While Black—describes the phenomenon in which officers target persons based on race for traffic [violations] (or other) detentions, in order to follow up on hunches of criminal behavior. . . . Although African-Americans have disproportionately suffered this procedure other groups have been or can be targeted, for example, women and Arabs. Suppose that a law enforcement office, post-September 11, 2001 . . . decides to target all persons of apparent Arab ancestry, ‘just in case they are terrorists.’ An officer may put such persons under surveillance and use a minor traffic violation, such as the failure to use a seatbelt, as a pretext for further investigation. With the racial and ethnic makeup of the nation changing and after the terrorist attacks of September 11,

cal law enforcement is subject to a standard that demands a “reasonable, articulable suspicion that crime is afoot.”<sup>68</sup> This standard, however, is so unclear that a person may be stopped for almost any reason and, in particular, for reasons relating to one’s race, gender identity, and/or perceived sexual orientation.<sup>69</sup> For example, in *People v. Lomiller*, the First Department held that “a man carrying a purse” meets this standard.<sup>70</sup> This reason for a stop and frisk, among others that are equally unjustified, is not uncommon. Wearing tight clothing or too much makeup is seen as a reasonable, articulable suspicion of solicitation for the purposes of prostitution, especially for people whose gender expression appears “wrong” or “suspicious” to police enforcement.<sup>71</sup> Similarly, in my clients’ experience, not making eye contact is often used as an indication of drug use, and holding hands with someone perceived to be of the same sex or different gender expression may be considered indication of prostitution. According to my clients, using the bathroom that a police officer perceives as “the wrong bathroom” is often used as an indication of lewd conduct. Some police departments have been accused of claiming that possession of three or more condoms is sufficient

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2001, other groups such as Arab Americans, Muslims, and Asian Americans, have joined the call for an end to racial profiling.

<sup>68</sup> *Terry v. Ohio*, 392 U.S. 1, 30 (1968). Although various States have distinguished *Terry* from state law, it continues to be the federal standard, and is understood as condoning racial profiling. See, e.g., Capers, *supra* note 60 (describing *Terry* as “the case that has enabled racial profiling to flourish”). In New York State, the controlling case is *People v. De Bour*, 40 N.Y.2d 210 (1976), which lays out a four-tiered method for evaluating the propriety of police stops, with “the minimal intrusion of approaching to request information is permissible when there is some objective credible reason for that interference not necessarily indicative of criminality.” *Id.* at 223. Level two, the common-law right to inquire, which falls short of forcible seizure, must be based upon a founded suspicion that criminal activity is afoot. *Id.*

<sup>69</sup> See, e.g., Angela J. Davis, *Race, Cops and Traffic Stops*, 51 U. MIAMI L. REV. 425, 426–27 (1997) (explaining the discrimination in pretextual Fourth Amendment based police stops); see also MOGUL ET AL., *supra* note 3, at 23 (“The specter of criminality moves ceaselessly through the lives of LGBT people in the United States. It is the enduring product of persistent melding of homosexuality and gender-nonconformity with concerts of *danger, degeneracy, disorder, deception, disease, contagion, sexual predation, depravity, subversion, encroachment, treachery, and violence.*”).

<sup>70</sup> 30 A.D.3d 276, 278 (N.Y. App. Div. 2006).

<sup>71</sup> Mogul, Ritchie, and Whitlock explain the ways in which race, poverty, gender expression, and/or sexuality are treated as reasons for suspicion and therefore criminality by local law enforcement:

Over time, within broader notions of criminality informed by race, class, and gender, a number of closely related and mutually reinforcing “queer criminal archetypes” have evolved that directly influence the many manifestations and locations of policing and punishment of people identified as queer or living outside of ‘appropriately gendered’ heterosexual norms. These archetypes serve to establish compelling, ultimately controlling, narratives, or predetermined story lines that shape how a person’s appearance and behavior will be interpreted—regardless of individual circumstances or realities.

MOGUL ET AL., *supra* note 3, at 23.

cause for presuming that a suspect is engaged in prostitution.<sup>72</sup> Although specific actions or inactions are named by law enforcement as the reasons for police stops, a person's race is often considered an indicator of a threat generally;<sup>73</sup> brown or black skin is also a marker of potential immigration status.<sup>74</sup> Each of these stops is based on a combination of race, poverty, gender expression, sexual orientation, and/or perceived immigrant status. In addition, transgender individuals are often falsely arrested when they call the police to report incidents of violence. For example, in domestic violence disputes involving a queer or transgender relationship, police officers often operate on pre-existing stereotypes about who is a perpetrator and who is a victim<sup>75</sup> and either fail to arrest the perpetrator in situations that do not involve perceived male-against-female violence or arrest everyone, including the survivor of the violence.<sup>76</sup>

Police brutality and excessive force are also common experiences for my transgender and gender-nonconforming clients. Amnesty International has documented "serious patterns of police misconduct and brutality aimed at LGBT people, including abuses that amount to torture and ill treatment." Amnesty explains that their findings:

strongly indicate that police abuse and the forms it takes are often specific to the different aspects of the victim's identity, such as sexual orientation, race, gender or gender identity, age or economic status. Identities are complex, multi-layered and intersectional, such that a person may be targeted for human rights violations based on a composite of identities that the person seems to represent. For example, a lesbian woman who is black may not only be a target of police abuse because of her sexual orientation but also because she is a woman of color. The targeting of lesbian, gay, bisexual and transgender people for discriminatory enforcement of laws and their treatment in the hands of the police needs to

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<sup>72</sup> See John Del Signore, *Should Condoms Be Used as Evidence to Prosecute Prostitution?*, *GOHAMIST* (Jan. 12, 2010), [http://gothamist.com/2010/01/12/should\\_condoms\\_be\\_used\\_as\\_evidence.php](http://gothamist.com/2010/01/12/should_condoms_be_used_as_evidence.php).

<sup>73</sup> See Capers, *supra* note 60, at 2.

<sup>74</sup> See, e.g., Kristin Collins, *N.C. native wrongly deported to Mexico*, *CHARLOTTEOBSERVER.COM* (Aug. 30, 2009), <http://www.charlotteobserver.com/2009/08/30/917007/nc-native-wrongly-deported-to.html> (A Puerto-Rican American citizen with bipolar disorder was deported to Mexico despite evidence proving his status as an American citizen).

<sup>75</sup> See, e.g., Sheila M. Seelau & Eric P. Seelau, *Gender-Role Stereotypes and Perceptions of Heterosexual, Gay and Lesbian Domestic Violence*, 20 *J. FAM. VIOLENCE* 363, 364–65 (2005); *Domestic Violence Against GLBT People*, *PUB. HEALTH-SEATTLE & KING CNTY.*, <http://www.kingcounty.gov/healthservices/health/personal/glbtdv.aspx> (last visited Mar. 6, 2012) (explaining that "[a]lthough many police remain confused when attempting to sort out incidents involving same gender couples and may end up arresting the wrong or both parties in a battering situation, opportunities to educate and train the police and courts about the realities of domestic violence in same-sex relationships are increasing.").

<sup>76</sup> See Seelau & Seelau, *supra* note 75, at 364.

be understood within the larger context of identity-based discrimination, and the interplay between different forms of discrimination—such as racism, sexism, homophobia and transphobia—[that] create the conditions in which human rights abuses are perpetuated.<sup>77</sup>

The ways in which transgender people of color are simultaneously harmed by multiple vectors of state intervention, neglect, and discrimination increases their likelihood of being unjustly targeted by the police.<sup>78</sup>

### C. *Disproportionate Incarceration*

Following the trajectory of discriminatory enforcement, the high rates of racial and transgender profiling by police officers result in the disproportionate representation of transgender and gender-nonconforming people of color in prisons and jails.<sup>79</sup> The staggering statistics alone explain that the prison industrial complex is one that thrives on racism. According to a study by Legal Services for Prisoners with Children, African Americans represent 12.7% of the US population, 15% of US drug users (72% of all users are white), 36.8% of those arrested for a drug-related crime, 48.2% of American adults in state and federal prisons and local jails, and 42.5% of prisoners under sentence of death.<sup>80</sup> Additionally, one in three black men between the ages of twenty and twenty-nine live under some form of correctional supervision or control.<sup>81</sup> African American children (7.0%) were nearly nine times more likely to have an incarcerated parent in prison than white children (0.8%).<sup>82</sup> Similarly, Latino children (2.6%) were three times as likely as white children to have a parent in prison.<sup>83</sup> Native Americans represent less than one percent of the U.S. population, but over four percent of Native Americans are under correctional supervision (compared to two percent of whites).<sup>84</sup>

Other non-white communities also experience disproportionate incarceration. For example, a study by Services and Advocacy for Asian Youth (SAAY) in 2004 found that, while overall arrest rates for Asian Americans were lower than for other racial groups, their conviction rates were twenty-eight percent higher and they were placed into institutions at significantly

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<sup>77</sup> STONEWALLED, *supra* note 26, at 2–3.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 16.

<sup>80</sup> LEGAL SERVS. FOR PRISONERS WITH CHILDREN, PEOPLE OF COLOR AND THE PRISON INDUSTRIAL COMPLEX: FACTS AND FIGURES AT A GLANCE, *available at* <http://www.prisonerswithchildren.org/pubs/color.pdf> (last visited Apr. 2, 2012).

<sup>81</sup> MARC MAURER & TRACY HURLING, THE SENTENCING PROJECT, YOUNG BLACK AMERICANS AND THE CRIMINAL JUSTICE SYSTEM: FIVE YEARS LATER I (1995).

<sup>82</sup> CHRISTOPHER J. MUMOLA, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SPECIAL REPORT: INCARCERATED PARENTS AND THEIR CHILDREN 2 (Aug. 2000).

<sup>83</sup> *Id.*

<sup>84</sup> *See* LEGAL SERVS. FOR PRISONERS WITH CHILDREN, *supra* note 80.

higher rates than African American, Latino/a, or white youth.<sup>85</sup> The study also found that national arrest rates for white, Native American, and African American youth decreased that year, but that the arrest rates for Asian and Pacific Islander youth increased 11.4%.<sup>86</sup> Similarly, since September 11, 2001, the United States has seen a dramatic rise in the numbers of South Asian and Muslim people being detained. For example, Omar C. Jadwat of the ACLU Immigrants' Rights Project discusses the arbitrary detention of thirteen Muslim men from either South Asia or the Middle East: two years after being arrested, all were still in immigration facilities and none were charged with a crime or associated with any terrorist activities.<sup>87</sup>

People of color who are also transgender or gender-nonconforming encounter not only race-based implicit bias by the criminal justice system but also added implicit bias due to their gender identities and perceived sexual orientations.<sup>88</sup> While there is currently no conclusive data on the exact number of currently incarcerated transgender people,<sup>89</sup> many studies demonstrate that transgender people are extremely overrepresented in the criminal justice system.<sup>90</sup> A 1997 San Francisco Department of Health study found that sixty-seven percent of transgender women and thirty percent of transgender men had a history of incarceration.<sup>91</sup> The Sylvia Rivera Law Project ("SRLP"), the only poverty law organization focused on providing free legal services to indigent transgender clients, reports numbers that confirm high levels of criminalization. Of SRLP's 1,512 clients since 2003, two-thirds have experienced arrest and/or incarceration at some point in their lives. In an SRLP survey, seventy-two percent reported time spent in jails while thirty-six percent reported having been incarcerated in a prison.<sup>92</sup> The National Center for Transgender Equality and the National Gay and Lesbian Task Force also found that homeless transgender individuals are 2.5 times more likely to be incarcerated than transgender individuals who have not experienced homelessness.<sup>93</sup>

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<sup>85</sup> Helen Zia, *Preface to OTHER: AN ASIAN & PACIFIC ISLANDER PRISONERS' ANTHOLOGY*, at xi (Eddy Zheng & the Asian Prisoner Support Comm. eds., 2007).

