

**LATINOS AND THE CRIMINAL JUSTICE SYSTEM:
OVERCOMING RACIAL STIGMA FROM TRIAL TO INCARCERATION**

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I. INTRODUCTION

According to the National Council of La Raza “NCLR”, Latinos in the United States face discrimination and overrepresentation in every step of the criminal justice system, from arrest to incarceration.¹ “Tough on crime” policies enacted since the 1970’s for the purpose of reducing violent crimes and promoting efficiency in the criminal justice system, have failed to ensure fairness for minorities.² As a result of this neglect, Latinos receive disparate treatment throughout the criminal justice system.

In the 1970’s, rising crimes rates and the sheer volume of cases caused public concern that the court system and police were unable to effectively deter crime.³ The nation lacked confidence in the criminal justice system due to the deplorable conditions of prisons, the poor being at a disadvantage, and the rise in crime.⁴ In the subsequent decades, the United States has responded with tough on crime policies aimed at reducing the rate of violent crime and bolstering confidence in the public’s safety.⁵ Public perception of minorities is fairly negative, and the media reinforces these prejudices by portraying Latinos as being criminals and a problem needed to control.⁶ Pejorative phrases and terms proliferate the media describing Latinos as “third-world invaders” or the Latino culture as “lawless”.⁷ The negative portrayal of Latinos gives credence to tough on crime policies as a necessary control mechanism for “dangerous” Latino

¹ NANCY E. WALKER ET. AL., LOST OPPORTUNITIES: THE REALITY OF LATINOS IN THE U.S. CRIMINAL

² See Kenneth E. Fernandez & Timothy Bowman, *Race, Political Institutions, and Criminal Justice: An Examination of the Sentencing of Latino Offenders*, 36 COLUM. HUM. RTS. L. REV. 41, 49-52 (2004).

³ See *Justice on Trial*, NEWSWEEK, Mar. 8, 1971, at 16-18.

⁴ See *id.* at 16.

⁵ See Willa Payne & Matt Luton, *A Relocation of Prisoner Identity*, 10 N.Y. CITY L. REV. 299, 300-01 (2006).

⁶ WALKER ET AL., *supra* note 1, at 2.

⁷ Christina Iturralde, *Rhetoric and Violence: Understanding Incidents of Hate Against Latinos*, 12 N.Y. CITY L. REV. 417, 423-25 (2009).

communities. A slippery slope occurs in which stereotypes of the Latino criminal trickle down from arresting officer to judges leading to disparate treatment of Latinos in the criminal justice system.⁸

Despite negative stereotypes, Latinos are the least likely of all groups to have a criminal history.⁹ According to a study by the NCLR, in 1996, “56.6% of Latino defendants had been arrested on at least one prior occasion, as compared to 60.5% of White defendants and 75% of Black defendants.”¹⁰ Additionally, “Latino’s comprised only 8.6% of federal prisoners convicted of violent offenses and 12.5% the general population as of 2001.”¹¹

These statistics demonstrate the overrepresentation of Latinos in the prison system with a majority imprisoned for non-violent offenses.¹² While tough on crime policies have been made to decrease the amount of non-violent offenses, in turn, these policies have worked to imprison Latinos, specifically for drug and immigration related offenses.¹³ Additionally, these tough on crime policies have resulted in resources devoted to incarceration¹⁴ while neglecting spending on public defender programs and cost-effective drug treatment.¹⁵ Polls and research demonstrate that the Latino community is open to reforms of the criminal justice system such as community prevention programs for juvenile offenders, reduced sentences for non-violent offenders,

⁸ *See id.*

⁹ *See id.*

¹⁰ WALKER ET AL., *supra* note 1, at 18.

¹¹ *Id.*

¹² *Id.* at 19.

¹³ *Id.* at 43.

¹⁴ *See id.*; *see also* Marcia Johnson & Luckett Anthony Johnson, *Bail: Reforming Policies to Address Overcrowded Jails, the Impact on Detention, and Community Revival in Harris County, Texas*, 7 NW J.L. & SOC. POL’Y 42, 43-45 (2012).

¹⁵ *See* WALKER ET AL., *supra* note 1, at 62.

and government support in education, job training, and youth development. Latinos support these reforms due to a perception that they are “more often harassed and detained than other Americans.”¹⁶ Furthermore, Latinos question the fairness of the justice system based on a perception that the wealthy are treated more favorably.¹⁷ Lastly, Latinos demonstrate a lack of confidence in the fairness of the criminal justice system generally, stating, “the justice system is not in touch with their community”.¹⁸ The lack of confidence in assuring fairness observed in the United States in the 1970’s has continued to echo within the Latino community, showing that current tough on crime policies have done little to ensure that Latinos receive fair treatment and have contributed to overrepresentation in the criminal justice system.¹⁹

According to the NCLR, “Latinos constitute the largest and fastest-growing racial group in the United States constituting 12.5% of the U.S. population in 2000, growing by 58% from 1990 to 2000.” Despite being only 12.5% of the U.S. population, Latinos “constitute more than 31% of incarcerated individuals in the federal criminal justice system.”²⁰ A range of issues affect Latinos in the criminal justice system, but particularly tough on crime policies such as discretion in pretrial detainment, the war on drugs, and increased funding of the prison system at the expense of public defender and community programs have created barriers in achieving fairness for Latinos. A move away from tough on crime rhetoric and towards ensuring fairness will alleviate overcrowded prisons while reducing the amount of violent crimes. Most importantly, Latinos will be afforded

¹⁶ *Id.* at 5.

¹⁷ *See id.*

¹⁸ *Id.*

¹⁹ *See Justice on Trial*, *supra* note 3, at 16-29; WALKER ET AL., *supra* note 1, at 40.

²⁰ WALKER ET AL., *supra* note 1, at 7, 17.

fair treatment in every step of the criminal justice system and will receive assurance that law enforcement and justice is truly color-blind.

II. INCREASED DISCRETION AFFORDED TO LAW ENFORCEMENT: INCREASED DISCRIMINATION FOR LATINOS

On racial profiling, former Attorney General John Ashcroft stated, “There should be no loopholes or safe harbors for racial profiling. Official discrimination of this sort is wrong and unconstitutional no matter what context.”²¹ Using ethnicity to target individuals for investigative activities by law enforcement has created the greatest mistrust in the criminal justice system for Latinos.²² According to the NCLR, “racial profiling occurs when law enforcement officials rely on race, ethnicity, national origin, or religion to establish probable cause for suspecting an individual of a crime.”²³ Law enforcement have wide discretion in investigating individuals for crime and it is difficult, if not impossible, to prove subjective discriminatory police conduct with regard to whom they stop, and their basis for doing so.²⁴ Racial profiling has largely been evaluated under the context of traffic stops and law enforcement policing of minority neighborhood designated as “high crime” areas.²⁵ Additionally, defenses to racially discriminatory police practices include the misleading idea that minorities commit a disproportionate amount of crime and this amount of crime occurs in certain locales and social settings.²⁶ Arguably, increased discretion to law enforcement in investigatory practices have led to

²¹ 107 CONG. REC. S2272 (daily ed. Mar. 14, 2001) (statement of Sen. John Ashcroft).

²² See WALKER ET AL., *supra* note 1, at 47.

²³ *Id.* at 59.

²⁴ Samuel R. Gross & Katherine Y. Barnes, *Road Work: Racial Profiling and Drug Interdiction on the Highway*, 101 MICH. L. REV. 651, 655-56 (2002).

²⁵ See *id.* at 655.

²⁶ See David Rudovsky, *Law Enforcement by Stereotypes and Serendipity: Racial Profiling and Stops and Searches Without Cause*, 3 U. PA. J. CONST. L. 296, 307 (2001).

an “overrepresentation of Latinos in the criminal . . . justice system.”²⁷ Furthermore, the belief Latinos maintain that racial profiling is employed by the police, creates mistrust that law enforcement will adhere to their needs, thus Latinos are less likely to report crime or generally cooperate with law enforcement.²⁸

In the last decades, law enforcement has been focused on drugs and illegal immigrants as evidenced by the “war on drugs” and the Immigration and Naturalization Service of the Department of Justice’s imperative to remove illegal aliens and prosecute immigration offenses.²⁹ As a result, law enforcement largely relies on race in investigating drug and immigration violations.³⁰ The Supreme Court has tolerated the use of drug profiles in making an investigatory stop if the agent “articulates the factors leading to the existence of reasonable suspicion, but the fact that these factors may be set forth in a profile does not somehow detract from their evidentiary significance.”³¹ Additionally, lower federal courts have allowed drug courier profiles which use race as a component in that profile when stopping an individual at an airport.³² Rather than a valid stop or search based upon suspicion formed from specific information, profiling relies on the characteristic of race, which bears no relation to criminal activity.³³

²⁷ WALKER ET AL., *supra* note 1, at 59.

²⁸ *See id.*

²⁹ *See* David Rudovsky, *The Impact of the War on Drugs on Procedural Fairness and Racial Equality*, 1994 U. CHI. LEGAL F. 237, 237 (1994); Renata A. Gowie, *Driving While Mexican: Why the Supreme Court Must Reexamine United States v. Brignoni-Ponce*, 23 HOUS. J. INT’L L. 233, 234 (2001).

³⁰ Kevin R. Johnson, *U.S. Border Enforcement: Drugs, Migrants, and the Rule of Law*, 47 VILL. L. REV. 897, 898 (2002).

³¹ *Id.* at 902; *accord* United States v. Sokolow, 490 U.S. 1, 10 (1989).

³² *See* United States v. Weaver, 966 F.2d 391, 394 (8th Cir. 1992).

³³ *See* David Rudovsky, *The Impact of the War on Drugs on Procedural Fairness and Racial Equality*, 1994 U. CHI. LEGAL F. 237, 243-44 (1994).

Within the context of immigration, Border Patrol largely relies on Latino appearance when deciding to stop an individual along the border region.³⁴ In *United States v. Brignoni-Ponce*, the Supreme Court held that a “roving [border] patrol may stop a vehicle . . . [based on] specific [and] articulable facts, together with rational inferences from those facts that reasonably warrant suspicion that the vehicles contain aliens who may be illegal in the country.”³⁵ The Supreme Court held that a Border Patrol stop is invalid if made solely on Mexican ancestry.³⁶ However, the court continued by stating that “the likelihood that any given person of Mexican ancestry is an alien is high enough to make Mexican appearance a relevant factor but standing alone it does not justify stopping all Mexican Americans to ask if they are aliens.”³⁷ The Supreme Court in *United States v. Arvizu* affirmed its precedent in *United States v. Arvizu* in looking at the “totality of the circumstances” to give rise to a reasonable suspicion for an investigatory stop.³⁸ In *Arvizu*, a Border Patrol stop used to inquire about citizenship allowed law enforcement to gain consent from the driver and discover narcotics in the search.³⁹ The Ninth Circuit attempted to limit the discretion given to Border Patrol and declined to allow “Hispanic appearance” as a reliable factor in determining whether to stop a vehicle.⁴⁰ However, the Supreme Court reversed this decision in order to comply with prior precedent and

³⁴ See Gowie, *supra* note 29, at 234.

