Richmond Public Interest Law Review

Volume 21
Issue 2 *Symposium Issue*

Article 10

3-20-2018

The Criminalization of the Immigration System: the Dehumanizing Impact of Calling a Person "Illegal"

Ashley R. Shapiro

THE CRIMINALIZATION OF THE IMMIGRATION SYSTEM: THE DEHUMANIZING IMPACT OF CALLING A PERSON "ILLEGAL"

*Ashley R. Shapiro, Esq.**

* Ashley R. Shapiro, Esq. is an Immigration Resource Attorney for the Virginia Indigent Defense Commission. Ms. Shapiro is a former Assistant Public Defender in the Fairfax County Office of the Public Defender's Office. She extends special thanks to the attorneys at the Capital Area Immigrants' Rights (CAIR) coalition who provided training on the immigration system and the immigration consequences of criminal convictions, specifically Heidi Altman (National Immigrant Justice Center), Rachel Jordan (Brooklyn Defender's Service), Adina Appelbaum, Claudia Cubas, and Saba Ahmed, among many others. This training was invaluable in enabling Ms. Shapiro to advise and train public defenders on this critical issue. Ms. Shapiro also wishes to thank those who helped her in composing this article: Conor Shapiro, Maria Jankowski, Catherine French Zagurskie, and Brad Lindsay.

ABSTRACT

In the context of immigration, words matter. The increasingly used term "criminal alien" is not only used as an adjective to define a noncitizen who has committed a crime, but it also acts as a description of his or her personhood. The use of the term "illegals," which is the shortened version of "illegal alien," is pervasive in the media as well as policy debate. In Part I, this paper discusses the evolution of the immigration system in the United States from a discretionary and humanitarian system to a criminalized process. In Part II, this paper examines the convergence of the criminal and immigration systems, as well as the dehumanization of its participants. In Part III, this paper addresses the impact of immigration status and consequences in the practice of criminal defense following the landmark decision, Padilla v. Kentucky.[1] Additionally, the author draws on her experience as a public defender and immigration resource attorney in Virginia to discuss the impact of "crimmigration" policies. Ultimately, this article suggests replacing inaccurate and inflammatory identifiers with precise and non-pejorative language in both policy and public discourse as a first step away from crimmigration. This article utilizes and encourages use of the term "noncitizen" to describe any person in the U.S. without citizenship, with more status-specific terms when relevant.

INTRODUCTION

Criminal: "relating to, involving, or being a crime"[2] or "morally wrong."[3]

Illegal: "not according to or authorized by law: unlawful, illicit."[4]

Alien: "differing in nature or character typically to the point of incompat-

[1] Padilla v. Kentucky, 559 U.S. 356 (2010).

[2] *Criminal*, MERRIAM WEBSTER'S DICTIONARY (2017), https://www.merriam-webster.com/dictionary/criminal.

[3] *Id.*

[4] *Illegal*, MERRIAM WEBSTER'S DICTIONARY (2017), https://www.merriam-webster.com/dictionary/illegal.

ibility,"[5] or "a creature that comes from somewhere other than the planet Earth,"[6] and in the legal context, "any person not a citizen or national of the United States."[7]

In the context of the immigration debate and definitional terms, most people do not confuse noncitizens with the second definition of alien, creatures from a planet other than Earth, but the implication of division is clear. The separation between "us" and "them" is accentuated by using these terms. Further, "criminal/illegal alien" conflates morally wrong or illicit behavior with a person who is foreign and different. Similarly, the term "illegal aliens," used colloquially to mean noncitizens that are in the United States without proper documentation, is often shortened and personalized by the media, simply calling people "illegals." The term "criminal alien" formally refers only to those noncitizens with criminal convictions, but in colloquial usage, the term paints much more broadly and sounds strikingly menacing.

Social sciences have long recognized the importance in how society refers to people or groups. For example, the "People First Language" movement, which began as an advocacy movement, encourages the use of terms such as "person with an intellectual disability" rather than "mentally retarded."[8] As stated by The Arc, a national advocacy group for people with intellectual and developmental disabilities, "Our words and the meanings we attach to them create attitudes, drive social policies and laws, influence our feelings and decisions, and affect people's daily lives and more. How we use them makes a difference."[9] This concept—that the way we as a society define people and social groups impacts the rights of those so defined—has broad policy implications and transfers into the legal lexicon. As pointed out in the context of the civil rights movement, "Words are powerful; old, inaccurate, and inappropriate descriptors perpetuate negative stereotypes and attitudinal barriers."[10]

This article tackles how such terms dehumanize those noncitizens who are caught up in the increasingly criminalized immigration system. The impact, both in policy and public opinion, of deeming a *person* rather than an

[5] *Alien*, MERRIAM WEBSTER'S DICTIONARY (2017), https://www.merriam-webster.com/dictionary/alien (second adjective definition).

[6] *Id.* (definition for English learners).

[7] 8 U.S.C. § 1101(a)(3).

[8] Kate Sablosky Elengold, *Branding Identity*, 93 DENV. U. L. REV. 1, 35 (2015) (delving into racial labels and their impact in the civil rights movement).

[9] *What is People First Language?*, THE ARC (2016), http://www.thearc.org/who-we-are/media-center/people-first-language.

[10] Elengold, *supra* note 8, at 36 (quoting The Arc).

action to be illegal has enabled the creation of "crimmigration."[11] Crimmigration refers to the conflagration of the immigration and criminal systems wherein immigration status is incorporated into the criminal system in addition to the importation of criminal justice norms and procedures into the immigration system, or the "criminalization" of the immigration system.

Part I explains how the historical rise in criminal offenses for immigration violations, coupled with the vast expansion of immigration consequences for criminal acts, created a duplicative crimmigration system with all of the penal consequences and none of the protections offered by the criminal justice system in the United States. Part II emphasizes collaboration between the local and federal authorities in order to share information and apprehend noncitizens by examining data revealing how the two systems became intertwined over time. Part III explains the impact of crimmigration on criminal defense of immigrants, specifically in Virginia. It also revisits the marginalization of noncitizens bolstered by terms such as "illegal alien."

I. CRIMMIGRATION: A HISTORICAL LOOK AT THE CRIMINALIZATION OF THE IMMIGRATION SYSTEM

A. The Institutional Evolution of Crimmigration and the False Distinction between Civil and Criminal Proceedings

The historical blurring of the lines between the immigration and criminal systems is the subject of much academic research, and it is not the purpose of this article to rehash those arguments. However, it is necessary to provide the evolution of this confluence to elucidate how the dehumanization of the noncitizen enabled crimmigration to occur. Historically, the immigration policy in the United States derived from the sovereign power of the nation as a matter of international policy.[12] Notably, in 1893, the U.S. Supreme Court held that "'[d]eportation' is the removal of an alien out of the country, simply because his presence is deemed inconsistent with the public welfare, and without any punishment being imposed or contemplated," and therefore, "the order of deportation is not a punishment for crime."[13] Early in the country's history, the federal government did not actively seek to ex-

[11] *See* Juliet Strumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 376 (2006).

[12] César Cuauhtémoc Garcia Hernández, *Immigration Detention as Punishment*, 61 UCLA L. REV. 1346, 1351–52 (2014); Fong Yue Ting v. United States, 149 U.S. 698, 705 (1893).

[13] Fong Yue Ting, 149 U.S. at 709.

pel noncitizens convicted of crimes after their arrival.[14] Rather, it used the deportation process to expel those who "were not supposed to have been admitted in the first place," analogous to "a voidable contract."[15] In fact, it was not until 1917 that the government broadened the basis for removal proceedings to include noncitizens convicted of crimes.[16]

By the mid-1900s, the immigration system expanded, as did the sanctioned use of detention to effectuate the deportation process.[17] In 1950, the United States Supreme Court was called upon to answer the question: "[under the Internal Security Act of 1950] may the Attorney General, as the executive head of the Immigration and Naturalization Service, after taking into custody active alien Communists on warrants . . . continue them in custody without bail, at his discretion pending determination as to their deportability."[18] The Court elaborated that "[d]eportation is not a criminal proceeding and has never been held to be punishment."[19] It continued, "No jury sits. No judicial review is guaranteed by the Constitution," and therefore, the 1950 Act placed discretion to detain aliens without bail in the Attorney General.[20] The Court answered the initial question in the affirmative, allowing noncitizens to be detained for non-criminal matters, continuing longstanding precedent that such proceedings are civil in nature and not considered punishment, despite allowing for incarceration prior to removal.[21]

In 2001, in a decision challenging the use of indefinite detention for noncitizens after a removal order, the Supreme Court held, "the proceedings at issue here are civil, not criminal, and we assume that they are nonpunitive in purpose and effect."[22] This case affirmed almost a century of litigation, and concluded, without much analysis beyond reliance on precedent, that immigration proceedings are civil in nature despite their outwardly punitive result.[23] As previously summarized, it was considered "civil confinement because it is part of a civil proceeding to determine whether a civil sanction is meted out,"[24] without any regard or concern for changing poli-

---

[14] Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469, 487 (2007).