<sup>86</sup> *Id.* at x.

<sup>87</sup> OMAR C. JADWAT, ACLU, *THE ARBITRARY DETENTION OF IMMIGRANTS AFTER SEPTEMBER 11*, at 1 (2004), available at <http://www.aclu.org/files/iclr/jadwat.pdf>.

<sup>88</sup> MOGUL, ET AL., *supra* note 3, at 24.

<sup>89</sup> *Id.* at xii. For safety purposes many transgender and gender-nonconforming people are not "out" in the criminal justice system and/or prisons. See *IT'S WAR IN HERE*, *supra* note 54, at 15–16; Sydney Tarzwell, Note, *The Gender Lines Are Marked with Razor Wire: Addressing State Prison Policies and Practices for the Management of Transgender Prisoners*, 38 COLUM. HUM. RTS. L. REV. 167, 170 (2006); see generally Gabriel Arkles, *Safety and Solidarity Across Gender Lines: Rethinking Segregation of Transgender People in Detention*, 18 TEMP. POL. & CIV. RTS. L. REV. 515 (2009) (discussing the violence experienced by transgender prisoners, but arguing against the use of solitary confinement as a means of "protection").

<sup>90</sup> MOGUL, ET AL., *supra* note 3, at xii.

<sup>91</sup> *Id.*

<sup>92</sup> SRLP Client Survey Report (2007) (on file with author).

<sup>93</sup> INJUSTICE AT EVERY TURN, *supra* note 44, at 66.

#### D. Violence and Incarceration

Once transgender and gender-nonconforming persons are incarcerated in jails, prisons, or detention centers, they are almost inevitably subject to a range of traumatizing events including invasive strip searches that are essentially genital checks<sup>94</sup> and face assault, harassment, and rape—often by correction officers who are ostensibly there to supervise their safety.<sup>95</sup> Transgender people are almost always placed in jails and prisons according to the sex they were assigned at birth.<sup>96</sup> This means that untold numbers of transgender women are in men’s jails and prisons around the country. And while placement issues are one area of concern—and perhaps the most publicly recognized—issues of discrimination and abuse that transgender people encounter in prison also encompass access to medical care, access to showers, clothing, safety, work programs, and legal assistance.<sup>97</sup>

Because transgender and gender-nonconforming people are automatic targets for homophobic and transphobic violence and brutality by other inmates and correction officers, issues regarding safety are common in public policy debates.<sup>98</sup> To keep people safer from such advances, state and federal departments of corrections generally house vulnerable individuals—including transgender people—in some kind of “protective custody”—more often than not the equivalent of twenty-three hour lock-down/solitary confine-

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<sup>94</sup> See MOGUL ET AL., *supra* note 3, at 66 (“[Gender policing by state authorities] often extends to routinely subjecting transgender and gender-nonconforming people to inappropriate, invasive, and unlawful searches conducted for the purpose of viewing or touching individuals’ genitals, either to satisfy law enforcement officers’ curiosity, or to determine a person’s ‘real’ gender.”).

<sup>95</sup> See, e.g., IT’S WAR IN HERE, *supra* note 54, at 18; Arkles, *supra* note 89, at 517 (“That transgender people in detention experience horrific levels of violence is indisputable. A recent study showed that fifty-nine percent of transgender women in California men’s prisons have been sexually assaulted while incarcerated, as compared to four percent of a random sample of people incarcerated in California men’s prisons.”) (citing VALERIE JENNESS ET AL., VIOLENCE IN CALIFORNIA CORRECTIONAL FACILITIES: AN EMPIRICAL EXAMINATION OF SEXUAL ASSAULT 3 (2007), available at [http://ucicorrections.seweb.uci.edu/pdf/Executive\\_Summary\\_of\\_Val\\_s\\_PREA\\_report.pdf](http://ucicorrections.seweb.uci.edu/pdf/Executive_Summary_of_Val_s_PREA_report.pdf)).

<sup>96</sup> See ALEXANDER LEE, NOWHERE TO GO BUT OUT: THE COLLISION BETWEEN TRANSGENDER & GENDER-VARIANT PRISONERS AND THE GENDER BINARY IN AMERICA’S PRISONS 23, 24 (2003), available at <http://www.justdetention.org/pdf/NowhereToGoButOut.pdf> (discussing how overly narrow constructions of the term transgender as well as a lack of public representation of FTM spectrum people contribute to the scant attention transgender people in women’s prisons receive); see also Arkles, *supra* note 89, at 538–39 (explaining that although placement according to birth sex is a concern for transgender individuals, segregation, isolation, and so-called “protective custody” can be far more damaging than being housed in general population facilities); Russell K. Robinson, *Masculinity as Prison: Sexual Identity, Race, and Incarceration*, 99 CALIF. L. REV. 1309, 1311 (2011) (explaining that in the Los Angeles County Men’s Jail, gay and transgender individuals are housed according to their birth sex but offered segregated space for protection from rape by other inmates). Robinson, however, also critiques the ways in which such segregation affirms prison as a space that hosts and reproduces masculinity while alienating those who struggle to survive within that space. *Id.* at 1346.

<sup>97</sup> See IT’S WAR IN HERE, *supra* note 54, at 17.

<sup>98</sup> See Arkles, *supra* note 89, at 517; see also Robinson, *supra* note 96, at 1309.

ment.<sup>99</sup> Although solitary confinement can offer some protection from violence in prison, numerous studies have demonstrated its negative impact on a person's mental and emotional well-being.<sup>100</sup> This is particularly true the longer the time during which a person is isolated.<sup>101</sup> Since corrections departments often have no other "solution" but to isolate transgender people,<sup>102</sup> such isolation can continue for extremely unreasonable periods of time. For example, Rhonda, a transgender prisoner who is a client of the SRLP,<sup>103</sup> has been incarcerated in solitary confinement for eight years. Originally, Rhonda requested a placement transfer because she was being repeatedly raped in the general population. The correction facility in which she resides complied by placing her in solitary confinement—in their opinion, her only safe option for housing. Rhonda is currently in the psychiatric unit of the correctional facility on twenty-four hour suicide watch.

### E. Criminal Procedure, Plea Bargains, and Safety

While Rhonda's story may represent an extreme, it is by no means unusual. All forms of incarceration are dangerous and violent for transgender and gender-nonconforming people.<sup>104</sup> Because prisons and jails are hyper-gendered (and gender policed) spaces,<sup>105</sup> and transgender people are "easy" targets for violence, they are also often willing to take a guilty plea for a crime that they did not commit so that they can minimize jail time—even if

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<sup>99</sup> Arkles, *supra* note 89, at 537–38:

Placements in protective custody, administrative segregation, supermax facilities, or punitive segregation are usually highly isolating. While systems vary somewhat, people are commonly confined to a tiny cell for twenty-one to twenty-four hours a day. They often have little or no human contact except for highly limited (and often unpleasant) interactions with facility staff. Sometimes even this "contact" is limited to announcements through loudspeakers.

<sup>100</sup> *Id.* at 538; see also Tracy Hresko, *In the Cellars of the Hollow Men: Use of Solitary Confinement in U.S. Prisons and Its Implications Under International Laws Against Torture*, 18 PACE INT'L L. REV. 1, 3 (2006) ("The devastating psychological and physical consequences of solitary confinement have been recognized since the mid-1800s.").

<sup>101</sup> See Hresko, *supra* note 100, at 3.

<sup>102</sup> See Arkles, *supra* note 89, at 537.

<sup>103</sup> All client names have been changed to protect confidentiality. Rhonda remains incarcerated and is continually shuffled between solitary confinement in an upstate New York prison and solitary confinement in the prison's psychiatric unit. With no release date in the near future, Rhonda continues to experience suicidal ideations.

<sup>104</sup> This is not to say that only transgender and gender-nonconforming people experience violence in prisons and jails. The very concept of punitive segregation from society has proven to be inherently violent for all people. Many studies have demonstrated this phenomenon. See generally THE CELLING OF AMERICA (Daniel Burton-Rose et al. eds., 1998) (critiquing the United States' prison-industrial complex); DAVIS, ARE PRISONS OBSOLETE?, *supra* note 35 (analogizing the United States' practice of "super-incarceration" to its history of slavery).

<sup>105</sup> See Lee, *supra* note 96, at 3.

this results in known or unknown future immigration repercussions.<sup>106</sup> Because of over-crowding in the system and court mandated efficiency, people arrested for petty or survival-related<sup>107</sup> crimes are often offered plea bargains,<sup>108</sup> either at their arraignment hearing or at a later hearing.<sup>109</sup> In New York City, there is a good deal of pressure for people to “plea out” to crimes that they either did not commit and/or are grossly exaggerated in relation to their conduct.<sup>110</sup> Extraordinary pressure can also be imposed for people to become police informants in exchange for lowering or eliminating charges against them, which not only funnels more people into the system but can also expose informants to dangerous conditions.<sup>111</sup>

As explained above in Part I.B, transgender and gender-nonconforming people of color living in poverty are disproportionately profiled by the police, subjected to police misconduct and charged with survival-related crimes. Since there is already an exceptional amount of pressure by the criminal justice system to push people to take a guilty plea rather than challenge their arrest at a trial, and transgender and gender-nonconforming people often would do almost anything not to be in jail, they are exceptionally likely to succumb to this pressure.<sup>112</sup> The ability to take a guilty plea rather than serve time in jail or prison is often of extreme value for transgender and gender-nonconforming people who are United States citizens. Not only does this process expedite their court hearing, it also minimizes their exposure to inevitable transphobic and homophobic violence inside.

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<sup>106</sup> My clients at the Sylvia Rivera Law Project often tell me they will “do anything” to avoid jail or prison, or get out as soon as possible, because they feel extremely unsafe and vulnerable. See *IT’S WAR IN HERE*, *supra* note 54, at 18.

<sup>107</sup> INCITE! WOMEN OF COLOR AGAINST VIOLENCE, LAW ENFORCEMENT VIOLENCE AGAINST WOMEN OF COLOR & TRANS PEOPLE OF COLOR: A CRITICAL INTERSECTION OF GENDER VIOLENCE & STATE VIOLENCE 25, available at [http://incite-national.org/media/docs/3696\\_TOOLKIT-FINAL.pdf](http://incite-national.org/media/docs/3696_TOOLKIT-FINAL.pdf) (last visited Apr. 2, 2012).

<sup>108</sup> See generally DAVID FEIGE, *INDEFENSIBLE: ONE LAWYERS JOURNEY INTO THE INFERNO OF AMERICAN JUSTICE* (2006) (critiquing the criminal justice system through the lens of the author’s experiences as a criminal defense attorney in South Bronx); Oren Bar-Gill & Omri Ben-Shahar, *The Prisoners’ (Plea Bargain) Dilemma*, 1 J. LEGAL ANALYSIS 737 (2009) (examining the ways in which prosecutors extract unfavorable guilty pleas from defendants).

<sup>109</sup> FEIGE, *supra* note 108.

<sup>110</sup> *Id.*

<sup>111</sup> See, e.g., Francis X Donnolly, *Teen Found Dead Three Days After Helping Police*, DETROIT NEWS, Jan. 6, 2012, <http://www.detroitnews.com/article/20120106/METRO01/201060375>.

<sup>112</sup> The plea bargain option of criminal justice system has invoked numerous critiques. See, e.g., Bar-Gill & Ben-Shahar, *supra* note 108. However, plea bargains can be advantageous for a number of reasons as well. This is especially true when considering expediency. In New York City, for example, a first misdemeanor arrest often results in an offer for an Adjudication in Contemplation of Dismissal (ACD) which allows for the expungement of the arrest from a person’s record if they do not get arrested again within 6 months. FEIGE, *supra* note 108.

## II. DEVOLUTION OF CRIMINAL AND IMMIGRATION LAW

For transgender and gender-nonconforming immigrants, however, the willingness to do almost anything to minimize jail time often results in harsh immigration repercussions. Although criminal defense and immigration law have been traditionally separated fields of practice, this is no longer the case.<sup>113</sup> In 2010, the Supreme Court issued the landmark decision *Padilla v. Kentucky*, holding that the Sixth Amendment right to effective assistance for counsel includes the right to be informed by counsel of the immigration consequences of pleading guilty to drug distribution.<sup>114</sup>

Since 1996, the immigration consequences of minor criminal convictions in the United States have resulted in the mass deportation of immigrants across the nation.<sup>115</sup> These consequences have only multiplied since September 11, 2001, paving the way for the “war on terror,” Section 287(g), SB 1070 and its copycat legislation, Secure Communities, and the new “indefinite detention” provision.<sup>116</sup> Since transgender people of color who are immigrants are also more likely to encounter police interaction than others, many of them have and will continue to face immigration detention and deportation due to no crime other than “walking while trans.”<sup>117</sup>

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<sup>113</sup> “Criminal Immigration” has evolved into a legal practice in and of itself. *See e.g.*, Juliet P. Stumpf, *Doing Time: Crimmigration Law and the Perils of Haste*, 58 UCLA L. REV. 1705, 1706 (2010–2011) [hereinafter Stumpf, *Crimmigration Law*] (using the term “crimmigration law” to critique the arbitrary temporal gauges that criminal law and immigration law rely on to evaluate who should be included or expelled from society).

<sup>114</sup> 130 S. Ct. 1473, 1476 (2010).

<sup>115</sup> *See, e.g.*, Stumpf, *Crimmigration Law*, *supra* note 113.

<sup>116</sup> President Obama recently signed the “indefinite detention” bill that is embedded in the National Defense Authorization Act (“NDAA”) for Fiscal Year 2012. *See* National Defense Authorization Act for Fiscal Year 2012, H.R. 1540, 112th Cong. § 1021 (2011) (enacted); *see also* Enemy Belligerent Interrogation, Detention, and Prosecution Act of 2010, S. 3081, 111th Cong. § 5 (2010), *cited in* Amanda Tyler, *The Forgotten Core Meaning of the Suspension Clause*, 125 HARV. L. REV. 901, 905 n.17 (2012). These bills allow for the indefinite detention, without trial and for the duration of hostilities, of anyone, including a citizen of the United States, who was a part of or substantially supported al-Qaeda, the Taliban, or associated enemies of the United States. *See generally* Glenn Greenwald, *Three Myths about the detention bill*, SALON (Dec. 16, 2011), [http://www.salon.com/2011/12/16/three\\_myths\\_about\\_the\\_detention\\_bill/singleton/](http://www.salon.com/2011/12/16/three_myths_about_the_detention_bill/singleton/); Press Release, Am. Civil Liberties Union, President Obama Signs Indefinite Detention Bill into Law (Dec. 31, 2011), *available at* <http://www.aclu.org/national-security/president-obama-signs-indefinite-detention-bill-law>. Anthony D. Romero, ACLU Executive Director stated:

President Obama’s action today is a blight on his legacy because he will forever be known as the president who signed indefinite detention without charge or trial into law. . . . The statute is particularly dangerous because it has no temporal or geographic limitations, and can be used by this and future presidents to militarily detain people captured far from any battlefield.

*Id.*

<sup>117</sup> *See supra* note 63 and accompanying text.

In 1996, Congress passed the Illegal Immigration Reform and Immigration Responsibility Act (“IIRIRA”)<sup>118</sup> and its companion act, the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”),<sup>119</sup> making it far more likely that immigrants, especially poor immigrants, convicted of crimes would be deported from the United States. Prior to 1996, the range of “deportable crimes” was far less inclusive,<sup>120</sup> and if a non-citizen was put in proceedings for a conviction they were able to apply for a waiver of deportation.<sup>121</sup> The 1996 laws expanded the definition of “aggravated felony,”<sup>122</sup> triggering mandatory deportation and reducing opportunities to seek relief from deportation following conviction of other “crimes involving moral turpitude (“CIMTs”).”<sup>123</sup> Since 1996, a conviction of one aggravated felony constitutes grounds for deportation for any noncitizen.<sup>124</sup> Moreover, although the statute specifically uses the term “felony,” in reality, this cate-

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<sup>118</sup> Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 309 (1996) (codified at 8 U.S.C. § 1101(a)(43) (2012)).

<sup>119</sup> Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified as amended in scattered titles and sections of the U.S. Code).

<sup>120</sup> See Theresa A. Miller, *Blurring the Boundaries Between Immigration and Crime Control After September 11*, 25 B.C. THIRD WORLD L.J. 81, 85 (2005) (noting the expansion of the types of crimes that mandate detention and deportation). This expansion even applies to immigrants who are legal permanent residents (LPRs) or “green card” holders. *Id.* Katherine Brady, IMMIGRANT LEGAL RES. CTR., QUICK REFERENCE CHART AND NOTES FOR DETERMINING IMMIGRATION CONSEQUENCES OF SELECTED CALIFORNIA OFFENSES, at Section II (2010), available at [http://sdcounty.ca.gov/oac/docs/Immigration\\_QR\\_Chart.pdf](http://sdcounty.ca.gov/oac/docs/Immigration_QR_Chart.pdf) (providing long list of California state offenses that carry immigration consequences).

<sup>121</sup> BRYAN LONEGAN, LEGAL AID SOC’Y, IMMIGRATION DETENTION AND REMOVAL: A GUIDE FOR DETAINEES AND THEIR FAMILIES 13 (2004), available at <http://shusterman.com/pdf/detention1004.pdf>; see also Nancy Morawetz, *Rethinking Retroactive Deportation Laws and the Due Process Clause*, 73 N.Y.U. L. REV. 97, 109 (1998).

<sup>122</sup> 8 U.S.C. § 1101(a)(43) (2012) (defining “aggravated felony” to include, among other things, drug or firearms trafficking, money laundering, theft or burglary offenses for which the sentence is at least one year, pimping or involuntary servitude offenses, fraud or tax evasion in excess of \$10,000, and certain counterfeiting and forgery crimes); see Kari Converse, *Criminal Law Reforms: Defending Immigrants in Peril*, THE CHAMPION (Aug. 4, 1997), <http://www.nacdl.org/CHAMPION/ARTICLES/97aug04.htm>. IIRIRA amended the Immigration and Nationality Act, decreasing the threshold term of imprisonment for many offenses from five years to one year. IIRIRA, Pub. L. No. 104-208, § 321(a), 110 Stat. 3009-546, 3009-628 (1996) (codified at 8 U.S.C. § 1101(a)(42) (2012)). See also Manual D. Vargas, *Immigration Consequences of New York Criminal Convictions*, 4 CS: COLLATERAL CONSEQUENCES OF CRIMINAL CHARGES (last modified Nov. 18, 2011), <http://blogs.law.columbia.edu/4cs/immigration/> (last visited Mar. 8, 2012).

<sup>123</sup> 8 U.S.C. § 1227(a)(2)(A)(i) (2012). Although the Immigration and Nationality Act has yet to define crimes involving moral turpitude (CIMTs), years of case law have applied CIMTs to most poverty-related offenses. CIMTs include the following: crimes in which either an intent to steal or to defraud is an element (such as theft and forgery offenses), crimes in which bodily harm is caused or threatened by an intentional or willful act or serious bodily harm is caused or threatened by an act of recklessness (such as murder, rape, and certain manslaughter and assault offenses), and most sex offenses. See THE DEFENDING IMMIGRANT P’SHIP, REPRESENTING NONCITIZEN CRIMINAL DEFENDANTS: A NATIONAL GUIDE 5 (2008).

<sup>124</sup> See 8 U.S.C. § 1227(a)(2) (2012).

gory sometimes includes misdemeanor crimes.<sup>125</sup> CIMTs include almost all survival related crimes.<sup>126</sup> The effect of both IIRIRA and AEDPA furthers an agenda of social control of poor and other marginalized people through criminalization and eventual deportation.

Additionally, although the definition of the term “aggravated felony” is linked to a sentence in criminal court of more than one year, under immigration law it does not matter if the sentence is ever served.<sup>127</sup> For example, in a recent Board of Immigration Appeals (BIA) decision, the court held that an immigrant’s term of imprisonment or sentence is determined by the period of confinement or incarceration ordered by the court, regardless of any suspension or withholding of execution.<sup>128</sup> As a result, even if a sentence is completely suspended and the individual never spends any time in jail, that person is still considered to have been convicted of an aggravated felony and is thus deportable according to U.S. immigration law.

IIRIRA and AEDPA also affect the ways in which CIMTs are enforced.<sup>129</sup> Two CIMTs constitute grounds for removal. In IIRIRA, Congress defined its use of the word “conviction” for immigration purposes.<sup>130</sup> Prior to 1996, a conviction for such purposes was based on a state disposition. Therefore, if a criminal record was expunged by a state, it was also ex-

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<sup>125</sup> See *United States v. Graham*, 169 F.3d 787, 788 (3d Cir. 1999) (holding that in New York, the misdemeanor charge of petit larceny with a one-year prison sentence is considered an “aggravated felony” for immigration purposes).

<sup>126</sup> See *THE DEFENDING IMMIGRANT P’SHIP*, *supra* note 123, at D1-D40 (listing a wide range of cases involving crimes of moral turpitude). For a clear extension of the history of the construction of immigration law and its definition of who is worthy of legal residency and who is not, see generally Juliet P. Stumpf, *States of Confusion: The Rise of State and Local Power over Immigration*, 86 N.C. L. REV. 1557 (2007) [hereinafter Stumpf, *States of Confusion*] (showing how immigration laws throughout history that govern who is and is not a desirable United States resident are linked to the rise of power afforded to state and local law enforcement to police immigrants). Stumpf writes:

The emphasis of [ ] early colonial and state immigration laws was not on foreign affairs in the sense of the state’s relations with foreign countries, but rather on controlling the entrance of undesirables who might settle in the community. Arising from the states’ traditional powers over health, welfare, and crime, these laws sought to affect the population inside the borders of the state. Together, these early colonial and state laws constituted a network of border control regulation, reflecting choices about who may join the community and who should be excluded. They served to control the membership of the community by screening out those who were of an undesirable status, race, color, religion, or class.

*Id.* at 1569.

<sup>127</sup> See *THE DEFENDING IMMIGRANT P’SHIP*, *supra* note 123, at 70.

<sup>128</sup> See *In re Sanchez*, No. A26-708-191, 2008 WL 3919110, at \*1-2 (BIA July 29, 2008) (holding that even though appellant was sentenced to a one year suspended sentence for a simple assault in the criminal justice system, this conviction constituted a violent felony that was punishable by up to one year for the purposes of immigration and appellant was therefore ineligible for a waiver of removal).

<sup>129</sup> 8 U.S.C. § 1227(a)(2)(A)(i) (2012) (identifying deportable status of any “alien” convicted of a crime involving moral turpitude).

<sup>130</sup> 8 U.S.C. § 1101(a)(48)(A) (2012).

punged for immigration purposes.<sup>131</sup> In IIRIRA, however, Congress defined “conviction” to include much more than a formal judgment of guilt or a conviction under relevant state or federal criminal law.<sup>132</sup> Under this law, a disposition in which either (1) an adjudication of guilt is withheld but a judge or jury has found the immigrant guilty, or (2) the immigrant has entered a plea of guilty, a plea of *nolo contendere*, or admitted sufficient facts to warrant a finding of guilt, constitutes a conviction if the judge orders some form of punishment, penalty, or restraint on the immigrant.<sup>133</sup> According to this new definition, any admission of an aggravated felony or a CIMT, regardless of whether the person knew it was a crime or whether the charge was dismissed in court, constitutes a conviction and renders an immigrant deportable.<sup>134</sup>

Due to these changes, a problem arises for my noncitizen clients when they are questioned by an immigration officer about whether or not they have ever engaged in sex work. According to the new definition of conviction, if a defendant answers affirmatively, they are deportable even if they have never been convicted for prostitution, or did not know that prostitution is illegal in the United States, or if they confess to having engaged in sex work in their country of origin.<sup>135</sup> The same is also true for many other “criminal” acts regardless of a conviction, such as falsely claiming United States citizenship, registering to vote despite ineligibility, or failing to register with United States Selective Service.<sup>136</sup> Each of these criminalized acts carries severe immigration consequences and most often impacts people who are poor and cannot afford an attorney, who do not speak English, who are

<sup>131</sup> See generally William J. Johnson, *When Misdemeanors are Felonies: The Aggravated Felony of Sexual Abuse of a Minor*, 52 N.Y.L. SCH. L. REV. 419 (2008) (providing an in-depth analysis of the history of the definition of a conviction pursuant to immigration law).

<sup>132</sup> See 8 U.S.C. § 1101(a)(48)(A) (2012).

<sup>133</sup> See *id.*; see also Vargas, *supra* note 122, at 3.

<sup>134</sup> See 8 U.S.C. § 1101(a)(48)(A) (2012); see also *In re Roldan-Santoyo*, 22 I&N Dec. 512, 516–17 (BIA 1999) (these new provisions also apply retroactively).

<sup>135</sup> See 8 U.S.C. § 1101(a)(48)(A) (2012) (conviction can encompass a defendant admitting sufficient facts to warrant a finding of guilt, even if an adjudication of guilt is withheld). From my work at SRLP, I am aware of at least two recent instances of an affirmative response to an officer’s interrogation about prostitution rendering an immigrant potentially deportable. Both cases, however, are currently pending a hearing.

<sup>136</sup> See, e.g., NAT’L CTR. FOR TRANSGENDER EQUAL., *THE SELECTIVE SERVICE: HOW THE SELECTIVE SERVICE IMPACTS TRANSGENDER PEOPLE* (2008), available at [http://transequality.org/Resources/Selective\\_Service\\_only.pdf](http://transequality.org/Resources/Selective_Service_only.pdf). Transgender immigrants, in particular transgender women, often are unaware that they are supposed to register with the Selective Service because they do not identify as men. *Id.* at 3. “This registration is used to keep an updated database of potential service members in case a draft were to be reintroduced.” *Id.* at 1. As it stands, all citizens whose birth-assigned sex was male must register within thirty days of their eighteenth birthday and failure to do so is punishable by up to five years in prison, \$250,000 in fines, and severe immigration penalties. *Id.* at 1. The Act includes transgender women, regardless of whether they transitioned before or after they were ages eighteen to twenty-five. *Id.* at 2. Transgender men, on the other hand, are exempt from registering but often must disclose personal medical details before obtaining a letter of exemption. *Id.*

discriminated against or are profiled by immigration officers, who have psychiatric disabilities, and those who are within other marginalized immigrant communities.<sup>137</sup> Finally, these communities and immigrants are extremely susceptible to coercion that encourages false confessions. Immigration officers are notorious for eliciting such false confessions especially from already marginalized immigrants.<sup>138</sup>

This expanded definition of a conviction is particularly damaging to poor people who are more likely to commit “survival crimes.”<sup>139</sup> Currently, a conviction for one CIMT that is committed within five years of admission into the United States and punishable by one year in prison is grounds for deportation.<sup>140</sup> Again, the term “crime involving moral turpitude” is interpreted broadly by courts and is ever-expanding.<sup>141</sup> As Manuel D. Vargas explains, in New York this category includes:

[C]rimes in which either an intent to steal or to defraud is an element (such as theft and forgery offenses); crimes in which bodily harm is caused or threatened by an intentional or willful act, or serious bodily harm is caused or threatened by an act of recklessness . . . and most sex offenses. In New York, Class A misdemeanors as well as felonies are punishable by a year, so they could

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<sup>137</sup> Gehi, *Struggles from the Margins*, *supra* note 27, at 317.

<sup>138</sup> For a specific focus on immigration and false confessions, see Mary Beth Sheridan, *U.S. Anti-Terrorism Tactic: Immigration*, WASH. POST, Mar. 29, 2004, at B1; *see generally Understand the Causes: False Confessions*, THE INNOCENCE PROJECT, <http://www.innocenceproject.org/understand/False-Confessions.php> (last visited Mar. 3, 2012) (explaining the coercion and duress that often accompany the eliciting of false confessions).

<sup>139</sup> Survival-related crimes are crimes committed by impoverished individuals so that they can eat, attain shelter, access healthcare, ride public transportation, etc. *See, e.g., Survival Related Crimes Initiative*, POVERTY REDUCTION COAL. & ELIZABETH FRY SOC'Y OF CALGARY, <http://www.reducepoverty.ca/pdf/Survival-Related%20Crimes%201-pg.pdf> (last visited Mar. 8, 2012). Survival crimes generally parallel what others, bothered by the “undesireables” in their community, deem “quality of life crimes.” *See, e.g., Eric Lipton, Computers to Track ‘Quality of Life’ Crime, Giuliani Says*, N.Y. TIMES, Nov. 15, 2000, at B3.

<sup>140</sup> *See* Vargas, *supra* note 122.

<sup>141</sup> *See* Fernando A. Nuñez, *Collateral Consequences of Criminal Convictions to Noncitizens*, MD. B. J., July 2008 at 40, 44, *available at* [http://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=1576&context=fac\\_pubs](http://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=1576&context=fac_pubs).

The term moral turpitude is not defined by statute, but rather by case law. It refers generally to conduct which is inherently base, vile, or depraved and contrary to the accepted rules of morality. Moral turpitude has been defined as intrinsically wrong or malum in se, so it is the nature of the act itself and not the statutory prohibition which renders it a CIMT. It is the inherent nature of the crime, defined by the statute and interpreted by the courts, as limited and described in the record of conviction, and not the facts and circumstances of the case that determines if a crime is a CIMT.

*Id.* at 44.

. . . also make an LPR [(Legal Permanent Resident)] defendant deportable.<sup>142</sup>

A conviction of two CIMTs, regardless of whether they are felonies or misdemeanors, also renders a legal permanent resident deportable, as does one conviction for any controlled substance offense (even possessing small amounts), possession of a firearm or destructive device, and any crime of domestic violence, stalking, child abuse, or neglect or abandonment.<sup>143</sup> These Class A misdemeanors, which constitute CIMTs, are disproportionately charged against poor people and people of color, especially if they have added vulnerabilities including their perceived gender identities and/or sexuality.<sup>144</sup> The expanded inclusion of crimes that constitute aggravated felonies, as well as the new definition of conviction by Congress, only applies to immigrants in the United States. These amendments, along with the ever-broadening definition of CIMTs have grave effects on immigrant communities, especially low-income and transgender immigrant communities.

#### A. *Impact on Transgender and Gender-Nonconforming Communities*

As explained above, transgender and gender-nonconforming people are profiled by the police based purely on appearance.<sup>145</sup> Trans people are “put through the system” at an alarmingly high rate and are often subject to intense additional punishment if they are not United States citizens.<sup>146</sup> For trans immigrants (as for all people), deportation can result in the equivalent of imprisonment and/or death in their home countries.<sup>147</sup> The cumulative effects of racist and transphobic targeting in the United States criminal punishment system, the general evisceration of the Fourth Amendment, and the combination of draconian immigration laws in relation to minor (often false) criminal arrests is devastating for those who are rendered perpetually “suspect” and “disorderly” in contemporary law enforcement practice.

##### 1. *Post 9/11 Shifts*

Although criminal and immigration systems in the United States have embodied notions of race and gender norms since their inceptions, in the period since September 11, 2001, the drastic enhancement and militarization of law enforcement overall has worsened conditions for those targeted by these systems. As practitioner April McKenzie explains, “The United States

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<sup>142</sup> Vargas, *supra* note 122, at 2–3.

<sup>143</sup> *Id.* at 3.

<sup>144</sup> *Id.*

<sup>145</sup> See *supra* Part I.

<sup>146</sup> *Id.*

<sup>147</sup> Gehi, *Struggles from the Margins*, *supra* note 27, at 343 (explaining the ways in which transgender people are punished in their home countries either through incarceration or not being able to access necessary healthcare).

of America was attacked by terrorists on its home soil, changing immigration forever. On that day, America went from being a nation of immigrants to a nation of suspects.”<sup>148</sup> McKenzie argues that one problem for the federal government as it implemented new draconian legislation to “combat terrorism” was the “lack of manpower” within Immigration and Customs Enforcement (ICE) to track and deport the estimated 8 million undocumented residents in the United States.<sup>149</sup> As a result, in the years since McKenzie’s article was written in 2004, the Department of Justice determined that deputizing local law enforcement to enforce immigration law enforcement was a worthy endeavor.

## 2. *Immigration Enforcement Through Local Law Enforcement*

Soon after September 11, then-Attorney General John Ashcroft initiated Section 287(g) of the Immigration Naturalization Act, which provides that:

The Attorney General may enter into a written agreement with a State, or any political subdivision of a State, pursuant to which an officer or employee of the State or subdivision, who is determined by the Attorney General to be qualified to perform a function of an immigration officer in relation to the investigation, apprehension, or detention of aliens in the United States.<sup>150</sup>

Although Section 287(g) requires States to agree to a memorandum of understanding before it is implemented,<sup>151</sup> many States have signed on.<sup>152</sup> Section 287(g) has yet to be implemented in New York City, but the city has signed on to another non-public federal initiative that allows ICE officers to interrogate people who are incarcerated at jails and other correctional facilities; this initiative has already led to mass deportations.<sup>153</sup> Although the initiative’s effect has been detrimental for immigrants and others,<sup>154</sup> its publicity, and therefore, its critique, has been minimal.