³⁵ *United States v. Brignoni-Ponce*, 422 U.S. 873, 884 (1975).

³⁶ See *id.* at 886.

³⁷ *Id.* at 886-87.

³⁸ Johnson, *supra* note 30, at 912.

³⁹ See *United States v. Arvizu*, 534 U.S. 266, 271-72 (2002).

⁴⁰ Johnson, *supra* note 30, at 912.

promote law enforcement discretion.⁴¹ Border Patrol's reliance on race, in effect, leads to drug arrest and convictions, which is not permitted in the criminal law context.⁴²

Defenses to wide police discretion include the misguided idea that Latinos are more likely to commit drug crimes, thus arguably leading to an overrepresentation of Latinos charged with drug offenses.⁴³ According to data compiled by the NCLR, "Hispanics accounted for 43.4% of the total drug offenders convicted in 2000, more than three times the proportion of Latinos in general population."⁴⁴ Furthermore, "three-quarters of Latino federal prison inmates are incarcerated for drug offenses."⁴⁵ Despite these incarceration statistics, according to federal health statistics, "drug use rates per capita among minorities and White Americans are similar."⁴⁶ While the rhetoric of "driving while black" has been used to describe racial profiling practices in traffic stops, this rhetoric translates to Latinos who are stopped for "driving while brown" in the immigration and criminal realm.⁴⁷ The Drug Enforcement Agency ("DEA") has taught local police that drug couriers are likely to be Latino.⁴⁸ While law enforcement has stated that drug possession and drug crimes are disproportionately committed by Latinos, the former Chief of the DEA stated that, "it is probably safe to say whites constitute the majority of traffickers."⁴⁹

⁴¹ *Id.*

⁴² *Id.* at 911.

⁴³ See WALKER ET AL., *supra* note 1, at 4.

⁴⁴ *Id.* at 75.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ See *id.* at 76; see generally Gowie, *supra* note 29, at 246-49.

⁴⁸ *United States v. Wilson*, 853 F.2d 869, 875 (11th Cir. 1988).

⁴⁹ Rudovsky, *supra* note 26, at 310.

In addition to drug courier profiles, traffic stops are used by law enforcement in drug interdiction.⁵⁰ Police are granted wide discretion to perform an automobile stop if based on a violation of traffic laws.⁵¹ Thus, pretextual traffic stops are used as an investigatory tactic in discovering possible drug offenses.⁵² Additionally, stops are made on profile characteristics that mirror those for drug courier stops.⁵³ Furthermore, a disproportionate amount of Latinos are subjected to traffic stops.⁵⁴ The Supreme Court allows traffic stops when made on probable cause that a traffic violation was committed.⁵⁵ For the officer's protection, the officer may order the driver and its passengers outside the vehicle to deny them possible access to a weapon.⁵⁶ The officer "may [also] use a trained dog to detect narcotics . . . [absent] any suspicion, cause, or consent."⁵⁷ Additionally, after a citation has been issued, the officer may ask for consent to search the vehicle or seize any contraband in plain view.⁵⁸ If probable cause is warranted for arrest, the officer may search the vehicle.⁵⁹

Because of the wide latitude of discretion offered to officers in stopping a vehicle due to traffic violations, the question addressed to the Supreme Court has been whether the subjective intent of the officer should be considered during a traffic stop in order to determine whether racial profiling was employed.⁶⁰ In *Whren v. United States*, police

⁵⁰ Rudovsky, *supra* note 29, at 243-49.

⁵¹ *Id.* at 251.

⁵² *Id.* at 249.

⁵³ *Id.*

⁵⁴ *Id.* at 250-51 ("[I]n Volusia County Florida, 70% of the motorists stopped were black or Hispanic . . . by comparison only 5% of drivers were black or Hispanic.").

⁵⁵ Tracey Maclin, *Race and the Fourth Amendment*, 51 VAND. L. REV. 333, 342 (1998); *Whren v. United States*, 517 U.S. 806, 810 (1996).

⁵⁶ *Maryland v. Wilson*, 519 U.S. 408, 413-14 (1997).

⁵⁷ *See United States v. Place*, 462 U.S. 696, 698 (1983); Rudovsky, *supra* note 26, at 318.

⁵⁸ *See Ohio v. Robinette*, 519 U.S. 33 (1996); *see Horton v. California*, 496 U.S. 128, 133-37 (1990).

⁵⁹ *New York v. Belton*, 453 U.S. 454, 460 (1981).

⁶⁰ Rudovsky, *supra* note 26, at 318-19.

officers made a traffic stop and found two bags of crack cocaine on a passenger.⁶¹ The stop occurred because the driver failed to signal before turning and proceeded at an “unreasonable speed.”⁶² The defendants asserted that the officer did not have probable cause to search for drugs due to a stop for a traffic violation.⁶³ The defendants maintained that the traffic stop was used as a pretext to investigate drug activity, absent any cause to investigate for such, because the defendants were black and were driving a quality vehicle.⁶⁴ The Supreme Court held that “the constitutional reasonableness of traffic stops does not depend on the actual motivations of the individual officers involved.”⁶⁵ Furthermore, the court held that the test should be “whether probable cause existed to justify the stop” in determining reasonableness under the Fourth Amendment.⁶⁶

Although the Supreme Court in *Whren* rejected to analyze the defendant’s evidence concerning racial profiling, empirical evidence suggests that the nature of a pretextual stop is largely based on race.⁶⁷ As reported by Tracy Maclin, police in Avon, Connecticut target Latino motorists for pretextual stops in the predominately white suburbs.⁶⁸ Law enforcement in this suburb target cars with black and Latino individuals and are instructed by their superior officers to find a reason to stop these motorists and “see what they are up to.”⁶⁹ Additionally, in the late 1980’s, New Jersey civil rights activists expressed their disdain for the pretextual stops employed by state troopers for

⁶¹ *Whren v. United States*, 517 U.S. 806, 808-09 (1996).

⁶² *Id.* at 808.

⁶³ *Id.* at 809.

⁶⁴ *See id.*

⁶⁵ *See id.* at 813.

⁶⁶ *See id.* at 810.

⁶⁷ *See Maclin, supra* note 55, at 343-44.

⁶⁸ *See id.* at 344.

⁶⁹ *See id.* at 345.

narcotics investigation.⁷⁰ Empirical evidence used to support this claim was produced in *New Jersey v. Pedro-Soto*, a case decided three months prior to *Whren*.⁷¹ The trial court held that due to their race, the troopers stopped the black defendants.⁷² The trial court judge based his decision on the lengthy record of traffic stops according to the race of the motorists.⁷³ While automobiles with black occupants represented 15% of those who violated speeding laws, 46.2% of the race stops were of black motorists, thus the discrepancy demonstrated through empirical evidence supported the trial judges holding of racial profiling employed in police practices.⁷⁴ Additionally, in *Wilkins v. Maryland State Police*, a state trooper stopped an automobile for speeding where four black defendants were occupants.⁷⁵ In a class action lawsuit, the defense presented evidence that 93.3% of the drivers on that particular interstate were violating traffic laws, with the violators being 17.5% black and 74.7% white. 73% of motorists stopped were black and 80.3% searched were black or Latino, however, only 19.7% searched were white.⁷⁶ Despite the overrepresentation of minorities searched, the percentage of those searches that revealed contraband was similar among white and minority individuals.⁷⁷ The statistics revealed in both *Wilkins* and *Pedro-Soto* demonstrate that the wide discretion afforded to law enforcement in traffic stops is subject to abuse through racial profiling leading to an erosion of Fourth Amendment protection afforded to Latino motorists.⁷⁸

⁷⁰ *See id.* at 346.

⁷¹ *See id.* at 346-47.

⁷² *See id.* at 347.

⁷³ *See id.*

⁷⁴ *See id.* at 347-49.

⁷⁵ *See Macklin, supra* note 55, at 349.

⁷⁶ *See id.* at 350.

⁷⁷ *See id.* at 351.

⁷⁸ *See id.* at 352.

With evidence of racial profiling employed in automobile stops, the same tactics are used in the context of pedestrian stops due to the emphasis on enforcing drug laws.⁷⁹ Police use pedestrian stops in the same manner as automobile stops, to investigate crime and suspicious behavior, as well as controlling and promoting the safety of the community.⁸⁰ Police effectuating a pedestrian stop of an individual must do so upon “reasonable suspicion” that a crime is afoot.⁸¹ Under *Terry v. Ohio*, Police may stop an individual upon reasonable conclusions, due to the totality of the circumstances known to the officer, that criminal activity is afoot.⁸² Additionally, the officer may frisk the individual under a reasonable belief that the individual is armed and dangerous.⁸³ Again, just as with automobile stops in *Whren*, the court has expanded police powers and fails to view the exclusionary rule as a means to deter racial profiling.⁸⁴ Furthermore, despite community resentment due to racial profiling employed in police practices, the court continues to defer to police powers in “genuine investigative and preventative situations.”⁸⁵

With the greater discretion provided to police officers in pedestrian stops, just as with automobile stops, greater discretion perpetuates greater abuse. Minority communities designated as “high crime” areas are subject to greater police intervention based on the misguided premise that minorities have a high predisposition for crime, especially drug offenses.⁸⁶ For example, in New York City, Amadou Diallo was gunned

⁷⁹ See Rudovsky, *supra* note 26, at 332-33.

⁸⁰ See *id.* at 333.

⁸¹ See *Terry v. Ohio*, 392 U.S. 1, 30 (1968).

⁸² See *id.*

⁸³ See *id.*

⁸⁴ See Rudovsky, *supra* note 26, at 336-37.

⁸⁵ See *Terry*, 392 U.S. at 17.

