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Locked Up: Criminal and Immigration Incarceration in America

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LOCKED UP: CRIMINAL AND IMMIGRATION INCARCERATION IN AMERICA

Keynote Address

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If we accept Dr. King's definition of peace as more than merely the absence of war, but as the presence of justice, then I think many of us would agree that as a result of this country's incarceration agenda — whether incarceration under criminal laws or immigration laws — poor people and people of color have been living in a state of siege for the last few decades. We have witnessed the launch of multiple legal attacks against our communities, and despite facing the same system, we have failed, for the most part, to respond collectively. We each responded from our various corners and our separate podiums, unable back then to see most clearly the links that were being made between the criminal justice system and the immigration system. Well, the fog has lifted and the connections and collaborations between the two systems are painfully clear.

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For years, the United States has had the dubious distinction of having one of the highest incarceration rates in the world.[1] Today, it rightfully claims first place as the country with *the* highest incarceration rate — a status that David Fathi of Human Rights Watch has called "dysfunctional" and "shameful."[2] I agree. With only 5% of the world's population, the U.S. now houses 25% of the world's reported prisoners.[3] Today, more than three times as many mentally ill people are in prisons as are in mental health hospitals.[4] It is in the midst of this absolute crisis — a crisis that one U.S. Senator recently referred to as "a national disgrace"[5] — that we — as advocates, incarcerated individuals, concerned community members, and those who have suffered the loss of a loved one behind bars — come together to discuss criminal and immigrant detention in America.

Today, 2.38 million are behind bars in the land of the free.[6] An additional 5 million are on supervised parole or probation.[7] That's well over 7 million people under the authority of U.S. corrections and subject to the devastation that arises from a to-

1 JENNIFER WARREN, PEW CHARITABLE TRUSTS, ONE IN 100: BEHIND BARS IN AMERICA 2008 5 (2008), *available at* http://www.pewcenteronthestates.org/uploadedFiles/One%20in%20100.pdf.

2 David C. Fathi, *Prison Nation*, THE HUFFINGTON POST, (Apr. 9, 2009, 7:09 PM), http://www.huffingtonpost.com/david-c-fathi/prison-nation_b_185377.html.

3 SUZANNE M. KIRCHHOFF, CONGRESSIONAL RESEARCH SERVICE, ECONOMIC IMPACTS OF PRISON GROWTH i (2010).

4 TREATMENT ADVOCACY CTR. & NATIONAL SHERIFF'S ASS'N, MORE MENTALLY ILL PERSONS ARE IN JAILS AND PRISONS THAN HOSPITALS: A SURVEY OF THE STATES 1 (2010), *available at* http://www.sheriffs.org/userfiles/file/FinalJailsvHospitalsStudy.pdf.

5 *The National Criminal Justice Commission Act*, WEBB.SENATE.GOV, http://webb.senate.gov/issuesandlegislation/criminaljusticeandlawenforcement/Criminal_Justice_Banner.cfm (discussing that the National Criminal Justice Commission Act of 2009 would reexamine the criminal justices system "with an eye for reshaping the process from top to bottom").

6 Sen. Jim Webb, *Why We Must Reform our Criminal Justice System*, THE HUFFINGTON POST, (Jun. 11, 2009, 1:07 AM), http://www.huffingtonpost.com/sen-jim-webb/why-we-must-reform-our-cr_b_214130.html.

7 *Id.*

tal loss of liberty and forced isolation.[8] But prison doesn't just affect individuals. It disrupts parent-child relationships and disproportionately burdens families and communities already living in poverty.[9] Rachael Herzig of Critical Resistance has reminded us that this is not the result of system malfunction; the system is not broken, but rather, it may be working perfectly.[10] Such an understanding of the system would lead us to conclude that mere repair of the system is insufficient, and that instead we need a system with a different agenda, one of community health, rehabilitation, and real peace.

We often base our conversations about various injustices on the effect these injustices have on vulnerable populations. So if we're talking about prisons, we might focus on vulnerable populations within prisons. But we often fail to recognize the prison population itself as vulnerable. Let me give you the perfect example of this vulnerability.

In 2008, California voters — yes, the voters and not the legislature — each by casting a simple vote substantively changed

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[8] The devastating impact of incarceration on communities is well documented. *See* TODD CLEAR, IMPRISONING COMMUNITIES: HOW MASS INCARCERATION MAKES DISADVANTAGED NEIGHBORHOODS WORSE xiv (Oxford University Press 2007) (discussing incarceration as changing "permanently, the life chances of those who go to prison, and as a consequence affect the prospects of the nonincarcerated who are close to them, personally and spatially"). *See also* James C. Thomas, PhD, MPH & Elizabeth Torrone, MSPH, *Incarceration as Forced Migration: Effects on Selected Community Health Outcomes,* 98 AM. J. PUB. HEALTH S183 (Supp. 1 2008) (finding that "associations between incarceration rates and health outcomes [are] strong and consistent").

[9] JEREMY TRAVIS, ELIZABETH CINCOTTA MCBRIDE & AMY L. SOLOMON, URBAN INSTITUTE JUSTICE POLICY CENTER, FAMILIES LEFT BEHIND: THE HIDDEN COSTS OF INCARCERATION AND REENTRY 1 (2005), *available at* http://www.urban.org/uploadedpdf/310882_families_left_behind.pdf.

[10] *Abolishing the Prison Industrial Complex: Rachel Herzing in conversation with Trevor Paglen*, RECORDING CARCERAL LANDSCAPES, http://www.paglen.com/carceral/pdfs/herzing.pdf (last visited Sep. 29, 2010). Herzig explains that merely reforming or improving the system makes it more effective at what it aims to do, which she describes as "killing, disappearing, and alienating certain specific groups of people." *Id.* at 1.

the state of the law with regards to the parole process for prisoners with life sentences and the role of victims and their family members during this process.

Overnight, Proposition 9 amended the Constitution of the State of California by increasing the influence that victims and their families have over the sentencing process.[11] Proposition 9 also changed the minimum time between parole hearings for lifers from 1 to 3 years and the maximum time from 5 to 15 years.[12] And 15 years is the default. The statute simply states that the Board of Parole Hearings *shall* schedule the next parole hearing 15 years after any hearing in which parole is denied "unless" it finds by clear and convincing evidence that the consideration of public and victim's safety does not require such a lengthy period of additional incarceration.[13] This default to 15 year rollovers sends a message to prisoners' families that their loved ones are never coming home. Prisoners who have been incarcerated for decades and are coming up for new parole hearings will now go from yearly denials to denials that are 15 years apart. Many have characterized Proposition 9 as changing a life sentence to a sentence of life without the possibility of parole.

There were no debates; no careful consideration of expert testimony from law enforcement officers, prison experts, rehabilitation experts and penologists; no studies done with respect to incarceration, victims' rights and the prison crisis; no discussion of the fact that California's parole system was already known as being among the strictest in the U.S.[14] Many voters who went to the polls that day were voting likely on the basis of Proposition 9's title the Victim's Rights and Protection Act or Victim's Bill

11 CAL. CONST. art. I, § 28(b)(8) (amended by the passing of the Victim's Bill of Rights Act of 2008: Marsy's Law).
12 Cal. Penal Code § 3041.5(b)(3) (2010).
13 Cal. Penal Code § 3041.5(b)(3)(A) (2010).
14 *Arguments*, LEAGUE OF WOMEN VOTERS OF CA. EDUC. FUND, http://www.smartvoter.org/2008/11/04/ca/state/prop/9/#arguments (last visited Sep. 10, 2010)(summarizing the arguments for and against Proposition 9).

of Rights Act. Some may have also read the brief arguments for and against the proposition found in the voter pamphlets. That is how we made law that day; that is how we made *bad* law that day. Not just bad according to the families of the incarcerated, but also according to law enforcement officers. Indeed, Proposition 9 was firmly opposed by none other than the former warden of San Quentin State Prison, Jeanie Woodford, and the former Director of California's Department of Corrections, Allan Breed.[15] Was there an expertise held by California voters on this topic that decades of direct prison management experience couldn't seem to compete with? But so it was. Proposition 9 dealt a heavy blow to an already dysfunctional and repressive prison system, a blow that was particularly devastating because the populations most directly affected by this law were unable to vote.

Turning now to incarceration under immigration laws, the unmistakable expansion of the immigration detention system cannot be described as anything but consistent with this nation's reliance on incarceration as a main way of getting things done. The explosion of this American tradition onto the immigration landscape over the last 15 years has increasingly merged the experience of migration with that of incarceration. Rather than address root causes of the problem or explore the role of U.S. foreign policy in creating the need for migration and flight, we instead continue to flex our muscle as a nation and banish those whom we deem undesirable.

But it was not always exactly like this. The immigration service did not always rely so heavily on detention as a primary enforcement mechanism. In fact, before 2003, the agency was known as INS – the Immigration and Naturalization Service. After 9/11 and the subsequent passage of the Homeland Security

[15] *Id.*

Act, it was renamed the Department of Homeland Security[16]; a name that undoubtedly communicates not only the shift in treating immigration as a national security issue but also an urgent need to protect what is provocatively referred to as the "homeland." This concept of having a homeland in need of protection from so called "foreign elements" invokes memories of Japanese internment and similar historical examples — and suggests that we have left much unlearned from our past.

Interestingly, however, many advocates would agree that the most critical year for detention and deportation was not 2001, the year in which 9/11 occurred. Rather, it was 1996. 1996 wasn't just a bad year for immigrants; it was a bad year for numerous marginalized communities. It was in 1996 that Congress passed the Prison Litigation Reform Act, a law aimed at restricting and discouraging litigation by prisoners.[17] It was also in 1996 that President Clinton signed into law the Personal Responsibility and Work Opportunity Reconciliation Act, welfare reform that was aimed specifically at the nation's poor and that dramatically changed the system to require work in exchange for time-limited assistance.[18] And of course it was in 1996 that we passed the Anti-Effective Death Penalty Act and the Illegal Immigrant Reform and Immigrant Responsibility Act.[19] These two pieces of legislation dramatically altered the legal landscape for immigrants. AEDPA and IIRIRA made it possible for the government to mandatorily detain individuals on the basis of minor, non-violent misdemeanor offenses for which they may have re-

16 *See* Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stats. 2135 (discussing that, as of March 1, 2003, the Department of Homeland Security is to replace the Immigration and Naturalization Service (INS)).

17 *See* Prison Litigation Reform Act of 1995, Title VIII, Pub. L. 104-134, 110 Stat. 1321 (1996).

18 *See* Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. 104-193, 110 Stat. 2105 (1996).

19 *See* Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub.L. No. 104-132, 110 Stat. 1214 (1996), Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub.L. No. 104-208, 110 Stat. 3009 (1996).

ceived little to no jail time. Crimes that left an individual eligible for bail while adjudicated before criminal courts somehow magically resulted in mandatory detention without bond when adjudicated before *civil immigration* courts.

Before the laws changed in 1996, ICE's daily detention capacity was less than 7,500.[20] Today, the daily detention capacity is over 30,000.[21] Currently, approximately 380,000 people are detained every year by the Department of Homeland Security in well over 300 facilities in the U.S., including jails, federal detention centers and private prisons run on DHS contracts.[22] While most believe that detention is reserved for individuals who are here without any immigration status, the opposite is true. In America's detention centers you will find longtime lawful permanent residents, or green card holders. You will find refugees and asylees. You will find students who entered the U.S. legally on student visas. You will find veterans who faithfully served the United States and believed that for all intents and purposes they too were U.S. citizens. Not to mention in America's detention centers, you will also often find U.S. citizens. Due to the complexity of immigration laws and DHS's willingness to detain first and verify later, numerous U.S. citizens are caught in the immigration detention system until they can demonstrate their citizenship claims to the government's satisfaction.

So I've thrown around the word "detention" several times now without actually getting to the heart of what is is. Most of us who hear the word "detention" immediately distinguish it from "jail" or "prison." There is something less severe, isn't there? Something smaller. Something shorter about "deten-

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20 Kevin Sief, *Down for the Count*, TEX. OBSERVER (Mar. 25, 2010), http://www.texasobserver.org/cover-story/down-for-the-count.

21 AMNESTY INTERNATIONAL, JAILED WITHOUT JUSTICE: IMMIGRATION DETENTION IN THE U.S.A. – EXECUTIVE SUMMARY 1 (2009), *available at* http://www.amnestyusa.org/uploads/JailedWithoutJusticeExecutiveSummary.pdf.

22 *About Detention and Deportation*, DETENTIONWATCHNETWORK.ORG, http://www.detentionwatchnetwork.org/aboutdetention (last visited Sep. 29, 2010).

tion." In reality, the experience and impact of detention is anything but small. Detainees in DHS custody are subject to involuntary transfers throughout the U.S., often to facilities in remote locations, thousands of miles away from family members, experts, lawyers and advocates.[23] In these facilities, there are no binding standards for the treatment of detainees.[24] Conditions of confinement may be substandard and dangerous, and programs that otherwise help a prisoner pass the time and maintain relative psychological health may be entirely missing.

Perhaps, most significantly, imprisonment in the form of detention does not come with any fixed sentence. The psychological impact of remaining incarcerated, often for years, without a fixed sentence is something that I firmly believe has yet to be properly documented. Remarkably, we have created a new class of prisoners in the U.S. who "do time" behind our nation's bars without knowing either when their imprisonment might end or what continent they may find themselves in upon release.

On top of that, families are given little to no information about detained loved ones, so detention has repeatedly felt like a process into which people are disappeared. The impact of detention and deportation on families cannot be overstated. Between 1997 and 2007, the U.S. deported the lawfully residing parent of over 88,000 U.S. citizen children, many of whom it first detained.[25] Approximately half of these children were under the age of 5 when their parent was deported.[26] In holding that defense counsel has a duty to advise non-citizens regarding immigration consequences of criminal convictions, the Supreme

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23 *See* HUMAN RIGHTS WATCH, LOCKED UP FAR AWAY: THE TRANSFER OF IMMIGRANTS TO REMOTE DETENTION CENTERS IN THE UNITED STATES (2009), *available at* http://www.hrw.org/en/node/86789.

24 *Id.* at 25. *See also* AMNESTY INTERNATIONAL, *supra* note 21, at 7.

25 JONATHAN BAUM, ROSHA JONES & CATHERINE BARRY, IN THE CHILD'S BEST INTEREST?: THE CONSEQUENCES OF LOSING A LAWFUL IMMIGRANT PARENT TO DEPORTATION 1 (2010), *available at* http://www.law.ucdavis.edu/news/images/childsbestinterest.pdf.

26 *Id.*

Court in part justified its holding on the "concomitant impact of deportation on families."[27]

That none of these consequences can be legally classified as "punishment" adds insult to injury and has devastating effects on due process. The seminal case labeling deportation as a civil rather than a criminal matter is *Fong Yue Ting v. United States,* in which the U.S. Supreme Court held that an "order of deportation is not a punishment for crime."[28] Maureen Sweeney, a noted scholar and advocate in the field of criminal immigration, recently referred to this designation as a "legal fiction" that is not reflective of the reality and impact of current immigration laws.[29] She points out that at the time the *Fong Yue Ting* case was decided, "the only provision allowing for deportation related to the failure of individuals to comply with the terms of their admission. . ."[30] There were no deportation provisions triggered by post-entry criminal conduct. The continued applicability of *Fong Yue Ting* is at a minimum questionable and the Supreme Court's recent opinion in *Padilla v. Kentucky* expressly recognizes deportation as "intimately related to the criminal process."[31] In fact, the Court states that it is "most difficult" to divorce the penalty of deportation from the criminal conviction upon which it is based.[32] Still, *Fong Yue Ting* continues to remain binding and the inadequacy of due process protections in detention and removal operations is ongoing.

