Aliens, Aggravated Felons, and Worse: When Words Breed Fear and Fear Breeds Injustice

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ALIENS, AGGRAVATED FELONS, AND WORSE: WHEN WORDS BREED FEAR AND FEAR BREEDS INJUSTICE

Emily C. Torstveit Ngara†

Abstract

As presidential candidates casually and inaccurately throw the term “anchor baby” into public discourse, the time is right to examine the Immigration and Nationality Act for many other examples of misleading language in the statute. This article undertakes the critical task of examining how the language of immigration law, using prevailing immigration metaphors, manipulates perceptions of noncitizens. From the use of the term “alien” to describe any noncitizen and emphasize otherness, to describing “prosecutorial” enforcement decisions to strengthen the alien-as-criminal narrative, these word choices are significant. This is especially true when noncitizens are interacting with the criminal justice system. These words and metaphors find their way into the collective subconscious and impact cognitive bias against immigrant communities. This article identifies several terms that are particularly problematic, then advocates for alternative language that more accurately reflects the definitions provided by the INA.

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Words can be like tiny doses of arsenic: they are swallowed unnoticed, appear to have no effect, and then after a little time the toxic reaction sets in after all.\footnote{Victor Klemperer, The Language of the Third Reich: LTI—Lingua Tertii Imperii A Philologists Notebook 15-16 (Martin Brady, trans., 2000). The use of these quotes is in no way meant to compare the US government, or American society, to that of Nazi Germany, but rather to emphasize the importance of language usage on public consciousness.}

\section*{Introduction}

Language choice can be a very powerful tool in guiding perceptions in the listener. The words chosen to describe noncitizens in public discourse often trigger basic human instincts such as survival, self-preservation, and fear of the “other.”

Print and broadcast media demonstrate how our culture talks about the world and current events. Both rely heavily on metaphorical language, and the practice is so widespread, listeners seldom recognize that the language is not literal and are generally unaware of its influence. In his article *Alien Language: Immigration Metaphors and the Jurisprudence of Otherness*, Keith Cunningham-Parmeter identifies three prominent immigration metaphors: Immigrants are Aliens, Immigration Is a Flood, and Immigration Is an Invasion. Cunningham-Parmeter also analyzes the metaphoric language used in three seminal Supreme Court opinions concerning immigrants. In *Plyler v. Doe*, the Court describes undocumented migrants as

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13 *Id.* at 460.

14 Cunningham-Parmeter, *supra* note 10.
a “shadow population,”15 In Hoffman Plastic Compounds, Inc. v. NLRB, undocumented workers are described as stealthy criminals.16 In INS v. Lopez-Mendoza, immigrants are described as toxic waste.17 Cunningham-Parmeter argues that the metaphoric language choices made by the Supreme Court are more than mere reflection of America’s cultural understanding of immigration.18 He argues that Court’s adoption and rebroadcasting of these metaphors contributes to the creation of the predominant cultural perception of immigrants and the treatment they should receive.19 In this way, the Court’s language choices contribute not only to public discourse, but also to the environment that cultivates anti-immigrant legislation.20

This article argues that, like the Supreme Court’s language choices, many of specific terms Congress has chosen to use in the Immigration and Nationality Act perpetuate and lend credibility to the dominant immigration metaphors. This is especially true in the context of immigrants who have had contact with the criminal justice system. Congress has used its plenary power over immigration21 to define certain terms of art in a way that does not comport with the commonly accepted meanings in colloquial use or in other

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18 Cunningham-Parmeter, supra note 10, at 1585.
19 Cunningham-Parmeter, supra note 10, at 1585.
20 Cunningham-Parmeter, supra note 10, at 1585.
21 Fong Yue Ting v. U.S., 149 U.S. 698 (1893).
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areas of law. Frequently, these new terms are traditionally associated with danger, violence, or serious harm and are defined broadly to encompass behavior or situations that do not involve such risks. For example, an “aggravated felony” need be neither aggravated nor a felony. These redefined terms are then used to lend weight and credibility to media publications, debates, and conversation without reference to their statutory definitions, leading the audience to imbue the terms with their original meaning and connotations. By manipulating language, the drafters of these statutes are able to capitalize on existing fears and push the discussion of immigration issues toward ever harsher laws which in turn impose injustice on noncitizens and their families.