[15] *Id.*

[16] Strumpf, *supra* note 11, at 376 (referencing GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW 22 (1996).

[17] Hernández, *supra* note 12, at 1355.

[18] Carlson v. Landon, 342 U.S. 524, 526–28 (1952).

[19] *Id.*

[20] *Id.* at 537.

[21] *Id.* at 537–39, 542.

[22] Zadvydas v. Davis, 533 U.S. 678, 690 (2001).

[23] Hernández, *supra* note 12, at 1353–55; Legomsky, *supra* note 14, at 512.

[24] Hernández, *supra* note 12, at 1352 (citing Dona Schriro, *Improving Conditions of Confinement for*

cies and use of detention over the last century. These cases enabled violations of civil immigration laws to result in detention based on the theory that such confinement is not punishment.

In neglecting to realize the human cost of these stripped rights, the cases instead focus on an antiquated differentiation between the two systems that no longer exists. These cases were integral to the rise in criminal-type consequences for civil immigration infractions, to include detention and further limiting noncitizens rights.[25] However, simply repeating that conclusion does not absolve the justice system of properly recognizing those within its grasp. Instead, this distinction allowed for the criminalization of the immigration system without the constitutional protections present in a criminal proceeding.[26]

The logic of this distinction is flimsy at best. As pointed out by previous authors, blindly defining the immigration enforcement system as a civil regulatory system ignores the characteristics it shares with criminal punishment.[27] Incapacitation, deterrence, retribution, and banishment are all common goals of the criminal justice system.[28] Further, "[p]robably nothing distinguishes criminal and civil proceedings more sharply than the threat of incarceration, not only at the end of the process, but often while the process is ongoing. Jailing people the government was trying to deport used to be unusual, but it has become commonplace."[29] Long before the rise in crimmigration, even a Supreme Court justice recognized the severity of immigration consequences, albeit in dissent, "deportation is equivalent to banishment or exile. Deportation proceedings technically are not criminal; but practically they are for they extend the criminal process of sentencing to include on the same convictions an additional punishment of deportation."[30]

Thus, this legal partition is consistently and repeatedly invoked to foreclose constitutional rights to respondents in an immigration proceeding, which include the Sixth Amendment right to counsel, privilege against self-

Criminal Inmates and Immigrant Detainees, 47 AM. CRIM. L. REV. 1441, 1442 (2001) ("Immigration proceedings are conducted exclusively in civil courts, and immigration detention is not a form of punishment.").

[25] *See* Legomsky, *supra* note 14, at 487 ("Today, one may be removed from the United States for entering the country while within one of the inadmissible classes or for entering without inspection or by fraud.").

[26] *See id.* at 515.

[27] *Id.* at 514; Hernández, *supra* note 12, at 1352–53.

[28] Legomsky, *supra* note 14, at 514; Hernández, *supra* note 12, at 1352–53.

[29] David A. Sklansky, *Crime, Immigration, and Ad hoc Instrumentalism*, 15 NEW CRIM. L. REV. 157, 181–82 (2012).

[30] Gabriel J. Chin, *Illegal Entry as a Crime, Deportation as Punishment: Immigration Status and the Criminal Process*, 58 UCLA L. REV. 1417, 1454 (2011) (quoting Jordan v. De George, 341 U.S. 223, 243 (1951) (Jackson J., dissenting)).

incrimination, and Fourth Amendment evidentiary protections.[31] Conversely, the lack of the right to counsel in immigration proceedings is codified, and states "the alien shall have the privilege of being represented, at no expense to the government."[32] This "privilege" is an empty promise for an indigent person facing the immigration system who cannot afford to pay for an attorney. This is similar to the "privilege" to hire an attorney as an indigent person in the criminal context, which was held to be an empty promise without counsel being paid for by the court.[33]

Another constitutional right afforded to criminal defendants that is absent from immigration proceedings is that a noncitizen facing a removal hearing does not appear before an independent Article III judge, constitutionally mandated for criminal court.[34] Rather, the hearings are adjudicated before an immigration judge within the Department of Justice (DOJ), part of the Executive Branch,[35] which is simultaneously in charge of enforcement.[36] Finally, another conflict between these two systems is the basic constitutional precept barring criminal penalties imposed *ex post facto*.[37] Under the prohibition against *ex post facto*, a legislative act criminalizing conduct must prescribe a possible sentence for its violation.[38] While courts have consistently held that the *ex post facto* clause does not to apply to civil regulations,[39] one could argue that prolonged detention in immigration courts or facilities violates this precept. In fashioning a sentence for a criminal violation, a legislature weighs the severity of the proscribed conduct against the liberty rights of the violator.[40] Therefore, any further incarceration or penalty would exceed that legislative determination.[41] By minimizing the personal liberty interests and rights of the participants, the system continues to exceed the proper punishment for a criminal offense by sup-

[31] Legomsky, *supra* note 14, at 515–16 n.223–31.

[32] 8 U.S.C. § 1229a(b)(4)(A) (2006).

[33] Gideon v. Wainwright, 372 U.S. 335, 344 (1963) ("'[The assistance of counsel] is one of the safeguards of the Sixth Amendment deemed necessary to insure fundamental human rights of life and liberty.' Not only these precedents but also reason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth.").

[34] Legomsky, *supra* note 14, at 517.

[35] *Id.*

[36] *Id.* at 509.

[37] U.S. CONST. art. I, § 10, cl. 1 ("No State shall . . . pass any Bill of Attainder, ex post facto Law . . . "); Calder v. Bull, 3 U.S. 386, 397 (1798) ("The enhancement of a crime, or penalty, seems to come within the same mischief as the creation of a crime of penalty; and therefore they may be classed together.").

[38] *Calder*, 3 U.S. at 396–97.

[39] Jane Harris Aiken, *Ex Post Facto in the Civil Context: Unbridled Punishment*, 81 KY. L.J. 323, 324 (1993).

[40] *See* Legomsky, *supra* note 14, at 519.

[41] *Id.*

plementing detention in the civil proceeding.[42] While it is unlikely that such penalties will be eliminated wholesale, it is still a relevant consideration in the dehumanization of the noncitizen trapped in the crimmigration system.

B. Legislative Enactments contributing to the Rise of Crimmigration

The lack of procedural protections becomes increasingly important as the immigration system creeps closer to a punitive system, outlined above. Immigration violations were first criminalized in the 1920s, when for the first time the penalty for an offense such as illegal reentry was not only deportation, but also a criminal charge and incarceration.[43] This process began in 1929 by making illegal reentry a felony, but such immigration related crimes were not heavily prosecuted until the 1980s.[44] With the passage of the Immigration Reform and Control Act of 1986 (IRCA),[45] the types of immigration related offenses with criminal penalties vastly expanded.[46]

However, the passage of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA)[47] marked a tidal change in the intersection of criminal and immigration law.[48] IIRIRA reshaped the immigration system with not only by creating new immigration related criminal offenses, but vastly expanding the impact of unrelated criminal convictions on immigration status. [49] The passage of this legislation was arguably the true beginning of "crimmigration" in the United States.[50] With the codification of 8 U.S.C. §§ 1182 and 1227, the grounds for inadmissibility and deportability formed an incredibly broad scheme of immigration consequences for criminal convictions. No longer limited to solely "crimes involving moral turpitude" (CIMTs) and a very limited list of aggravated felonies, these two

[42] *See* Wong Wing v. U.S., 163 U.S. 228, 235 (1896) ("Detention is a usual feature of every case of arrest on a criminal charge, even when an innocent person is wrongfully accused . . . .").

[43] Strumpf, *supra* note 11, at 384; Legomsky, *supra* note 14, at 487–88; Sklansky, *supra* note 29, at 157, 164.

[44] Sklansky, *supra* note 29, at 164.

[45] Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3355 (codified as amended in scattered sections of 8 U.S.C.).

[46] Legomsky, *supra* note 14, at 477; *see* Sklansky, *supra* note 29, at 165.

[47] Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (codified as amended in scattered sections of 8 U.S.C. and 18 U.S.C.).

[48] *See* Saba Ahmed et al., *The Human Cost of IIRIRA—Stories from Individuals Impacted by the Immigration Detention System*, 5 J. MIGRATION & HUM. SEC. 194 (2017).

[49] *Id.* at 195 ("IIRIRA's criminalization of the immigration system has funneled millions of immigrants through a massive criminal immigration deportation pipeline").

