Abstract: The criminalization of immigration plagues the lives of immigrants, both documented and undocumented within the United States. The criminalization of immigration is a complex system that spans hundreds of years and functions as a living, breathing organism. It is fed by xenophobia, by racism, by classism, and excretes a painful viscous substance of criminality, one that pushes punitive and harmful punishments (detention, deportation and the stigma criminality) for immigrants.The complex structure that forges and reinforces criminality while ascribing it to immigrants is based on a multitude of intersecting forces, mostly located *outside* the criminal justice system. With the exception of crimes of unlawful entry or reentry (ex: border-crossing), the status that is termed "illegality" is largely derived from non-criminal– that is administrative or civil agencies, policies, and court systems. So the question then becomes, if immigration itself is considered a civil issue and not a criminal issue, what is it that leads to the criminalization of immigration? What makes it so that immigrants as a group are targeted, prosecuted, and labeled as criminals?

The criminalization of immigration– the legal, administrative, and social processes that enshrine arbitrary, racist, and xenophobic fears into the criminal justice and immigration systems–often merge these authorities and infrastructures. The criminalization of immigration looks like a haunting history of United States marginalization, where immigrant bodies are commodified and exploited through discriminatory policies. The criminalization of immigration has been produced and reproduced through both systems and institutions that expand upon a rhetoric of "them" versus "us." This can be seen historically through various twentieth century policies, popular belief, and legislation that push a narrative of an immigrant as criminal, thus negatively affecting the United States. The social systems that impact the criminalization of immigration span from sociolinguistic ties that deem immigrants "illegals" to methods of normalized marginalization in society, to the conflation and intertwining of criminal law with immigration law. Modern day laws and practices that criminalize immigration can be observed through the U.S Code targeting entry and reentry of undocumented immigrants. The normalization of detention and deportation–also stigmatic in its own right–additionally exacerbates the criminalization of immigration through the specific targeting of undocumented immigrants that result in significant life alterations for both the immigrant and the people around them. The criminalization of immigration within the United States is ever present and intensified through the current treatment of migrants under the Trump administration. However, similar to the way that illegality was constructed for immigrants, it can also be deconstructed. The decriminalization of immigration involves the undoing of systems of oppression, policies, and everyday practices that actively harm immigrants.

Crisálida: The Becoming and 'Unbecoming' of Criminalized Immigration in the United States

Criminalization and Decriminalization of Immigration

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Dedication

Dedico esta tesis a cada inmigrante que ha sido parte del desarrollo de la identidad nacional de los Estados Unidos. Dedico esta tesis a cada inmigrante que ha hecho lo imposible– arriesgando su seguridad para perseguir una visión de una vida con libertad, seguridad, y justicia. Lo siento que te hemos fallado. Dedico esta tesis a mi papá, tu historia se ha convertido en mi pasión.

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Introduction:

A Note on Naming:

Una crisálida, una salida, un cambio. I chose to title my work *crisálida,* chrysalis in English. This is the process of change from one state to another and both represents the slow transformation that was made from the early twentieth century to today that has criminalized migration, and*, crisálida* represents a glimmer of hope for undoing in the future– the emergence of the butterfly after a long period of darkness.

Introduction:

"Migrant illegality is not an objective fact; people become illegalized– are *made illegal"*- Harsha Walia

I used to live with a criminal. We breathed the same air, lived in the same house, and he drove me to my very first pediatrician appointments. Though by the time that I was born, he was an ex-criminal. Fathers can be anyone and look like anything, and criminals the same. And yet, the only crime that my *papi* had committed had been entering the United States without documentation when he was 19 years old–just a couple years younger than me while writing this.

His story is one of thousands[1] that details the haunting of migrants through the criminalization of immigration– the legal, administrative, and social processes that enshrine arbitrary, racist, and xenophobic fears into the criminal justice and immigration systems, often merging these authorities and infrastructures. The stories of immigrants are in constant conversation with micro and macro decisions and actions that impact the externally determined "legitimacy" of their existence.

When Donald Trump was elected for a second time– the story of a red political sea never turned blue– the story of a deep sadness and overwhelm, my first feelings weren't fear for

[1] Recent data states that there are approximately 47.8 million immigrants within the United States, meaning 14.3% of the total U.S population, or 1 in 7 (Moslimani). 2022 data found that there were approximately 11 million undocumented immigrants, 3.3% of the total U.S population (Passel).

myself, but fear for all of the communities that I hold close to me. The communities that surrounded me as I grew up are parts of my past and present– especially the immigrant community. My personal ties to the community and connection to the immigrant community made me fearful for the implications and realities for immigrants in what Donald Trump was branding the "largest mass deportation in American history." [2] Trump's persistent dehumanization of immigrants has once again sparked a divide throughout the United States between those who support immigrant deportation and those who do not.

The criminalization of immigration is a complex system that spans hundreds of years and functions as a living, breathing organism. It is fed by xenophobia, by racism, by classism, and excretes a painful sticky substance of criminality, one that pushes punitive and painful punishments (detention, deportation and stigmatization of being considered criminal). Criminalization of immigration looks like a haunting history of United States exclusion, the pawning, use, and abuse of immigrant bodies (labor), and discriminatory policies. My focus on southern border criminalized immigration and immigrants calls into question the overlapping systems of oppression– from race and history, to xenophobia and oppression that situate the realities of what it means for immigration to be criminalized within an intersection sphere.

Criminalization of immigration looks like the tightening of systemic social operations that work to socially exclude immigrants– through sociolinguistic methods, through methods of exclusion, through the conflation of criminal law and immigration law. This conflation, frequently existent as an overlap is referred to as crimmigration.[3] The criminalization of immigration looks like court cases that have defined immigrants' rights and presidents who refuse to respect them.

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[2] ACLU, "Trump on Immigration"

[3] Juliet Stumpf coined the term, read more about crimmigration on page 46

I employ three lenses when dissecting and interrogating the becoming, the creation, of the criminalization of immigration: the history of the criminalization of immigration (Chapter 1), systemic social influences behind the criminalization of immigration (Chapter 2), and the (il)legality of the entire process (Chapter 3). While these different lenses all independently, to a degree, explain the criminalization of immigration– my work sees them as interrelated and paints an expansive picture of the unification and contemporary implications of the criminalization of immigration and its entanglements.

The rhetoric that Donald Trump is sharing with his followers is one that highlights immigrants as "illegals," "illegal aliens," and "illegal immigrants." The rhetoric simplifies criminality as an innate characteristic of some people's existence as opposed to a legal status prescribed by laws. Even when this discriminatory and xenophobic immigration rhetoric addresses legal processes that might indicate criminality– such as crossing the border without documentation[4] or when immigrants commit crimes (namely first or second degree crimes[5])[6]--it conflates civil infractions and crimes, therefore applying criminality to migrants with or without a legal process determining criminality. A crime is handled within the criminal justice system and occurs when someone breaks the criminal law. Criminal cases are dealt with in courts of law and a typical punishment for them ranges from fines and community service in the cases of misdemeanors, to serving time in prison for first and second degree crimes. The act of immigrating without documentation, which is typically referred to as "illegal immigration," can transgress criminal or administrative law. Unlawful entry, as explored in this thesis, can be

[4] The process of a person gaining documentation will be discussed in the legal section

[5] The three classifications of crimes that will be mentioned are misdemeanors, first class and second class crimes. The difference between the three is that a misdemeanor is considered a "smaller crime" such as shoplifting, or trespassing, along with other examples. Each state has its own regulations regarding what they consider to be a misdemeanor. First and second degree crimes are both more serious– including arson, grand theft, murder. The difference between the two is that second degree crimes are where crimes were committed that are *not* premeditated. Miranda Rights Law Firm, Douglas Miranda.

[6] Though more and more frequently, immigrants have been prosecuted– to be deported– for misdemeanors.

prosecuted criminally. However, a noncitizen can also become deportable after lawful migration too, such as, when overstaying a visa or being denied asylum. These events are *not* considered to be criminal law but rather a violation of administrative law, meaning it is a civil infraction. Other examples of civil infractions are speeding, jaywalking, not wearing a seatbelt, and disorderly conduct. Civil infractions typically result in fines and do not result in criminal records or convictions. Civil infractions typically do *not* result in the criminalization of the person charged.

So the question then becomes, if immigration itself is considered a civil issue and not a criminal issue, what is it that leads to the criminalization of immigration? What makes it so that immigrants as a group are targeted, prosecuted, and labeled as criminals?

Throughout my thesis, when discussing criminalization of immigration, I am referring to the process, result, and reality of treating and viewing immigrants as criminals.[7] It is important to notice the difference and not conflate different people that may be immigrating. Immigrants are different from refugees[8], asylum seekers[9], and migrants.[10]

My thesis will argue that the criminalization of immigration stems from three different paths that together have led to our current reality. The history of the criminalization of immigration that stems from nativism and xenophobia has propelled a narrative of the normalization of othering (both legally and socially) immigrant groups. Immigrant marginalization is firmly established in the "nation of immigrants." Legally, modern day laws antagonize immigrants. Migrants can be prosecuted for unlawful entry and re-entry (followed by

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[7] Therefore the decriminalization of immigration refers to the possibility of decreasing the results and realities that come from the criminalization of immigration.
[8] A refugee is someone who has moved from one country to another because of persecutions from their country of origin. Some refugees can gain refugee status which gives them certain international protections and support.
[9] Asylum seekers are similar to refugees as they are seeking international protection, fleeing because of unsafe conditions and/or persecutions. The difference is that asylum seekers' refugee status has not been internationally recognized. Asylum seekers must apply for protections within the country that they have gone to to seek refuge.
[10] A migrant, as defined by the International Rescue Committee, is someone who has come to a country for temporary reasons; whether it be temporary work or economic prospects.

deportation)[11], but immigrants within the U.S. can also commit deportable crimes, leading to their criminal prosecution, followed by a separate administrative process of removal from the country. The sequential nature and/or conflation of criminal law with administrative immigration law (or, crimmigration[12]) has also created a legal environment where the merger results in criminal punishments for immigration laws without the criminal defense privileges that citizens or the criminally accused receive. Lastly, the sociological makeup of the criminalization of immigration– both regarding the social classification and treatment of immigrants in addition to the sociolinguistic aspects of the term "illegal"– have contributed to the criminalization of immigration. These entrenched pathways toward immigrant criminalization also point to the potential for *decriminalization*.

Literature Review

My thesis is largely informed by several texts that describe the development and continuation of the criminalization of immigration relating to the legal makeup of this process and reality. Specifically, ideas behind *Crisálida* started with learning about a process named "crimmigration", coined by Juliet Stumpf[13], which is discussed in much detail in chapter 2. Crimmigration describes the ways in which criminal law becomes intertwined with immigration law, creating a legal system where immigrants become criminals.

In Stumpf's *American University Law Review* journal article titled "The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power", she ties the making of crimmigration directly with membership theory, who is included in a group and who is not. Specifically when speaking of membership theory, Stumpf is referring to categorical membership[14] surrounding ideas of

[11] See "United States Code", page 60
[12] See *Crimmigration,* page 46
[13] See *Crimmigration* page 46
[14] Categorical membership refers to someone needing to be in a certain *category* of people. Examples of categorical membership can be religion (religious vs non-religious people), sex, nationality, and more.

citizenship. Membership theory defines an "ingroup" and an "outgroup": the separation between the altern and subaltern which can be seen throughout my second chapter: "Systemic Social Influences of Criminalizing Immigration." This chapter traces various social influences behind the criminalization of immigration, almost all of which result in there being a separation between citizens and non-citizens, those who are documented (by birth or by naturalization) and those who are undocumented, those deemed legitimate and those deemed illegitimate.

Building off of ideas of crimmigration, my work is also largely informed by César Cuahtémoc García Hernández's article "Deconstructing Crimmigration" which focuses on legislative origins of crimmigration– with a specific focus on the Reagan era among other things. His focus on the Reagan administration can be seen in chapter 1 of my thesis, "The History of the Criminalization of Immigration." He describes various doctrines that have impacted the criminalization of immigration through crimmigration, many of which I also explore in detail–with a more detailed focus on the Immigration and Nationality Act and law enforcement contributing to the criminalization of immigration. García Hernández explores both systematic and institutional underpinnings of the criminalization of immigration. I also choose to explore both systems and institutions behind the criminalization of immigration. Chapter 2 of *Crisálida* focuses on social systems behind the criminalization of immigration while chapter 3, "The (Il)legality of It", focuses on legal institutions criminalizing immigration.

Lastly, the work that Harsha Walia has done in her book, *Border and Rule*, specifically the fourth chapter, "Bordering Regimes: Four Border Governance Strategies Externalization as Border Imperaliam" has informed my work. She describes these four strategies working with one another to criminalize immigration: exclusion, territorial diffusion, commodified inclusion, and discursive control. My thesis has strong ties to these strategies with an emphasis on discursive

control which can be observed in my exploration of sociolinguistic ties to the social criminalization of immigration.

While these three sources have largely influenced my thesis, there are several other topics and sources that I explore. These include, the history of the criminalization of immigration, modern acts of criminalizing immigrants, and the *decriminalization* of immigration.

Chapter 1: The History of the Criminalization of Immigration

The United States has categorically been known as a land of immigrants, and though the relationship between immigration and the United States has shifted throughout the years, the fact of the matter remains the same. Historically, presently, and in the future, the United States has, is and will see, immigration. Immigration in and of itself, apart from ties to a singular country, began way before the existence of arbitrary walls, the definition of topography, and defined country borders. As restrictions and "rules" ("rules" regarding immigration) were created to manage migration and the racial and cultural composition of the United States, immigration enforcement became a powerful authority. For some, fear of what is different, or xenophobia, led the anti-immigrant movement's narrative that immigrants would change the status quo within the nation. A range of anxieties developed regarding immigration that included fears of impoverished, unhealthy, disloyal, ideologically dangerous, and criminally-prone foreigners. These fears shaped the laws, legal authorities, and borders that would define the United States.

Immigration within the United States can be characterized by different groups of people (from different countries of origin), migrating for a range of reasons, and being received in different ways. Some groups of immigrants were discriminated against and used for their labor power more than others (for example, Chinese migrants were recruited in the West for building railroads, or later on, Mexican immigrants migrated or were recruited for their labor power specifically in agriculture). Racial otherness was often a concern, even amongst Europeans. For example, Italian immigrants during the late 1800s and early 1900s, were not considered to be

white.[15] While this speaks to the patterns of privilege and racialization, it is important to note that while some groups were able to assimilate and dissolve larger differences between them and the altern, others were not.

Popular sentiment helps define minority groups, if they are deemed "other", their basis as an other remains unless otherwise acted upon. For example, Asian immigrants within the United States have gone from being exploited, put into internment camps, and discriminated to now readjusting the wage gap between white people and people of color such that in some cases, Asian men earn more than white men. This is typically attributed to something referred to as the model minority myth– an idea that follows stereotypes that group Asian people as smarter, better, more capable, etc, when compared to other minority groups. This myth and stereotypes that follow, however, do not protect them from discrimination. At any given point, their proximity to whiteness can be revoked– which was seen during the COVID-19 pandemic where anti-Asian hatred spiked. It is easy to blame any problems within a country on immigrants or "others." Using immigrants as scapegoats has been something that the United States government and its people have done historically and continue to do modernly.

Any and all groups of the subaltern that are perceived as different from the altern at any point in time are at risk and have typically had the history of being marginalized and discriminated against by those in power. In the 1920s, those in power were white men– although arguably, the same should be said now– one white man specifically who has been enshrined in immigration law today.

20th Century Restrictions

1924 Quota Act

[15] They were said to have strong ties to the Catholic church and could not be trusted because they would take the word of the Pope before the word of government.

One of the major restrictive policies during the twentieth century was the 1924 Quota Act. Race-based nativism[16] led to the strong favoring of some immigrants, specifically northern and western European immigrants and the rejection of eastern and southern European immigrants which were considered "undesirable races" (Ngai 69). The Quota Act enacted numerical "caps" for the number of immigrants the United States would accept based on one's race. The quotas were calculated using the Quota Board who deliberately ignored and discounted several races when using the census to determine numerical quotas. Their decisions rested on extremely conservative viewpoints regarding the composition of the United States and therefore decided that many immigrant groups were threats to the nation and would lead to the eventual extinction of their own race (Ngai 75).

With some countries and regions of origin being subjected to quotas and others not, the Quota Act normalized in-policy rejection and specific legislative racism that served as a precursor to many other immigration acts during the 1920s, especially the 1929 Undesirable Aliens Act.