This article does not challenge Congress’s power to use and define terms in whatever manner it wishes. As Justice Souter stated “Humpty Dumpty used a word to mean ‘just what [he chose] it to mean—neither more nor less,’ and legislatures, too, are free to be unorthodox.” Although Congress is free to do so, the “unorthodox” use of terminology creates an unduly opaque

23 See Guerrero-Perez v. INS, 242 F.3d 727, 737 (7th Cir. 2001) (holding that convictions for State-level misdemeanors can constitute aggravated felonies when they fall into a category listed in INA §101(a)(43)); but see Lopez v. Gonzalez, 549 U.S. 47, 60 (2006) (holding that “a state offense constitutes a ‘felony punishable under the Controlled Substances Act’ only if it proscribes conduct punishable as a felony under that federal law.” The respondent’s South Dakota felony conviction for aiding and abetting the possession of cocaine was therefore not an aggravated felony under INA §101(a)(43)(B)).
24 See Lopez v. Gonzales, 549 U.S. at 54 (footnote omitted) (interpreting “illicit trafficking in a controlled substance” and “aggravated felony”).
immigration system and confusion in the populace. Language and word choice have the power to shape public consciousness and can be used to manipulate the populace into accepting ideas that may otherwise have seemed repugnant. Transitioning to language that more accurately reflects the content of immigration law and policy is an important first step in creating a more transparent immigration system. Use of more accurate language could also help shift the dominant metaphors influencing the perception of immigrants and immigrant communities, as statutory language would no longer lend weight to these ideas.

This article first explores the importance of metaphoric language in cognitive processes and metaphor’s impact on cognitive bias against noncitizens and undocumented populations. Cognitive bias is a deeply powerful influence on human emotion, thought, and action. It is also difficult to combat due to the implicit nature of this bias. This is particularly true in an environment where it frequently causes more outrage to call someone racist than it does to make racist statements publicly.

To help understand the historical development of these problematic terms, the second section tracks the public discourse and events coinciding with important changes in immigration law and statutory language choices over the past two centuries. In considering the history of both discourse and statutory terminology, it becomes clear that anti-immigrant rhetoric and
current events have shaped statutory terms whose definitions depart from common understanding of those terms. That statutory language has in turn been used to strengthen anti-immigrant rhetoric, creating a reinforcing feedback loop.25 This is particularly true when these statutory terms are used to appeal to groups who are unfamiliar with the particularized definition of the terminology.

The third section analyzes several terms in the Immigration and Nationality Act that are used in an “unorthodox” manner which presents noncitizens, and particularly noncitizens who have had contact with the criminal justice system, as more dangerous than is necessarily warranted by the statutory definition. Some of these terms are per se harmful, meaning that the use of the language itself inflicts harm on an individual or community, and others are harmful in their obfuscating effect or propensity to strengthen prevailing metaphors of immigration. Each subsection highlights the difference between the generally accepted definition of the words used in these terms and their statutory definition. This article then suggests an alternative term or phrase that more closely matches the statutory definition and does not inflate the level of danger or play on the same implicit biases activated by current statutory language.

25 See DONELLA H. MEADOWS, THINKING IN SYSTEMS: A PRIMER 187 (2009) (defining a reinforcing feedback loop as “[a]n amplifying or enhancing feedback loop, also known as a “positive feedback loop” because it reinforces the direction of change. These are vicious cycles and virtuous circles.”)
While there is much to do to heal the immigration system in the United States, changing the language we use to discuss noncitizens, particularly those who have had contact with the criminal justice system, is an important first step in shifting the national dialogue.