[50] Strumpf, *supra* note 11, at 376, 384; *see* Yolanda Vazquez, *Crimmigration: The Missing Piece of Criminal Justice Reform*, 51 U. RICH. L. REV. 1093, 1114–15 (2017).

statutes changed the landscape of immigration and criminal law.[51] IIRIRA also expanded the list of criminal offenses that trigger mandatory detention, which means that once in immigration custody, the noncitizen cannot request bond.[52] Something as minor as possession of a small amount of marijuana could trigger this drastic consequence.[53] As a direct result of this and a few prior similarly purposed laws, "over a twenty-five-year period, from 1981 through 2005, the number of noncitizens 'removed' each year because of criminal convictions increased *eightyfold* [. . .] from just over 500 in 1981 to more than 40,000 in 2015."[54]

The next step in the crimmigration process is the increasingly punitive nature of immigration enforcement resulting from the lack of constitutional protections for civil infractions combined with the increase in laws aimed at removing noncitizens with criminal convictions.[55] By comparison, while the constitutional rights of indigent criminal defendants are constantly in need of protection, their existence is never in question. The fundamental rights to counsel, silence, and jury trial, combined with the burden of proof beyond a reasonable doubt are all absolutely essential to the system of criminal justice in America. Yet, in immigration court, almost none of these protections are afforded.[56] This is despite the system itself being far more analogous to a criminal system with detention and penalties than a civil regulatory system. As previously stated, "the case for classifying deportation as punishment becomes strongest when the particular deportation grounds are based on criminal convictions or other post-entry conduct—as distinguished from those grounds that are linked solely to the original entities."[57] However, the government and courts largely ignored the criminalization of the immigration system as it became more punitive in nature and was fueled by heightened rhetoric surrounding "illegals" and "criminal al-

---

[51] Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 §§ 7342, 7343 (introducing the list of aggravated felonies: murder, weapons trafficking, and drug trafficking); Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 § 435; *see* Legomsky, *supra* note 14, at 483; Sklansky, *supra* note 29, at 175; *see also* Hernández, *supra* note 12, at 1351–52.

[52] *See* 8 U.S.C. § 1226(c) (2017).

[53] 8 U.S.C. § 1182(a)(2)(i)(II) (2017) (declaring any noncitizen to be inadmissible if they have a conviction for a violation of any law relating to a controlled substance); *id.* at § 1226(c)(1)(A) (2017) (referencing any noncitizen who "is inadmissible by reason of having committed any offense covered in [INA] section 212(a)(2) [8 U.S.C. § 1182(a)(2)]").

[54] Sklansky, *supra* note 29, 178; *see* MARC R. ROSENBLUM & WILLIAM A. KANDEL, CONG. RESEARCH SERVICE, R42075, INTERIOR IMMIGRATION ENFORCEMENT: PROGRAMS TARGETING CRIMINAL ALIENS 11–12 (2012).

[55] Sklansky, *supra* note 29, at 181–85; Legomsky, *supra* note 14, at 487–89.

[56] *See supra* note 24.

[57] Legomsky, *supra* note 14, at 488 (relying on Daniel Kanstroom, *Deportation, Social Control, and Punishment: Some Thoughts about Why Hard Cases Make Bad Laws*, 113 HARV. L. REV. 1889, 1893–94 (2000)).

iens."[58] In this way, both the legislative enactments and case law combined to create and reinforce the crimmigration system.

C. The Social and Political Evolution of Crimmigration

The evolution of crimmigration was caused by a variety of social, political, and judicial circumstances. Many social scientists posit that immigrants were merely swept up in the midst of the "War on Crime" and the "War on Drugs" that brought about tough-on-crime policies in the 1980s and 1990s.[59] Others have pointed to links between nationalism and racial prejudice.[60] As stated by Professor César Cuauhtémoc Garcia Hernández at Sturm College of Law, "Immigration imprisonment cannot be characterized as nonpunitive. The legislative origins of today's immigration detention system show a desire to punish noncitizens thought to be dangerous to society."[61] Prof. Garcia Hernández suggests that such detention is not an accidental consequence of immigration policy, but is rather deeply intertwined with racial animus and the War on Drugs.[62] Indeed, the legislative efforts having the largest impact on crimmigration were often intertwined with anti-drug legislation.[63] For example, a string of legislation beginning in 1986 and culminating in IIRIRA "expanded the government's immigration detention authority dramatically and [was] frequently wrapped in legislative context tinged with drug war fervor."[64] With drug enforcement as the gateway, "[e]ntry into the criminal justice apparatus for a variety of conduct but especially drug activity . . . ought to result in entry in to an immigration law regime now equipped with detainers and detention."[65]

An additional ill-timed amendment to the immigration system curtailed the discretionary-based relief for noncitizens, which previously allowed judges in either a criminal or immigration court to mitigate immigration consequences.[66] One specific remedy was a provision allowing an immigra-

[58] *See id*.

[59] Strumpf, *supra* note 11, at 402 ("The rapid importation of criminal grounds into immigration law is consistent with a shift in criminal penology from rehabilitation to harsher motivations: retribution, deterrence, incapacitation, and the expressive power of the state."); Vazquez, *supra* note 50, at 1105–06.

[60] Vazquez, *supra* note 50, at 1107–08; Strumpf, *supra* note 11, at 408–9, 412; Phillip L. Torrey, *Rethinking Immigration's Mandatory Detention Regime: Politics, Profit, and the Meaning of 'Custody,* 48 U. MICH. J.L. REFORM 879, 883–84, 894–95 (2015).

[61] Hernández, *supra* note 12, at 1360.

[62] *Id.*

[63] *Id.* at 1362–63.

[64] *Id.* at 1361–62.

[65] *Id.* at 1367 (referencing the Anti-Drug Abuse Act, Pub. L. No. 99-570, 100 Stat. 3207 (1986)); *see* U.S. DEP'T OF HOMELAND SEC., IMMIGR. & CUSTOMS ENFORCEMENT, DHS FORM I-247, IMMIGRATION DETAINER: NOTICE OF ACTION (2012).

[66] Jason A. Cade, *The Plea-Bargain Crisis for Noncitizens in Misdemeanor Court*, 34 CARDOZO L. REV.

tion judge to consider various community and family ties, as well as rehabilitation and the severity of the crime in not ordering the removal of the noncitizen.[67] This option for relief was eliminated in 1996.[68] Furthermore, Judicial Recommendations Against Deportation (JRADs), which allowed the criminal sentencing judge to order that the present conviction should not be the basis for deportation, were eliminated in 1990.[69] "The existence of both discretionary tools meant that many individuals convicted of a crime could avoid deportation or exclusion. Their repeal, therefore, made it more likely these individuals would face removal from their country," which coincided with the vast expansion of grounds for removal in legislation like IIRIRA.[70] Repealing these discretionary protections dehumanized noncitizen defendants who could no longer have their individual circumstances and histories be considered in a court of law. Rather, stark and severe legislative pronouncements limited judicial intervention and reduced immigrants to variables within a systematic calculus of statutory consequences.[71]

In sum, crimmigration evolved through the classification of immigration penalties and detention as part of a civil proceeding, the increased number and severity of criminal offenses for immigration violations, the expansion of immigration consequences for criminal convictions, and a lack of discretion allowed in the removal proceeding. Crimmigration therefore created a pseudo criminal system without the constitutional protections.

II. INCREASED ENFORCEMENT AND THE IMPACT ON NONCITIZENS

A. The Rise in Enforcement: The Mechanisms and the Outcome

The most impactful consequence of the criminalization of the immigration system is the rise in penalties, referenced above, and the resulting creation of a complex and ubiquitous enforcement apparatus. This section emphasizes the collaboration between local and federal authorities to share information and apprehend noncitizens. To truly grasp the magnitude of this merger, it is necessary to look to the data and trace the rise in enforcement programs, removal orders, and case backlogs. This data reveals the intertwining of the two systems over time, as well as bolsters the argument of the increasingly punitive nature of the immigration system.

1751, 1761 (2013).

[67] *Id.* (discussing the former INA § 212(c) relief).

[68] *Id.*

[69] *Id.* at 1762; Hernández, *supra* note 12, at 1377.

[70] Hernández, *supra* note 12, at 1378–79.

[71] *See id.* at 1382.

In her 2006 article, Professor of Law at Lewis and Clark Law School Juliet Strumpf predicted the outcome of the increasingly criminalized immigration system and incumbent policies.[72] Strumpf extrapolated from the politics of 2006 and how they would affect the future.[73] Beginning with a fictional retrospective account, Prof. Strumpf wrote a letter to the President in 2017 regarding the "current" state of immigration.[74] She wrote, "Deportation became the consequence of almost any criminal conviction of a noncitizen, including legal permanent residents."[75] Strumpf also anticipated overwhelmed detention centers and reliance on private jails to facilitate the "civil" immigration detention.[76] She foresaw "the national conversation polarized between legalizing the population of undocumented immigrants and using the power of the state to crack down on the 'illegal' population," as well as the rise in removals, inmates, and backlog in the courts.[77] Her predictions are, as this paper presents, the reality of the immigration enforcement landscape today.