⁸⁶ See Rudovsky, *supra* note 26, at 334.

down and killed by officers in front of his apartment building holding only his wallet.⁸⁷ Officers decided to investigate his nighttime appearance at the location, and believing that Diallo was holding a gun and acting “suspiciously” fired nineteen bullets into Diallo’s body, killing Diallo.⁸⁸ Diallo had no criminal record and was not carrying weapons, thus causing controversy that racially based policing is employed in minority neighborhoods.⁸⁹ Although police practices designed at low-income communities, these minority areas are racially biased and the fact that a majority of arrests and criminal activity occur in these areas give misguided credence to the practicality of these practices.⁹⁰ A study of pedestrian stops in New York City and Philadelphia exhibited impermissible conduct in narcotics enforcement. The study in New York uncovered that precincts constituting a majority-minority population experience more Terry stop and frisk activity.⁹¹ After accounting for differing crime rates, Latinos were stopped 39% more often than whites across crime categories.⁹² Furthermore, only one in nine recorded stops resulted in arrest.⁹³ In Philadelphia, during a week period 135 of the 214 pedestrian stops of African-American pedestrians were conducted without a legally sufficient written explanation.⁹⁴ Therefore, the discretion afforded to officers through the “reasonable suspicion” standard is broad and not significantly defined resulting in officers effectuating “valid” stops with limited evidence.

⁸⁷ *Id.*

⁸⁸ *See id.*

⁸⁹ *Id.*

⁹⁰ *See id.*

⁹¹ *See id.* at 340-43.

⁹² *Id.* at 343.

⁹³ *See Rudovsky, supra* note 26, at 345.

⁹⁴ *Id.* at 340.

Due to policies emphasizing the enforcement of drug and immigration offenses, courts in balancing law enforcement interest and individual privacy defer to law enforcement imperatives at the expense of Latinos.⁹⁵ Because race is employed in law enforcement tactics such as drug courier profiles and policing of low-income neighborhoods, arguably this has led to an overrepresentation of Latinos in the criminal justice system.⁹⁶ Additionally, because Latinos, due to a majority being at an economic disadvantage, are not in a favorable position to challenge racially-biased policing.⁹⁷ The result leads to a confirmation bias in which law enforcement focuses on targeting a disproportionate amount of Latinos based on a misguided belief that Latinos commit a disproportionate amount of crime, thus leading to a greater amount of Latinos who are arrested and incarcerated, especially for drug offenses.⁹⁸ Just because there is an overrepresentation of Latinos incarcerated for drug crimes does not mean law enforcement should disproportionately target Latinos for drug crimes. With that false logic, because Latinos represent per capita the largest amount of Congressional Medal of Honor winners, should the United States military primarily recruit Latinos to serve?⁹⁹

III. DISCRETIONARY BAIL SETTING: ABUSE OF DISCRETION CONTINUING FROM ARRESTING OFFICER TO JUDGE

According to data from the NCLR, “Latinos are almost three times as likely as non-Hispanic Whites to be detained before trial.”¹⁰⁰ Subsequent to tough on crime policies, from 2006-2008, the number of people held pretrial in jail increased more than

⁹⁵ See generally Rudovsky, *supra* note 26; Gowie, *supra* note 29; Maclin, *supra* note 55.

⁹⁶ See WALKER ET AL., *supra* note 1, at 46; Rudovsky, *supra* note 29, at 269.

⁹⁷ See WALKER ET AL., *supra* note 1, at 113.

⁹⁸ See Rudovsky, *supra* note 26, at 308; Maclin, *supra* note 55, at 387.

⁹⁹ See *A Salute to Latino Medal of Honor Recipients*, LATINO INFO. NETWORK AT RUTGERS (Jan. 2, 2013), http://www.slideshare.net/LINAR_RutgersUniversity/a-2013-salute-to-latino-medal-of-honor-recipients.

¹⁰⁰ WALKER ET AL., *supra* note 1, at 4.

20%.¹⁰¹ According to data from The State Court Processing Statistics, fewer people were released pretrial without bail and fewer were granted bail from 1992-2008.¹⁰² Not only does this increase the burden to an already overcrowded prison system, bias used in the expansion of discretionary bail setting adversely affects Latinos and contributes to the overrepresentation of Latinos in an overcrowded prison system.

The Judiciary Act of 1789 mandated a right to bail for all defendants accused of non capital crimes.¹⁰³ Congress passed the Bail Reform Act of 1966, which required federal courts to release defendants charged with non-capital offenses without bond, unless the defendant would fail to appear for trial.¹⁰⁴ Subsequently, Congress passed the Bail Reform Act of 1984 allowing release without bond to be granted if the court found that release will not reasonably assure the appearance of the person or will endanger the safety of the community.¹⁰⁵ The Bail Reform Act of 1984 expanded the discretion courts have in determining bail so long as denial of release is based upon requiring appearance or for public safety.¹⁰⁶ Additionally, the Bail Reform Act allows the government to consider factors when deciding pretrial detention such as the nature of the offense, for example crimes of violence and capital offenses, or whether the crime involved a minor or the use of a deadly weapon.¹⁰⁷

The constitutionality of the Bail Reform Act (BRA) was challenged in the Supreme Court in *United States v. Salerno*.¹⁰⁸ The Supreme Court held that detention

¹⁰¹ Johnson, *supra* note 14, at 48.

¹⁰² *Id.*

¹⁰³ See Kenneth F. Berg, *The Bail Reform Act of 1984*, 34 EMORY L.J. 685, 687 (1985).

¹⁰⁴ Johnson, *supra* note 14, at 59.

¹⁰⁵ See *id.*

¹⁰⁶ See *id.*

¹⁰⁷ See *id.* at 59-60.

¹⁰⁸ *Id.* at 60; see generally *U.S. v. Salerno*, 481 U.S. 739 (1987).

based on a compelling interest other than prevention of flight does not require release on bail based on the Eighth Amendment as long as the bail sum is solely designed to ensure that goal.¹⁰⁹ A majority concluded, “the only . . . substantive limitation of the Bail Clause [wa]s that the Government’s proposed conditions f[or] release o[f] detention not be ‘excessive’ in light of the perceived evil.”¹¹⁰

The wide discretion provided to judges through the *Salerno* decision are easily subject to abuse when using discriminatory factors such as race and economic situation.¹¹¹ The *Salerno* decision provided a list of factors to aid federal and state courts to exercise their expanded discretion in granting bail.¹¹² For example, Texas courts’ determination of the amount of bail is based on certain guidelines according to the laws of Texas.¹¹³ Texas judges are also permitted to consider, in addition to the factors set forth in *Salerno*, the length of the sentence, the nature of the offense, the defendant’s work record, family ties, length of residency, prior criminal record, conformity with previous bond conditions, and aggravating factors involved in the offense.¹¹⁴

In consideration of social and economic factors, Latinos who are unemployed or live in poverty may be adversely affected when judges consider factors such as the defendant’s work record.¹¹⁵ According to the NCLR, “[i]n March [of] 2002, 8.1% of Hispanics in the civilian labor force aged 16 and older were unemployed, . . . [while] only 5.1% for non-Hispanic Whites.”¹¹⁶ Furthermore, with regards to “full time, year-round

¹⁰⁹ See *Salerno*, 481 U.S. at 754.

¹¹⁰ *Id.*

¹¹¹ Johnson, *supra* note 14, at 61.

¹¹² *Id.*

¹¹³ See TEX. CODE CRIM. PROC. ANN. art. 17.15. (2011).

¹¹⁴ *Ex Parte Anunobi*, 278 S.W.3d 425 (2008).

¹¹⁵ See Johnson, *supra* note 14, at 61.

¹¹⁶ WALKER ET AL., *supra* note 1, at 8.

workers, . . . 26.3% of Hispanics and 53.8 % of non-Hispanic Whites earned \$35,000 or more.”¹¹⁷ Also, “Hispanics are more likely . . . to live in poverty than non-Hispanic whites, 21.4% of Hispanics were living in poverty, compared to 7.8% of non-Hispanic Whites.”¹¹⁸ Due to law enforcement targeting low-income Latino communities and using racial profiling as a basis for suspicious criminal activity, police precincts with higher rates of poverty and racial segregation tend to increase jail admissions.¹¹⁹ Additionally, since Latinos are overrepresented in the jail system, stereotypes of what the judge considers a dangerous offender can improperly involve race in the determination of the dangerousness of a Latino defendant.¹²⁰ An example of the effects of judge’s discretion adversely affecting Latino’s in bail setting can be observed in Harris County, Texas. In 2011, records show that Hispanic defendant’s were released on bond about 52% of the time for misdemeanors and 31% for felonies, while white defendant’s were released on bond about 70% for misdemeanors and 44% for felonies.¹²¹ While racial bias cannot be measured, a racial disparity occurs at the disadvantage of Latinos.

Additionally, these bail reforms have increased the amount of persons detained for low-level offenses, thus placing into question their legitimacy in detaining individuals based on the safety of the community.¹²² For example, Chief Judge Lippman noted that New York’s bail system solely considers whether the defendant will return for trial for a

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *See id.*; Johnson, *supra* note 14, at 70-72.

¹²⁰ *See* Johnson, *supra* note 14, at 65; *see also* WALKER ET AL., *supra* note 1, at 17.

¹²¹ WALKER ET AL, *supra* note 1, at 67 (citing Janis Bane ET AL., *Harris County Pre-Trial Services: Policies and Practices*, HOUS. MINISTERS AGAINST CRIME (2011)).

¹²² *See* Russ Buettner, *Judge Calls New York’s Bail System Unfair and Unsafe*, N.Y. TIMES, Feb. 5, 2013, available at http://www.nytimes.com/2013/02/06/nyregion/judge-jonathan-lippman-seeks-to-overhaul-bail-process.html?hpw&_r=0.

fee.¹²³ The bail bond business takes a percentage of that amount, but will ignore those charged with low-level bail amounts.¹²⁴ According to the New York Times, Judge Lippman indicated “the bail system was stacked against those accused of minor crimes, keeping them in jail at great personal hardship and weakening their resolve in plea negotiations.”¹²⁵

A study of the bail bonding system in Connecticut recognized a racial disparity in bail amounts set by the judge and bail bond rates set by bond dealers.¹²⁶ Connecticut General Statute section 54-64a, requires courts to set the minimum bail amount that would “reasonably assure the appearance of the arrest person in court.”¹²⁷ This study “asks whether minority defendants are charged bail rates that are significantly lower than those charged [on] Whites.”¹²⁸ Simply put, “if minorities face higher bail amounts [set by the court] but pay lower rates [to bond dealers] than whites, then the higher bail amounts [set by the court] for minority defendants must reflect racial disparity in bail setting.”¹²⁹

The market test relies on certain assumptions including “that bail setters impose bail amounts designed to equalize flight risks across [similar] defendants, and . . . flight probabilities decrease as bail increases.”¹³⁰ The “bond rate test [will] indicate [] whether

¹²³ See *id.* Judge Lippman, the Chief Judge of the State of New York and Chief Judge of the Court of Appeals, was appointed and confirmed in 2009, *Administrative Directory – Executive Officers*, N.Y. STATE UNIFIED COURT SYSTEM (Jan. 10, 2013), http://nycourts.gov/admin/directory/lippman_jonathan.shtml.