I. IMMIGRATION METAPHORS AND COGNITIVE BIAS

Whatever it is that people are determined to hide, be it only from others, or from themselves, even things they carry around unconsciously—language reveals all.26

The rhetoric of exclusion has played a part in the legal process since the founding of United States, and continues to play an important role in the immigration system. In their book *Power, Privilege and Law: A Civil Rights Reader*, Leslie Bender and Daan Braveman invite readers to analyze case law with an eye toward the Rhetoric of Exclusion.27 Bender and Braveman outline sixteen specific argument styles in which courts have used language to exclude and subordinate minority groups. Many of these styles can be seen at work in the immigration debate as well as in the selection of statutory terminology. Metaphor is one style of argument used in the Rhetoric of Exclusion, and is a prominent style choice in the realm of immigration

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26 Klemperer, supra note 1, at 11.
Metaphor was traditionally viewed as “linguistic expressions” used to facilitate understanding via “generic similarity.” More recently, studies have shown that metaphor is actually a cognitive device, meaning that it is central to the way human beings understand the world in ways the traditional “literal conception of thought,” did not. The literary metaphor as taught in grade school is simply a linguistic manifestation of the way human brains understand one concept in relation to another. There is a distinction between basic conceptual metaphors, which are commonly held, and the individual verbal expressions of the basic metaphor. A speaker or writer may use a unique verbal expression of a metaphor, but for that metaphor to be understood by the listener, it must have, at its root, a commonly held conceptual metaphor.

In a metaphor, something unfamiliar, called the “target domain” is understood by applying the characteristics of something more familiar, referred to as the “source domain.” Thus, in the metaphor “life is a rollercoaster,” life is the target domain which the listener understands by

28 Bender & Braveman, supra, note 27 at Ch. 3B.
30 Cunningham-Parmeter, supra note 10, at 1552; Hunter, supra note 12, at 459.
31 Cunningham-Parmeter, supra note 10, at 1552.
32 Hunter, supra note 12, at 470.
33 Hunter, supra note 12, at 470-71.
34 Cunningham-Parmeter, supra note 10, at 1553.
projecting onto it characteristics of the source domain, in this case, a rollercoaster. The cultural commonplaces, implications and ideas about the roller coaster are projected onto the concept of “life.” This process is not perfect in that not all features of the source domain are projected onto the target domain.

Experientialism, a concept developed by linguist George Lakoff and philosopher Mark Johnson, asserts that the way humans understand the world is informed by their interactions with their social, physical, and cultural environments. One’s concrete experiences are used to understand abstract ideas. This process is imperfect, however, as it involves selecting certain characteristics of the source domain on which to focus while ignoring other characteristics. In the preceding example of “life is a roller coaster,” the features of a roller coaster such as “full of ups and downs,” “exhilarating,” or “scary” might be projected, while features such as “has seats,” or “made of wood” would not be.

The metaphors in everything from media to judicial opinions have

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35 Hunter, supra note 12, at 460, 468.
36 Hunter, supra note 12, at 460, 468.
37 Cunningham-Parmeter, supra note 10, at 1553-1554 (citing GEORGE LAKOFF & MARK JOHNSON, METAPHORS WE LIVE BY (1st ed. 1980)).
38 Cunningham-Parmeter, supra note 10, at 1552-1553; see also Steven L. Winter, Transcendental Nonsense, Metaphoric Reasoning, and the Cognitive Stakes for Law, 137 U. PA. L. REV. 1105, 1443-1445 (1989) (describing the uses of up-down imagery in experientially motivated cases).
39 See supra notes 2-7.
made their way into cultural understanding and color our collective picture of noncitizens. When these metaphors are repeated frequently and uncritically, the two concepts are conflated in our collective consciousness and the metaphor is no longer metaphorical, but literal. The risk of deception is greatest when the listener conflates completely the concepts the metaphor is comparing. This is where statutory language can compound the misleading effect of metaphors. When the terminology in the law conjures familiar concepts which fit with common immigration metaphors, listeners will be inclined to accept the terminology and the connotations the words convey and see no reason to investigate the ways in which those terms have actually been defined in the code. This effect is compounded by the media, which use this terminology in conjunction with the most extreme examples, including murder, child sex abuse, rape, robbery, and drug offenses.