The rise in federal enforcement comes from bipartisan policy. While IRCA and the Immigration Act of 1990[78] were passed under Republican presidents, IIRIRA and AEDPA[79] were both passed under a Democratic president. Further, since 2000, detention of noncitizens and subsequent removal soared under both Presidents George W. Bush and Barack Obama (see Table 1). With regard to enforcement specifically, IRCA arguably started the trend as it "blurred the boundary between civil detention and penal detention by encouraging the confinement of excludable and deportable individuals in federal prisons operated by the Bureau of Prisons (BOP)."[80]

IRCA also required the U.S. Attorney General to "begin any deportation proceeding as expeditiously as possible after the date of conviction,"[81] and created the Criminal Alien Program (CAP). AEDPA and IIRIRA also escalated criminal enforcement, as the former vastly expanded the number of offenses deemed "aggravated felonies," and the latter introduced "287(g) agreements"[82] and enabled the "Secure Communities" program, discussed

[72] Stumpf, *supra* note 11, at 381.
[73] *Id.*
[74] *Id.* at 368–75.
[75] *Id.* at 371.
[76] *Id.* at 373.
[77] Stumpf, *supra* note 11, at 370.
[78] Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978.
[79] Antiterrorism and Effective Death Penalty Act, Pub. L. No. 104-132, 110 Stat. 1214 (1996).
[80] Hernández, *supra* note 12, at 1364.
[81] ROSENBLUM & KANDEL, *supra* note 42, at 11–12.
[82] Hernández, *supra* note 12, at 1370.

below.[83] Secure Communities, 287(g), and CAP are all federal programs used for "state and local law enforcement to facilitate ICE's [Immigration and Customs Enforcement's] initiation of removal proceedings against noncitizen arrestees."[84] These programs together thus enhanced the ability to locate and apprehend noncitizens through local law enforcement cooperation.

Secure Communities is a program allowing data collected by local law enforcement, and shared with the U.S. Department of Justice, to then automatically pass to ICE.[85] Biometric data, such as fingerprints and other personal identifying information, is then checked against U.S. Department of Homeland Security (DHS) databases.[86] Based on this information, if the noncitizen is believed to be removable, a "detainer" is issued.[87] This detainer is a request to hold the noncitizen for up to 48 hours after the release on bail or the conclusion of the criminal case.[88] While the legality of this extrajudicial hold has been successfully challenged,[89] detainers are still utilized in almost every jurisdiction and emphasize the cooperation between the local and federal authorities in information sharing and detention.[90]

CAP is a "'jail-status check' program[], intended to screen individuals in federal, state, or local prisons and jails for removability."[91] CAP was created through IRCA by merging the Secure Communities and 287(g) programs under the former Immigration and Nationalization Service (later replaced

---

[83] *Id*.

[84] Cade, *supra* note 66, at 1763.

[85] DEP'T OF HOMELAND SEC., IMMIGR. & CUSTOMS ENFORCEMENT, SECURE COMMUNITIES: FAQS (2017).

[86] *Id.*

[87] *Id.*

[88] *See* 8 C.F.R. § 287.7 (2011).

[89] *See* Morales v. Chadbourne, 793 F.3d 208, 223 (1st Cir. 2015) (holding that ICE must have probable cause to effectuate an arrest); Moreno v. Napolitano, 213 F. Supp. 3d 999, 1008 (N.D. Ill. 2016) (holding that "ICE's issuance of detainers that seek to detain individuals without a warrant goes beyond its statutory authority to make warrantless arrests"); Miranda-Olivares v. Clackamas Cty, No. 3:12-cv-02317-ST, 2014 U.S. Dist. LEXIS 50340, at *29 (D. Or. Apr. 11, 2014) (holding that "continued detention exceeded the scope of the jail's lawful authority over the released detainee, constituted a new arrest, and must be analyzed under the Fourth Amendment."); Lunn v. Commonwealth, 477 Mass. 517, 2017 WL 3122363 at *519 (2017) (holding that a detainer is civil, not criminal: "nothing in the statutes or common law of Massachusetts authorizes court officers to make a civil arrest in these circumstances" and therefore any detention past the ordered release on a criminal case is unlawful); s*ee also* U.S. Dep't of Justice, Office of the Att'y General, Opinion 14-067 (2015) ("It is my opinion that an ICE detainer is merely a request . . . For that reason, an adult inmate or a juvenile inmate with a fixed release date should be released from custody on that date notwithstanding the agency's receipt of an ICE detainer.").

[90] DEP'T OF HOMELAND SEC., IMMIGR. & CUSTOMS ENFORCEMENT, SECURE COMMUNITIES: FAQS (2017).

[91] *The Criminal Alien Program (CAP) Immigration Enforcement in Prisons and Jails*, AM. IMMIGR. COUNCIL 2 (Aug. 2013), https://www.americanimmigrationcouncil.org/sites/default/files/research/cap_fact_sheet_8-1_fin_0.pdf.

by ICE).[92] Currently, CAP operates in 100 percent of federal and state jails.[93] Meanwhile, 287(g) agreements deputize local officers with federal arrest power allowing them to arrest noncitizens exclusively for immigration related offenses.[94]

CAP, Secure Communities, and 287(g) agreements dissolved the distinction between federal and local law enforcement by encouraging or demanding state cooperation.[95] IIRIRA also provided the infrastructure for this expansion by starting a biometric identification database in order to identify noncitizens and store their information.[96] These programs combined with new mandatory detention triggers to create a new issue of housing noncitizens by increasing the numbers of those caught up in the dragnet.[97] IIRIRA accounted for this, and envisioned new leases and purchases of public and private detention centers.[98]

Under these programs, immigration status is now relevant from the beginning of the criminal adjudication process.[99] During the booking process (when an arrestee is taken to a police station and processed), the noncitizen is screened by immigration authorities via mechanisms created by all three programs.[100] At this stage, prior to formal charging, a defendant is not provided an attorney and typically one has not yet been appointed.[101] This concerns immigrants right's advocates, because CAP agents interview noncitizens without a legal representative to protect the interests of the interviewee and ask sensitive immigration related questions, and then the information gained is submitted to the DHS databases. This is a fairly routine process, as many jails have video teleconference technology within the jail to allow for ICE agents to interview arrestees remotely.

These programs dramatically increased enforcement and the criminalization of the immigration system.[102] As a result of crimmigration, not only are

---

92 U.S. DEP'T OF HOMELAND SEC., IMMIGR. & CUSTOMS ENFORCEMENT, FACT SHEET: SECURE COMMUNITIES 2 (2008).

93 WILLIAM A. KANDEL, CONG. RESEARCH SERV., R44627, INTERIOR IMMIGRATION ENFORCEMENT: CRIMINAL ALIEN PROGRAMS 14 (2016).

94 8 U.S.C. § 1357(g)(1) (2006).

95 *See* 8 U.S.C. § 1357(g) (2006); ROSENBLUM & KANDEL, *supra* note 54, at 11–12.

96 Hernández, *supra* note 12, at 1371.

97 *See id.*

98 *Id.*

99 ROSENBLUM & KANDEL, *supra* note 54, at 14.

100 *Id.*

101 Rothgery v. Gillespie Cty., 554 U.S. 191, 198 (2008) (quoting McNeil v. Wisconsin, 501 U.S. 171, 175 (1991); U.S. v. Gouveia, 467 U.S. 180, 188 (1984)) (holding that the right to counsel "'does not attach until a prosecution is commenced' . . . 'by way of formal charge, preliminary hearing, indictment, information or arraignment.'").

102 ROSENBLUM & KANDEL, *supra* note 54, at 1.

noncitizens in immigration detention the most common type of detainee in the U.S.,[103] but the U.S. also operates the world's largest immigration detention system.[104] First, looking at removal numbers, the number of noncitizens apprehended and removed rose by about 8,000 percent between 1925 and 2000, as depicted in Table 1.[105] Although steadily increasing over time, the numbers of individuals subject to the immigration system ballooned after the previously discussed legislation and policy changes in the 20th century.[106] By 1990, apprehension and deportation numbers broke one million.[107] Just 10 years later, in 2000, the numbers almost doubled to over 1.8 million, the apex.[108] Next, looking at the numbers of noncitizens deemed "criminal aliens" (those in removal proceedings who have prior criminal offenses—regardless of status or type of offense) in Table 2 below, the pattern displayed between 1995 and 2015 is stark. Table 2 reveals important information both on the inaccuracy of public perception, as well as the drastic increase in removals.[109]

These data show two essential points to understanding the rise of crimmigration. First, although removals peaked in 2010, removals skyrocketed prior to that time.[110] Removals in 1995 totaled 50,924 people, including criminal and non-criminal.[111] In 2010, the total was 381,525, or over a sevenfold increase.[112] By 2015, the total decreased slightly to 333,341.[113] Second, despite common rhetoric, non-criminals consistently comprise substantially more than half of all removals.[114] Thus, the majority of noncitizens in the immigration removal system do not have any criminal convictions. Politically speaking, it is common to highlight the growing use of the immigration system for apprehending so-called criminals, yet statistically speak-

---

[103] Hernández, *supra* note 12, at 1382.

[104] Ahmed et al., *supra* note 48, at 194.

[105] *See* U.S. DEP'T OF HOMELAND SEC., YEARBOOK OF IMMIGRATION STATISTICS, TABLE 33 (2015); *id.* at TABLE 39 (Here, deportation includes both returns and removals, which includes both those who have been removed based on an order of removal, as well as those who have been released by other mechanisms) [hereinafter DHS YEARBOOK 2015].