¹²⁴ See Buettner, *supra* note 122.

¹²⁵ *Id.*

¹²⁶ See generally Ian Ayres & Joel Waldfogel, *A Market Test For Race Discrimination in Bail Setting*, 46 STAN. L. REV. 987 (1994) (presenting “a market-based test of unjustified disparate impact” on black and male Hispanic defendants in setting high bail amounts for these groups).

¹²⁷ *Id.* at 989; CONN. GEN. STAT. ANN. § 54-64a (West 2012).

¹²⁸ Ayres & Waldfogel, *supra* note 126, at 1008.

¹²⁹ *Id.*

¹³⁰ *Id.*

judges use criteria that have disparate racial impact without offsetting justification of equalizing flight risks.”¹³¹

In fact, this study suggests that rates set by bond dealers can “partially alleviate the impact of discriminatory bail setting.”¹³² Bail levels set by judges for Hispanic men are 19.2% higher than for white men, while the bond fees set by bond dealers are only 4.6% higher.¹³³

While this study suggests that race is a factor when judges determine bail setting, it does not examine the extent of racial discrimination in bail setting due to additional factors judges may consider such as unemployment.¹³⁴ While racial discrimination cannot be proven, this study demonstrates that bond dealers charge lower bond rates to minority males and courts increase bail for minority defendants based on characteristics outside flight risk propensity and these minority males are likely to have this characteristic.¹³⁵ The results demonstrate that while courts may not intentionally practice discrimination in bail setting, minorities are disproportionately affected in bail setting.

Research of the Connecticut Bail System and the Harris County Bail system disproportionately affect Latinos, in that they are more likely to be charged higher bail amounts or detained without bail. Racial disparity leads to the inference that impermissible racial bias affects judges’ decisions in pre-trial detainment, thus reinforcing the Latino criminal stereotype. Furthermore, the pattern of the courts

¹³¹ *Id.* at 1012.

¹³² *Id.* at 1014.

¹³³ *Id.* at 1013-14.

¹³⁴ *See id.* at 1011.

¹³⁵ *Id.* at 1039.

increasing discretion, such as with law enforcement in traffic stops and with judges in setting bail, has led to abuse resulting in an overrepresentation of Latinos incarcerated.

IV. NEGLECT OF INDIGENT DEFENSE PROGRAMS IS TO NEGLECT FAIRNESS IN THE CRIMINAL JUSTICE SYSTEM

The nation's indigent defense services are severely underfunded and overworked. As a result, Latinos rely on indigent defense services that fail to effectively meet their representational needs.¹³⁶ Due to tough on crime policies such as the war on drugs and removal of "dangerous" immigrants, indigent defense services are overburdened, resulting in inadequate time to research and prepare a proper defense for each individual.¹³⁷ Additionally, indigent defense services must compete for funds devoted to prisons and police that are backed by tough on crime rhetoric.¹³⁸ Because of a lack of adequate resources, indigent defense attorneys face the impossible challenge of allocating limited resources to employ effective criminal defense investigation and representation to every client.¹³⁹ Latinos who disproportionately rely on public defenders for their defense bear the consequences of ineffective representation.¹⁴⁰

According to data collected by the NCLR, "a majority of Latinos who go through the criminal justice system are poor."¹⁴¹ In 1999, "Latinos in state prison were more likely than Whites to have publically financed attorneys with 73% for Latinos and 57% for Whites."¹⁴² At the federal level, 56% of Latinos were represented by publically,

¹³⁶ See WALKER ET AL., *supra* note 1, at 60.

¹³⁷ See *id.* at 50, 76; Robert P. Mosteller, *The Sixth Amendment Rights To Fairness: The Touchstones of Effectiveness and Pragmatism*, 45 TEX. TECH L. REV. 1, 6 (2012).

¹³⁸ See WALKER ET AL., *supra* note 1, at 82.

¹³⁹ See Donald A. Dripps, *Ineffective Assistance of Counsel: The Case for an Ex Ante Parity Standard*, 88 J. CRIM. L. & CRIMINOLOGY 242, 252 (1997).

¹⁴⁰ See WALKER ET AL., *supra* note 1, at 62.

¹⁴¹ *Id.* at 61.

¹⁴² *Id.* at 62.

appointed counsel.¹⁴³ Additionally, “88% of defendants with publically-financed counsel were found guilty and received prison sentences, in relation to only 77% of defendants with private counsel.”¹⁴⁴

A. Underfunded Indigent Defense System Disproportionately Affects Latinos, Resulting in Increased Incarceration

The Fifth Amendment requires a “fair trial,” which is partially defined by the Sixth Amendment’s right to counsel clauses.¹⁴⁵ Furthermore, the right to counsel is the right to effective assistance of counsel.¹⁴⁶ These constitutional mandates can be broken down into three categories as they relate to Latinos in the criminal justice. First, the right to appointed counsel. Second, the right to effective assistance of counsel. Third, how effective assistance of appointed counsel relates to the criminal justice system.

Since *Gideon v. Wainwright*, state governments are constitutionally mandated to require effective assistance to those individuals who cannot afford legal representation.¹⁴⁷ American Bar Association Standards (ABA) recommend an annual maximum caseload of 150 felonies and 400 misdemeanors per attorney, however, as Donald Dripps states, “Most defendants are prosecuted in jurisdictions with caseloads that double or triple that number.”¹⁴⁸ Additionally, workloads have risen more than spending for the Defender Services Division.¹⁴⁹ While there is this constitutional mandate, it is difficult to enforce the *Gideon* mandate due to an overburdened indigent defense system.¹⁵⁰

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ See *Strickland v. Washington*, 466 U.S. 668, 685 (1984).

¹⁴⁶ See generally *McMann v. Richardson*, 397 U.S. 759, 771 (1970).

¹⁴⁷ See generally *Gideon v. Wainwright*, 130 U.S. 335 (1963).

¹⁴⁸ Donald A. Dripps, *Up From Gideon*, 45 TEX. TECH. L. REV. 113, 119 (2012).

¹⁴⁹ See *id.* at 121 (reporting that state public defender offices experienced a 20% increase in caseload but only a 4% increase in resources from 1999-2007).

¹⁵⁰ See *id.*

Paying for indigent defense is a state or local mandate and varies across the United States.¹⁵¹ According to Martin Guggenheim, “The three basic forms . . . include: a statewide public defender office, a contract system, or an assigned . . . appointment system.”¹⁵² However, “those responsible for funding indigent legal services have failed to provide the funds needed for counsel to” provide effective assistance.¹⁵³ A report by the American Bar Association in 2004 found that “thousands of persons are processed through America’s courts every year either with no lawyer at all or with a lawyer who does not have the time or resources to provide effective representation.”¹⁵⁴ Being that Latinos are disproportionately low-income and go through the criminal justice system, Latinos are appointed an attorney that does not perform meaningful case work such as negotiating plea agreements or conducting meaningful, factual investigation.¹⁵⁵

The increase in caseloads has resulted from tough on crime policies, such as the war on drugs, which have disproportionately impacted Latinos. According to the NCLR, “[w]hile cases involving violent crimes remained . . . constant [from 1980 to 2001,] . . . cases involving drug offenses more than tripled.”¹⁵⁶ “Drug offenses doubled from 30,470 in 1990 to 84,944 in 2003 and persons sentenced to the Federal Bureau of Prisons dramatically increased from 16.3% in 1970 to 54.7% in 2002.”¹⁵⁷ Additionally, “the U.S. attorneys prosecuted 84% of the persons referred for drug offenses.” “In 2001, 38% of arrests made by the Drug Enforcement Agency (“DEA”) were Latino individuals at a rate

¹⁵¹ See Susan Herlofsky & Geoffrey Isaacman, *Minnesota’s Attempts to Fund Indigent Defense: Demonstrating The Need For A Dedicated Funding Source*, 37 WM. MITCHELL L. REV. 559, 560-61 (2011).

¹⁵² Martin Guggenheim, *The People’s Right To A Well-Funded Indigent Defender System*, 36 N.Y.U. REV. L. & SOC. CHANGE 395, 402 (2012).

¹⁵³ See *id.*

¹⁵⁴ *Id.* at 405.

¹⁵⁵ See WALKER, *supra* note 1, at 61.

¹⁵⁶ *Id.* at 42.

¹⁵⁷ *Id.* at 44.

three times their proportion to their population in the United states.”¹⁵⁸ The U.S. Sentencing Commission reported, “43% of total drug offenders convicted in 2000 were Latino and nearly three-quarters of Latino federal prison inmates are incarcerated for drug offenses.”¹⁵⁹ Despite these statistics, Latinos are not more likely than other groups to use illegal drugs, but are more likely to be arrested and charged with drug offenses.¹⁶⁰ Tough on crime policies rely heavily on incarceration as a response to drug usage, however, with the dire consequence of overloading the criminal justice system.¹⁶¹ State legislatures fund the minimum constitutional right of appointing counsel while neglecting to allocate resources sufficient to guarantee effective assistance of counsel.¹⁶²

“Recent immigration laws have resulted in increased mandatory detention” as well as limiting due process for immigrants.¹⁶³ “[T]he Bureau of Prisons and INS were required to detain . . . more nonviolent immigration offenders.”¹⁶⁴ Latinos are taken into custody and provided little information on their legal rights and facilities lack competent bilingual services.¹⁶⁵ Additionally, detainment facilities are located in rural areas making it difficult for Latinos to maintain consistent contact with their attorneys.¹⁶⁶

The Bureau of Immigration and Customs Enforcement (“ICE”) has recently adopted policies to remove immigrants who are considered “dangerous”, however, most of the individuals who are considered “dangerous” were removed for drug trafficking,

¹⁵⁸ *Id.* at 18.

¹⁵⁹ *Id.* at 75.

¹⁶⁰ *See id.*

¹⁶¹ *See id.* at 52.

¹⁶² *See* Dripps, *supra* note 139, at 258-59.

¹⁶³ WALKER ET AL, *supra* note 1, at 68.

¹⁶⁴ *Id.* at 68.

¹⁶⁵ *Id.* at 69.

