



GW Law Faculty Publications & Other Works

Faculty Scholarship

2024

Disability, Race, and Immigration: The Intersectional Impact of Policing

Tania N. Valdez

Follow this and additional works at: https://scholarship.law.gwu.edu/faculty_publications



Part of the [Law Commons](#)

DISABILITY, RACE, AND IMMIGRATION: THE INTERSECTIONAL IMPACT OF POLICING

TANIA N. VALDEZ

INTRODUCTION	1983
I. BACKGROUND	1989
A. <i>Key Definitions</i>	1989
B. <i>The Current Mental Health Care Crisis</i>	1992
C. <i>Mental Illness & Policing</i>	1996
1. <i>Roots of Police Violence</i>	1996
2. <i>Case Studies</i>	1999
3. <i>An Introduction to Intersectionality’s Effect on Policing Outcomes</i>	2002
II. AN OVERLOOKED INTERSECTING ISSUE: HOW NONCITIZENS WITH DISABILITIES ARE AFFECTED BY POLICING	2005
A. <i>Intersectionality & Disability Justice</i>	2005
B. <i>Funneling from Criminal to Immigration Enforcement</i>	2008
C. <i>The Dangers of the Mental Health Crisis-to-Deportation Funnel for Noncitizens</i>	2013
III. CURRENT POLICING REFORM EFFORTS	2019
A. <i>Why Policing Reform Is Necessary Despite Other Approaches</i>	2020
B. <i>Diversion</i>	2021
C. <i>Civilian First Responders</i>	2023
1. <i>Crisis Assistance Helping Out on the Streets: Eugene, Oregon</i>	2025
2. <i>Support Team Assisted Response: Denver, Colorado</i>	2026
3. <i>Crisis Response Unit: Olympia, Washington</i>	2028
D. <i>CIT for Law Enforcement Officers</i>	2029
E. <i>Lessons Learned</i>	2032
IV. A PATH FORWARD	2034
A. <i>General Recommendations for Existing Reform Efforts</i>	2035
B. <i>Principles for Assessing Proposed Police Reforms</i>	2036
1. <i>Principle #1: Recognize the Unique Impact That Any Contact with Law Enforcement Has on Noncitizens</i>	2037
2. <i>Principle #2: Avoid Admissions of Guilt, Convictions (Including Misdemeanors), Incarceration, and Other Criminal Penalties</i>	2038
3. <i>Principle #3: Ensure That Considerations Around “Public Safety” Include the Safety of the Person Being Contacted</i>	2039
4. <i>Principle #4: Recognize the Particular Cultural and Practical Issues for Noncitizens, Including Language Barriers When Calling for Assistance, Responding to Officer Commands, and Accessing Desired Social Services</i>	2041
5. <i>Principle #5: Incorporate Race Consciousness Within Implemented Strategies to Be Most Effective</i>	2042
6. <i>Principle #6: Account for the Most Marginalized People</i>	2043
CONCLUSION	2043

DISABILITY, RACE, AND IMMIGRATION: THE INTERSECTIONAL IMPACT OF POLICING

TANIA N. VALDEZ*

Abstract: Law enforcement officers commonly must respond to situations in which a person is experiencing acute symptoms of a mental illness. Yet from the first moment of police involvement, these community members face the possibility of negative outcomes. Consequences include officers' use of excessive force leading to injury or death, criminal arrest and prosecution that results in deprivation of liberty, separation from the community, and the creation of a permanent criminal record that affects other rights.

Although potential violence and criminalization are important reasons to avoid relying on police during mental health events, another key consideration is often ignored in the discourse: the specific heightened repercussions noncitizens face. Namely, noncitizens face the additional possibility of deportation. Because immigration law and policy link local law enforcement to the federal government, noncitizens contend with the risk of transfer from criminal to immigration custody, even if criminal charges are not imposed. The myriad problems within the immigration system—including lack of access to counsel and inadequate mental health care—increase mentally ill noncitizens' likelihood of ultimately being deported. This Article calls for systemic changes to policing that account for the unique experience of noncitizens with mental illnesses. This Article also offers a set of Principles by which future proposed police reforms can be assessed.

* Associate Professor of Law, The George Washington University Law School (GW Law). I am grateful to participants at the following conferences for comments on drafts: UCLA Emerging Immigration Scholars Conference, 2023 Biennial Emerging Immigration Scholars Conference hosted at GW Law, Berkeley Poverty Law Conference, Law & Society Association, Graciela Olivares Latinas in the Legal Academy, Clinical Writers' Workshop, and faculty workshops at GW Law, Pepperdine Caruso School of Law, the Indiana University Kelley School of Business, and the Ohio State University Moritz College of Law. Special thanks to Cori Alonso-Yoder, Ahilan Arulanantham, Ruth Colker, Kate Evans, Angélica Guevara, César Cuauhtémoc García Hernández, Mary Hoopes, Kit Johnson, Margaret Kwoka, Arthur Andrew Lopez, Fatma Marouf, Dayna Bowen Matthew, Daniel Morales, Hiroshi Motomura, Jessica Steinberg, and Kate Weisburd. Lastly, I thank Hilary Smith, Vera Wang, Cornelia Waugh, Maeve McBride, and Maddy Klimchak for their invaluable research assistance. This Article is dedicated to my client whose perseverance inspired this project.

INTRODUCTION¹

Over the past several years, many have called for changes to policing practices, particularly those related to mental health crises.² Law enforcement responses to situations involving mental health-related challenges are often inadequate in addressing the needs of the person contacted.³ Moreover, reliance on law enforcement officers presents the potential for criminalization of, and violence against, the person needing assistance.⁴ Rather than treating mental health crises for what they are at the root—a health concern—our system currently treats them as criminal matters.⁵ For noncitizens in particular, another potential outcome of police involvement is deportation.⁶

A mental health crisis may be defined as “any situation in which a person’s behavior puts them at risk of hurting themselves or others and/or prevents them from being able to care for themselves or function effectively in the

¹ To acknowledge my own positionality regarding this subject, I am writing from the perspective of a lawyer and law professor who has represented noncitizens with mental illness and other disabilities in affirmative and defensive immigration proceedings. Although I share certain characteristics, identities, and experiences with people affected by the issues discussed in this Article, I acknowledge that I am writing from a position of privilege. For a comprehensive list of materials produced by people in directly affected communities, please see resources such as INTERRUPTING CRIMINALIZATION, PROJECT NIA & CRITICAL RESISTANCE, SO IS THIS ACTUALLY AN ABOLITIONIST PROPOSAL OR STRATEGY? (2022), <https://www.interruptingcriminalization.com/resources-all/so-is-this-actually-an-abolitionist-proposal-or-strategy> [<https://perma.cc/4M5B-Q5NJ>].

² See, e.g., Law Enforcement Training for Mental Health Crisis Response Act of 2023, H.R. 3501, 118th Cong. (2023) (proposing the funding of “behavioral health crisis” training within law enforcement agencies); Press Release, ACLU of Washington, D.C., Lawsuit Challenges Unequal Response to Mental Health Emergencies in Washington, DC (July 6, 2023), <https://www.aclu.org/press-releases/lawsuit-challenges-unequal-response-to-mental-health-emergencies-in-washington-dc> [<https://perma.cc/A2X7-7ANF>] (alleging that using police to respond to mental health calls instead of mental health providers is a violation of both the Rehabilitation Act and the Americans with Disabilities Act (ADA)); MARIAME KABA & ANDREA J. RITCHIE, NO MORE POLICE. A CASE FOR ABOLITION 148–51 (2022) (exploring the unsuccessful, perpetually harmful impact policing has on addressing violence and suggesting alternative, community-focused initiatives that diverge from traditional policing).

³ See *infra* notes 14–31, and accompanying text (proposing two real-life examples of how inadequate responses to mental health crises have led to damaging results).

⁴ See discussion *infra* Part I.C.2 (presenting case studies of police involvement with noncitizens having mental health crises to demonstrate law enforcement’s lack of preparation for and adequate handling of such situations).

⁵ See *Criminalization of People with Mental Illness*, NAT’L ALL. ON MENTAL ILLNESS, <https://www.nami.org/advocacy/policy-priorities/stopping-harmful-practices/criminalization-of-people-with-mental-illness/> [<https://perma.cc/7HS5-KXX6>] (explaining that certain factors, like “zero tolerance” policing and negative assumptions about individuals with mental illness, contribute to the overcriminalization of mental illness in the United States).

⁶ See *infra* notes 207–247, and accompanying text (recognizing the strong ties between the criminal and immigration systems and how a noncitizen’s interaction with the criminal justice system often results in the initiation of removal proceedings and ultimately deportation).

community.”⁷ Mental health crises often lead to the summoning of law enforcement by the person themselves, their family, or others nearby and frequently escalate to violence or arrest.⁸ For noncitizens, the consequences of criminalization extend beyond jail, homelessness, and poverty. Specifically, a criminal arrest opens the door to immigration enforcement, including deportation. This is a phenomenon that I refer to in this Article as the “mental health crisis-to-deportation funnel.”⁹

Professor Hiroshi Motomura has thoughtfully argued that the decision whether to arrest is the “discretion that matters.”¹⁰ Although it is certainly true that the discretionary determination whether to arrest a noncitizen is critical, it is not the *first* important link in the chain of events leading to immigration enforcement. This Article takes a step further back to argue that mere interaction with law enforcement officers prior to arrest matters, as it presents the possibility of escalation and violence toward the individual.¹¹ Additionally, encounters with police that only result in an incident report, even without an arrest, may still trigger immigration consequences for noncitizens.¹² Thus, if noncitizens are to avoid the mental health crisis-to-deportation funnel, avoiding contact with police officers altogether must be the ultimate goal.

Let us consider two real-life examples of how the combined failures of the criminal and immigration systems lead to deeply unfair results.¹³ These stories,

⁷ NAT’L ALL. ON MENTAL ILLNESS, NAVIGATING A MENTAL HEALTH CRISIS 5 (2018), <https://www.nami.org/Support-Education/Publications-Reports/Guides/Navigating-a-Mental-Health-Crisis/Navigating-A-Mental-Health-Crisis> [<https://perma.cc/4WSW-29SC>].

⁸ See discussion *infra* Part I.C.2 (highlighting real-life examples of how police involvement has led to substantial escalation with harmful effects on the individual experiencing the mental health crisis).

⁹ I describe this phenomenon as a “funnel” in order to provide a metaphorical image of how police involvement in a mental health incident commences a seemingly inevitable path toward removal proceedings for any noncitizen. Although not all individuals’ mental health events are criminalized, and not every instance of criminalization will lead to removal proceedings or deportation, police involvement at least raises the possibility of immigration enforcement because of the enmeshment of the U.S. criminal and immigration systems. See *Padilla v. Kentucky*, 559 U.S. 356, 365–66 (2010) (“Our law has enmeshed criminal convictions and the penalty of deportation for nearly a century . . .”).

¹⁰ See Hiroshi Motomura, *The Discretion That Matters: Federal Immigration Enforcement, State and Local Arrests, and the Civil-Criminal Line*, 58 UCLA L. REV. 1819, 1829, 1838–39 (2011) (arguing that law enforcement’s tremendous discretion in deciding whether and whom to arrest triggers subsequent immigration law consequences).

¹¹ See *infra* notes 215–227 and accompanying text (contending that any law enforcement involvement in a situation with a noncitizen is potentially harmful); see also discussion *infra* Part I.C (highlighting the frequency of police violence against noncitizens).

¹² See discussion *infra* Part II.B (discussing the mental health crisis-to-deportation funnel and the different ways in which U.S. Immigration and Customs Enforcement (ICE) can identify a noncitizen and initiate removal proceedings against them).

¹³ See *infra* notes 14–30 and accompanying text.

just two of many, show the potentially disastrous effects of the criminalization of mental health crises that ultimately lead to immigration enforcement.

First, take the case of Mark Lyttle. Mr. Lyttle was born in the United States (and is therefore a U.S. citizen) yet had experiences with law enforcement officers similar to those a non-U.S. citizen might face.¹⁴ In short, he was arrested, incorrectly identified as a noncitizen, deported, and forced into four months of alternating homelessness and incarceration in Guatemala, Mexico, Nicaragua, and Honduras.¹⁵ Initially, law enforcement arrested Mr. Lyttle for “inappropriately touching a worker’s backside in a halfway house that serves individuals with mental disorders.”¹⁶ Although Mr. Lyttle insisted that he was born in the United States, the jail notified ICE that he was a suspected undocumented noncitizen.¹⁷ ICE took Mr. Lyttle into custody at a North Carolina jail and transferred him to the Stewart Detention Facility in Lumpkin, Georgia.¹⁸ According to the American Civil Liberties Union (ACLU), ICE knew of Mr. Lyttle’s “obvious and well documented” disabilities, but he was not provided counsel and was deported to Mexico six weeks later.¹⁹ Because he could not speak Spanish and had no contacts in Mexico, Mr. Lyttle struggled. Mexican authorities sent him to Honduras, and Honduran officials then sent him to Guatemala, where Mr. Lyttle luckily was able to contact one of his brothers through Guatemala City’s U.S. Embassy.²⁰ Eventually, Mr. Lyttle was issued a U.S. passport and returned to Georgia.²¹

Second, consider the case of Tania Silva, a noncitizen community college student with schizophrenia, who experienced a mental health crisis after discontinuing her medications.²² After a person in the neighborhood saw Ms. Sil-

¹⁴ Press Release, ACLU of Ga. & ACLU of N.C., *ACLU Files Lawsuit After Government Wrongfully Deports U.S. Citizen with Mental Disabilities*, <https://www.aclu.org/press-releases/aclu-files-lawsuits-after-government-wrongfully-deports-us-citizen-mental> [https://perma.cc/C69B-9T99] (Apr. 6, 2012).

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* Mr. Lyttle has stated that a woman who handled his intake screening at the jail where he was booked told him that his brown skin perhaps meant he was from Mexico. Jacqueline Stevens, *Deporting American Citizens: ICE’s Mexican-izing of Mark Lyttle*, HUFFPOST: THE BLOG, https://www.huffpost.com/entry/deporting-american-citizens_b_265187 [https://perma.cc/3V6F-HCVR] (Dec. 6, 2017). She then marked his intake form with the following information: “Race: OTHER[.] Complexion: MEDIUM[.] Ethnicity: ORIENTAL[.] Place of Birth: MEXICO[.]” *Id.* This document likely served as the basis for the jail notifying ICE that they had a noncitizen in custody. *Id.*

¹⁸ Press Release, ACLU of Ga. & ACLU of N.C., *supra* note 14.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² See Gus Bova, *Video: ‘Traumatic, Unnecessary’ Arrest of Austin Woman Shows How Cops Can Worsen Mental Health Crises*, TEX. OBSERVER (Sept. 25, 2019), <https://www.texasobserver.org/>

va attempt to get into several parked cars, this individual invited Ms. Silva into her home to talk.²³ The homeowner successfully calmed Ms. Silva down and called 911 for medical assistance.²⁴ Officers from the Austin Police Department, however, arrived instead.²⁵ Ms. Silva panicked when the male officers handcuffed her, and the incident quickly escalated.²⁶ The three officers threw Ms. Silva to the ground and piled on top of her.²⁷ The officers arrested Ms. Silva, took her to jail instead of a hospital, and charged her with felony assault.²⁸ While she was in criminal custody with deteriorating mental health, ICE issued a detainer request.²⁹ Due to public pressure, ICE later dropped the detainer and released Ms. Silva to her home instead of ICE detention.³⁰ Nonetheless, many others—whose stories never reach the public—are not so fortunate.

Both of these real stories demonstrate myriad institutional and structural problems, such as: the overreliance on law enforcement during mental health-related incidents, punitive focus of policing, criminalization of mental health challenges, and a litany of due process issues at every level of immigration enforcement. This Article focuses on the critical juncture where the mental health crisis-to-deportation funnel begins: the moment of, and moments leading up to, a noncitizen coming into contact with law enforcement.³¹

Immigration legal scholarship regarding mental illness has understandably focused on issues related to the immigration system, such as how noncitizens with mental illness fare procedurally and substantively in removal proceedings and in immigration detention.³² On the flip side of the coin, criminal

cops-mental-health-crises-tania-silva-austin-texas [<https://perma.cc/FC7Z-FTDA>] (recounting the case of Tania Silva and displaying police bodycam footage of the incident).

²³ *Id.*

²⁴ *Id.* At the time, Austin, Texas had a crisis response team that consisted of medical professionals who would work with the police department to respond to mental health crises. *Id.* Nevertheless, police officers decided to report to the scene instead of calling on that team. *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.* ICE detainers are requests that another agency (often state or local police departments) hold a person for immigration enforcement-related purposes. *What Are ICE Detainers?*, ACLU MASS., <https://www.aclum.org/en/what-are-ice-detainers> [<https://perma.cc/SJE7-WPD5>]; see *infra* notes 223–227 and accompanying text (discussing the operation of ICE detainers).

³⁰ Bova, *supra* note 22.

³¹ See *infra* notes 207–284 and accompanying text.

³² See generally, e.g., Fatma E. Marouf, *Incompetent but Deportable: The Case for a Right to Mental Competence in Removal Proceedings*, 65 HASTINGS L.J. 929 (2014) (arguing that the right to competence in criminal proceedings should also apply to immigration removal proceedings); Christina P. Greer, *Safeguards for Mentally Disabled Respondents in Removal Proceedings*, 23 HEALTH MATRIX 279 (2013) (urging the incorporation of protections for people with mental disabilities within the immigration system, including trainings, mental health checks during removal proceedings, and the guarantee of appointed counsel); Alice Clapman, *Hearing Difficult Voices: The Due-Process Rights of*

legal scholarship discussing mental health and policing has largely lacked a discussion of immigration consequences.³³ Taking an intersectional approach that joins the issues of immigration, disability, and race is vital to remedying the harms our current system of policing inflicts.³⁴ As one scholar writing on disability and immigration reform reminds us, “progressive immigration reform can only take place when we consider the unique ways in which racism and ableism interact to permeate our immigration system.”³⁵ This Article bridges these areas.

Part I provides key definitions and discusses the current mental health care crisis in the United States.³⁶ Part I also considers mentally disabled people’s interactions with law enforcement and emphasizes how the criminal legal system tends to punish, rather than serve, people experiencing acute mental health issues.³⁷ Part II discusses the utility of an intersectional framework and explains

Mentally Disabled Individuals in Removal Proceedings, 45 NEW ENG. L. REV. 373 (2011) (advocating for additional procedural due process safeguards in the immigration system); Sarah Sherman-Stokes, *No Restoration, No Rehabilitation: Shadow Detention of Mentally Incompetent Noncitizens*, 62 VILL. L. REV. 787 (2017) (contending that a determination of incompetence should trigger termination of removal proceedings); Stacey A. Tovino, *The Grapes of Wrath: On the Health of Immigration Detainees*, 57 B.C. L. REV. 167 (2016) (calling attention to the absence of health care access in ICE detention).

³³ See generally, e.g., Jamelia N. Morgan, *Policing Under Disability Law*, 73 STAN. L. REV. 1401 (2021) [hereinafter Morgan, *Policing Under Disability Law*] (discussing the intersection of disability, race, and criminalization); Megan Quattlebaum & Tom Tyler, *Beyond the Law: An Agenda for Policing Reform*, 100 B.U. L. REV. 1017 (2020) (suggesting general police reform); Jamelia N. Morgan, *Policing Marginality in Public Space*, 81 OHIO ST. L.J. 1045 (2020) (exploring how law enforcement polices public spaces); Frank M. Webb, *Criminal Justice and the Mentally Ill: Strange Bedfellows*, 49 TEX. TECH. L. REV. 817 (2017) (offering a history of the relationship between law enforcement and individuals with mental illness); Camille A. Nelson, *Racializing Disability, Disabling Race: Policing Race and Mental Status*, 15 BERKELEY J. CRIM. L. 1 (2010) (analyzing the intersection of mental illness, race, and criminalization). But see Jamelia Morgan, *Disability, Policing, and Punishment: An Intersectional Approach*, 75 OKLA. L. REV. 169, 184 (2022) (mentioning immigration detention as an intersecting issue with disability and the criminal system).

³⁴ See Kimberlé W. Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1245 (1991) (identifying the need “to account for multiple grounds of identity when considering how the social world is constructed”). A recent article employs an intersectional approach, arguing that disability justice principles should be incorporated into dialogue around the immigration system in order to eliminate ableism within the system. Nermeen Arastu & Qudsiya Naqui, *Standing on Our Own Two Feet: Disability Justice as a Frame for Reimagining Our Ableist Immigration System*, 71 UCLA L. REV. 236 (2024).

³⁵ Katherine Perez, *A Critical Race and Disability Legal Studies Approach to Immigration Law and Policy*, UCLA L. REV.: L. MEETS WORLD (Feb. 2, 2019), <https://www.uclalawreview.org/a-critical-race-and-disability-legal-studies-approach-to-immigration-law-and-policy/> [https://perma.cc/3KST-DQAK].

³⁶ See *infra* notes 51–100 and accompanying text.

³⁷ See *infra* notes 101–176 and accompanying text.

procedurally how the criminalization of mental health crises funnels people into the immigration enforcement system, where they await new harms.³⁸

The current landscape of violence, criminalization, and immigration consequences for disabled noncitizens calls for immediate action.³⁹ Part III highlights proposed and already implemented policing reforms around the country that attempt to decrease the criminalization of mental health crises.⁴⁰ For example, one reform is the creation of crisis intervention teams that send mental health and social work professionals to handle calls related to mental health and poverty.⁴¹ Other jurisdictions have embraced crisis intervention training (CIT) for law enforcement officers to better handle mental health-related incidents.⁴² Alternative reforms include diversions to treatment or sending people to “mental health court.”⁴³ These reforms have varying levels of utility for noncitizens.⁴⁴

Part IV weaves together the intersectional framework and lessons learned from policing reforms to make general recommendations and provide a set of Principles that can be used when assessing future proposed reforms.⁴⁵ Any proposed law or policy must account for the most marginalized people whose lives or livelihoods are at risk. Thus, reforms to the criminal system that ignore the particular impact on disabled noncitizens are incomplete. The Principles offered in Part IV are intended to serve as guiding lights for any systemic reforms, by which their efficacy can be evaluated.⁴⁶

To be clear, the perspective presented by this Article is not that mental illness or other disabilities themselves present a “problem” to fix. Rather, *the systems* are the problem because they directly harm individuals who are in vulnerable positions, particularly when it comes to the criminal and immigration legal systems. In the words of the late disability rights activist Judy Heumann, “[d]isability only becomes a tragedy when society fails to provide the things we need to lead our lives—job opportunities or barrier-free buildings, for example It is not a tragedy to me that I’m living in a wheelchair.”⁴⁷ It is imperative to identify and correct the ways in which our current systems fail

³⁸ See *infra* notes 177–285 and accompanying text.

³⁹ See *infra* notes 203–285 and accompanying text.

⁴⁰ See *infra* notes 286–407 and accompanying text.

⁴¹ See discussion *infra* Part III.C.

⁴² See discussion *infra* Part III.D.

⁴³ See *infra* notes 302–306 and accompanying text.

⁴⁴ See discussion *infra* Part III.E.

⁴⁵ See discussion *infra* Part IV.

⁴⁶ See discussion *infra* Part IV.B.