[106] *See* Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3355; Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009; ROSENBLUM & KANDEL, *supra* note 54, at 14; Hernández, *supra* note 12, at 1382.

[107] DHS YEARBOOK 2015.

[108] *Id.*

[109] U.S. DEP'T OF JUSTICE, IMMIGR. AND NATURALIZATION SERV., STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE, TABLE 63 (1999) [hereinafter DOJ YEARBOOK 1999]; U.S. DEP'T OF HOMELAND SEC., YEARBOOK OF IMMIGRATION STATISTICS, TABLE 41 (2005) [hereinafter DHS YEARBOOK 2005]; DHS YEARBOOK 2015, at TABLE 41.

[110] *See* DHS YEARBOOK 2015, at TABLE 41.

[111] DOJ YEARBOOK 1999, at TABLE 63.

[112] DHS YEARBOOK 2015, at TABLE 41.

[113] *Id.*

[114] *See id.*; DOJ YEARBOOK 1999, at TABLE 63; DHS YEARBOOK 2005, at TABLE 41.

ing that is inaccurate.[115] Further, even of those noncitizens who have a criminal record, an "in-house report prepared by ICE revealed that, of the aliens held on September 1, 2009, 34 percent were not subject to mandatory detention and 49 percent were not felons; only 11 percent had committed [sic] violent offenses."[116] While this is a snapshot, it shows that even of those deemed "criminal aliens," the vast majority have not committed a violent offense, and one-third did not even have a conviction sufficient to trigger the very low mandatory detention grounds.[117]

The final measurement revealing the explosion of the crimmigration system is the resulting debilitating rise in caseload. This can be shown in two comparative charts that look at pending cases and average days to adjudicate those cases (Tables 3 and 4).[118] Pending cases count the number of pending immigration proceedings open at any given time.[119] Average days are counted based on the average length of time a case is open during proceedings.[120] The Government Accountability Office (GAO) summarized: "Our analysis of EOIR's [Executive Office of Immigration Review] annual immigration court system caseload—the number of open cases before the court during a single fiscal year—showed that it grew 44 percent from fiscal years 2006 through 2015 due to an increase in the case backlog."[121] Based on this backlog, some cases pending on the non-detained docket are now scheduled as far out as July of 2022 for adjudication.[122] Combined, these data paint a clear picture: every measurement relating to enforcement and penalty in the immigration system has vastly increased over time, specifically since the crimmigration legislative boom of the 1980s and 1990s.

---

115 *See id*.

116 Sklansky, *supra* note 29, 184–85.

117 *See id.*

118 *Immigration Court Backlog*, TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE AT SYRACUSE UNIV. (2017) http://trac.syr.edu/phptools/immigration/court_backlog/.

119 *About the Data*, TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE AT SYRACUSE UNIV. (2011), http://trac.syr.edu/phptools/immigration/court_backlog/about_data.html.

120 *Id.*

121 U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-17-438, IMMIGRATION COURTS, ACTIONS NEEDED TO REDUCE CASE BACKLOG AND ADDRESS LONG-STANDING MANAGEMENT AND OPERATIONAL CHALLENGES 1, 20 (2017).

122 *Immigration Crisis in the Courts*, NBC 10 NEWS PHILADELPHIA (Sept. 25, 2017), http://www.nbcphiladelphia.com/news/national-international/Immigration-Crisis-in-the-Courts-446790833.html.

B. "Illegals" and "Criminal Aliens:" How the Rise in Enforcement and the Criminalization of the Immigration System Dehumanized Noncitizens in the Political Sphere

This criminalization of the immigration system had simultaneous effects from a sociological standpoint, and the term "criminal alien" as well as the colloquial term "illegals," reflects those effects.[123] The terminology has concrete consequences in the legal limitation of human rights based on the classification of immigration as a civil, rather than criminal system.[124] More provocatively stated, "the term 'criminal alien' [is] a strategic sleight of hand. These laws established the concept of 'criminal alienhood' that has slowly but purposefully redefined what it means to be unauthorized in the United States such that criminality and unauthorized status are too often considered synonymous."[125] Similarly, the term constitutes a "psychosocial dehumanization of immigrants as disposable, threatening, and categorically excludable."[126]

The Immigration and Nationality Act (INA) defines an "alien" is "any person not a citizen or national of the United States."[127] The term "criminal alien," while not defined by INA, is used by the government to refer generically to those noncitizens convicted of a crime and builds on the concept of separating and dehumanizing noncitizens.[128] This term is used regardless of the noncitizen's immigration status or the severity of the offense, including any minor traffic offense.[129] The term "illegals" used in common parlance refers to those noncitizens who either entered without inspection, or are currently without proper documentation.[130] This conflation of the idea of the "other" with criminality is not an accident, and it causes separations within society.[131] Both the immigration and criminal systems heavily employ this

---

[123] See Leisy Abrego, et al., *Making Immigrants into Criminals: Legal Processes of Criminalization in the Post-IIRIRA Era*, 5 J. MIGRATION & HUM. SOC'Y 694, 702 (2017).

[124] *See id.* at 697.

[125] *See id.* at 695.

[126] Ahmed et al., *supra* note 48, at 214.

[127] 8 U.S.C. § 1101(a)(3) (2017).

[128] Ingrid V. Eagly, *Criminal Justice for Noncitizens: An Analysis of Variation in Local Enforcement*, 88 N.Y.U. L. REV. 1126, 1140 (2013); ROSENBLUM & KANDEL, *supra* note 54, at 41 (defining "'criminal alien' as a noncitizen who has been convicted of a crime in the United States" . . . "Despite its widespread use, no consistent definition of the term 'criminal alien' exists.").

[129] Eagly, *supra* note 128, at 1140–41.

[130] Vazquez, *supra* note 50, at 1115.

[131] *See* Stumpf, *supra* note 11, at 397 ("Membership theory influences immigration and criminal law in similar ways. Membership theory is based in the idea that positive rights arise from a social contract between the government and the people. Those who are not parties to that agreement and yet are subject to government action have no claim to such positive rights, or rights equivalent to those held by members.").

terminology while they "act as gatekeepers of membership in our society, determining whether an individual should be included in or excluded."[132] Those who are excluded are then deprived of those rights which are granted based on "a social contract between the government and the [included] people."[133]

Furthering this separation, the public often associates immigration generally with illegal immigration specifically, and higher criminality rates.[134] In Prof. Strumpf's article, she rightly predicted, "changes in the law fed a powerful vision of the immigrant as a scofflaw and a criminal that began to dominate the competing image of the benign, hard-working embodiment of the American dream."[135] Due to crimmigration, "[n]o longer were [immigrants] seen as those who arrived for a better life, to work hard and contribute to society, but instead they were increasingly viewed as those who came to the United States to commit crimes and endanger the safety of the nation."[136] This is subconsciously reflected and reinforced by the fact that the predecessor to ICE, INS, was moved out of the Department of Justice and into the Department of Homeland Security, whose mission is primarily to fight terrorism in the wake of September 11, 2001. Further, this shift implied that the immigration system is not part of a broader, justice-and-rule-based system, but instead specifically designed to target immigrants who are now broadly associated with criminality and terrorism.[137] The use of "criminal alien" and "illegals" coincides with the move of ICE to DHS, and serves to further dehumanize the noncitizen population in the eyes of the public.[138] History shows that the use of such terminology paved the way for the restriction and limitation of the rights of those noncitizens caught up in this fervor.[139] Strumpf's prediction could not be more accurate given the nationalistic rhetoric displayed in the 2016 presidential election, and increased enforcement in 2017, discussed in the conclusion below.

[132] *Id.* at 396–97.

[133] *Id.*

[134] Legomsky, *supra* note 14, at 508.

[135] Stumpf, *supra* note 11, at 371.

[136] Vazquez, *supra* note 50, at 1115–16.

[137] *See id.*

[138] *See id.*

[139] *See* Stumpf, *supra* note 11, at 397.

III. IMPACT OF CRIMMIGRATION ON CRIMINAL DEFENSE

The expansion of crimmigration hit a speed bump with the Supreme Court of the United State's decision in *Padilla v. Kentucky* in 2010.[140] By recognizing the devastating impact of deportation and immigration consequences, the decision momentarily validated the humanity of noncitizens.[141] However, the decision reaffirmed that despite the criminal-like consequences, the immigration system is still classified as civil, not criminal. This section explains the impact of this decision on criminal defense of immigrants, specifically in Virginia. It also discusses the marginalization of noncitizens bolstered by terms such as "illegal alien," which arguably result in a multitude of inequities for immigrants and noncitizens in the criminal justice system.