Listeners use their accumulated knowledge to gauge the credibility of a

468 U.S. at 1046).

41 Cunningham-Parmeter, supra note 10, at 1156 (citing STEPHEN ULLMANN, LANGUAGE AND STYLE 237-238 (2d ed. 1964)).

42 Id.

43 See Gary Emerling, Deported illegals include criminals, THE WASHINGTON TIMES, July 14, 2005, at B01 (focusing on “sexual predators”); Cauchon, supra note 5; Jerry Seper, Sweep nets 19 for Sex Crimes; Targets Illegal Alien Pedophiles, THE WASHINGTON TIMES, Mar. 23, 2004, at B01; Navarrette, supra note 6 (“the Obama administration has zeroed in on ‘criminal aliens.’ These are individuals who after crossing the border illegally are suspected of committing more serious offenses such as robbery, rape, and murder.”); Julia Preston, Immigrants Are Matched To Crimes, N.Y. TIMES, Nov. 13, 2009, 13 (“more than 11,000 has been charged with or convicted of the most serious crimes, including murder and rape[.]”); Markon, supra note 3.
given metaphoric statement.\textsuperscript{44} Because immigrants who lack legal status often do not disclose that status, sometimes even to their own children,\textsuperscript{45} many Americans either do not have or are unaware of personal experience with undocumented individuals. This leaves them to use the cultural commonplace to evaluate the veracity of the metaphoric language that has contributed to that same cultural environment.\textsuperscript{46}

Culture transmits beliefs and preferences, including racial and group-based stereotypes.\textsuperscript{47} Because these beliefs and preferences are so deeply ingrained in American culture, they become part of an “individual’s rational ordering of her perceptions of the world[,]” rather than explicit lessons.\textsuperscript{48} Explicit beliefs are consciously endorsed, meaning the actor can identify the intention behind the act, even if he or she is unwilling to vocalize that intention.\textsuperscript{49} In the case of implicit beliefs, the science suggests that people “do not always have conscious, intentional control over the processes of social perception, impression formation, and judgment that motivates their

\textsuperscript{44}Cunningham-Parmeter, supra note 10, at 1554.
\textsuperscript{46}Hunter, supra note 12, at 460, 468.
\textsuperscript{48}Lawrence at 323.
Implicit attitudes and stereotypes can create discriminatory implicit biases which can “produce behavior that diverges from a person’s avowed or endorsed beliefs or principles.”

In the case of noncitizens, that exposure frequently includes high levels of anti-immigrant rhetoric. If an individual does not have the opportunity to base opinions of noncitizens on personal interactions, the mass media and other cultural norms will influence that individual’s perception of noncitizens. In this way, the idea that noncitizens are dangerous, violent, or threatening becomes a part of the unconscious filter through which that individual processes information.

The “othering” of noncitizens is exacerbated by the human tendency to categorize as a way to make sense of experiences. The categories “citizen” and “noncitizen” are ready-made. When the category can be correlated with characteristics that exist on a continuum, such as propensity for violence, the tendency is to exaggerate the difference between the categories on that continuum and minimize any differences between members of the same category. The more important the categorization is to an individual, the more likely it is that he or she will distinguish sharply between characteristics.

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50 Greenwald & Krieger at 946.
51 Greenwald & Krieger at 951.
52 Lawrence, supra note 45, at 343.
53 Lawrence, supra note 45, at 337.
54 Lawrence, supra note 45, at 337.
of those who belong to the two groups. Additionally, even when grouped on a random or trivial basis, people perceive their own group members as more similar to them, and members of other groups as more different from them. Thus, if citizen recognizes themselves as nonviolent, he or she will perceive other “citizens” as similarly nonviolent, and will see members of the outgroup “noncitizens” as even more violent.