⁴⁷ Joseph Shapiro, *Activist Judy Heumann Led a Reimagining of What It Means to Be Disabled*, NPR, <https://www.wgbh.org/news/national-news/2023/03/06/activist-judy-heumann-led-a-reimagining-of-what-it-means-to-be-disabled> [<https://perma.cc/8B95-JTDG>] (Aug. 7, 2023).

to account for human variation and are thereby inflicting harm on certain members of our communities.

I. BACKGROUND

Section A of this Part identifies and defines important vocabulary related to immigration status and mental health used throughout this Article.⁴⁸ Section B describes the current mental health care crisis, with a focus on noncitizens.⁴⁹ Section C lays the foundation for understanding how law enforcement and society treat mental illness as a criminal problem.⁵⁰

A. Key Definitions

Although immigration law—including the Immigration and Nationality Act (INA)—has historically used the word “alien” to describe anyone who is not a U.S. citizen or national,⁵¹ that terminology is dehumanizing and outdated.⁵² The term “immigrant” is also used widely in non-legal circles to describe people who are not U.S. citizens, but it is not legally accurate. Specifically, immigration law defines “immigrants” as people who have a lawful status and are essentially on a path to U.S. citizenship—“immigrant” therefore does not include undocumented people, people who once had lawful status and have since fallen out (such as visa overstays), or people who are in temporary immigration statuses (such as Temporary Protected Status (TPS)).⁵³ Thus, this Article generally uses the term “noncitizen” to encapsulate all non-U.S. citizens who might be subject to removal from the United States.⁵⁴

The primary focus of this Article is on police contact with noncitizens who are experiencing a mental health crisis. The symptoms of mental illness

⁴⁸ See *infra* notes 51–67 and accompanying text.

⁴⁹ See *infra* notes 68–100 and accompanying text.

⁵⁰ See *infra* notes 101–176 and accompanying text.

⁵¹ See, e.g., INA § 101(a)(3), 8 U.S.C. § 1101(a)(3) (defining “alien” as “any person not a citizen or national of the United States”).

⁵² The Biden Administration has pushed for the use of inclusive language by referring to “migrants” or “noncitizens” instead of “aliens” in official documents. In response, ICE, U.S. Customs and Border Protection (CBP), and U.S. Citizenship and Immigration Services (USCIS) have all released memoranda instructing employees to change their language accordingly. Camilo Montoya-Galvez, *U.S. Immigration Agencies Drop Use of Terms Like “Illegal Alien” and “Assimilation,”* CBS NEWS (Apr. 19, 2021), <https://www.cbsnews.com/news/immigration-terms-alien-assimilation-discard/> [<https://perma.cc/R3WZ-LD9G>].

⁵³ INA § 101(a)(15), 8 U.S.C. § 1101(a)(15) (distinguishing “immigrants” from “nonimmigrants”).

⁵⁴ I also note, however, that sometimes U.S. citizens have been improperly placed in removal proceedings and deported, such as Mr. Lytle who was described in the Introduction, *supra*.

are not static.⁵⁵ A person may experience *one* mental health crisis in their entire lifetime, meaning that they may not fit the definition of having a mental illness or disability.⁵⁶ On the other hand, for many people, symptoms do not just manifest one time.⁵⁷ Note that having an illness or disability does not define someone, but these labels can help explain a common experience or array of symptoms.⁵⁸ The proposals in this Article are intended to help anyone experiencing a mental health crisis, as well as anyone whom law enforcement or the public *perceive* to be experiencing a mental health crisis.⁵⁹

The definitions involved are complex. First, there are a variety of ways to define and use the word “disability.” In its negative connotation, “disability” is a term that can be used to disempower by labeling a disabled person as someone deserving of “pity, as defective, or having an impairment that must be eliminated, treated, or cured.”⁶⁰ On the other hand, “disability” can instead be viewed as an experience shared by many individuals that exposes the ways that

⁵⁵ See *Mental Illness*, MAYOCLINIC (Dec. 13, 2022), <https://www.mayoclinic.org/diseases-conditions/mental-illness/symptoms-causes/syc-20374968> [<https://perma.cc/RF2T-6PAQ>] (“Signs and symptoms of mental illness can vary, depending on the disorder, circumstances and other factors.”). Courts recognize the variable nature of mental illness as well. See, e.g., *Dwyer v. Apfel*, 23 F. Supp. 2d 223, 229 (N.D.N.Y. 1998) (“It should be noted that mental illness is not a static condition. The frequency and severity of symptoms can change over time due to various factors.”); *Matter of M-A-M-*, 25 I&N Dec. 474, 480 (B.I.A. 2011) (recognizing that mental competency is dynamic and urging that an individual’s competency must be revisited throughout the course of immigration proceedings).

⁵⁶ See *Psychosis and Mental Illness*, BETTER HEALTH CHANNEL, <https://www.betterhealth.vic.gov.au/health/conditionsandtreatments/psychosis> [<https://perma.cc/EQQ5-9K42>] (explaining that psychotic episodes may only occur once or may be more frequent); see also THOMAS INSEL, *HEALING: OUR PATH FROM MENTAL ILLNESS TO MENTAL HEALTH* 11 (2022) (noting that one way to evaluate mental illnesses and disabilities is by assessing their prevalence, severity, and “impact on work or function”).

⁵⁷ *Psychosis and Mental Illness*, *supra* note 56.

⁵⁸ INSEL, *supra* note 56 at xii.

⁵⁹ See discussion *infra* Part IV (suggesting Principles to consider when reforming current approaches to responding to mentally ill individuals and creating new systems of response). Behaviors or characteristics that are outside the status quo may lead to a misperception of disability. See Jasmine E. Harris, *Reckoning with Race and Disability*, 130 YALE L.J.F. 916, 949–50 (2021), <https://www.yalelawjournal.org/forum/reckoning-with-race-and-disability> [<https://perma.cc/U63X-BTE2>] (using aesthetics theory to understand the relationship between race and disability). Historically, for example, race—and blackness in particular—has been used to signify disability. *Id.* Black people were considered biologically inferior to white people and therefore denied various rights. *Id.*

⁶⁰ Angélica Guevara, *Ableness as Property*, 97 DENV. L. REV. F. 1, 10 (2020).

society's systems reflect ableist beliefs⁶¹ and are not accessible to all members of society.⁶²

In this Article, I intend to use the word "disability" in the latter sense. At times, I also use "disability" for its formal, legal meaning as defined in the ADA: "(A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment"⁶³ When considering whether a person's "major life activities" have been substantially limited, a court looks at one's ability to perform common daily activities that many non-disabled individuals take for granted.⁶⁴

This Article also often employs the phrase "mental illness." Not all mental illnesses fit the legal definition of disability because not all mental illnesses substantially limit one's major life activities. Moreover, "mental illness" best describes the conditions involved in police incidents where a person is experiencing a mental health crisis. A mental illness is broadly defined as "a mental, behavioral, or emotional disorder."⁶⁵ The National Institute of Mental Health divides mental illnesses into two groups by severity: (1) Any Mental Illness and (2) Serious Mental Illness (SMI).⁶⁶ An SMI "substantially interferes with or limits one or more major life activities," tracking the ADA definition of "disability" outlined above.⁶⁷

Because significant impairments are more likely to be a relevant factor in encounters with police, this Article primarily addresses SMIs. It also often uses the phrases "mental disability" and "mental illness" interchangeably, even though those concepts do not always overlap.

⁶¹ Ableism is multi-faceted, but it can be defined as personal or systemic prejudice against individuals with disabilities or those perceived to have a disability. See Andrew Pulrang, *Words Matter, and It's Time to Explore the Meaning of "Ableism."* FORBES (Oct. 25, 2020), <https://www.forbes.com/sites/andrewpulrang/2020/10/25/words-matter-and-its-time-to-explore-the-meaning-of-ableism/?sh=670f4b7162d0> [<https://perma.cc/V798-SDET>] (listing varying definitions of the term "ableism").

⁶² See Guevara, *supra* note 60, at 11–12 (describing how the social model approach to disability sees society and its perception and treatment of individuals with disabilities as the disabling actor, rather than the individual's disability itself); see also Harris, *supra* note 59, at 934 (noting that disability is similar to race in that "both are socially constructed categories manipulated by state and private actors to maintain socio-political and economic power by framing both categories in the language of biological determinism").

⁶³ 42 U.S.C. § 12102(1).

⁶⁴ See *id.* § 12102(2)(A) (defining "major life activities" as "caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working").

⁶⁵ *Mental Illness Statistics*, NAT'L INST. OF MENTAL HEALTH, <https://www.nimh.nih.gov/health/statistics/mental-illness> [<https://perma.cc/MLH4-QS22>] (Mar. 2023).

⁶⁶ *Id.*

⁶⁷ *Id.*

B. The Current Mental Health Care Crisis

There is a broad mental health care crisis in the United States. Only 43.3% of the 47.6 million people in the United States with mental illness received mental health treatment in 2018.⁶⁸ People of color face additional barriers.⁶⁹ Black and Latine⁷⁰ people obtain services about half as frequently as Caucasian Americans, and Asian Americans about one third as frequently.⁷¹ It is predicted that there will be even more people who do not receive necessary access to care because Americans have increasingly reported symptoms of mental illnesses such as anxiety, depression, and post-traumatic stress disorder since the COVID-19 pandemic.⁷²

Dr. Thomas Insel, a psychiatrist and neuroscientist who previously served as the director of the National Institute of Mental Health, has emphasized that the types and prevalence of mental illnesses today are not new, and that “nearly every modern mental illness has long been part of the human condition.”⁷³ Perhaps contrary to popular belief, Dr. Insel also explains that there is not a shortage of providers and medicine;⁷⁴ rather, society is experiencing a “crisis of care.”⁷⁵ Although we have treatments that work and plenty of practitioners, the problems lie in deeply inefficient systems that focus on responding to crises rather than longer-term treatment geared toward preventing illness and promoting recovery.⁷⁶

⁶⁸ Alexis D. Campbell, Note, *Failure on the Front Line: How the Americans with Disabilities Act Should Be Interpreted to Better Protect Persons in Mental Health Crisis from Fatal Police Shootings*, 51 COLUM. HUM. RTS. L. REV. 313, 320 (2019).

⁶⁹ See AM. PSYCHIATRIC ASS'N, MENTAL HEALTH DISPARITIES: DIVERSE POPULATIONS 3 (2017), <https://www.psychiatry.org/getmedia/bac9c998-5b2d-4ffa-ace9-d35844b8475a/Mental-Health-Facts-for-Diverse-Populations.pdf> [<https://perma.cc/XQQ7-4SQK>] (describing barriers that people of color face when seeking mental health treatment).

⁷⁰ This Article uses “Latine” as a gender-neutral descriptor for people of Latin American heritage. “Latine” has replaced “Latinx” as the preferred gender-neutral word in Spanish-speaking countries because it is more easily pronounced in Spanish. Tess Garcia, *Latine vs Latinx? What Young People of Latin American Descent Think of These Terms*, TEEN VOGUE (Oct. 12, 2022), <https://www.teenvogue.com/story/latine-vs-latinx-what-young-people-think> [<https://perma.cc/2QUM-UMBA>].

⁷¹ NAT'L ALL. ON MENTAL ILLNESS, *supra* note 7, at 1.

⁷² See Jacob Stern, *This Is Not a Normal Mental-Health Disaster*, THE ATLANTIC (July 7, 2020), <https://www.theatlantic.com/health/archive/2020/07/coronavirus-special-mental-health-disaster/613510/> [<https://perma.cc/L55T-7XYE>] (“[T]he secondary health effects [of the pandemic] will long outlast the pandemic itself.”).

⁷³ INSEL, *supra* note 56, at 13.

⁷⁴ *Id.* at 19 (“Today we have more medications, more therapies, more clinicians than at any time in our history.”).

⁷⁵ *Id.* at 13 (“The mental health crisis is simply a crisis of care. The tragedy for Roger was not that he developed schizophrenia. The tragedy was that he did not receive the interventions that could have saved his life.”).

⁷⁶ See *id.* at xxiii, 58–59 (describing how the U.S. mental health system is designed as a “sick-care system” that responds to crises and was created by insurance and pharmaceutical companies for

This crisis of care results in two of the greatest risks associated with mental illness: death and disability. Over 47,000 people die by suicide every year, nearly three times greater than the number of homicide deaths.⁷⁷ Experts say that 66 to 99% of suicides result from mental illness.⁷⁸ People with mental illness have a life expectancy that is on average twenty-three years shorter than other Americans.⁷⁹ Other than suicide, the major causes of death resulting from mental illness include drug overdoses, complications from alcoholism, development of other addictions, lack of access to medical care for non-mental illness health conditions, shortened lifespan due to hard living conditions or homelessness, and, of course, police violence.⁸⁰

Although migrants are not more likely than other populations to face mental health challenges,⁸¹ access to mental health care is especially challenging for noncitizens. Data show that noncitizens access mental health services at a lower rate than U.S. citizens.⁸² For example, one study found that about 38% of U.S.-born people of Mexican descent with a psychiatric illness diagnosis accessed care as compared to 15% of noncitizens from Mexico with a similar diagnosis.⁸³ Another study found that Latine and Asian noncitizens access mental health services at about half of the rate of their U.S. citizen counterparts.⁸⁴ The rates of accessing care were even lower for undocumented noncitizens.⁸⁵

profit, and explaining the importance of rehabilitative care—including support for educational and employment goals, the person’s family, and ongoing psychotherapy—in preventing relapse); *see also id.* at 6 (describing parents’ decision to call the police when their son was experiencing a mental health crisis because they did not have a better option available).

⁷⁷ *Id.* at 9.

⁷⁸ *Id.*

⁷⁹ *See id.* at 10 (noting that the life expectancy for people with mental illness is the same as Americans’ life expectancy in the 1920s).

⁸⁰ *See id.* at 9–10 (highlighting suicide, drug overdose, alcoholism, and inadequate access to medical care as significant causes of early mortality for individuals with mental illness); Eric Westervelt, *Mental Health and Police Violence: How Crisis Intervention Teams Are Failing*, NPR (Sept. 18, 2020), <https://www.npr.org/2020/09/18/913229469/mental-health-and-police-violence-how-crisis-intervention-teams-are-failing> [<https://perma.cc/82DG-UMTE>] (reporting that since 2015, almost twenty-five percent of all individuals killed by law enforcement officers had a mental illness).

⁸¹ *See* Andrew F. Moore, *The Immigrant Paradox: Protecting Immigrants Through Better Mental Health Care*, 81 ALB. L. REV. 77, 78 (2018) (noting that research shows migrants experience better overall mental health than the general U.S. population upon arriving in the country).

⁸² Amelia Seraphia Derr, *Mental Health Service Use Among Immigrants in the United States: A Systematic Review*, 67 PSYCHIATRIC SERVS. 265, 266–67 (2016).

⁸³ *Id.* at 266.

⁸⁴ *Id.* at 266–67.

⁸⁵ *Id.* at 267, 269.

A variety of factors can explain the lower access rate for noncitizens.⁸⁶ Barriers that noncitizens face include providers' cultural incompetence, stigma within migrant communities around seeking mental health care, transportation difficulties, preferences for providers of a particular gender, fear of deportation, elevated cost of treatment, and lack of insurance.⁸⁷ Further, public health insurance (like Medicaid and Medicare) and financial assistance programs (like Social Security Income (SSI) and Social Security Disability Income (SSDI)) are critical for people's access to mental health care and ability to live more stable lives.⁸⁸ Noncitizens, however, are simply ineligible for many of these benefits. Following the passage of the Personal Responsibility and Work Opportunity Act (PRWORA) in 1996, noncitizens who are undocumented or in temporary statuses such as TPS, nonimmigrant visas, and Deferred Action for Childhood Arrivals (DACA) are only eligible for Medicaid or Medicare in emergency circumstances and are ineligible for the Special Supplemental Nutrition Program for Women, Infants, and Children (WIC).⁸⁹ PRWORA also reduced access to other federal means-tested benefits such as food stamps and Supplemental Security Income, which is monthly support for people with disabilities.⁹⁰ Although some states have expanded access to health insurance and certain public benefits, these programs remain inaccessible to most noncitizens.⁹¹

⁸⁶ See *id.* at 269 (highlighting the reasons why undocumented individuals fail to seek mental health care, including fear of deportation or request to show documents, lack of funds or insurance, anxiety about missing work, language barriers, and negative stigma around seeking help).

⁸⁷ See *id.* at 267–69 (assessing patterns among cultural and minority groups when seeking or avoiding mental health care or treatment and emphasizing that migrants' rate of being uninsured is three times higher than U.S. citizens').

⁸⁸ INSEL, *supra* note 56, at 32–33. People with mental illness make up 43% of SSI recipients and 27% of SSDI recipients. *Id.* at 33.

⁸⁹ *Fact Sheet: Undocumented Immigrants and Federal Health Care Benefits*, NAT'L IMMIGR. F. (Sept. 21, 2022), <https://immigrationforum.org/article/fact-sheet-undocumented-immigrants-and-federal-health-care-benefits/> [<https://perma.cc/PG3F-U2FU>].

⁹⁰ See Personal Responsibility and Work Opportunity Reconciliation Act of 1996, 8 U.S.C. § 1612(a)(1)–(3) (stating that a “qualified alien” is ineligible for federal programs, defined as the SSI and food stamps programs); Moore, *supra* note 81, at 93–94 (describing the impact PRWORA had on noncitizens' access to care).

⁹¹ See Moore, *supra* note 81, at 96 (noting state responses to the lack of insurance access for noncitizens); see also *Public Benefits for Noncitizens in California*, IMMIGR. LEGAL RES. CTR. 2–3 (Sept. 2022), https://www.ilrc.org/sites/default/files/resources/ca_public_benefits_for_noncitizens_sept_2022.pdf [<https://perma.cc/B89L-R7EK>] (outlining the details of state public benefits offered to noncitizens within California); Claire Heyison & Shelby Gonzales, *States Are Providing Affordable Health Coverage to People Barred from Certain Health Programs Due to Immigration Status*, CTR. ON BUDGET & POL'Y PRIORITIES 2 (Feb. 1, 2024), <https://www.cbpp.org/sites/default/files/12-15-23health.pdf> [<https://perma.cc/6GDE-ZRVA>] (describing the state programs created to provide health care coverage to noncitizens who are otherwise ineligible for federal programs). But see Dayna Bowen Matthew, *The Social Psychology of Limiting Healthcare Benefits for Undocumented Immigrants—*

Other structural problems for noncitizens' mental health care access include a lack of interpreters and culturally sensitive mental health services. Particularly, noncitizen workers in rural locales face challenges in finding available services and maintaining care.⁹² Stigma and other negative attitudes about mental health services within some communities also inhibit access. Studies of African and Latina women and Chinese, Korean, and Iranian migrants revealed that stigma was a substantial obstacle to seeking care.⁹³ The notion that "only crazy people seek mental healthcare" embodies this common cultural attitude.⁹⁴

Additionally, some communities reject the idea that mental health can be treated with medication and instead embrace a view of mental health as involving the spirit.⁹⁵ This may explain why some people often turn to religious leaders when experiencing a crisis, as reflected in studies focusing on African and Latine immigrants.⁹⁶

Lastly, it is common for undocumented noncitizens to fear deportation when providing information about themselves to any type of official entity—whether government agencies or mental health professionals—in connection with seeking services.⁹⁷ Accordingly, the fear of being required to present identity documents or documents showing legal status is enough to keep people from seeking care.⁹⁸ These concerns are not unfounded. First, the INA expressly provides that a person with certain physical or mental disorders that may pose, or ever have posed, a risk of harm to anyone (including themselves) is excludable from the United States.⁹⁹ Thus, there is a disincentive to disclose any symptoms of such disorders or to seek help in the first place. Second, peo-

Moving Beyond Race, Class, and Nativism, 10 HOUS. J. HEALTH L. & POL'Y 201, 213–17 (2010) (explaining various state laws passed to limit healthcare access for noncitizens).

⁹² See APA PRESIDENTIAL TASK FORCE ON IMMIGR., CROSSROADS: THE PSYCHOLOGY OF IMMIGRATION IN THE NEW CENTURY 66 (2012), <http://www.apa.org/topics/immigration/immigration-report.pdf> [<https://perma.cc/2JCA-VGEF>] (describing barriers to mental health care for noncitizens in different living situations).

⁹³ See Derr, *supra* note 82, at 268 (considering various cultural barriers that impact migrants' choice to not seek care).

⁹⁴ *Id.* Stigma around accessing mental health care, sometimes referred to as an "attitudinal barrier," exists in many communities. INSEL, *supra* note 56, at 21. For example, studies of the general U.S. population (without regard to citizenship status) have found that "attitudinal barriers" were reported by 97.4% of people who were not being treated. *Id.*

⁹⁵ See Derr, *supra* note 82, at 267–68 (discussing patterns among noncitizens in turning to informal mental health services and treatment).

⁹⁶ *Id.*

⁹⁷ The author has represented many people who express fear of contacting health providers and other non-enforcement services because of their immigration status.

⁹⁸ See Derr, *supra* note 82, at 269 (highlighting how fear that service providers will report them to immigration authorities is a reason why undocumented migrants do not seek mental health care).

⁹⁹ INA § 212(a)(1)(A)(iii), 8 U.S.C. § 1182(a)(1)(A)(iii).

ple seeking mental health services while in immigration detention have experienced breaches of their confidentiality. In 2020, after assuring detained minors that their statements to health providers would be confidential, their communications were provided to ICE and used against them in their removal proceedings.¹⁰⁰ One can imagine that a person's ability to trust any provider would be destroyed after such a betrayal. This crisis of care exposes the need to implement effective responses to people experiencing mental health crises that do not rely on the police.

C. Mental Illness & Policing

This Section discusses the dangers that people in mental health crisis face when dealing with police, including the possibility of violence or criminalization. Certain communities are particularly aware of these dangers, as reflected in a recent survey in which about twenty-five percent of adults, "especially Black and LGBT adults," reported that calling 911 does "more harm than good in a mental health crisis situation."¹⁰¹

Subsection 1 outlines the history of police violence, particularly toward individuals with disabilities.¹⁰² Subsection 2 provides some chilling case studies of violence against people with disabilities that have resulted in serious injury or death.¹⁰³ Lastly, Subsection 3 chronicles the harm that police violence uniquely inflicts on migrant communities.¹⁰⁴

1. Roots of Police Violence

There is a long history of negative interactions between people with disabilities and law enforcement. In the 1800s and 1900s, laws known as "ugly laws" prohibited people with "physical and mental deformities" from being seen in public.¹⁰⁵ The implementation of these laws obviously led directly to the policing of people with disabilities or perceived disabilities. Today, large numbers of mentally ill people continue to be subject to the criminal legal sys-

¹⁰⁰ See Hannah Dreier, *Trust and Consequences*, WASH. POST (Feb. 15, 2020), <https://www.washingtonpost.com/graphics/2020/national/immigration-therapy-reports-ice> [<https://perma.cc/EDP5-R99V>] (examining instances in which supposedly confidential statements of young noncitizens were shared with ICE and used against them in removal proceedings).

¹⁰¹ Deidre McPhillips, *90% of US Adults Say the United States Is Experiencing a Mental Health Crisis, CNN/KFF Poll Finds*, CNN, <https://www.cnn.com/2022/10/05/health/cnn-kff-mental-health-poll-wellness/index.html> [<https://perma.cc/D33M-DXCH>] (Oct. 5, 2022).

¹⁰² See *infra* notes 105–123 and accompanying text.

¹⁰³ See *infra* notes 124–152 and accompanying text.

¹⁰⁴ See *infra* notes 153–176 and accompanying text.

¹⁰⁵ See Lauren Young, *Decriminalizing Disability*, 52 MD. BAR J. 62, 62 (2019) (recognizing the long history of policing individuals with disabilities).

tem. Research shows that about half of people with a mental illness are arrested during their lifetimes.¹⁰⁶ Such a high arrest rate is not reflective of the dangerousness of people with mental illness—to the contrary, the majority of arrests of mentally ill people are for low-level criminal charges related to substance use or homelessness.¹⁰⁷

Furthermore, scholars have extensively examined the role that race plays in policing.¹⁰⁸ Studies have found that “Black men are 2.5 times more likely than white men to be killed by police and . . . Black women are 1.4 times more likely than white women to be killed by police.”¹⁰⁹ In attempting to explain this disturbing phenomenon, studies have explored presumptions of dangerousness. One study found that Black people, especially Black men, are presumed to be dangerous because of negative stereotypes that label Black people as violent or criminal.¹¹⁰ In other research, psychologists conducted “shooter bias” studies in which participants engage in a video simulation where they are instructed to “shoot” targets holding guns, but not anyone else.¹¹¹ The studies revealed that participants were more likely to shoot—and shoot faster—at Black targets, even those who were unarmed.¹¹² In another study of police of-

¹⁰⁶ Alexandra Douglas, Note, *Caging the Incompetent: Why Jail-Based Competency Restoration Programs Violate the Americans with Disabilities Act Under Olmstead v. L.C.*, 32 GEO. J. LEGAL ETHICS 525, 537 (2019) (citing Jeffrey Draine, Mark S. Salzer, Dennis P. Culhane & Trevor R. Hadley, *Role of Social Disadvantage in Crime, Joblessness, and Homelessness Among Persons with Serious Mental Illness*, 53 PSYCHIATRIC SERVS. 565, 566 (2002)).

¹⁰⁷ See *id.* (“[T]he vast majority of mentally ill individuals will never commit a crime of violence.”).

¹⁰⁸ See generally Devon W. Carbado, (E)rasing the Fourth Amendment, 100 MICH. L. REV. 946, 961–62 n.79 (2002) (describing police officers’ common misperception that Black men were carrying guns or another weapon, when they in fact were not); Paul Butler, *The White Fourth Amendment*, 43 TEX. TECH L. REV. 245, 247 (2010) (considering “the Fourth Amendment jurisprudence’s willful blindness to race”); MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2012) (shedding light on how the criminal justice system in America perpetuates a racial caste); Cynthia Lee, *Reasonableness with Teeth: The Future of Fourth Amendment Reasonableness Analysis*, 81 MISS. L.J. 1133, 1150 (2012) (critiquing the reasonableness standard for its failure to account for race and its impact on perceived suspicion and criminality).

¹⁰⁹ Jeffrey Fagan & Alexis D. Campbell, *Race and Reasonableness in Police Killings*, 100 B.U. L. REV. 951, 1007–08 (2020).

¹¹⁰ See Mark W. Bennett & Victoria C. Plaut, *Looking Criminal and the Presumption of Dangerousness: Afrocentric Facial Features, Skin Tone, and Criminal Justice*, 51 U.C. DAVIS L. REV. 745, 795 (2018) (noting the heightened negative bias against people with Afrocentric features and darker skin tone); see also Sophie Trawalter, Andrew R. Todd, Abigail A. Baird & Jennifer A. Richeson, *Attending to Threat: Race-based Patterns of Selective Attention*, 44 J. OF EXPERIMENTAL SOC. PSYCH. 1322, 1322 (2008) (“Because they are so readily appraised as threatening, furthermore, Black men are more likely to be shot erroneously (i.e., when holding benign objects rather than weapons) and are often (mis)perceived, suspected, automatically evaluated, and misremembered as aggressors.”) (citations omitted); Carbado, *supra* note 108, at 961–62 n.79 (highlighting how police often mistakenly believed Black individuals are armed).

¹¹¹ Bennett & Plaut, *supra* note 110, at 789.

¹¹² *Id.*

ficers, more officers judged Black faces as “look[ing] criminal” than white faces.¹¹³ This presumption of dangerousness has led to more instances of police violence against civilians of color. Moreover, another study found that Black and Latine individuals experiencing a mental health crisis face an increased risk of being killed by police.¹¹⁴ Section A of Part II further discusses the intersection of race, disability, and policing.¹¹⁵

In addition to the stereotype that people of color are dangerous, society holds this same misperception about people with mental disabilities.¹¹⁶ Mental disabilities are more negatively stereotyped—and less understood—than other types of disabilities.¹¹⁷ As noted by one scholar, “individuals with mental illness are presumed to be prone to violence, incapable of functioning in society, untreatable, and deserving of punishment.”¹¹⁸ This perception of dangerousness is compounded when a person is both disabled and a person of color.

The high rates of police violence against people with mental illness can be attributed in part to law enforcement officers’ lack of adequate training. Very little of officers’ training is focused on recognizing or appropriately handling mental health-related incidents, nor does training typically focus on de-escalation techniques.¹¹⁹ Additionally, officers lack training specifically geared toward providing support or assistance to community members instead of arresting them.¹²⁰ Moreover, a “siege mentality”—also referred to as an “us versus them” perspective—permeates police departments.¹²¹ This toxic idea that police are pitted against “criminals” deserving of punishment runs contrary to the purported law enforcement mission to “serve and protect” people in the communities that they are policing.

¹¹³ *Id.* at 792.

¹¹⁴ See Fagan & Campbell, *supra* note 109, at 997–98 (conducting a statistical analysis to determine which factors have a significant effect on killings that result after police encounters).

¹¹⁵ See discussion *infra* Part II.A.

¹¹⁶ Marouf, *supra* note 32, at 983.

¹¹⁷ Douglas, *supra* note 106, at 537.

¹¹⁸ *Id.*

¹¹⁹ For further discussion on the insufficiency of law enforcement training, see *infra* Part III.D.

¹²⁰ Barry Friedman, *Amid Calls to ‘Defund,’ How to Rethink Policing*, WALL ST. J. (June 13, 2020), <https://www.wsj.com/articles/amid-calls-to-defund-how-to-rethink-policing-11592020861> [<https://perma.cc/GYA7-268M>] [hereinafter Friedman, *Amid Calls to ‘Defund,’ How to Rethink Policing*] (“The problem, simply put, is this: We send police officers to deal with too many social problems—substance abuse, mental illness, homelessness, domestic disputes, even civil unrest—for which they are grossly unprepared.”).

¹²¹ andré douglas pond cummings, “*Lord Forgive Me, but He Tried to Kill Me*”: *Proposing Solutions to the United States’ Most Vexing Racial Challenges*, 23 WASH. & LEE J. C.R. & SOC. JUST. 3, 30–32 (2016) (“This ‘siege’ model focuses on officer’s attention on crime control rather than crime prevention, and it isolates the police from the people and the communities in which they serve.”).

Police culture is also notorious for its machismo, relying on commands and physical force to secure the obedience of community members.¹²² Unfortunately, it may be difficult or impossible for a person experiencing symptoms of mental illness to obey commands. This may be because the person enters fight-or-flight mode due to past trauma, is unable to control their physical movements, hears voices, or is unable to distinguish between what is real and not real about a situation.¹²³ Even though this non-compliance may be involuntary, it heightens the possibility of arrest or violence.

2. Case Studies

The consequences of insufficient training and harmful police culture are a matter of life and death for people with mental illness. Consider the following examples:

On January 3, 2023, Keenan Anderson, a thirty-one-year-old English teacher, father, and cousin of a Black Lives Matter co-founder, died after an encounter with Los Angeles Police Department officers.¹²⁴ After getting into a car accident, police said that Mr. Anderson was “running in the middle of the street and exhibiting erratic behavior”¹²⁵—signs of a mental health crisis.¹²⁶ Mr. Anderson was apparently trying to run away when the officers commanded that he lie face down.¹²⁷ When he allegedly did not comply with this command, an officer repeatedly tased him.¹²⁸ He died at a hospital a few hours later.¹²⁹

In 2022, the daughter of Amelia Baca, a seventy-five-year-old woman who had dementia, called 911 seeking assistance because her mother was threatening her with a knife.¹³⁰ Las Cruces Police Department officers reported to the scene and spoke with family members.¹³¹ Body camera footage shows Ms. Baca standing in her home with two kitchen knives, followed by an officer

¹²² See Webb, *supra* note 33, at 824 (noting how officers are “trained to be authoritative, physical, and commanding”).

¹²³ *Id.*

¹²⁴ Stella Chan & Elizabeth Wolfe, *Keenan Anderson, Cousin of Black Lives Matter Co-founder, Dies from Cardiac Arrest After Being Tased by Los Angeles Police*, CNN, <https://www.cnn.com/2023/01/13/us/keen-an-anderson-black-lives-matter-cousin-police-death/index.html> [<https://perma.cc/G3PM-DZNX>] (Jan. 14, 2023).

¹²⁵ *Id.*

¹²⁶ See *id.* (quoting police officers who responded to the incident).

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ Fallon Fischer & Lianna Golden, *City of Las Cruces Settles \$2.75M Lawsuit with Family for Death of 75-year-old Amelia Baca*, KFOX14 (Aug. 1, 2022), <https://kfoxtv.com/news/crime-news/city-of-las-cruces-settles-275m-lawsuit-with-family-for-death-las-cruces-police-department-shooting-of-75-year-old-amelia-baca-april-16> [<https://perma.cc/LS5B-7FEU>].

¹³¹ *Id.*

yelling several times in English to drop the knife.¹³² According to the officers, Ms. Baca—a Spanish speaker—did not comply with their orders.¹³³ The officer shot twice at Ms. Baca, and she died at the scene.¹³⁴

In 2020, officers of the Salt Lake City Police Department shot Linden Cameron, a thirteen-year-old boy with an autism spectrum disorder.¹³⁵ His mother had called 911 seeking a crisis intervention team because her son was having a mental breakdown.¹³⁶ Linden’s mother warned them that he would run from the police.¹³⁷ Even with the mother’s warning, officers chased after Linden when he ran away and began shooting when he refused to obey their multiple commands to “get on the ground.”¹³⁸ According to the lawsuit, officers shot the boy eleven times while he was unarmed, and he miraculously survived.¹³⁹

In 2019, police shot a twenty-three-year-old Black man named Miles Hall in a residential neighborhood in Walnut Creek, California, where he lived.¹⁴⁰ His grandmother and mother called 911 to report that Mr. Hall had a mental illness and had threatened them.¹⁴¹ The police officers involved said they were scared for their lives as Mr. Hall charged at them carrying a gardening tool.¹⁴² Officers first shot bean bag rounds at Mr. Hall and then proceeded to fire their

¹³² *Id.*

¹³³ *Id.*; Justin Garcia, *Amelia Baca’s Family Slams City After Learning Officer Who Killed Her Returns to Work*, LA CRUCES SUN NEWS (Nov. 11, 2022), <https://www.lcsun-news.com/story/news/local/2022/11/11/amelia-bacas-family-slams-city-after-learning-officer-who-killed-her-returns-to-work/69637901007/> [<https://perma.cc/Ry2V-ALZQ>].

¹³⁴ Fischer & Golden, *supra* note 130.

¹³⁵ Kayla Winn, *Family of Linden Cameron Settle Lawsuit over SLCPD Shooting of 13-year-old Boy with Autism*, KJZZ14, <https://kjzz.com/news/local/family-of-linden-cameron-settle-lawsuit-over-slcpcd-shooting-of-autistic-13-year-old-long-term-physical-violence-crisis-intervention-federal-court-linden-cameron-salt-lake-city-police> [<https://perma.cc/33VU-L22R>] (Sept. 21, 2022).

¹³⁶ *Id.* The officers sent to the scene were aware that Linden had a “psych problem.” See Paighen Harkins, *Salt Lake City Reaches \$3M Settlement with Parents of Unarmed, Autistic Child Shot by Police*, SALT LAKE TRIB., <https://www.sltrib.com/news/2022/09/20/salt-lake-city-reaches-3m/> [<https://perma.cc/H7DD-2MHK>] (Sept. 20, 2022) (noting that one of the officers questioned why they were doing a police approach at the child’s home for a “psych problem”).

¹³⁷ Harkins, *supra* note 136.

¹³⁸ *Id.*

¹³⁹ *Id.* The *Salt Lake Tribune* also reported that forty percent of police shootings between 2010–2020 involved a person experiencing a mental health crisis. *Id.*

¹⁴⁰ *Two Walnut Creek Officers Not Charged in 2019 Fatal Shooting of Miles Hall: DA*, NBC BAY AREA, <https://www.nbcbayarea.com/news/local/two-walnut-creek-officers-not-charged-in-2019-fatal-shooting-of-miles-hall-family/2538888> [<https://perma.cc/5JXP-XJYJ>] (May 7, 2021); Madeleine Wood, *Son’s Killing by Officers Forges a Mom’s Campaign to Divert the Police*, ABC NEWS (Nov. 7, 2022), <https://abcnews.go.com/US/sons-killing-officers-forges-moms-campaign-divert-police/story?id=92625007> [<https://perma.cc/DS6F-T9BQ>].

¹⁴¹ *Two Walnut Creek Officers Not Charged in 2019 Fatal Shooting of Miles Hall: DA*, *supra* note 140.

¹⁴² *Id.*

handguns when the bean bag rounds failed to deter him.¹⁴³ Mr. Hall died at the hospital.¹⁴⁴ Contra Costa County recently created a program to dispatch mental health professionals in lieu of police to mental health calls, and the program is aptly named the Miles Hall Community Crisis Hub.¹⁴⁵

Not only have individuals suffering from a mental health crisis encountered violence and death during police encounters, but bystanders have also been injured in these situations. In 2016, a police officer in North Miami shot a therapist named Charles Kinsey.¹⁴⁶ Mr. Kinsey's patient, Arnaldo Rios, has autism and had escaped from his group home.¹⁴⁷ Mr. Rios had a silver toy truck in his hand that the officer mistook for a gun.¹⁴⁸ The officer shot three times, and one of the shots hit Mr. Kinsey.¹⁴⁹

The list of instances of police violence against people suffering mental health crises is too lengthy to include in one law review article. The Washington Post studied police killings and found that one fourth of victims experienced some degree of mental health concerns.¹⁵⁰ A 2015 study found that law enforcement shot and killed a person having a mental health crisis every thirty-six hours.¹⁵¹ Scholars often frame police violence against people of color as a public health issue because it affects people's ability to live healthy lives—or, in some cases, to live at all.¹⁵² Violence against people with disabilities should certainly qualify as the same.

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ Tony Hicks, *Contra Costa Officials Unveil Plan Making Mental Health Pros First Responders*, DANVILLE SAN RAMON (Jan. 13, 2024), <https://danvillessanramon.com/news/2022/01/13/contracosta-officials-unveil-plan-making-mental-health-pros-first-responders> [https://perma.cc/ZS6S-NJFV].

¹⁴⁶ Liane Morejon, *Cop's Conviction in Shooting of Unarmed Therapist Overturned*, LOCAL 10 NEWS, <https://www.local10.com/news/local/2022/02/16/cops-conviction-in-shooting-of-unarmed-therapist-overturned/> [https://perma.cc/GY7K-WNCX] (Feb. 16, 2022).

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ Mark Berman, John Sullivan, Julie Tate & Jennifer Jenkins, *Protests Spread Over Police Shootings. Police Promised Reforms. Every Year, They Still Shoot and Kill Nearly 1,000 People.*, WASH. POST (June 8, 2020), https://www.washingtonpost.com/investigations/protests-spread-over-police-shootings-police-promised-reforms-every-year-they-still-shoot-nearly-1000-people/2020/06/08/5c204f0c-a67c-11ea-b473-04905b1af82b_story.html [https://perma.cc/K8TQ-QXQS].

¹⁵¹ Wesley Lowery et al., *Distraught People, Deadly Results*, WASH. POST (June 30, 2015), <https://www.washingtonpost.com/sf/investigative/2015/06/30/distraught-people-deadly-results> [https://perma.cc/AUA6-K3PE].

¹⁵² See Osagie K. Obasogie & Zachary Newman, *Police Violence, Use of Force Policies, and Public Health*, 43 AM. J.L. & MED. 279, 280 (2017) (framing “use of force policies that often precipitate and absolve police violence as not only a legal or moral issue, but distinctively as a *public health issue* with widespread health impacts for individuals and communities”). See generally Justin K. Reichman, *Police Reform as Preventative Medicine: Reframing Police-Community Violence as a Public Health Law Issue*, 22 QUINNIPIAC HEALTH L.J. 289 (2019) (evaluating police violence through

3. An Introduction to Intersectionality's Effect on Policing Outcomes

The intersection of various aspects of a person's identity and life experiences, such as their race, gender, and disability, can substantially increase their likelihood of encountering police violence.¹⁵³ For instance, homelessness is one predictor of police violence.¹⁵⁴ A high correlation exists between homelessness and mental disabilities, with about forty-six percent of unhoused adults reporting that they have a mental illness.¹⁵⁵ Being both disabled and unhoused increases the likelihood of police violence.¹⁵⁶ The likelihood of dying at the hands of police is 6.5 times higher for unhoused people than the general public.¹⁵⁷

Immigration status is another intersecting issue that heightens the risk of encountering police violence. One study found that counties with large populations of immigrant-residents experience high rates of police killings.¹⁵⁸ This finding is at odds with the reality that immigrants do not commit more crime and cities with higher populations of foreign-born people have lower rates of violent crime.¹⁵⁹ Immigration status itself often intersects with racial identity, which, as discussed previously, increases the threat of a violent police encounter. High percentages of immigrants are people of color.¹⁶⁰ In 2022, of the es-

a public health lens). In his article, Reichman argues that legislatures should pass laws requiring law enforcement to report police violence data to a centralized office. Reichman, *supra*, at 290.

¹⁵³ See Sirry Alang, Rahwa Haile, Rachel Hardeman & J  Judson, *Mechanisms Connecting Police Brutality, Intersectionality, and Women's Health Over the Life Course*, 113 AM. J. PUB. HEALTH S29, S29 (2023) (discussing the importance "of applying an intersectionality framework in research that examines the health impacts of police brutality and in the development of policies to eliminate this form of structural violence that harms women of color"); Bridie Taylor, *Intersectionality 101: What Is It and Why Is It Important?*, WOMANKIND WORLDWIDE (Nov. 24, 2019), <https://www.womankind.org.uk/intersectionality-101-what-is-it-and-why-is-it-important/> [<https://perma.cc/8NQU-UTSR>] ("[I]ntersectionality is the concept that all oppression is linked. . . . Intersectionality is the acknowledgement that everyone has their own unique experiences of discrimination and oppression and we must consider everything and anything that can marginalise people . . .").

¹⁵⁴ See Carly Masenthin, Note, *Peace of Mind: Improving Conflicts Between Law Enforcement and the Mentally Ill Homeless While Exploring Sustainable Community Solutions for Care*, 27 KAN. J.L. & PUB. POL'Y 103, 107–08 (2018) (explaining how an untreated mental illness can escalate in severity and lead to homelessness, which in turn increases the likelihood that the individual will experience violence or death at the hands of police).

¹⁵⁵ *Id.* at 106.

¹⁵⁶ See *id.* at 108 ("Particularly in the case of the mentally ill homeless, interactions with police officers can be jarring and lead to violence—even death.").

¹⁵⁷ *Id.*

¹⁵⁸ See Fagan & Campbell, *supra* note 109, at 994 (examining the factors that make a deadly police encounter more likely).

¹⁵⁹ See *id.* at 994–95 (highlighting that immigration into the United States has no statistical effect on crime).

¹⁶⁰ See Nicole Ward & Jeanne Batalova, *Frequently Requested Statistics on Immigrants and Immigration in the United States*, MIGRATION POL'Y INST. 6, <https://www.migrationpolicy.org/sites/>

estimated 46.2 million immigrants living in the United States, more than a quarter identify as Asian; around 20% identify as white; 20% identify as some other race; 21% identify as two or more races; 9% identify as Black; and less than 2% identify as American Indian, Alaska Native, Native Hawaiian, or Pacific Islander.¹⁶¹ Additionally, 44% of immigrants reported identifying as “Hispanic or Latino,” an identity that can overlap with any of the racial categories previously listed.¹⁶²

Even short of violence, many mental health-related police encounters end in criminalization of noncitizens—the creation of a criminal record based on any contact with police, arrest, conviction, and possibly jail or prison time. Having a criminal record not only deprives a person of liberty through the course of that specific case and sentence but also increases the likelihood of future arrests and incarceration, creating a “revolving door.”¹⁶³ All of these dangers are especially heightened for people of color who possess a mental illness.

Large numbers of people with mental illness are housed in jails and prisons. There are ten times the amount of people with psychiatric diseases in criminal custody than in hospitals.¹⁶⁴ In a 2017 study, the Bureau of Justice Statistics within the U.S. Department of Justice found that approximately 44% of jail inmates and 37% of federal prisoners “had been told in the past by a mental health professional that they had a mental disorder.”¹⁶⁵ Furthermore, 25% of people who are incarcerated have an SMI.¹⁶⁶

default/files/publications/FRS-PRINT-2024-FINAL.pdf [https://perma.cc/RN52-UH5T] (Mar. 13, 2024) (exploring various statistics on noncitizens in the United States).

¹⁶¹ *Id.* at 2, 6.

¹⁶² *Id.* at 7.

¹⁶³ Cf. Barry Friedman, *Are Police the Key to Public Safety?: The Case of the Unhoused*, 59 AM. CRIM. L. REV. 1597, 1618 (2022) (characterizing jails as a “revolving door for homeless people” and observing that criminalization increases the chances of homelessness, which in turn increases the chances of criminal arrest). Friedman observes that “[i]f you are homeless, you are more likely to end up in jail or prison, and if you are put in jail or prison, the collateral consequences are more likely to render you homeless.” *Id.*

¹⁶⁴ *Criminalization of Mental Illness*, TREATMENT ADVOC. CTR., <https://www.treatmentadvocacycenter.org/key-issues/criminalization-of-mental-illness> [https://perma.cc/N2HF-U8BR].

¹⁶⁵ JENNIFER BRONSON & MARCUS BERZOFKY, BUREAU OF JUST. STAT., U.S. DEP’T OF JUST., INDICATORS OF MENTAL HEALTH PROBLEMS REPORTED BY PRISONERS AND JAIL INMATES, 2011-12, at 1 (2017), <https://bjs.ojp.gov/content/pub/pdf/imhprpji1112.pdf> [https://perma.cc/8RRV-LBJP].

¹⁶⁶ See Dean Aufderheide, *Mental Illness in America’s Jails and Prisons: Toward a Public Safety/Public Health Model*, HEALTHAFFAIRS BLOG (Apr. 1, 2014), <https://www.healthaffairs.org/doi/10.1377/forefront.20140401.038180/full/> [https://perma.cc/2YYH-L44J] (“It also appears that the individuals being incarcerated have more severe types of mental illness, including psychotic disorders and major mood disorders than in the past.”).

It is important to recognize that not every person in jail has been convicted of a crime, as some are in pretrial detention.¹⁶⁷ For example, seventy-five percent of people in county jails throughout California have not been convicted or sentenced.¹⁶⁸ Those in pretrial detention might also include people who have been accused of a crime but cannot proceed to trial because they have been deemed incompetent by a criminal judge.¹⁶⁹ In some jurisdictions, these individuals are on lengthy waitlists to be sent to state hospitals to receive treatment and be restored to competency.¹⁷⁰ As a result, these individuals sit in jail for unspecified lengths of time until they are transferred to a psychiatric facility for treatment.¹⁷¹ Once transferred to a hospital, it may take months or longer for competency to be restored.¹⁷² Thus, criminal defense lawyers face an ethical dilemma: raising competency issues for their clients may result in far longer time spent in detention than would result if the case simply moved forward.¹⁷³

Perhaps less obvious is that some people in jails have yet to be charged with a crime at all. In some jurisdictions, jails are used to hold people experiencing a mental health crisis when hospitals and other treatment centers cannot take them because of a lack of bedspace.¹⁷⁴ This is a significant problem in rural areas, where sometimes even children experiencing a crisis are held in jails while awaiting transfer to a hospital.¹⁷⁵

¹⁶⁷ The U.S. Supreme Court has described pretrial detention as a preventative measure to detain those suspected of posing a flight risk or danger to the community. *United States v. Salerno*, 481 U.S. 739, 744–45 (1987).

¹⁶⁸ INSEL, *supra* note 56, at 80.

¹⁶⁹ Margo Schlanger, Elizabeth Jordan & Roxana Moussavian, *Ending the Discriminatory Pretrial Incarceration of People with Disabilities: Liability Under the Americans with Disabilities Act and the Rehabilitation Act*, 17 HARV. L. & POL'Y REV. 231, 235–48, 272 (2022) (noting that competency determinations in criminal proceedings require an assessment of whether the accused has a “sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and a rational as well as factual understanding of the proceedings against him” (quoting *Dusky v. United States*, 362 U.S. 402, 402 (1960))). Criminal judges often base competency determinations on evaluations conducted by mental health professionals. Marisol Orihuela, *The Unconstitutionality of Mandatory Detention During Competency Restoration*, 22 BERKELEY J. CRIM. L. 1, 7 (2017).

¹⁷⁰ See Orihuela, *supra* note 169, at 9.

¹⁷¹ See Douglas, *supra* note 106, at 540–41 (noting that the Supreme Court refused to impose limits on how long an incompetent defendant can be held in confinement) (citing *Jackson v. Indiana*, 406 U.S. 715, 730–31 (1972)).

¹⁷² See Orihuela, *supra* note 169, at 9 (noting that studies have shown restoration to competency “can be completed in the majority of cases in less than six months,” but detention can last much longer in some cases).

¹⁷³ *Id.* at 9–10.

¹⁷⁴ INSEL, *supra* note 56, at 80–81.

¹⁷⁵ Taylor Elizabeth Eldridge, *When a Mental Health Emergency Lands You in Jail*, MARSHALL PROJECT (Sept. 20, 2017), <https://www.themarshallproject.org/2017/09/20/when-a-mental-health-emergency-lands-you-in-jail> [<https://perma.cc/5NLG-X5ZR>].

As demonstrated above, when the criminal legal system handles mental health crises, the outcome is deprivation of liberty and the creation of a permanent criminal record. Consequently, people with mental illness are too frequently locked away in carceral settings. For noncitizens, there is an added threat of immigration consequences, which is addressed in the next Part.¹⁷⁶ This Article argues that mental health crisis responses should instead center around effective rehabilitation or connection to necessary resources that would prevent another crisis from occurring in the future.

II. AN OVERLOOKED INTERSECTING ISSUE: HOW NONCITIZENS WITH DISABILITIES ARE AFFECTED BY POLICING

As discussed in the prior Part, race and disability are two factors that increase the potential for law enforcement's infliction of violence and criminalization. Immigration status is another factor that intersects with policing, the effect of which should not be ignored. Section A of this Part begins with a discussion of intersectionality that frames the Article's analysis.¹⁷⁷ Section B then highlights the mental health crisis-to-deportation funnel, explaining the ways that contact with the criminal legal system can place disabled noncitizens at risk.¹⁷⁸ Namely, contact with the criminal justice system may either directly or indirectly put them on the radar of immigration authorities and serve as evidence later used to deny relief. Last, Section C unpacks how the funnel exposes noncitizens to the traumas of immigration enforcement, including the process itself, detention, and deportation.¹⁷⁹

A. Intersectionality & Disability Justice

The most potent applicable framework when examining the impact of policing on noncitizens experiencing a mental health crisis is the concept of intersectionality, including a disability justice component.¹⁸⁰ In the context of policing, intersectionality clarifies that the violence and trauma mentally ill noncitizens experience is not solely the product of one marginalized identity; rather, policing incidents and their aftermath play out differently based on all of a person's intersecting identities.¹⁸¹ To give an example, let us consider a disabled

¹⁷⁶ See discussion *infra* Part II.

¹⁷⁷ See *infra* notes 178–202 and accompanying text.

¹⁷⁸ See *infra* notes 203–239 and accompanying text.

¹⁷⁹ See *infra* notes 240–285 and accompanying text.

¹⁸⁰ See, e.g., Arastu & Naqui, *supra* note 34, at 260 (employing an intersectional framework to argue that disability justice principles should guide immigration abolition efforts).

¹⁸¹ See Alang et al., *supra* note 153, at S29 (examining the role of intersectionality in evaluating police brutality); Crenshaw, *supra* note 34, at 1244–45 (stating that multiple factors are critical in shaping individuals' experiences).

noncitizen who is a person of color. It is impractical to separate a person's identities and *only* analyze the consequences of policing based on their disability, or *only* based on their race, or *only* based on their citizenship status. Rather, a person's experiences are affected by all these identities at the same time. A person facing immigration consequences has a fundamentally different experience with the criminal legal system than someone who does not. Additionally, as explained in the prior Part, socioeconomic status and housing status are other intersecting identities that might increase the chances of violence or criminalization during a mental health crisis.¹⁸² Crafting solutions to the problem must look through the lens of intersectionality to determine and lend a particular eye to those at greatest risk—otherwise, any such solution will be incomplete.

Disability justice is an area of scholarship that has applied the concept of intersectionality to understand disability and its intersection with race.¹⁸³ Disability justice seeks to move away from the “medical model” of labeling disabled people as sick, wrong, inadequate, or not belonging.¹⁸⁴ Rather, disability justice embraces the “social model” of disability, which recognizes that human variation is natural.¹⁸⁵ The social model of disability urges that it is in fact society that limits people with disabilities and is therefore the disabling actor.¹⁸⁶ The social model is helpful in understanding that it is not the existence of disability itself that needs fixing, but rather it is the response of law enforcement to mental health crises that requires change.¹⁸⁷

Additionally, law school Dean Camille A. Nelson has made important descriptive and normative contributions to the discussion of the intersection of race and disability in policing.¹⁸⁸ Her work is significant in that she employs a Foucauldian approach to analyzing cases involving police encounters with

¹⁸² See discussion *supra* Part I.C (discussing the findings of multiple studies assessing different factors' impact on police violence outcomes).

¹⁸³ See generally Morgan, *Policing Under Disability Law*, *supra* note 33 (exploring the dimensions of different identities, including race and disability, and policing).

¹⁸⁴ See, e.g., *id.* at 1406 (noting that the ADA supports a social model, rather than a medical model, of disability).

¹⁸⁵ *Id.* at 1406–07.

¹⁸⁶ See *id.* (“In the social model of disability, ‘disability is viewed not as a physical or mental impairment, but as a social construction . . .’” (quoting Richard K. Scotch, *Models of Disability and the Americans with Disabilities Act*, 21 BERKELEY J. EMP. & LAB. L. 213, 214 (2000))).

¹⁸⁷ See Perez, *supra* note 35 (“Disability justice requires us to challenge notions of normalcy and confront a system of capitalism and meritocracy that prioritizes productive bodies and minds and devalue disabled ones.”).

¹⁸⁸ See generally Nelson, *supra* note 33. Professor Jasmine E. Harris has also written about how our “national reckoning” with race and policing must take disability into account. Harris, *supra* note 59, at 916. Harris's work focuses on a broader application of aesthetics theory to understanding the intersection of race and disability rather than providing a deep dive into policing. *Id.* at 954–56.

mentally ill people of color.¹⁸⁹ In her research, she concludes that police disproportionately subject “negatively racialized” people (meaning individuals who are perceived as non-white) to violence when they are also known or perceived as mentally ill.¹⁹⁰

Dean Nelson examines the three primary modalities that police use when handling encounters with mentally ill individuals: the medical modality, the criminal modality, and the disciplinary force modality.¹⁹¹ She explains that law enforcement officers disparately apply these modalities (which vary in severity) to mentally ill people based on race. When using the medical modality, law enforcement officers use de-escalation techniques and help the individual seek treatment or other resources.¹⁹² This modality may include taking an individual to a hospital or other treatment center, or simply releasing a person to their own family for care.¹⁹³ Unfortunately, releasing a person to their family, which is arguably the most compassionate approach, is most *uncommonly* used when the police negatively racialize a mentally ill person.¹⁹⁴

In contrast to the medical modality, the criminal modality “prioritizes containment and incarceration over treatment.”¹⁹⁵ Under this modality, the police file a report and begin the criminal adjudicatory process rather than assisting someone with obtaining treatment or releasing them to their family.¹⁹⁶ Dean Nelson highlights that, for white mentally ill people, the criminal modality may be resorted to when medical care is not readily available, such as when bedspace at hospitals is full or the person poses a heightened threat.¹⁹⁷

Lastly, the most severe modality—and the one most frequently employed against people of color—is the disciplinary force modality.¹⁹⁸ This model centers around “immediate physical punishment.”¹⁹⁹ Such punishment includes

¹⁸⁹ Nelson, *supra* note 33, at 3 (utilizing Michel Foucault’s study of power, including “notions of discipline and punishment,” to analyze the policing of people perceived to have mental illness).

¹⁹⁰ *Id.* at 4.

¹⁹¹ *Id.* at 4–5. Dean Nelson’s naming of these categories arose from her reading of police misconduct cases brought against law enforcement where the courts mentioned the race of the mentally ill individuals involved. *Id.* at 4.

¹⁹² *Id.* at 21.

¹⁹³ *Id.* at 21, 26–28.

¹⁹⁴ *See id.* at 28 (“[I]n managing negatively racialized suspects the police do not exercise their discretion in favor of the family modality, even when there are instructions that family members should be contacted.”).

¹⁹⁵ *Id.* at 5.

¹⁹⁶ *See id.* at 5, 29.

¹⁹⁷ *Id.* at 29.

¹⁹⁸ *See id.* at 5, 24, 28. Nelson examines several case studies of the disciplinary force modality. *Id.* at 37–54. In doing so, she recognizes that police had little tolerance for Black mentally ill individuals, even when, as occurred in one medical modality case study, the individual posed less of a threat than a white suspect. *Id.* at 24, 28.

¹⁹⁹ *Id.* at 5.

infliction of severe physical pain and even death.²⁰⁰ In these cases, which primarily involve mentally ill people of color, Dean Nelson theorizes that law enforcement officers are often responsible for escalating the situation and triggering violent, sometimes deadly consequences.²⁰¹

This three-modality approach demonstrates the severity of the consequences that flow from a person being categorized as non-white and mentally ill. Even where mentally ill people of color survive police interactions, the application of the criminal modality can lead to further negative outcomes for immigrants.²⁰² Dean Nelson's three-modality theory also reveals that policing is not just an inadequate but a dangerous response to mental health crises.

B. Funneling from Criminal to Immigration Enforcement

This Section addresses the specific harms and vulnerabilities mentally ill noncitizens experience from police encounters. There are four general ways in which a person can end up in immigration removal proceedings: (1) seeking entry to the United States at a border or other port of entry, like airports; (2) denial of an application for an immigration benefit with USCIS; (3) a stop or raid conducted by Border Patrol or ICE agents; and (4) through contact with the criminal legal system.²⁰³ This Article focuses on the fourth way. Specifically, this Article centers on the situation where a person's mental health crisis leads to police involvement and subsequently pushes the person into the immigration removal system.

The concept of "crimmigration" recognizes the pervasive, and growing, overlap between the criminal and immigration systems and helps expose the full scope of this overlap on noncitizens.²⁰⁴ The U.S. Supreme Court has recognized the interplay between the criminal and immigration systems, noting that "[a]lthough removal proceedings are civil in nature, deportation is never-

²⁰⁰ See *id.* at 37–54 (describing several cases of asphyxiation, brutal treatment such as two severe kicks to the testicles with no prior attempts at de-escalation, pepper-spraying a 13-year-old autistic girl, and shooting an unarmed homeless man to death); see also discussion *supra* Part I.C. (discussing the current landscape and commonality of violent policing encounters).

²⁰¹ Nelson, *supra* note 33, at 37–38.

²⁰² See discussion *infra* Part II.C (explaining the potential consequences that flow from the criminalization of noncitizens).

²⁰³ See EM PUHL, IMMIGRANT LEGAL RES. CTR., OVERVIEW OF THE DEPORTATION PROCESS: A GUIDE FOR COMMUNITY MEMBERS & ADVOCATES 2–3 (2018), https://www.ilrc.org/sites/default/files/resources/overview_deport_process-20181221.pdf [<https://perma.cc/A4U8-DBK3>] (outlining the immigration system and the steps of the deportation process in the United States).

²⁰⁴ See, e.g., Juliet Stumpf, *The Cimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 376 (2006) (defining "crimmigration" as the "criminalization of immigration law"); César Cuauhtémoc García Hernández, *Creating Cimmigration*, 2013 BYU L. REV. 1457, 1458 (2013) (explaining how the criminal and immigration systems have adopted and integrated certain principles and procedures from one another).

theless intimately related to the criminal process. Our law has enmeshed criminal convictions and the penalty of deportation for nearly a century”²⁰⁵ Even under recent presidential administrations that appear to be more receptive of immigrants, the narrative remains that immigration enforcement should focus on deporting people who have been accused or convicted of crimes.²⁰⁶

Because of the federal government’s stated priority of expelling “criminals,” any contact with law enforcement can greatly enhance a person’s chances of ending up in removal proceedings.²⁰⁷ One study estimates that noncitizens with a conviction are “at least one hundred times” more likely to be deported than those that lack a conviction.²⁰⁸ Much of this contact with law enforcement happens through state and local actors.²⁰⁹ In fact, local police and sheriff’s offices account for the largest source of ICE arrests at forty-one percent.²¹⁰ Indeed, some state and local agencies such as police departments, probation departments, and courts specifically target noncitizens in enforcing criminal law.²¹¹ Thus, the operation of state and local criminal systems has a large impact on noncitizens. Furthermore, individual bias from many actors within these systems—including prosecutors,²¹² judges, juries,²¹³ and even

²⁰⁵ *Padilla v. Kentucky*, 559 U.S. 356, 365–66 (2010).

²⁰⁶ See generally Memorandum from Alejandro N. Mayorkas, Sec’y, U.S. Dep’t Homeland Sec., to Tae D. Johnson, Acting Dir., U.S. Immigr. & Customs Enf’t 2 (Sept. 30, 2021) <https://www.ice.gov/doclib/news/guidelines-civilimmigrationlaw.pdf> [<https://perma.cc/Q4QP-MEGZ>] (urging that immigration enforcement must prioritize “those who pose a threat to national security, public safety, and border security and thus threaten America’s well-being”). Contrary to popular belief, noncitizens might be subject to deportation for minor crimes, including misdemeanors like petty theft. See Jenny Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts*, 45 U.C. DAVIS L. REV. 277, 297–303 (2011) (giving examples of noncitizens deported, or nearly deported, due to misdemeanor convictions, including minor drug offenses).

²⁰⁷ See David K. Hausman, *The Unexamined Law of Deportation*, 110 GEO. L.J. 973, 975–76 (2022) (recognizing presidential administrations’ goal of deporting people deemed to be “felons”). For an undocumented person in the United States, possessing a criminal conviction increases their likelihood of getting deported to greater than fifty percent. *Id.* at 976.

²⁰⁸ *Id.* at 983.

²⁰⁹ See *Tracking Over 2 Million ICE Arrests: A First Look*, TRAC: IMMIGR. (Sept. 25, 2018), <https://trac.syr.edu/immigration/reports/529/> [<https://perma.cc/WZ8A-V3YV>] (explaining how noncitizens come into ICE custody).

²¹⁰ *Id.* Through Freedom of Information Act (FOIA) requests, the Transactional Records Access Clearinghouse (TRAC) obtained records regarding all ICE arrests from October 2008 to June 2018. *Id.* ICE claims that it does not track this data. *Id.*

²¹¹ See Ingrid V. Eagly, *Criminal Justice for Noncitizens: An Analysis of Variation in Local Enforcement*, 88 N.Y.U. L. REV. 1126, 1130–31 (2013) (explaining that some localities have rules directing law enforcement, judges, prosecutors, and probation officers to consider immigration status). Eagly also describes how “[f]ederal immigration agents are a continuous presence in the local law enforcement system: They are often physically present in local jails, impede release on criminal bail, train prosecutors on how to secure plea agreements that guarantee removal, and sometimes deport noncitizen defendants prior to their criminal trials.” *Id.* at 1134.

²¹² See, e.g., *cummings*, *supra* note 121, at 33–34 (noting that federal prosecutors often “cherry-pick” defendants who are poor and Black to prosecute on the federal level). Prosecutors have discre-

noncitizens' own defense lawyers²¹⁴—means that mentally ill immigrants of color may end up with harsher penalties and criminal punishments in conjunction with the possibility of deportation.

Once a noncitizen encounters law enforcement, they may be brought to the attention of immigration authorities in a myriad of ways.²¹⁵ Immigration authorities might be notified about a potential target even before the start of a criminal case or at any point during the criminal process, including after sentencing.²¹⁶ The police may simply call ICE directly, for example during a traffic stop.²¹⁷ Alternatively, the federal 287(g) program deputizes local and state law enforcement to enforce immigration laws when they enter into such an agreement.²¹⁸ Although some may believe that law enforcement officers target people suspected of serious crimes, nearly fifty percent of actions taken pursuant to the 287(g) program are a result of misdemeanor and traffic violation arrests.²¹⁹

Even where there is no 287(g) agreement in place, federal immigration authorities may still become aware of a person's contact with the criminal system via the Criminal Apprehension Program.²²⁰ While booking a person into any jail or prison, officials take the person's fingerprints and automatically

tion in how many criminal charges to bring, usually choosing to charge Black defendants who are already in state custody. *Id.* This has the effect of substantially increasing the time these defendants spend in jail. *Id.* at 34. Furthermore, ninety-one percent of targeted defendants in "stash house" sting operations are people of color, and joint task forces in conjunction with ICE often carry out such operations. *Id.* at 34–35.

²¹³ See Melissa L. Breger, *Making the Invisible Visible: Exploring Implicit Bias, Judicial Diversity, and the Bench Trial*, 53 U. RICH. L. REV. 1039, 1051–57 (2019) (discussing implicit bias among all actors in the courtroom, which prevents the fair and just operation of judicial proceedings).

²¹⁴ See L. Song Richardson & Phillip Atiba Goff, *Implicit Racial Bias in Public Defender Triage*, 122 YALE L.J. 2626, 2634–41 (2013) (describing how implicit racial bias may affect public defenders' decision-making regarding how to allocate their scarce resources in defending clients).

²¹⁵ See PUHL, *supra* note 203, at 2 (describing how law enforcement can share arrestee information with ICE, allow ICE to find and interview people in local jails, or directly transfer arrestees to ICE custody).

²¹⁶ See *id.*

²¹⁷ See *id.* (noting relationships between local law enforcement officers and ICE).

²¹⁸ INA § 287(g), 8 U.S.C. § 1357(g) (giving the Attorney General the power to enter into agreements with state or local law enforcement and deputizing such officers to enforce immigration laws). For a history of the 287(g) program and information regarding its implementation under recent presidential administrations, see generally Huyen Pham, *287(g) Agreements in the Trump Era*, 75 WASH. & LEE L. REV. 1253 (2018).

²¹⁹ See RANDY CAPPS, MARC R. ROSENBLUM, CHRISTINA RODRÍGUEZ & MUZAFFAR CHISHTI, MIGRATION POL'Y INST., DELEGATION AND DIVERGENCE: 287(G) STATE AND LOCAL IMMIGRATION ENFORCEMENT 2 (2011), <https://www.migrationpolicy.org/sites/default/files/publications/287g-divergence.pdf> [<https://perma.cc/VXV9-8SYZ>] (assessing the 287(g) program's enforcement on a national level).

²²⁰ See *Criminal Apprehension Program*, U.S. IMMIGR. & CUSTOMS ENF'T, <https://www.ice.gov/identify-and-arrest/criminal-apprehension-program> [<https://perma.cc/349Y-MSRK>] ("The Criminal Apprehension Program . . . supports U.S. Immigration and Customs Enforcement . . . Enforcement and Removal Operations . . . through the arrest and removal of noncitizens . . .").

transmit them to the Federal Bureau of Investigation (FBI) through the Secure Communities program.²²¹ These fingerprints are then forwarded to the Department of Homeland Security, and if the individual is deemed removable, ICE determines whether to carry out an immigration enforcement response.²²² At this point, ICE can issue a “detainer.”²²³ Detainers are requests that ICE issues that ask other entities to hold a noncitizen for immigration enforcement purposes.²²⁴ Detainers have been subject to legal challenges at a variety of levels; many state and local jurisdictions have refused to cooperate with ICE detainers.²²⁵ ICE detainers not only lead to immigration consequences but also may negatively impact prosecutor and criminal courts’ decisions around bail, charges, and dispositions.²²⁶ Further, judges presiding over criminal hearings have considered ICE detainers as negative factors related to flight risk that can weigh against an individual’s ability to receive non-jail sentences.²²⁷

Even if a person is released from jail without ICE picking them up directly, ICE can still arrest them later.²²⁸ For example, ICE has arrested noncitizens at courthouses when appearing for hearings,²²⁹ at their places of employ-

²²¹ *Secure Communities*, U.S. IMMIGR. & CUSTOMS ENF’T, <https://www.ice.gov/secure-communities> [<https://perma.cc/5SSH-JWZW>].

²²² *See id.* (discussing how ICE uses Secure Communities and information-sharing agreements with the FBI to identify potentially removable noncitizens).

²²³ *See id.* (explaining how ICE will use the information received through Secure Communities to determine if there is probable cause for the removal of an individual and accordingly issue a detainer).

²²⁴ *See Immigration Detainers: An Overview*, AM. IMMIGR. COUNCIL 1 (Mar. 21, 2017), https://www.americanimmigrationcouncil.org/sites/default/files/research/immigration_detainers_an_overview_0.pdf [<https://perma.cc/5764-BGSC>] (“Detainers instruct federal, state, or local law enforcement agencies . . . to hold individuals for up to 48 business hours beyond the time they otherwise would have been released . . .”).

²²⁵ *See Community and Courtroom Responses to Immigration Detainers*, NAT’L IMMIGR. F. (Dec. 16, 2013), <https://immigrationforum.org/article/community-courtroom-responses-immigration-detainers/> [<https://perma.cc/N696-Z9DB>] (discussing how cities, counties, and states across the United States have passed laws limiting their cooperation with ICE detainers and how various lawsuits have been filed challenging detainers); Christopher N. Lasch, *Rendition Resistance*, 92 N.C. L. REV. 149, 152 (2013) (considering how many jurisdictions have chosen to “opt out” of cooperating with ICE detainers and their enforcement of immigration law).

²²⁶ *See* Eisha Jain, *Jailhouse Immigration Screening*, 70 DUKE L.J. 1703, 1725–26 (2021) (outlining the insidious effects immigration detainers and status assessments have on an individual’s overall experience with the criminal justice system).

²²⁷ *See id.* at 1725–27.

²²⁸ *See* BRYAN LONEGAN & THE IMMIGRATION LAW UNIT, LEGAL AID SOC’Y, IMMIGRATION DETENTION AND REMOVAL: A GUIDE FOR DETAINEES AND THEIR FAMILIES 2 (2006) (noting that “there is no statute of limitations” on when ICE can carry out an arrest).

²²⁹ *See* Christopher N. Lasch, *A Common-Law Privilege to Protect State and Local Courts During the Crimmigration Crisis*, 127 YALE L.J.F. 410, 411–12, 423 (2017) (discussing an incident in which ICE officers showed up at the Denver courthouse to arrest a noncitizen and arguing that a fifteenth century common-law privilege prohibits ICE arrests at courthouses).

ment,²³⁰ at their homes,²³¹ or anywhere else ICE suspects them to be. ICE employs a variety of tools to find people, such as obtaining records from utility companies, state Departments of Motor Vehicles (DMV), and other surveillance mechanisms.²³²

Notably, these immigration enforcement actions may follow *any* contact with the criminal system, including an arrest that does not result in any charges.²³³ For that reason, avoiding any law enforcement contact is imperative to avoiding the mental health crisis-to-immigration funnel.

Contacts with the criminal system have immigration consequences beyond removal proceedings. In immigration court, there are few available protections against the admission of documents or other evidence created or obtained in the course of a criminal investigation.²³⁴ For example, police reports—which are notoriously unreliable documents—can be admitted in im-

²³⁰ See Abigail Hauslohner, *ICE Agents Raid Miss. Work Sites, Arrest 680 People in Largest Single-state Immigration Enforcement Action in U.S. History*, WASH. POST (Aug. 7, 2019), https://www.washingtonpost.com/immigration/ice-agents-raid-miss-work-sites-arrest-680-people-in-largest-single-state-immigration-enforcement-action-in-us-history/2019/08/07/801d5cfe-b94e-11e9-b3b4-2bb69e8c4e39_story.html [<https://perma.cc/AU7D-ZBTF>] (highlighting the ICE raids that took place in Mississippi agricultural processing plants that resulted in the arrests of approximately 680 people at their place of work).

²³¹ See Katherine Evans, *The Ice Storm in U.S. Homes: An Urgent Call for Policy Change*, 33 N.Y.U. REV. L. & SOC. CHANGE 561, 568, 572 (2009) (explaining ICE officials' documented pattern of early morning raids and use of "deception and intimidation" to enter homes).

²³² See, e.g., Sam Biddle, *LexisNexis Is Selling Your Personal Data to ICE So It Can Try to Predict Crimes*, THE INTERCEPT (June 20, 2023), <https://theintercept.com/2023/06/20/lexisnexis-ice-surveillance-license-plates> [<https://perma.cc/929Z-CNHS>] (explaining that ICE obtains information from LexisNexis, which has "information ranging from boating licenses and DMV filings to voter registrations and cellphone subscriber rolls" on over 280 million people); Melissa Adan, *ICE Buys Driver's License, Utility Bill Data to Track Americans: Reports*, NBC 7 SAN DIEGO, <https://www.nbcsandiego.com/news/local/ice-buys-drivers-license-utility-bill-data-to-track-americans-report/2943863/> [<https://perma.cc/KG5S-6JJN>] (May 12, 2022) (citing an investigation revealing that ICE buys DMV, utility bill information, and records from data brokers to track people).

²³³ See Fatma Marouf, *Immigration Law's Missing Presumption*, 111 GEO. L.J. 983, 987 (2023) [hereinafter Marouf, *Immigration Law's Missing Presumption*] (arguing that removal proceedings operate similarly to and are integrated with criminal proceedings, especially "because criminal arrests, charges, and convictions can all directly trigger the deportation process"); see also Devon W. Carbado & Cheryl I. Harris, *Undocumented Criminal Procedure*, 58 UCLA L. REV. 1543, 1550 (2011) (highlighting that immigration violations are often used as a pretext in criminal investigations and, similarly, criminal violations are often used as a pretext in immigration investigations).

²³⁴ See Marouf, *Immigration Law's Missing Presumption*, *supra* note 233, at 989 (observing that the protections and rights guaranteed in criminal proceedings are not guaranteed to noncitizens in removal proceedings). For example, the exclusionary rule does not apply in immigration removal proceedings. See *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1050–51 (1984) (holding that evidence obtained in violation of the Fourth Amendment is not barred from being offered in deportation proceedings). Moreover, the Federal Rules of Evidence do not apply in removal proceedings. See *Matter of Y-S-L-C-*, 26 I&N Dec. 688, 690 (BIA 2015) (noting that "the test for admitting evidence [in removal proceedings] is whether it is probative and its admission is fundamentally fair").

migration court.²³⁵ Whereas officers who prepared a police report can be cross-examined in criminal court to test the reliability of the document, there is no such right to cross-examination in immigration court.²³⁶ Moreover, statements contained within police reports cannot be excluded as hearsay because the Federal Rules of Evidence do not apply in this context.²³⁷ Therefore, on the basis of an unproven police report, immigration judges may make an adverse credibility determination or deny a noncitizen's application for relief.²³⁸

Now that the criminal-to-immigration funnel has been described, we turn to analyzing the challenges and dangers that mentally ill noncitizens face as they encounter each of the criminal and immigration systems.²³⁹

C. The Dangers of the Mental Health Crisis-to-Deportation Funnel for Noncitizens

An obvious danger that noncitizens face following contact with the criminal system is deportation. Less obvious is the trauma of going through removal proceedings and being detained, potentially indefinitely. Even lesser known is that a record of *any contact* with the criminal system—even contact that does not result in criminal prosecution or conviction—may be used against a noncitizen in immigration proceedings (whether in immigration court or before USCIS). Each of these issues is considered in turn here.

First, the primary danger of the funneling from criminal to immigration proceedings is deportation. It is critical to note that any involvement with the criminal system for noncitizens exposes them to ICE through the various initiatives described in the previous Section and may also lead to the denial of relief. Contrary to popular belief, people can lose their lawful status and be deported simply on the basis of a misdemeanor.²⁴⁰ Furthermore, a judge can discretionarily decide to deny noncitizens numerous types of relief absent any contact with the criminal system whatsoever.²⁴¹

²³⁵ Marouf, *Immigration Law's Missing Presumption*, *supra* 233, at 1033.

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ See *id.* at 1033–34 (stating that immigration judges often rely on mere arrests or charges, even without convictions, as negative factors in their credibility or discretionary determinations). Forms of relief in removal proceedings include cancellation of removal, adjustment of status, asylum, withholding of removal, protection under the Convention Against Torture, and waivers of removability grounds. *Id.* at 994.

²³⁹ See *infra* notes 240–284 and accompanying text.

²⁴⁰ See Roberts, *supra* note 206, at 297–303 (giving examples of noncitizens deported, or nearly deported, due to misdemeanor convictions, including minor drug offenses).

²⁴¹ See Shoba Sivaprasad Wadhia, *Darkside Discretion in Immigration Cases*, 72 ADMIN. L. REV. 367, 369, 372–75 (2020) (condemning the discretion immigration adjudicators can use to deny relief such as cancellation of removal or asylum despite the fact that the noncitizen satisfies the federal statutory criteria to obtain such relief).

Moreover, a noncitizen's disability can be considered a negative factor in immigration proceedings. As mentioned above, one of the grounds of inadmissibility bars noncitizens who have certain physical or mental disorders from being admitted to the United States.²⁴² Alternatively, the "public charge" rule can also lead to the exclusion of people with disabilities. In making "public charge" determinations, immigration officials can use any information—including information from a medical examination—to determine whether an immigrant is likely to become reliant on government resources at any point in the future.²⁴³ Thus, disability can be taken into account in these determinations, resulting in the exclusion or deportation of people with disabilities from the United States.²⁴⁴

Deportation can be especially harsh for mentally ill noncitizens. Exact numbers of how many deported people have mental disabilities are not available, possibly due to a lack of governmental record-keeping or a lack of public access to the information.²⁴⁵ The ACLU estimates that tens of thousands of

²⁴² INA § 212(a)(1)(A)(iii), 8 U.S.C. § 1182 (a)(1)(A)(iii) (providing that a person with certain physical or mental disorders that may pose, or ever has posed, a risk of harm to anyone is excludable from the United States). Earlier immigration laws excluded anyone deemed to be a "lunatic, idiot, or any person unable to take care of himself or herself without becoming a public charge." *See* An Act to Regulate Immigration, Pub. L. No. 47-376, § 2, 22 Stat. 214, 214 (1882) (explaining that a noncitizen found to have such characteristics would not be allowed on land).

²⁴³ *See* Medha D. Makhoul, *Destigmatizing Disability in the Law of Immigration Admissions*, in *DISABILITY, HEALTH, LAW, AND BIOETHICS* 187, 193 (I. Glenn Cohen, Carmel Shachar, Anita Silvers & Michael Ashley Stein eds., 2020) (defining a "public charge" as someone who is "likely to become 'primarily dependent on the government for subsistence, as demonstrated by either (i) the receipt of public cash assistance for income maintenance, or (ii) institutionalization for long-term care at government expense'" (quoting Field Guidance on Deportability and Inadmissibility on Public Charge Grounds, 64 Fed. Reg. 28689, 28689 (Mar. 26, 1999))).

²⁴⁴ *See id.* (explaining that immigration officials can use a medical examination to assess the likelihood that a noncitizen will be a public charge, and that if the examination reveals a disability, the official may accordingly decide to exclude that noncitizen under the public charge rule).

²⁴⁵ *See* SARAH MEHTA, HUM. RTS. WATCH & ACLU, *DEPORTATION BY DEFAULT: MENTAL DISABILITY, UNFAIR HEARINGS, AND INDEFINITE DETENTION IN THE US IMMIGRATION SYSTEM* 16–17 (2010), https://www.hrw.org/sites/default/files/reports/usdeportation0710webwcover_1_0.pdf [<https://perma.cc/E3WU-E6CD>] (noting that neither the Executive Office for Immigration Review nor ICE keeps track of the number of noncitizens with mental disabilities that appear before them or that are in ICE detention). Some organizations have attempted to obtain information using FOIA, prompting varying results. *Id.* at 16. The Department of Immigrant Health Services compiles some data on the health status, including the mental illnesses, of detainees. *See id.* at 16–17 (stating that in 2008, there were 378,582 people in ICE detention, and "between 38,000 and 60,000 detainees had some kind of encounter with the mental health system"). In 2022, ICE announced a Directive providing for the "identification, diagnosis, treatment, and monitoring of individuals with serious mental disorders or conditions and/or who are determined by an immigration judge . . . to be incompetent . . ." U.S. IMMIGR. & CUSTOMS ENF'T, ICE DIRECTIVE 11063.2, IDENTIFICATION, COMMUNICATION, RECORD-KEEPING, AND SAFE RELEASE PLANNING FOR DETAINED INDIVIDUALS WITH SERIOUS MENTAL DISORDERS OR CONDITIONS AND/OR WHO ARE DETERMINED TO BE INCOMPETENT BY AN IMMIGRATION

people with mental disabilities appear in immigration proceedings each year.²⁴⁶ Although much of the discourse on immigration is silent with respect to people with disabilities, this population has additional reasons for wanting or needing to stay in the United States. For instance, noncitizens who are deported may be unable to access necessary mental health care in their countries of origin. This is particularly important for asylum seekers who fear persecution and torture on the basis of their mental illness. Even if a person proves that it is more likely than not that they will be persecuted in their country of origin, thus warranting the granting of their asylum application, they can still be deported because of a criminal conviction.²⁴⁷

Another common danger posed to mentally ill noncitizens is that immigration detention deprives them of their liberty.²⁴⁸ On contact with immigration enforcement, a person may or may not be taken into immigration custody. In March 2024, there were 8,705,389 removal proceeding cases.²⁴⁹ Of those, 1,665,671 people were “Detained,” 1,035,536 were “Released” (meaning initially detained, but eventually released from custody), and 6,003,775 were “Never Detained.”²⁵⁰

In terms of length of detention, people with mental disabilities have languished in detention in cases where they have been deemed incompetent by an immigration judge. For example, in 2013, in *Franco-Gonzalez v. Holder*, the U.S. District Court for the Central District of California heard a case involving two main plaintiffs who were detained for an astonishing *five years* at the time the lawsuit was filed—a result of the immigration court deeming them incompe-

JUDGE 1 (2022), <https://www.ice.gov/doclib/news/releases/2022/11063-2.pdf> [<https://perma.cc/GVV5-W59E>].

²⁴⁶ See MEHTA, *supra* note 245, at 17 (approximating that tens of thousands of noncitizens in ICE detention suffer from mental illnesses).

²⁴⁷ Fatma Marouf, *Assumed Sane*, 101 CORNELL L. REV. ONLINE 25, 38 (2016).

²⁴⁸ See *Immigration Detention Is Harmful to Health—Alternatives to Detention Should Be Used*, WORLD HEALTH ORG. (May 4, 2022), <https://www.who.int/europe/news/item/04-05-2022-immigration-detention-is-harmful-to-health---alternatives-to-detention-should-be-used> [<https://perma.cc/67N5-862T>] (considering the negative effects that the deprivation of liberty through immigration detention has on migrants). CBP detains individuals apprehended at or near borders and ports of entry. See Press Release, U.S. Customs and Border Patrol, CBP Announces Opening of New Temporary Processing Facility in El Paso, Texas (Jan. 11, 2023), <https://www.cbp.gov/newsroom/local-media-release/cbp-announces-opening-new-temporary-processing-facility-el-paso-texas> [<https://perma.cc/6TBG-EJVP>]. In this Article, however, references to immigration detention focus on ICE detention, as most incidents involving the mental health crisis-to-deportation funnel occur in the interior of the United States. See *Featured Issue: Immigration Detention and Alternatives to Detention*, AM. IMMIGR. LAWS. ASS’N (Apr. 16, 2024), <https://www.aila.org/library/featured-issue-immigration-detention> [<https://perma.cc/53HF-FZUT>] (observing that most immigration detention facilities “operate through contracts between ICE . . . and localities for the purposes of detaining noncitizens”).

²⁴⁹ *New Proceedings Filed in Immigration Court*, TRAC: IMMIGR. (Mar. 2024), <https://trac.syr.edu/phptools/immigration/ntanew/> [<https://perma.cc/DDS3-TCMM>].

²⁵⁰ *Id.*

tent to proceed yet failing to terminate proceedings or order them released from custody.²⁵¹ Lacking counsel, neither of the plaintiffs had anyone to advocate for them and, consequently, spent more time in detention than they should have.²⁵²

Detention not only deprives noncitizens of their liberty, but it is a practical barrier to the ability to effectively litigate removal proceedings.²⁵³ Detention limits a noncitizen's access to their lawyer, their support networks including medical and mental health providers, and other resources that could aid in preparation of their case.²⁵⁴ Detention, particularly when coupled with inadequate procedural protections in immigration court and exclusionary laws that have a disparate impact on mentally ill noncitizens, creates a perfect storm that can lead to deportation.²⁵⁵

There are rather sparse data on mentally ill individuals in immigration detention.²⁵⁶ In 2023, however, ICE reported that it had provided 49,518 "mental health interventions" that year.²⁵⁷ Although these data do not give a comprehensive sense of the number of people with mental illness in detention, older data may be useful in approximating the overall number. In 2008, the DIHS estimated that 7,571 to 18,929 detainees (about 2 to 5% of immigration detainees) had an SMI.²⁵⁸ Currently, it is estimated that approximately 15% of people in immigration detention have a mental disability.²⁵⁹

²⁵¹ Press Release, ACLU of S. Cal., *Immigrants with Mental Disabilities Lost in Detention for Years* (Mar. 25, 2010), <https://www.aclu.org/press-releases/immigrants-mental-disabilities-lost-detention-years> [https://perma.cc/HPX2-BUVJ]; see *Franco-Gonzalez v. Holder*, No. CV 10-02211, 2013 WL 3674492, at *4 (C.D. Cal. Apr. 23, 2013) (holding that the Rehabilitation Act requires the appointment of counsel for noncitizens deemed incompetent to represent themselves).

²⁵² See Press Release, ACLU of S. Cal., *supra* note 251 ("These men were completely forgotten in the immigration prison system, their cases neglected for years.").

²⁵³ See Aditi Shah, *Without Access to Counsel, Detained Immigrants Face Increased Risks of Prolonged Detention and Unlawful Deportation*, ACLU (June 22, 2022), <https://www.aclu.org/news/immigrants-rights/without-access-to-counsel-detained-immigrants-face-increased-risks-of-prolonged-detention-and-unlawful-deportation> [https://perma.cc/M4LH-UGVD] (discussing how ICE detention facilities create barriers between detainees and their ability to communicate with counsel).

²⁵⁴ See *id.* (recognizing the severe limitations individuals experience while living in detention); *Immigration Detention Is Harmful to Health—Alternatives to Detention Should Be Used*, *supra* note 248 (outlining different negative health implications of immigration detention).

²⁵⁵ See *id.* (stating that detainees without legal counsel are ten times less likely to be successful in their immigration cases and seven times less likely to be freed from detention as compared to detainees with counsel); Sherman-Stokes, *supra* note 32, at 789–91 (highlighting the lack of procedural safeguards present in the immigration proceedings system).

²⁵⁶ See *supra* notes 245–246 and accompanying text (discussing the lack of data on immigration detainees).

²⁵⁷ *ICE Health Service Corps Focused on Best Patient Outcomes*, U.S. IMMIGR. & CUSTOMS ENF'T, <https://www.ice.gov/features/health-service-corps> [https://perma.cc/P78Z-5Q92].

²⁵⁸ MEHTA, *supra* note 245, at 16–17.

²⁵⁹ *Id.* at 17.

The government voluntarily accepts responsibility for the safety and care of noncitizens taken into its custody. Yet, immigration detention centers are notorious for providing inadequate medical care, including mental health care.²⁶⁰ Among these shortcomings are untimely screenings for mental health issues, failure to provide medication either consistently or at all, insufficient staffing, and failure to appropriately respond to detainees' needs (including supporting those who are experiencing mental health crises).²⁶¹

Take the tragic story of Efrain Romero, who had a schizophrenia diagnosis and a history of psychiatric hospitalization.²⁶² ICE officers first interviewed Mr. Romero while he was in custody at the Marion Correctional Treatment Center in Virginia.²⁶³ In 2018, while in criminal custody in North Carolina for a separate occasion, Mr. Romero was transferred directly to ICE custody in Georgia.²⁶⁴ During his time in ICE detention, Mr. Romero reported hallucinations and made many references to his own death to multiple providers.²⁶⁵ He was put in solitary confinement several times during his detention.²⁶⁶ After four months in ICE detention and a twenty-one-day-stint in solitary confinement, Mr. Romero hanged himself.²⁶⁷ ICE's internal review process determined that "staff had falsified documents; improperly dealt with Romero's medication; neglected to follow proper procedures for his care; and improperly placed him in disciplinary solitary confinement" despite receiving a number of warnings that Romero's mental health was declining.²⁶⁸

In fact, the foremost cause of death for detainees is suicide.²⁶⁹ Some detainees are placed on suicide watch in isolation cells yet manage to commit

²⁶⁰ See Tania N. Valdez, *Eliminating the Fugitive Disentitlement Doctrine in Immigration Matters*, 97 NOTRE DAME L. REV. 963, 992–97 (2022) (drawing attention to the negligent and unhealthy conditions present in detention centers); *Immigration Detention Is Harmful to Health—Alternatives to Detention Should Be Used*, *supra* note 248 (noting that immigration detention centers often fail to provide adequate mental health and psychological care and support).

²⁶¹ See *Immigration Detention Is Harmful to Health—Alternatives to Detention Should Be Used*, *supra* note 248 (outlining the harms perpetuated by and in immigration detention centers).

²⁶² See U.S. IMMIGR. & CUSTOMS ENF'T, DETAINEE DEATH REPORT: DE LA ROSA, EFRAIN ROMERO I, <https://www.ice.gov/doclib/foia/reports/ddrDeLaRosaEfrainRomero.pdf> [<https://perma.cc/FT5P-89GC>] (reporting on the death by suicide of a detainee, Efrain Romero, while in ICE detention).

²⁶³ *Id.*

²⁶⁴ See *id.* (reporting that Romero was transferred to Steward Detention Center, located in Georgia).

²⁶⁵ Jose Olivares, *ICE Review of Immigrant's Suicide Finds Falsified Documents, Neglect, and Improper Confinement*, THE INTERCEPT (Oct. 23, 2021), <https://theintercept.com/2021/10/23/ice-review-neglect-stewart-suicide-corecivic> [<https://perma.cc/VX4R-MJX5>].

²⁶⁶ *Id.*

²⁶⁷ *Id.*; U.S. IMMIGR. & CUSTOMS ENF'T, *supra* note 262, at 4.

²⁶⁸ Olivares, *supra* note 265. The Intercept obtained Romero's Detainee Death Review through a FOIA request. *Id.*

²⁶⁹ Tovino, *supra* note 32, at 181. Another source also states that suicide is one of the top causes of death in ICE custody. Nick Schwellenbach, Mia Steinle, Katherine Hawkins & Andrea Peterson,

suicide nonetheless.²⁷⁰ Others request “sick calls” and are never assisted.²⁷¹ Still others have physical medical needs that are not attended to and likely died by suicide because of their unbearable pain.²⁷²

Mr. Romero’s story is also emblematic of another danger in detention for noncitizens with mental illness: the frequent, prolonged, and improper use of solitary confinement. Solitary confinement is the practice of detaining someone in an isolated setting “for 22 hours or more per day without meaningful human contact.”²⁷³ This type of confinement has been widely criticized as exacerbating problems with mental and physical health.²⁷⁴ Mental harms include the development of post-traumatic stress disorder and an increased risk of suicide.²⁷⁵ Physical harms include “brain damage and . . . symptoms such as hallucinations, confusion, heart palpitations, disrupted sleep, and reduced cognitive function.”²⁷⁶ Even for otherwise healthy individuals, solitary confinement can cause “anxiety, panic, withdrawal, hallucinations, self-mutilation, and suicidal thoughts and behaviors.”²⁷⁷ Juan E. Méndez, the former United Nations Special Rapporteur on Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, wrote in a 2011 report that solitary confinement beyond fifteen days is considered prolonged and should not be permitted.²⁷⁸ After fifteen days, there is a risk that the “harmful psychological effects of isolation

Isolated: ICE Confines Some Detainees with Mental Illness in Solitary for Months, PROJECT ON GOV’T OVERSIGHT (Aug. 14, 2019), <https://www.pogo.org/investigation/2019/08/isolated-ice-confines-some-detainees-with-mental-illness-in-solitary-for-months> [https://perma.cc/99JK-MV44].

²⁷⁰ See Tovino, *supra* note 32, at 181–82 (providing examples of detainees who have committed suicide while on suicide watch in detention).

²⁷¹ See *id.* at 174 (telling the story of Jose Lopez-Gregorio, whose sick call went unanswered for seven days).

²⁷² See *id.* at 188–89 (recounting the death of Nery Romero, who committed suicide due to “unbearable, untreated pain” after his detention staff denied him necessary pain medication).