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<sup>148</sup> April McKenzie, *A Nation of Immigrants or a Nation of Suspects? State and Local Enforcement of Federal Immigration Laws since 9/11*, 55 ALA. L. REV. 1149, 1150 (2004). McKenzie further explains that the federal government immediately took steps to combat this overwhelming threat of terrorism, focusing primarily on immigration. For example, she notes that “negotiations between Mexico and the United States to legalize the over three million undocumented Mexican workers within the U.S. were immediately ceased.” *Id.* at 1149.

<sup>149</sup> *Id.* at 1150; see also Michael Riley, *Immigration Bill Has Police Uneasy—Officials Say They’re Unprepared to Add INS Cases*, DENV. POST, Apr. 22, 2002, at A-01.

<sup>150</sup> 8 U.S.C. § 1357(g) (2012).

<sup>151</sup> 8 U.S.C. § 1357(g)(2) (2012); see also ICE *Delegation of Immigration Authority Section 287(g)*, *supra* note 19.

<sup>152</sup> FOIA Library, U.S. DEPT. OF HOMELAND SEC., <http://www.ice.gov/foia/library/> (last visited Mar. 1, 2012) (click link entitled “287(g) - Memorandums of Agreement/Understanding”).

<sup>153</sup> See ICE *Criminal Alien Program*, *supra* note 20.

<sup>154</sup> Uncover the Truth: ICE & Police Collaborations, *Insecure Communities: Families Under Threat*, <http://uncoverthetruth.org/category/film> (last visited Mar. 8, 2012) (twelve

Secure Communities is the latest, and perhaps most detrimental, federal initiative towards the devolution of local law enforcement and immigration law enforcement.<sup>155</sup> The cited goal of Secure Communities is to “improve and modernize the identification and removal of criminal aliens from the United States.”<sup>156</sup> The Department of Homeland Security’s own statistics indicate that its “Secure Communities program (one of many enforcement programs) is deporting over ten thousand individuals with minor convictions per year.”<sup>157</sup>

With this new initiative, anyone who is arrested is checked by local law enforcement against an FBI database as well as a Department of Homeland Security database.<sup>158</sup> According to the Immigration Policy Center there are several key concerns with this new policing measure: obstacles to community policing,<sup>159</sup> unnecessary or prolonged detention, profiling or pretextual

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minute film describing the problematic effects of ICE programs delegating immigration enforcement to local police).

<sup>155</sup> ICE *Secure Communities*, *supra* note 18. Under Secure Communities, the Federal Bureau of Investigation sends the fingerprints it obtained from local jurisdictions to ICE to check against its immigration databases. Based on these checks, ICE may take enforcement action, prioritizing the removal of repeat offenders and of individuals “who present the most significant threats to public safety as determined by the severity of their crime, their criminal history, and other factors. . . .” This provides a simple and common sense enforcement mechanism by relying on existing information-sharing partnership between ICE and the FBI. *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> Alice Clapman, *Petty Offenses, Drastic Consequences: Towards a Sixth Amendment Right to Counsel for Noncitizen Defendants Facing Deportation*, 33 *CARDOZO L. REV.* 585, 588 n.9 (explaining that in the thirty-five month period between October 2008 and September 2011, DHS’s Secure Communities program alone deported 37,626 noncitizens with one or two misdemeanor convictions) (citing U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, *SECURE COMMUNITIES: IDENT/IAFIS INTEROPERABILITY, MONTHLY STATISTICS THROUGH SEPTEMBER 30, 2011*, at 2, 4 (2011), *available at* [http://www.ice.gov/doclib/foia/sc-stats/nationwide\\_interoperability\\_stats-fy2011-to-date.pdf](http://www.ice.gov/doclib/foia/sc-stats/nationwide_interoperability_stats-fy2011-to-date.pdf)). Clapman goes on to explain, however, that:

This figure [of 37,636] is underinclusive because it does not include noncitizens with more than two misdemeanor convictions or with misdemeanor convictions that qualify as “aggravated felonies” under federal law, and because it does not include other programs through which noncitizens with convictions are deported, such as federal-state enforcement partnerships pursuant to INA § 287(g), 8 U.S.C. § 1357(g) (2006), and ICE’s Criminal Alien Program, which “identifies, processes and removes criminal aliens incarcerated in federal, state and local prisons and jails throughout the U.S.”

*Id.* at 588 n.9.

<sup>158</sup> See ICE *Secure Communities*, *supra* note 18.

<sup>159</sup> For example, recently in California, a Chinese immigrant called the police for help with a domestic violence incident. In accordance with Secure Communities, her fingerprints were sent to ICE and she was placed in ICE custody, despite the fact that no criminal charges were filed against her. *Secure Communities – Not about Security*, LA UNION DEL PUEBLO ENTERO (Apr. 14, 2011), <http://lupergv.wordpress.com/2011/04/14/secure-communities-not-about-security/>. This example is only one of many that indicate a growing lack of trust in local law enforcement. Rather than access the police for help, people are likely to continue to live in fear and violence rather than face immigration, detention, and/or deportation.

arrests, lack of complaint mechanisms, lack of oversight and lack of transparency.<sup>160</sup>

### 3. *Specific Impacts on Transgender Communities*

Concerns about the implementation of Secure Communities have specific relevance for transgender and gender-nonconforming immigrants in particular. Secure Communities is part of a broader shift towards increased local law enforcement latitude for racial profiling on the basis of perceived immigration status.<sup>161</sup> Like other harsh immigration bills, Secure Communities disproportionately impacts low-income immigrant trans and gender-nonconforming people of color because gender policing, which results in increased arrest rates.<sup>162</sup> As discussed above, transgender people are often falsely arrested when they call the police to report any incident of violence.<sup>163</sup> With the implementation of Secure Communities, such wrongful arrests may also result in prolonged detention and potentially deportation; transgender people who are arrested and detained also face staggeringly high rates of sexual and physical violence and abuse.<sup>164</sup>

Transgender and gender-nonconforming immigrants migrate because they, like many immigrants, are economic refugees. Often their home countries' economies have been destroyed by military occupation and free trade agreements that have decimated local food and labor systems and exploited local resources.<sup>165</sup> In addition, transgender and gender-nonconforming immigrants often flee their home countries because of the state-sponsored persecution and a belief that they will be safer in the United States.<sup>166</sup> Others flee because of the lack of acceptance they face from family and friends due to their gender identities. Still others leave because they are unable to find

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<sup>160</sup> See *Secure Communities: A Fact Sheet*, IMMIGRATION POL'Y CTR. (last updated Nov. 29, 2011) <http://www.immigrationpolicy.org/just-facts/secure-communities-fact-sheet>.

<sup>161</sup> See *Uncover the Truth: ICE and Police Collaborations*, *supra* note 154.

<sup>162</sup> See, e.g., STONEWALLED, *supra* note 26, at 2.

<sup>163</sup> See *supra* Part I.

<sup>164</sup> See Turney, *supra* note 27, at 1360.

<sup>165</sup> See generally JOSEPH E. STIGLITZ, *GLOBALIZATION AND ITS DISCONTENTS* (2002) (explaining, for example, how the West enforces asymmetrical trade agreements and benefits disproportionately from globalization); QUEER MIGRATIONS: SEXUALITY, U.S. CITIZENSHIP, AND BORDER CROSSINGS (Eithne Luibhéid & Lionel Cantu Jr. eds., 2005) (discussing reasons, including persecution, that LGBT people are especially vulnerable in foreign countries and seek to immigrate to the United States).

<sup>166</sup> This persecution of trans individuals occurs worldwide, and can range from a lack of support from family and friends to assault and detention on behalf of the State. See Morgan, *supra* note 27, at 135–36 (explaining that LGBT asylum seekers often flee to the United States to escape persecution in their home countries, including “police abuse, harsh penalties (including death) for consensual sex, incarceration, drug or electroshock ‘treatments,’ and government inaction to prevent antigay violence”); see, e.g., *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1087 (9th Cir. 2000) (finding that a “gay [man] with female sexual identities” was persecuted in her home country on the basis of her gender identity).

employment in their countries because of discrimination and poverty.<sup>167</sup> Many cannot access the healthcare they need.<sup>168</sup> For many HIV-positive transgender, gender-nonconforming, and queer immigrants, deportation is effectively a death sentence because of lack of access to life-saving HIV medications in their home countries.<sup>169</sup>

Some queer and transgender immigrants who are deported are separated from their families, their partners, their communities, and their loved ones who remain in the United States, and many people who are removed from the United States are barred from returning for several years at a time.<sup>170</sup> For queer and trans immigrants, the devolution of criminal and immigration systems combined with the discrimination that these communities already experience on a daily basis is devastating.

Although New York tried to “opt out” of Secure Communities,<sup>171</sup> the state has already borne witness to its devastating effects. As the now-federal mandate intends to “combat terrorism,” it has drawn an increased presence of local law enforcement to communities that are home to people of various ethnic identities.<sup>172</sup> One example is that of Jackson Heights, NY. Jackson Heights is known as an ethnic enclave and home to many immigrant communities. Recently, SRLP has witnessed a flood of arguably false arrests of transgender women of color on the streets of Jackson Heights, most on charges of loitering for the purposes of prostitution.<sup>173</sup> Even when they are informed of the immigration consequences of taking a plea bargain, they are often so unwilling to face the horrors of jail that they feel they have no other choice but to plead. In the experience of my clients, since Secure Communities has gone into effect, taking a plea results in an automatic “immigration

<sup>167</sup> See generally QUEER MIGRATIONS, *supra* note 165.

<sup>168</sup> Several of my clients who are transgender and HIV-positive have told me that they fled their home countries to come to the United States because they could not receive the medical treatment they required. They thought that there might be better resources for attaining medical treatment in the United States.

<sup>169</sup> Gehi, *Struggles from the Margins*, *supra* note 27, at 343.

<sup>170</sup> See Immigration and Nationality Act, 8 U.S.C. § 1182(a)(9)(A) (2006) (stating that a removed person is inadmissible for five years, unless it is a second or subsequent removal, in which case it is twenty years).

<sup>171</sup> Elise Foley, *New York Quits Secure Communities Immigration Enforcement Program Cuomo Announces*, HUFFINGTON POST (June 1, 2011), [http://www.huffingtonpost.com/2011/06/01/new-york-quits-secure-communities\\_n\\_869969.html](http://www.huffingtonpost.com/2011/06/01/new-york-quits-secure-communities_n_869969.html).