¹⁶⁶ *See Secret Court Confused and Isolated, Many Immigrants are Assembly Line Deportation Detention Centers*, BOSTON GLOBE, (Dec. 11, 2012), <http://www.bostonglobe.com/metro/2012/12/11/2qon3LVfLUOyzciU6Enk7L/story.html>.

and low-level convictions.¹⁶⁷ According to the NCLR, persons detained by ICE are considered the fastest growing sector of the growing prison population.¹⁶⁸ In 2004, 32.1% of the federal prison population was Latino, with about 29% being Latino non-citizens from various countries such as Mexico and Latin America.¹⁶⁹ From 1995-2001, there was a 61% increase of the number of inmates in the federal system with 48% being for drug offenses and 21% for immigration offenders.¹⁷⁰ Only about 1.5% of immigrants detained in U.S. federal prison were sentenced for violent offenses as compared to 15% of U.S. citizens.¹⁷¹ Additionally, the Department of Homeland Security's three actual leading causes of removal based on criminal convictions were for drug crimes, traffic offenses, and immigration related violations.¹⁷² Emphasis on drug offenses and immigration detainment efforts has contributed to an overburdened criminal justice system, thus contributing to the inability for indigent defense programs to provide effective assistance.¹⁷³

Those especially affected by inadequate defense are Latino non-citizens due to the complexities in the overlap between criminal and immigration law.¹⁷⁴ Cr-Immigration law has provided a mechanism of oppression on Latino citizens and non-citizens alike through stereotypes of removing the "criminal alien".¹⁷⁵ Criminal convictions affect the Latino non-citizens immigration status, ability to naturalize, and the ability to remain

¹⁶⁷ See Yolanda Vazquez, *Perpetuating the Marginalization of Latinos: A Collateral Consequence of the Incorporation of Immigration Law Into the Criminal Justice System*, 54 HOW. L. J. 639, 661 (2011).

¹⁶⁸ WALKER ET AL., *supra* note 1, at 68.

¹⁶⁹ *Id.* at 44.

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² Vazquez, *supra* note 167, at 665.

¹⁷³ See WALKER ET AL., *supra* note 1.

¹⁷⁴ See *id.*

¹⁷⁵ See Vazquez, *supra* note 167, at 654-57.

with family in the United States, and a criminal conviction can lead to immigration removal for lawful permanent residents, who have lived in the United States for most of their lives.¹⁷⁶ In order to effectively represent a criminal defendant and take into account immigration consequences, the indigent defense attorney must be knowledgeable in Nationality and Immigration law in order to prepare an effective defense that takes into account future immigration consequences.¹⁷⁷ Because the constitution does not mandate appointment of counsel at the expense of the government in removal proceedings, the first line of defense to immigration removal proceedings is the criminal defense attorney.¹⁷⁸

According to the NCLR, Latinos currently represent the largest minority in the United States, representing about 13% of the United States population.¹⁷⁹ Latinos also represent the largest number of immigrants in the United States at about 53% and the largest number of permanent residents.¹⁸⁰ Furthermore, “Latinos represent the largest number of non-citizens removed for criminal violations at about 94% in 2009.”¹⁸¹ Therefore, Latino immigrants represent the largest group affected by removal due to criminal convictions.

¹⁷⁶ *See id.*

¹⁷⁷ *See* Maurice Hew, Jr., *Under the Circumstances: Padilla v. Kentucky Still Excuses Fundamental Fairness and Leaves Professional Responsibility Lost*, 32 B.C. J. L. & SOC. JUST. 31, 32-33 (2012).

¹⁷⁸ *See generally* *Padilla v. Kentucky*, 559 U.S. 356 (2010).

¹⁷⁹ *See* WALKER ET AL., *supra* note 1.

¹⁸⁰ *The Benefits of Commonsense Immigration Reform: Latino Immigrant Communities*, http://www.whitehouse.gov/sites/default/files/docs/latino_fact_sheet.pdf.

¹⁸¹ Yolanda Vazquez, *Perpetuating the Marginalization of Latinos: A Collateral Consequence of the Incorporation of Immigration Law into the Criminal Justice System* (2011), 54 HOW. L.J. 3, http://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1362&context=faculty_scholarship.

In order to avoid immigration removal proceedings, appointed counsel for indigent Latino immigrants¹⁸² need to account for the consequences of the criminal conviction but also for the collateral immigration consequences resulting from the criminal conviction.¹⁸³ In *Padilla v. Kentucky*, the United States Supreme Court held that the Sixth Amendment's right to effective assistance of counsel requires lawyers to inform their clients of potential immigration consequences regarding their criminal conviction, thus resulting in a defendant who's plea is knowingly and voluntarily made.¹⁸⁴ This raised the constitutional criminal defense attorney's standards to advise clients of deportation risks during the criminal stage; professional standards that have been in place "for at least the past 15 years."¹⁸⁵ At the very least, that which results from this vague standard is that criminal defense attorneys must "do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences."¹⁸⁶

While this standard is in place, still Latinos fall through the cracks and investigation into immigration status, criminal history, and the facts of the case are not performed by an overburdened public defender. The ABA Rules of Professional Responsibility require competent representation that at a minimum, a criminal defense attorney should determine: "(1) the immigration status and criminal history of the client; (2) immigration consequences of the proposed plea; (3) the client's wishes and plans for

¹⁸² See WALKER ET AL., *supra* note 1.

¹⁸³ *Padilla*, 559 U.S. at 375-76.

¹⁸⁴ *Id.* at 373-74.

¹⁸⁵ *Id.* at 372.

¹⁸⁶ See Hew, *supra* note 177, at 32.

the near future; and (4) a criminal trial strategy to meet the client's needs."¹⁸⁷ The immigration removal proceedings can be done away with all together for client if the attorney can tailor their strategy to the client's situation. This can be accomplished in a number of ways such as drafting creative plea agreements with the prosecutor. For example, under immigration law, a criminal conviction relating to a controlled substance can trigger deportation unless the conviction was for a single offense of possession of marijuana of less than thirty grams.¹⁸⁸ Possession for drug paraphernalia is also a deportable offense.¹⁸⁹ In Texas, possession of marijuana less than 30 grams is a Class B misdemeanor, while possession of drug paraphernalia is a Class C misdemeanor.¹⁹⁰ Therefore, a plea to the Class B misdemeanor rather than the lower, Class C, charge will not trigger immigration proceedings. The consequences of the criminal convictions are imposed while the immigration consequences are avoided. Plea bargains, such as these, can only be accomplished if the criminal defense attorney tailors his strategy to the specific client. Additionally, for a Class C misdemeanor of possession of drug paraphernalia, the consequence is only a fine rather than jail time.¹⁹¹ However, if convicted, they will then be detained until their immigration removal proceeding. Due to the large number of Latinos placed in immigration detention prior to their removal, the Latino immigrant can avoid detention, pay their fine, and remain with their family through effective assistance of counsel in the criminal proceeding.

¹⁸⁷ Hew, *supra* note 177, at 32; *see also* MODEL RULES OF PROF'L CONDUCT R. 1.0(e) 1.1, 1.2, 1.3; *People v. Poxo*, 746 P.2d 523, 529 (Colo. 1987) ("Attorney's must inform themselves of material legal principles that may significantly impact the particular circumstances of their clients.").

¹⁸⁸ *See* Hew, *supra* note 177, at 44-45.

¹⁸⁹ Immigration and Nationality Act 8 U.S.C. § 1227 (a)(2)(B)(i) (2007).

¹⁹⁰ Texas Controlled Substances Act §§ 481.121-.125 (1994).

¹⁹¹ TEX. PENAL CODE § 12.23 (1994).

The results from ineffective assistance of counsel to Latino immigrant defendants are dire and the assistance provided falls short of the minimum requirements from a competent attorney. The result is a failure of the adversarial process.¹⁹² Ineffective assistance of counsel can result from muteness from the attorney in providing information of immigration consequences and failure to perform diligence in investigation and fact-finding.¹⁹³

An example of attorney muteness is found in *Padilla* and illustrates the uphill battle Latino defendants have in ensuring fairness in their prosecution. “Jose Padilla was born in Honduras” and was a legal permanent resident alien of the United States for over forty years prior to his arrest.¹⁹⁴ Padilla honorably served in the U.S. military in Vietnam and lived in California with his family.¹⁹⁵ Padilla was indicted for trafficking marijuana and relying on his attorney’s advice that he would not be deported, because “he had been in the country so long.”¹⁹⁶ Padilla pled guilty to felony trafficking.¹⁹⁷ Padilla was then placed in removal proceedings based on his guilty plea.¹⁹⁸ Padilla then filed post-conviction relief in Kentucky state court, alleging that “his Sixth Amendment . . . right to effective assistance of counsel” was violated due to his attorney’s advise concerning potential immigration consequences.¹⁹⁹ The Supreme Court held that his attorney’s performance was constitutionally deficient because, through reasonable diligence in conforming to professional standards, the attorney would have realized Padilla had

¹⁹² See generally Dripps, *supra* note 148.

¹⁹³ *Padilla*, 559 U.S. at 374 (holding that muteness as a constructive denial of counsel).

¹⁹⁴ See Kara B. Murphy, *Representing Noncitizens in Criminal Proceedings: Resolving Unanswered Questions in Padilla v. Kentucky*, 101 J. CRIM. L. & CRIMINOLOGY 1371, 1376 (2011).

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* at 1376-77, n.44.

¹⁹⁸ *Id.* at 1376.

¹⁹⁹ *Id.* at 1376-77.

committed a deportable offense, thus satisfying the first prong of *Strickland*.²⁰⁰ The U.S. Supreme Court held that immigration advice “was not categorically excluded from the ambit of the Sixth Amendment.”²⁰¹ Therefore, due to the relation between deportation and the criminal system, the attorney must at minimum advise the defendant that they may be deported to ensure against a Sixth Amendment violation.²⁰²

Additionally, in *State v. Paredes*, Ramon Paredes, a permanent resident alien from Guatemala, “pleaded guilty to criminal sexual contact of a minor [of] the third degree” and was given a suspended sentence and placed on supervisory probation for three years.²⁰³ However, “six days later, [Paredes] filed a motion to withdraw his guilty plea and alleg[ed] [that] he was not fully informed . . . [of] the effect [the conviction] would have on his immigration status.”²⁰⁴ His motion was subsequently denied.²⁰⁵ Paredes appealed alleging that his attorney did not provide him with specific advice regarding the impact a guilty plea would have on his immigration or naturalization status.²⁰⁶ On certiorari in the Supreme Court of New Mexico, the court held that Paredes established a prima facie case of ineffective assistance of counsel and that his attorney had an affirmative duty to determine his immigration status and advise him that he certainly would be deported if he pled guilty.²⁰⁷ Furthermore, the Court held that had Paredes’ known of the dire consequences, he would not have made a guilty plea, thus

²⁰⁰ *See id.* at 1378.