²⁷³ HARVARD IMMIGR. & REFUGEE CLINICAL PROGRAM, HARVARD L. SCH., PEELER IMMIGR. LAB & PHYSICIANS FOR HUM. RTS., “ENDLESS NIGHTMARE”: TORTURE AND INHUMAN TREATMENT IN SOLITARY CONFINEMENT IN U.S. IMMIGRATION DETENTION 6 (2024), <https://phr.org/wp-content/uploads/2024/02/PHR-REPORT-ICE-Solitary-Confinement-2024.pdf> [https://perma.cc/F98S-QGF9] [hereinafter “ENDLESS NIGHTMARE”].

²⁷⁴ See, e.g., Mariposa McCall, *Health and Solitary Confinement: Issues and Impact*, PSYCHIATRIC TIMES (Mar. 16, 2022), <https://www.psychiatristimes.com/view/health-and-solitary-confinement-issues-and-impact> [https://perma.cc/9KMQ-QMZC] (highlighting the negative health impacts of solitary confinement such as premature death, suicide, hallucinations, paranoia, and depression).

²⁷⁵ “ENDLESS NIGHTMARE,” *supra* note 273, at 6.

²⁷⁶ *Id.*

²⁷⁷ Davis v. Ayala, 576 U.S. 257, 289 (2015) (Kennedy, J., concurring) (citing Grassian, *Psychiatric Effects of Solitary Confinement*, 22 WASH. U. J.L. & POL’Y 325 (2006)).

²⁷⁸ U.N. Secretary-General, *Interim Report of the Special Rapporteur of the Human Rights Council on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 9, U.N. Doc. A/66/268 (Aug. 5, 2011).

can become irreversible.”²⁷⁹ Accordingly, the use of solitary confinement on mentally ill noncitizens exacerbates existing mental health conditions.²⁸⁰

Despite the known harms that solitary confinement causes to mental health, a recent report showed that approximately seven hundred solitary confinement placements were for ninety days or less, and forty-two placements spanned beyond a year.²⁸¹ In a study of 8,788 ICE records covering 2018 to 2023, more than forty percent of the detainees in solitary confinement had a mental illness.²⁸² Moreover, “[t]he percentage of immigrants with mental health conditions placed in solitary confinement jumped from 35 percent in 2019 to 56 percent in 2023.”²⁸³ These data demonstrate that immigration authorities use solitary confinement to isolate people with mental illness on a frequent basis, putting them at heightened risk of further harm.²⁸⁴

Now that this Article has considered the myriad problems disabled noncitizens face as a result of criminal system involvement, the following Part turns to an examination of current policing reform efforts.²⁸⁵

III. CURRENT POLICING REFORM EFFORTS

Because the criminal legal system is often the entry point for people with mental illnesses to removal proceedings,²⁸⁶ how a mental health crisis is handled is a critical moment of intervention. Whereas the mission of a larger project may propose dismantling the criminal, policing, and immigration systems, this Part assumes their continued existence but with an eye toward reform that protects the lives of mentally ill noncitizens right now.

Section A of this Part considers the importance of policing reforms in general and contemplates the details of three main methods of reform.²⁸⁷ In light of the various approaches to serve mentally ill noncitizens discussed in Section A, this Article nonetheless argues that policing reform is crucial.²⁸⁸ The

²⁷⁹ *Id.*

²⁸⁰ See McCall, *supra* note 274 (“Those without preexisting mental illness may experience a deterioration in mental health, and those with mental health conditions often decompensate and cycle from suicide watch to psychiatric hospital and back to [solitary confinement].”).

²⁸¹ “ENDLESS NIGHTMARE,” *supra* note 273, at 2; see Andrea Castillo, *ICE Kept a California Immigrant in Solitary Confinement for Two Years, Study Finds*, L.A. TIMES (Feb. 6, 2024), <https://www.latimes.com/politics/story/2024-02-06/ice-immigrants-in-solitary-confinement> [<https://perma.cc/CD2Q-XRZD>] (reporting on ICE’s use of solitary confinement).

²⁸² “ENDLESS NIGHTMARE,” *supra* note 273, at 17.

²⁸³ *Id.*

²⁸⁴ See *id.* (noting that immigration detention officials often use a detainee’s mental health conditions to place them in solitary confinement despite the known negative consequences of doing so).

²⁸⁵ See discussion *infra* Part III.

²⁸⁶ See discussion *supra* Part II.B (discussing the mental health crisis-to-deportation funnel).

²⁸⁷ See *infra* notes 294–301 and accompanying text.

²⁸⁸ See *infra* notes 294–301 and accompanying text.

subsequent Sections in this Part explore current attempts at such policing reform.²⁸⁹ Section B discusses the efficacy of diversion programs for noncitizens.²⁹⁰ Section C explores the benefits and shortcomings of the civilian first responder approach through case studies.²⁹¹ Section D examines CIT programs.²⁹² Finally, Section E reflects on the takeaways from current policing reform efforts.²⁹³

Police departments currently employ three main methods in responding to situations where mental health is a factor: (1) diversion to treatment; (2) sending civilian responders, including peers, in lieu of police whenever possible; and (3) enhanced and widespread race-conscious CIT for law enforcement officers. This Part discusses each as outlined above and draws attention to their inadequacies.

Notably, it does not appear that existing proposals focus on, or even acknowledge, the unique impact of policing on noncitizens. Thus, as a first step, reforms should be constructed in a way that acknowledges and specifically considers the needs of noncitizens.

A. Why Policing Reform Is Necessary Despite Other Approaches

The ineffective and harmful approaches to handling mental health crises, particularly for noncitizens, are multi-faceted. As described in this Article, numerous actors are involved from the healthcare, policing, and immigration systems. Thus, solutions also must be multi-faceted.

First, improving the mental health care system is an important part of the solution. Although this is a central goal, those solutions are best left to the mental health experts and include proposals such as increasing hospital beds (as opposed to jail beds), combining medication and psychotherapy, and focusing on healing and prevention as opposed to only responding to crises.²⁹⁴ Other proposals specific to noncitizens include reforms to federal and state insurance schemes to expand coverage, including to people who are undocumented or in temporary statuses.²⁹⁵ Although these solutions are outside the scope of this Article, they are important to name nonetheless.

Second, civil rights laws could play a role in compensating noncitizens whose constitutional rights have been violated, including following incidents

²⁸⁹ See *infra* notes 302–407 and accompanying text.

²⁹⁰ See *infra* notes 302–310 and accompanying text.

²⁹¹ See *infra* notes 311–363 and accompanying text.

²⁹² See *infra* notes 364–393 and accompanying text.

²⁹³ See *infra* notes 395–407 and accompanying text.

²⁹⁴ INSEL, *supra* note 56, at 238–41.

²⁹⁵ See Moore, *supra* note 81, at 96, 114 (explaining how various states have taken the initiative to expand insurance coverage to certain noncitizens, but reforms on the federal level seem unlikely).

involving excessive force.²⁹⁶ Nevertheless, the qualified immunity doctrine has greatly eroded the efficacy of civil rights laws,²⁹⁷ acting as an “absolute shield for law enforcement officers” that “tells officers that they can shoot first and think later” and, ultimately, avoid accountability.²⁹⁸ Most critically for noncitizens, civil rights lawsuits do not provide any remedy that protects from deportation.²⁹⁹ Other approaches could include amendments to existing disability civil rights laws, namely the ADA and the Rehabilitation Act of 1973, geared toward protecting noncitizens.³⁰⁰ Although such amendments, which could mandate CIT or expand protections during arrest,³⁰¹ would be useful, they do not necessarily stop the contact with law enforcement that begins the mental health crisis-to-deportation funnel for noncitizens.

For these reasons, the most effective approach within the scope of this Article focuses on police reform.

B. Diversion

“Diversion,” or an intervention that diverts someone away from traditional criminal proceedings, is sometimes offered as a solution to the overcriminalization of mental health crises.³⁰² Yet depending on the type, diversion may not achieve the desired outcome of avoiding negative immigration consequences and is another area where noncitizens have been overlooked.

For example, one approach to “diversion” proposes an increase in the use of court diversionary programs for mental health-related crimes (including drug crimes).³⁰³ But depending on how “diversion” programs operate in a given jurisdiction, a diversion may still be considered a conviction for immigration purposes. For example, if a diversion requires entry of a guilty plea (also called a “deferred judgment” in some jurisdictions), that crime will be consid-

²⁹⁶ See *Felder v. Casey*, 487 U.S. 131, 139 (1988) (stating that federal and state courts have concurrent jurisdiction over 42 U.S.C. § 1983 claims).

²⁹⁷ Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797, 1801 (2018) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)).

²⁹⁸ *Kisela v. Hughes*, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting).

²⁹⁹ See, e.g., *Felder*, 487 U.S. at 141 (observing that § 1983 provides compensatory relief).

³⁰⁰ See Schlanger et al., *supra* note 169, at 249–66 (arguing that the ADA and Rehabilitation Act of 1973 already require alternatives to immigration detention for noncitizens with mental disabilities).

³⁰¹ See Campbell, *supra* note 68, at 319, 330 (arguing that Title II of the ADA should apply to arrests to limit fatal police encounters for people in mental health crises). One scholar has argued that “[a]lthough Title II does not currently require police departments to provide CIT or mental health training to their officers, interpreting Title II to require such training would best serve the ADA’s purpose of protecting persons experiencing mental illness from discrimination.” *Id.* at 363.

³⁰² See, e.g., Talia Peleg, *The Call for the Progressive Prosecutor to End the Deportation Pipeline*, 36 GEO. IMMIGR. L.J. 141, 200–01 (2021) (discussing diversion toward mental health and drug treatment courts but noting that diversion must be pre-plea to avoid immigration consequences).

³⁰³ Moore, *supra* note 81, at 117–18.

ered a “conviction” for immigration purposes—even if the crime is later expunged and sealed under state law.³⁰⁴ Therefore, this type of diversion may subject a person to deportation. Additionally, diversion in this context means that there is a record of a noncitizen’s involvement in the criminal system. As discussed in Section B of Part II, there can be negative immigration consequences based solely on involvement with the criminal system absent any charges or a conviction.³⁰⁵

Another more promising approach to diversion is to divert people suffering from mental illness away from the criminal system entirely. Avoiding police reports, arrests, and prosecutions would have a favorable impact on noncitizens. Programs focused on this sort of diversion generally aim to divert people toward mental health treatment. One example is the Substance Abuse and Mental Health Services Administration (SAMHSA), which issues grants to law enforcement agencies to establish or promote programs that divert mentally ill adults away from the criminal system and toward community-based services.³⁰⁶

SAMHSA’s Sequential Intercept Model offers a clear picture of how a mentally ill person interacts with the criminal legal system by identifying several moments when a person could be instead diverted to mental health services.³⁰⁷ These points of intervention are: (1) providing community services to people before there is ever a need to contact 911; (2) having law enforcement connect people to treatment rather than arresting them; (3) having jail staff or courts divert to treatment early on in a person’s case; (4) assisting with re-entry to the community by connecting the person to mental health services after release from jail; and (5) employing “community-based criminal justice supervi-

³⁰⁴ See INA § 101(a)(48)(A), 8 U.S.C. § 1101(a)(48)(A) (defining the meaning of “conviction” for immigration proceedings purposes). The INA does not require a “formal judgment of guilt” for a crime to constitute a “conviction.” *Id.* Rather, there is a conviction where:

- (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or *nolo contendere* or has admitted sufficient facts to warrant a finding of guilt, and
- (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien’s liberty to be imposed.

Id. (emphasis added). Thus, even where the state does not recognize a diversion as a conviction, it may still be considered a conviction for federal immigration purposes. *See id.* (broadening the definition of a “conviction”).

³⁰⁵ See discussion *supra* Part II.B.

³⁰⁶ Notice of Funding Opportunity: Behavioral Health Partnership for Early Diversion of Adults and Youth, SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., <https://www.samhsa.gov/grants/grant-announcements/sm-23-012> [<https://perma.cc/JR2J-C7SP>] (June 12, 2023).

³⁰⁷ See *The Sequential Intercept Model*, SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., <https://www.samhsa.gov/criminal-juvenile-justice/sim-overview> [<https://perma.cc/DSY3-62LV>] (Sept. 27, 2022) (seeking to avoid contact with law enforcement and instead promote diversion to local care services).

sion” to avoid recidivism.³⁰⁸ Interventions at points (1) and potentially (2) are likely to be effective in avoiding immigration consequences, as they largely avoid law enforcement contact and the creation of a criminal record altogether.

Although diversion itself is beneficial in some regards, diverting noncitizens to mental health care is only as effective as the services they can receive. The current crisis of care—which includes discrimination, stigma around seeking care, poor delivery of services, lack of focus on prevention, and the prioritization of treating crises as they arise rather than aiming for the individual’s full recovery—will continue to pose a serious barrier until reforms to the mental health care system are undertaken.³⁰⁹ Moreover, lack of access to insurance and longer-term care programs is a serious barrier for noncitizens in particular, especially those who are undocumented. Federal and state laws barring noncitizens from access to insurance and public benefits must be amended to guarantee access for all.³¹⁰

C. Civilian First Responders

A growing movement in jurisdictions around the country is the implementation of programs where service providers, rather than police, respond to a mental health crisis.³¹¹ It does not appear that any of these programs are geared toward addressing the needs of noncitizens specifically. Thus, some recommendations to improve these programs, with specific consideration to noncitizens, are discussed in Section E of this Part III.³¹²

³⁰⁸ *Id.*

³⁰⁹ See discussion *supra* Part I.B (discussing the mental health crisis in the United States and the factors that contribute to the exacerbating crises among noncitizens).

³¹⁰ See Moore, *supra* note 81, at 93–94, 96 (discussing PRWORA’s limitation on noncitizens’ access to care and noting that Illinois, Massachusetts, New York, and Pennsylvania also have Medicaid programs with high levels of access for noncitizens); Personal Responsibility and Work Opportunity Reconciliation Act of 1996, 8 U.S.C. § 1612 (a)(1)–(3) (stating that a “qualified alien” is ineligible for Federal programs, defined as the SSI and food stamps programs). For a discussion of what it would take to change the national conversation around undocumented noncitizens’ access to healthcare benefits, see generally Matthew, *supra* note 91 (applying social psychologists’ Group Identity Model to reformulating the public perception that immigration is an “us versus them” issue by emphasizing commonalities between citizens and noncitizens and highlighting “shared objectives, needs, and priorities”).

³¹¹ See, e.g., Quattlebaum & Tyler, *supra* note 33, at 1034 (discussing different ways in which police departments can collaborate with “nonpolicing agencies” and other sectors to respond to mental health calls); Friedman, *Amid Calls to ‘Defund,’ How to Rethink Policing*, *supra* note 120 (“We need a whole new concept of first responders, on the model of emergency room doctors, with generalist professionals, trained to diagnose, stabilize and resolve situations as best they can but to call in specialists if needed.”). But see KABA & RITCHIE, *supra* note 2, at 148–51 (cautioning against programs that send civilian responders like social workers to crises and merely replace police with a form of “soft policing”).

³¹² See discussion *infra* Part III.E.

An early and ongoing criticism of these programs is that the service providers are in danger when law enforcement do not accompany them; this concern is often based on a misperception that being a police officer is one of the most dangerous jobs.³¹³ Currently, law enforcement officers spend only four percent of their time handling violent crimes.³¹⁴ Bringing other providers to handle incidents related to mental illness, homelessness, drug overdoses, and other similar issues would allow law enforcement to focus on other parts of their jobs.³¹⁵

Proponents of the civilian first responder approach highlight various benefits of these programs; these benefits include minimizing violent interactions with police, directing people away from jail and to social services, and allowing police to turn their attention to more pressing matters.³¹⁶ Another often-cited benefit of first responder programs is the cost savings to localities and states because it is expensive to house people in jails and emergency rooms.³¹⁷ The subsections below examine how a few of these first responder programs operate in order to better understand why some deem them valuable.

³¹³ See Frank Castro, *Cops: The Myth of the 'Most Dangerous Job'*, MEDIUM (Dec. 27, 2014), <https://medium.com/@FrankCastro/cops-the-myth-of-the-most-dangerous-job-americanawakiewakie-3098f780e439> [<https://perma.cc/8MXC-CYUW>] (addressing the misconception that police officers have one of the most dangerous jobs). Indeed, “[a] cop is far more likely—8.5 times—to kill you than you are to kill a cop.” *Id.* According to the Bureau of Labor, being a police officer is number eighteen on the list of deadliest jobs. Andy Kiersz & Madison Hoff, *The 34 Deadliest Jobs in America*, BUSINESS INSIDER, <https://www.businessinsider.com/the-most-dangerous-jobs-in-america-2018-7> [<https://perma.cc/5GEK-FGKU>] (Dec. 16, 2021) (citing 2020 statistics from the Bureau of Labor).

³¹⁴ Jeff Asher & Ben Horwitz, *How Do the Police Actually Spend Their Time?*, N.Y. TIMES, <https://www.nytimes.com/2020/06/19/upshot/unrest-police-time-violent-crime.html> [<https://perma.cc/3TZ8-ADAC>] (Nov. 8, 2021).

³¹⁵ See *id.* (explaining that there has been a push to divert some of these responsibilities and investments to actors outside of the police force). This initiative gained mass attention following the murder of George Floyd. *Id.*

³¹⁶ Christie Thompson, *This City Stopped Sending Police to Every 911 Call*, MARSHALL PROJECT (July 24, 2020), <https://www.themarshallproject.org/2020/07/24/crisisresponders> [<https://perma.cc/2CVX-UCPK>].

³¹⁷ See WHITE BIRD CLINIC, CRISIS ASSISTANCE HELPING OUT ON THE STREETS: MEDIA GUIDE 2020, at 1, 5 (2020), <https://whitebirdclinic.org/wp-content/uploads/2020/06/CAHOOTS-Media-Guide-20200626.pdf> [<https://perma.cc/NXE4-4KNM>] [hereinafter WHITE BIRD CLINIC] (discussing the substantial cost savings to the city of Eugene as a result of their community-based first response program); see, e.g., Kristen Hwang & Nigel Duara, *As California Closes Prisons, the Cost of Locking Someone up Hits New Record at \$132,860*, CAL MATTERS (Jan. 23, 2024), <https://calmatters.org/justice/2024/01/california-prison-cost-per-inmate/> [<https://perma.cc/8GAK-ZWQG>] (explaining the surge in the price it costs to house someone in California prisons). See generally Joseph Vanable, *The Cost of Criminalizing Serious Mental Illness*, NAT'L ALLIANCE ON MENTAL ILLNESS (Mar. 24, 2021), <https://www.nami.org/Blogs/NAMI-Blog/March-2021/The-Cost-of-Criminalizing-Serious-Mental-Illness> [<https://perma.cc/7T69-9YCD>] (highlighting that for an adult with a mental illness, “the cost of 35 to 83 days in prison would provide the financing of a hospitalization that would have a better chance of bringing about recovery.”).

1. Crisis Assistance Helping Out on the Streets: Eugene, Oregon

On the front end of the movement toward civilian first responder programs was Eugene, Oregon's Crisis Assistance Helping Out on the Streets (CAHOOTS) program. The White Bird Clinic founded this program in 1989, and the Eugene government funds it.³¹⁸ It is self-described as "an innovative community-based public safety system to provide mental health first response for crises involving mental illness, homelessness, and addiction."³¹⁹ The CAHOOTS system dispatches a two-person team—a medical professional (either an Emergency Medical Technician (EMT), paramedic, or nurse) and a mental health worker experienced in handling crisis situations.³²⁰ CAHOOTS team members are not trained as law enforcement officers and are unarmed.³²¹ Therefore, they cannot arrest anyone or force someone to accept treatment.³²² Team members receive over five hundred hours of training and learn crisis intervention and de-escalation techniques.³²³

In 2019, CAHOOTS reported receiving about twenty-four thousand calls that year, and only about 150 of those calls required police assistance.³²⁴ CAHOOTS teams respond to calls regarding "welfare checks, mental health episodes, public intoxication, or death notices," among others.³²⁵ Calls are routed to CAHOOTS through one of two pathways: from the normal 911 system or from the police department's non-emergency number.³²⁶ Dispatchers have been trained to identify "non-violent situations with a behavioral health component" and direct such calls to CAHOOTS.³²⁷

Some critics have taken issue with the program.³²⁸ First, critics find fault with CAHOOTS for its connection to the police department.³²⁹ They point out

³¹⁸ WHITE BIRD CLINIC, *supra* note 317, at 1–2.

³¹⁹ *Id.* at 1.

³²⁰ *Id.*

³²¹ *Id.* at 2.

³²² *See id.* (noting that the CAHOOTS team does not possess the powers police have).

³²³ *Id.*

³²⁴ *Id.* at 3.

³²⁵ Thompson, *supra* note 316.

³²⁶ WHITE BIRD CLINIC, *supra* note 317, at 1.

³²⁷ *Id.*

³²⁸ *See* Alan Torres, *CAHOOTS Overburdened, City Emergency Response Uncoordinated, Study Finds*, DAILY EMERALD (Feb. 1, 2023), https://www.dailymerald.com/news/cahoots-overburdened-city-emergency-response-uncoordinated-study-finds/article_9c39690c-a296-11ed-bcb9-a35fd62db24c.html [<https://perma.cc/T33E-QEMG>] (noting that the CAHOOTS program has received mixed reviews).

³²⁹ *See* Jackson Beck, Melissa Reuland & Leah Pope, *Case Study: CAHOOTS Eugene, Oregon*, VERA INST. OF JUST. (Nov. 2020), <https://www.vera.org/behavioral-health-crisis-alternatives/cahoots> [<https://perma.cc/FQH9-ZYPL>] (noting that some communities have a distrustful relationship with law enforcement).

that distrust between the police and communities of color has meant that fewer people of color feel safe accessing the program.³³⁰ Second, a recent study found that not only is CAHOOTS overburdened with calls, but the program also experiences coordination issues that result in multiple departments sometimes answering the same call.³³¹

Despite these criticisms, the program has received praise for providing necessary services to numerous community members.³³² With respect to cost-saving, CAHOOTS is estimated to conserve about \$8.5 million in public safety spending for the city of Eugene annually.³³³ Additionally, the program's provided medical services saved approximately fourteen million dollars in emergency medical systems costs in 2019 alone.³³⁴

One of the CAHOOTS program's most significant impacts is its nationwide influence.³³⁵ As one of the earliest civilian response efforts, CAHOOTS consults with other cities on developing their own programs.³³⁶ Because the strengths and challenges of each community are different and resources also vary, each program must be tailored to the individual community in which it operates.³³⁷ CAHOOTS has collaborated with Olympia, Washington and Denver, Colorado, and these two programs are addressed below.³³⁸

2. Support Team Assisted Response: Denver, Colorado

Denver's program, Support Team Assisted Response (STAR), was established in 2020.³³⁹ It operates similar to CAHOOTS; STAR teams consist of a behavioral health clinician and either a paramedic or EMT and respond to low-

³³⁰ See *id.* (recognizing that the program's successful partnership with the local police department is partially influenced by the community demographic being about eighty percent white). It is a privilege to have a healthy relationship with the police, and this privilege is often absent in communities of color. *Id.*

³³¹ Torres, *supra* note 328.

³³² See Beck et al., *supra* note 329 (pointing out how CAHOOTS has received particular attention in conversations across the country about police alternatives to mental health crises or behavioral matters).