Padilla v. Kentucky required the Court to address the consequence of crimmigration, namely, the lack of notice or advisal of the immigration consequences in the confines of a criminal prosecution.[142] In *Padilla*, the Court evaluated the history of the increasing severity of the immigration system stating that "[t]hese changes to our immigration law have dramatically raised the stakes of a noncitizen's criminal conviction."[143] The Court recognized that legislative changes referenced in Part I altered the calculus for whether the immigration consequence was so integral to the criminal case that it must be incorporated into the standard for evaluating the effective assistance of counsel.[144] The Court writes, "The importance of accurate legal advice for noncitizens accused of crimes has never been more important" and most surprising, "as a matter of federal law, deportation is an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes."[145] Despite this recognition, the Court upheld the criminal/civil distinction, stating that "although removal proceedings are civil in nature, deportation is nevertheless intimately related to the criminal process"[146] and further "deportation is a particularly severe penalty, but it is not, in a strict sense, a criminal sanction."[147] Still, the inclusion of immigration consequences as part of the criminal penalty, and the holding that counsel must

[140] Dorothy A. Harbeck, M. Michelle Park & Yoonji Kim, *The Impact of Padilla v. Kentucky on the Immigration Courts: Does the Potential for Vacating a Criminal Plea Effect Removal/Deportation Proceedings?*, 1 J. INT'L & COMP. L. 66, 68 (2010).

[141] *Padilla*, 559 U.S. at 373–74.

[142] *Id.* at 364.

[143] *Id.*

[144] *Id*. at 360–64.

[145] *Id*. at 364.

[146] *Padilla*, 559 U.S.at 365.

[147] *Id.*

advise regarding those consequences, marked a sea-change in the field of criminal defense. As the court stated, "[i]t is quintessentially the duty of counsel to provide her client with available advice about an issue like deportation," remarked the Court.[148]

The burden of this new legal obligation fell largely on court-appointed attorneys and public defenders.[149] However, fully understanding the complexity of immigration law, not only on an academic level, but at a level sufficient to advise a client about the possibly life altering consequences, is daunting to say the least. Those consequences in immigration court are then doled out without the benefit of appointed counsel.[150] This leaves court-appointed attorneys in the criminal case to attempt to fill the void and advise clients about the penalties in both systems.[151] This incredibly difficult burden to bear is a direct result of the criminalization of the immigration process and puts noncitizen defendants at a disadvantage.[152] Despite the Supreme Court clearly holding that the failure to advise clients regarding the immigration consequences of a criminal charge is ineffective assistance of counsel,[153] this required practice is not universally employed. Overburdened with high caseloads, it is difficult for criminal defense attorneys to obtain the necessary training to properly advise their clients.[154] Even for those attorneys fortunate enough to receive adequate training and the assistance of pro bono immigration attorneys, the far reaching consequences are almost impossible to account for. Thus, "[d]efendants who lack competent counsel, or any attorney at all, will not be aware of the immigration consequences of guilty pleas to petty charges. Even when defendants have knowledgeable counsel, effective plea bargains and acquittals are difficult to achieve."[155]

Beyond the penalties in the immigration system, the increasing hardship suffered by noncitizens in the criminal justice system is pervasive and insidious. Coinciding with the dehumanization of noncitizens and the confluence of immigration and illegality, prejudices have developed throughout the process. At every step of the criminal justice process, from bond determinations to plea-bargaining to even sentencing, noncitizens face numerous obstacles to justice.[156] As discussed previously, beginning with booking,

[148] *Id.* at 371.
[149] *See* Ahmed et al., *supra* note 48, at 195–96.
[150] *See id.* at 196.
[151] *Id.*
[152] *See id.* at 195–96.
[153] *Padilla*, 559 U.S. at 371 (quoting Hill v. Lockhart, 474 U.S. 52, 62 (1985)).
[154] *See* Ahmed et al., *supra* note 48, at 196.
[155] Cade, *supra* note 66, at 1796.
[156] *See id.* at 1751; Abrego, et al., *supra* note 123; Vazquez, *supra* note 50, at 1093.

noncitizens are subject to an interview without counsel, which can result in an immigration detainer through Secure Communities and CAP.[157] Prior to being formally arraigned for a criminal offense, noncitizens are questioned by ICE, have their fingerprints sent to DHS, and possibly have a detainer issued against them.[158] Thus, the immigrant is not only subject to the criminal procedure, but the outside influence of the federal government.

Once formally charged, a magistrate or judge must determine if the arrestee should be released or issued a bond amount to secure their bail.[159] Their decision is often influenced by the arrestee's immigration status.[160] For the author's clients, the issue of whether a client has an immigration detainer if often at the forefront of a judge's mind while making a bond determination. Some judges refuse to issue a bond to someone with a detainer fearing that the noncitizen would be taken by ICE and never return to court to be held responsible for the criminal offense. Other judges issue a heightened bond reasoning that an immigration detainer indicates a risk of flight. Further, there is a presumption against bond in cases where a noncitizen is charged with certain felony or other enumerated misdemeanor offenses, including driving under the influence, if they are "identified as being illegally present."[161]

Many scholars document this phenomenon.[162] Jurisdictions regularly take into account the defendant's immigration status when determining bail, usually as a factor relating to risk of flight.[163] While it may be relevant if the arrestee newly arrived in the country and lacks community ties, for a noncitizen who has family and community connections and has made a life in the U.S., immigration status has little bearing on risk of flight.[164] Courts, however, have upheld immigration status as a lawful factor in bail decisions.[165] Further, even in cases where a noncitizen is granted a bond, his or her unknown or undocumented immigration status may lead to prohibitively

---

[157] *See* Eagly, *supra* note 128, at 1148–49.

[158] *See id.*; 8 C.F.R. § 287.7(a) (2017).

[159] VA. CODE ANN. § 19.2-120 (2017).

[160] Lena Graber & Amy Schnitzer, *The Bail Reform Act and Immigration Custody for Federal Criminal Defendants*, NAT'L IMMIGR. PROJECT OF THE NAT'L LAWYERS GUILD 5 (2013), https://nationalimmigrationproject.org/PDFs/practitioners/practice_advisories/crim/2013_Jun_federal-bail.pdf.

[161] VA. CODE ANN. § 19.2-120.1 (2017).

[162] *See* Cade, *supra* note 66, at 1791–92 (comparing state policies regarding the consideration of immigration status when determining bail); Eagly, *supra* note 128, at 1150 (detailing the corresponding difficulty if the noncitizen is given a bond in immigration court but not released therefrom); Vazquez, *supra* note 50, at 1126–27 (outlining ways in which immigration status has been used to deny bail).

[163] Cade, *supra* note 66, at 1791; Chin, *supra* note 30, at 1423–24.

[164] Chin, *supra* note 30, at 1450.

[165] Cade, *supra* note 66, at 1791.

expensive bonds or the refusal of bond companies to secure that bond.[166] The result of an inability to obtain or pay a bond results in extended incarceration pending trial and in sentencing.[167]

While a case is pending, immigration status continues to play a key role, particularly if the noncitizen remains detained. Detained defendants are generally more likely to plead guilty, which can occur at a bond motion for minor offenses in some jurisdictions.[168] Regarding less serious criminal offenses, "facing prohibitively high bond, delay, repeated court appearances, and other process costs, most misdemeanor defendants submit to institutional pressures to plead guilty at the earliest opportunity."[169] Further, if the client does not have a detainer, there is a perverse incentive to plead guilty quickly and ignore the immigration consequences to avoid immediate ICE apprehension.[170] Pleading guilty forecloses any legal or constitutional defenses that may have arisen in the criminal court proceedings.[171] Unfortunately, the crimmigration system creates the "danger that fear or ignorance will skew innocent defendants' bargaining," leading an innocent client to make an uninformed choice in order to avoid ICE apprehension.[172]

Another aspect of the plea bargaining process is prosecutor involvement. Although the Supreme Court in *Padilla* envisioned immigration consequences would be considered in the plea bargaining process, in practice this is difficult to effectuate.[173] Prosecutors are often reluctant to take immigration status into account, either because these considerations could constitute an unfair advantage to noncitizens or because they believe that mitigating the immigration consequences is not their concern.[174] In many jurisdictions, including Virginia, any criminal defendant is only entitled to an attorney if there is a possibility of incarceration.[175] The prosecutor can waive any jail time on an offense,[176] which is commonplace for minor offenses, thus removing the right to appointed counsel. However, this leaves noncitizens without the right to a court-appointed attorney to help them navigate both the criminal charges and the immigration consequences.[177] Thus, the "*Pa-*

[166] *Id.* at 1801.
[167] *Id.* at 1792.
[168] *Id.* at 1792–93.
[169] *Id.* at 1754.
[170] Cade, *supra* note 66, at 1797.
[171] *Id.* at 1797.
[172] *Id.* at 1804.
[173] *See Padilla*, 559 U.S. at 373.
[174] Ahmed et al., *supra* note 48, at 197–98; *see* Eagly, *supra* note 119, at 1151–52.
[175] VA. CODE ANN. § 19.2-160 (2017); Kapoor v. Commonwealth, No. 2582-03-4, 2004 Va. App. LEXIS 557, at *1, *3 (Va. Ct. App. Nov. 16, 2004).
[176] VA. CODE ANN. § 19.2-160.
[177] *Memorandum*, ARLINGTON CTY BAR ASS'N (Feb. 22, 2017), https://www.arlnow.com/wp-

dilla Court's assumption that the parties will bargain for deportation-avoiding dispositions is least likely to occur precisely where the rift between the gravity of the criminal offense and the ensuring deportation consequence is the largest," as the bargaining process and full representation is least likely to occur in minor offenses.[178] If noncitizens choose to go to trial, they may face certain structural inequalities. In some jurisdictions, unlawful entry or status can be used as grounds to impeach a witness or the accused.[179] Impeachment is permitted based on the assumption that unlawful entry or expired status is a "bad act probative of dishonesty," and thus bears on the credibility of the witness or accused similar to a prior criminal conviction.[180] Alternatively, unlawful status may create a bias against the defendant in favor of the government.[181] In sum, the willingness to conflate immigration status with dishonesty and criminal activity further dehumanizes noncitizen defendants, and solidifies the links between foreign heritage, illegality, and untrustworthiness.