There is evidence that this implicit bias is, in fact, at work in the perception of noncitizens. A General Social Survey conducted in 2000 sampled a representative group of adults to “measure attitudes and perceptions toward immigration in a ‘multi-ethnic United States.’” Twenty-five percent believed that more immigrants were “very likely” to cause higher crime rates and another forty-eight percent believed that this was “somewhat likely.” In all, seventy-three percent believed that immigration is causally linked to higher crime, higher than the number who thought more immigrants would mean lost jobs for Americans (sixty percent) and those who thought an increased number of immigrants would make it harder to “keep the country united.”

55 Lawrence, supra note 45, at 337.
58 Id.
59 Id.
Professor Ian Haney Lopez has called the technique of using coded language which is, on the surface, race-neutral to capitalize on underlying implicit bias “dog whistle politics” because the language is not racial on its face, but the connotations are nonetheless audible to the unconscious mind. As open racism became taboo, public discourse turned from the use of racial slurs to speaking of cultural conflict. Rather than discuss racial minorities explicitly, politicians began to speak about “criminals and welfare cheats, illegal aliens, and sharia law in the heartland.” Because the population has been socialized to connect these ideas with racial minorities, these terms are very effective in conveying the message of people of color threatening the majority white culture. In the immigration context, focus has been on a claimed failure to assimilate, from the Chinese immigrants of mid to late 1800’s to newly-arrived immigrants from Mexico and Central America today, the perceived threat of an immigrant group is frequently based on assumptions of how well they will adopt “American” culture. Harvard professor of political science Samuel P. Huntington presented a dangerous clash of culture that threatens the very existence of the United States when wrote for *Foreign Policy* in 2004:

60 IAN HANEY LÓPEZ, DOG WHISTLE POLITICS: HOW CODED RACIAL APPEALS HAVE REINVENTED RACISM & WRECKED THE MIDDLE CLASS 121 (Oxford University Press 2014).
61 Id. at 121.
62 Id. at ix.
63 Id. at ix.
64 Id. at 121; Chae Chan Ping v. U.S., 130 U.S. 581, 595-96 (1889).
The persistent inflow of Hispanic immigrants threatens to divide the United States into two peoples, two cultures, and two languages. Unlike past immigrant groups, Mexicans and other Latinos have not assimilated into mainstream U.S. culture, forming instead their own political and linguistic enclaves—from Los Angeles to Miami—and rejecting the Anglo-Protestant values that built the American dream.65

The prevailing immigration metaphors play a large role in shaping cognitive biases. In some instances, they also play a large role in shaping explicit biases. Hate crimes against immigrants and Latina/os have risen as the explicit biases of politicians, pundits, and nativist groups66 have become increasingly virulent.67 Thus, these metaphors not only endanger the transparency and accuracy of the public’s understanding of the law, they also endanger the physical well-being of immigrants or those who may be perceived as immigrants due to their race or religion.

65 Haney López, supra note 58, at 121 (quoting Samuel P. Huntington, “The Hispanic Challenge,” 141 FOREIGN POL’Y 31, 32 (2004)).

66 For an in-depth discussion of the anti-immigrant rhetoric of white supremacist groups and its impact on State law and local ordinances, see Kristina M. Campbell, A Dry Hate: White Supremacy and Anti-Immigrant Rhetoric in the Humanitarian Crisis on the U.S. Mexico Border, 117 W. VA. L. REV. 1081.