Coleman Livingston Blease and the Undesirable Aliens Act

The contention between Mexico and the United States had been palpable since the U.S.-Mexican war (1846), when national borders were erased and rewritten. People living in what would be newly acquired American territories would be reidentified overnight– from living in Mexico to living in America, without having physically moved at all. Despite legal boundaries having been changed, with lax immigration policy, Mexicans saw America as an opportunity to escape, something that became incredibly important during the Mexican Revolution. The Mexican Revolution (1910-1920) caused political and physical instability due to armed regional conflicts. However, their immigrants weren't without consequence. Mexicans became targeted by

[16] In conversation with eugenics

Texans due to a combination of historical events (the Bandit Wars of 1915 and the 1915 Plan of San Diego) and growing nativist ideology. Slowly, restrictions were placed on Mexican immigration, with the establishment of Border Patrol in 1924 (Deonarain) and political policies, including adopting a "whites only" immigration system that capped immigrants from anywhere other than Northern and Western Europe (the 1924 Quota Act) (Lytle Hernandez).

When it came to Mexican immigrants, attempts to cap the number of them was frequently met with backlash, especially from agricultural employers and farm owners who relied heavily on Mexican labor. Individuals who pushed back on the cap for Mexican immigrants also held onto a birds of passage ideology.[17] S.Parker Frisselle, an agricultural lobbyist, in 1926 stated "The Mexican is a 'homer'. Like the pigeon he goes home to roost."[18] In their minds, agricultural employers had nothing to worry about– Mexicans helped their labor and profits and weren't a threat to the permanency of their American lifestyles.

Senator Coleman Livingston Blease, who entered congress in 1925, upon hearing his constituents' increasing concern surrounding Mexicans, decided to act upon it. Where farm owners and other agricultural capitalists relied heavily on Mexican labor and knew that limiting Mexicans from immigrating would negatively affect them, nativists simply wanted them gone. Blease was a known segregationist and white supremacist, holding firm to his belief that Americans were superior to Mexicans, so his siding with nativists was without question. His racial beliefs informed his Act as opposed to any evidence connecting Mexicans to national security threats (Deonarain). In 1929, the Undesirable[19] Aliens Act was passed.

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[17] Birds of passage refers to the idea that someone may be here today and not tomorrow, a transient lifestyle directly referring to migration.
[18] 1926, H.R. 6741, H.R. 7559, H.R. 9036.
[19] Undesirable speaks to the condition in which the United States government does not want to grant legal access to the country, considered unsuitable for entry

While many Mexicans[20] entered through ports of entry, paid fees and submitted to any required testing (such as literary and health tests), many Mexican immigrants did not. Mexican immigrants who did not enter the United States through an official port of entry did not have to submit to this testing. The required fee to enter was higher for Mexican workers, meaning immigrating "legally" through a port of entry was less accessible. The stereotypes and assumptions that Mexican immigrants carried disease and were dirty subjected them to kerosene baths and delousing procedures (Dorado Romo). It made sense why it may have been easier for some Mexican migrants to enter informally at the border, which they had been doing for decades. Blease's bill focused on criminalizing unmonitored entry, labeling "unlawfully[21] entering the country" as a misdemeanor and unlawfully returning– a felony. Blease's aim was to specifically target Mexican immigrants and he did just that, criminalizing their immigration in the act. Any Mexican immigrant who had been "caught" not going through a port of entry would be subject to criminal fines, imprisonment and deportation. Close to one year later, the U.S attorney general reported prosecuting 7,001 cases of unlawful entry and by the end of the decade, U.S attorneys had prosecuted more than 44,000 cases (Lytle Hernandez). These prosecutions, of course, led to increased imprisonment of Mexican immigrants, where the 1930s-1940s never saw a dip below 85% of all imprisoned immigrants being Mexican. This number rose to 99% years later (Lytle Hernandez).

Blease's 1929 Undesirable Aliens Act had a direct impact on future immigration legislation, especially legislation that was built on prejudice towards Mexicans. The 1952 Immigration and Nationality Act[22] (INA) repealed the Undesirable Aliens Act while carrying the

[20] Approximately one million according to U.S immigration officials (Lytle Hernández)
[21] Unlawfully referring to without going through a port of entry
[22] Public Law 414 Chapter 477, June 27, 1952

heart of the act– discriminating against Mexicans through the illegalization and further immigration restrictions.[23]

The INA was ideologically led by two sides: those who favored the liberalization of immigration laws and the dissolution of a racialized restrictive quota system that favored individuals from Northern and Western Europe. Having been created shortly after WWII, the ideas that the INA were based on reflected the rise of anti-communist sentiments in the United States. Senator Paul McCarran, who at the time served as the head of the Senate Judiciary Committee's Internal Security Subcommittee, had initiated an investigation of the administrations of Roosevelt and Truman, in specific search of communist infiltration. Anti-communist propaganda and the connotation of communism with evils perpetrated a seemingly "security" based focus when it came to legislation especially. When introduced, President Truman had been outwardly against the bill, stating that "the basic error of this bill is that it moves in the direction of suppressing opinion and belief… that would make a mockery of the Bill of Rights and of our claims to stand for freedom in the world." Despite his disagreement with the Act, Congress overrode Truman's veto, successfully legalizing the bill. Expressed concerns that eliminating the quota system entirely would open the country up to the possible infiltration of communists that would "threaten the foundations of American life" (McCarran), which effectively pushed for the passing of the bill. The new quota system put into place by the INA was specific in its selectivity about which country or region got how many visas were permitted to them– meaning some countries or regions, such as Western and Northern Europe were allocated 85% of visas while other countries had particularly small limits. Additionally, the

[23] The INA, influenced by the Anti Drug Abuse Act of 1986, added a statutory reference to immigration detainers which are a request by federal immigration officials to local enforcement agencies to keep someone suspected of violating immigration law in custody. Today, immigration detainers play a large role in the way that federal law enforcement collaborates with local law enforcement (Garcia Hernandez 201-202).

new quota system redefined ideological grounds for exclusion and deportation of immigrants (Campi 1). Deportation became a faster process, allowing for the immediate deportation of those who the United States did not want to receive (anarchists, communists, etc), however also could almost immediately deport those who violated immigration law. Additionally, the Act expanded immigration enforcement.

Racial stereotypes along with nativist and white supremacist beliefs is what had led Senator Blease into passing the Undesirable Aliens Act in 1929. The codification of racism interwoven as law became commonplace, especially as the evolution of immigration law became one where racist and xenophobic beliefs could easily favor white immigrants while not only targeting but further racializing immigrants who were deemed "undesirable." In the world of white supremacy, a world in which Blease fell into, anyone who deviated beyond his view of whiteness was immediately targeted, with a special focus on Mexicans. A racist focus on Mexicans later became the targeting of Latin American immigrants entering through the southern United States border. Today's comments from the Trump administration, many of which have echoed the 2016 Trump administration, go to show this exact sentiment.

Between 1952 and the 2016 Trump administration marked another political era where immigration policies drastically changed the way that immigration was viewed and greatly added to the criminalization of immigration.

Ronald Reagan, IRCA, and El Centro

While the criminalization of immigration through government is distributed between policy and enforcement, it is– at least federally– commonly led by the president. Despite any checks and balances that may exist, typically, the presidential stance on immigration is what becomes enshrined in public policy: "in heightened periods of xenophobia, presidents have

responded divergently to fears of immigrants, utilizing both their formal constitutional authority and informal presidential rhetoric" (D. Hernández 28). When thinking about the effects of presidential authority on the criminalization of immigration, one president stands out.

Ronald Reagan, elected president in 1980, held office from 1981 to 1989, saw the enactment of restrictive policies and actions that contributed to the criminalization of immigration. His actions at large– the War on Drugs, his treatment of Central American asylum seekers, his treatment of sanctuary workers, and the Immigration Reform and Control Act– created a more recent historical foundation, rooted in legal policies and stigmatization, marginalized and criminalized immigrants and other minority groups. He demonized African American and Latinos[24], played the hero, and was rewarded with lasting electoral success (García Hernández 205). His political choices were calculated and had lasting effects on undocumented immigrants.

In his time as president, not only did he create policies that affected the criminalization of undocumented immigrants but he also militarized the border and used private prison contracts for immigrant detention leading to the commodification of the immigrant[25], an idea that has remained prevalent before the Reagan administration and is continuing to hold strong today.

A turning point in the field of immigration– the Immigration Reform and Control Act (IRCA) had been the first major revision of immigration law in decades, and was passed by the Reagan administration." IRCA was envisioned by its sponsors, and widely heralded, as a "carrot and stick" law that would end most of the problems of illegal immigration in the United States"(Kanstroom 226). The Immigration and Naturalization Service (INS), in 1986 and had a

[24] What is referred to as the "southern strategy"

[25] The commodification of the immigrant refers to the usage of an immigrant body, typically their labor power. Not only is the reduction of someone to what they are able to provide a common symptom of capitalism, but the commodification is exacerbated when undocumented immigrants are often threatened and are not given the same privileges or rights of a working class citizen (such as the right to have a Union, workers rights, fair pay, fair hours, etc).

significant impact on the way that undocumented immigrants were stigmatized and therefore criminalized within the labor force. The idea behind IRCA emphasized the "preservation of jobs"[26] for American workers (in addition to "authorized" workers in the United States– meaning workers who had documents stating that they were eligible to work). IRCA required that all employers were to verify the identity of their employees, corroborating their employment and citizenship status usually by filing photocopies of government issued IDs. Even today when applying for jobs in the United States, there is a question that states "are you lawfully permitted to work in the United States?" The emphasis on documentation status and "eligibility" has remained. For employers who knowingly hired undocumented immigrants, there were civil and criminal penalties.[27] Additionally for employers, IRCA targeted undocumented laborers, removing their labor protections: "most [first generation immigrants] occupy low wage jobs in agriculture, construction, food-service, domestic work and day labor. Federal laws like the Immigration Reform and Control Act (IRCA) of 1986 limit the rights and protections of these workers" (Garcia Quijano). This takes place through the deliberate construction of conditions that disadvantage immigrant laborers. An undocumented status for a laborer creates vulnerabilities in the workplace: coercion to work(calling Immigration and Customs Enforcement which could and can be used as a scare tactic to force the submission of undocumented laborers) or the prevention of unions from forming (Costa). Additionally,

[26] If only the United States history would not repeat itself so tragically. The Mexican Repatriation, happening from 1929-1936 saw the repatriation of, what is estimated between 400,000 to one million Mexicans. The fear behind the Mexican Repatriation was that specifically Mexican immigrants were taking the jobs of Americans. After the expulsion of so many migrants (many of which were also Mexican American US citizens or had been given temporary status in the United States), the economy saw an egregious decline which later encouraged the United States government to invite Mexican laborers back into the country with the Bracero Program. Note that the movement of Latino immigrant bodies have been, historically, used as pawns, to discard when not wanted and invite back when the government changes their mind.

[27] IRCA also offered a pathway to legal permanent residence for undocumented immigrants who had entered the country before 1982, however with an almost constant influx of immigrants, this retroactive step did not at all help with recently arrived undocumented immigrants.

undocumented immigrants face more workplace fatalities and workplace injuries than native born workers (Garcia Quijano). IRCA works actively to criminalize immigration by not granting protections for an already vulnerable class. Employers who hired undocumented immigrants despite the fear of sanctions (which may have caused some employers not to hire or to discriminate against people perceived to be immigrants), while benefiting from the labor, did frequently face sanctions and penalties (Davis).

This also, of course, ignores any positive contributions to the economy or labor market that undocumented immigrants contribute. For example, the agriculture and meatpacking industries, as has been established, are the place of employment for a lot of undocumented laborers. Research done by the United States Department of Agriculture has said that between 2020-2022, 42% of crop workers were undocumented. Undocumented laborers– looking at one industry alone– make up almost half of the total workers meaning that without undocumented labor within the agricultural industry alone, millions of pounds of produce would never enter the United States market. It is clear that the United States economy thrives off of the labor– commodified labor at that– of undocumented immigrants.

The criminalization of immigration can be seen through criminal punishment– civil and criminal penalties for employers– and criminalization through discriminatory practices for undocumented employees, which is highlighted through IRCA. Labor through IRCA brought about a new wave of propaganda and stigmatization for undocumented immigrants, in what Reagan called an “immigration emergency” (Massey). The emphasis on an “out of control" border led to the heavy reliance on border enforcement to apprehend border crossers, including Central Americans seeking asylum, as well as interior enforcement mechanisms such as workplace raids and employer sanctions. These actions necessitated the turn towards private

detention. The expansion of immigration detention saw the rise of private prisons for immigration detention purposes where private prisons were specifically contracted to detain immigrants.

Quite literally, the criminalization of immigration was affected by the conflation of undocumented immigrants to citizens who had committed criminal acts. Immigration was criminalized through association by location– someone coming from Europe must be a European, a young person coming from a school must be a student, someone coming into or from a prison– must be a criminal.

The criminalization of immigrants however, was a mere side effect– the Reagan administration decided to contract private prisons, ultimately, to cut government costs (Goldman). The use of corrections corporations, due to the reality of their establishment, treat migrants in detention as imprisoned criminal offenders. It is important to note when talking about the detention– or in this case imprisonment of undocumented citizens that violations of immigration law are civil infractions[28], not crimes, and therefore should not be treated as crimes. The decision, the move towards private prisons detaining immigrants did not stop with the Reagan administration: as of July 2023, 90.8% of individuals in immigration detention were held in detention facilities owned or operated by private prison companies (Jeske). Private prisons operate under a different set of laws and regulations when compared to government owned detention.

Private and federal prisons are dangerous places as they stand. Immigrants, as their status stands, have fewer rights than the criminally accused or convicted and therefore are even more vulnerable. The vast web of facilities creates huge oversight issues and various administrations

[28] For comparison, other examples or civil infractions are traffic violations (speeding, running a red light, failing to wear a seatbelt), local ordinance violations (littering, jaywalking, building permit violations), and others. Civil infractions, in almost every other case, are punishable by fines.

fiddle with the "standards" that guide immigrant incarceration. With shifting definitions of what should be considered "standard", it makes sense that so frequently detention centers are unregulated and the dangerous conditions of them make it so that many times, the condition of immigrants in detention slips through the cracks.

In late October of 1981, a staff member from Arizona Senator Dennis DeConcini's office traveled to El Centro Detention Center (in Southern California) to report on the conditions that immigrants were living in. His report listed the following problems at the facility: "overcrowding, poor sanitation, lack of proper nutrition and basic necessities, limited access to medical care, reports of physical abuse, and case backlogs that lengthened detainees' stays" (Shull 80).

His report continued with detailed descriptions of different areas of the prison. The maximum security area had ten by ten rooms with two people in each room. There were no sinks, toilets, no electricity, he described "a horrible smell of human waste." The "holding tank," where "recent arrivals" came to wait for upwards of ten hours, had no food or water. The infirmary had no doctors. He describes seeing someone with what appeared to be a gunshot wound to his chest, clutching his chest and complaining. The nurse gave him aspirin (Shull 81).

Written on a sheet and thrown over a ten-foot barbed wire fence at El Centro was a message written in a mix of fruit punch and detainee blood. It read: "en el nombre de Dios, ayúdanos."[29]

Operation Streamline:

Trends in immigration frequently fluctuate, undulating, often peaking and declining due to economic and political conditions in the United States and in sending nations. For example, trends in immigration between 1992 and 2004 in the United States shows a peak of recent

[29] in the name of God, help us

arrivals to the United States around the year 2000, then declining and peaking again in 2004 (PEW Research). The 2004-2005 peak saw an increase in especially non-Mexican immigrants, from 9,896 documented non-Mexican immigrant arrivals in 2004 to 15,642 non-Mexican arrivals in 2005 (Corradini et al. 2). Before 2005, Immigration and Naturalization Services (INS) processed undocumented immigrants in two different ways depending on their country of origin. Despite the continuance of the law criminalizing unlawful entry and re-entry, Mexicans were removed in a process that fast tracked deportation– called voluntary return[30]– and non-Mexican immigrants were removed through civil proceedings. The 2004-2005 peak in non-Mexican immigration was fairly concentrated, with the majority of them coming through Texas, specifically Del Rio. The increase of non-Mexican immigrants concentrated in one specific part of Texas paired with the already longer process of civil proceedings led to the overwhelm of several immigration systems– including both federal courts and detention centers. With detention centers operating at over-capacity, Border Patrol released several immigrants from detention centers and told them to appear in immigration court at a future date to begin civil deportation proceedings. However, the conscious choice that Border Patrol made to release undocumented immigrants feared that this would illustrate an "easy path" into the United States (Corradini et al. 2).