³³³ WHITE BIRD CLINIC, *supra* note 317, at 1.

³³⁴ *Id.* at 5.

³³⁵ *Id.* at 1 (stating that CAHOOTS consults and guides communities across the nation in implementing their own first response alternatives).

³³⁶ *Id.* at 1, 6.

³³⁷ See *id.* (noting that the CAHOOTS program would not be effective if replicated without modification in other jurisdictions).

³³⁸ *Id.*; see *infra* notes 339–363 and accompanying text.

³³⁹ 9-1-1 COMMUNITY DENVER PUB. SAFETY, SUPPORT TEAM ASSISTED RESPONSE (STAR) 2022 MID-YEAR REPORT 1 (2022), https://www.denvergov.org/files/assets/public/public-health-and-environment/documents/cbh/2022_midyear_starreport_accessible.pdf [<https://perma.cc/56Z6-EYQB>].

risk calls, as identified by a 911 dispatcher.³⁴⁰ STAR is not sent if “someone is injured, a weapon is present, or someone is acting in a violent manner.”³⁴¹ Between January and July 2022, STAR teams responded to 2,837 calls, and no calls resulted in requests for police backup.³⁴² One study found that reported crimes dropped by thirty-four percent during the program’s initial six-month trial period.³⁴³ This amounts to approximately 1,400 fewer crimes as compared to the pre-STAR program rate.³⁴⁴

The Mental Health Center of Denver (MHCD) administers the STAR program in partnership with the Denver Police Department and Denver Sheriff Department.³⁴⁵ Thus, like the CAHOOTS program, STAR has been criticized for its direct relationship with law enforcement.³⁴⁶ Community organizers in Denver hope that the program will eventually be staffed by community-based organizations instead.³⁴⁷

Community members have also criticized the program for leaving them out of program planning and creating a monopoly under the MHCD, rather than involving multiple providers with different specialties as STAR collaborators.³⁴⁸ In fact, the behavioral health system in Colorado, of which MHCD is a part, has come under criticism for failing to serve some of the most at-risk individuals, taking fewer patients, charging higher costs, and lacking Spanish-speaking providers.³⁴⁹ Community members have also complained that sometimes police show up along with STAR—even when a call is low-risk—or that

³⁴⁰ Compare *id.* (explaining the structure of the STAR first response team), with WHITE BIRD CLINIC, *supra* note 317, at 1 (explaining the structure of CAHOOTS).

³⁴¹ 9-1-1 COMMUNITY DENVER PUB. SAFETY, SUPPORT TEAM ASSISTED RESPONSE (STAR) 2022 MID-YEAR REPORT, *supra* note 339, at 1.

³⁴² *Id.*

³⁴³ Krysten Crawford, *A New Stanford Study Shows Benefits to Dispatching Mental Health Specialists in Nonviolent 911 Emergencies*, STANFORD NEWS SERV. (June 8, 2022), <https://news.stanford.edu/press/view/43952> [<https://perma.cc/868R-G96L>].

³⁴⁴ *Id.*

³⁴⁵ CMTY. RES. HUB, STAR PROGRAM EVALUATION 1 (2021), https://wp-denverite.s3.amazonaws.com/wp-content/uploads/sites/4/2021/02/STAR_Pilot_6_Month_Evaluation_FINAL-REPORT.pdf [<https://perma.cc/5NLU-U84Q>].

³⁴⁶ Victoria Carodine, *As STAR Expands, Community Members Feel Left Out of Planning. Here’s Why It Matters.*, ROCKY MOUNTAIN PBS, <https://www.rmpbs.org/blogs/rocky-mountain-pbs/as-star-expands-the-community-feels-left-out-of-planning-heres-why-it-matters> [<https://perma.cc/3WJQ-5A34>] (July 18, 2022). Although CAHOOTS works with the local police department, the community largely makes the program’s decisions, which is a component that critics of STAR believe the Denver program lacks. *Id.*

³⁴⁷ *Id.*

³⁴⁸ *Id.*

³⁴⁹ *Id.*

there are police inside the STAR vehicles.³⁵⁰ These community members have begun calling for transparency and third-party evaluations.³⁵¹

3. Crisis Response Unit: Olympia, Washington

In Olympia, the Crisis Response Unit dispatches “crisis responders” to nonviolent situations where it appears the person is experiencing “mental illness, addiction, or homelessness.”³⁵² Responders are on call between seven a.m. and nine p.m. every day.³⁵³ Once a call is made, the person is then connected with social services.³⁵⁴ As of 2020, the Crisis Response Unit had responded to five hundred requests for support.³⁵⁵ Calls sometimes come from 911 operators, but they more frequently originate from social service providers and police officers.³⁵⁶ An important responsibility of the Crisis Response Unit is to follow up with the people it has assisted.³⁵⁷ For example, the Olympia team takes community members to necessary appointments, helps them find places to stay, and assists them with obtaining identification documents.³⁵⁸

Advocates of the program acknowledge the difficulty of building trust with the community because the Crisis Response Unit is housed within the Olympia Police Department.³⁵⁹ Supporters of this arrangement point out that a benefit of having close ties with a police department is that it is easier for community members to access services such as obtaining identification.³⁶⁰ Nevertheless, this relationship contributes to some community members’ lack of trust in the program.³⁶¹ Moreover, certain community members are unable to join the Unit.³⁶² For example, people with felonies cannot join the Crisis Response Unit as staff; this reality creates a missed opportunity to further build community trust in the program.³⁶³

³⁵⁰ *Id.*

³⁵¹ *Id.*

³⁵² Thompson, *supra* note 316.

³⁵³ *Id.*

³⁵⁴ *See id.* (providing an example of crisis responders responding to a call for a man with suicidal thoughts and transporting him to a hospital for medical care).

³⁵⁵ *Id.*

³⁵⁶ *Id.*

³⁵⁷ *See id.* (highlighting how important follow-ups were after the COVID-19 pandemic when resources and outside assistance became especially limited).

³⁵⁸ *Id.*

³⁵⁹ *Id.*

³⁶⁰ *Id.*

³⁶¹ *See id.* (discussing how the Crisis Response Unit seeks to re-examine its partnership with law enforcement, with particular consideration to the police department’s “history of racial violence”).

³⁶² *Id.*

³⁶³ *See id.*

D. CIT for Law Enforcement Officers

Another commonly proposed policing reform is to enhance officer training around mental health, especially in response to mental health crisis situations. As previously stated, none of the existing training programs appear to focus on crisis intervention pertaining to noncitizens or policing practices within communities with high noncitizen populations.

As a general matter, officers are required to mediate difficult situations and provide social service referrals, both of which require the skill of identifying mental illness or substance use.³⁶⁴ In fact, studies show that more than ninety percent of police officers encounter about six individuals in crisis every month.³⁶⁵ Yet of the topics covered in law enforcement training, the most time is dedicated to topics like investigations, patrol procedures, defensive tactics, firearms training, and constitutional and criminal law.³⁶⁶ Officers only receive an average of sixteen hours of training related to mental illness—a small fraction of the average 833 hours of total training.³⁶⁷

An alternative training method that should be more widely used within police forces is CIT. CIT involves training law enforcement officers to identify and more appropriately respond to mental health calls by learning to understand the signs of mental illness and how to deescalate these kinds of situations.³⁶⁸

The CIT approach requires forty hours of training for officers who volunteer to be part of the program.³⁶⁹ They are trained on identifying signs of mental illness, de-escalation techniques, and other related topics.³⁷⁰ This sort of

³⁶⁴ See Friedman, *Amid Calls to 'Defund,' How to Rethink Policing*, *supra* note 120 (assessing the wide range of issues that police officers encounter and the many skills, including those skills that are social work-like, that these issues necessitate).

³⁶⁵ Jennifer D. Wood, Amy C. Watson & Anjali J. Fulambarker, *The 'Gray Zone' of Police Work During Mental Health Encounters: Findings from an Observational Study in Chicago*, 20 POLICE Q. 81, 82 (2017).

³⁶⁶ EMILY D. BEUHLER, BUREAU OF JUST. STAT., NCJ 255915, STATE AND LOCAL LAW ENFORCEMENT ACADEMIES, 2018—STATISTICAL TABLES 1, 3 (2021), <https://bjs.ojp.gov/sites/g/files/xyckuh236/files/media/document/slleta18st.pdf> [<https://perma.cc/3VFY-QS5H>].

³⁶⁷ *Id.* at 1, 10; see Friedman, *Amid Calls to 'Defund,' How to Rethink Policing*, *supra* note 120 (“We send police officers to deal with too many social problems—substance abuse, mental illness, homelessness, domestic disputes, even civil unrest—for which they are grossly unprepared.”).

³⁶⁸ See *Crisis Intervention Team (CIT) Programs*, NAT’L ALLIANCE ON MENTAL ILLNESS, [https://www.nami.org/Advocacy/Crisis-Intervention/Crisis-Intervention-Team-\(CIT\)-Programs](https://www.nami.org/Advocacy/Crisis-Intervention/Crisis-Intervention-Team-(CIT)-Programs) [<https://perma.cc/32E6-89VM>] (explaining CIT programs and their community-based approach to training for mental health crisis response). The acronym “CIT” is also used to refer to “Crisis Intervention Teams” in jurisdictions that have designated teams of people involved in crisis intervention. *Id.* I use “CIT” more broadly here to include jurisdictions that have (or are contemplating implementing) such training programs for their officers, regardless of whether they have designated crisis teams.

³⁶⁹ Fagan & Campbell, *supra* note 109, at 976–77.

³⁷⁰ *Id.* at 977.

training has lowered both instances of force against people with mental illness and the rate of injuries for officers and contacted individuals alike.³⁷¹

According to Frank Webb, the retired police chief who helped develop the CIT program in Houston, Texas and who trained all Texas police chiefs, there are significant differences in how traditional officer training programs teach concepts versus CIT programs' approaches.³⁷² Mr. Webb states that police officers are generally "trained to be authoritative, physical, and commanding."³⁷³ Yet he notes that those tactics have a tendency to escalate an interaction, making them largely ineffective in situations involving people experiencing a mental health crisis.³⁷⁴ Moreover, surveys of law enforcement officers have demonstrated that officers feel ill-equipped to handle mental health crisis calls.³⁷⁵ As one study reported:

Surveys of officers suggest that they do not feel adequately trained to effectively respond to mental health crises, that mental health calls are very time-consuming and divert officers from other crime fighting activities, and that mental health providers are not very responsive. Officers perceive mental health related calls as very unpredictable and dangerous, which without adequate training in de-escalation, could inadvertently cause them to approach in a manner which escalates the situation.³⁷⁶

CIT may also help ameliorate officers' fear of interacting with mentally ill individuals.³⁷⁷

Of course, CIT programs have their limitations.³⁷⁸ First, CIT is oriented toward training police officers and therefore still involves law enforcement and the accompanying threats of violence, arrest, and criminal prosecution.³⁷⁹ Thus, CIT is not a sufficient approach for ending the mental health crisis-to-deportation funnel. Second, training only goes so far in instances where, for

³⁷¹ *Id.*

³⁷² See Webb, *supra* note 33, at 825 (displaying a chart summarizing the differences between the concepts taught in traditional police training and CIT programs).

³⁷³ *Id.* at 824.

³⁷⁴ *Id.*

³⁷⁵ Amy C. Watson & Anjali J. Fulambarker, *The Crisis Intervention Team Model of Police Response to Mental Health Crises: A Primer for Mental Health Practitioners*, 8 BEST PRACT. MENTAL HEALTH 71, 72 (2012).

³⁷⁶ *Id.* (citations omitted).

³⁷⁷ See *id.* at 72–73 (noting that CIT exposes law enforcement officers to de-escalation procedures, mental health resources, and mental illness symptoms).

³⁷⁸ See Fagan & Campbell, *supra* note 109, at 978 (highlighting potential roadblocks to successfully implementing CIT).

³⁷⁹ See *id.* at 961 (noting that CIT programs have been shown to be ineffective at reducing the overall number of shootings).

example, split-second decision-making means that biases and prejudices influence conduct.³⁸⁰ Studies have noted that it is unclear whether these programs are actually effective in reducing police shootings, particularly when taking race into account.³⁸¹ For example, one study found little evidence that CIT programs reduce racial disparities in shooting deaths.³⁸² Thus, undergoing CIT alone may not actually assist in ameliorating the implicit and explicit biases that lead to the escalation of police-civilian interactions.³⁸³

Third, as discussed above, there are institutional and structural problems with how our medical, policing, and immigration systems handle mental health incidents. CIT focuses on the beliefs and behaviors of individual officers and therefore does not reach structural or institutional problems.³⁸⁴ Critics take issue with CIT's arguably improper focus on individual bias when attempting to address racial discrimination.³⁸⁵ Where people become fixated on "an individual, intent-based understanding of discrimination," they become distracted from recognizing that larger systems carry out subordination as well.³⁸⁶

Although it is important to recognize the limitations of CIT programs, these programs may still help to reduce harmful outcomes for people with mental illness when carried out effectively.³⁸⁷ Research suggests that CIT programs could indeed be effective under certain circumstances.³⁸⁸ For example, some scholars conclude that race-conscious CIT may reduce implicit bias through strategies like debriefing how race may have factored into police stops

³⁸⁰ See *id.* (urging for changes in CIT that specifically take into account race's impact "in the officers' perceptions of risk and their decision-making in potentially dangerous interactions").

³⁸¹ *Id.*

³⁸² *Id.* The researchers in the study recommend race-conscious training as one way to combat disproportionate police killings of mentally ill people of color. *Id.* at 1007–08.

³⁸³ See *id.* at 1006–09 (suggesting additions to CIT programs that would make them more effective and other comprehensive approaches to improving police responses to mental health crises, especially those involving people of color).

³⁸⁴ See Fagan & Campbell, *supra* note 109, at 978, 1008 ("However, even in municipalities with CIT training programs, successful implementation of the programs may be inhibited by 'system- and policy-level obstacles.'" (quoting Mitchel T. Compton et al., *System- and Policy-Level Challenges to Full Implementation of the Crisis Intervention Team (CIT) Model*, 10 J. POLICE CRISIS NEGOT. 72, 72 (2010))); see, e.g., Angela P. Harris & Aysha Pamukcu, *The Civil Rights of Health: A New Approach to Challenging Structural Inequality*, 67 UCLA L. REV. 758, 784 (2020) (discussing civil rights advocates' often limited focus on individually sourced discrimination instead of considering the actual broad scheme of institutional discrimination).

³⁸⁵ See Harris & Pamukcu, *supra* note 385, at 784 (discussing further the general failure of civil rights' advocates to consider racial discrimination with a broader, systemic lens).

³⁸⁶ *Id.*

³⁸⁷ See Watson & Fulambarker, *supra* note 375, at 76 ("While additional research is needed to establish CIT as an Evidence Based Practice, it is arguably the most well known model of collaboration to improve police response to mental health crisis.").

³⁸⁸ *Id.*

and use-of-force incidents.³⁸⁹ Others have suggested that CIT curricula involving solely the passive receipt of information are insufficient; rather, effective CIT programs must include simulated exercises, which are more likely to actually shift biases and change how officers react in emergency situations.³⁹⁰ Such interventions must also address multiple layers of bias (against immigrants, people of color, disabled people, et cetera) in order to be effective.

CIT programs can also have broader benefits because officers may learn to be aware of how a mental health disability can impact a person's conduct, de-escalation methods, and thereby how to handle mental health calls more effectively.³⁹¹ One fourth of the U.S. population is estimated to have a disability.³⁹² CIT programs could help officers learn to be aware of how a disability might be impacting a person's conduct when responding to a call.

Even in jurisdictions where civilian first responder programs are in full operation, there will still be instances in which law enforcement may be called to respond to a scene involving a mental health crisis; for instance, if the person is armed and appears to pose a threat to themselves or others. Therefore, CIT is a proactive measure to ensure that law enforcement officers are equipped, from the very beginning, to accurately assess situations, deescalate where possible, and respond appropriately when determining whether to use force or make an arrest.³⁹³ Jurisdictions should explore broader implementation of CIT, including mandatory trainings for *all* officers, instead of limiting CIT to officers who volunteer. More CIT programs, although an incomplete solution alone, may lessen the risks of violence and unnecessary arrests from law enforcement encounters and benefit society as a whole.

E. Lessons Learned

Follow-up studies on the effectiveness of these programs, reports from community members, and the scholarly literature highlight the lessons learned from the implementation of diversion programs, civilian first responder programs, and CIT as potential avenues for the adequate handling of mental health

³⁸⁹ See Fagan & Campbell, *supra* note 109, at 1008 (presenting the benefits of the incorporation of race-conscious material in CIT curricula).

³⁹⁰ See Harris, *supra* note 59, at 955 n.191 (discussing aesthetics literature that counsels against traditional training models as largely ineffective because they fail to simulate the triggering of emotional responses of police officers during law enforcement encounters).

³⁹¹ See Watson & Fulambarker, *supra* note 375, at 74 (discussing trends in CIT-trained officers effectively diverting individuals to mental health services).

³⁹² *Prevalence of Disability and Disability Types by Urban-Rural County Classification—United States, 2016*, CDC, <https://www.cdc.gov/ncbddd/disabilityandhealth/features/disability-prevalence-rural-urban.html> [<https://perma.cc/3YJ3-F83J>] (Oct. 27, 2021).

³⁹³ See Watson & Fulambarker, *supra* note 375, at 74 (acknowledging CIT's success in training law enforcement to better respond to situations involving an individual with mental illness).

crises. This Section summarizes the lessons and drawbacks of these respective reform efforts.³⁹⁴

The first lesson learned is that programs seeking to address mental health crises must be designed with the particular locality it serves—including both its strengths and challenges—in mind. A one-size-fits-all approach will not be effective.³⁹⁵ Some police departments have dedicated increased resources to mental health and homelessness outreach.³⁹⁶ Others have paired social workers with police when responding to calls—yet as discussed above, the very presence of armed officers can escalate a situation or lead to an arrest, even if the officers have mental health training.³⁹⁷ Accordingly, some community advocates have argued that crisis teams that do not involve law enforcement altogether may prove to be the most beneficial.³⁹⁸ For example, depending on the circumstances, some jurisdictions send only mental health professionals to a scene.³⁹⁹ Others send a mental health professional along with a paramedic where the situation appears to involve more serious medical events.⁴⁰⁰ Of course, a potential challenge with not involving police is that the contacted person may be armed or dangerous, such as when calls involve a suicide risk. Nonetheless, some believe that the dangerousness concern is overstated because existing civilian crisis teams have handled many calls where everyone involved remained safe.⁴⁰¹

Second, dispatchers play a critical role in whatever system is implemented. 911 operators and other dispatchers triage calls, determine what sort of event is occurring, decide who should respond, give dispatched officers an initial impression of what sort of scene they can expect, and deliver important information to the parties involved.⁴⁰² Therefore, comprehensive training of

³⁹⁴ See *supra* notes 395–407 and accompanying text.

³⁹⁵ See WHITE BIRD CLINIC, *supra* note 317, at 6 (urging that the implementation of civilian first responder programs cannot follow a “cookie-cutter approach”).

³⁹⁶ Thompson, *supra* note 316.

³⁹⁷ See *id.* (“But advocates of alternatives say even a well-trained, armed officer can escalate a situation or land someone in jail.”).

³⁹⁸ See, e.g., *id.* (“Think about somebody whose community has experienced oppression by law enforcement. There’s so much more potential for that interaction to go in a really negative direction.” (quoting Tim Black, a director at CAHOOTS)).

³⁹⁹ See, e.g., *Albuquerque Community Safe*, CITY OF ALBUQUERQUE, <https://www.cabq.gov/acs/our-response> [https://perma.cc/WB8Z-9KBC] (describing Albuquerque’s use of Behavioral Health Responders).

⁴⁰⁰ See *id.* (noting that CAHOOTS “dispatches a nurse or EMT alongside an experienced mental health worker” for certain kinds of calls).

⁴⁰¹ See, e.g., Thompson, *supra* note 316 (noting, for example, that the Olympia, Washington team reported that there had been zero reports of assaults on crisis team members).

⁴⁰² See Campbell, *supra* note 68, at 362–63 (recognizing the role dispatchers play in assessing crisis calls).

dispatchers is also a critical component of an effective mental health crisis response program.⁴⁰³

A third lesson learned is that it is wise to avoid having first responders directly working through police departments. Having separate organizations that independently collaborate with police departments can help build trust with the community.⁴⁰⁴ For example, if the person in need of mental health intervention has an addiction to an illegal substance or engages in sex work, they may be more willing to speak openly and without fear of arrest if law enforcement is not involved in the crisis response.

Fourth, the implementation of these alternative methods requires the redirection of public funds away from law enforcement and toward public health services and social workers. In response to critics' concerns about the cost of these reform efforts, it is important to note the current substantial cost of policing and incarceration.⁴⁰⁵ Mental health crisis response programs have the potential to reduce costs as compared to current law enforcement efforts.⁴⁰⁶ For example, the government spends approximately \$182 billion per year on incarceration, release programs such as parole and probation, court costs, policing, and health care in prisons.⁴⁰⁷ Funding other services may require divesting a fraction of the police budget, but, as this Article argues, these alternative methods to mental health crisis response would be more effective and beneficial to society as a whole.

IV. A PATH FORWARD

In response to the continuing mental health care crisis and growing incidents of violence against people with mental illness, this Part offers suggestions for legislators, policymakers, law enforcement agencies, and community advocates who are interested in police reforms that account for noncitizens with disabilities.⁴⁰⁸ Diversion, civilian first responder programs, and CIT all

⁴⁰³ See *id.* at 362 (advocating for training for both officers and all other individuals that play a role in crisis response).

⁴⁰⁴ See, e.g., Carodine, *supra* note 346 (describing the erosion of rapport with the community when police officers emerge from vans that should only contain alternative responders).

⁴⁰⁵ See PETER WAGNER & BERNADETTE RABUY, PRISON POL'Y INITIATIVE, FOLLOWING THE MONEY OF MASS INCARCERATION (2017), <https://www.prisonpolicy.org/reports/money.html> [<https://perma.cc/LT74-X7TJ>] (discussing the substantial costs that are required to maintain the prison and criminal justice systems in the United States). The Bureau of Justice estimates a lower annual cost of eighty-one billion dollars, but that amount only includes the costs of running prisons, jails, and parole and probation programs. *Id.*

⁴⁰⁶ See WHITE BIRD CLINIC, *supra* note 317, at 1 (recognizing the cost savings of the CAHOOTS program).

⁴⁰⁷ WAGNER & RABUY, *supra* note 405.

⁴⁰⁸ See *infra* notes 407–460 and accompanying text.

present opportunities to examine and reform aspects of the criminal legal system that have a direct impact on noncitizens with disabilities. As they exist now, however, they fail to give particular attention to how best to serve the needs and concerns of mentally ill noncitizens. Accordingly, Section A of this Part begins with general recommendations on how to improve these existing approaches.⁴⁰⁹ Then, Section B offers a set of Principles that can be used to evaluate any future proposed reforms and focus on the unique needs of noncitizens.⁴¹⁰

A. General Recommendations for Existing Reform Efforts

Current efforts to reduce negative policing outcomes for people experiencing mental health crises include diversion, civilian first responder programs, and CIT.⁴¹¹ As explored in this Article, these programs may be helpful to noncitizens, but they all lead to the same conclusion—the most effective way to reduce negative immigration consequences for noncitizens with mental illness is to limit their contact with law enforcement altogether.