67 Kevin R. Johnson, It’s the Economy, Stupid: The Hijacking of the Debate Over Immigration Reform by Monsters, Ghosts, and Goblins (or the War on Drugs, War on Terror, Narcoterrorists, Etc.), 13 CHAP. L. REV. 583, 608 (2010).
II. THE HISTORY OF IMMIGRATION RHETORIC AND THE DEVELOPMENT OF IMMIGRATION LAW

New words keep turning up, or old ones acquire new specialist meanings, or new combinations are formed which rapidly ossify into stereotypes.⁶⁸

The prevailing metaphors of immigration both influence and are influenced by statutory language. As public acceptance of these metaphors grows, law makers introduce and pass laws intended to combat the perceived threat. The language choices made in drafting these laws reflect these metaphors. The statutory language is then used to lend credibility and urgency to the metaphors that led to the statues’ enactment in a reinforcing feedback loop.⁶⁹ The same metaphors of alien, flood, invasion, stealth, and criminality reoccur over time directed at the current wave of newcomers. The reoccurring themes become clear when reviewing the history of immigration discourse and concomitant legislation. To understand how the problematic terms came into the Immigration and Nationality Act, this section describes the political and social context for several of the important changes to United States immigration law over the past two centuries.

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⁶⁸ Klemper, supra, note 1, at 29.
⁶⁹ Meadows, supra note 25, at 187.
A. 1849-Early 1900’s: The First Immigration Restrictions and Chinese Exclusion

The “immigrants are criminals” metaphor dates back to the earliest immigration restrictions. Debate about preventing immigrants with criminal records from entering the United States began in the mid nineteenth century with law makers’ concern over reports of foreign sovereigns offering pardons for serious offenders in return for the offender’s promise to emigrate to the United States.\(^{70}\) A House Report by the thirty-fourth Congress warned that “[a] policy has long prevailed on the continent of Europe to transport paupers and criminals to this country.”\(^{71}\) In 1875, Congress passed the first law excluding aliens “undergoing a sentence” for felonious non-political crimes and women “imported for the purposes of prostitution.”\(^{72}\) Public officials noted that

While, under the constitution and the laws, this country is open to the honest and industrious immigrant, it has no room outside of its prisons or almshouses for depraved and incorrigible criminals or


\(^{71}\) Hutchinson, supra note 70, at 42 (citing H.R. Rep. No. 359 (1855-1857)).

\(^{72}\) Hutchinson, supra note 70, at 66, (citing Immigration Act of 1875).
hopelessly dependent paupers who may have become
a pest or burden, or both, to their own country.\textsuperscript{73}

The “immigrants are alien outsiders” metaphor gained prominence when
the California gold rush lured thousands of Chinese nationals to the United
States in the late 1800’s.\textsuperscript{74} In the decades that followed, Chinese labor played
a major part in the completion of the transcontinental railroad.\textsuperscript{75} Soon,
however, the residents of areas with large Chinese populations began to feel
that

the presence of Chinese laborers had a baneful effect
upon the material interests of the state, and upon public
morals; that their immigration was in numbers
approaching the character of an Oriental invasion, and
was a menace to our civilization; that the discontent
from this cause was not confined to any political party,
or any class or nationality, but was well nigh universal;
that they retained the habits and customs of their own

\textsuperscript{73} \textit{Chae Chan Ping}, 130 U.S. at 609 (quoting a dispatch from Secretary of State Blaine
to Cramer, minister to Switzerland, in 1881).
\textsuperscript{74} Gabriel J. Chin, \textit{Chae Chan Ping and Fong Yue Ting, in Immigration Stories 7, 7-8}
(David A. Martin and Peter H. Schuck, eds., Foundation Press 2005).
\textsuperscript{75} \textsc{William F. Chew}, \textsc{Nameless Builders of the Transcontinental Railway: The
Chinese Workers of the Central Pacific Railroad} 40 (Trafford 2004).
country, and in fact constituted a Chinese settlement within the state, without any interest in our country or its institutions.[76]

Concern over the “Yellow Peril”[77] prompted the passage of a number of increasingly restrictive laws known as the Chinese Exclusion Act and the Geary Act.[78] These exclusionary laws resulted in two pivotal Supreme Court cases which established Congress’s plenary power over immigration law and the legal fiction that deportation is not a punishment.[79]