²⁰¹ *Padilla*, 559 U.S. at 366.

²⁰² *See* Murphy, *supra* note 194, at 1378-79.

²⁰³ *State v. Paredes*, 101 P.3d 799, 800-01 (N.M. 2004).

²⁰⁴ *Id.* at 801.

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.* at 803-04.

satisfying the prejudice prong of *Strickland*.²⁰⁸ The Court reasoned that there was no “conceiv[able] . . . tactical reason for an attorney’s failure to inform the client that accepting a guilty plea almost certainly would result in the client’s deportation.”²⁰⁹

While informing the client of deportation could avoid deportation and detainment all together, diligent investigation of the facts such as naturalization status, in some cases, can avoid imprisonment or prosecution entirely.²¹⁰ In the case of Luis Fernando Juarez, diligence into his naturalization status would have avoided prosecution.²¹¹ Juarez was born in Mexico in February of 1983.²¹² He entered the United States in 1989 with his mother.²¹³ “Juarez lived in the United States [permanently] from 1989-2002.”²¹⁴ Juarez’ mother became a U.S. citizen in 1999.²¹⁵ Juarez married a U.S. citizen and in 2001, while he was married, he filed an application to Register Permanent Resident or Adjust status and his wife filed a petition for Juarez as well.²¹⁶ In 2002, Juarez was convicted of possession of cocaine triggering deportation to Mexico.²¹⁷ When he returned to the United States in 2005, Luis Fernando Juarez was charged and “pled guilty to lying about his U.S. citizenship on a Firearms Transaction Record [for] which he completed while attempting to purchase a handgun in Houston, Texas.”²¹⁸ “Juarez also pled guilty to illegal re-entry into the U.S. after deportation following a conviction for an aggravated

²⁰⁸ *Id.* at 805-06.

²⁰⁹ *Paredes*, 101 P.3d at 806.

²¹⁰ *See generally* United States v. Juarez, 672 F.3d 381 (5th Cir. 2012).

²¹¹ *See id.*

²¹² *Id.* at 384.

²¹³ *Id.*

²¹⁴ *Id.* at 385.

²¹⁵ *Id.* at 384.

²¹⁶ *Id.* at 384-85.

²¹⁷ *Juarez*, 672 F.3d at 385.

²¹⁸ *Id.* at 384-85.

felony.”²¹⁹ “Juarez . . . learned [of] the possibility of his derivative U.S. citizenship through his mother’s naturalization in . . . 2007 . . . [and] Juarez’s trial counsel knew, when asked in court, that his mother had become a naturalized citizen but was unaware of a derivative citizenship defense.”²²⁰

Juarez proceeded to file for post-conviction relief in the United States Court of Appeals asserting constitutionally deficient counsel from his public defender, who failed to recognize and assert a citizenship defense to the crimes charged.²²¹ Juarez alleged U.S. citizenship through his mother, thus forming a defense to the alienage elements of the crimes he pled guilty. Juarez’s attorney failed to recognize the possibility of his client’s U.S. citizenship through inquiry or investigation.²²² He further testified that had he acquired such information in advance, a guilty plea would have been withdrawn.²²³ However, the court stated that “Juarez’s attorney . . . had a duty to . . . research the law and investigate the facts . . . of the case.”²²⁴ Furthermore, had Juarez’s attorney researched the law, Juarez would have proceeded to trial and placed the burden on the government to prove the alienage element.²²⁵ At this point, it would have been nearly impossible for a prosecutor to prove this element to a jury.²²⁶ The court held that Juarez, due to his attorney’s advice from a deficient investigation into Juarez’ derivative citizenship, did not reasonably receive effective counsel in his plea.²²⁷ Thus, Juarez’s

²¹⁹ *Id.* at 384.

²²⁰ *Id.* at 385.

²²¹ *Id.*

²²² *Id.*

²²³ *Id.* at 385.

²²⁴ *Juarez*, 672 F.3d at 387.

²²⁵ *Id.* at 389-89.

²²⁶ *Id.* at 390.

²²⁷ *Id.*

plea, based on his attorney's advice, was not intelligently or voluntarily made.²²⁸ For Juarez, diligent investigation into his citizenship by his appointed counsel would have avoided two criminal convictions.

Due to the overwhelming number of illegal re-entry cases, fast-track programs were enacted to increase the capacity for prosecutors to attain convictions.²²⁹ The Attorney General, under the PROTECT Act, must approve fast track programs in certain districts for defendants charged with immigration crimes which offer defendants options such as charge-bargains, essentially plea agreements to lesser offenses or illegal reentry, and reduced sentences.²³⁰ In return, the defendant must waive certain rights such as indictment by a grand jury, appellate review, and preliminary hearings.²³¹ Additionally, the defendant must quickly enter into the plea before the "advantage" is revoked.²³² Luis Fernando Juarez was convicted in a fast track jurisdiction.

The zeal of prosecuting attorneys and the depletion of resources for appointed counsel have led to an erosion in the criminal justice system where Latino defendants, whom the majority rely on appointed counsel, are making pleas that are not knowingly or voluntarily entered.²³³ Additionally, based on the facts asserted in *Juarez*, it can be inferred that prosecutors themselves are accepting guilty pleas without full knowledge that the facts satisfy the particular elements of a crime.²³⁴ Particularly in fast track jurisdictions, prosecutors must especially take into account constitutional safeguards to

²²⁸ *Id.*

²²⁹ Jane L. McClellan & Jon M. Sands, *Federal Sentencing Guidelines and The Policy Paradox of Early Disposition Programs: A Primer on "Fast-Track" Sentences*, 38 ARIZ. ST. L.J. 517, 517 (2006).

²³⁰ *Id.* at 518.

²³¹ *Id.* at 530.

²³² *Id.*

²³³ See Murphy, *supra* note 194, at 1376, 1379.

²³⁴ See generally *United States v. Juarez*, 672 F.3d 381 (5th Cir. 2012).

ensure reliability in convictions.²³⁵ For instance, Mark Lyttle, a United States citizen with a diminished capacity, was taken into custody by ICE agents for allegedly designating his citizenship as Mexican, while in prison for misdemeanor assault.²³⁶ However, the Department of Homeland Security had information of his U.S. citizenship.²³⁷ An immigration judge ordered his removal as an alien in the country, in violation of the immigration laws for his conviction of misdemeanor assault.²³⁸ Due to being interrogated in Spanish by ICE agents, Lyttle did not speak [Spanish], Lyttle waived his right to a removal hearing before an immigration judge, falsely acknowledged that he was a Mexican citizen, and agreed to be deported to Mexico.²³⁹

Lyttle is of Puerto Rican descent and was born and adopted in North Carolina.²⁴⁰ He suffered from diminished capacity and was in treatment in a mental facility where the misdemeanor assault occurred.²⁴¹ After agreeing to removal to Mexico, he was transported to the Mexican border and sent off on foot into Mexico.²⁴² Lyttle wandered around Mexico until Mexican immigration officials arrested Lyttle and deported him to Honduras because he could not prove his Mexican citizenship.²⁴³ After being detained in an immigration camp in Honduras, he later made his way to Nicaragua and then was deported to Guatemala for failing to prove his immigration status.²⁴⁴ In Guatemala,

²³⁵ See McClellan, *supra* note 229, 533-34.

²³⁶ Christina P. Greer, *Safeguards for Mentally Disabled Respondents in Removal Proceedings*, 23 HEALTH MATRIX 279, 280-81 (2013).

²³⁷ *Id.* at 281.

²³⁸ *Id.* at 280-81.

²³⁹ *Id.* at 280.

²⁴⁰ *Id.* at 280-81.

²⁴¹ *Id.* at 281.

²⁴² *Id.* at 280.

²⁴³ *Id.*

²⁴⁴ Greer, *supra* note 236, at 280.

Lyttle located the U.S. embassy.²⁴⁵ An employee at the embassy located Lyttle's brother who then sent Lyttle's adoption papers.²⁴⁶ The embassy then issued a U.S. passport in a day.²⁴⁷

In the cases of Padilla and Paredez, those defendants made guilty pleas without fully being informed of the consequences of their cases due to deficient representation from appointed counsel. More drastically, in the cases of Juarez and Lyttle, defendants were being convicted of crimes without satisfying essential elements of the crime. While efficiency in the criminal justice system is pertinent, it should not be done at the cost of ensuring that due process is not afforded to the defendant. It is the responsibility of both the prosecutor and public defender to perform their due diligence, ensuring that a low-income Latino can assert his defense.

Deportation can often be the harshest consequence of a non-citizen criminal defendant's guilty plea, so that "in many misdemeanor and low-level felony cases he or she is usually much more concerned about immigration consequences than about the term of imprisonment."²⁴⁸ The deficiencies in the indigent defense system have continued since the 1970's through a neglect of allocating adequate resources. As a result, Latinos are not ensured their constitutional right of effective assistance of counsel, thus placing the fairness of the criminal justice system into question. Latinos are affected on two grounds. The first being aggressive law enforcement of drug and immigration crimes to which Latinos are disproportionately arrested and incarcerated. Second, the majority of

²⁴⁵ *Id.* at 281.

²⁴⁶ *Id.*

²⁴⁷ *Id.*

²⁴⁸ Jennifer Welch, *Defending Against Deportation: Equipping Public Defenders to Represent Noncitizens Effectively*, 92 CALIF. L. REV. 542, 545 (2004).

Latinos relying on indigent defense counsel, do not receive effective assistance due to an overburdened justice system that is the result of the increase in drug and immigration offenses. Additionally, a costly burden falls on building more prisons and detainment facilities creating a cyclical effect, where the Latino defendant does not receive effective counsel and is detained or incarcerated; thus allocating additional funds to house the influx of those convicted, while limiting resources to funding indigent defense.

V. RACIAL CATEGORIZATION: LATINOS FACING DISCRIMINATION WITHIN THE PRISON SYSTEM

Prison conditions since the 1970's have worsened.²⁴⁹ Latinos entering the prison system can look forward to facing inhumane and overcrowded conditions, in addition to discrimination in the structure of their daily life.²⁵⁰ As stated in the Newsweek article entitled "Justice on Trial", polls demonstrated wide support for prison reform due to inhumane conditions, overcrowding, increased inmate violence, and minorities overrepresented in the prison system.²⁵¹ However, tough on crime policies have failed to address these conditions and have only increased funding to build more prisons. Additionally, policies such as increased detainment of immigrants, the war on drugs, harsher sentencing laws, and fewer resources devoted to indigent defense and drug treatment programs, have only inflated the prison population with an overrepresentation of Latino's among the prison population.²⁵² According to the U.S. Department of Justice,

²⁴⁹ See WALKER ET AL., *supra* note 1, at 41.