Accordingly, given that CIT approaches still require law enforcement officers' involvement in mental health responses, CIT alone does not help noncitizens avoid police contact. Additionally, there is conflicting evidence on whether CIT reduces the likelihood of arrest.⁴¹² For these reasons, noncitizens may still be subjected to the mental health crisis-to-deportation funnel when CIT is the only reform used. Accordingly, CIT alone is not sufficient for protecting noncitizens' interests.

Similarly, diversion that occurs after an arrest will also not be adequate in avoiding immigration consequences for noncitizens, as explained *supra*.⁴¹³ The most effective diversionary programs for noncitizens will avoid all law enforcement contact, such as SAMHSA's suggested approach of providing preventive care to community members.⁴¹⁴ The second most effective model SAMHSA suggests is to have law enforcement connect people to treatment in

⁴⁰⁹ See *infra* notes 411–418 and accompanying text.

⁴¹⁰ See *infra* notes 419–460 and accompanying text.

⁴¹¹ See discussion *supra* Part III (discussing different alternatives to police response and intervention for mental health crises).

⁴¹² Amy C. Watson & Michael T. Compton, *What Research on Crisis Intervention Teams Tells Us and What We Need to Ask*, 47 J. AM. ACAD. PSYCHIATRY L. 422, 423–24 (2019).

⁴¹³ See discussion *supra* Part III.B.

⁴¹⁴ See *The Sequential Intercept Model*, *supra* note 307 (suggesting a model in which individuals are diverted to crisis services without requiring the intervention of law enforcement).

lieu of arrest.⁴¹⁵ This type of diversion, however, still leaves room for law enforcement to exercise discretion, which poses risks for noncitizens.⁴¹⁶

Considering the shortcomings of most CIT and diversion programs in addressing noncitizens' unique needs, civilian first responders present an important opportunity to avoid the harms of reliance on police in mental health incidents. Critically, the most useful civilian first responder programs to noncitizens will avoid sending law enforcement officers at all. Thus, programs that send police officers along with civilian first responders are insufficient. Moreover, in order to maintain community trust, the programs should not be housed within police departments. Although the first responder approach would be most beneficial for noncitizens, other proposals might be worth exploring in jurisdictions that are hesitant to eliminate the use of police in these situations. As an example of such a proposed reform, Professor Barry Friedman has recommended the creation of a new system of "generalist first responders," which are essentially police officers that go to a two-to-four-year program to learn techniques such as "mediation, social work, knowledge of social services, EMT skills."⁴¹⁷ These responders would abide by a central tenet to "do no harm" and be rewarded for avoiding both uses of force and arrests.⁴¹⁸ Such a program would not avoid all contact with law enforcement, but it would at least be a step in the right direction of avoiding the immigration consequences that result from police interactions.

B. Principles for Assessing Proposed Police Reforms

Given the current political climate and recent agitation for change, there is no doubt that more police reform proposals are forthcoming. The effectiveness of the various reforms varies depending on jurisdictional considerations such as geographical location, access to other resources, funding, and so on. Not all programs will be equally effective everywhere. Thus, rather than advocating for the implementation of a specific reform, this Section offers a set of

⁴¹⁵ See *id.* (articulating how law enforcement can divert certain individuals to treatment rather than subjecting them to the criminal justice process).

⁴¹⁶ *Id.* Although the decision of whether to arrest someone is the "discretion that matters" most, it is preferable to avoid presenting the opportunity for police to exercise their discretion in the first place. See Motomura, *supra* note 10, at 1829; *supra* notes 10–12 and accompanying text.

⁴¹⁷ Barry Friedman, *Disaggregating the Policing Function*, 169 U. PA. L. REV. 925, 934, 982 (2021) [hereinafter Friedman, *Disaggregating the Policing Function*] (considering adopting the European countries' requirement that officers attend a multiple-year training program, as opposed to the American approach of allowing officers to take the position after only several weeks of training); Friedman, *Amid Calls to 'Defund,' How to Rethink Policing*, *supra* note 120.

⁴¹⁸ Friedman, *Amid Calls to 'Defund,' How to Rethink Policing*, *supra* note 120.

Principles that can be used to assess proposed police reforms with an eye toward interrupting the mental health crisis-to-deportation funnel.⁴¹⁹

1. Principle #1: Recognize the Unique Impact That Any Contact with Law Enforcement Has on Noncitizens

Avoiding contact with the criminal legal system is important for any person experiencing a mental health crisis.⁴²⁰ As described at length in Parts I and II, the criminal system is not only ill-equipped to provide support during mental health crises, but it also poses a risk of violence, criminalization, and other harms for people with disabilities—regardless of whether they are citizens or noncitizens.⁴²¹ Criminalization itself poses multiple dangers, including deprivation of liberty through arrest and incarceration, unduly harsh punishments flowing from a mental health-related incident, and further aggravation of mental health symptoms.⁴²² For example, aggressive policing has been shown to result in worse mental health outcomes for those who encounter the criminal justice system. In a study on the mental health of young men and policing, researchers found that participants who had been stopped and frisked exhibited symptoms of increased trauma and anxiety.⁴²³

For noncitizens, contact with the criminal legal system poses additional problems. As discussed in Part II, any criminal contact can have devastating consequences—from bringing the noncitizen to the attention of ICE to precipitating the denial of relief during immigration proceedings.⁴²⁴ Any criminal system involvement, such as the creation of a police report or an arrest, may expose a noncitizen to immigration enforcement.⁴²⁵ For these reasons, recognizing the unique impact contact with the criminal system has on noncitizens and working to avoid it altogether are key components of any successful proposed solution.⁴²⁶

⁴¹⁹ See notes 420–460 and accompanying text (proposing Principles to apply when assessing police reforms).

⁴²⁰ See discussion *supra* Part II.B (discussing the unique harms noncitizens face because of the significant overlap between the U.S. criminal and immigration systems).

⁴²¹ See discussion *supra* Part I.C, Part II.B (considering all the negative effects, as well as the particular disparate impacts on noncitizens, that the criminal and immigration systems impose on all people).

⁴²² See discussion *supra* Part I.C, Part II.B.

⁴²³ Amanda Geller, Jeffrey Fagan, Tom Tyler & Bruce G. Link, *Aggressive Policing and the Mental Health of Young Urban Men*, 104 AM. J. PUB. HEALTH 2321, 2321–23 (2014).

⁴²⁴ See *supra* notes 203–284 and accompanying text (describing the mental health crisis-to-deportation funnel).

⁴²⁵ See *supra* notes 303–305 and accompanying text.

⁴²⁶ This Principle pertains to contact with law enforcement that might lead to arrest. Sometimes, noncitizens may need to rely on the police for protection or assistance after a crime has been perpetrated against them. Relatedly, police departments are crucial in obtaining law enforcement certifica-

2. Principle #2: Avoid Admissions of Guilt, Convictions (Including Misdemeanors), Incarceration, and Other Criminal Penalties

Noncitizens face the same potentially negative outcomes as U.S. citizens in terms of risk of violence and criminalization by police officers. Nevertheless, noncitizens face the additional risk of deportation. Proposed solutions must account for this disparity. Any actor seeking to propose reforms to mental health crisis responses in their jurisdiction should consult with immigration lawyers familiar with the laws of such jurisdiction. This way, the actor can ensure that the reforms are furthering the program's intended goals with noncitizens in mind.

In the criminal system as it currently exists, sometimes the involvement of law enforcement might be an appropriate response to certain mental health-related incidents, such as where a person poses a risk of harm to themselves or others.⁴²⁷ In these situations, avoiding harsh penalties—especially those that could potentially affect noncitizens' immigration status or possibilities for relief—becomes the touchstone. As discussed in Part II, criminal convictions of any variety or level of seriousness frequently form the basis for ICE detainees and deportation.⁴²⁸ The specific immigration consequences of criminal convictions are too numerous to list in this Article,⁴²⁹ partially because the consequences may vary based on the federal circuit in which the immigration case takes place. Nonetheless, the following is a short overview of conduct that might lead to deportation for people who already hold lawful status (such as a “Green Card”) in the United States:

- Misdemeanors such as battery and low-level drug convictions,⁴³⁰

tions for U visas, which create a potential path to citizenship for noncitizens who have been victims of crime and cooperate in the subsequent police investigations. *See Victims of Criminal Activity: U Nonimmigrant Status*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/humanitarian/victims-of-criminal-activity-u-nonimmigrant-status> [<https://perma.cc/X7R2-296G>] (Apr. 2, 2024) (“The U nonimmigrant status (U visa) is set aside for victims of certain crimes who have suffered mental or physical abuse and are helpful to law enforcement or government officials in the investigation or prosecution of criminal activity.”). It must also be noted, however, that sometimes when mentally ill noncitizens call for help, criminalization results instead. *See* discussion *supra* Part I.C, Part II.B.

⁴²⁷ The information explaining this Principle comes from Part II.B, *supra*, unless otherwise indicated.

⁴²⁸ *See supra* notes 203–244 and accompanying text.

⁴²⁹ *See generally Immigration Consequences of Crimes Summary Checklist*, IMMIGR. DEF. PROJECT, <https://www.immigrantdefenseproject.org/wp-content/uploads/Imm-Consq-checklist-2017-v3.pdf> [<https://perma.cc/J6AG-U7NM>] (June 16, 2017) (outlining what may happen when a noncitizen is convicted of a crime).

⁴³⁰ *See* Roberts, *supra* note 206, at 297–303 (considering examples in which noncitizens faced serious, negative immigration consequences as a result of minor convictions).

- Any crimes defined in immigration law as fitting into the broad category of “crimes of moral turpitude”;⁴³¹
- Receipt of stolen property;⁴³²
- Being “a drug abuser or addict” (with no conviction required);⁴³³
- Conviction for breaking a law “relating to a controlled substance” other than simple possession of marijuana;⁴³⁴ and
- Situations in which the noncitizen “admits having committed, or . . . admits committing acts which constitute the essential elements” of a crime involving moral turpitude or relating to a controlled substance.⁴³⁵

Moreover, the definition of “conviction” under immigration law is broader than state definitions and, consequently, has a significant effect on immigration outcomes.⁴³⁶ Even criminal cases that do not end in a “conviction” under state law—such as an expungement, diversion, or deferred judgment—may still fall under the definition of “conviction” in immigration law if the noncitizen is required to enter a guilty or no-contest plea.⁴³⁷ Thus, a court diversionary program that forces a person to enter a guilty plea may still count as a “conviction” for immigration purposes and therefore will not help noncitizens avoid immigration consequences.⁴³⁸ If reform proposals do not account for immigration law and policy, they will not be effective for noncitizens. Thus, it is advisable to consult with lawyers who are familiar with these complex intersections during the process of developing reform proposals.

3. Principle #3: Ensure That Considerations Around “Public Safety” Include the Safety of the Person Being Contacted

If a primary goal of law enforcement is public safety, then the preservation of life should be a central goal of our system of policing.⁴³⁹ Thus, we must eliminate arbitrary loss of life and bodily injury and recognize that some individuals are more at risk than others. As explored in Section C of Part I, disabil-

⁴³¹ INA § 237(a)(2)(A)(i)–(ii), 8 U.S.C. § 1227(a)(2)(A)(i)–(ii).

⁴³² INA § 237(a)(2)(A)(iii), 8 U.S.C. § 1227(a)(2)(A)(iii) (providing that an aggravated felony is grounds for deportability); INA § 101(a)(43)(G), 8 U.S.C. § 1101(a)(43)(G) (defining aggravated felony to include “receipt of stolen property”).

⁴³³ See INA § 237(a)(2)(B)(ii), 8 U.S.C. § 1227(a)(2)(B)(ii) (providing that mere admission of being a drug abuser is grounds for deportability).

⁴³⁴ INA § 237(a)(2)(B)(i), 8 U.S.C. § 1227(a)(2)(B)(i).

⁴³⁵ INA § 212(a)(2)(A)(i), 8 U.S.C. § 1182(a)(2)(A)(i).

⁴³⁶ INA § 101(a)(48)(A), 8 U.S.C. § 1101(a)(48)(A) (defining “conviction”).

⁴³⁷ See INA § 101(a)(48)(A)(i), 8 U.S.C. § 1101(a)(48)(A)(i) (stating that a conviction includes a guilty plea and a *nolo contendere* plea).

⁴³⁸ See *id.* (including a guilty plea as a conviction for immigration purposes).

⁴³⁹ The information explaining this Principle comes from Part II.C, *supra*, unless otherwise indicated.

ity, race, and immigration status are some of the factors that increase the likelihood of violence during a police encounter because of heightened surveillance and perceptions of dangerousness of certain communities.⁴⁴⁰

Professor Barry Friedman has written that our society generally understands public safety to be the government's first priority.⁴⁴¹ Nevertheless, he goes on to explain that we have interpreted the phrase "public safety" to solely encompass protecting people from violence from other community members, calling this the "protection function."⁴⁴² In Friedman's view, this focus on the protection function has resulted in providing immense resources to—and not second-guessing the judgments of—police officers.⁴⁴³ Furthermore, other scholars have found that police culture currently views interactions with the public as "us versus them," as though officers are under siege.⁴⁴⁴ This mentality inherently centers the safety of law enforcement above the safety of the person they are responding to, any bystanders, and the community at large. The siege mentality prevalent in police forces today directly undermines the goal of public safety.

An "us versus them" mentality is also present in attitudes about immigrants,⁴⁴⁵ which compounds the problem when immigrant status (whether actual or perceived) is also at issue. Rhetoric inciting fear and anger about migrants who bring drugs and crime to this country is prevalent throughout society and certainly bleeds into the police force.⁴⁴⁶ Studies have shown shifts in local law enforcement practices following the implementation of 287(g) agreements, which allow local law enforcement actors to engage in immigra-

⁴⁴⁰ See discussion *supra* Part I.C.

⁴⁴¹ See Barry Friedman, *What Is Public Safety?*, 102 B.U. L. REV. 725, 734–36 (2022) (providing examples of leaders assuring the general public that their safety is their main priority).

⁴⁴² *Id.* at 736–39.

⁴⁴³ See *id.* at 730 ("Society valorizes those who provide [protection], in particular the police, and seems loath to second-guess their choices, even when—quite frankly—doing so might make good sense.").

⁴⁴⁴ See *supra* notes 121–123 and accompanying text (discussing the siege mindset currently prevalent within police forces).

⁴⁴⁵ See Ediberto Román & Ernesto Sagás, *Rhetoric and the Creation of Hysteria*, 107 CORNELL L. REV. ONLINE 188, 188–89 (2022), <https://www.cornelllawreview.org/2022/12/02/rhetoric-and-the-creation-of-hysteria/> [<https://perma.cc/P2LW-USJX>] (describing the "us versus them" narratives prevalent in recent years and quoting presidents from the United States, Brazil, Argentina, Dominican Republic, and Chile).

⁴⁴⁶ See *id.* (emphasizing the "anti-immigrant political rhetoric" that characterized former President Donald Trump's 2016 presidential campaign); see, e.g., Heather Gupte, *We Met with Jacksonville's Police Department to Educate Them on the Immigrant Experience. Here's What Happened*, ACLU FLA. (Apr. 20, 2018), <https://www.aclufi.org/en/news/we-met-jacksonvilles-police-department-educate-them-immigrant-experience-heres-what-happened> [<https://perma.cc/3GK3-JDS7>] (explaining how anti-immigrant rhetoric has strained the relationship between police forces and migrant communities).

tion enforcement actions.⁴⁴⁷ One study noted that, after the implementation of 287(g) agreements, characteristics of “foreignness” like language, legal status, and country of origin were considered by law enforcement officers in a way they never had been before.⁴⁴⁸ The “us versus them” mentality against immigrants thus presents another reason why society must be deliberate in defining and protecting public safety, and thereby, in determining what sort of behavior to expect and tolerate from the police.

Friedman suggests that “public safety” should be redefined.⁴⁴⁹ He argues that a broader, and perhaps better, definition of public safety would include protecting people from *state* violence.⁴⁵⁰ Moreover, an effective definition of public safety would recognize that certain problems should be categorized as “public health” issues, such as homelessness, drug use, and mental health challenges.⁴⁵¹ Re-categorizing these problems as health issues rather than criminal problems would similarly serve the goal of redefining public safety and the role of police in enforcing it.⁴⁵² Accordingly, the concept of public safety should include not only safety from violence and crime but also access to shelter, food, and other necessary care, as well as freedom from unwarranted infliction of harm or violence.⁴⁵³

4. Principle #4: Recognize the Particular Cultural and Practical Issues for Noncitizens, Including Language Barriers When Calling for Assistance, Responding to Officer Commands, and Accessing Desired Social Services

Proposed reforms must account for the fact that some noncitizens may not speak English. For that reason, providing resources such as interpreters and having patience is crucial to avoiding escalation during law enforcement encounters. If English is not a person’s primary language, that person may be unable to successfully communicate and seek the assistance they need during a mental health crisis. Additionally, law enforcement officers expect a person to obey their commands. Clearly, a person cannot comply with such commands if

⁴⁴⁷ See, e.g., Katharine M. Donato & Leslie Ann Rodríguez, *Police Arrests in a Time of Uncertainty: The Impact of 287(g) on Arrests in a New Immigrant Gateway*, 58 AM. BEHAV. SCIENTIST 1696, 1697 (2014) (identifying patterns in arrests before and after the implementation of the 287(g) program); *supra* notes 218–219 and accompanying text (explaining 287(g) agreements).

⁴⁴⁸ Donato & Rodríguez, *supra* note 447, at 1697.

⁴⁴⁹ See Friedman, *Disaggregating the Policing Function*, *supra* note 417, at 930 (reconceptualizing the idea of public safety).

⁴⁵⁰ *Id.*

⁴⁵¹ *Id.*

⁴⁵² See *id.* at 930–31 (arguing that in order to more successfully promote public safety and “structure the role of police accordingly, we need to disaggregate the policing function”).

⁴⁵³ See *id.* (describing public safety broadly).

they simply do not understand the language in which commands are given; nevertheless, law enforcement might take such non-compliance as grounds to use force or make an arrest. Adequate provision of care means giving people meaningful access to the resources, treatment, and community support that they want and need to live healthy lives. Such connections to care cannot be established without culturally competent and language-accessible materials and resources.

Moreover, when connecting individuals to care, society should be aware of and avoid the problem of transinstitutionalization. This concept involves shifting people from jails and prisons into other liberty-restraining institutions such as “homeless shelters, inpatient treatment facilities, or other locked-down facilities.”⁴⁵⁴ Other advocates refer to such solutions as “soft policing.” As Mariame Kaba and Andrea Ritchie have written, “alternatives to policing” often carry the same violent, carceral, and otherwise harmful outcomes as traditional policing—even though this variety of policing might be carried out by medical professionals and social workers.⁴⁵⁵ Kaba and Ritchie point out that these interventions can undermine efforts to achieve true community safety.⁴⁵⁶ Thus, it is important to connect noncitizens to care in a way that is voluntary and not forced.

5. Principle #5: Incorporate Race Consciousness Within Implemented Strategies to Be Most Effective

As discussed at length in Part II, because of officers’ perceptions that people of color and mentally ill people are dangerous, the intersection of race and disability in the context of policing is fraught with the possibility of violence.⁴⁵⁷ Too often, law enforcement officers demonstrate their inability or unwillingness to interact compassionately with people with disabilities. Additionally, as the studies discussed in Section D of Part III found, ignoring race in CIT curricula did not decrease levels of violence.⁴⁵⁸ For these reasons, race must be a central consideration in any proposed reforms.

⁴⁵⁴ Bernard E. Harcourt, *Reducing Mass Incarceration: Lessons from the Deinstitutionalization of Mental Hospitals in the 1960s*, 9 OHIO ST. J. CRIM. L. 53, 87–88 (2011).

⁴⁵⁵ KABA & RITCHIE, *supra* note 2, at 142.

⁴⁵⁶ *Id.* For advice aimed at ending criminalization of mental health, see INTERRUPTING CRIMINALIZATION, PROJECT NIA & CRITICAL RESISTANCE, *supra* note 1.

⁴⁵⁷ The information explaining this Principle comes from Part II.A, *supra*, unless otherwise indicated; see Nelson, *supra* note 33, at 56 (noting police officers’ “perceptions of heightened dangerousness and their attendant fear” of individuals of color with mental illness).

⁴⁵⁸ See *supra* notes 388–390 and accompanying text.

6. Principle #6: Account for the Most Marginalized People

Lastly, the focus of this catch-all Principle is on ensuring an effective reform by incorporating the perspective of the most vulnerable people in the community. The reason this Principle is stated broadly is that the “most vulnerable” in any given community may vary, as well as the particular challenges that they face. This Article has explored the effect of policing practices on people who share at least two characteristics that make their experiences unique and potentially put them at a great disadvantage: (1) having a mental illness and (2) being a noncitizen. Yet there are other intersecting issues affecting people in the mental health crisis-to-deportation funnel, such as being a person of color, living in a lower socioeconomic status, and being unhoused. As Professor Mari J. Matsuda says:

When notions of right and wrong, justice and injustice, are examined not from an abstract position but from the position of groups who have suffered through history, moral relativism recedes and identifiable normative priorities emerge Looking to the bottom for ideas about law will tap a valuable source previously overlooked by legal philosophers.⁴⁵⁹

This quote highlights how “looking to the bottom”—meaning, examining a law or practice from the perspective of the most marginalized—allows for the articulation of objectives that otherwise may not have been apparent.⁴⁶⁰ Thus, a proposed reform must adequately account for mentally ill noncitizens and all of their intersecting identities in order to move toward a fair and just system.

An effective reform, when looking from the perspective of the most marginalized, would mean that a person will be safe in their person and liberty, avoid harsh penalties, and also avoid immigration consequences.

CONCLUSION

Every moment of contact with law enforcement houses the possibility of escalation, violence, arrest, detention, conviction, and deportation. Furthermore, law enforcement officers will often favor criminalization of a person’s disability over treatment when responding to a crisis. Accordingly, it is imperative to consider pre-contact interventions that can avoid law enforcement involvement entirely.

⁴⁵⁹ Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 325–26 (1987).

⁴⁶⁰ *Id.*

For mentally ill noncitizens, some of the most drastic consequences may be indefinite detention and eventual deportation. Deportation can be particularly harsh for noncitizens who may be deported to countries where treatment for their conditions is unavailable. Although the focus of this Article is to promote interventions that prevent a noncitizen from becoming involved with the criminal legal system in the first place, there are also crucial points of advocacy available once a noncitizen is already involved. Reforms must be formulated for noncitizens who are already in the system as well.

A major benefit of two types of policing reform discussed in this Article—civilian first responder programs and race-conscious CIT—is that they do not require widespread adoption to reap their benefits. Rather, individual police departments have already begun implementing these models, with apparent success in their missions of reducing violence and better serving communities. Other jurisdictions should take note and implement the same, bearing in mind the Principles identified in this Article.

Finally, this Article has focused on interventions that the current system of policing can undertake to reduce the risks of negative outcomes for noncitizens experiencing mental health crises. It should be recognized, however, that the approaches suggested herein are only addressing one small part of the problem. There are larger questions at play, such as: can our society's current system of policing be adequately reformed to protect noncitizens with disabilities? If not, how do we move forward? For now, the recommendations proposed in this Article, along with the guiding Principles, aim to immediately ameliorate the most devastating circumstances for noncitizens with disabilities.