B. 1917-1930: Quotas and the Fear of Foreign Political Ideologies

In the early twentieth century, concerns of immigrant criminality extended beyond the fear that other countries were “sending” their convicted criminals to the US to fear that immigrants were committing crimes in the US after their admission. Thus, the Immigration and Nationality Act of 1917 introduced removability for “crimes involving moral turpitude”[80] committed

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[76] Chae Chan Ping, 130 U.S. at 595-96.
[79] Chae Chan Ping, 130 U.S. at 609; Fong Yue Ting, 149 U.S. at 709.
[80] A pervasive theme in both the rhetoric of immigration and the statutory language is the idea that immigrants are morally deficient. Mexicans in the American Southwest were long considered “semi-barbarians…only interested in satisfying their animal wants.”
within five years of entry with a sentence of one year or more imposed.\textsuperscript{81} The

Yolanda Vazquez, \textit{Perpetuating the Marginalization of Latinos: A Collateral Consequence of the Incorporation of Immigration Law into the Criminal Justice System}, 54 \textit{How. L.J.} 639, 645-46 (2011). It was also said that “[t]here are no people...more miserable in condition or despicable in morals than the mongrel race inhabiting New Mexico.” \textit{Id}. at 646 (citing \textit{REGINALD HORSMAN, RACE AND MANIFEST DESTINY: THE ORIGINS OF AMERICAN RACIAL ANGLO-SAXONISM} 211 (1981)). Congress, too, subscribed to the idea that immigrants were less able to control themselves and had no conception of the moral society in the United States and the rules and institutions created by that morality. Cong. Rec. H.134 (Dec. 9, 1920) (Representative Griffin of New York, speaking against the exclusion of immigrants.). This conception of immigrants as morally bankrupt is reflected in the term “Crime Involving Moral Turpitude” (CIMT) which appeared in statutory language in 1917. Immigration and Nationality Act of 1917. The 1891 Immigration Act, Sess. II Chap. 551; 26 Stat. 1084

Passed by the 51st Congress on March 3, 1891 introduced the concept of moral turpitude. That statute excluded from admission “persons who have been convicted of a felony or other infamous crime or misdemeanor involving moral turpitude.” The term is not defined in the statute and the courts have been left to create the definition. The generally accepted definition is a crime that is “inherently base, vile, or depraved and contrary to the accepted rules of morality and the duties owed between persons or to society in general.” Matter of Silva-Trevino, 24 I&N Dec. 687 (A.G. 2008). Base, in this context, is defined as “a: lacking or indicating the lack of higher qualities of mind or spirit[,]” \textit{MERRIAM WEBSTER’S COLLEGIATE DICTIONARY} 101 (11th ed. 2004). Vile means “1a: morally despicable or abhorrent…4: disgustingly or utterly bad[,]” \textit{MERRIAM WEBSTER’S COLLEGIATE DICTIONARY} 1395 (11th ed. 2004). Depraved is defined as “marked by corruption or evil; \textit{esp : PERVERTED[.]” These definitions give the impression of despicable acts perpetrated by individuals with no moral compass.

Because CIMTs are linked to societal morals, they can shift over time. For example, consensual sodomy was at one time a CIMT, \textit{Velez-Lozano v. INS}, 463 F.2d 1305 (D.C. Ct. App. 1972). A few decades later, consensual sodomy is no longer widely considered base, vile or depraved, and is no longer criminal conduct. \textit{Lawrence v. Texas}, 539 U.S. 558 (2003). Theft and fraud are common elements in CIMT offenses, regardless of the value of the loss. \textit{Jordan v. DeGeorge}, 341 U.S. 223, 227 (1951); \textit{Castillo-Cruz v. Holder}, 581 F.3d 1154, 1161-62 (9\textsuperscript{th} Cir. 2009). While children learn that stealing is “wrong,” it may be disproportionate in 2015 to label someone who is guilty of shoplifting as “abhorrent” or “evil.”