Nearly every lawful permanent resident I have met in detention facing removal on the basis of crimes has been unable to fully grasp the concept that they could be punished twice, in America, for the same offense. Immigrants are punished once by the criminal justice system, and then again by the immigra-

27 Padilla v. Kentucky, 130 S.Ct. 1473, 1486 (2010).
28 Fong Yue Ting v. United States, 149 U.S. 698, 730 (1893).
29 Maureen A. Sweeney, *Fact or Fiction: the Legal Construction of Immigration Removal for Crimes*, 27 YALE J. ON REG. 47, 49 (2010).
30 *Id.* at 54.
31 *Padilla*, 130 S. Ct. at 1481.
32 *Id.*

tion system. In my experience, these individuals understand their confinement and removal, in no uncertain terms, as punishment, a punishment that comes even after you complete your criminal sentence. These individuals often perceive and experience criminal incarceration as the lesser punishment and detention and deportation as the graver one. It is far too ironic then — and frankly difficult to bear — that we call one "punishment" and the other a "remedial civil action." It is this "legal fiction" that Sweeney refers to as untenable for moral and doctrinal reasons, and it is in desperate need of re-examination.

For the last six months I have served as in-house immigration counsel to the Alameda County Public Defenders Office in Oakland, California. As such, I have had the privilege and the honor of working closely with a group of effective and committed advocates who face uphill battle after uphill battle in defense of their clients. In representing often the most marginalized, outcast, and un-welcomed members of our society, these defenders carry the heavy weight of understanding the nuanced consequences faced by defendants in our criminal justice system. And amidst already impossible workloads, this weight has been exacerbated by the relentless addition of unforgiving immigration consequences. Defender offices, already struggling for resources, must now incorporate inquiry, investigation and advice on immigration consequences of criminal convictions into their representation of non-citizens in criminal proceedings.

ICE's collaboration with the criminal justice system continues to increase in intensity, yet no procedural due process safeguards are in place to protect the targets of these new alliances. Recently, one public defender shared with me that in response to his mentioning his client's immigration status during plea negotiations, the prosecuting attorney, a representative of the U.S. Department of Justice and an officer of the court, responded that in fact getting deported was "like going home" so a defendant shouldn't have a big problem with it.

There is a complete disconnect between the very language we use to describe this "going home," — this separation and confinement — and the actual reality of the same. The significance of this same "going home," however, was far better understood by none other than one of this nation's founding fathers, James Madison, who wrote that:

> If banishment of an alien from a country into which he has been invited as the asylum most auspicious to his happiness, a country where he may have formed the most tender connections; where he may have invested his entire property. . .; where he enjoys under the laws a greater share of the blessings of personal security and personal liberty than he can elsewhere hope for; . . .if a banishment of this sort be not a punishment, and among the severest of punishments, it will be difficult to imagine a doom to which the name can be applied.[33]

Still, it appears that a popular prosecutorial response to efforts on behalf of non-citizens to avoid the most severe immigration consequences of criminal convictions is the following: "We don't want to treat illegal immigrants any differently than citizens." Such a response completely ignores the huge disparity in consequences between non-citizens and citizens, which arises from contact with the criminal justice system. When a non-citizen, who has legally resided here since the age of 2 and has complied with all immigration laws, can be deported for simple possession of drug paraphernalia, for which he is sentenced only to probation and serves no time in jail — a licensed representative of the criminal justice system simply *cannot and may not* pretend that equal treatment for defendants, regardless of immigration status, is the government's desired outcome. Such representations are tolerated simply because we continue, as a

[33] Fong Yue Ting v. United States, 149 U.S. 698, 740-41 (1893).

society, to erroneously categorize detention and deportation as something other than what they are. Hopefully, these responses will become less utilized in light of the U.S. Supreme Court's recognition in *Padilla v. Kentucky* of the important role of immigration consequences during plea negotiations in light of the "severity of deportation" and its equivalence to "banishment or exile."[34]

So let's jump for a moment from discussing how the criminal justice system impacts immigrants to talking about the immigration system itself. The Supreme Court has recognized that the Due Process Clause of the Constitution protects any person in the United States — regardless of citizenship status.[35] Still, the classification of detention and removal as civil remedies results in the government's ability to wield certain powers in immigration courts that would never be tolerated in our criminal courts. I don't raise these issues to suggest that criminal incarceration is in any way better than immigration detention. The comparisons are used for the sole purpose of shedding light on the lesser understood phenomenon of immigration detention by contextualizing it within the more familiar criminal justice system. I will provide three examples of the wide latitude the government enjoys in prosecuting removal cases.

First, there is no right to appointed counsel in removal proceedings, even if you are detained.[36] As a result, approximately 84% of detainees facing deportation are unrepresented.[37] It is widely recognized that immigration laws are comparable in complexity to U.S. tax laws.[38] That a detainee will have to defend him or herself against a DHS prosecuting attorney under these complex laws in what is then recorded as a "fair" hearing

34 *Padilla,* 130 S. Ct. at 1486.
35 Zadvydas v. Davis, 533 U.S. 678, 693 (2001).
36 *See* 8 U.S.C. § 1229a(b)(4)(A) (2006).
37 AMNESTY INTERNATIONAL, *supra* note 21, at 30.
38 Memorandum from Stephen R. Viña, Legislative Attorney, Am. Law Div. to House Comm. on the Judiciary (July 28, 2005) *available at* http://www.ilw.com/immigrationdaily/news/2005,0824-crs.pdf.

is mindboggling. In numerous immigration courts, detainees are shackled at their wrists during their hearings. Often, they are not brought inside the well of the court even when their own cases are called, but instead remain shackled in the back of the courtroom next to other detainees, expected to litigate their cases *in pro se* from where they are seated.

And what about language barriers? A court interpreter is provided in every case where the detainee does not speak English.[39] But outside of court, where a detainee has to read the government's briefs, examine the charging documents against him, review the evidence and prepare a defense, no interpreter is provided. If a detainee appeals, it's even worse, as such appeals are exclusively in written form. Without English fluency, this right to appeal an immigration judge's decision is rendered meaningless.

Secondly, in removal proceedings, there is no speedy trial provision.[40] Despite the fact that many respondents are detained, there is no limit to how long such proceedings can continue.[41] This period of detention is not calculated towards an eventual sentence because detention is neither a sentence nor a punishment. This detention period, even where it is prolonged, is virtually unaccounted for. There is similarly no specific time frame within which DHS must allege all charges.[42] So an individual can show up on the day of his last and final hearing, only to face new charges by DHS. He can exhaust resources and efforts fighting a case based on one legal theory, only to have everything flipped on its head as the case continues. I have witnessed numerous judges characterizing these legal advantages in open court as "unfair." However, this is usually followed by a recognition by

39 8 C.F.R. § 1240.5 (2010); 8 C.F.R. § 1003.22 (2010). *See also* IMMIGRATION COURT PRACTICE MANUAL § 4.11 (2008).
40 *See* 8 U.S.C. § 1229a.
41 *See* Demore v. Kim, 538 U.S. 510 (2003) (upholding the constitutionality of mandatory detention and failing to put any time requirement on the length of detention pursuant to removal hearings).
42 8 C.F.R. § 1240.10(e) (2010).

the judge that there is simply nothing she or he can do about the situation. Let me clarify that I am not providing you with examples of egregious exceptions; I'm talking about what we see in court day in and day out.

And third, even winning does not mean you get to go home. When a detained immigrant prevails in immigration court and relief is granted, DHS always has the option of reserving appeal.[43] Once appeal is reserved, the decision of the immigration judge is no longer final and the person's detention continues. Detention will continue on average for at least another 4-6 months. It is this period of incarceration that many detainees decide they simply cannot cope with. Many abandon even the most meritorious of claims, in favor of bringing an end to their detention. Detention, then, becomes a coercive tool at DHS's disposal that can directly affect a legal outcome. James Smith describes this as sending a "clear" message to the non-citizen that "even if you are successful in your defense, you will pay the price of lengthy detention."[44]

In 2008, James Pendergraph, a top ICE official stated, "If you don't have enough evidence to charge someone criminally but you think he is here illegally, we can make him disappear."[45] He was speaking to a room full of sheriffs and policemen. Pendergraph was not mistaken. Nor was he referring to some clandestine operation against foreign nationals. He was simply referring to our current immigration system.