Operation Streamline was created in Texas in 2005. It was a joint initiative between the Department of Homeland Security (DHS) and the Department of Justice with the goal to deter immigration and create a faster deportation system that also involved more surveillance (releasing undocumented immigrants meant they were not being surveilled). Before Operation

[30] "More than 90 percent of all expulsions throughout US history have been via an administrative process…referred to as "voluntary departure"" (Goodman 1). Voluntary departure is when immigrants choose to leave the country they have immigrated to regardless of whether or not they are in deportation hearings. Voluntary return applies only to when an immigrant is actively in deportation hearings.

Streamline, most undocumented immigrants would have their cases heard and tried by civil immigration courts– as undocumented immigration was a *civil infraction.* Federal prosecution was reserved for multiple time offenders or individuals who had committed more serious immigration related offenses (human trafficking, drug trafficking, etc) (Corradini et al. 1). In labeling unauthorized border crossing as a criminal offense, undocumented immigrants are tried in criminal proceedings in criminal court. Most undocumented immigrants plead guilty to "illegal entry" (a misdemeanor) or "illegal reentry" (a felony).[31] Pleading guilty to a felony, and in some cases, a misdemeanor, were deportable offenses. Increasing the severity of border crossing also necessitated federal focus to be on petty immigration prosecutions[32] which meant that federal district courts were overwhelmed trying to get through their caseloads. There began en masse hearings (Lydgate 1).

Individual due process was not considered in en masse hearings where magistrate judges saw dozens– up to 100 (García Hernández 217) undocumented immigrants at a time. The defendants, then, as a group, plead guilty and were sent to be deported after facing time in prison for having committed a misdemeanor to begin with.

It is likely that magistrate judges saw no other way to facilitate the sheer number of petty immigration prosecutions they were facing. Operation Streamline turned the federal court criminal docket to majority migration cases. Research done by The Chief Justice Earl Warren Institute on Race, Ethnicity and Diversity published quantitative data that illustrates the rise of petty immigration prosecutions, from 2002 to 2008, with 2008 showing about 54,000

[31] It is important to note that in 1996, Congress made changes to immigration law in which a misdemeanor was deportable if it was deemed a crime of moral turpitude (fraud, theft, embezzlement, perjury, assault) or misdemeanors that had been classified as "aggravated felonies" (Brady 5). In increasing the threshold for deportable "crimes"

[32] "Petty offenses are misdemeanors with a maximum sentence of six months. Petty immigration-related offenses are almost exclusively prosecutions under 8 U.S.C §1325 for first time unlawful entry into the United States" (Lydgate, 2).

prosecutions while the number of all drug prosecutions and felony smuggling prosecutions decreased, then plateaued. This would suggest that there was a surge in immigration – more immigration court cases would logically be explained by there being a rise in immigration. However, this was not the case (Lydgate 3). There instead, was a specific and retroactive targeting of undocumented immigrants that put pressure on federal judges, removed judicial consideration for undocumented immigrants (by removing due process and conducting en masse hearings), and increased detention, imprisonment and deportation.

More than that, as described by the National Network for Immigrant and Refugee Rights: "the real impact of Operation Streamline has been on extending the criminalization of immigration…" (1). Operation Streamline contributed to the criminalization of immigration through its direct movement of how unauthorized border crossings were defined. Adding a criminal process to a civil one (both involving incarceration) meant that undocumented immigrants *became* criminals, they had committed crimes, went to federal court and in several cases, were imprisoned as criminals before they were deported.

The history of the criminalization of immigration– spanning from racist legislation to presidents and congressmen pushing racist rhetoric onto the public saw a plethora of micro and macro actions that enacted criminality for migrants. From en masse hearings– which undoubtedly remove due process (which immigrants are entitled to)[33] to punishing employers for hiring undocumented immigrants to actively hurting immigrants in detention centers, when it comes to the history of the criminalization of immigration, many historical influences, especially stigmatic ones, have had a cumulative effect that echoes into the realities of today– not just legally, economically and politically, but also socially.

[33] See "Plyler v Doe" page 68

Chapter 2: Systemic Social Influences of Criminalizing Immigration

"Immigration is about the person who's checking you out at the grocery store. It's about who is sitting next to you in the coffee shop. Immigration is about your neighbor and the person sitting next to your kid in school." -
Camille Mackler

The social positioning of the criminalization of immigration is situated within a multifaceted world that combines all of the dimensions of life for a criminalized immigrant. I use systemic social influences to refer to the ways in which different social systems influence the criminalization of immigrants and immigration. For example, I discuss the sociological system of criminalizing and surveilling behavior to analyze the ways in which this system contributes to the criminalization of immigration. Later, I discuss the sociolinguistic implications of the word "illegal," as a rhetorical tool; associating sociolinguistic choices to the normalization and reproduction of immigration as a criminal act and migrants as inherent criminals. Following this, methods of marginalization highlight the social ways in which immigrants are excluded from everyday life[34] and the ways this exclusion contributes to the criminalization of immigration. Lastly, the discussion of crimmigration is used transitionally between systemic social structures and legal influences of the criminalization of immigration.

Systemic social influences of criminalizing immigration seeks to situate the problem of the criminalization of immigration beyond historical and legal reproductions of illegality. Criminalizing immigration also lives within the everyday interactions of immigrants, the way they are spoken about, the production of the social and physical exclusion of them. I start by situating the criminalization of immigration within the sociological sphere of how criminality is birthed.

[34] Exclusion from everyday life can look like being unable to create a bank account (several banks require Social Security numbers to open accounts), difficulties getting a license, being unable to vote, difficulty getting insurance and healthcare, existing within an underground economy, and more.

Sociological Criminalization:

The determination of legitimacy of someone's actions and the process of criminalization initially starts from a place of cultural and legal power– legislatures deem what is right and wrong, from either cultural norms, personal interests, or perceived constituents' interests. This process of decision making stems from a place of cultural power, determination and construction of deviance.[35] As John Kituse wrote in his 1962 essay published by Northwestern University, titled "*Societal Reaction to the Deviant Behavior: Problems of Theory and Method"*, "deviance may be conceived as a process by which the members of a group, community or society interpret behavior as deviant, define persons who so behave as a certain kind of deviant and accord them the treatment considered appropriate to such deviants" (248). The weight of defining someone as deviant (or criminal) therefore makes it so that those deemed deviants or criminals are faced with both criminal punishment and the weight of socially being deemed and labeled criminals. This is to say, criminalization in general has everyday implications for those who are affected. That being said, there are two, equally important aspects of criminalizing behaviors– reflection on the law and enforcement from the state (Dempsey 3).

Reflection on the law essentially means that the law *must* say that something is criminal for it to be criminal. The process of the codification of law[36] is one that, while important, is less essential in determining the factors behind criminalization. However, motives behind bills *are* important in determining these factors. At its core, deviance is a violation between an agreement (not one that both parties have necessarily agreed to) between the rule violator and the rule enforcer (Muncie). Typically, those who are "rule violators," due to both the discrepancies and the discrimination within the criminal justice system and the systemic racism that plagues almost

[35] In sociology, the term to refer to something that is criminal or against the status-quo in any way, is deviant. Someone can be labeled as a "deviant" and sociologically, due to its stature as a criminal act, undocumented immigrants would be deemed "deviant."

[36] Codification of the law refers to the process of making introduced bills into official law

every part of everyday life, are typically also what the altern would consider “outsiders”: within the United States, both historically and today, crime and criminality is disproportionately attributed to actions from marginalized communities (Gaynor 1). The nation’s earliest immigration laws reflected this pattern of the deviant or undesirable immigrant versus the normative white migrants and potential future citizens. For example, the 1790 Naturalization Act established a white racial prerequisite for naturalization into citizenship that, in some form, remained until the passage of Immigration and Nationality Act (INA) in 1952, which then overhauled the nation’s migration system. Additionally, the invitation of some, juxtaposing the rejection of others can be seen through the looser quota restrictions regarding how many people were allotted visas per year from Western and Eastern Europe compared to Asia or Latin America after passage of the 1952 INA.

There is essentially a negative feedback loop in the social creation of law where social reactions merge with social constructions of minoritized populations. These social constructions can normalize using certain language, symbols, metaphors or stories to label and refer to a group. In immigration discourse, these constructions of marginality can be refitted for different migrant groups in different social and political contexts. Constructions of marginality today and historically can be seen through the different rhetorics that are created surrounding different immigrant groups: that they are dangerous, that they bring sickness and disease, that they pose a threat to the economy, and other stereotypical and xenophobic narratives. All of these tie a marginalized group to a stereotype and further any stigma that may have already been created.

Stigmatic identity constructions are developed that shape expectations and determinations of deservingness and appropriateness for inclusion into the general public. At the same time, social reactions and sentiments toward the group– whether through confirmation bias or through

a more generalized and fabricated mob fear feed into the cycle of predermining innocence and guilt. Societal norms, predominantly influenced by the dominant group, inform policymakers to create bills that uphold their values.

Such laws, in turn, further influence anti-immigrant sentiment. Personal and constituent sentiments toward immigration explains why Senator Blease decided to push the Undesirable Aliens Act in 1929. Blease pushed a narrative that immigrants– Mexicans specifically had been threatening his and his constituents' way of life.[37] Additionally to his stereotype-based xenophobic fears, Blease had a personal interest in the creation and passing of his law, as a white supremacist. Racist stereotypes informed the passing of the law, and the passing of the law then reinforced racist stereotypes. Discrimination against immigrants, especially Latino immigrants became commonplace, normalized not only among the people but also the government. The language and stories being used to describe immigrants created (and continue to create) a narrative that was passed down through generations, and can be illustrated in contemporary discourse.

Donald Trump's two successful presidential campaigns hinged on anti-immigrant sentiment and manufactured fears. In his 2024 presidential campaign, for example, Trump pushed an entirely baseless narrative stating that Haitian immigrants were "eating dogs" (Thomas and Wendling). The targeting of specific groups of immigrants was not new to Trump as in his 2016 presidential campaign, he targeted Latino immigrants, especially Mexicans, calling them "bad hombres," additionally pushing a narrative that most immigrants who entered the United States without documentation were a part of a criminal drug trade or the cartel. An older narrative is that immigrants were coming to the United States to steal jobs, get money, and leave. The Council on Foreign Relations clearly shows that it is *not* the case: "generally, they are

[37] See "Coleman Livingston Blease and the Undesirable Aliens Act" page 15

coming not for work but to make asylum claims[38], and many of them are unaccompanied children" (Roy et al.) Trump's view on migrants as criminals, as gang members, as temporary workers who will hurt the U.S economy by denying United States citizen's jobs continuously pushes a narrative of immigrants as criminals. Trump's insistent social criminalization of immigrants demonstrates that narratives that follow certain marginalized groups, especially as it is to do with criminalized and marginalized communities cannot escape the negative feedback loop that surrounds their criminalization (sustaining and worsening) and their discrimination through policy changes.

While discrimination is a form of social punishment, a type of social exile, it is not the only form of enforcement.[39] Rhetorical criminalization is conjoined with the legal, material, and social infrastructures of criminalization. Enforcement of a law is created through the prosecution, conviction, sentencing and punishment for the act of something considered "criminal." For undocumented immigrants, enforcement additionally is Immigrations and Customs Enforcement (ICE), detention and deportation. For immigrants, immigration enforcement sequentially follows the criminal justice system, emphasizing their existence as "criminal aliens."

Moral Panic:

To criminalize an act is to also build a narrative that the act is bad and will threaten society's way of life. When this narrative building is not targeted to a behavior and instead is targeted to a group of people, the reality of moral panic begins. The narrative becomes fear– the very presence of migrants suggests danger. Moral panic can be used to justify discriminatory policy, dehumanize people, and ultimately criminalize their acts and existence.

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[38] Some reasons for asylum claims include: criminal violence, extortion, rising gang and cartel violence, unsafe conditions, sexual violence, political targetting, and more.
[39] See "Methods of Marginalization" page 41

Building moral panic involves a two-sided process where the government and the media create narratives that feed a sense of fear – a perceived threat to social order and "life as we know it." In his book, *Folk Devils and Moral Panics,* Stanley Cohen outlines this process. The development of moral panic needs to be digestible and palatable for the public, meaning the media is breaking down ideas of distrust and disinformation to portray a group as threatening. Usually, this process, the process of *social problematization,* also involves using symbols or phrases that target the group of people. Once this has been established, the exposure of the threat becomes normalized and logically following, the public begins to fear the group. With both the fear established and citizens demanding a solution from the threat– an escape from the fear, policy makers and politicians are able to address these "new" concerns with new laws or policies. Cohen explains that this process is usually done through the escalation of law enforcement (132) and specific persecution of this group of people.

Conditioning the public to moral panic allows the government to exert specific control over a group of people and take dramatic action. The culture of fear itself is translated into everyday behavior and perspective through the addictive tendencies of fearful thinking. Once a notion of fear is created, it is very difficult to divest from that emotion, even if someone wants to not be fearful any longer. The normalization of fear, specifically ethnocentric xenophobia[40] means that even longer than immigrants are portrayed as a threat, the essence of being fearful of immigrants will remain and social policies that criminalize immigrant behavior will be justified. In the case of the criminalization of immigration, because immigrants (other than those who overstayed their visas) crossed the border "illegally", they therefore "committed a crime" and are criminals.

[40] Ethnocentric xenophobia refers to the dislike or prejudice against people from other countries in a way that simultaneously establishes one's own culture as the standard, or better.

Cohen explains that the government and media first establish, in a sort of "public consensus" that the country must "*first,* must keep out as many… foreigners as possible; *second,* that these people always lie to get themselves [politically and socially] accepted; *third,* that strict criteria of eligibility and therefore tests of credibility must be used… This *culture of disbelief* penetrates the whole system" (xxii). Cohen describes the tie between immigrants and a narrative that immigrants are liars, using the example that many believe that the majority of immigrants have arrived for economic reasons (though data proves that many arriving more recently are arriving due to political persecution, corruption, and safety concerns). The culture of disbelief translates into a constant skepticism regarding the "truth" behind immigrants– nevermind the fact that the act and label of being made a criminal inherently comes with decreased credibility. Skepticism regarding the validity of immigrants' stories, reasons for immigrating, and character especially play out in the distrust of the asylum system and presumption of bogus claims echo into the lives and daily treatment of immigrants. Immigrants are socially criminalized through a culture of disbelief.

Overall, mass panic surrounding ideas of immigration and immigrants has become standard and is fueled by the ways in which the government and the media speak about immigrants today. This then contributes to the criminalization of immigration through the ways in which (unauthorized) immigration has become a social problem, creating moral panic surrounding the existence of immigrants within the United States and the culture of disbelief revoking any credibility that they may have had. Moral panic creates popular anxiety around immigrant existence within the United States in general and normalizes an atmosphere of distrust of immigrant's uses of humanitarian systems of relief.[41]

[41] Even just existing within the United States

Related to sociological influences describing the process of the criminalization of immigration is the sociolinguistic reality of the criminalization of immigration.

Sociolinguistic Aspects of Building a Criminal Identity: *Illegal*

"The media's lexicon of verbal abuse has kept up a constant level of bigotry" - Stanley Cohen

The criminalization of immigration is not just perpetuated by the interplay of laws and enforcement strategies but also through the way in which undocumented immigrants are spoken and written about. It has become commonplace to label undocumented immigrants as "illegal immigrants" or "illegals." However, the assignation of undocumented immigrants to their breaking of immigration law has created a hostile state where a stereotype of undocumented immigrants as lawbreakers has become normalized. To put this into perspective, if someone were to jay walk, something that is *technically "*illegal," they would not be labelled by the public, news, media, and government as "illegal walkers." The fact of the matter is that some people in the United States, typically those who are white, white passing, or have close proximity to whiteness, are less policed due to racialized policing.[42] Being less policed is a law-breaking privilege. When it comes to immigrants, especially immigrants of color, they are so removed from whiteness and the law-breaking privileges that it comes with that when it comes to the possible breaking of any immigration laws, they are labeled as "illegal."

The power in nomenclature and the sociolinguistic weight of the term "illegal" pushes that exact trope: their inherent, almost ontological, illegality and therefore their criminalization. When it comes to the task of the decriminalization of immigration, the simple task of changing the way that undocumented immigrants are spoken about can carry a large weight.

[42] Many sources confirm this, for more information I recommend exploring publications by the NAACP, The Sentencing Project, Pew Research Center, American Civil Liberties Union, etc.

The term "illegal alien" has roots in the 18th century. Between 1765 and 1769, William Blackstone, an English jurist and politician published a piece of common law, written in *Commentaries on the Laws of England* in which he referred to an alien as a foreigner or an outsider. From there, 1790 saw President George Washington's usage of "alien" within the Naturalization Act in reference to a "free white person" who is eligible for citizenship. However, eight years later, the term had taken a turn away from whiteness. Following the French Revolution, in stark fear that something similar would happen on U.S soil, President John Adams signed the Alien and Sedition Acts where it was stated that the president then had the power to "expel aliens" who were considered "dangerous to the peace and safety of the United States." Following this, racial rhetoric surrounding slavery (beginning in the early 1800s) and the Chinese Exclusion Act (1882) continued to push anti-immigrant ideology which made it so that in 1916 when American eugenicist Madison Grant published *The Passing of the Great Race*[43] – ideas surrounding white supremacy were easily and quickly adopted by anti-immigrant lobbyists and politicians. Following WWI, 1924 saw the growth of anti-immigrant sentiment and introduced the first quota system. For the next 50 years, the term "illegal alien" or "illegal immigrant" was used in the media, by the government, and made popular among the public. All of these examples exemplify the criminalization of immigration through law constraints– where a new identity for people is created– people outside of the law, "illegals."

A hierarchy of racial and national desirability was folded into the makings of "illegal" as a term to describe people. 2010 saw the "Drop the I-Word" campaign which was released by the Applied Research Center (now known as Race Forward: The Center for Racial Justice Innovation) which urged media outlets and the public to stop describing immigrants as "illegal"

[43] *The Passing of the Great Race* popularized pseudoscientific theories of racial superiority and has been named the "most influential tract of American scientific racism" by scientist and historial Stephen Jay Gould.

because of its dehumanizing qualities. 2013 saw a turn away from that when the Associated Press's senior vice president and executive editor at the time, Kathleen Carroll, commented "'illegal' should only describe an action, not a person." Early 2014 in a speech at Yale Law School, Supreme Court Justice Sonya Sotomayor described her preference for using the term undocumented immigrants as opposed to "illegal immigrants", commenting "to call them illegal aliens, seemed and does seem insulting to me."

The use of the word "illegal" when referring to immigrants has been, in recent times, contested due to its dehumanizing effects.

Research and theories in the field of applied linguistic anthropology help explain the weight of the label of "illegal" when referring to undocumented immigrants. Language in general plays a large role in the development and sustainment of social relationships between communities and within communities themselves. However, due to power differences within the United States racial hierarchy, typically the altern is responsible for the process of name giving and mobilizing language towards the subaltern (Avineri 172).[44]

The popularization and circulation of the concept of "illegality" as it is to do with undocumented immigrants "corresponds to the nation's efforts to strategically facilitate particular population's migrant and labor participation while maintaining them in a perpetual state of deportability" (Rosa 177). This suggests that the altern is purposefully assigning, while understanding the consequences of the label, the term "illegal" to, in a way, remain in control and create an environment of fear both that undocumented immigrants feel and fear that the population may feel towards those deemed "illegal."

[44] Though there are some cases where terms from marginalized groups are reclaimed such as the word "queer" for the LGBTQ+ community.

Those who seem to not be affected by the use of the term "illegal" when referring to immigrants may see the term as a politically neutral label for migrants who enter without documentation (Rosa 177), meaning "illegal" simply exists as a label, much like someone being tall. However, as Johnathan Rosa in "Debating the Language of Migrant Illegality" suggests, "illegal" speaks to more than a person's legitimate or illegitimate presence within the United States, and instead "illegal" is "corresponded to racially coded models of idealized citizen-subjects" (Rosa 177). Essentially, the label of "illegal" is not just a simple adjective speaking to someone's decisions, labelling someone as "illegal" not only typically holds racial/ethnic markers and carries negative connotations. Quantitative analysis by the University of Vermont (published in Megan Cope's "Coding Qualitative Data" from *Qualitative Research Methods in Human Geography)* has shown that the effect of immigrants being named "illegal" has created a negative feedback loop where the words and phrases most commonly associated to describe specifically Latino immigrants are words such as "illegal", "gang" and "criminal" (Barriere 8). The establishment of Latino immigrants as "criminals", "illegals", and other dehumanizing terms push, if not encourage, discrimination, racism, hate crimes, fear, and ultimately affects legislation that is introduced and codified. If the majority of the United States government has established a fear of immigrants, convincing themselves of immigrants' "illegality", it is only logical why racially discriminatory laws and immigration exclusionary policies continue to be passed. In 2016, research published by the Immigration Legal Resource Center highlighted the disproportionate targeting of Latinos: the country of origin for 35% of immigrants in the United States was Mexico and the Northern Triangle (Guatemala, Honduras, and El Salvador) meanwhile 92.5% of removals were of people from Mexico and the Northern Triangle. It is clear that a plethora of social and legal systems are affecting the targeting of Latino

immigrants. Likely the amalgamation of racism, anti-immigrant rhetoric, language spoken, skin color, and the specific association between Latino immigrants (Mexicans especially) contribute to their criminality.

There has been a push to stop using the word "illegal" in reference to immigrants which can be seen through the "Drop the I-Word" campaign. Established in 2010, its mission was to eradicate the use of the word "illegal" in reference to immigrants. The campaign focuses on tenets of linguistic anthropology, especially the idea that language can be used as a form of social action and change. It argued that the usage of the word was biased, not-neutral and not-accurate (Rosa 36), which saw backlash as some individuals, especially in positions of power in the media, who described "illegal" as not only being accurate but also was the easiest way of communicating to the public. A piece published by Margaret Sullivan in the *New York Times* in 2012, "Reader's Won't Benefit if the Times Bans the Term 'Illegal Immigrant'" wrote that undocumented should not be used because the word "undocumented" had a "new currency" due to federal policy changes involving immigrants who came to the United States before age 15 (referring to DACA).[45] Sullivan's preference for "illegal" over undocumented because of changes in immigration law –where some undocumented people had protections from deportation and therefore were different from other "illegals" only exemplifies the dangerousness of the term "illegal." It is misleading because of its self-evident nature, presuming that a judicial process determining illegality has occurred. With the exception of prosecutions of unlawful entry and reentry, most people deemed "illegal" have never been prosecuted for immigration crimes. "Illegal" is therefore excessive and abrasive, relying on stereotypes. Perhaps Sullivan was

[45] The Deferred Action for Childhood Arrivals (DACA) program was established in June 2012 by President Obama whose aim was to protect young, undocumented people from deportation.

unaware, at the time of writing, about the weight of the term "illegal" on the undocumented immigrant population.

The Drop the I-Word Campaign, created by the Race Forward Foundation argued that the term "illegal" should not be used in reference to undocumented immigrants for three reasons. First, it is dehumanizing: promoting violence and supporting a "long term strategy for mass criminalization of immigrants" (Drop the I Word). Secondly, "illegal" is racially charged: fueling racial profiling, racially coded, and effects specifically immigrants and communities of color. And third, it is legally inaccurate: those working in immigration courts do not use the term because it unlawfully assumes guilt. The Campaign suggests that the use of the term "illegal" was strategically used by anti-immigrant activists in 2010 to prevent immigration reform. The Campaign had positive effects as several major news outlets such as the *Associated Press*, *USA Today* and the *Los Angeles Times* pledged to stop using "illegal" in reference to undocumented immigrants– progress.

In an un-neutral and dehumanizing act, the usage of the term "illegal" ties immigrants to the act of their border crossing or the act of them overstaying their visas. While overstaying a visa is deportable, it is not a crime. Undocumented entry into the United States is a crime per U.S Code section 1325[46] that needs to be prosecuted and cannot simply be an accusation. The conflation of deportability and "criminality" can be seen through the use of "illegality" in referring to the supracategorical groups of immigrants. Beyond that, the usage of "illegal" in reference to immigrants encourages the correlation of undocumented immigrants with criminals, therefore furthering the social criminalization that undocumented immigrants face. There has been some work towards the social decriminalization of immigration which has been established through the "Drop the I-Word" Campaign, (pledges by some of the major media outlets to no

[46] See "United States Code" page 61

longer refer to undocumented immigrants as "illegal"). However, when compared to the social destruction that the Trump presidency brings with his specific and racialized targeting of the immigrant community (especially Latino immigrants), it is clear that the sociolinguistic aspect of the criminalization of immigration remains strong.

Beyond sociolinguistic exile, there are several other ways in which immigrants are socially, politically and logistically exiled, in what can be referred to as methods of exclusion.

Methods of Marginalization:

Migrant criminalization is largely a process that targets migrants within the territorial United States based on post-entry actions of immigrants or the rhetorical characterization of immigrants. International boundaries and the broader concept of the border and border region, while ostensibly focused on exclusion, or managing lawful migration, also directly and indirectly affect the reception, treatment, and social construction of migrants. That is, the border and the legal, social, and physical systems that make it up play major roles in normalizing the criminalization of immigrants. Harsha Walia in her book, *Border and Rule: Global Migration, Capitalism, and the Rise of Racist Nationalism,* describes four border governance strategies[47] that play a hand in the criminalization of immigration. Walia's theory behind border governance strategies is that together, they form ways of not only controlling immigrants, but ultimately criminalizing them.

Walia terms the first border governance strategy 'exclusion' and describes it as a way to contain and expel people– tangible and witnessable structures and events– walls, boundaries, detention centers, and deportations. Mass deportations and detentions– violent acts in themselves– serve as a threatening way to punish, intimidate, and deter immigrants. Detention centers, for example, are breeding grounds for state enforced gendered violence (68). Between

[47] "Border governance is at the nexus of working and warring, exclusion and extraction…" (Walia 76)

2012 and 2018, detainees filed 1,448 complaints of sexual violence against ICE and 33,126 complaints of abuse between 2010 and 2016 (Speri). The entirety of detention and deportation as an exclusionary act is an abrasive one– from the arrest, time in criminal court proceedings, and detention itself. Detention reflects a larger and equally violent prison industrial complex and an equally violent, corrosive, abrasive and unfair criminal justice system that impacts both of them (both detentions and prisons). All types of criminals, regardless of citizenship are typically and very easily seen as less than, less deserving, and less human. When it comes to immigration and immigrants specifically, exclusion as a border governance strategy does much more than make it more difficult for immigrants to enter, it encourages and enforces a violent push of the narrative of an undocumented immigrant as a criminal. This narrative is in itself a robust technology of exclusion.

When it comes to other forms of exclusion, take for example the economic function of borders, there is a distinction between who or what is crossing. Note the prioritization of objects over people, where commodities and capital are able to move freely, yet people are not. The former is directly related to increasing the profits of capitalists while the other, the human laborer, faces a frequent and wrongful stereotype that they hurt the economy, despite their centrality to it. While objects are morally neutral and economically positive, *people* crossing the border bear negative connotations, and an entirely separate rhetorical and sociolinguistic technology of exclusion which functions throughout the nation. This transforms the border into a tangible, intentional separation between the desirables from the undesirables, the insiders from the outsiders, the "us" from the "them" (Walia 67). Creating such a big divide between two groups further facilitates the dehumanization that immigrants face when ascribed "outsiders" and "criminals."

The second governance strategy that Walia explains is 'territorial diffusion' (Walia 81), which internalizes and externalizes border enforcement. Walia describes territorial diffusion as working with surveillance technologies and outsourcing border enforcement. Essentially, border enforcement is not limited to the border but happens through the cooperation of local officials with ICE and the Criminal Alien Program.[48] Close to half of all interior deportations[49] are due to the Criminal Alien Program that targets undocumented immigrants for immigration, drug, and traffic related charges. The majority of immigration apprehensions through the Criminal Alien Program then happen through jails, prisons and the criminal justice system (Golash-Boza, 177; Onyeukwu). Border internalization through territorial diffusion elasticised the border through surveillance (surveillance that in many cases, is racialized, and enacted through racial profiling). In addition to this targeted surveillance providing a lesser sense of safety and security for undocumented immigrants (and those perceived to be undocumented immigrants), it also increases the ease at which Immigration and Customs Enforcement are able to identify and apprehend undocumented people.

Following territorial diffusion is 'commodified inclusion' as a border governance strategy. Commodified inclusion describes the way in which immigrants are used for their labor power under the threat of deportation as a punishment (Walia 81). As has already been established, labor laws for undocumented immigrants are virtually nonexistent.[50] An undocumented immigrant's status is essentially used as a way to increase their exploitability. That is, their undesirability as migrants makes them desirable as laborers. If a laborer is to be compliant (including not unionizing), they are forced into a role where they are pushed further

[48] The Criminal Alien Program (CAP) is a program run by Immigrations and Customs Enforcement (ICE). CAP is one of the specific programs that targets apprehensions and detention.. In fact, it is responsible for two thirds of all ICE apprehensions (Immigrant Legal Resource Center 1). Under CAP, ICE officials are able to access local and state prisons and apprehend deportable people.
[49] Interior deportations refer to deportations that happen beyond border apprehensions.
[50] See "Reagan, IRCA, and El Centro" page 19

into subservience. If migrants challenge labor conditions, their vulnerability as deportable workers can lead to deportation. The relationship between capitalism and labor is one that perpetually pierces the veil between workers and fair labor, the wound is exacerbated by the deportability of immigrants which can be seen through unfair labor practices, unfair pay, not being able to unionize and immigration raids.

Walia cites the immigration raids of 2019 in Paco and Koch processing plants to corroborate her theoretical framing. Joseph Grendys, a billionaire, ran Koch Foods, which had been an active labor site of many undocumented, specifically Latino immigrants. In 2005, workers organized a unionization drive which then was followed almost immediately by a seven year lawsuit for discrimination and sexual harassment. The lawsuit was eventually settled, in favor of the workers for $3.75 million. Very soon after that, there were 680 arrests in an ICE raid. Workers at Koch were faced with poor working conditions, discrimination, and sexual harassment. As undocumented workers, they had no labor protections and decided to unionize. It can be implied that it was this decision that caused someone at the plant to inform ICE of the documentation status of the workers (Ford).

Lastly, Walia describes ‘discursive control’ (Walia 82) as the last method of border governance strategies. The framing of Walia’s of discursive control mirrors the sociolinguistic aspect of the criminalization of immigration. Discursive control, as Walia describes it, the implications of word choice, specifically between refugees or asylum seekers and economic immigrants.[51]Refugees are given temporary protections, forgiveness and acceptance governed by U.S. and international norms, while non-humanitarian economic immigrants are not and face numerous policy restrictions. Walia is clear in how she believes these terms should be used, “I use ‘migrants and refugees’ together, not to conflate lived experiences or collapse material

[51] Economic immigrants refer to those migrating for better economic and educational opportunities

difference, but to refuse binaries of forced and voluntary, deserving and undeserving, real and bogus, and to depict irregular migration as an autonomous force defying and exceeding state characterizations and controls" (83). Her claim is that regardless of why someone has come here, they are being assigned a role, legitimate or illegitimate, in their existence as immigrants within the United States. Categorizing and therefore forming a hierarchy (of desirability and validity) can very clearly be used as a way to exclude certain individuals or groups and creating distinct categories (such as the categories between economic immigrant and refugee) functions to control and manage people.

Together, Harsha Walia's border governance strategies work collectively to criminalize immigration and marginalize migrants within the interior of the United States. Exclusion, especially violent forms of exclusion such as detention and deportation is aimed to deter. Territorial diffusion describes the collaboration of local law enforcement with ICE which creates feelings of unsafety beyond the border. Commodified inclusion forces immigrants into either a subservient role of compliance or deportation. And discursive control effectively makes a hierarchy of legitimacy through labeling, and works strategically to target immigrants. Modes of border control, from the rhetorically stigmatic and economically exploitative to the material apparatus of detention and deportation, are elastic and flexible. As opposed to the border being a physical location where the threat to one's safety is tangible, the unsafety and instability of the border zone (at least for undocumented migrants) is everywhere. Technologies of exclusion, steeped in the history of migration affect all the statuses of noncitizens--from the undocumented to temporary visitors--including those, often Latine people, perceived to be immigrants. Deterring immigration and labeling some who come to the country as "illegitimate," furthermore emphasized through detention and deportation criminalizes immigrants by forcing them into

federal courts and in some cases, federal prisons (for the crimes of unauthorized entry or reentry). Additionally, increased surveillance and the use of local law enforcement *directly* ties criminal law to immigration law, therefore criminalizing immigration.

The discussion of the ties between criminal law and immigration law are essential in understanding the overlap between legal influences and systemic social influences behind the criminalization of immigration within the United States.

Crimmigration[52]:

The criminalization of immigration and immigrants requires an understanding of two systems of enforcement– domestic criminal systems and enforcement as well as simultaneously similar and disparate systems of immigrant policing and punishment. This is highlighted through scholar and academic, Juliet Stumpf's, analysis of the increasing overlap between criminal law and immigration law, in her 2006 publication in the *American University Law Review* which explores this merger, in a piece entitled "The Crimmigration Crisis: Immigrants, Crime and Sovereign Power." Stumpf is the first scholar to explore the unification of criminal law with immigration law, and in particular, she coined this unification crimmigration. The term is used to describe the process in which immigration law has increased its proximity to criminal law and Stumpf explores how criminal law and mechanics frequently overlaps, with immigration law, creating a morass of complexity and contradiction.

The prologue of Stumpf's article is shaped as a fictional letter to the president elect of 2016. It is important to note that at the time of her publication in 2006 the letter sought only to highlight extreme scenarios if crimmigration were to continue– in a fictional manner that was

[52] Note: there is a large intersection between systemic social influences and legal influences of crimmigration when it is to do with the criminalization of immigration within the United States. Using Stumpf's ideas of membership theory, which I attribute to a systemic social issue, it is categorized under this chapter. I use crimmigration as a transition between systemic social issues behind the criminalization of immigration and legal influences behind the criminalization of immigration.

perhaps more palatable to a reader, nevermind getting the reader's attention. She positions herself as the President's campaign manager. In the letter, Stumpf seeks to provide the president historical context and advice. She mentions several events that have occurred in the past, including but not limited to[53]:

- 2001 terrorist attacks in France and Australia that resulted in massive tragedy
- 2004 the United States deported almost 200,000 noncitizens
- 2005 saw a peak in the number of immigrants who were entering the country
- 2006 marked a turning point in the national conversation regarding immigration seeking to legalize the population of immigrants vs using the power of the state to attempt to decrease the number of undocumented immigrants within the country
- 2007 Congress declared all violations of immigration law, criminal
- 2008 made deportation mandatory for *any* undocumented person who committed a felony
- 2009 this group of deportable crimes also grew to include misdemeanors
- 2012 two suicide bombers were caught in international flights
- 2015 International Prison Riots

Stumpf's use of a fictional future-based letter, detailing fictional past events, helps to create a world for the reader where they understand the weight and possible eventual effect of crimmigration. She closes her prologue by reminding the president-elect about the national conversations regarding conflicting visions of the immigrant: whether an immigrant should be seen as a member of society or a criminal; what the practical consequences of these choices are; and the connection between the unification of criminal and immigration law along with its

[53] While Stumpf's use of this letter and future-historical events is entirely based on fiction, there are some similarities in her listed events to today's world. There have been peaks in immigration (surprisingly enough there was a 2004-2005 peak), massive deportations of non-citizens, an increase of deportable crimes, and more.

international and domestic effects. Stumpf is sure to explain that all of these events were caused because of crimmigration and the increased frequency in viewing an immigrant as a criminal.

In the Introduction, Stumpf lays out the grounds of her argument: membership theory has resulted in crimmigration. This she then refers to the prologue, explaining that this imagined future represents a future based in the present where immigration violations that previously were maneuvered through the civil courts are now more and more frequently being intertwined and given off to criminal courts. Stumpf mentions that membership theory, of which she bases her argument as to why crimmigration has occurred, limits rights and privileges to the members of a group based on who is given license to be in the group. Membership theory is based on being a categorical member of a group, specifically a citizenship group. Membership theory establishes an ingroup and an outgroup that then projects two tools of the sovereign state, punishment and moral condemnation for the individual offender.

The section "Immigration and Criminal Law Converge" follows the introduction in which Stumpf seeks to establish the similarities and differences between immigration and criminal law. Both forms of law differ from *other* forms of law. Whereas most other forms of law focus on resolving conflicts between individuals and/or businesses, both criminal and immigration law seek to regulate the relationship between the state and the individual. Both legal systems operate in relation to membership theory which includes a crux of systems of inclusion and exclusion that result in insiders and outsiders. These insiders and outsiders groups go by many names: innocent and guilty, admitted and excluded, legal and "illegal."

The differences between criminal and immigration law include their evolution. The first federal statutes that restricted immigration barred the entry of foreigners who had been convicted of crimes but since then, the relationship between criminal and immigration law has intertwined

to the point where many immigration violations themselves are defined as criminal offenses. These criminal offenses are also, in more cases than not, deportable. The relationship between criminal law and immigration law that has resulted in crimmigration is not limited to the criminalization of immigration violations but, as Stumpf outlines, is due to three fronts.

The first front is the overlap of the mechanisms and realities of immigration law and criminal law (379). This includes the evolution of immigration law from an administrative civil process to the interlacing of criminal law with immigration law. Increasing the grounds by which undocumented people can be excluded and deported in addition to increasing the severity of the consequences for crimes that were previously considered civil actively criminalizes immigration. This includes an overlap in the the substance of the law– which describes the process in which immigration became administrative, to its merger with criminal law, including the creation of criminal offenses, criminal labels and stereotypes, and shared physical infrastructure for detaining and deporting noncitizen offenders. Additionally, this overlap is due to "removing noncitizen offenders" or who are often termed "criminal aliens" (382) the creation of immigration-related crimes that can be prosecuted (384) and the focus that the United States government has had on terrorism (385). Stumpf explains that the association between immigration law and criminal law has been so strong that immigration law is being used less and less and in its place, criminal law. However, this sort of double punishment for a single crime (being tried and convicted in a criminal court) does not excuse the noncitizen offender from being deported via the immigration courts, which as the next front explains, is happening more and more often.

The second front of crimmigration is due to the act of mirroring between immigration enforcement and criminal law enforcement (386). While the offenders themselves have a

different level of constitutional rights awarded to them due to their citizenship status, the over-policing of both groups connects them. The Border Patrol, as Stumpf explains (388) has transitioned from a group of ranchers, military men, mail clerks, local marshals and sheriffs, etc, to a group of trained and uniformed people who approach their job very similarly to the way that a police force does. Not mentioned within Stumpf's piece but worthy of note is the similarities of criminals and undocumented people as it is to do with how they are treated within the holding system (whether a detention center or a prison) are very similar.[54] Proof of a merged crimmigration system of enforcement can be seen through the transfer of responsibility of immigration control from the Department of Commerce and Labor to the Department of Justice (in 1940) and then around 60 years later, from the Department of Justice to the Department of Homeland Security. The bureaucratic relocation of what group of people is to be held responsible for immigration has aligned immigration law closer and closer to criminal law. Stumpf, in this section also includes differences between immigration and criminal law including but not limited to: constitutional protections for criminal citizens vs criminal noncitizens and the power to detain and deport migrants for having committed crimes after entry into the United States.

The third front of crimmigration is based on the increased similarities between the procedural aspects of prosecuting immigration violations to those of criminal procedures (390). Stumpf mentions and describes the similarities between a judge's role within criminal and immigration court being a decision that revolves around exclusion and the "physical liberty of an individual" (390). In addition to this, the "increased use of an immigration sanction– detention" (391) – is similar to the way that the criminal law system has seen an increase in incarceration. Included in the discussion of procedural events Stumpf also explains a procedural difference: immigration has historically been solely the responsibility of the federal government which

[54] See "Ronald Reagan, IRCA, and El Centro" page 19

contrasts with the state's responsibilities for criminal offenses. Together, she argues that these three fronts contribute to the development of crimmigration.

The second section of Stumpf's article is titled "Membership Theory and Crimmigration" in which she attempts to answer the question: "Why has the merger of criminal and immigration law taken place?" (396). She begins to answer the question with a look into "the role of membership theory in criminal and immigration law" (396) which explains the process of deciding whether or not an individual should be located within the ingroup or outgroup of society. She also mentions the importance of connotation– how more and more often undocumented immigrants are labeled "illegal" or unlawful, with people associating them with committing future crimes as extreme as terrorism. She attributes membership theory and the increased intensity of categorizing undocumented people in the outgroup and not truly members of U.S. society. Criminal law results in segregation from society– imprisonment (which involves being in a separate space while remaining in the country) whereas immigration law results in separation through expulsion (deportation). Membership theory helps courts and others define who is "the People."[55]

Similar to this is the approach of the acquisition and loss of membership. People who are tried under criminal law assume that the defendant is a citizen and therefore are starting off with a basis of membership. On the other hand, those tried under a criminalized immigration law assume that the defendant is a noncitizen and is not worthy of membership and expendable via deportation. This presumed membership distinction impacts the constitutional protections of the defendant and if found guilty, whether the defendant is segregated or separated.

Stumpf also writes on the relationship between sovereign power and penology in criminal and immigration law (402). There has been a shift within both systems from one that focuses on

[55] Referring to "We, the People…"

rehabilitation to retribution. Additionally, criminal penology has been used to usher in new policies, which is what immigration law had been doing "since its inception" (402). Stumpf explains that the old philosophy that separated a person from their crime transitioned in the 1970s to a system that focuses on retribution and "collateral consequences" (404) for lesser and lesser crimes. "Collateral consequences", as Stumpf lists them, encompass civil restrictions derived from criminal convictions (404). Stumpf mentions this shift that focuses on retribution and retributive justice as not only a defining attribute of the modern criminal justice system but also coincides with society's view of how a crime should be morally condemned.

She closes her argument by mentioning that the value of rights for those in the ingroup (meaning non-criminal citizens while the outgroup are noncitizens or criminals) become more valuable because of the exclusionary mechanisms. Essentially by not giving everyone any one resource, the resource is deemed as more valuable because of its implicit scarcity. In defining membership, the classification in and of itself of who is and is not externally dictated to be worthy of being a part of the (in) group is one of the similarities between the criminal justice laws and system and the immigration laws and legal system. Crimmigration, the merger between the two, is attributed largely to, Stumpf explains, membership theory– the separation of ingroup and outgroup due to criminality, and those in the outgroup are cast out. Undocumented immigrants are not only detached from the ingroup because of their status but are also cast out due to their criminality.

Stumpf's analysis of the merger of criminal law and immigration law (crimmigration) has been revolutionary for those studying immigration and immigration law. By putting a name to this phenomenon, researchers and writers are able to examine different theories by which crimmigration was created and why it persists.

Stumpf isn't the only immigration researcher that has delved into the analysis of crimmigration. César Cuauhtémoc García Hernández is also a foundational writer and analyst in the field of crimmigration, especially his journal article, 'Deconstructing Crimmigration,' which builds off of Stumpf's foundation while focusing specifically on the interactions of crimmigration with society– both in the origins of crimmigration along with the materiality of crimmigration law.

García Hernández discusses the legislative origins of crimmigration, theorizing that the Reagan era was a monumental shift in the way that the country both viewed immigrants and legislatively dealt with undocumented immigration, especially regarding the change of the connotation of undocumented immigration in relation to citizens. The shift towards thinking of undocumented immigration as a public safety risk provided ammunition for xenophobic and racist lawmakers (Reagan administration, then the Bush and Clinton administrations) to pass (or attempt to pass) policies that further blur the line between criminal law and immigration law. García Hernández describes part of this process "legislative architecture" (204). Government and the media amplified the U.S. population's moral panic.[56] Hysteria and anxiety – specifically anti-drug hysteria and anti-terrorism anxiety (both partially racially influenced) were commonly applied to migration via criminalization and the "wars on x" (ex: War on Terror and the War on Drugs) instituted to confront these anxieties were heavily funded efforts at the roots of criminalization that consolidated authority and hurt nonwhite communities.

García Hernández writes that today's crimmigration law can be divided into three doctrines. The legal doctrine of crimmigration law is heavily influenced by the relationship between criminal history and immigration status. He cites the Immigration and Nationality Act

[56] Moral panic can be understood as a societal reaction (panic) over a perceived threat to a social order. Both the media and the government are responsible for feeding into the narrative of creating moral panic within society. See "Moral Panic" page 33

(INA) as an example for the legal doctrine of crimmigration. Dozens of provisions within the INA trigger deportation of an undocumented immigrant in the case of conviction and in some cases, simply the alleged commission of the crime (referring to there not needing to be a conviction) (García Hernández 211). In the case of these provisions, an individual's criminal history has a direct influence on their immigration status. For example if someone were convicted of committing a crime, take for example, theft, they could be deported. In the case of an alleged crime, regardless of the judicial outcome (innocence or guilt), an immigrant is still deportable because of their association with the crime which affects their desirability as migrants.[57]

The second doctrine of crimmigration law describes the ways that state and federal criminal proceedings operate. Several states criminalize persons using fraudulent citizenship or immigration documents, therefore criminalizing activity related to the act of migration or the masking of their migration. In the case of Arizona, this is taken a step further. Arizona uses human smuggling to prosecute undocumented immigrants, claiming that undocumented immigrants have "self smuggled." Not only will undocumented immigrants in Arizona be federally charged in the case of undocumented entry or reentry (U.S.C. 8 §1325 and §1326) but they will also be charged locally with the crime of "self-smuggling" (García Hernández 211).

The third doctrine of crimmigration law describes the way that law enforcement impacts undocumented immigrants through its conflation of traditional criminal law enforcement tactics with traditional immigration law enforcement tactics. For example, 100 miles within the all land and oceanic borders (the 100 Mile Border Zone), where according to the ACLU, roughly two

[57] In the case of drug rehabilitation programs which have increased over the last two decades to reduce the prison populations (McVay et al. 4), migrants granted this form of relief from criminal punishment still suffer the consequences of their migrant status as "criminal aliens," often leading to their deportation. While the goals of these drug rehabilitation programs are typically just that– rehabilitation and eventual reentry into society, typically, undocumented immigrants who have committed crimes receive the opposite: removal.

thirds of the population lives, immigration law enforcement has *special* liberties and jurisdictional authorities. At official ports of entry, for example the Fourth Amendment, which protects citizens from arbitrary stops and searches, federal authorities only need *reasonable suspicion* or *probable cause* to conduct what they may call a "routine search" which also includes Border Patrol being given permission to conduct "immigration checkpoints" (ACLU).

These three doctrines that describe the way that law, legal/criminal proceedings, and law enforcement simultaneously work to create what is known as crimmigration.

García Hernández further details how these systematic and institutional overlaps leading to crimmigration can be thought to be beneficial for law enforcement– specifically the subscription to the belief that crimmigration will make the United States safer, when in reality, "crimmigration law's mere existence inflicts numerous harms on people, institutions, and the legitimacy of law itself" (213). García Hernández goes on to explain that crimmigration law harms people through securitization and imprisonment (213).

"At its core," writes García Hernández, "crimmigration law promotes a security-centered view of migrants and migration. A foundational tenet involves demonetization of migrants and discussions of migration as a threatening unknown" (214), García Hernández supports his claim through citing two presidents as being subservient to the "immigrants as harmful" ideology. Obama, for example, famously said his immigration enforcement priorities were focused on "felons, not families"[58], while at the same time the Obama administration expanded the Bush-era Operation Streamline to criminally punish migrants for unlawful entry and re-entry (i.e., Blease's 1929 law now codified under U.S Code 1325 and 1326).[59] In other words, felons and families were actually conflated for having committed crimes *in* the United States and others for

[58] President Barack Obama, Remarks by the President in Address to the Nation on Immigration (Nov. 20, 2014), https://obamawhitehouse.archives.gov/the-press-office/ 2014/11/20/remarks-president-address-nation-immigration.
[59] See "United States Code" page 61

committing crimes *entering* the United States. Secondly, García Hernández cites Trump's first administration[60] where Trump was blatantly racist and discriminatory against migrants, and as he would in his second term, the President persistently used (and uses) baseless, false claims to create a sense of moral panic within his followers. For example, Trump suggested that many Mexican immigrants were rapists[61], and posed a "significant threat to national security and public safety."[62] Trump, of course, was backed up by his administration, with his top law enforcement officer, Attorney General Jeff Sessions making claims that immigrants were directly responsible for criminality (García Hernández 215). This rhetoric mobilizes immigration to be used as a tool to specifically build mass panic and convince the general public that they should be afraid for their safety.

Alongside securitization is the harm that immigrants face due to imprisonment which explains that while detention rates have gone up, conditions for detention facilities have decreased. This is illustrated through Reagan's turn to privatized detention facilities that have made immigrant detention a for-profit business, where immigrants are (ab)used in order to increase profit margins for detention facilities. García Hernández cites that detention centers, other than having less-than-humane conditions for detainees, also make mistakes in *who* they are detaining.

Davino Watson, for example, was born in Jamaica and moved to the United States as a teenager, living with his father. In 2002, both Davino and his father were naturalized. In 2007 he pleaded guilty to selling cocaine and he was imprisoned until May 2008. At 23 years old, living in New York, having just been released from his sentence, ICE detained Watson. He was later

[60] During his second term, Trump is still blatantly racist, discriminatory, and uses baseless, false claims to create a sense of moral panic within his followers.
[61] 8 Full Text: Donald Trump Announces a Presidential Bid, WASH. POST (June 16, 2015), https://www.washingtonpost.com/news/post-politics/wp/2015/06/16/full-textdonald-trump-announces-a-presidential-bid/.
[62] Exec. Order No. 13,767, 82 Fed. Reg. at 8793

brought to an ICE facility in rural Alabama. While detained, ICE attempted to look up Watson's father, Hopeton Ulando Watson, but confused Ulando Watson for Hopeton Livingston Watson. Livingston Watson lived in Connecticut (not New York), did not have a son named Davino, and had arrived in the United States at a completely different time than Ulando Watson. However, ICE did not catch their error and used Livingston Watson's file to determine that Davino was not a citizen. Davino remained in ICE facilities as a "deportable alien" (Domonoske) for around three and a half years, 1,273 days.While in detention, Davino wrote to immigration officers, attaching his father's naturalization certificate (which had his father's *correct* name), gave ICE the phone numbers of his father and stepmother to call and confirm his status (ICE did not call the number) and kept repeating his status– a citizen. When he was released from ICE detention in Alabama, he was not given an explanation or financial compensation (Domonoske).

Davino's case is likely one of many. One study published by the *Virginia Journal of Social Policy and the Law* cites that around 1.5% of all deportations are of U.S citizens (632). Theoretically, this is discovered during immigration legal proceedings[63], however, similar to Davino's case, clerical and administrative issues– human error and bias– have real effects on not just immigrants, but also citizens.

García Hernández is clear in his statement, especially with Davino's story as evidence, that crimmigration law has an adverse effect on immigrants.[64] Beyond effects on people, crimmigration law also harms institutions including local governments and the federal government. Regarding local government, crimmigration law is harmful because the way in which ICE is dependent on local law enforcement. This means that local law enforcement face

[63] See "United States Code" page 61

[64] The citizen proxy argument essentially means: the way society treats immigrants today is the way it will treat its citizens tomorrow.It has frequently been expressed by various activists and policymakers to reflect the idea the way that the government and people treat a minoritized class (immigrants) who can become easy targets and scapegoats, will then normalize behaviors that governments will use towards their citizens.

financial liability "for engaging in constitutionally dubious policing tactics at the behest of, or to further, the immigration policy goals of the federal government" (García Hernández 225). Federal government is harmed by crimmigration law through treating federal courts as a monolith that focus heavily and disproportionately on immigration crime prosecutions and policing, including the misdemeanor of unlawful entry.

Last, García Hernández argues that crimmigration law negatively affects the law by damaging the role that the law plays in modern society, especially social relations. García Hernández suggests that, before *knowingly* disobeying a law, a person who is a moral agent, weighs the law, deciding for themselves if it is a law *worth* breaking: "laws that conflict with widespread perceptions of moral legitimacy are more likely to be disobeyed" (García Hernández 228). Alongside this, governmental authorities have frequently looked the other way or carved out exceptions to crimmigration law because its merger might be regarded a danger to public safety in more pro-immigrant communities or because its enforcement might run counter to other needs, such as the need for migrant labor.

As a whole, crimmigration law plays a hand in the development of the criminalization of immigration. Crimmigration, alongside the creation and establishment of moral panic, sociolinguistic ties to the criminalization of immigration, and internal and external methods of marginalization, continue to normalize the migrant-as-criminal trope and immigration as a threat to public safety.

To fully understand the intricacies of crimmigration law, the distinction has to be made within legal confines regarding what should and should not be considered criminal.

Chapter 3: The (Il)legality of It

The construction of immigration as criminality is built from a relationship between history and present day, social implications and law. While all aspects behind the criminalization of immigration are important, it is also crucial to recognize the *direct* ties that law has with criminalizing immigration. Only through the creation of law as criminal law (with criminal law repercussions) are immigrants criminalized. At the same time that public rhetoric and opinion informs law, law substantially works to shape public opinion. As a whole, the criminalization of immigration is impacted by multiple scales of law and policy, almost in constant conversation with one another. Immigration is a federal jurisdictional authority, but this authority is often managed in partnership with third party legal systems (states and localities), local enforcement such as municipal and county policing, as well as third party jailers (public and private) that detain immigrants.

There are certain aspects of immigration that are typically criminalized, such as entry, re-entry and visa overstay. While U.S Code 1325 and 1326 explore entry and re-entry, visa-overstay is an entirely different process that involves individuals who were at one point documented (documented through their having a visa). Visas have periods of time where individuals are allotted legal admittance and residence within the United States. However, when this period of time is over, the immigrant is instructed to return to their country of origin. If the immigrant, for whatever reason they stay, they have overstayed their visas. While this is not a crime, it is deportable. There is a different sense of legality with visa overstays because they at one point were documented. However, their criminalization and deportability connects them to those who have entered or reentered the country without documentation.

The criminalization of immigration through legal means also introduces nuances between misdemeanors, aggravated felonies and civil infractions. All three of these are punishable by different measures, especially in regards to non-citizens. The differences in sentencing range from fines to imprisonment to deportation. Deportation is triggered when someone who commits a misdemeanor is sentenced to a year (365 days) in prison (Brady 5). While there have been some states, New York and California mainly, who have reduced the maximum sentence of a misdemeanor to 364 days, deportation post-imprisonment is actively criminalizing immigration by essentially punishing them twice for the same crime.

Through an examination of current U.S code, impactful court cases, and restrictive policy, "The (Il)legality of It" seeks to examine the legal constructions behind the criminalization of immigration. Lastly, the law also shapes a determination of right and wrong from either party– those in power and those not (in this case, the government and immigrants). This determination easily points out where either party might be breaking the law. The last section seeks to explore a different kind of criminality, one where the government is breaking the law.

United States Code:

Federal criminal law plays just as big a part in the criminalization of immigration as state law. Whereas the federal government can create immigration laws that migrants must abide by and for which they can be punished, states' and localities' criminal justice systems serve as feeders to immigration enforcement when migrants commit local crimes that might make them deportable. As discussed in chapter one, the 1929 Undesirable Aliens Act, 8 U.S.C §1325 and §1326 of the United States Penal Code, criminalize entry and reentry of immigrants in the United States without "proper" documentation (this is clear "permission" that the United States grants to people, which would typically look like a Visa, Green Card, or other forms of authentication).

Unauthorized entry, §1325 is a misdemeanor punishable by up to 6 months imprisonment (for a first offense). §1326 is a felony and is punishable by up to two years of imprisonment. It is important to note that when undocumented immigrants are tried and found guilty of unauthorized entry or reentry into the United States, they are essentially being punished twice for the same "crime"–first through criminal prosecution and second through the immigration consequences of their crime. The criminal concept of double jeopardy does not apply to these sequential forms of punishment, however, because immigration law is an administrative and civil system, deemed separate from the criminal system.[65] The roots of Blease's 1929 law – which documented racist ideologies– were at the foundation of criminalizing entry and re-entry and were instituted to "further racist and white supremacist ideology" (National Immigration Project).[66]

Immigration violations (overstaying a visa, transporting or harboring undocumented citizens, unauthorized employment)[67] are considered civil offenses, for which an immigrant can be deported, but are categorized as administrative law– hollow "law", a defined sense of criminality that lives within administrative law. To illustrate this, functionally immigration law can be more attuned to housing codes that a business must adhere to (Mackler). Most of the criminality that is absorbed by immigrants would be the same as saying that a building owner is a criminal for disregarding OSHA.[68] The central laws written into the United States Code that detail a misdemeanor and a felony are *"improper entry by alien"* and "*reentry of deported alien."* As discussed in chapters one and two, immigrant criminality is determined by a culmination of social, rhetorical, and historical structures in addition to legal codes.

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[65] It is important to note that immigrants within the court system are treated differently than criminal defendants. While criminal defendants are granted lawyers, undocumented immigrants are not. United States citizens and criminal defendants are promised "fair and free trials", undocumented immigrants are not. Usually, when criminal defendants are tried, they are tried directly before the court contrary to en masse hearings that can involve up to hundreds of defendants.

[66] See *Coleman Livingston Blease and The Undesirable Aliens Act* page 15

[67] American Immigration Law Group

[68] OSHA is the Occupational Safety and Health Administration whose goal is to enforce safety within the workforce

U.S.C §1325 "Improper Entry By Alien"

" **(a) Improper time or place; avoidance of examination or inspection; misrepresentation and concealment of facts**

Any alien who (1) enters or attempts to enter the United States at any time or place other than as designated by immigration officers, or (2) eludes examination or inspection by immigration officers, or (3) attempts to enter or obtains entry to the United States by a willfully false or misleading representation or the willful concealment of a material fact, shall, for the first commission of any such offense, be fined under title 18 or imprisoned not more than 6 months, or both, and, for a subsequent commission of any such offense, be fined under title 18, or imprisoned not more than 2 years, or both.

(b) Marriage fraud

Any individual who knowingly enters into a marriage for the purpose of evading any provision of the immigration laws shall be imprisoned for not more than 5 years, or fined not more than $250,000, or both.

(c) Immigration-related entrepreneurship fraud

Any individual who knowingly establishes a commercial enterprise for the purpose of evading any provision of the immigration laws shall be imprisoned for not more than 5 years, fined in accordance with title 18, or both.

(June 27, 1952, ch. 477, title II, ch. 8, §275, 66 Stat. 229 ; Nov. 10, 1986, Pub. L. 99–639, §2(d), 100 Stat. 3542 ; Nov. 29, 1990, Pub. L. 101–649, title I, §121(b)(3), title V, §543(b)(2), 104 Stat. 4994 , 5059; Dec. 12, 1991, Pub. L. 102–232, title III, §306(c)(3), 105 Stat. 1752 .)"

U.S.C §1325 labels the entry of an immigrant through a non-official port of entry[69], entering the United States without authorization, or not allowing an immigration official to conduct a search. Breaching any of these, per U.S.C §1325, results in a fine or up to six months imprisonment. U.S.C §1325 also details immigration related marriage fraud– entering in a marriage for the sole purpose of receiving legal documentation (Legal Permanent Residence[70]) and creating a company to avoid immigration laws. It is important to note that for any of these

[69] A port of entry is a designated location where customs and border enforcement oversee the movement of people or goods into and out of the country.

[70] Colloquially known as Green Card holders

criminal charges, federal courts *must* follow due process[71] to prove that any person within the United States was found guilty for one or more of these misdemeanors.[72]

> *U.S.C 8 §1326: "Reentry of deported alien; criminal penalties for reentry of certain deported aliens"*
> *"*(a) Subject to subsection (b) of this section, any alien who-
> (1) has been arrested and deported or excluded and deported, and thereafter
> (2) enters, attempts to enter, or is at any time found in, the United States, unless (A) prior to his reembarkation at a place outside the United States or his application for admission from foreign contiguous territory, the Attorney General has expressly consented to such alien's reapplying for admission; or (B) with respect to an alien previously excluded and deported, unless such alien shall establish that he was not required to obtain such advance consent under this chapter or any prior Act,
> shall be fined under title 18, or imprisoned not more than 2 years, or both.
> (b) Notwithstanding subsection (a) of this section, in the case of any alien described in such subsection-
> (1) whose deportation was subsequent to a conviction for commission of three or more misdemeanors involving drugs, crimes against the person, or both, or a felony (other than an aggravated felony), such alien shall be fined under title 18, imprisoned not more than 10 years, or both; or
> (2) whose deportation was subsequent to a conviction for commission of an aggravated felony, such alien shall be fined under such title, imprisoned not more than 20 years, or both.
> For the purposes of this subsection, the term "deportation" includes any agreement in which an alien stipulates to deportation during a criminal trial under either Federal or State law.
> (June 27, 1952, ch. 477, title II, ch. 8, §276, 66 Stat. 229 ; Nov. 18, 1988, Pub. L. 100–690, title VII, §7345(a), 102 Stat. 4471 ; Nov. 29, 1990, Pub. L. 101–649, title V, §543(b)(3), 104 Stat. 5059 ; Sept. 13, 1994, Pub. L. 103–322, title XIII, §130001(b), 108 Stat. 2023 .)"

U.S.C §1326 describes the unauthorized re-entrance of an undocumented immigrant after they have been formally deported in addition to what is to happen if an undocumented immigrant is convicted for an aggravated felony *before* they are sent to be deported (in which the sentence is a fine or up to ten years in federal prison before they are set to be deported again).

[71] Due process is the process by which a defendant goes to court to prove their innocence or plead guilty. Many people say that due to the fact that immigration law is administrative and not civil,
[72] Per Plyler v Doe, see page 68

The 1929 codification of entry and reentry crimes for undocumented immigrants in the United States occurred at a time when numerical quotas severely limited European, African, and Asian migration. The Western hemisphere, in particular Mexican migration, was exempt from numerical quotas. Congress, under the leadership of Blease, in a proto-crimmigration manner, merged immigration with the criminal system as a way to manage Mexican migration in the absence of quotas. The visa overstay–the temporary visa was the primary method of overseas migration after 1924–was not criminalized, although still deportable. Today, prosecutions and convictions for unauthorized entry and reentry have overwhelmed federal courts: "in fiscal year 2016, for example, federal courts oversaw prosecutions of 68,314 defendants whose most serious charged criminal offense was an immigration crime. All but a small number of these prosecutions were for unauthorized entry or reentry" (García Hernández 212). In 2021, 43% of all federally seen criminal cases were immigration crime prosecutions (United States Sentencing Commission).

Apart from the judicial and legislative branches of government having a direct relationship on the criminalization of immigration, so too does the executive branch. During Donald Trump's first term, he instructed the Department of Justice, through an executive order, to prioritize "prosecutions of offenses having a nexus to the southern border"[73] and later that same day released yet another executive order that targeted immigration. Directed at the Attorney General Jeff Sessions and the Secretary of Homeland Security Kirstjen Nielson, Trump issued them to "ensure that adequate resources are devoted to the prosecution of criminal immigration offenses."[74] Trump's orders were not only followed but amplified. In a 2017 speech, Sessions urged Customs and Border Protection employees to "take a stand against this filth"

[73] Exec. Order No. 13,767, 82 Fed. Reg. 8793, 8796 (Jan. 25, 2017)
[74] Exec. Order No. 13,768 § 11, 82 Fed. Reg. 8799, 8801 (Jan. 25, 2017).

(Sessions) (referring to immigrants) through the prioritization of prosecution of "federal immigration crimes" (García Hernández 212). Prosecutions for immigration crimes under the Trump administration were the trigger for the infamous period of family separations in 2018 where almost 3,000 families were traumatically split apart, some permanently.

The criminalization of immigration through codified law is the only solid and identifiable piece of legislation that targets immigrants, leading to their "criminal" convictions. However, it is important to note what these convictions imply: due process in criminal court. In immigration court, noncitizens have few legal rights and protections, with various mechanisms to bypass due procedural rights altogether and expedite the deportation process. To accuse a person residing in the United States of being undocumented and not allow them due process only to deport them is illustrates a slippery slope toward the criminalization of persons with legal statuses, including citizens.[75]

Court Cases:

While there have been several court cases that have exemplified both discriminatory and nondiscriminatory policies that target or protect undocumented (and in some cases, documented) immigrants, there have been a few that are monumental to the functional legal immigration system as we know it today.

Chy Lung v Freeman:

August 24, 1874, a steamship, *Japan*, owned by the Pacific Mail Steamship Company, coming from China, landed in an official United States Port of Entry in San Francisco. It carried more than 500 Chinese passengers who had come to the United States to reside and work due to

[75] This is termed the citizen proxy by legal scholar Hiroshi Motomura, arguing that the ways in which immigrants/non-citizens are treated is eventually the way that citizens will be treated.

a treaty that the United States had to increase Chinese immigration (the Burlingame-Seward[76] treaty). Among the 500 were 22 women who, at the time of landing, did not know that their future in the United States would be filled with discrimination, sexism, and ultimately, a tumultuous legal battle.

Rudolf Norwin Piotrowski, the Commissioner of Immigration boarded *Japan* when it landed, specifically targeting the 22 Chinese women. He began interrogating them about their marital statuses, children, relatives in the United States in a manner that can only be described as humiliating. The women answered honestly and yet Piotrowski declared their answers "perfectly not satisfactory" (Dahlstrom 8), declaring the women lewd and debauched[77], and ordered their immediate deportation. The following day, Leander Quint, an attorney and former judge was hired by an individual[78] who filed a writ of habeas corpus[79] in the California District Court, filed on behalf of one of the detained women, Ah Fook (Dahlstrom 8). During the trial, the women testified and denied any involvement in commercial sex. State witnesses pointed to the women's clothing (handkerchiefs on their heads and brightly colored silk embroidered garments) to justify suspicions that the women were, in fact, prostitutes.[80] The Judge ruled that it was within the State's power to deport the women.