Whether through a plea agreement or juror's decision, immigration status infiltrates the sentencing stage as well.[182] In light of *Padilla*, it is an ethical practice to reference the possible immigration consequences of defendants at sentencing.[183] However, immigration status can adversely affect noncitizens at this stage as well.[184] Statutorily, a suspended sentence on a fairly minor offense can be considered an aggravated felony if the suspended sentence is 365 days or more.[185] To avoid these triggers, attorneys often ask for active jail time with a shorter suspended sentence, even for clients with probation guidelines who typically would never see the inside of a jail.[186] Thus, noncitizens may spend time in jail in order to avoid immigration consequences even though the penalty is inappropriate for the criminal case. Still, arguing to avoid a particular sentence is not guaranteed to sway judg-

content/uploads/2017/03/Waiver-of-Jail-Time-ACBA-Memo.pdf; Rachel Weiner, *Get Caught with Pot, Don't Go to Jail: Why Not Everyone is Happy*, WASH. POST (Mar. 10, 2017), https://www.washingtonpost.com/local/public-safety/get-caught-with-pot-dont-go-to-jail-why-not-everyone-is-happy/2017/03/09/81c0e6a6-fecb-11e6-8ebe-6e0dbe4f2bca_story.html.

[178] Cade, *supra* note 66, at 1775.

[179] Chin, *supra* note 30, at 1426–27.

[180] *Id.* at 1427–28.

[181] *Id.* at 1427.

[182] Eagly, *supra* note 128, at 1154.

[183] IMMIGRATION DEF. PROJECT & N.Y. UNIV. SCH. OF LAW IMMIGRANT RIGHTS CLINIC, JUDICIAL OBLIGATIONS AFTER PADILLA V. KENTUCKY: THE ROLE OF JUDGES IN UPHOLDING DEFENDANT'S RIGHTS TO ADVICE ABOUT THE IMMIGRATION CONSEQUENCES OF CRIMINAL CONVICTIONS 24 (2011).

[184] *Id.*

[185] *See* 8 U.S.C. § 1101(a)(43)(F) and (G) (2017).

[186] *See* Chin, *supra* note 30, at 1436.

es. Some think citizens and noncitizens should be treated equally in a criminal case, and the immigration consequences are thereby irrelevant.[187]

Disturbingly, immigration status can also be taken into account for determining sentence lengths and penalties. This can be created by biases on the bench, but may also be statutorily authorized.[188] Whether through implicit bias or statutory construction, studies show that noncitizens are more likely to be incarcerated and have longer sentences than U.S. citizens.[189] Many states even specifically allow for a longer sentence based solely on unlawful entry, because it is considered to indicate a "disregard for the law."[190]

Additionally, in criminal sentencing, there are often statutory alternatives to incarceration, including probation, work release, house arrest, and drug treatment programs.[191] Immigration status is permitted to be a determining factor in whether to allow a defendant to take advantage of these rehabilitative programs.[192] If they are not sentenced to active jail time, probation may still present risks for noncitizens, such as ICE involvement and apprehension.[193] Consequently, noncitizens may not be able to avail themselves to all the remedies available by law, based solely on their immigration status. Finally, even if the noncitizen can partake in an alternative criminal disposition, often rehabilitation programs allowing defendants to avoid conviction can trigger immigration consequences.[194] This perpetuates the dehumanization of noncitizens in the crimmigration system as their rights are restricted at every stage of the criminal justice process.

CONCLUSION

Words matter. How we define and discuss people and groups affects their most fundamental rights and how they are impacted by policy. By declaring an entire group of people to be "illegal," society has allowed federal and local governments to perpetuate the logical fallacy that the immigration system is merely civil regulation and therefore those subject to it are not entitled to procedural protection. This fallacy, created by defining people based on their status rather than their human dignity, has stripped millions

[187] *See id.* at 1443.
[188] *See, e.g.*, *id.* at 1431.
[189] Vazquez, *supra* note 50, at 1127.
[190] *See* Chin, *supra* note 30, at 1432–33 n.80–92.
[191] *Id.* at 1430.
[192] *Id.*
[193] Eagly, *supra* note 128, at 1154–55 n. 106 and n.9; VA. CODE ANN. § 19.2-294.2 (2017)..
[194] 8 U.S.C. § 1101(a)(48)(A) (2017); Jaquez v. Sessions, 859 F.3d 258, 261 (4th Cir. 2017).

of people of the most basic rights of our Constitution[195] The negative stereotypes of noncitizens and immigrants bolstered over the past 50 years through legislation and "tough on crime" policies created a punitive and dehumanizing immigration system. These stereotypes must be dismantled to evaluate honestly the current state of crimmigration in the United States.

During President Obama's second term, there was some cause for hope with regard to enforcement. At the end of 2014, President Obama began the Priority Enforcement Program (PEP), at the direction of former DHS Secretary Jeh Johnson.[196] PEP utilized prosecutorial discretion to prioritize only those noncitizens without proper documentation who committed certain types of crimes for enforcement.[197] The goal was to apprehend only those noncitizens who violated the law.[198] Under this program, demonstrated in Table 1, removals and apprehensions declined.[199] By the end of 2016,

> 98 percent of initial enforcement actions . . . involved individuals classified within one of the three enforcement priority categories. Ninety-one percent were among the top priority (Priority 1), which includes national security threats, individuals apprehended at the border while attempting to enter unlawfully, and the most serious categories of convicted criminals as well as gang members.[200]

Along with PEP, President Obama also instituted the Deferred Action for Childhood Arrivals (DACA) program in 2012.[201] This program utilized prosecutorial discretion in order to protect noncitizens without documentation who were brought to the United States as children, referred to as "Dreamers," based on the name of prior legislation.[202] The program protected recipients from deportation proceedings and authorized them to

---

[195] Daniel Fisher, *Does the Constitution Protect Noncitizens? Judges Say Yes.*, FORBES (Jan. 30, 2017, 12:08 PM), https://www.forbes.com/sites/danielfisher/2017/01/30/does-the-constitution-protect-noncitizens-judges-say-yes/#5d46af274f1d.

[196] *Priority Enforcement Program*, U.S. DEP'T. OF HOMELAND SEC. (2017), https://www.ice.gov/pep. The contents of this page no longer reflect the Department's policies.

[197] *Id.*

[198] Eyder Peralta, *Obama Goes It Alone, Shielding up to 5 Million Immigrants from Deportation*, NPR (Nov. 20, 2014, 6:00 PM), http://www.npr.org/sections/thetwo-way/2014/11/20/365519963/obama-will-announce-relief-for-up-to-5-million-immigrants.

[199] *See* DHS YEARBOOK 2015, at TABLE 33; U.S. DEP'T OF HOMELAND SEC., ALIENS APPREHENDED: FISCAL YEARS 1925 TO 2015 (2016).

[200] *DHS Releases End of Fiscal Year 2016 Statistics*, DEP'T. OF HOMELAND SEC. (Dec. 30, 2016), https://www.ice.gov/news/releases/dhs-releases-end-fiscal-year-2016-statistics.

[201] Julia Preston & John H. Cushman Jr., *Obama to Permit Young Migrants to Remain in U.S.*, N.Y. TIMES (Jun. 15, 2012), http://www.nytimes.com/2012/06/16/us/us-to-stop-deporting-some-illegal-immigrants.html.

[202] U.S. DEP'T OF HOMELAND SEC., OFFICE OF THE SEC'Y, EXERCISING PROSECUTORIAL DISCRETION WITH RESPECT TO INDIVIDUALS WHO CAME TO THE UNITED STATES AS CHILDREN (2010).

work.[203] PEP and DACA benefit from positive and humanizing terms, focusing on protecting families and dreamers. Instead of deporting families, they support "dreamers."