²⁵⁰ See *id.* at 70.

²⁵¹ NEWSWEEK, *supra* note 3.

²⁵² See WALKER ET AL., *supra* note 1, at 58.

“if recent incarceration rates, remain unchanged, an estimated one in fifteen persons in the United States will serve time in prison during his lifetime.”²⁵³

From 1970 to 2008, the number of persons imprisoned in the United States has risen 705% with the United States detaining almost a quarter of all prisoners in the world.²⁵⁴ “In 1980, . . . 500,000 men and women were in prison and jail combined”; this number rose in 2003 to more than two million.²⁵⁵ In 2001, state prisons were operating between 1% and 16% above capacity.²⁵⁶ In 2000, according to the U.S. Census Bureau, Latinos comprised 12.5% of the nation’s population and “31% of incarcerated individuals in the federal criminal justice system.”²⁵⁷ Additionally, “17% of Hispanic males will enter state or federal prison during their lifetime, compared with 5.9% of White males.”²⁵⁸ “[A]lmost three times as many Latino men serve time in prison as do White men.”²⁵⁹ Findings from the National Council of La Raza, indicate that Latinos are less likely to be jailed than imprisoned.²⁶⁰ Additionally, “[i]n 2002, Latinos were a greater share of new prison . . . [inmates] than either African Americans or Whites (33.9% of Latinos as compared to 32.7% for Whites).”²⁶¹ Latinos also “represent[] a smaller share of prison releases than either Whites or African Americans, (26% Latinos, 40.5% African

²⁵³ *Id.*, at 118.

²⁵⁴ Johnson, *supra* note 14, at 44.

²⁵⁵ WALKER ET AL., *supra* note 1, at 38.

²⁵⁶ *Id.*

²⁵⁷ *Id.* at 17.

²⁵⁸ *Id.* at 19.

²⁵⁹ *Id.*

²⁶⁰ *Id.* at 21.

²⁶¹ Jason Ziedenisberg & Vincent Schiraldi, *Race and Imprisonment in Texas: The Disparate Incarcerations of Latinos and African American in the Lone Star State*, JUST. POL’Y INST. (2005), http://www.justicepolicy.org/images/upload/05-02_REP_TXRaceImprisonment_AC-RD.pdf.

Americans, and 32.2% Whites) and the NCLR suggests that “if these proportions hold constant... the share of the overall prison population that is Latino may grow.”²⁶²

Additionally, the incidents of gang violence and race riots have been glossed over and used as support for the funding and building of prisons.²⁶³ Racial categorization, for example in California, is used by correctional officers to segregate inmates with the pretext of reducing gang violence.²⁶⁴ However, prison violence has not decreased with this paradigm.²⁶⁵ Using racial categories, correctional officers can structure the daily life of inmates, such as in housing.²⁶⁶ While prison violence, such as the Attica riot in the 1970’s, could be the possible result of racial tension, evidence suggests that the uprising was more complicated due to “a newfound social consciousness” from disparate racial treatment and failure to maintain safe prison conditions.²⁶⁷ Nevertheless, tough on crime politicians legitimize their agenda by simply pointing out the mere fact that these criminals are violent and their acts during incarceration demonstrates that these inmates must remain incarcerated.²⁶⁸ However, overcrowded prisons and dissatisfaction with inhumane conditions from inmates are overlooked as the main contributing factors for current inmate violence.²⁶⁹ Quantity over quality is emphasized, thus perpetuating neglect.

²⁶² *Id.*

²⁶³ Sarah Spiegel, Comment, *Prison “Race Riots”: An Easy Case for Segregation?*, 95 CALIF. L. REV. 2261, 2274 (2007).

²⁶⁴ *See id.* at 2275.

²⁶⁵ *See id.*

²⁶⁶ *See id.* at 2275-76, 2283, 2289.

²⁶⁷ *See id.* at 2271-74.

²⁶⁸ *See id.* at 2271-73.

²⁶⁹ *See id.* at 2272, 2286; Dale Noll, *Building A New Identity: Race, Gangs, And Violence In California Prisons*, 66 U. MIAMI L. REV. 847, 864-65 (2012).

Previously in California, inmates would be held in their own cell, however, with the overcrowding of prisons, inmates now share cells.²⁷⁰ In the California Prison System, “there [wa]s a practice of discouraging cell moves” or in-house placement of inmates of different races²⁷¹. Even in the intake forms, when denoting gang affiliation there is a check box for gangs associated with white inmates and multiple choices for Latino gang affiliations.²⁷² Denoting gang affiliation aids correctional officers in dealing with gangs and protecting themselves.²⁷³ Even in the case of a Latino prison gang being responsible for riot or inmate violence, correctional officers will lock down other inmates based on their possible affiliation due to their race and where they are from.²⁷⁴ For instance, in the case of Andrew Escalera, the Southern Hispanic gang caused a riot and Andrew Escalera was placed “on lockdown for the next four months,” solely because he is from the area of California where the Southern Hispanic gang has members.²⁷⁵ A challenge to the California prison racial segregation policy in the Supreme Court was remanded to view the plan under strict scrutiny and a district court found that prisons generally present a “social emergency,” justifying protective segregation.²⁷⁶ In that case, “Garrison Johnson, an African-American inmate,” in custody of the California Department of Corrections, filed a complaint that the CDC’s reception center housing policy violated his right to equal protection under the 14th amendment by assigning him cellmates on the basis of

²⁷⁰ See Philip Goodman, “*It’s Just Black, White, or Hispanic*”: An Observational Study of Racializing Moves in California’s Segregated Prison Reception Centers, 42 LAW & SOC’Y REV. 735, 736 (2008).

²⁷¹ Noll, *supra* note 269, at 874.

²⁷² See Goodman, *supra* note 270, at 750.

²⁷³ See *id.* at 755.

²⁷⁴ See Spiegel, *supra* note 263, at 2261.

²⁷⁵ *Id.*

²⁷⁶ *Id.* at 2266.

race.²⁷⁷ Johnson asserted that he had a constitutional right to be free from race-based decisions that harmed him as a member of a racial minority.²⁷⁸ Latino inmates live, such as in California, in racially divided structures based on racial categorization that determine “who you go with, what you do when you arrive, . . . and what you [will do] when [you are] finally there.”²⁷⁹ Thus, the result is racial indoctrination.²⁸⁰

The process of racial segregation indoctrinates the Latino inmates into believing that the decisions he makes in prison are affected by race. Just as denoting, Latino, on a housing application will determine his cell placement and activities. Decisions made based upon race will continue while an inmate is in prison. For example, if a Latino inmate requests a cell change with an inmate of another race, it is perceived as an act against the inmate’s race due to the fact that prison officials discourage mixed race cells.²⁸¹ Inmates are aware of racial segregation and can facilitate the proliferation of prison gangs through this model.

Furthermore, the California prison system, through racial segregation, directly and indirectly supports the prison gang hierarchy, which in turn influences incoming Latino inmates to “stick with their own kind.”²⁸² As inmate populations grow, prison gang population increases, resulting in prison administrators having less control over the safety of the inmates and maintaining order.²⁸³ A cycle of turmoil occurs because as prison gangs grow, incoming inmates perceive that correctional officers have less control over the safety of the prisoners. Inmates then seek protection from prison gangs, thus

²⁷⁷ *Id.* at 2265.

²⁷⁸ *See id.* at 2267.

²⁷⁹ Goodman, *supra* note 270, at 745.

²⁸⁰ *See generally* Noll, *supra* note 269, at 854-55.

²⁸¹ Noll, *supra* note 269, at 869.

²⁸² Goodman, *supra* note 270, at 758-59.

²⁸³ *See generally* Goodman, *supra* note 270, at 735; Noll, *supra* note 269, at 864.

strengthening the gang.²⁸⁴ Correctional officers conducting initial interviews will determine placement based on the inmates declaration of race and affiliation.²⁸⁵

Therefore, they are negotiating with the prisoner on whom and where they will be placed.

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Prison gangs in California form along racial and geographic lines to their relation as an extension of street gangs.²⁸⁷ For example, Latino prisons gangs, in California are divided down the middle with the assumption that Latino inmates from counties in Northern California associate with La Nuestra Familia and those in the southern counties associate with Mexican Mafia.²⁸⁸ Correctional officers conducting the initial interview are aware of the gang's racial and geographical make up and solicit answers from the Latino inmate, presupposing gang affiliation.²⁸⁹ For instance, incoming inmates must indicate what their gang affiliation is and the Latino inmate may not indicate that they are unaffiliated. Simply being from a certain region associates the Latino with certain gangs. If a Latino is from Northern California, then they are presumed to affiliate with the Northern Latino gang.²⁹⁰ The officer conducting the initial interview will asks "who they roll" with.²⁹¹ If the Latino inmate says he is unaffiliated, the officer will ask who could you be affiliated with to solicit some type of gang classification.²⁹² To the correctional officer, the Latino unaffiliated inmate is rare and even indicated as such on intake

²⁸⁴ Goodman, *supra* note 270, at 735.

²⁸⁵ *Id.* at 752.

²⁸⁶ *See id.* at 752-53.

²⁸⁷ *Id.* at 763-64.

²⁸⁸ Noll, *supra* note 269, at 852.

²⁸⁹ *See* Goodman, *supra* note 270, at 748-49, 752-53.

²⁹⁰ Noll, *supra* note 269, at 852.

²⁹¹ Goodman, *supra* note 270, at 756.

²⁹² *Id.*

forms.²⁹³ In negotiation, the Latino inmate will give some affirmative answer of affiliation and will be placed with inmates of those gangs.²⁹⁴ Even without any affirmative answer of affiliation, the Latino inmate can be placed with inmates of a particular Latino gang, based on geographic location.²⁹⁵

The inmate's perception of their necessity to affiliate based on safety and loyalty to one's race is also partly reinforced by correctional officers upon entering.²⁹⁶ Orientation speeches outlining the different racial gang affiliations and the necessity to "talk to your people" imply that survival is based on affiliation with those of your race.²⁹⁷ This loyalty idea is reinforced in the housing process from the implementation of racial segregation.²⁹⁸ A general association with other races is also looked as treasonous against the prison gang, especially because Latino prison gangs know that the prison takes measures in segregating the races.²⁹⁹ During intake, the correctional officer will remind the inmate of the dangers regarding rivalries within the prison, thus the Latino inmate uses altruism to satisfy the need for survival.³⁰⁰

While a White inmate goes through the prison intake system similarly to a Latino inmate, the answers they provide usually create favorable categorization.³⁰¹ A white inmate can affiliate with Latino and Black gangs.³⁰² Thus, correctional officers do not presume gang membership based on race for a White inmate and are more willing to

²⁹³ *See id.* at 750.