Petitioners quickly filed a writ to the Supreme Court of California to sustain the judgement meanwhile Ah Fong (another of the 22 women) filed a writ of habeas corpus to the Circuit Court for the District of Columbia. In Fong's case, the Judge declared that the statute

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[76] The Burlingame-Seward treaty of 1868 was aimed at fostering a friendlier relationship between the United States and China which included promoting trade and easing immigration restrictions (which also aided the labor force within the United States).
[77] Chy Lung v Freeman, 92 U.S 275 (1875)
[78] Sources are unclear as to whether the individual was a wealthy merchant or a perpetrator of human trafficking (Dahlstrom 8)
[79] A writ of habeas corpus refers to a court order that challenges the legality of someone's detention/arrest
[80] There are many parallels between the way that Chinese bodies and dress were being read and assumed very similarly to how dress and tattoos are being used to assume membership in a gang (especially for Latinos) today.

violated the 14th Amendment and the Civil Rights Act of 1870: "this decision was reportedly the first case to articulate such a robust vision of statutory and constitutional protections for noncitizens" (Dahlstrom 9). The tag-like game of filing writs culminated in the filing of writ that reached the Supreme Court in 1875. Justice Samuel Miller wrote for the unanimous Supreme Court that supported the women and struck down California law; "by allowing the commissioner to label any young woman as "lewd" if they had improper manners, Justice Miller observed that the California law granted vast, unfettered power to state immigration officials" (Dahlstrom 10). As a result, the Supreme Court found that the federal government, not the states, had exclusive power to make laws related to immigration.[81]

Chy Lung v Freeman highlights not only ways that sexism and racism play into court decisions but also, ultimately clearly states that immigration law is decided upon by and administered by the federal government. In regards to the relationship between federally sanctioned immigration law and the criminalization of immigration, the decision of Chy Lung v Freeman illustrates a concept of federal preemption[82], which is double-edged. On one hand, after the late 19th century states could not infringe on the powers and jurisdiction of the federal government in creating immigration laws and policies. On the other, states are limited in granting relief to immigrants, including sanctuary for undocumented immigrants. So-called sanctuary cities[83] today are not able to grant undocumented immigrants full protections or immunity, especially as harsher immigration policies are birthed and rebirthed into mainstream America.

Plyler v Doe:

[81] The Page Law Act of 1875 was an act through which Congress permitted immigration authorities to exclude women deemed to be migrating for sex work. The law was selectively enforced against Chinese women (Lubhéid 1)
[82] Federal preemption describes a legal process where federal law supersedes state law (Adkins et al. 2)
[83] Sanctuary cities are cities or jurisdictions that declare that they limit the cooperation between local law enforcement and ICE

Texas, 1975: The Texas state legislature enacted section 21.031 of the Texas Education code which authorized local school districts to charge or completely deny public school acceptance of undocumented students[84], explicitly stating that free public education was only a right of citizens. The code stated that undocumented children were not "within the jurisdiction" of the state and therefore did not have the same rights to public education as citizens did. In July of 1977 in the east of Texas, about two hours from Dallas, the Tyler Independent School District (ISD) (a public school district) adopted a district-wide policy that required all foreign born students to pay tuition– one thousand dollars per year per student (Library of Congress)– if they had not been "legally admitted" to the United States or were not able to prove that they had been "legally admitted" (American Immigration Council 1). The school district's policy specified that "legal admittance" had to be proved through either the documentation demonstrating that an individual was legally present in the United States or if federal immigration authorities confirm that these individuals were in the process of securing these documents. Soon after, a group of students from Mexico (who could not establish that they had been "legally admitted") brought a class action lawsuit against the district through the Mexican American Legal Defense and Educational Fund (MALDEF) with the help of Peter Roos and Vilma Martinez (Library of Congress).

The District Court declared that the Texas education law violated the Constitution and was "preempted" by federal immigration law[85] in September of 1978. A month after the ruling, Tyler ISD issued an appeal to the Federal Appeals Court where the Judge, William Wayne upheld the decision on constitutional grounds (declaring section 21.031 unconstitutional). As

[84] Specifically those who have "entered unlawfully" and did not have paperwork to provide "evidence" that they had entered with specific authorization
[85] Doe v. Plyler, 458 F. Supp. 569 (E.D. Tex. 1978)

could be predicted, the Tyler school district was not particularly pleased with the decisions and decided to file an appeal with the Supreme Court.

On June 15th of 1982, the Supreme Court reached a decision, a 5-4 vote against the school district. Supreme Court Justice William J. Brennan Jr. declared that the Court had ruled against 20.031 and explicitly noted "that the Equal Protection [Clause][86] under the 14th Amendment are provisions that are 'universal in their application to all persons within the territorial jurisdiction, without regard to any differences of race, color, or nationality'" (Library of Congress). In Justice Brennan's statement, he said "by denying these children a basic education, we deny them the ability to live within the structure of our civil institutions and foreclose any realistic possibility that they will contribute in even the smallest way to the progress of the Nation" (American Immigration Council 2).

While Plyler v Doe was tailored to the education of undocumented children within the United States, the decision reflected the slim majority's view about immigrants in 1982. The country was four years away from a broad amnesty for long-term undocumented migrants with the Immigration Reform and Control Act (1986). The court had hinted at an almost near permanence of undocumented youth and their likelihood to remain in the nation, and therefore, their need to be educated. At the same time, Brennan's linking of undocumented youth to the "progress of the Nation" suggests a metric of productivity that benefits "good" productive migrants, but at the same time, suggests that "bad," unproductive, or criminal migrants also exist, and should be feared and possibly deported.

[86] The Equal Protections Clause of the 14th Amendment, found in the first section of the Amendment, ensures that states must treat all individuals within their jurisdiction under the law and was created to prevent discrimination. Other than the right to a free public education, the 14th Amendment also declares the right to due process. The Equal Protections Clause of the 14th Amendment has been used to challenge discriminatory laws and has been used in race based rulings such as Brown v Board of Ed.

Plyler v Doe underscored that the 14th Amendment is applicable, in all ways, to every "person" residing within the United States, regardless of citizenship status.

In a 2014 interview with Supreme Court Justices Ruth Bader Ginsburg and Antonin Scalia, both judges weighed in on the 14th Amendment and immigrants with Scalia stating "I think anybody who's present in the United States has the protections under the United States Constitution" (Scalia in an interview with Ethics and Excellence Journalism Foundation). Ginsburg added, stating "when we get to the 14th Amendment, it does not speak of 'citizens.' Some constitutions grant rights to 'citizens,' but our constitution says 'person' and the 'person' is every person who is here– documented or undocumented." In the conversation about the criminalization of immigration, immigrants' rights can be fleeting, especially among the general populace, and thus it is important to note what rights they possess. The criminalization of immigration, when internal, can also manifest as disregarding legal safeguards that immigrants (documented or not) have in place.

Illegal Immigration Reform and Immigrant Nationality Act:

"[Deportation is] a punishment, and among the severest of punishments" -James Madison

The end of the twentieth century was plagued with anti-drug and anti-terrorist ideology that served as an ember for the foundation of a newfound nativism. So, in 1996 when then President Bill Clinton signed and therefore enacted the Omnibus Consolidated Appropriations Act, it was without question that, when talking about an act tied into the Omnibus– the Illegal Immigrant Reform and Immigrant Nationality Act (IIRIRA) he would cite the importance of "cracking down on illegal immigration" through "strengthening the rule of law by cracking down on illegal immigration at the border, in the workplace, and in the criminal justice system"(Clinton, Statement on Signing the Omnibus Consolidated Appropriations Act, 1997).

IIRIRA did exactly that– emphasizing border enforcement, deportation, and penalties for undocumented immigrants. Specifically as to the mechanisms of criminalization of immigration, IIRIRA expanded deportable offenses (what are called aggravated felonies), mandated detention, reduced due process, and enacted criminal penalties for immigration violations. IIRIRA allowed immigration authorities to deputize state and local law enforcement officers to act as federal immigration agents, blurring the lines between federal and state sanctions and consequences for undocumented immigration affected by local police (Ewing et. al 14).[87] Although these "force multipliers" would not be instated until after 9/11 and the Bush administration, federal local enforcement cooperation would become normalized, doubling the danger and vulnerability to deportation far away from the border region to potentially any locality. Interior immigration enforcement through readily funded federal local partnerships grew rapidly and erratically as some localities welcomed immigration policing, while others rejected such cooperation. The rhetoric, nonetheless, of needing *extra* immigration enforcement in the interior of the nation is ever-present in the United States today– which can be highlighted through Trump's "build a wall" campaign and current immigration rhetoric and policy.

IIRIRA expanded the definition of deportable defenses, increased the criminal grounds of inadmissibility and quickened the deportation process. Deportable crimes included "crimes of "moral turpitude" committed within five years of admission for which a sentence of at least one year could be imposed, two or more crimes of moral turpitude, controlled substance violations (excluding a single offense of simple possession of marijuana of 30 grams or less), high-speed flight from an immigration checkpoint, firearms offenses and aggravated felonies" (Kerwin). Not only did the conviction of an aggravated felony trigger "fast-track removal, mandatory detention" and deportation but the vagueness behind crimes of "moral turpitude" involved many

[87] Referred to as 287(g) officers based off of the 287(g) section of IIRIRA

more minor actions. In defining deportable crimes in this way, a few things happen. First, "crimes of moral turpitude" is a standard that is so vague and unspecified that it can be used as grounds for deportation with very little evidence. The creation of flexible and arbitrary grounds for deportation criminalizes immigration by reducing the depth of due process that immigrants are entitled to. Additionally, it creates an environment of reckless claims, where politicians and media can exploit the space for their own interest. Minor crimes (such as drug possession), if so defined, can be "crimes of moral turpitude." Second, while including aggravated felony as a deportable offense, the Antiterrorism and Effective Death Penalty Act expanded the definitions of what was considered an aggravated offense. For example, the metric of one-year sentence equates misdemeanors in the criminal court system with felonies in the immigration courts. The third thing that happened with the passing of IIRIRA was the widespread removal of long term residents including Legal Permanent Residents[88] who had committed nonviolent crimes well in the past, crimes for which they had already been convicted and for which they had served their sentences.

Whereas double jeopardy does not apply, double-criminalization of migrants is underscored with IIRIRA. This sort of double jeopardy removes humanity and justice for immigrants: "a public defender laments how the criminal justice system treats his clients as "'illegal' by virtue of their very presence' and how the immigration system effectively punishes them a second time" (Kerwin S6). The criminalization of immigration is not only in the border enforcement, entrance policy, "illegality" of undocumented people, but is also found within the criminalization of immigrants themselves and the sequential punishment systems of criminal justice followed by immigration consequences. The impacts of the criminalization of immigrants

[88] Legal Permanent Residents, sometimes referred to as LPRs or Green Card Holders have been given explicit governmental permission to reside within the United States for a given amount of time before either Naturalizing or returning to their country of origin.

is exacerbated when the theoretical rights that "all persons" are afforded are stripped away because of citizenship status and the facile presumption of criminality. In other words, the general populace presumes that all undocumented immigrants are "illegal" and therefore they are not granted the same rights, privileges and respect as citizens. With the exception of achieving full-fledged citizenship through naturalization, when immigrants become documented under the myriad of lawful statuses–from green cards to humanitarian categories–they are still not granted the same rights, privileges and respect as citizens. At what point can we say that the case of the criminalization of immigrants and immigration is not about *criminality* at all but instead about *immigrants*?

A New Age of Criminality:

There is a typical narrative within the immigration regime that immigrants are the ones who are breaking the laws– entering unlawfully, behaving criminally, not waiting their turns, and being inherent criminals. However, what happens when the people breaking the law *aren't* immigrants but rather the government itself?

The new age of criminality related to immigration demonstrates a complete disregard for laws that offer legal protection, due process, and the checks and balances that protect the status quo. Criminalizing immigration, up until now, has meant a rivalry between immigrants and a historically discriminatory government, one which both follows and contributes to the narrative that immigrants are criminals with no regard for the law. However, only months into the second Trump presidency we can see that the roles have reversed. The criminality of government actors infringes on the rights of immigrants, especially the 14th Amendment right to due process.

Trump's treatment of immigrants is the culmination of what the criminalization of immigration can lead to: (1) the Trump administration is using historical policies and acts, reinterpreting and re-enacting them to propel forward a Eurocentric vision of the United States

(e.g., invoking the Aliens Enemy Act to target lawfully admitted Venezuelans (this far) as an "invading" force); (2) the administration is using the President's platform and social positioning to target and marginalize the immigrant community; (3) and it is using primarily executive power (without the authority of Congress) to eliminate immigrants lawful statuses, which can be seen through the revocation of student visas, Green Cards, and Trump's political and economic partnership with the prison industrial complex in El Salvador. In a public-facing effort to confront a negative and vitriolic conception of the immigrant community, Trump is actually creating undocumented migrants out of lawful ones.

The specific deviance from the law can be seen most notably in his complete disregard for due process while deporting individuals.

El Salvador:

In February 2025, there was speculation of a partnership between the Trump administration and El Salvador where Trump would be "renting out" prison space to deport immigrants to a nation that many have never been to.[89] As well, it has been speculated that Trump will eventually want to send United States criminal citizens to be incarcerated in El Salvador. There are numerous legal questions being addressed in a slew of court cases, some more high profile than others, but it has been made clear that the conditions of incarceration are not only troubling, but put the lives of non-citizens and citizens at risk.

With only 30 minutes out of their 70-80 person cells a day, no visitation, no bedding (including mattresses), and fairly consistently using humiliation to display authority over those incarcerated (Rios), the El Salvador prison center (Center for Terrorism Confinement, CECOT) is a non-typical site for immigrant detention, which in the United States is an administrative form of custody and not a penal one. This means that detainees are officially imprisoned. While

[89] Is it a deportation when a deportee is not returned to their home country?

detention is administrative custody– regardless of whether the immigrant is in a U.S jail, they are detained per detention standards, *not* criminal standards. CECOT is *not* being used for immigrant detention, but instead as a penal colony for U.S. deportees who are not being deported home (to Venezuela)[90], but to a third country. The Trump administration first focused on individuals thought to be affiliated with Venezuelan gangs but since then its scope has expanded to include not only undocumented immigrants not affiliated with gangs but also has included non-undocumented immigrants.

Trumping Due Process:

In the summer of 2024, I was able to intern under an immigration attorney in a nonprofit law firm. There, I was tasked with several responsibilities including interacting with clients, intaking new clients, translating, aiding in the interview process for affidavits, and attending immigration hearings in court. I'm speaking on behalf of my experience interning at an immigration law firm, where not only was I able to work with undocumented immigrants but I was also able to attend immigration hearings. What happens in cases of deportation is that an individual is given a Notice to Appear (NTA), essentially an official "invitation" to appear before an immigration judge to have your case heard. There, in the court, frequently without an attorney to represent them[91](because immigration does not provide public defenders as they do in the criminal system), they are tasked with attempting to understand the legal-ease and ultimately, are either sentenced to deportation or granted bond. This typically includes future ICE check-ins. At

[90] The relationship between deportation and CECOT started with Trump wanting to apprehend and detain Venezuelan gang members residing within the United States

[91] It can be difficult to find and afford an attorney when you are unsure what resources are available to you. Increasing local access to information and finding out free or reduced price ways of aid is incredibly important in the process of decriminalizing immigration. For example, while I was observing the court hearing, there was a man who was given the option of having his case dismissed. With no one there to guide him and him barely understanding what it meant to have his case dismissed, he almost picked to not have dismissed, making him still deportable. It was so difficult for me, in a moment like that to sit back and watch. I knew what was going on, I knew how to help, and yet the way that the court system is set up, my silence was the only allowable way for me to be there.

that point, bonded immigrants are asked to pursue formal avenues to documentation– whether that be application for asylum or visas. Each person is given, at least was given in the cases I heard, time with the judge, it was not an *en masse* hearing, and the right to due process was respected.

It is important to note the typical process of deportation to then understand how abnormal Trump's *new* process of deportation is. Trump's relationship with the El Salvadoran prison system– much like the domestic use of third party jailers– has resulted in the acceleration of the deportation process. In several cases eliminating due process for undocumented immigrants facing deportation, the Trump administration has simply sent individuals arbitrarily presumed to have gang affiliations to El Salvador. They are not given hearings, their constitutional right to due process is not respected and the Trump administration's reaction to any challenges has been that the deportation of these individuals is a "matter of foreign relations" (Kibel). Essentially, what is happening is that individuals who the government states may have gang affiliations (in some cases this is only due to tattoos or clothing choices), are being detained and then instead of receiving a Notice to Appear and being seen before a judge, they are immediately being flown to El Salvador, where Donald Trump has made private agreements with El Salvadoran President Bukele to essentially rent out prison space, again, for an supposedly administrative form of custody. The problem with eliminating due process is that anyone thought to be a criminal by the Trump executive branch not only is made to be a criminal but anyone thought to be an undocumented immigrant is made to be an undocumented immigrant. The citizen proxy argument would argue that eventually, clerical mistakes will be made leading to the deportation of United States citizens.