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43 8 C.F.R. § 1003.1(b) (2010).

44 James Smith, *United States Immigration Law as We know It: El Clandestino, the American Gulag, and Rounding Up the Usual Suspects*, 38 U.C. DAVIS L. REV. 747, 777 (2005).

45 Jacqueline Stevens, *America's Secret ICE Castles*, THE NATION, Jan. 4, 2010, at 13, *available at* http://www.thenation.com/doc/20100104/stevens/single ("'If you don't have enough evidence to charge someone criminally but you think he's illegal, we can make him disappear.' Those chilling words were spoken by James Pendergraph, then executive director of Immigration and Customs Enforcement's (ICE) Office of State and Local Coordination, at a conference of police and sheriffs in August 2008").

It's true what they say about things getting worse before they get better. Today, in Arizona, the fact of being undocumented alone *is enough* to charge someone criminally. On April 23, 2010, Arizona's Governor signed into law an unprecedented piece of legislation that allows an individual who is present in the United States without permission to be criminally prosecuted by the *state* for the crime of trespassing.[46] Arizona's highly controversial SB 1070 gives police officers broad power to detain anyone they suspect is in the U.S. without authorization.[47] SB 1070 is a frightening but instructive example of the steadily increasing efforts to blur the lines between criminal and immigration enforcement.

We are, once again, at a critical point in our history, and I'd like to say a few words about movement building and our path forward. In the past, the immigrants' rights movement has attempted to win gains by distancing itself from criminal justice issues, drawing clear lines in the sand through the use of isolating slogans such as "we are not criminals."[48]

Presumably intending to highlight the injustice of the criminalization of immigration, these slogans instead communicated that the immigrants' rights movement is willing to sacrifice the needs of those whom our society has given up on, in favor of those whom it is still willing to invest in. It communicated the willingness of the movement to distance itself from an equally important human rights struggle, in order to move its agenda forward. When it comes time for comprehensive immigration reform, this translates into a willingness by the proponents of reform to concede greater enforcement in exchange for a path to legalization.

As our country looks again to a moment of potential reform of this nation's archaic immigration laws, I can only hope that

46 S.B. 1070, 49th Gen. Assem., 2nd Reg. Sess. (Ariz. 2010).
47 *Id.*
48 This slogan was used as recently as the time of this writing in preparing to organize against SB 1070.

after having seen the effects of this enforcement on our communities, we will refuse to further compromise the principles that are so integral to our collective step towards human rights, principles that require us to do more than address our problems from a place of fear, ignorance, or expedience.

Criminal justice and immigration advocates must work closely together. The incarceration that is hurting our communities and our clients is one and the same — be it governed by criminal laws or immigration laws. Subhash Kateel, co-founder of Families for Freedom, has written that the immigrant's rights movement has a great deal to learn from the civil rights movement that came before it. In reflecting on these important lessons, he notes:

> The victories of integration were followed by an explosion in the prison system and mass incarceration in the Black community. Communities that survived poll tests, poll taxes, and grandfather clauses to preserve their right to vote were processed through the criminal justice system only to be disenfranchised again. . .What the Civil Rights struggle forced the government to give back to Black folks through the narrative of its "best" (Rosa Parks, Dr. King, and so forth) the government would later take by pushing narratives of the Black community at its "worst."[49]

Let us not make this mistake again and again. Thank you.

[49] Subhash Kateel, *Winning the Fight of Our Lives: Immigrant Rights and Prison-Industrial Complex*, LEFT TURN, http://www.leftturn.org/?q=node/1238 (Oct. 1, 2008),