<sup>172</sup> AARTI KOHLI, PETER MARKOWITZ & LISA CHAVEZ, THE CHIEF JUSTICE EARL WARREN INST. ON LAW & POLICY, SECURE COMMUNITIES BY THE NUMBERS: AN ANALYSIS OF DEMOGRAPHICS AND DUE PROCESS 5 (2011), available at [http://www.law.berkeley.edu/files/Secure\\_Communities\\_by\\_the\\_Numbers.pdf](http://www.law.berkeley.edu/files/Secure_Communities_by_the_Numbers.pdf) (“Latinos are disproportionately impacted by Secure Communities. . . . 93% of the people identified for deportation through Secure Communities are from Latin American countries, while 2% are from Asia and 1% are from Europe and Canada. The overwhelmingly large percentage of Latinos . . . identified for deportation by Secure Communities raises serious questions.”).

<sup>173</sup> The charges of prostitution are often the result of “walking while trans.” See *supra* note 63. I argue that these incidents should be considered “false arrests” because often there is no real suspicion that criminal activity is afoot to make a stop, nor is there any probable cause to make an arrest, but rather the arrest is based on implicit biases and stereotypes about transgender people in ethnically diverse neighborhoods.

hold” which triggers an automatic removal proceeding for people who are undocumented.<sup>174</sup> One of the only ways in which we at SRLP have found to break the cycle of mandatory removal is by having people pay their bail fee. While this is effective temporarily, it is also extremely challenging because all of the people with whom SRLP works are extremely impoverished. Most have little family or community support and no money to use as bail for even extremely minor misdemeanors. And, while payment of bail temporarily breaks the cycle of criminalization to deportation, having a conviction on one’s record—especially for prostitution or some other CIMT—continues to render these individuals deportable in the future.

### B. *Opposition to Secure Communities*

There has been a national outcry against Secure Communities, and activists in many states have successfully mobilized against its implementation.<sup>175</sup> However, in August 2011, President Obama declared Secure Communities a federal mandate with no state opt-out.<sup>176</sup> Documents obtained through Freedom of Information Act requests by the National Day Laborer Organizing Network, the Center for Constitutional Rights, and the Cardozo Immigration Justice Clinic also revealed that Secure Communities is the first step in the Next Generation Identification (“NGI”) initiative, which is “an unprecedented, billion dollar initiative to create the world’s largest biometric database. NGI will expand on Secure Communities by forcing greater collection and dissemination of personal information between federal agencies, without the consent of the states that provide the information.”<sup>177</sup> The Secure Communities mandate thus appears to be part of a broader surveillance tactic by state and federal governments.

For the most part, LGBTQ advocates and organizations have spoken out very little against Secure Communities and the resultant profiling that LGBTQ people of color experience on a daily basis. Not surprisingly, the few that have are the small, under-resourced, and relatively marginal groups that center their work in a commitment to racial and economic justice and primarily serve low-income people, people of color, and immigrants. Two

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<sup>174</sup> See NAT’L IMMIGRATION FORUM, *supra* note 20, at 15.

<sup>175</sup> See, e.g., Foley, *supra* note 171 (after a great deal of pressure from New York-based advocates, New York Governor Andrew Cuomo agreed to suspend state participation in Secure Communities).

<sup>176</sup> See, e.g., Albor Ruiz, *Obama Makes Deportation Priority by Mandating Secure Communities on States*, LATINO NEWS (Aug. 11, 2011), [http://latinonews.co/obama\\_makes\\_deportation\\_priority\\_by\\_mandating\\_secure\\_communities\\_on\\_states.htm](http://latinonews.co/obama_makes_deportation_priority_by_mandating_secure_communities_on_states.htm) (describing President Obama’s announcement making Secure Communities a federal mandate).

<sup>177</sup> Press Release, Uncover the Truth: ICE & Police Collaborations, Secure Communities Scrutiny Expands to the FBI (Sept. 12, 2011), *available at* <http://uncoverthetruth.org/featured/press-release-secure-communities-scrutiny-expands-to-fbi/>; see also *Next Generation Identification*, FBI, [http://www.fbi.gov/about-us/cjis/fingerprints\\_biometrics/ngi](http://www.fbi.gov/about-us/cjis/fingerprints_biometrics/ngi) (last visited Apr. 2, 2012).

organizations that work with LGBTQ people of color, Communities United Against Violence<sup>178</sup> and Streetwise and Safe,<sup>179</sup> issued a statement on National Coming Out Day urging President Obama to take immediate action to eliminate the destructive program.<sup>180</sup> These groups led a recent campaign with over sixty groups signing on to a statement noting:

All immigrants in this country struggle to find safe and secure housing, healthcare, employment, and education while living in fear of deportation. Immigrants who are LGBTQ are particularly vulnerable to detention and deportation because they are more likely to come into contact with law enforcement through police profiling and discriminatory enforcement of minor offenses, as well as through false or dual arrest when they attempt to survive or flee violence. Officials often use excessive force and coercion against LGTBQ people at the scene of arrest, including threats of deportation. Once in jail, prison, or immigration detention, LGTBQ people experience rampant and sometimes fatal sexual, physical, and emotional abuse, mirroring the abuse many face from partners, employers, and neighbors outside.<sup>181</sup>

For transgender people of color, calling the police is often unsafe in and of itself. They will often avoid the police at all costs because of the awareness that gender expression-based profiling can lead to unjustified stops, which then lead to arrests and incarceration.<sup>182</sup> For transgender people who are immigrants, the conflation of local law enforcement with federal immigration enforcement unites the power of two damaged systems to devastate lives.

### C. *Reactions to Arizona SB 1070*

Despite the fact that a range of harsh immigration laws were already on the books, the introduction of Arizona's SB 1070 caused a momentous and national stir. SB 1070 received attention nationally because, in passing it, Arizona explicitly required law enforcement to do what they already do all the time: profile based on physical appearance. The bill made the failure to carry immigration documents a crime and gave the police broad authority to

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<sup>178</sup> See COMMS. UNITED AGAINST VIOLENCE, <http://www.cuav.org/> (last visited Mar. 18, 2012).

<sup>179</sup> See STREETWISE AND SAFE, <http://www.streetwiseandsafe.org/> (last visited Apr. 2, 2012).

<sup>180</sup> Press Release, Cmty. United Against Violence, Streetwise & Safe, Nat'l Day Laborer Org. Network, Lesbian, Gay, Bi-Sexual, Transgender, Queer Organizations "Come Out" Against ICE's Secure Communities Deportation Program (Oct. 11, 2011), available at <http://myemail.constantcontact.com/-Organizations-Come-Out-Against-ICE-s-Secure-Communities-Program-.html?soid=1101557261397&aid=chxJacxmtxM>.

<sup>181</sup> *Id.*

<sup>182</sup> See *supra* Part I.

detain anyone suspected of being in the United States illegally.<sup>183</sup> Pursuant to SB 1070, no warrant was needed for an arrest as long as the officer had probable cause that the person had committed a public offense that made them removable from the United States.<sup>184</sup> The bill even encouraged people to make anonymous tips to the police of employers who hired “illegals.”<sup>185</sup> As Rep. Raul Grijalva, Democrat of Tucson, Arizona, and co-chair of the Congressional Progressive Caucus explained: “It’s a license to racially profile. It creates a second-class status for primarily Latinos and people of color in the state of Arizona. . . . Arizona’s been the petri dish for these kinds of harsh, racist initiatives.”<sup>186</sup> President Obama even stated that he wanted to closely monitor the civil rights and other implications of the bill.<sup>187</sup> The bill publicly represented one of the most overtly racist and draconian laws this country has witnessed in recent times and immediately drew a broad base of opposition.<sup>188</sup> Among this base was a prominent civil rights coalition led by the American Civil Liberties Union (“ACLU”). The coalition was made up of the ACLU, the Mexican American Legal Defense and Education Fund (“MALDEF”), the National Immigration Law Center (“NILC”), the Asian Pacific American Legal Center (“APALC”), the ACLU of Arizona, the National Day Labor Organizing Network (“NDLON”), and the National Association for the Advancement of Colored People (“NAACP”).<sup>189</sup> The coalition filed a lawsuit in federal court challenging the racist law and seeking a preliminary injunction to block the implementation of the bill. The coalition argued that SB 1070 “invites the racial profiling of people of color, violates the First Amendment and interferes with federal law.”<sup>190</sup>

While it is correct that Arizona SB 1070 was a clear violation of civil liberties and First Amendment rights, and interfered with Congressional power over immigration law, it is also true that transgender people of color

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<sup>183</sup> Archibold, *Arizona Enacts Stringent Law*, *supra* note 8, at A1.

<sup>184</sup> Amy Goodman, *Boycotting Arizona’s Racism*, HUFFINGTON POST (Apr. 28, 2010, 4:53 PM), [http://www.huffingtonpost.com/amy-goodman/boycotting-arizonas-racis\\_b\\_555896.html](http://www.huffingtonpost.com/amy-goodman/boycotting-arizonas-racis_b_555896.html).

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

<sup>188</sup> Although the bill essentially legalized profiling on the basis of race, poor people of color in the United States had already been experiencing such profiling throughout their lives; such profiling has been essentially “legal.”

<sup>189</sup> Press Release, Am. Civil Liberties Union, ACLU and Civil Rights Groups Ask Court to Block Implementation of Arizona’s Racial Profiling Law During Legal Battle (June 5, 2010), *available at* <http://www.aclu.org/immigrants-rights-racial-justice/aclu-and-civil-rights-groups-ask-court-block-implementation-arizona>.

<sup>190</sup> *Id.* The Obama administration also initiated a legal challenge against the law. On July 28, 2010, a federal district court in Arizona issuing a preliminary injunction against the most controversial parts of the bill, which remains currently in place. *See* Randal C. Archibold, *Judge Blocks Arizona’s Immigration Law*, N.Y. TIMES, July 28, 2010, [http://www.nytimes.com/2010/07/29/us/29arizona.html?\\_r=1](http://www.nytimes.com/2010/07/29/us/29arizona.html?_r=1) [hereinafter Archibold, *Judge Blocks Arizona’s Immigration Law*].

and other marginalized communities experience and suffer the consequences of these civil rights violations all the time. However, this bill served only to further the legitimacy of racial profiling in the United States. Already several states including Georgia,<sup>191</sup> South Carolina, Pennsylvania, Minnesota, and Rhode Island have expressed interest in introducing similar bills to “combat illegal immigration.”<sup>192</sup> While many voices strongly opposed the bill and the federal district court in Arizona issued a preliminary injunction against its implementation,<sup>193</sup> a trend towards its legitimization and duplication continues.

### III. INTEREST CONVERGENCE AND THE PERPETRATOR PERSPECTIVE

Arizona SB 1070 generated an unprecedented level of outrage, which was certainly warranted. But it cannot be lost on the mainstream LGBTQ community that the outcry and resulting injunction against the bill is a modern day example of interest convergence. In line with Derrick Bell’s theory, while eliminating an overtly discriminatory piece of legislation, the reaction to SB 1070 failed to address in any meaningful way the systems that continually perpetuate outrageous discrimination against LGBTQ and immigrant communities. Interest convergence and Freeman’s theory of the perpetrator perspective<sup>194</sup> are both applicable in our efforts to understand how the mainstream LGBTQ community has gauged its success while working within the confines of an inherently unequal and corrupt system.

Bell’s principle of interest convergence provides that “[t]he interest of blacks in achieving racial equality will only be accommodated when it converges with the interests of whites.”<sup>195</sup> His theory helps explain how seeming advances in racial justice can be made through the courts without ever disturbing the racial distribution of wealth and life chances.<sup>196</sup>

This principle, along with Allan Freeman’s description of the perpetrator perspective, can be applied to the overruling of SB 1070 and the labeling

<sup>191</sup> H.B. 87, 151st Gen. Assemb., 2011 Reg. Sess. (Ga. 2011).

<sup>192</sup> *Arizona SB 1070 Inspires Other State Legislatures*, UNITED FOR A SOVEREIGN AM. (USA) (June 4, 2010), <http://immigrationbuzz.com/?p=3849>.

<sup>193</sup> See Archibold, *Judge Blocks Arizona’s Immigration Law*, *supra* note 183. At the time of this publication, the Supreme Court has granted certiorari to hear Arizona’s appeal of the injunction against the implementation of SB 1070. The decision in this case will be pivotal with regards to race-based profiling and the deputization of local law enforcement to enforce immigration laws. See *ACLU Reacts to Supreme Court’s Ruling Regarding Arizona’s Anti-Immigrant Law*, AM. CIVIL LIBERTIES UNION (Dec. 12, 2011), <http://www.aclu.org/immigrants-rights/aclu-reacts-supreme-court-ruling-regarding-arizonas-anti-immigrant-law>.

<sup>194</sup> Allan Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law*, in *CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT* 29 (Kimberlé Crenshaw et al. eds., 1995) (explaining the ways in which antidiscrimination laws do not address or alter systemic reasons for disparate life chances among different communities).

<sup>195</sup> Bell, *supra* note 21, at 523.

<sup>196</sup> *Id.* at 518.

of similar overtly racist state bills as “outliers” and “aberrations,” which produces the fiction that the rest of the immigration or criminal enforcement systems are racially neutral.<sup>197</sup> Freeman critiques the “perpetrator perspective” that views “racial discrimination not as conditions but as actions, or a series of actions inflicted on the victim by the perpetrator.”<sup>198</sup> Freeman then argues that the perpetrator model wrongly assumes that a few bad actors perpetrate harm on certain victims through specific actions and thereby fails to examine the ways in which structural harms produce and sustain disparities based on race, class, sexuality, ableism, gender identity and expression, and immigration.<sup>199</sup> For these reasons, Freeman explains, antidiscrimination laws that embrace the perpetrator/victim perspective fail to produce systemic remedies for discrimination.<sup>200</sup>

Although SB 1070 and its copycat bills are extremely damaging in their impact on the lives of undocumented immigrants, the idea that these bills are unusually egregious has allowed similar legislation—as egregious, if not more—to go unnoticed.<sup>201</sup> Similarly, the national attack on SB 1070 relied on the perpetrator perspective—deeming the perpetrators of violence as discriminatory state legislators rather than a discriminatory system—to vilify a specific action, i.e., the passing of a bill that allows for race-based profiling. Rather than capturing terrorists (the stated goal of the “war on terror”), Arizona’s bill attacked “hard-working” (those who do not need support like public benefits or housing) and “law-abiding” (those not caught up in the criminal punishment system) taxpayers through race-based profiling. Through litigation that challenged this racist bill, the discriminatory practice that it supported was supposedly quashed.

Notably, much of the narrative opposing Secure Communities has also centered on the victim/perpetrator model,<sup>202</sup> focusing specifically on the plight of undocumented domestic violence survivors. The conversation focuses on the fact that undocumented domestic violence survivors will not feel safe to call the police for protection because of their own fear of deportation.<sup>203</sup> This narrative is problematic because it focuses on one particularly

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<sup>197</sup> Freeman, *supra* note 194, at 29

<sup>198</sup> *Id.*

<sup>199</sup> *Id.*

<sup>200</sup> *Id.* at 30.

<sup>201</sup> Section 287(g), Secure Communities, and the U.S. Criminal Alien Program each essentially allow for the same level of race-based profiling as SB 1070 but are framed as federal legislation that is necessary to combat the war on terror. *See, e.g., ICE Delegation of Immigration Authority Section 287(g), supra* note 19; *ICE Secure Communities, supra* note 18; *ICE Criminal Alien Program, supra* note 20.

<sup>202</sup> *See* Freeman, *supra* note 194, at 29.

<sup>203</sup> *See, e.g., Amy Woo, Secure Communities Silences Domestic Violence Victims, NEW AM. MEDIA/NEWS ANALYSIS* (Oct. 21, 2011), <http://newamericamedia.org/2011/10/scomm-silences-domestic-violence-victims.php> (“The projected expansion of Secure Communities to every jurisdiction in the U.S. severely undercuts the advances made by advocates to empower battered immigrant women to seek help.”); *see also* Press Release, Safe Horizons, Homeland Security Laws Create Danger for Victims of Domestic Violence (Feb. 24, 2011), *available at* <http://www.safehorizon.org/index/pressroom-5/safe->

sympathetic subset of the immigrant group as a whole and thereby positions “deserving non-criminal immigrants” against “non-deserving criminal immigrants.” This narrative legitimizes an inherently flawed criminal punishment system that relies on implicit bias to disproportionately prosecute poor people, people of color, people with disabilities, immigrants and LGBT people.<sup>204</sup> As Dean Spade explains in his critique of rights-based movements:

With the recognition that changing what the law explicitly says about a group does not necessarily remedy the structured insecurity faced by that group comes a larger question about transformation that cannot occur through demands for legal recognition and inclusion. In fact, legal inclusion and recognition demands often reinforce the logics of harmful systems by justifying them, contributing to their illusion of fairness and equality, and by reinforcing the targeting of certain perceived “drains” or “internal enemies,” carving the group into “the deserving” and “the undeserving” and then addressing only the issues of the favored sector.<sup>205</sup>

The federally mandated Secure Communities program relies on local law enforcement for its execution. Therefore, domestic violence victim advocates who construct a deserving/undeserving immigrant dichotomy implicitly rely on this system to justify their arguments.

As I have discussed herein, numerous studies have demonstrated that people of color are disproportionately targeted by local law enforcement.<sup>206</sup> Fewer, but notable, studies have similarly demonstrated that LGBTQ people, especially transgender and gender-nonconforming individuals, are also disproportionately targeted by local law enforcement.<sup>207</sup> It naturally follows that LGBTQ people of color who live at the intersection of two distinct vectors of subjugation are even more likely to be targets of criminalization. As the collaboration of criminal and immigration law enforcement has become such a prominent feature of the “war on terror,” LGBTQ people of color who are immigrants are suffering from the collateral damage of this war. However, immigration and race-based profiling have yet to be a central concern of mainstream LGBTQ organizations. The opposition to Arizona SB 1070 proved to be a welcome exception, as major LGBTQ organizations

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horizon-in-the-news-28/news/homeland-security-laws-create-danger-for-victims-of-domestic-violence-52.html); *see also* Lee Romney & Paloma Esquivel, *Noncriminals swept up in federal deportation program*, L.A. TIMES, Apr. 25, 2011, <http://articles.latimes.com/2011/apr/25/local/la-me-secure-communities-20110425>.

<sup>204</sup> *See supra* Part I.

<sup>205</sup> SPADE, *NORMAL LIFE*, *supra* note 5, at 124.

<sup>206</sup> *See supra* Part I.

<sup>207</sup> *Id.*

spoke out against the unconstitutional profiling that this bill endorsed.<sup>208</sup> Lambda Legal issued a public statement opposing Arizona SB 1070, with more than twenty allied organizations signing on. In it, the organizations argue:

All Arizona families—lesbian, gay, bisexual, transgender and straight—have reason to be alarmed. The state’s new law threatens to tear apart families, separate children from their parents and rip apart loving couples who are building their lives together. The LGBT community knows all too well how easily people who “look different” or “act different” can be singled out for harassment and persecution. LGBT immigrants will be doubly vulnerable under this law, which gives license to discriminate.<sup>209</sup>

Lambda Legal also joined civil rights groups to file an amicus curiae brief opposing Alabama’s “copycat” bill, HB 56, arguing, “The brief clarifies that Alabama HB 56—like the anti-immigrant measure, SB 1070, passed in Arizona—will lead to racial profiling, discrimination and anti-immigrant extremism.”<sup>210</sup>

It is striking that the LGBTQ national organizations, often quiet on immigration issues—especially those linked to national security<sup>211</sup>—took such a united stand against Arizona SB 1070 and its copycat bills. However, it is also significant that police profiling of LGBTQ people, especially LGBTQ people of color, has yet to become an agenda item for these mainstream organizations. Secure Communities, Section 287(g), The Criminal Alien Program, and the new indefinite detention bill provide examples of federal legislation that condones the exact same race-based profiling of people of color—and by default, LGBTQ people—yet opposition to these bills has yet to become a cause for LGBTQ organizations. For example, although the National Gay and Lesbian Task Force (“NGLTF”) did sign onto the statement issued by Community United Against Violence (“CUAV”) and Streetwise and Safe (“SAS”) opposing Secure Communities,<sup>212</sup> its major

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<sup>208</sup> See, e.g., Shelley Ettinger, *Boycotting Arizona: Authors Cry Out Against SB 1070*, LAMBDA LITERARY (May 12, 2010), <http://www.lambdaliterary.org/features/oped/05/12/boycotting-arizona/>.

<sup>209</sup> Press Release, Lambda Legal, Lesbian, gay, bisexual and transgender rights groups and allies join outcry against anti-immigrant measure in Arizona (June 7, 2010), available at [http://www.lambdalegal.org/news/ny\\_20100607\\_lgbt-groups-join-outcry-against-anti-immigrant-measure-az](http://www.lambdalegal.org/news/ny_20100607_lgbt-groups-join-outcry-against-anti-immigrant-measure-az).

<sup>210</sup> Press Release, Lambda Legal, Lambda Legal Joins Civil Rights Groups to File Amicus Brief Opposing Alabama Anti-Immigrant Law, HB 56 (Nov. 22, 2011), available at [http://www.lambdalegal.org/news/al\\_20111122\\_lambda-legal-joins](http://www.lambdalegal.org/news/al_20111122_lambda-legal-joins).

<sup>211</sup> As explained in the Introduction to this Article, when LGBTQ organizations take on immigration issues, they are usually advocating for UAFB and/or the repeal of DOMA—both of which, if passed or repealed, would ensure increased rights for same-sex immigrant couples.

<sup>212</sup> See Press Release, Cmty. United Against Violence, *supra* note 180.

campaigns remain anti-bullying legislation in public schools and the Employment Non-Discrimination Act (“ENDA”).<sup>213</sup>

For the most part, since LGBTQ civil rights organizations have emerged, the focus of their work has been single issue rights advocacy such as overturning anti-sodomy laws, securing anti-discrimination and hate crimes legislation, and, more recently, advocating the legalization of same-sex marriage and the repeal of “Don’t Ask, Don’t Tell.”<sup>214</sup> This work is not, and has never been, reflective of the needs of trans and queer people who are the most marginalized.<sup>215</sup> As Dean Spade and Rickke Mananzala explain:

Critiques of these developments have used a variety of terms and concepts to describe the shift, including charges that the focus [of gay rights activists] became assimilation; that the work increasingly marginalized low-income people, people of color, and transgender people; and that the resistance became co-opted by neoliberalism and conservative egalitarianism. Critics have argued that as the gay rights movement of the 1970s institutionalized into the gay and lesbian rights movement in the 1980s—forming such institutions as Gay and Lesbian Advocates and Defenders, the Gay and Lesbian Alliance Against Defamation, the Human Rights Campaign (HRC), Lambda Legal Defense and Education Fund, and the National Gay and Lesbian Task Force—the focus of the most well-funded, well-publicized work on behalf of queers shifted drastically . . . .<sup>216</sup>

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<sup>213</sup> See, e.g., *Hundreds of advocates to lobby U.S. Congress during Creating Change*, NAT’L GAY & LESBIAN TASK FORCE BLOG (Jan. 20, 2012), <http://thetaskforceblog.org/2012/01/20/hundreds-of-advocates-to-lobby-u-s-congress-during-creating-change/> (describing ENDA and anti-bullying legislation as the main areas of LGBTQ lobbying).

<sup>214</sup> See *supra* note 32 and accompanying text. In my opinion, some of the inaction from mainstream LGBTQ movements is likely tied to their traditional alliance with the Democratic Party. While LGBTQ organization leaders are not to blame for utilizing the most practical political vehicle available to realize any potential legislative changes, history shows us that the Democratic Party, while open to such pressures, has been resistant and even harmful in efforts to effect meaningful social change. By relying on Democratic “allies,” the mainstream LGBTQ movements have been rewarded with legislation like IIRIRA and AEDPA, passed by President Clinton in 1996. The effects of these laws have been devastating to LGBTQ communities that are targeted by local law enforcement because of identity-based bias. Additionally, President Obama, while hailed by many in the LGBTQ community as an ally, has made Secure Communities a federal mandate and, as a result, has deported more people in his first term than his Republican predecessor did in both of his terms. Mainstream LGBTQ organizations have yet to address the problematic bias of local law enforcement to the devolution of criminal immigration laws on a federal level. I believe that although organizations acknowledge intersecting identities at times, they continue to rely on systems that sustain punishment of these identities for solutions to discrimination.

<sup>215</sup> See, e.g., Rickke Mananzala & Dean Spade, *The Nonprofit Industrial Complex and Trans Resistance*, 5 *SEXUALITY RES. & SOC. POL’Y* 53, 57 (2008).

<sup>216</sup> *Id.* at 59.

In fact, many of the single-issue rights-based initiatives that mainstream LGBTQ organizations focus on rely on strengthening institutionalized systems that work against marginalized communities, such as transgender immigrants who are people of color.<sup>217</sup>

For example, much time and money has been invested by LGBTQ organizations advocating for the inclusion of gender identity and sexual orientation in the context of “hate crimes” in state legislation<sup>218</sup> and now leveling federal legislation.<sup>219</sup> Hate crimes legislation increases the automatic sentencing requirements when an act of violence can be traced to an identity-based bias.<sup>220</sup> The very phenomenon of hate crimes legislation is problematic in that it relies on the above-described flawed systems of criminal justice, which are biased in their implementation.<sup>221</sup> Hate crimes laws expand and increase the power of the same unjust criminal punishment system. In fact, it has been demonstrated that hate crimes legislation, like other criminal punishment legislation, is enforced unequally against communities that are already marginalized in our society.<sup>222</sup> These laws increase the already staggering incarceration rates of people of color, poor people, queer people, and transgender people based on a system that is inherently and deeply unequal, and it has been shown that these types of laws do not deter violent crime.<sup>223</sup>

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<sup>217</sup> *Id.* at 57.

<sup>218</sup> Eleven states currently have gender identity or gender expression included in their hate crimes legislation. See *Hate Crimes*, NAT'L CTR. FOR TRANSGENDER EQUAL., [http://transequality.org/Issues/issues\\_hate\\_crimes.html](http://transequality.org/Issues/issues_hate_crimes.html) (last visited Mar. 6, 2012).

<sup>219</sup> See Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, Pub. L. No. 111–84, 123 Stat. 2835 (codified as amended in scattered sections of 42 and 18 U.S.C.); see also *SRLP Opposes the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act*, SYLVIA RIVERA LAW PROJECT, <http://srlp.org/fedhatecrimelaw> (last visited Mar. 6, 2012):

We are also dismayed by the joining of a law that is supposedly about “preventing” violence with the funding for continued extreme violence and colonialism abroad. This particular bill was attached to a \$680-billion measure for the Pentagon’s budget, which includes \$130 billion for ongoing military operations in Iraq and Afghanistan. Killing people in Iraq and Afghanistan protects no one, inside or outside of U.S. borders.

<sup>220</sup> *SRLP Opposes the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act*, *supra* note 219.

<sup>221</sup> *Id.*

<sup>222</sup> Cf. INCITE! WOMEN OF COLOR AGAINST VIOLENCE AND CRITICAL RESISTANCE, STATEMENT ON GENDER VIOLENCE AND THE PRISON INDUSTRIAL COMPLEX 1 (2001), available at [http://www.incite-national.org/media/docs/5848\\_incite-cr-statement.pdf](http://www.incite-national.org/media/docs/5848_incite-cr-statement.pdf) (describing the importance of finding ways to combat violence against women without relying on the “sexist, racist, classist, and homophobic criminal justice system”).

<sup>223</sup> See KATHERINE WHITLOCK, AM. FRIENDS SERV. COMM., IN A TIME OF BROKEN BONES: A CALL TO DIALOGUE ABOUT HATE CRIMES AND THE LIMITATIONS OF HATE CRIMES LEGISLATION 8 (2001), available at <http://srlp.org/files/Broken%20Bones-1.pdf>; see also SPADE, NORMAL LIFE, *supra* note 5, at 82 (“[Hate crime laws] focus on punishment and cannot be argued to actually prevent bias-motivated violence. In addition to their failure to prevent harm, they must be considered in the context of the failures of our legal system and, specifically, the violence of our criminal punishment system. Anti-discrimination laws are not adequately enforced.”).

Even as mainstream LGBTQ organizations understand and articulate the problems stemming from increased police power in Arizona SB 1070 and its copycat laws—as one press release noted, “The LGBT community knows all too well how easily people who ‘look different’ or ‘act different’ can be singled out for harassment and persecution”<sup>224</sup>—they rely on utilizing and strengthening the power of the same biased system to protect LGBTQ people from violence.

Another recent LGBTQ “victory” that demonstrates the interplay of the interest convergence principle and perpetrator model is the repeal of “Don’t Ask, Don’t Tell” regulations promulgated under President Clinton. This repeal effectively allows gay and lesbian people to be “out” in the United States military without punishment or discharge. While it is a positive victory (especially given that the Department of Defense is the largest employer in the United States),<sup>225</sup> this victory also works to strengthen the military-industrial complex.<sup>226</sup> The mainstream LGBTQ community has not publicly acknowledged that the U.S. Department of Defense employs the greatest number of United States citizens because it sustains global wars abroad at the expense of civilian people of color, some of who are undoubtedly LGBTQ-identified.

In addition, this victory simultaneously maintains the status quo of multi-billion dollar wars, allows the Obama administration to claim an LGBTQ victory, and quells dissent against unjust global wars and increased “security” measures such as Secure Communities. In addition, this victory sustains a victim/perpetrator model as it draws upon the narrative that “Don’t Ask, Don’t Tell” victimized loyal, patriotic LGBTQ people who wanted to openly and fully participate in the United States military, for example:

When Dan Choi appeared on MSNBC’s The Rachel Maddow [S]how he didn’t speak badly about the way his government was fighting the war. He didn’t insult his superiors. He just spoke honestly of who he was as a person. A gay person. And his re-

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Dean Spade goes on to explain why anti-discrimination laws are not successful for similar reasons:

Most people who experience discrimination cannot afford to access legal help, so their experiences never make it to court. Additionally, the Supreme Court has severely narrowed the enforceability of these laws over the last thirty years, making it extremely difficult to prove discrimination short of a signed letter from a boss or landlord stating, “I am taking this negative action against you because of your [insert characteristic].”

*Id.*

<sup>224</sup> Press Release, LGBT Rights Groups and Allies Join Outcry Against Anti-Immigrant Measure in Arizona, *supra* note 13.

<sup>225</sup> *About the Department of Defense*, U.S. DEP’T OF DEF., <http://www.defense.gov/about/> (last visited Apr. 2, 2012).

<sup>226</sup> Dwight D. Eisenhower, Military-Industrial Complex Speech (1961), *transcript available at* [http://avalon.law.yale.edu/20th\\_century/eisenhower001.asp](http://avalon.law.yale.edu/20th_century/eisenhower001.asp).

ward? A letter discharging him from the army. You wouldn't get a letter discharging you from a job for being born a man or a woman, why . . . should you get one discharging you from the job you love just because you were born gay?<sup>227</sup>

Like the immigrant rights movement, the messaging around LGBTQ people, from the LGBTQ movement, often draws a distinction between "good" and "bad." LGBTQ people who are in the military, want to join the military, or are discharged from the military because of their sexual orientation, are "good" and not to be confused with LGBTQ people who are critical of their government, who see themselves as choosing queerness rather than being born into it, or who are incarcerated, disabled, or discriminated against for multiple reasons.

#### CONCLUSION

The collaboration of local law enforcement with federal immigration enforcement increases the power of punitive systems that are inherently biased in their application. This bias is particularly damaging to transgender people of color and immigrants living in poverty in the United States. As laws such as Secure Communities, Section 287(g), the Criminal Alien program, and the Indefinite Detention bill allow for local law enforcement to increase race, sexuality, gender identity, and immigrant profiling in the name of security, many lives are at stake. Obvious civil liberty violations such as those embedded in Arizona's SB 1070 and its copycat legislation provide a forum for outrage that essentially works to quell dissent on a broader level. As the mainstream LGBTQ movement rallies against certain identity-based profiling, it continues to rely on unconstitutional systems to fight against discrimination, thus devaluing certain lives while sustaining local and global injustice. Now is the time to fight against the swelling of inherently violent, discriminatory laws that are justified to maintain national security.

I urge mainstream LGBTQ organizations to draw upon the connections between the punitive systems of immigration and criminalization to address the root of violence and discrimination that transgender people of color endure as collateral consequences of continued exposure to those systems. As the war on terror rages forward, transgender people living at the intersection of different identities are quickly and easily discarded and deported for no other crime than "walking while trans."

After demonstrating an effective, truly amazing, unprecedented ability to advocate for people who have been historically marginalized in its reaction to SB 1070, the mainstream LGBTQ movement must not lose sight of

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<sup>227</sup> *10 Personal Stories that Highlight why Don't Ask Don't Tell Needs to be Repealed Now*, QUEERIED, <http://www.queeried.com/personal-dadt-discharge-stories/> (last visited Mar. 8, 2012).

the people who now strive to exist in the most hostile of environments. With this Article, I hope to start to bridge the gap between these two groups. My hope is that mainstream LGBTQ organizations will work with both immigrant rights and racial justice organizations to support the repeal of Secure Communities, Section 287(g), the Criminal Alien Program, and the Indefinite Detention Bill; work to repeal hyper-criminalizing legislation such as IIRIRA and AEDPA; undo the rights-based approach to legal reform that relies on the perpetrator/victim model; work towards meaningful social change that addresses the inherent failure of the criminal and immigration systems as it punishes transgender people; and identify police profiling as an LGBTQ, immigrant, and social justice issue.