Grave mistakes with large consequences have already been made. Kilmar Abrego Garcia's story has been echoing through news reports, lawyer circles, and activists' mouths. His story was also addressed in Senator Cory Booker's speech[92] on March 31, 2025. In Senator Booker's speech, he is quoted as saying: " Court filings from the Trump administration reveal they mistakenly deported a Maryland father to this horrific prison in El Salvador. Abrego Garcia's married to a United States citizen and has a 5-year-old disabled child who is a US citizen. He has no criminal record in the United States." Booker then goes on to explain the report that was given by *The Atlantic*– Abrego Garcia had been given protected legal status and had been "grabbed" and deported– *accidentally.* The Trump Administration blamed clerical errors, admitting that Immigration and Customs Enforcement was aware of his status and yet deported him anyway (Miroff). The Supreme Court later ruled 9-0, ordering the Trump administration to "facilitate" the release of Abrego Garcia (Kibel). Since then, Trump has met with Bukele in the Oval Office, where Bukele has refused to release Abrego Garcia.

Why is the story of Abrego Garcia important? The Trump administration is actively criminalizing immigration through the criminal treatment of those not considered criminals– the conflation of different groups of people with different statuses shows the complete disregard the administration has for legality.

[92] Senator Cory Booker broke the record for the longest speech (not a filibuster as there was no bill present) in United States history and was in protest to the atrocities– governmental, economic, social, political, etc, atrocities being committed and condoned by the Trump administration.

Conclusion: (Cri)salida/ Decriminalization

"We need an immigration system rooted in compassion, not criminalization." -Congressman Chuy García

In the discussion of the decriminalization of immigration, the *unbecoming*, and the cocooning process that hopefully emerges with a butterfly, the ending cycle of the *crisálida,* it is important to not only discuss the theoretical underpinnings of the undoing of the criminalization of immigration, but moving forward, what actionable steps can be completed? It is difficult to have a semblance of hope for the future when it feels as if with every step forward we take two steps backwards, especially under the contemporary political climate. There was, is, and always will be, however, resistance. Resistance and resilience can take many forms, when speaking of the criminalization of immigration. The biggest forms of resistance come from active steps to *decriminalize* immigration.

I feel it is not only my experience, but of many that in a liberal arts college, we are pushed towards solving large problems with large solutions: *e.g., How do we end racism?* With equity. But what does this look like in action? What does this mean for any non-academics who are looking to learn and act? My conclusion seeks to frame the decriminalization of immigration in such a way so that it speaks to meta concepts that could be applied to federal level action– steps that while not readily achievable, provide a goal. How do we reach the goal? My thesis also works to introduce ideas of decriminalization that are based locally, within communities, and individually. With a goal so large it can seem daunting, so, I list movements and moments of resistance and resilience that can accumulate and provide lessons for others.

Momentos de Resistencia

The New Way Forward Act

On March 28, 2023, an immigrant detention center–something that *NPR* referred to as a "makeshift jail" (Fredrick) in Juarez, México caught fire. It had been filled with a mix of

Mexican and non-Mexican migrants who had been "caught" by Mexican officials and others who had been apprehended at the border and sent back. The United States had (and has) been trying to rely on Mexican acceptance of immigrants transmigrating through Mexico to attempt to curb the increase in immigration. This partnership simply caused (and causes) more problems.

Conditions in the Mexican detention center were not unlike many detention centers within the United States. A Salvadoran man[93] recalls his experience not only in the center but also surviving the fire: there was no water, no toilet paper, sewage was spilling onto the floor. He asked one of the guards for water, and the reply was "that'll be 500 pesos."[94] He was also told to complain about his thirst "in his own country." The cells were packed beyond capacity. The desperation and need for water was impacting everyone. One Venezuelan immigrant, the man recalls, told a guard that if they did not get water, he would be setting the foam sleeping pad on fire. A guard responded "if you were gonna do it, you'd have already done it by now" (Frederick). The Salvadoran man did not see what happened after that, but shortly after that, the sleeping pad was on fire. There was no way out of the cells and the fire was quickly spreading. Security footage shows that the guards did not open the cells. A lawyer suggested that a senior official had ordered the guards to not open the cells (Arellano). Over 40 individuals died and over 15 were injured.

Representative Jesús "Chuy" García (IL) tweeted immediately following the events: "This tragedy cannot be separated from the current context of regional migration, a context in which United States policy plays a powerful role. Our immigration system forces migrants and asylum seekers into prison-like conditions on both sides of the U.S-Mexico border. It's long past

[93] The individual requested that his name not be used in fear of retribution in El Salvador or Mexico.
[94] The most recent exchange rate, with 1 USD being worth about 20 pesos, would mean that the guard was charging $25 for water.

time for change. We need an immigration system rooted in compassion, not criminalization" (Jesus García).

The following day, the New Way Forward Act was introduced to the House– led by Jesús "Chuy" García (IL), Ayanna Pressley (MA) and Greg Casar (TX). The New Way Forward Act sought to dissolve unfair practices and unjust laws that target immigrants in general, especially undocumented immigrants, through: ending mandatory detention in some cases –such as asylum seekers with "credible fear of persecution," making changes to immigration enforcement, repealing criminal penalties for improper entry and reentry into the United States. Additionally, the Act introduced the idea that the Department of Homeland Security (DHS) may not enter into its own contract with private detention facilities. It included a sort of "checks and balances" when entering detention, such as: "(1) requiring DHS to make an initial custody determination and establish probable cause within 48 hours of taking an individual into custody; (2) establishing hearings related to such determinations a presumption that the individual be released; and (3) requiring judges to impose the least restrictive detention conditions necessary" (H.R2374).

The proposed legislation included restrictions that a DHS officer not interrogate anyone as to immigration status based on an officer's suspicions about someone's race, religion, or spoken language. The bill would have removed certain crime-related grounds of inadmissibility and deportability. It would have prohibited state and local officials from performing immigration enforcement functions, and would have prohibited the National Crime Information Center database from keeping information pertaining to an individual's immigration status. Today, over 339 organizations have shown their support to the New Way Forward Act and there are 30 cosponsors within the U.S House of Representatives (New Way Forward Act).

It is clear that all of the steps that the bill introduces actively work towards decriminalizing immigration– it repeals Blease's law criminalizing entry and re-entry, it addresses a lot of the root causes of persecution based on race or language, it addresses surveillance and local enforcement essentially working for ICE, it begins to address problems in detention. The New Way Forward Act would have been a monumental piece of legislation in regards to decriminalizing immigration.

The New Way Forward Act did not pass.

Undocumented and Unafraid

In regards to the resilience that is necessary in tackling an issue so large, it is impossible to ignore people's movements, coalitions, and advocacy that is produced and reproduced from the ground up. The Undocumented and Unafraid movement began in the late 2000s with youth seeking to make changes in immigration policy. An *ABC News* article published in 2012 introduces the Undocumented and Unafraid movement. It began with a group of Dreamers[95] who started to make their unlawful and deportable statuses known. March 2010 in Chicago was one of the first major public actions that the Movement had, organized by the Immigrant Youth Justice League where they protested for the DREAM Act.[96] This initial act was followed by other demonstrations throughout the country– protests, sit-ins at politicians offices, street blockades, hunger strikes, and more. These actions of course, were extremely high risk. Not only were these youth acting in civil disobedience but they were also doing so while enunciating their status– the fear and threat of deportation, I can only imagine, must have been strong.

[95] Dreamers is a general term for undocumented immigrants who came to the United States as Children. DACA (Deferred Action for Childhood Arrivals) seeks to help Dreamers.
[96] The DREAM Act would have offered a pathway to citizenship for those who arrived undocumented in their childhood

While the DREAM Act did not pass in 2010, the inertia and advocacy from immigrant youth applied pressure for the creation of DACA,[97] which former President Obama established in 2012 via an executive order. While the youths primary objective was not met, the power in their advocacy was real and noticeable. Not only has the Undocumented and Unafraid Movement impacted policy but they also worked towards changing the narrative, working to erase the criminalized stigma that comes with the label "undocumented."

The Undocumented and Unafraid movement worked towards decriminalizing immigration through both legal and social avenues. Legally of course, DACA was a step in the right direction and socially, increasing visibility works to destigmatize and (ideally) socially include immigrants.

Unbecoming/Emergence

Illegality, as a status, is produced and reproduced through law, through interaction, through the way we speak, write about, and treat immigrants. To decriminalize immigration, we simply would need to stop the production of illegality.

Federal

The biggest and boldest actions to decriminalize immigration will take place where they started– federally. The New Way Forward Act would be the easiest step to take to decriminalize immigration, as it has already been presented and has gathered some support. However, there are also other pathways to rendering immigration uncriminal. While these ideas would ideally work together, even the introduction/reduction of one or two of these suggestions would create such large strides in the world of decriminalization.

Legally, repealing or ending prosecutions for §1325 and §1326 would decriminalize immigration–it would no longer be a crime. As for repealing, it is a common fear that the

[97] DACA provides temporary relief from deportation for youth and it allows them work authorization.

dissolution of §1325 would result in an open borders policy and that the United States would remain unprotected against foreign threats. However, what the repeal of §1325 would *actually* mean is that undocumented border crossing would become a civil violation and similar to overstaying one's visa, it could still result in deportation. If undocumented border crossing were to become a civil violation not only would this remove criminality from immigration but additionally would aid the United States by reducing the number of immigration cases related to §1325. Federal courts would be able to focus on more serious immigration crimes (Deonarain). Decriminalization of border crossing would mean that an immigrant would not be fined, detained, imprisoned or prosecuted for a federal crime, they would not obtain a criminal record due to their entrance into the United States.

In regards to reentry, §1326, because it is currently considered a felony, a person could serve up to 20 years in prison and then be deported, effectively being punished twice for the same crime. Reentry also has several cases for its repeal. Justice Department data published in 2021 reported that roughly 94% of all people prosecuted under §1326 (between 2020-2021) were from Mexico, Honduras, Guatemala and El Salvador (National Immigration Project). A Federal Judge in Nevada, Judge Miranda Du ruled in August 2021 that §1326 violated the Fifth Amendment due to its racist origins and ways in which it is used to racially target Latines (Ford). Repealing section 1326 would have resulted in the decriminalization of immigration, especially race-based criminalization that targets Latines within the United States. The Ninth Circuit later reversed this decision (National Immigrant Project).

If §1325 and §1326 are unable to be repealed, giving undocumented individuals the right to legal aid in immigration proceedings, similarly to how criminal defendants are promised legal aid, would also result in the beginning of the decriminalization of immigration. While criminal

defendants have access to public defenders, undocumented defendants in immigration courts do not have guaranteed legal counsel. Providing free or significantly reduced price legal counsel for those facing deportation with a §1325 or §1326 charge would result in the decriminalization of immigration by increasing access to information, resources, and help. A federal crime should result in the promise of free or reduced price legal aid for all defendants, regardless of status. This also presents the option of untangling crimmigration, separating immigration law from criminal law. As opposed to being a federal crime, immigration related crimes could go back to administrative law, resulting in entry and re-entry being fined as opposed to these individuals being criminally prosecuted. In the case that neither §1325 nor §1326 can be repealed, creating regulations for detention and deportation would be a step towards the right direction. Part of decriminalizing immigration is to stop treating immigrants as criminals. For this reason, I suggest that there no longer be privately owned prisons serving as detention facilities. Administrative custody should be non-punitive, and it should be the exception, not the rule. Deportation as well can be done in a much more humane process. Ending en masse hearings would also result in the decriminalization of immigration and would increase humanity given to undocumented migrants. At the bare minimum, at the federal level, there must be respect for the law and for due process for immigrants.

While I suggest all of these and sincerely think that any of these options would create noticeable changes in the world of the criminalization of immigration, I understand that it would be incredibly difficult to pass any of these suggestions as legislation or to make meaningful changes in the way that immigrants are treated. Smaller steps, while yielding smaller results, are typically more achievable.

State

Due to the fact that immigration related crimes are currently being seen in federal court, states have less power related to immigration protections than the government does. However, this does not mean that there is nothing that can be done: offering less cooperation with Immigration and Customs Enforcement; reducing the relationship between state officials; and redefining the relationship between state officials and undocumented immigrants as one of protection instead of prosecution would all result in steps towards decriminalizing immigration. While I understand that there is some state sanctioned surveillance, reducing the information that is given to ICE and DHS would serve to protect immigrants, especially undocumented immigrants.

Within courts, the reduction of a misdemeanor sentence to 364 days would result in there not being mandatory detention and deportation. As it stands, a sentence of a year or over converts any misdemeanor to an aggravated felony, which results in mandatory detention and deportation. New York and California have already implemented these sentencing policies which results in one step towards the decriminalization of immigration.

Local

Locally, within communities there are a plethora of options in regards to creating active change in reducing or eliminating immigrant criminality. Having community-based media (or state-based media outlets for that matter) sign onto the Drop the I Word Campaign would begin the social destigmatization of immigrants, reducing their connection with illegality through eliminating the reproduction of sociolinguistic weights. Publishing information on what undocumented immigrants are like, how they contribute to the local economy, how they contribute to the local ecosystem would work towards the decriminalization of immigration

through visibility. The child of an immigrant or an immigrant sits next to your child at school. Your cashier at a local supermarket is an immigrant. The person coming in to clean a building after everyone has left is an immigrant. The process of local decriminalization of immigration is rehumanizing immigrants in the eyes of the community. We are afraid of what we do not know. So let's make immigrants known.

When immigrants do commit crimes (disregarding §1325 and §1326) they should be given opportunities to atone similar to the way that citizens do. A minor crime should not trigger a life alternating deportation that affects people all around the deportee. By undoing the current status quo of "double jeopardy" for immigrants, their criminalization would be reduced. An immigrant who committed a crime would not be criminal due to their status and their crime, but simply their crime.

Additionally, speaking from experience after having interned at a nonprofit law firm, I saw the power, first hand of community aid, public services, legal aid, and nonprofits on the immigrant community. Letting immigrants know that there is a community waiting for them, that there is help, that there is support, reduces the criminalization of immigration through the integration of undocumented immigrants into everyday life and community structures.

Personal

Personal actions that one can take to reduce criminalization of immigration involve recognizing any personal bias towards undocumented immigrants and working to reduce it. If you yourself are an undocumented immigrant, especially in these unstable political times, it is crucial that you have a plan. Who are you going to call if you get detained? Do you know a local lawyer's number? While being prepared does not reduce the criminalization of immigration in ways similar to repealing laws, preparation takes power away from those trying to destabilize

you. Lastly, and most importantly, knowing your rights as a person within the United States, regardless of whether or not you are a citizen, and then being able to share them with others. Information is power. The Immigrant Legal Resource Center has published cards to be carried around in wallets that you can hand to an ICE official should they question you. Attached below are a printable version of the cards.

Conclusion:

The decriminalization of immigration, the emergence of the butterfly, la salida, the unbecoming, just like how it started, will be a process. It will be a process that works to humanize immigrants, that works against historical racist policies and ideologies. It will challenge systemic social influences that breed fear in people. The decriminalization of immigration will look like movements for immigrant equality, to ease the painful process of detention and deportation. It will look like attempts (and hopefully successful attempts) to appeal racially-based, harmful immigration policies. It will look like the disconnecting of crimmigration and the ceasing of using "illegal" in reference to immigrants. It will include affirmative elements such as protections for immigrants in the labor force. It will look like the reestablishment of due process. It will look like hope, like safety, like no longer being afraid. It will recognize that migrants belong to our communities. It will feel like it was meant to– *como una salida, como el nacimiento de una mariposa.*

Usted tiene derechos constitucionales:

- **NO ABRA LA PUERTA** si un agente de inmigración está tocando la puerta.
- **NO CONTESTE NINGUNA PREGUNTA** de un agente de inmigración si trata de hablar con usted. Usted tiene el derecho a guardar silencio.
- **NO FIRME NADA** sin antes hablar con un abogado. Usted tiene el derecho de hablar con un abogado.
- Si usted está fuera de su casa, pregúntele al agente si tiene la libertad de irse y si le dice que sí, váyase con tranquilidad.
- **ENTRÉGUELE ESTA TARJETA EL AGENTE.** Si usted está dentro de su casa, muestre la tarjeta por la ventana o pásela debajo de la puerta.

I do not wish to speak with you, answer your questions, or sign or hand you any documents based on my 5th Amendment rights under the United States Constitution.

I do not give you permission to enter my home based on my 4th Amendment rights under the United States Constitution unless you have a warrant to enter, signed by a judge or magistrate with my name on it that you slide under the door.

I do not give you permission to search any of my belongings based on my 4th Amendment rights.

I choose to exercise my constitutional rights.

These cards are available to citizens and noncitizens alike.

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Appendix 1: *Red Cards/ Tarjetas Rojas, Immigrant Legal Resource Center*

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