²⁹⁴ *See id.* at 750, 755-58.

²⁹⁵ *See id.* at 737.

²⁹⁶ *See id.* at 755.

²⁹⁷ *See id.* at 747.

²⁹⁸ *See id.* at 748.

²⁹⁹ *See Noll, supra* 269, at 857-58.

³⁰⁰ *See Goodman, supra* 270, at 747.

³⁰¹ *See id.* at 756, 758.

³⁰² *See id.* at 755.

accept an answer of “unaffiliated”.³⁰³ The risk for a white inmate to conform to this mold of racial and gang affiliation is much lower because they can negotiate to be away from the stronger Latino and Black prison gangs.³⁰⁴ The White inmate can integrate with different gangs, where as the Latino inmate is unable interact with a White inmate, due to a perceived rejection of the Latino race.³⁰⁵ Furthermore, Latino prison gangs, within themselves, have rules based on segregation such as “no overt display of mutual regard or sharing food or utensils” with other races. Correctional officers upon arrival then confirm these preconceived notions, and correctional officers affirm segregation rules within the Latino prison gang. Therefore, Latino inmates have more pressure to conform to prison politics and gangs than White inmates.

The perception of affiliation with prison gangs for survival and racial categorization causes Latinos to fall in line with a prison gang, thus increasing the likelihood of violence and other prison misconduct.³⁰⁶ Because prison gangs largely influence prison violence, they become more powerful and create prison instability. They increase in their number of recruits due to this power and start their recruitment on the street level.³⁰⁷ Racial segregation allows the racially established prison gang to centralize and an inmate housed with the prison gang will be pressured to fall under their authority.³⁰⁸ Additionally, a small-time gang member who is convicted for dealing drugs, will be obligated to affiliate with the particular gang associated with their region while in

³⁰³ See *id.* at 758.

³⁰⁴ See *id.* at 754.

³⁰⁵ See Sharon Dolovich, *Strategic Segregation In The Modern Prison*, 48 AM. CRIM. L. REV. 1, 50-51 (2011); Noll, *supra* note 269, at 864.

³⁰⁶ See Noll, *supra* note 269, at 863-64.

³⁰⁷ See Brentin Mock, *Gang Expert Tony Rafael Discusses Mexican Mafia Known as ‘La Eme’*, INTELLIGENCE REPORT, Winter 2006, at 1, available at <http://www.splcenter.org/get-informed/intelligence-report/browse-all-issues/2006/winter/guaging-the-gangs?page=0,0#.UZUmbis4WRQ>.

³⁰⁸ See Goodman, *supra* note 270, at 754; Mock, *supra* note 307.

prison and immediately, be given rules and regulations to follow.³⁰⁹ Furthermore, if the Latino “independent” inmate is housed with another Latino prison gang member, he will need to follow their rules or face violence.³¹⁰ Either you comply with prison politics or you act as an individual and face death.³¹¹

Prison gangs such as the Mexican Mafia; achieve their inspiration from the concept of La Raza and ethnic pride.³¹² A Mexican Mafia shot caller, Rudolph Cheyenne Cardena, in the 1970’s, believed that the Mexican Mafia could be formed into a social movement, gaining inspiration from the Aztec culture.³¹³ Cardena saw the influence of the Black Panther Party upon the black prison movement, and translated this to his own ideology.³¹⁴ Cardena learned Nahuatl, the Aztec language, and taught this to other inmates, eventually resulting in its use to send coded messages.³¹⁵ Centered on the ideology of La Raza, bringing unity through Latino prison gangs based on their shared culture.

While California has used racial categorization as a premise to reduce gang violence, it is a solution that continues to avoid the neglect of the prison system at the expense of discrimination against Latinos. Racial integration has shown a reduction of violence within the prison system.³¹⁶ A decade long study from the University of Texas, regarding integration of the prison system, has shown that racially integrated versus

³⁰⁹ See Mock, *supra* note 307.

³¹⁰ See *id.*

³¹¹ See *id.*

³¹² *Id.*

³¹³ *Id.*

³¹⁴ See *id.*

³¹⁵ *Id.*

³¹⁶ See Noll, *supra* note 269, at 870.

racially segregated double cells have resulted in lower incidents of inmate violence.³¹⁷ To integrate the prisons system of Texas, an inmate's ineligibility of integration with a different race can be determined by confirmed gang membership, rather than presumed membership along racial lines, three previous race-related problems in prison during the past two years, and confirmed "free-world victimizations" with complaints against integration.³¹⁸ These determinations do not mean that an inmate may never be racially integrated for the duration of their sentence, but the "determinations [will be] periodically re-evaluated."³¹⁹ The desire to be placed with an inmate of the same race is closely scrutinized and restricted.³²⁰ Furthermore, cells are assigned at random based on availability, and cell changes are tightly restricted, absent persistent violence.³²¹ At the end of the ten-year study, in 1999, more than 60% of double cells were racially integrated.³²²

The results of the ten-year study show that interracial violence among integrated cell partners was lower in relation to the rate of violence among inmates not integrated.³²³ Additionally, racially motivated violence among inmates in non-integrated cells were very few and even less among integrated cell partners.³²⁴ The authors of the study believes that the Texas Prison System demonstrates that using an objective determination for cell placement creates an equal status among inmates. In furtherance of this objective

³¹⁷ Chad Trulson & James W. Marquart, *The Caged Melting Pot: Toward an Understanding Of The Consequences Of Desegregation In Prisons*, 36 LAW & SOC'Y REV. 743, 743 (2002).

³¹⁸ *Id.* at 755.

³¹⁹ *Id.*

³²⁰ *Id.*

³²¹ *See id.* at 756.

³²² *Id.* at 757-58.

³²³ *See id.* at 760-62.

³²⁴ *See id.* at 761-62.

standard, inmates may not choose a cellmate of their same race.³²⁵ Overall, this study provides support that racial integration does not necessarily lead to increased prison violence.³²⁶

While Latino inmates entering the prison system may have preconceived notions of loyalty to their race and geography, the California prisons system reinforces these ideas through racial segregation. The solution of creating efficient control mechanisms for Latino inmates, through racial segregation and increased funding to prisons, ignores the problem of why correctional officers are unable to assert control in the first place, because the prison system is overcrowded. Latinos are overrepresented in the prison population. It is not because Latinos are more predisposed to crime than White Americans, but rather because ensuring public safety through emphasis on incarceration is a solution on the backend. Instead, solutions to public safety must be created in the front end, in analyzing why policies such as prosecuting drug and immigration offenses, that Latinos are disproportionately affected by, really ensure public safety.

VI. CONCLUSION

Bias and discrimination perpetuates through various facets of the criminal justice system at the disadvantage of the growing Latino community. This initial bias against Latinos has been facilitated through negative stereotypes of the make-up of low-income Latino communities, which in turn legitimizes tough on crime policies. However, tough on crime policies favoring detainment and incarceration, for non-violent offenses, such as drug possession and immigration offenses, fail to ensure fairness, despite constitutional

³²⁵ See Trulson, *supra* note 317, at 771.

³²⁶ See *id.* at 775; Noll, *supra* note 269 at 867.

mandates. Unless reforms are made to move away from an emphasis on incarceration, Latinos will bear the ultimate burdens in the criminal justice system.

The problem of the Latinos overrepresentation in the criminal justice system has begun, in part, by over criminalizing the law through tough on crime policies such as the “war on drugs” and removal of illegal immigrants. The lack of confidence in the 1970’s to the criminal justice system was due to a rise in violent crime. Emphasis devoted to finding drug offenders and removing illegal immigrants has led to the overrepresentation of Latinos. Racial profiling is used by law enforcement to fulfill those goals. Even with the unlikely assumption that racial profiling does not exist; still the Latino race is a component in drug courier and immigrant profiles. If the goal is to ensure community safety, emphasizing arrests of Latinos for non-violent offenses are not related to that goal and create a disparate effect on the Latino community.

Part of the solution of the overrepresentation of Latinos in the criminal justice system begins on the street level. An effort away from racially discriminatory, aggressive policing of low-income Latino neighborhoods and towards racially-conscious community based policing, can ensure community safety that is also, more cost efficient than incarceration for non-violent crimes. Aggressive policing through *Terry* stops of Latinos in low-income areas creates mistrust between the Latino community and law enforcement. Of course, law enforcement must establish a presence in the community, but this can be done by less intrusive and discriminatory means. Not every Latino in a low-income area is a criminal. The more intrusive stop and frisk methods and pretextual traffic stops used to control crime creates mistrust within the Latino community, making

them less likely to cooperate with law enforcement.³²⁷ Through community-based policing, officers can maintain close relations with law abiding Latinos, thus creating a reciprocal effect in which citizens help officers identify criminals in their neighborhoods and officers will protect them from criminal activity. As David Kennedy, director of the Center of Crime Prevention and Control, stated in a panel on racial profiling:

In Hempstead Village, Long Island, the worst drug market on Long Island was shut down two years ago through joint police-community action and direct contact with identified drug dealers. They ran 150 drug arrests going back fifteen years, 150 a year, as long as anybody can remember. Last calendar year, in this same drug market, there were two drug arrests. It's gone and the community is keeping it gone; there are better ways to do this stuff.³²⁸

Reducing the discriminatory practices of law enforcement will alleviate an overburdened criminal justice system while adhering to fairness under the law for Latinos. Furthermore, a trickle down effect will occur in which indigent defense systems will also become less burdened and a reduction in prison populations. The solution to Latino overrepresentation in the criminal justice system begins at the front-end, the arrest level. While this is a utopian viewpoint, it is not outlandish to assert that law enforcement, prosecution, and incarceration must truly be colorblind.

³²⁷ See WALKER ET AL., *supra* note 1, at 59.

³²⁸ Darius Charney, Jesus Gonzalez, David Kennedy, Noel Leader & Robert Perry, Remark, *Suspect Fits Description: Responses to Racial Profiling in New York City*, 14 N.Y. CITY L. REV. 57, 65 (2010).