However, these programs were eliminated by President Donald Trump.[204] Noncitizen arrests increased 38 percent in the first half of 2017.[205] This includes roughly 65 percent of the population previously protected under the PEP.[206] The number of detainers issued also increased 75 percent in 2017.[207] Looking forward, the Acting Director of ICE stated the "abolishment of the Priority Enforcement Program and re-establishment of the Secure Communities program, combined with the expansion of the 287(g)2 [sic] program, is expected to result in significant increases to interior apprehensions and removals."[208] Of those affected by this change in policy, "nearly 60 percent arrived in the U.S. before 2000 and one third have been here for more than 20 years. Eight million of the 11 million have jobs. They make up 5 percent of the country's labor force, mostly in agriculture, construction and the hospitality industry."[209] As indicated above, the majority of those in removal proceedings do not have a criminal record.[210] Additionally, the rescission of DACA exposes 800,000 law abiding and educated young people to removal.[211] These policy changes are swift and impactful with even veteran DHS officers questioning the increased enforcement.[212]

With the election of Donald Trump to the presidency, the crimmigration trend is surely to continue. However, if the media and the government stop

---

[203] U.S. DEP'T OF HOMELAND SEC., U.S. CITIZENSHIP AND IMMIGR. SERV., CONSIDERATION FOR DEFERRED ACTION FOR CHILDHOOD ARRIVALS (DACA) (2017).

[204] For DACA rescission, *see* U.S. DEP'T OF HOMELAND SEC., OFFICE OF THE PRESS SEC'Y, RESCISSION OF DEFERRED ACTION FOR CHILDHOOD ARRIVALS (DACA) (2017); for PEP rescission, *see* U.S. DEP'T OF HOMELAND SEC., OFFICE OF THE PRESS SEC'Y, EXECUTIVE ORDER: ENHANCING PUBLIC SAFETY IN THE INTERIOR OF THE UNITED States (2017).

[205] *Immigration and Customs Enforcement & Customs and Border Protection FY18 Budget Request: Hearing Before the Subcomm. on Homeland Sec. of the H. Comm. on Appropriations*, 115th Cong. (2017) (statement of of U.S. Dep't of Homeland Security, Immigration and Customs Enforcement Acting Director Thomas Homan).

[206] *Id*.

[207] *Id*.

[208] *Id*.

[209] NBC 10 News Philadelphia, *supra* note 113.

[210] DOJ YEARBOOK 1999, at 218–33; DHS YEARBOOK 2005, at 97–106; DHS YEARBOOK 2015, at 107–15.

[211] Royce Murray, *Six Months of Immigration Enforcement Under the New Administration*, Am. Immigr. Council (Jul. 21, 2017), http://immigrationimpact.com/2017/07/21/six-months-immigration-enforcement-administration/.

[212] Jonathan Blitzer, *A Veteran ICE Agent, Disillusioned with the Trump Era, Speaks Out*, NEW YORKER (Jul. 24, 2017), https://www.newyorker.com/news/news-desk/a-veteran-ice-agent-disillusioned-with-the-trump-era-speaks-out.

using terms such as "illegals" to define an entire group of people, perhaps a more humane system can take root. Rather than dehumanizing noncitizens, immigration reform can reverse the crimmigration trend and separate the two systems. For example, the use of the terms "families" and "dreamers" was accompanied by decreased enforcement and decreased criminal and immigration penalties.[213] Some hope still exists for dreamers after the rescission of DACA. Multiple pieces of legislation at the federal and state level are being introduced with the intent of protecting and humanizing young people without protected status.[214] The first step toward encouraging a fair and humane system is changing the way the debate is framed. Until the terms of the debate are changed, it will be difficult to begin meaningful discussion.

Noncitizens are people. They are neighbors, coworkers, and friends. They are not inherently "illicit or morally wrong" simply by virtue of not being born in the United States.[215] They are not so different in their nature that they are incompatible with American identity, as the term "alien" suggests.[216] In conclusion, until the humanity of noncitizens is recognized, the U.S. will not be able to analyze and fix the broken crimmigration system.

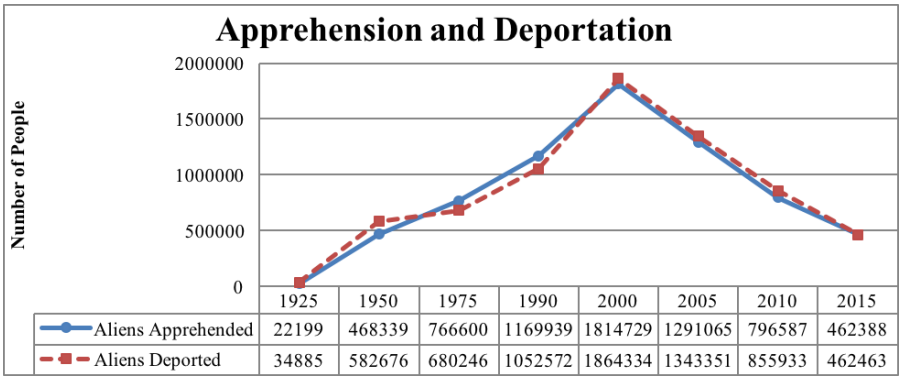
[213] See Tables 1 and 2.

[214] *The Dream Act, DACA, and Other Policies Designed to Protect Dreamers,* AM. IMMIGRATION COUNSEL (Sep. 6, 2017), https://www.americanimmigrationcouncil.org/research/dream-act-daca-and-other-policies-designed-protect-dreamers.

[215] *Criminal*, MERRIAM WEBSTER'S DICTIONARY (2017); *Illegal*, MERRIAM WEBSTER'S DICTIONARY (2017).

[216] *Alien*, MERRIAM WEBSTER'S DICTIONARY (2017).

Table 1:



	1925	1950	1975	1990	2000	2005	2010	2015
Aliens Apprehended	22199	468339	766600	1169939	1814729	1291065	796587	462388
Aliens Deported	34885	582676	680246	1052572	1864334	1343351	855933	462463

Table 2:

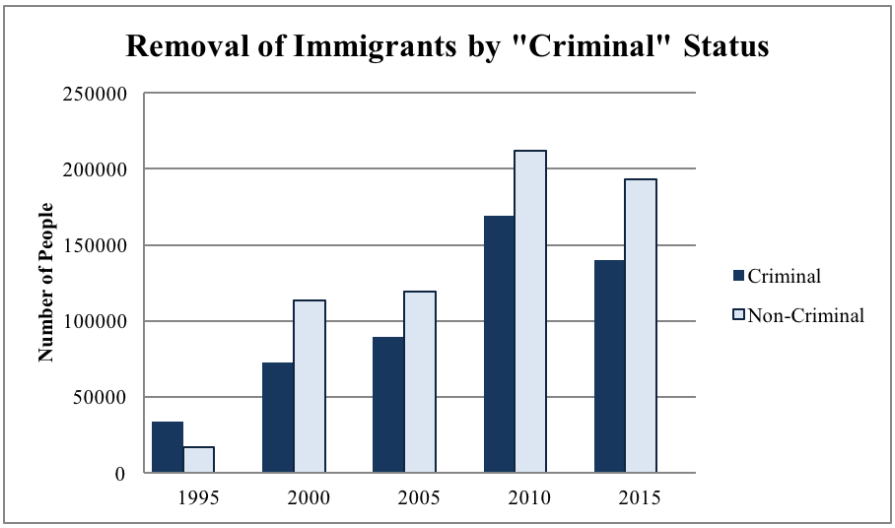


Table 3:

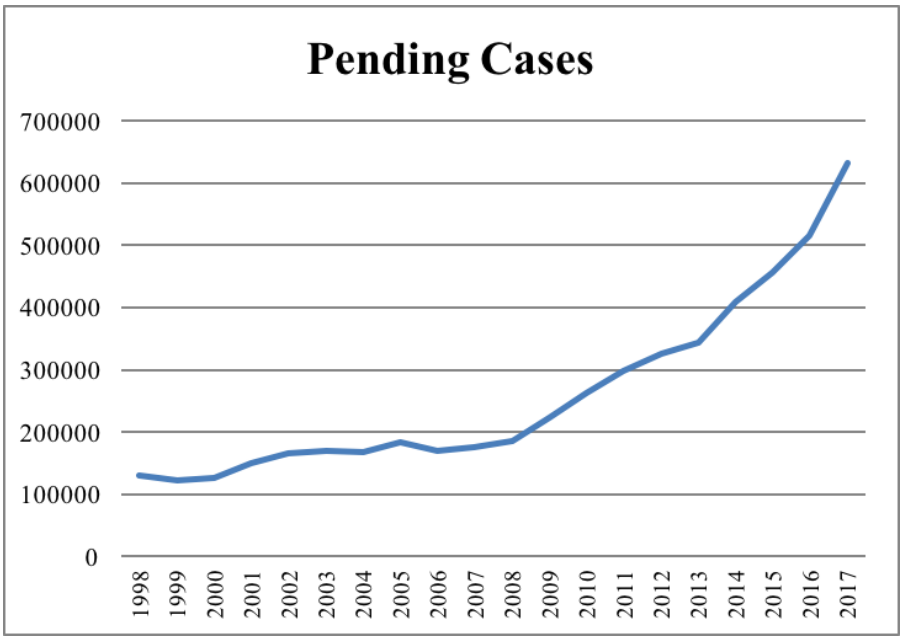


Table 4: