

COORDINATING COMMUNITY REINTEGRATION SERVICES FOR “DEPORTABLE ALIEN”¹ DEFENDANTS: A MORAL AND FINANCIAL IMPERATIVE

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Abstract

Recidivism rates for individuals who are convicted of illegal entry and re-entry (U.S.C. §§ 1325 and 1326) are quite high despite post-sentencing deportations. The “holistic defense” model developed in New York City at the Neighborhood Defender Services and Bronx Defenders has been instrumental in achieving better outcomes for criminal defendants and their communities, in large part due to an emphasis on re-entry or re-integration services for defendants being released from incarceration. However, that model is difficult to implement when applied to non-citizen defendants who are to be deported. This Article argues that some attention to re-entry services for deportable non-citizen defendants improves outcomes for the individual defendants and the communities they are prosecuted in. Deportable non-citizen inmates housed in United States Bureau of Prison facilities are provided fewer educational opportunities and minimal access to drug treatment. They are ineligible for placement in residential re-entry centers. Often, non-citizens have

1. This author acknowledges that the terms “deportable alien” and “alien” are loaded with meaning and controversy. *See, e.g.*, Stephen Hiltner, *Illegal, Undocumented, Unauthorized: The Terms of Immigration Reporting*, N.Y. TIMES (Mar. 10, 2017), <https://www.nytimes.com/2017/03/10/insider/illegal-undocumented-unauthorized-the-terms-of-immigration-reporting.html>; *see also* Derek Hawkins, *The Long Struggle over What to Call ‘Undocumented Immigrants’ or, as Trump Said in His Order, ‘Illegal Aliens,’* WASH. POST (Feb. 9, 2017), https://www.washingtonpost.com/news/morning-mix/wp/2017/02/09/when-trump-says-illegals-immigrant-advocates-recoil-he-would-have-been-all-right-in-1970/?utm_term=.6e61d73700e9. Federal law uses the term “alien” which is defined in 8 U.S.C. § 1101(a)(3) as “any person not a citizen or national of the United States.” This is the sense in which the term is used throughout this article. However, to acknowledge the xenophobic connotation of the word alien, it will frequently be presented in quotation marks. *See also* *Trump v. Hawaii*, No. 17-965, 585 U.S. (June 26, 2018) (SOTOMAYOR, J., dissenting) (slip op., at 19 n.7) (“It is important to note, particularly given the nature of this case, that many consider “using the term ‘alien’ to refer to other human beings” to be “offensive and demeaning.” *Flores v. United States Citizenship & Immigration Servs.*, 718 F. 3d 548, 551–52, n.1 (6th Cir. 2013). I use the term here only where necessary “to be consistent with the statutory language” that Congress has chosen and “to avoid any confusion in replacing a legal term of art with a more appropriate term.” *Ibid.*”).

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grown up in the United States and have limited connections to their “home countries.” The majority are deported to homelessness in Mexican cities along the United States border. Some defendants are not fluent in Spanish and many defendants lack legal Mexican identification—making it nearly impossible to find work in the communities to which they have been deported. This problem will only grow if deportation rates continue to rise. This Article suggests policy changes and data collection strategies to ameliorate the difficulties that non-citizen defendants face upon post-sentencing deportation, with an eye towards improving recidivism rates and keeping communities safer.

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ROMEO

What less than dooms-day is the prince’s doom?

FRIAR LAURENCE

A gentler judgment vanish’d from his lips,
Not body’s death, but body’s banishment.

ROMEO

Ha, banishment! be merciful, say “death”;

For exile hath more terror in his look,
 Much more than death: do not say “banishment.”

FRIAR LAURENCE

Hence from Verona art thou banished:
 Be patient, for the world is broad and wide.

ROMEO

There is no world without Verona walls,
 But purgatory, torture, hell itself.
 Hence-banished is banish’d from the world,
 And world's exile is death: then banished,
 Is death mis-termed: calling death banishment,
 Thou cutt'st my head off with a golden axe,
 And smilest upon the stroke that murders me.

Romeo and Juliet by William Shakespeare.²

Q. Why were you trying to leave Mexico that night?

A. Because I was in a very bad situation I didn't have a place to go, I didn't have anything to eat, and I didn't have a place to be.

Testimony of Raul Mendez-Bello during the *United States v. Mendez-Bello* trial.³

INTRODUCTION

This Article is not about “The Dreamers,” but about their parents, brothers, and cousins. Men and women who came to the United States and put down roots here, but were then convicted of crimes and deported back to home countries they hadn't seen in decades. The Obama administration deported immigrants and prosecuted immigration crimes at higher rates than did any previous administration.⁴ These high levels of deportation and prosecution continue under the Trump administration.⁵

2. WILLIAM SHAKESPEARE, *ROMEO AND JULIET* act 3, sc. 3.

3. Transcript of Trial at 605, *United States v. Mendez-Bello*, No. 14-CR-03459-BTM (S.D. Cal. Mar. 4, 2015) (testimony of Raul Mendez-Bello).

4. See Marisa Franco & Carlos Garcia, *The Deportation Machine Obama Built for President Trump*, NATION (June 27, 2016), <https://www.thenation.com/article/the-deportation-machine-obama-built-for-president-trump/>; Mehdi Hasan, *Barack Obama: The Deporter-in-Chief*, AL JAZEERA (Jan. 14, 2017), <http://www.aljazeera.com/programmes/upfront/2017/01/barack-obama-deporter-chief-170113105930345.html>; Serena Marshall, *Obama has Deported More People than Any Other President*, ABC NEWS (Aug. 29, 2016), <http://abcnews.go.com/Politics/obamas-deportation-policy-numbers/story?id=41715661>.

5. See Alvaro M. Bedoya, *Deportation is Going High-Tech Under Trump*, ATLANTIC,

Both administrations have prioritized the deportation of “criminal aliens”—individuals subject to deportation who also have at least one previous criminal conviction.⁶ Because the federal government is increasing the number of prosecutions for immigration crimes like illegal entry⁷ and illegal reentry after deportation,⁸ a growing number of people are being deported directly after serving criminal sentences in jail or prison.⁹ But their stories don’t end with deportation. Many of these individuals illegally reenter the United States again—sometimes within days or weeks of deportation—despite having just received lengthy prison sentences for the same offense.¹⁰

This phenomenon appears to be particularly acute among defendants with strong family ties to the United States and among those who struggle with mental health issues or addiction.¹¹

Over the past two decades, criminal justice reformers have acknowledged that community reentry services are essential to facilitating a smooth transition from custody back into the community, and to reducing recidivism.¹² But the reentry movement has, for the most

(June 21, 2017), <https://www.theatlantic.com/technology/archive/2017/06/data-driven-deportation/531090/>; Maria Sacchetti, *Deportations from the Interior of the United States are Rising Under Trump*, WASH. POST (Oct. 7, 2017), https://www.washingtonpost.com/local/immigration/deportations-from-the-interior-of-the-united-states-are-rising-under-trump/2017/10/07/44a14224-a912-11e7-b3aa-c0e2e1d41e38_story.html?utm_term=.85f541c44a63; Elliot Spagat, *Sessions Orders ‘Zero Tolerance’ Policy for Border Crossers*, WASH. POST (Apr. 6, 2018), [https://www.washingtonpost.com/world/national-security/deportations-fall-under-trump-despite-increase-in-arrests-by-ice/2017/09/28/1648d4ee-a3ba-11e7-8c37-e1d99ad6aa22_story.html?utm_term=.93c89dc2a6e6](https://www.washingtonpost.com/amphtml/national/sessions-orders-zero-tolerance-policy-for-border-crossers/2018/04/06/45add2a0-39d0-11e8-af3c-2123715f78df_story.html?no_redirect=on; but see Nick Miroff, Deportations Slow Under Trump Despite Increase in Arrests by ICE, WASH. POST (Sept. 28, 2017), <a href=).

6. Memorandum from Jeh Charles Johnson, Sec’y, Dep’t of Homeland Sec., to Thomas S. Winkowski, Acting Dir., Immigration & Customs Enf’t 3 (Nov. 20, 2014), https://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf; Exec. Order No. 13,768, 82 Fed. Reg. 8799 (Jan. 25, 2017) (on enhancing public safety in the interior of the United States).

7. 8 U.S.C. § 1325 (2012).

8. *Id.* § 1326.

9. *See infra* II.

10. “Notably, 38.1 percent of [federal immigration criminal] offenders were deported and subsequently illegally reentered at least one time *after* being convicted and sentenced for either a prior illegal entry offense (8 U.S.C. § 1325) or a prior illegal reentry offense (8 U.S.C. § 1326).” U.S. SENTENCING COMM’N, *ILLEGAL REENTRY OFFENSES* 15 (2015), <https://www.uscc.gov/research/research-publications/illegal-reentry-offenses>.

11. *See infra* Parts II.B, C.

12. *See, e.g.,* NAT’L REENTRY RES. CTR. & COUNCIL OF STATE GOV’TS JUSTICE CTR., *MAKING PEOPLE’S TRANSITION FROM PRISON AND JAIL TO THE COMMUNITY SAFE AND SUCCESSFUL: A SNAPSHOT OF NATIONAL PROGRESS IN REENTRY* 4 (2017), https://csgjusticecenter.org/wp-content/uploads/2017/06/6.12.17_A-Snapshot-of-National-

part, failed to address the community reentry and reintegration needs of individuals being deported to other countries after serving custodial sentences. This Article seeks to bridge that gap. First, it will describe the scope of the problem and the demographics of “deported alien” defendants, with an emphasis on the federal prison population. Second, this Article will describe the unique challenges “deportable alien” defendants face upon deportation following a criminal justice sentence. Finally, this Article proposes possible changes to better address the needs of “deportable alien” defendants and argues that some attention to reentry services for these defendants would improve outcomes both for the individuals themselves and for the communities in which they are prosecuted.

I. LARGE NUMBERS OF PEOPLE ARE DEPORTED IMMEDIATELY AFTER SERVING TIME IN JAIL OR PRISON

Currently, there are over 183,000 people in the custody of the Federal Bureau of Prisons (BOP).¹³ Though the majority of those in BOP custody—80 percent—are United States citizens, 20 percent—or one fifth—are noncitizens.¹⁴ For individuals sentenced for crimes in federal court, the number of noncitizens is even higher, with a full 41.7 percent of defendants sentenced in fiscal year (FY) 2016 lacking United States citizenship.¹⁵ This discrepancy can be explained by the fact that the vast majority of noncitizen defendants are prosecuted for immigration crimes, which have shorter sentences than do weapons, fraud, and drug offenses,¹⁶ meaning that noncitizen defendants typically serve less time and therefore represent a comparably smaller fraction of federal prison inmates. Assuming that nearly all noncitizens sentenced for federal crimes are deportable¹⁷ (nearly 42 percent of the federal defendants

Progress-in-Reentry.pdf. See generally Edward E. Rhine & Anthony C. Thompson, *The Reentry Movement in Corrections: Resiliency, Fragility and Prospects*, 47 CRIM. L. BULL. 177 (2011) (discussing the importance of community reentry services to improve reintegration).

13. See *Population Statistics*, FED. BUREAU PRISONS, https://www.bop.gov/about/statistics/population_statistics.jsp (last updated Apr. 12, 2018).

14. See *Inmate Statistics: Citizenship*, FED. BUREAU PRISONS, https://www.bop.gov/about/statistics/statistics_inmate_citizenship.jsp (last updated Mar. 24, 2018).

15. U.S. SENTENCING COMM’N, OVERVIEW OF FEDERAL CRIMINAL CASES FISCAL YEAR 2016 3 (2017), <https://www.uscc.gov/research/data-reports/overview-federal-criminal-cases-fiscal-year-2016>.

16. *Id.* at 6–9 (stating that in FY 2016, the average sentence for immigration crimes generally was thirteen months, whereas the average sentences for weapons offenses was seventy-five months, for fraud offenses twenty-five months, and the average sentence for drug offenses ranged between twenty-eight and ninety months depending on drug type).

17. This seems a fair assumption given that most noncitizens are facing immigration charges or drug charges. Prosecution for illegal entry or reentry implies inadmissibility as an alien present without permission or parole pursuant to 8 U.S.C. § 1182(a)(6)(A)(i). If an individual is convicted of alien smuggling pursuant to § 1324 or any drug trafficking offense, he or she is

sentenced criminally in FY 2016), over 28,000 people, will be deported after serving their time in custody. And that only includes the people being released from federal custody—it does not include people being deported after release from state prisons or local jails. In FY 2016, United States Immigrations and Customs Enforcement (ICE) removed 240,255 people from the United States—down from a high of 409,849 in FY 2012.¹⁸ The total number of ICE removals declined slightly to 226,119 in FY 2017.¹⁹ Particularly relevant to this discussion, however, is the number of deportations originating from the interior of the United States, as opposed to those deportations occurring at or near the border. Deportations from the interior United States amounted to 81,603 in FY 2017, up from 65,332 in FY 2016.²⁰ Of those deported from the interior United States in FY 2017, 67,859 (83 percent), had at least one prior criminal conviction.²¹ Though the data reported by ICE does not delineate exactly how many of those removed were apprehended in a custodial setting, the qualitative section of ICE’s FY 2016 report indicates that ICE apprehended the bulk of those deportees with criminal convictions through coordination with local law enforcement.²² This coordination occurs primarily through immigration detainers placed when federal authorities are notified that a “deportable alien” is in local jail or prison custody.²³

Much has been made of “sanctuary” policies that limit cooperation between local law enforcement and federal immigration enforcement. Under the leadership of Attorney General Jeff Sessions, the Department of Justice has decried recent legislation in California that limits cooperation with ICE.²⁴ In response to these laws, the Department of Justice has targeted California for increased immigration enforcement²⁵

deportable as an aggravated felon per § 1227(a)(2)(A)(iii). And even federal drug possession crimes render one deportable per § 1227(a)(2)(B)(i).

18. U.S. IMMIGRATION & CUSTOMS ENF’T, FISCAL YEAR 2016 ICE ENFORCEMENT AND REMOVAL OPERATIONS REPORT 2 (2016) [hereinafter FY 2016 REPORT], <https://www.ice.gov/sites/default/files/documents/Report/2016/removal-stats-2016.pdf>.

19. U.S. IMMIGRATION & CUSTOMS ENF’T, FISCAL YEAR 2017 ICE ENFORCEMENT AND REMOVAL OPERATIONS REPORT 12 (2017) [hereinafter FY 2017 REPORT], <https://www.ice.gov/sites/default/files/documents/Report/2017/iceEndOfYearFY2017.pdf>.

20. *Id.* at 12.

21. *Id.* at 13.

22. FY 2016 REPORT, *supra* note 18, at 9.

23. *Id.*

24. *See, e.g., 232 Illegal Aliens Arrested During ICE Operation in Northern California*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT (Mar. 1, 2018), <https://www.ice.gov/news/releases/232-illegal-aliens-arrested-during-ice-operation-northern-california> (“Recent legislation has negatively impacted ICE operations in California by nearly eliminating all cooperation and communication with our law enforcement partners in the state by prohibiting local law enforcement from contracting with the federal government to house detainees.”).

25. *See id.* (“ICE has no choice but to conduct at-large arrests in local neighborhoods and

and even filed suit against California.²⁶ But in reality, both right and left wing pundits have overstated the impact of the SB 54, The California Values Act.²⁷ California is not a true “sanctuary state”—California prisons are exempt from the so-called “sanctuary” legislation that limits information sharing with ICE,²⁸ and local law enforcement can share information about individuals convicted of any one of 800 enumerated offenses in the past 15 years with ICE.²⁹ Cooperation is still occurring—even in California—on a massive scale. “At-large” arrests, arrests from within the community rather than directly from a jail or prison setting, of non-U.S. citizens with prior criminal convictions increased in FY 2017 to 26,466.³⁰ But these “at-large” arrests still accounted for only a quarter of the total 105,736 ICE arrests of non-U.S. citizens with criminal convictions made in the interior United States.³¹ The vast majority of the over 80 thousand people deported from the interior in FY 2017 were deported immediately after serving time in jail or prison. This means that the number of individuals not provided with reentry services because of deportation immediately following sentence completion falls somewhere between 28 and 80 thousand annually—this is no small number.

After recognizing the vastness of this population, one must turn to demographic data to get a better sense of who exactly these “deportable aliens” are. Of the non-U.S. citizens in federal prison, most are Mexican citizens; Mexican citizens account for 12.9 percent of the current federal prison population.³² Mexican citizens represent a similarly large chunk of general deportees: 57 percent of all removals in FY 2017 were of Mexican citizens, down from 62 percent in FY 2016.³³ Following Mexicans in the federal prison population are citizens of Colombia, Cuba, and the Dominican Republic, each representing less than 1 percent of the prison population.³⁴ Another 4.9 percent of inmates have unknown or “other” citizenship.³⁵ Until recently, Cuban citizens avoided deportation

worksites, which will inevitably result in additional collateral arrests, instead of focusing on arrests at jails and prisons where transfers are safer for ICE officers and the community.”).

26. See Matthias Gafni & Katy Murphy, *U.S. Suing California over ‘Sanctuary’ Laws for Undocumented Immigrants*, SAN JOSE MERCURY NEWS (Mar. 6, 2018, (9:35 AM)), <https://www.mercurynews.com/2018/03/06/attorney-general-jeff-sessions-to-make-major-sanctuary-city-announcement-in-sacramento/>.

27. See Jazmine Ulloa, *No, California’s ‘Sanctuary State’ Law Does Not Allow the Release of Dangerous Criminals to the Streets*, L.A. TIMES (Apr. 6, 2018), <http://www.latimes.com/politics/la-pol-ca-sanctuary-state-criminals-explained-20180406-htmllstory.html>.

28. CAL. GOV’T CODE § 7284.4 (West 2018).

29. *Id.* § 7282.5.

30. FY 2017 REPORT, *supra* note 19, at 7.

31. *Id.* at 3, 7.

32. See *id.* at 3, 7, 15.

33. *Id.* at 12.

34. See *Inmate Statistics: Citizenship*, *supra* note 14.

35. See *id.*; see also FY 2017 REPORT, *supra* note 19, at 15–18 (listing the citizenship

based on special status due to Cold War policies, but as a result of improved relations between the United States and Cuba, deportations to Cuba began again in 2017.³⁶ In terms of the citizenship of deportees in general, Mexican citizens were followed by Guatemalan (14.1 percent), Honduran (9.2 percent), and Salvadorian (8.5 percent) citizens—though it is unclear what percentage of deportations from the interior are represented by these populations and therefore what portion are being deported from jail or prison.³⁷ Overall, it appears that the majority of noncitizens being deported immediately after serving criminal sentences are Mexican citizens who will be deported to Mexico after their release from jail or prison.

Deportations to Mexico differ from deportations to Colombia, The Dominican Republic, Guatemala, Honduras, Cuba, and El Salvador (the other countries mentioned above) because the United States shares a land border with Mexico, which facilitates swift mass deportations.³⁸ Typically, deportees are bussed or flown to a land border crossing and deported to a Mexican border city on the other side of the port of entry.³⁹ One third of all deportees (not just deportees to Mexico) are deported through land border crossings in Baja, California, with over half of those being deported to Tijuana.⁴⁰ This resulted in 320,778 people being deported to Tijuana from 2010 to 2013 alone.⁴¹ Tijuana has been dubbed the “Deportation Capital” and struggles to absorb hundreds of deportees a day,⁴² many of whom have just been released from jail or prison. Those not deported to Tijuana are overwhelmingly deported to other border cities rather than to the interior of Mexico.⁴³ This means that most of the

statistics for fiscal years 2016 and 2017).

36. See Reuters Staff, *Cuba Says United States Has Deported 117 Cuban Migrants Since Policy Shift*, REUTERS (Feb. 18, 2017), <https://www.reuters.com/article/us-cuba-usa-migration/cuba-says-united-states-has-deported-117-cuban-migrants-since-policy-shift-idUSKBN15X058>; Jay Weaver & Mimi Whitefield, *Some Cuban Felons, Including 2,000 Murderers, Could Face Deportation Under New Policy*, MIAMI HERALD (Jan. 13, 2017), <http://www.miamiherald.com/news/local/article126519244.html>.

37. FY 2016 REPORT, *supra* note 18, at 12.

38. See Catherine E. Shoichet & Curt Merrill, *ICE Air: How US Deportation Flights Work*, CNN (May 29, 2017, 11:04 AM), <http://www.cnn.com/2017/05/26/us/ice-air-deportation-flights-explainer/index.html>.

39. See *id.*; see also Sam Quinones, *In Tijuana, Mexicans Deported by U.S. Struggle to Find ‘Home’*, NAT’L GEOGRAPHIC (Nov. 21, 2014), <http://news.nationalgeographic.com/news/special-features/2014/11/141121-tijuana-deportees-immigrants-mexico-border/> (discussing the deportation process).

40. See Quinones, *supra* note 39.

41. *Id.*

42. See Alasdair Baverstock, *Tijuana Braces for Huge Influx of Deportees, Some 15K per Month, Under Trump*, FOX NEWS (Nov. 22, 2016), <http://www.foxnews.com/world/2016/11/22/tijuana-braces-for-huge-influx-deportees-some-15k-per-month-under-trump.html>.

43. See Quinones, *supra* note 39.

“criminal aliens” deported by the United States are being released in neighboring communities—right in the United States’ own backyard and within mere miles of major U.S. metropolitan areas. These individuals are not being effectively exiled. They are just being released on the other side of a border fence. The successful repatriation and reintegration of “criminal aliens” into those Mexican border communities is of paramount importance to United States interests.

II. “DEPORTABLE ALIEN” DEFENDANTS HAVE UNIQUE AND UNMET NEEDS UPON RELEASE

The reentry movement began in 1999 when Janet Reno, then Attorney General of the United States, asked her staff what was being done with inmates being released from prison.⁴⁴ This sparked a national dialogue about the challenges individuals face upon reentry and the collateral consequences of criminal convictions.⁴⁵ Reformers collected data and created programs to address housing, employment, substance abuse, and education issues with the hope of improving outcomes for individuals and communities.⁴⁶ This movement was complemented by the movement towards holistic defense in public defender offices.⁴⁷ And though the holistic defense movement emphasized mindfulness of the collateral consequence of deportation and urged defense attorneys to craft dispositions that avoided deportation,⁴⁸ these parallel movements failed to meaningfully address the specific concerns of offenders who were facing deportation upon completion of their criminal justice sentence. For example, a comprehensive 631-page report by the Reentry Policy Council (a private/public partnership) made only one mention of deportation—and that was to note in the appendices that “some deportable aliens,” like those sentenced to death, were exempt from the general federal prison requirement that inmates complete a “Release Preparation program.”⁴⁹

44. Rhine & Thompson, *supra* note 12, at 181.

45. See generally Michael Pinard & Anthony C. Thompson, *Offender Reentry and the Collateral Consequences of Criminal Convictions: An Introduction*, 30 N.Y.U. REV. L. & SOC. CHANGE 585 (2006) (“Relatively recently, a burgeoning chorus of advocates, policy analysts, and commentators has called attention to the various collateral consequences that attend criminal convictions.”).

46. Rhine & Thompson, *supra* note 12, at 182.

47. See generally Robin G. Steinberg, *Beyond Lawyering: How Holistic Representation Makes for Good Policy, Better Lawyers, and More Satisfied Clients*, 30 N.Y.U. REV. L. & SOC. CHANGE 625 (2006) (“[M]oving away from a traditional model of representation toward a more holistic one enhances advocacy, satisfies clients, and is an all-around good policy.”).

48. See, e.g., Pinard & Thompson, *supra* note 45, at 592.

49. COUNCIL OF STATE GOV'TS, REPORT OF THE RE-ENTRY POLICY COUNCIL: CHARTING THE SAFE AND SUCCESSFUL RETURN OF PRISONERS TO THE COMMUNITY 501 (2005), <https://csgjusticecenter.org/reentry/publications/the-report-of-the-re-entry-policy-council-charting-the-safe-and-successful-return-of-prisoners-to-the-community/>.

But deportation is not death, and deportable defendants are in need of reentry services.

Implementing reentry and reintegration services presents new challenges when applied to noncitizen defendants who are to be deported. Some of these challenges are inherent in being deported to a new country, and to a country lacking the social services safety network present in the United States. Often, noncitizens have grown up in the United States and have limited connections to their “home countries.”⁵⁰ As explained above, the majority of noncitizen defendants are deported to homelessness in Mexican cities along the United States border. Many of these defendants are not fluent in Spanish and lack legal Mexican identification—making it nearly impossible to find work in the communities to which they have been deported.⁵¹

But other challenges are the result of specific policies that either prioritize U.S. citizens or fail to address the unique needs of noncitizens. For example, “deportable alien” inmates housed in BOP facilities are provided fewer educational opportunities, and they are ineligible for comprehensive drug treatment.⁵² They are ineligible for halfway house placement and do not typically receive a probation officer to supervise them and coordinate a release plan. Furthermore, the internal policies of various federal agencies make it likely that identification documents and other property seized at the time of arrest will not be returned to deportees. These policies exacerbate the already tenuous position “deportable alien” defendants find themselves in upon release and deportation. It is as if the deck is not only stacked against them, but weighed down with a stone.

A. Education & Language

Research has shown that, on average, inmates who participated in correctional education programs (including ESL instruction) had a 43 percent lower recidivism rate than did inmates who did not participate.⁵³ Illiteracy and the lack of education remain barriers to reentry and employment for prisoners returning to their communities. Literacy and education attainment levels are lower for prisoners than for the general American public.⁵⁴ Figures are even lower for inmates from non-English

50. See Quinones, *supra* note 39.

51. See *id.*

52. *Infra* Sections II.A, B.

53. LOIS M. DAVIS ET AL., RAND CORP., EVALUATING THE EFFECTIVENESS OF CORRECTIONAL EDUCATION: A META-ANALYSIS OF PROGRAMS THAT PROVIDE EDUCATION TO INCARCERATED ADULTS 32 (2013), https://www.bja.gov/publications/rand_correctional-education-meta-analysis.pdf.

54. NAT'L CTR. FOR EDUC. STATISTICS, LITERACY BEHIND PRISON WALLS 18–19 (1994), <https://nces.ed.gov/pubs94/94102.pdf>.

speaking households.⁵⁵ This barrier is likely even more pronounced for deportable prisoners. Only 18 percent of illegal reentry defendants in FY 2013 had attended school in the United States.⁵⁶ A little more than half of illegal reentry defendants spoke some English.⁵⁷ And although almost all were fluent in the language of their home country,⁵⁸ many likely lacked full literacy in their native languages.

Unfortunately, access to education programs—and, in particular, education programs in home country languages (primarily Spanish)—is limited in federal prison. This makes it difficult for “deportable aliens” to adequately prepare themselves for their release and subsequent reentry into communities in their countries of deportation. In general, inmates who are not fluent in English or who lack a verified high school diploma or GED are required to participate in the BOP literacy and ESL programs.⁵⁹ But “deportable alien” inmates are exempt from this requirement⁶⁰—meaning that facility resources are often not available to give education access to all “deportable aliens.” Occupational education programs only allow participation of “deportable aliens” if resources permit, after giving priority to other inmates.⁶¹ Few classes are offered for Spanish, or other non-English, language development.⁶²

In this sense, California could serve as a model. New legislation enacted in 2017, The California Values Act, or SB 54, clearly states that the Department of Corrections and Rehabilitation “shall not . . . [r]estrict access to any in-prison educational or rehabilitative programming . . . on the sole basis of citizenship or immigration status, including, but not limited to, whether the person is in removal proceedings, or immigration authorities have issues a hold request.”⁶³ This commitment to rehabilitative treatment of non-U.S. citizens, even those facing deportation, is no doubt undergirded by the legislative findings in SB 54 that “[a]lmost one in three Californians is foreign born and one in two children in California has at least one immigrant parent.”⁶⁴ This finding confronts the realization that immigrants are embedded in the fabric of

55. *Id.* at 46.

56. U.S. SENTENCING COMM’N, *supra* note 10, at 24.

57. *Id.*

58. *Id.*

59. FED. BUREAU OF PRISONS, DIRECTORY OF NATIONAL PROGRAMS 3–4 (2016), https://www.bop.gov/inmates/custody_and_care/docs/BOPNationalProgramCatalog.pdf.

60. *Id.*

61. *Id.* at 7.

62. Christopher Zoukis, *Education in the Federal Bureau of Prisons*, PRISONEDUCATION.COM (May 23, 2013), <http://www.prisoneducation.com/prison-education-news/education-in-the-federal-bureau-of-prisons.html>.

63. CAL. GOV’T CODE § 7284.10(b)(1) (West 2018).

64. *Id.* § 7284.2(a).

our society—their destinies intertwined with those of U.S. citizens. But again, even California’s approach is wanting: it treats everyone equally rather than developing specific programs designed to prepare incarcerated individuals facing deportation for their release in their countries of origin.

B. Drug Treatment

The BOP estimates that over 40 percent of inmates have diagnosable, moderate-to-severe substance abuse problems.⁶⁵ There is no reason to think that “deportable alien” inmates buck this general trend. In fact, in one data set, 56.1 percent of all illegal reentry offenders had either reported substance abuse issues or been convicted of a DUI-type offense, or both.⁶⁶ But despite the need for substance abuse treatment, deportable aliens are ineligible for the 500 hour Residential Drug Abuse Program (RDAP) because they are ineligible for placement in a residential reentry center (RRC)—a requirement of the program.⁶⁷ The BOP itself estimates that 2,500 “deportable alien” inmates would participate in RDAP each year but for their ineligibility based on immigration detainers.⁶⁸ RDAP has demonstrated positive impact on recidivism. Compared to male inmates who do not complete the program, male inmates who complete the program are 16 percent less likely to be rearrested or revoked on supervised release (the federal equivalent of probation or parole) and are 15 percent less likely to use drugs.⁶⁹ Female inmates have even better outcomes and are 18 percent less likely to be rearrested or use drugs.⁷⁰ “Deportable alien” inmates are able to participate in two significantly shorter (and less effective) drug programs while in BOP custody,⁷¹ but

65. See Beth Weinman, Nat’l Drug Abuse Coordinator, Fed. Bureau of Prisons, Statement at the U.S. Sentencing Commission’s Symposium of Alternatives to Incarceration: Prison Programs Resulting in Reduced Sentences, 67, 72 (July 14, 2008), http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/alternatives/20080714-alternatives/05_FINAL_PrisonPrograms.pdf; see also FED. BUREAU OF PRISONS, ANNUAL REPORT ON SUBSTANCE ABUSE TREATMENT PROGRAMS FISCAL YEAR 2012 1, 4 (2012), <http://docplayer.net/docview/20/478887/#file=/storage/20/478887/478887.pdf> (providing the same 40% figure).

66. U.S. SENTENCING COMM’N, *supra* note 10, at 27.

67. Alan Ellis & Todd A. Bussert, *Federal Sentencing: Residential Drug Abuse Treatment Program (RDAP)*, 30 ABA CRIM. JUST. 30, 30 (2016); see also 28 C.F.R. § 550.53(b) (2018) (listing the criteria for admission into RDAP); FED. BUREAU OF PRISONS, PSYCHOLOGY TREATMENT PROGRAMS 8 (2009), https://www.bop.gov/policy/progstat/5330_011.pdf (stating the admission criteria for RDAP, including the RRC requirement).

68. U.S. GOV’T ACCOUNTABILITY OFFICE, BUREAU OF PRISONS: ELIGIBILITY AND CAPACITY IMPACT USE OF FLEXIBILITIES TO REDUCE INMATES’ TIME IN PRISON 32 (2012), <http://www.gao.gov/assets/590/588284.pdf>.

69. See Ellis & Bussert, *supra* note 67, at 30.

70. *Id.*

71. *Id.*

without access to RDAP they are at a significant disadvantage as compared to U.S. citizens.⁷²

The streets of Tijuana contain ample evidence of the dire effects of the lack of comprehensive drug treatment for “deportable aliens” in federal custody. The homeless use hard drugs regularly and openly in the “El Bordo” region of Tijuana.⁷³ These are mainly homeless deportees who turn to methamphetamine or heroin addiction after giving up hope of ever returning to the United States.⁷⁴ The drug problem among homeless deportees is so bad that in 2015, the local government in Tijuana felt compelled to forcibly place hundreds of homeless individuals—mostly deportees—in drug rehabilitation programs.⁷⁵ As a result of this initiative, some homeless deportees without drug problems were scooped up and forced to remain in treatment.⁷⁶ Officials viewed this as a way to rid the city of the blight of its homelessness problem.⁷⁷ Though drug treatment is available in Mexico, the quality of the programs is debatable, since the programs often lack trained medical professionals.⁷⁸ Further, because of violent incidents at drug rehabilitation facilities, a perceived risk of violence deters many addicts from seeking treatment in Mexico.⁷⁹

Lack of access to comprehensive drug and alcohol treatment programs, both in custody and upon release, is a significant barrier to successful reentry faced by “criminal aliens” who are deported after serving time in jail or prison.

72. They are also ineligible for the only sentencing reduction available in BOP custody. See generally 28 C.F.R. § 550.55 (listing Immigration and Customs Enforcement detainees as ineligible for early release).

73. See Louie Palu, *Drug Addiction in Tijuana*, PULITZER CTR. (Jan. 30, 2013), <http://pulitzercenter.org/reporting/drug-addiction-tijuana>.

74. See *id.*

75. Jean Guerrero, *Tijuana Mandates Drug Treatment for Hundreds of Homeless*, KPBS (Apr. 13, 2015), <http://www.kpbs.org/news/2015/apr/13/tijuana-homeless-get-compulsory-treatment/>.

76. Jean Guerrero, *Police Step Up Effort to Evict Homeless from Tijuana Canals*, KPBS (Feb. 25, 2016, 7:52 PM), <http://www.pbs.org/newshour/bb/police-step-up-effort-to-evict-homeless-from-tijuana-canals/>.

77. *Id.*

78. Jean Guerrero, *Missing: People, Funds in Tijuana’s Homeless Relocation Effort*, KPBS (July 10, 2015), <http://www.kpbs.org/news/2015/jul/10/missing-people-funds-tijuanas-homeless-relocation/>.

79. Alicia Yolanda Harvey-Vera et al., *Risk of Violence in Drug Rehabilitation Centers: Perceptions of People Who Inject Drugs in Tijuana, Mexico*, 11 SUBSTANCE ABUSE TREATMENT, PREVENTION, & POL’Y, Jan. 16, 2016, at 1, <https://substanceabusepolicy.biomedcentral.com/articles/10.1186/s13011-015-0044-z>.

C. Mental Health

Individuals with mental health issues are overrepresented in the U.S. prison and jail populations,⁸⁰ and they represent a similar share of the non-U.S. citizens in U.S. jails and prisons. Deportable noncitizens with mental health issues are faced with additional hurdles. This fragile population will be released without some of the benefits that U.S. citizens receive upon release. They are not assigned probation officers because they will not be supervised upon release.⁸¹ Furthermore, they are ineligible—for obvious reasons—for placement in residential reentry centers (RRCs) commonly known as a “half-way houses.”⁸²

The standard of mental health care in custody prior to release is also subpar. The BOP frequently uses privately-run prisons to house noncitizens, and the medical and mental health services at these facilities is far below those services at the federally-run prisons.⁸³ From 2015 to 2016, journalist Sam Freed Wessler of *The Nation* wrote a series about deaths that had occurred in private prisons housing noncitizens.⁸⁴ In addition to deaths due to lack of medical care, Wessler described a series of suicides attributable to lack of mental health services in these prisons.⁸⁵ One BOP official explained the disparity between federal and privately-run prisons: “In regular BOP prisons, mental-health treatment is part of the mission, because rehabilitation is part of the mission . . . For criminal-alien prisons, it’s just, ‘Hold them.’”⁸⁶ Perhaps as a result of Wessler’s articles, President Obama’s administration announced in August 2016 that it would begin phasing out the use of private prisons by the BOP.⁸⁷ However, Attorney General Jeff Sessions rescinded the

80. See, e.g., Ana Swanson, *A Shocking Number of Mentally Ill Americans End Up in Prison Instead of Treatment*, WASH. POST (Apr. 30, 2015), https://www.washingtonpost.com/news/wonk/wp/2015/04/30/a-shocking-number-of-mentally-ill-americans-end-up-in-prisons-instead-of-psychiatric-hospitals/?utm_term=.6592edb96c77; Dahlia Lithwick, *Prisons Have Become America’s New Asylums*, SLATE (Jan. 5, 2016, 2:17 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2016/01/prisons_have_become_warehouses_for_the_mentally_ill.html.

81. See *United States v. Balogun*, 146 F.3d 141, 143 (2d Cir. 1998) (noting that the probation file of a deportable alien “is simply closed the moment he is transported out of the country”); see also U.S. SENTENCING GUIDELINES MANUAL § 5D1.1(c) (U.S. SENTENCING COMM’N 2004) (recommending against the imposition of supervised release for deportable alien defendants).

82. See Ellis & Bussert, *supra* note 67.

83. Seth Freed Wessler, *‘This Man Will Almost Certainly Die,’* NATION (Jan. 28, 2016), <https://www.thenation.com/article/privatized-immigrant-prison-deaths/>.

84. *Id.*

85. *Id.*

86. *Id.*

87. Matt Zapotosky, *Justice Department Will Again Use Private Prisons*, WASH. POST (Feb. 23, 2017), https://www.washingtonpost.com/world/national-security/justice-department-will-again-use-private-prisons/2017/02/23/da395d02-fa0e-11e6-be05-1a3817ac21a5_story.html

previous administration's order and signaled that the Trump administration would continue to use privately-run prisons.⁸⁸ "Deportable alien" inmates will likely continue to receive subpar mental health treatment in prison as compared to their U.S. citizen counterparts, especially with the continued use of privately-run prisons.

In the federal system, an individual is usually placed in an RRC before finishing his sentence.⁸⁹ This helps ease the transition to the outside world and allows those with disabling mental illnesses to get Social Security Disability benefits started or restarted so that they have a steady stream of income to pay for food and housing.⁹⁰ But inmates facing deportation do not benefit from RRC placement or its accompanying transition services because immigration detainers render them ineligible for RRC placement.

Probation officers aid in transitioning prisoners to life on the outside.⁹¹ The officer typically meets with a prisoner prior to his release and then supervises him once he is released into the community.⁹² When the supervisee suffers from mental illness the probation officer typically helps with accessing Medicaid and other benefits,⁹³ which helps ensure that individuals have access to proper mental health medications upon release and reentry.⁹⁴ Probation officers can also connect supervisees to mental health counseling programs in the community.⁹⁵ But inmates facing deportation are not assigned probation officers because they are not supervised upon release. Therefore, they lack this transitional support which is especially vital for the mentally ill.

Aside from these structural supports—better care in custody, RRC placement, and probation officer support—U.S. citizens are released into communities where their families or other social support networks are located.⁹⁶ "Deportable aliens" are typically removed to communities where they lack these support networks. Because they don't have probation officers assessing their reentry plans, some are released and

?utm_term=.300f58dba4a7.

88. *Id.*

89. *See About Our Facilities*, FED. BUREAU PRISONS, https://www.bop.gov/about/facilities/residential_reentry_management_centers.jsp (last visited Apr. 11, 2018).

90. *Emergency Message*, SOC. SECURITY ADMIN., (June 22, 2017), <https://secure.ssa.gov/apps10/reference.nsf/links/12212016035308PM>.

91. *Probation Officers and Correctional Treatment Specialists*, BUREAU LAB. STAT. (Jan. 30, 2018), <https://www.bls.gov/ooh/community-and-social-service/probation-officers-and-correctional-treatment-specialists.htm#tab-2>.

92. *Id.*

93. *Chapter 3: Mental Health Treatment (Probation and Supervised Release Conditions)*, U.S. CTS., <http://www.uscourts.gov/services-forms/mental-health-treatment-probation-supervised-release-conditions> (last visited June 3, 2018).

94. *Id.*

95. *Id.*

96. *Id.*

deported without their families even being notified. One client of mine, who suffered from schizoaffective disorder, was released after a period of being medication noncompliant towards the end of his thirty-month sentence for illegal reentry. He crossed illegally again within 48 hours of being deported. At sentencing on the subsequent reentry case—where he received a total sentence of 57 months—I asked the judge to order that BOP staff contact his mother upon release to avoid another quick turn-around. The judge rejected my suggestion.

Anecdotally, noncitizens with mental health issues are frequently among the serial recidivists for illegal reentry offenses. Coordination with social services resources in Mexico or other countries of deportation is almost nonexistent, and this creates a revolving door for a vulnerable population.

D. *Uncertainty About Release*

Another difficulty all deportable aliens face upon release is uncertainty about the specifics of their deportation. Prisoners fixate on release dates—almost all inmates know theirs. As their release dates approach, most know the likely hour they will first step into the free world. But practically speaking, “deportable alien” inmates are not really “released” until they have been deported; they are held in custody based on immigration detainers until their deportation orders are executed.⁹⁷ Depending on where a “deportable alien” inmate is in custody, his immigration status, and his home country, his actual “release date” after deportation is difficult to predict. Inmates held in San Diego or other border cities who have been previously deported and are just awaiting reinstatement of a prior deportation order⁹⁸ are sometimes deported to Mexico the same day they are released from federal custody. But inmates held further from the border, inmates entitled to more process in immigration proceedings, and inmates being deported to countries that require air travel can sometimes have weeks or even months tacked onto their time in custody as they await deportation.⁹⁹ Even if the wait time for

97. Obviously, some “deportable aliens” are not identified by federal authorities when they are in state or local custody, immigration detainers are not placed, and they are released without being deported. These individuals are not the focus of this article.

98. *See* 8 U.S.C. § 1231(a)(5) (2012); 8 C.F.R. § 1241.8 (2018).

99. As an attorney at Federal Defenders in San Diego, I’d frequently receive anxious calls from family members of clients who had been released from BOP custody and were incommunicado in immigration detention. The family members were trying to figure out when to expect their loved ones back in Mexico after deportation but were having difficulties determining when exactly that would be—and I wouldn’t be able to provide them any definite answers. One mother of a developmentally disabled client was particularly concerned because she was afraid of him being victimized in Tijuana upon deportation if she wasn’t there to receive him. His likelihood of victimization was exacerbated by the fact that he had crossed in on a bicycle wearing bike shorts and a t-shirt—not exactly common apparel for a deportee. We spent a week trying to ensure

a hearing exceeds six months, nearly all inmates with criminal convictions will remain ineligible for immigration bond and will remain in custody indefinitely until they are deported.¹⁰⁰

Adding to the uncertainty and further frustrating the smooth transition plans is the fact that individuals don't always know exactly where they will be deported. An inmate being held in SeaTac, a BOP facility in Seattle, has no way of knowing ahead of time whether he will be deported through California to Tijuana or through Arizona to Nogales.¹⁰¹ And a "deportable alien" who was originally prosecuted in San Diego after crossing the border from Tijuana could be housed in Georgia during his prison commitment and then deported through Texas upon release. The Department of Homeland Security also has a "lateral repatriation" program which attempts to deport people to a different city than the one through which they entered¹⁰²—this adds to the anxiety and confusion.

Finally, once individuals are deported to a selected Mexican border town or city at one of the designated ports of repatriation, they still need to get "home." Deportees from the states of Michoacán and Guerrero—states with high levels of immigration due to cartel violence¹⁰³—find themselves deported to locations that are 28 or 35 hours away from their home states, respectively. And that assumes there is someone is waiting for them in their home states or that their entire family has not relocated to the United States. Though Mexican officials make efforts to help deportees relocate back home following deportation, many deportees end up stuck at the border.¹⁰⁴ Some stay to be close to family in the U.S. or in hopes of the higher wages available closer to the border.¹⁰⁵

All this uncertainty about timing, location, and transportation frustrates any attempt of deportees and their families to plan and orchestrate a smooth transition. Cities located at repatriation points in Mexico tend to have higher crime rates—in particular higher rates of robberies.¹⁰⁶ And deportees themselves are the most likely victims of

that the clothes she brought us would be delivered to him before his release, all to no avail. The federal agencies responsible for him weren't able to communicate and coordinate and he was indeed deported in bike shorts.

100. *Jennings v. Rodriguez*, 138 S. Ct. 830, 846 (2018).

101. *See* Shoichet & Merrill, *supra* note 38.

102. Nick Miroff, *Lateral deportation: Migrants Crossing the Mexican Border Fear a Trip Sideways*, WASH. POST (Feb. 12, 2013), https://www.washingtonpost.com/news/worldviews/wp/2013/02/12/lateral-deportation-migrants-crossing-the-mexican-border-fear-a-trip-sideways/?utm_term=.38d1900e21c7.

103. *See, e.g.*, Christopher Woody, *Mexico is Settling into a Violent Status Quo*, BUS. INSIDER (Mar. 21, 2017, 6:06 PM), <http://www.businessinsider.com/mexico-homicides-organized-crime-cartel-violence-2017-3>.

104. *See* Quinones, *supra* note 39.

105. *Id.*

106. Sandra V. Roza et al., *Deportation, Crime, and Victimization* 17 (unpublished Working Paper), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2833484.

these robberies.¹⁰⁷ These challenges are unique to defendants facing deportation and present significant obstacles to successful reentry and reintegration in the community.

E. Property, Identity Documentation, & Employment

- Q. What did you have with you when you were deported?
 A. Some clothes that the government gave me, a backpack, and a little bit of money.
 Q. And where was the money from?
 A. From the work.
 Q. Working at Taft [a BOP facility]?
 A. Yes.
 Q. How much were you paid monthly when you were working at Taft approximately?
 A. 16, 17, sometimes 20 with bonuses.
 Q. And is that dollars?
 A. Yes.
 Q. Did you have any ID, identification, when you were deported?
 A. No.
 Q. And what city in Mexico were you deported to?
 A. Tijuana
 Q. Were you able to find a job?
 A. No, because I didn't have an ID.
 Q. And what identification were the employers looking for?
 A. The voter ID card.
 Q. Why didn't you have a Mexican voter ID card?
 A. Because when I came here, I was young, and you have to be an adult to be able to get it while in Mexico.¹⁰⁸

Federal regulations dictate that BOP staff, in coordination with the assigned probation officer, assist in creating a release plan for all inmates.¹⁰⁹ But, as explained above, “deportable alien” inmates don’t have assigned probation officers.¹¹⁰ BOP staff are specifically mandated to “help an inmate obtain proper identification (social security card, driver's license, birth certificate, and/or any other documents needed by the inmate) prior to release.”¹¹¹ But inmates facing deportation are frequently released without any identification documents—creating myriad problems.

107. *Id.* at 20.

108. Transcript of Trial, *supra* note 3, at 670, 674 (testimony of Raul Mendez-Bello).

109. Institution Release Preparation Program, 28 C.F.R. § 571.13 (2018).

110. *See supra*, Part II.C.

111. 28 C.F.R. § 571.13(d).

Getting government-issued identification for non-U.S. citizen inmates presents unique challenges. For Mexican citizens, the primary form of photo identification is a “credencial” or a Mexican Voter’s ID.¹¹² Some individuals immigrate to the U.S. as minors, so they have never obtained a Voter’s ID.¹¹³ But many non-U.S. citizens are arrested with their identification, only to have it taken by American authorities and not returned.

Property return is complicated during federal prosecutions of “deportable aliens.” Often, they are arrested by one federal agency (for example, Border Patrol), prosecuted by another (the U.S. Attorney’s Office), held in custody by yet another (the BOP and U.S. Marshals), and deported by a fourth (ICE). These agencies do not prioritize the return of property or identity documents to deportees prior to release.¹¹⁴ One nonprofit organization, “No More Deaths,” issued a 2014 report detailing the abuses related to property dispossession that they uncovered through reviewing four years of data.¹¹⁵ The report explains:

When a migrant receives a prison sentence, they are transferred to U.S. Marshals Service custody to be imprisoned, and most of their belongings are not allowed to accompany them. These belongings remain at the Border Patrol station where they were first held. U.S. dollars follow people into “inmate accounts” at the prisons, but foreign currency is not accepted. Therefore pesos (and any other money not in USD) stay with belongings. Border Patrol summarily destroys these belongings after 30 days from the date of arrest. Many migrants, however, receive sentences of more than 30 days, resulting in the de facto loss of all of their belongings, including money in pesos.¹¹⁶

The report details the exact policies that serve to separate migrants from their property and money.¹¹⁷ The report further explains that if money (typically only U.S. dollars) is held on an immigrant inmate’s “books” while he is in prison, the funds are often transferred back to him in a way that he cannot use upon deportation,¹¹⁸ for example in the form of a debit card which has an access code that can’t be activated from

112. See Quinones, *supra* note 39.

113. *Id.*

114. See C.J. McElhinney, *Unfair Policy Too Often Results in Immigrants Losing Personal Property*, NMPOLITICS.NET (Apr. 21, 2016), <http://nmpolitics.net/index/2016/04/unfair-policy-too-often-results-in-immigrants-losing-personal-property/>.

115. NO MORE DEATHS, SHAKEDOWN: HOW DEPORTATION ROBS IMMIGRANTS OF THEIR MONEY & BELONGINGS 5 (2014) [hereinafter SHAKEDOWN], <http://nomoredeaths.org/wp-content/uploads/2014/12/Shakedown-withcover.pdf>.

116. *Id.* at 6.

117. *Id.* at 22–24.

118. *Id.* at 6, 26–32.

outside U.S. borders or as a money order or personal check that cannot be cashed in Mexico.¹¹⁹ In an attempt to realize some value from these items, deportees will sometimes exchange them with U.S. citizen inmates at steep discounts.¹²⁰

Money is not the only valuable property that federal officials take from deportees and fail to return. Other personal property—in particular identification and contact information (sometimes stored on cellular phones)—is equally vital and is also not returned.¹²¹ In discussing the issue of identification documents, the No More Deaths report explains:

When these documents are seized by U.S. agents and not returned, people are left on the border without the basic documents needed to receive a money transfer or have any recourse when harassed or extorted by the local police. With ID that proves Mexican citizenship, deported individuals gain some access to assistance from the Mexican government. Without ID, the risk of extortion, kidnapping, and sexual assault drastically increases. Without ID, individuals are unable to apply for legitimate work in the border towns where they are deported. With few or no options available to earn money or to leave town, some individuals are recruited into smuggling cartels or otherwise convinced to try crossing the border again as quickly as possible by guides who may take advantage of them.¹²²

Deportees whose access to contact information is confiscated and not returned are similarly disadvantaged. They are unable to contact family members to request funds for transportation, food, or housing upon deportation.¹²³ And they are also unable to contact former or prospective employers in hopes of securing work upon deportation and release.¹²⁴

Making matters worse, release gratuities given to “deportable aliens” are meager as compared to those awarded to their U.S. citizen counterparts. Generally speaking, BOP can award up to \$500 to inmates upon release.¹²⁵ This should be enough to ensure that the inmate “will have suitable clothing, transportation to the inmate’s release destination, and some funds to use until he or she begins to receive income.”¹²⁶ “Deportable aliens” are exempt from these policies. They are only

119. *Id.* at 6–7.

120. *Id.* at 7.

121. *Id.*

122. *Id.*

123. *Id.* at 39.

124. *Id.*

125. 18 U.S.C. § 3624(d) (2012).

126. 28 C.F.R. § 571.20 (2018).

awarded \$10,¹²⁷ and they are not provided funds for transportation to their release destinations because they are outside the U.S. and its territories.¹²⁸

Without money, legal identification, or contact information for family members, many deportees find themselves stranded at the border with no food, shelter, or means to find work.¹²⁹ And without legal identification, deportees are ineligible to get legal work and are subject to the same abuse at the hands of Mexican officials as undocumented migrants from Central America.¹³⁰ Mexican police routinely arrest and harass people for lacking proper legal identification—believing they may be “illegal” immigrants.¹³¹ This cruel irony is a reality for many deported Mexican citizens.

F. *Housing*

Q. [H]ow long were you in the Canal?

A. Two days.

Q. Based on your experience in those two days, what was the relationship like between the people like yourself who are homeless deportees and the Tijuana police in the Canal? . . .

[A.] Harassment.

Q. Did you ever see the Tijuana police beat people up in the Canal?

A. Yes.

Q. Did you ever see them knock down structures like the tents you've just pointed out?

A. Yes

Q. How would you describe life in the Canal for you, those two days?

A. It's like a jungle.¹³²

In Tijuana, there are two shelters available for recent deportees: Salvation Army and Casa Del Migrante.¹³³ The Mexican Institute of National Immigration contracts with both organizations to provide services to deportees.¹³⁴ At Salvation Army, deportees are allowed to stay

127. FED. BUREAU OF PRISONS, PROGRAM STATEMENT NO. 5873.06: RELEASE GRATUITIES, TRANSPORTATION, AND CLOTHING 5 (2003), https://www.bop.gov/policy/progstat/5873_006.pdf.

128. See 28 C.F.R. § 571.22.

129. SHAKEDOWN, *supra* note 115, at 37; see also Quinones, *supra* note 39 (noting that many deportees do not have papers, which makes obtaining work nearly impossible).

130. Kiran Nazish, *Treatment of Immigrants in Mexico Much Worse Than Any Other Country*, USA TODAY, (June 15, 2016, 11:05 AM), <https://www.usatoday.com/story/news/world/2016/06/15/immigrants-mexico-abused-kidnapped/85798440/>.

131. *Id.*

132. Transcript of Trial, *supra* note 3, at 680–81 (testimony of Raul Mendez-Bello).

133. Interview with Isaac Olvera Camarillo, Director of Operations at Salvation Army, Calle Aquiles Cerda #11585 Colonia Libertad, in Tijuana, Mex. (Dec. 3, 2014) (on file with author).

134. *Id.*

free of charge for three weeks, at which point they must begin to pay.¹³⁵ At Casa Del Migrante, deportees are generally permitted to stay up to twelve days—less if they have stayed previously.¹³⁶ After that, deportees must pay for lodging or live on the streets. There are low-cost shelters available for the equivalent of about a dollar a day, but that is outside the means of many recent deportees.¹³⁷

In recent years, homeless deportees flocked to the “El Bordo” region of Tijuana—a canal area right across the border from an American outlet mall.¹³⁸ Deportees lived in the canal in sewer pipes and makeshift tents and shelters.¹³⁹ The shanty town is constantly razed by the local police.¹⁴⁰ Police periodically burned it to the ground¹⁴¹ and would arrest and abuse the residents.¹⁴² Then from 2015 to 2016, local officials launched a campaign to clear the area of its homeless residents, forcing many to go underground and live in the sewer tunnels.¹⁴³ Fleeing aggressive police actions often turned deadly as homeless residents tried to cross highways bordering the area and were hit and killed by speeding cars.¹⁴⁴ The homeless deportees live in a sort of limbo—exiled from American society but not absorbed into Mexican society.

135. *Id.*

136. Telephone Interview with Ivette Carrasco, Social Worker for Casa Del Migrante, in Tijuana, Mex. (Dec. 29, 2014) (on file with the author).

137. See Interview with Rudy Moreno, Director of La Roca facility at 271 Calle Gonzalez Ortega, Zona Norte, in Tijuana, Mex. (Dec. 3, 2014) (on file with author).

138. Jean Guerrero, *Tijuana Migrants Hide in Tunnels as Police Raids Get Deadly*, KPBS (Jan. 28, 2016), <http://www.kpbs.org/news/2016/jan/28/tijuana-migrants-hide-tunnels-police-raids-get-dea/>.

139. Guerrero, *supra* note 138.

140. See EXILE NATION: THE PLASTIC PEOPLE (Nomad Cinema 2014), <https://www.amazon.com/Exile-Nation-Plastic-Chris-Bava/dp/B00POTE22Y>.

141. Transcript of Trial, *supra* note 3, at 781 (testimony of U.S. Border Patrol Officer Leonardo Contreras describing treatment of homeless in the Tijuana Canal by Mexican police officers).

142. Guerrero, *supra* note 138.

143. *Id.*

144. See EXILE NATION: THE PLASTIC PEOPLE, *supra* note 140.

G. *Family Reunification*¹⁴⁵

Many non-U.S. citizen defendants have strong cultural and family ties to the United States. For example, more than half of illegal reentry defendants come to the United States before they are 18—the median age is 17 years old.¹⁴⁶ Three quarters have worked in the U.S. for at least a year in the past.¹⁴⁷ The data about family ties is probably the most important. Most illegal reentry offenders—67.1 percent—had relatives (defined as a spouse, sibling, parent, grandparent, aunt, uncle, or cousin) in the United States at the time of the instant offense.¹⁴⁸ Admittedly, more—87.7 percent—had a relative in their home country.¹⁴⁹ When the U.S. Sentencing Commission looked at data about where illegal reentry offenders had children, it determined that significantly more had children in the U.S. than in their home countries—49.5 percent had children in the U.S., as compared to only 31.6 percent with children in home countries.¹⁵⁰ Of the offenders who did not have relatives in their native country, 95.8 percent had relatives in the United States.¹⁵¹

Not only do many deportees have strong ties to the United States, a significant share no longer have strong family ties in their home countries. These individuals face the most difficulty with reintegration because they are asked to put down roots in a country where they no longer have family. Realistically, and given economic factors, it is extremely unlikely that the families of deportees will relocate to Mexico. In addition to the obstacles and challenges discussed above, some deportable aliens are being asked to go it alone—with a border separating them permanently from their loved ones.

145. This Article was written before the Trump administration experimented with a policy of family separation for immigrant families caught at the border. See Maya Rhodan, *Here are the facts about President Trump's family separation policy*, TIME (June 20, 2018), <http://time.com/5314769/family-separation-policy-donald-trump/>. As a result of zero tolerance immigration enforcement, thousands of children were separated from their parents. When the Department of Homeland was ordered by a San Diego judge to reunite these families, it soon became apparent that hundreds of parents had already been deported to their home countries while their children remained in the United States awaiting immigration hearings. This “error” was blamed, in part, on a relevant government database that didn't have a column in the case management system for separated families (or “deleted family units”). See Nick Miroff, Amy Goldstein & Maria Sacchetti, *'Deleted' families: What went wrong with Trump's family-separation effort*, WASH. POST (July 28, 2018), <https://www.msn.com/en-us/news/us/%E2%80%9898deleted%E2%80%99-families-what-went-wrong-with-trump%E2%80%99s-family-separation-effort/ar-BBLbm2S>. This crisis exposed the real cost of the United States' failure to think about deportees holistically in terms of the need for community reintegration and family reunification.

146. U.S. SENTENCING COMM'N, *supra* note 10, at 26.

147. *Id.*

148. *Id.* at 25.

149. *Id.*

150. *Id.* at 26.

151. *Id.* at 25.

III. UNITED STATES COMMUNITIES AND FINANCES ARE NEGATIVELY IMPACTED BY THE FAILURE TO SUCCESSFULLY REINTEGRATE DEPORTEES

When deportees are not reintegrated into their communities of deportation successfully, they return. Of those sentenced for illegal reentry offense in FY 2013, 92 percent had a prior criminal conviction for a nontraffic offense;¹⁵² 38.1 percent were deported and subsequently illegally reentered at least one time after being convicted and sentenced for either a prior illegal entry offense (8 U.S.C. § 1325) or a prior illegal reentry offense (8 U.S.C. § 1326).¹⁵³ The illegal reentry offender sentenced in FY 2013 had, on average, 3.2 prior deportations.¹⁵⁴ And 4.6 percent had been deported more than ten times.¹⁵⁵ That means that many individuals were deported after serving a criminal justice sentence and then returned after a subsequent deportation—sometimes multiple times.

Moreover, when “criminal alien” deportees return, they sometimes commit further crime (aside from simply an immigration violation) in the United States before being apprehended. Of the sample studied by the U.S. Sentencing Commission from data from FY 2013, 48 percent of illegal reentry offenders had committed a crime other than an immigration-related violation penalized by 8 U.S.C. § 1325 or 8 U.S.C. § 1326 after their first deportation.¹⁵⁶ Some of these were serious crimes—drug offenses or crimes against people.¹⁵⁷

Besides the human cost of these subsequent crimes, there is a financial cost. The average sentence for an illegal reentry offender in federal court, based on data from FY 2013, is 18 months.¹⁵⁸ The average cost per inmate of a year of custody in the BOP, based on data from FY 2014, is \$30,619.85 (\$83.89 per day).¹⁵⁹ This results in an average cost of \$40,826.47 for each illegal reentry prosecution for the prison cost alone—and this doesn’t address the cost of prosecution in court or the subsequent deportation after the sentence is served.¹⁶⁰ Based on the numbers of illegal reentry prosecutions from FY 2013—18,498—that amounts to a cost of over \$750 million.¹⁶¹

Even if these deportees remain in their home communities, if they do not successfully reintegrate, there is a cost in American dollars. When

152. *Id.* at 16.

153. *Id.* at 15.

154. *Id.* at 14.

155. *Id.*

156. *Id.* at 28.

157. *Id.*

158. *Id.* at 1.

159. Annual Determination of Average Cost of Incarceration, 80 Fed. Reg. 12,523 (Mar. 9, 2015).

160. *See id.*; *see also* U.S. SENTENCING COMM’N, *supra* note 10, at 1.

161. U.S. SENTENCING COMM’N, *supra* note 10, at 1.

deportees are unable to get work in their communities of deportation, family members in the United States often feel obligated to send them money so they can avoid homelessness or hunger.¹⁶² Remittances to Mexico accounted for \$27 billion in 2016, and it is impossible to determine what portion of that sum was directed towards deportees who were jobless in Mexico due to inadequate reentry and reintegration services.¹⁶³

IV. WE CAN DO MORE TO MEET THE UNIQUE REENTRY NEEDS OF “DEPORTABLE ALIEN” DEFENDANTS AND IMPROVE OUTCOMES FOR INDIVIDUALS AND COMMUNITIES

The American criminal justice system can do more to meet the reentry needs of deportable alien defendants. The United States has an obligation to do more than just “hold them.”¹⁶⁴ One of the most important principles of sentencing is rehabilitation, even if the defendant is a “criminal alien.”¹⁶⁵ “Deportable alien” defendants are part of our communities whether we like it or not. Many will return. Even those who do not return have an impact on American communities because they leave behind sons, daughters, and other loved ones.¹⁶⁶

The BOP and the U.S. Sentencing Commission need to gather data about “deportable alien” defendants to better meet their needs and tailor programs specifically designed for them. There is no data about literacy in “home country” languages and no data about what programs help reduce recidivism for defendants facing deportation in particular. These agencies are well positioned to gather data and should be encouraged to do so.

The BOP should make efforts to allow for greater participation in BOP programming on the part of inmates facing deportation. For example, it should allow participation in RDAP or another equally robust drug treatment program—perhaps with the RRC portion held in a halfway house setting in Mexico through coordination with nonprofit agencies or with the Mexican government. Similarly, the BOP should allow for

162. See Quinones, *supra* note 39.

163. Anthony Harrup, *Remittances to Mexico Hit Record \$27 Billion in 2016*, WALL ST. J. (Feb. 1, 2017), <https://www.wsj.com/articles/remittances-to-mexico-hit-record-27-billion-in-2016-1485978810>.

164. See Wessler, *supra* note 83 (“In regular BOP prisons, mental-health treatment is part of the mission, because rehabilitation is part of the mission For criminal-alien prisons, it’s just, ‘Hold them.’”).

165. See, e.g., 18 U.S.C. § 3553(a)(2)(D) (2012) (listing, as one of the purposes of sentencing, “to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner”).

166. See INT’L HUMAN RIGHTS CLINIC UNIV. CAL. BERKELEY ET AL., *IN THE CHILD’S BEST INTEREST? THE CONSEQUENCES OF LOSING A LAWFUL IMMIGRANT PARENT TO DEPORTATION* 5–6 (2010), https://www.law.berkeley.edu/files/Human_Rights_report.pdf.

participation in vocational education programs. Noncitizens are currently low priority candidates, but adequate space in these programs needs to be accounted for to ensure participation of inmates facing deportation. The BOP should also, after gathering data about the needs of this unique population, design education programs to prepare “deportable aliens” for reintegration into their home communities—perhaps with an emphasis on fluency and literacy in “home country” languages like Spanish. This education programming should take priority over current BOP priorities—like ESL and GED programs—when it comes to inmates facing deportation.

If the BOP is going to continue to contract with private prisons to house non-U.S. citizen inmates, then those facilities need to be up to the task. All inmates, not just citizens, are entitled to adequate mental health treatment. The current practice of housing and not treating non-U.S. citizen inmates with mental health issues fuels recidivism and creates a revolving door for a particularly fragile population. The BOP should ensure that even “deportable alien inmates” receive appropriate medication and are deported with enough medication to make a smooth transition to the community.

The BOP also needs to do a better job coordinating the release of inmates who will be deported. Perhaps probation officers can be assigned to each inmate just for the purpose of creating a release plan in the final weeks of a sentence. These plans need not be comprehensive, but if BOP or probation staff can ensure that inmates have identification documents, contact information of family members in their home countries, and cash in home country currency (rather than checks, money orders, or debit cards), that would help ease the transition. These release liaisons could also be tasked with coordinating with ICE or the Department of Homeland Security to determine where and when an inmate will likely be deported so family can be notified.

Much of this work could be done in conjunction with staff from foreign consulates who are better positioned to obtain identification documents and family member contact information. Mexico typically provides transportation home for deportees from the border, but many deportees never realize this or take advantage of this option. If BOP or probation staff had more information on the logistics of these services, they might be able to go over options with the inmates being deported to Mexico so that they could make more informed decisions in those chaotic first few days after deportation.

There also needs to be real engagement on a policy level to determine what cost-effective ways exist to reduce recidivism and illegal reentry into the United States. Rather than spend money building a wall, the U.S. might discover that funding drug treatment or temporary housing in Tijuana and other border cities has a greater impact on reducing the flow

of illegal immigration—especially amongst “criminal aliens” with strong ties to the United States. The costs for these initiatives might be shared by American and Mexican authorities as part of binational agreements.

As advocates wait for these larger changes, there is much they can do for clients facing deportation right now. First, they can prepare clients and their families for the tough road ahead. Second, they can educate judges and prosecutors about the challenges their clients face. Once decision-makers are educated, defense attorneys can try to obtain specific orders from judges as part of sentencing, for example, orders to return seized property—specifically identity documents, foreign currency, and cellular phones—to defendants.¹⁶⁷ Just as judges make recommendations as to what BOP facility or region of facilities a defendant should be placed, judges could make recommendations as to what port of entry a defendant should be deported through to increase the likelihood of deportation to a city where family members reside. Similarly, judges could recommend placement in RDAP or an equally robust drug treatment program to create a need for the BOP to develop similar programming for noncitizens. Alternatively, an attorney could arrange for drug treatment in the country of deportation and ask for a sentencing reduction based on this treatment and based on inequitable sentencing disparities due to ineligibility for RDAP and RRC placement.¹⁶⁸

CONCLUSION

There is a profound need for greater study and analysis with respect to what reentry services are available, what reentry services are wanting, and what impact reentry services have on recidivism for “deportable alien” defendants. This article aims to start a conversation about these issues, highlight some of the unique challenges faced by individuals who are deported after release from a criminal justice sentence, and propose measures for reform. “Criminal aliens” are not the Dreamers, but they should not be thrust into a nightmare of homelessness along the Mexican border upon deportation after being released from American jails and prisons. It is too costly, both morally and financially, to leave the status quo in place. We can and must do more.

167. See FED. R. CRIM. P. 41(g); see also *Ordonez v. United States*, 680 F.3d 1135, 1137 (9th Cir. 2012) (“Federal Rule of Criminal Procedure 41(g) provides a mechanism by which any person may seek to recover property seized by federal agents.” (footnote omitted)).

168. See 18 U.S.C. § 3553(a)(6) (2012) (When determining sentence, the court should be consider “the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct”); see also *United States v. Navarro-Diaz*, 420 F.3d 581, 589 (6th Cir. 2005) (illegal reentry case remanded in light of *Booker* where district court noted that defendant would be punished more than a citizen due to ineligibility for half-way house placement and hinted that it may give shorter sentence on this basis if it had discretion to do so under the then mandatory guidelines).