The term “crimes involving moral turpitude” was once much more common in legal parlance, the term is now applied almost exclusively to immigrant behavior. While a citizen and noncitizen may be convicted of the same offence, it is only in the case of the noncitizen that such an offense is classified as a “crime involving moral turpitude” for the purposes of determining removability from the United States. The only other context I have found in which the term “moral turpitude” appears is when dealing with certain professional licensing. For example, individuals who have committed “acts involving moral turpitude,” which need not be criminal, may be unable to satisfy the character and fitness requirement for admission to the state bar. See \textit{In re Glass}, 58 Cal.4th 500 (2014) (declining to admit Stephen Randall Glass to the California State Bar due, in part, to “acts of moral turpitude”).

\textsuperscript{81} Immigration and Nationality Act of 1917.
same act rendered deportable noncitizens who committed two crimes involving moral turpitude at any time following admission.\(^\text{82}\)

In 1920, the metaphors of immigrant as criminal and immigrant as alien other converged on the heels of the Russian Revolution. Congress debated a moratorium on immigration, many Congressmen expressing concern that immigrants are more likely to commit violent crimes and bring their Bolshevist ideology to corrupt Americans. \(^\text{83}\) A grand jury report from Kings County New York was read during the debate as evidence. The report asserted that ““[a] study of the record of our proceedings shows that all of the homicides and most of the graver, most desperate, and heinous crimes were committed by foreigners, who palpably have no understanding of the genesis or genius of American institutions.””\(^\text{84}\) Even those Representatives opposing the measure and advocating for continued immigration accepted these claims without question. One such representative stated ““[i]t is true that a great deal of anarchy and socialism and crimes of various kinds are to be found among certain types of immigrants. They are highly emotional; they go from one extreme to another. They swing like a pendulum. They love much and they hate deeply.””\(^\text{85}\)

\(^{82}\) Immigration and Nationality Act of 1917.

\(^{83}\) Cong. Rec., H.233 (Dec. 9, 1920).

\(^{84}\) Cong. Rec., H.133 (Dec. 9, 1920) (Representative Fess of Ohio reading from findings of Kings County, New York grand jury statement published in the New York Times.)

\(^{85}\) Cong. Rec., H.134 (Dec. 9, 1920) (Representative Griffin of New York, speaking against the exclusion of immigrants).
The complete moratorium on immigration was not passed, but in 1921 the Johnson Quota Act limited the number of immigrants allowed to enter the country and tied levels of new immigration to existing populations. The complete moratorium on immigration was not passed, but in 1921 the Johnson Quota Act limited the number of immigrants allowed to enter the country and tied levels of new immigration to existing populations. 86 New admissions from each country were limited to three percent of the foreign born of that nationality who were living in the U.S. during the 1910 census. 87 This limitation on “legal” immigration increased the level of unauthorized immigration, particularly among nationalities with low quotas. 88 It was not long before those entering without inspection were identified as a threat by the authorities, and the immigrants are criminals metaphor gained the “stealth” component described by Cunningham-Parmeter. While there were no precise numbers at the time, the Immigration and Naturalization Service (INS) warned:

The figures presented are worthy of very serious thought, especially when it is considered that there is such a great percentage of our population…whose first act upon reaching our shores is to break our laws by entering in a clandestine manner—all of which serves to emphasize the potential source of trouble, not to say

86 Johnson Quota Act, Act of May 19, 1921, 67 Cong. Ch. 8; 42 Stat. 5 (1921).
87 Id. at § 2.
88 Ngai, supra note 74, at 56-58.
menace, that such a situation suggests.\textsuperscript{89}

In 1929, the law was changed to make entry at a point not designated by the U.S. government or by means of fraud or misrepresentation a misdemeanor and reentry after a deportation a felony.\textsuperscript{90} This change in the law made the metaphorical “criminal” aspect of entry without inspection, which had previously been a failure to obey the civil immigration laws, literal. The same act established the Border Patrol and charged it with enforcing the new restrictions at the U.S./Mexico border.\textsuperscript{91} In the post-war atmosphere, anti-immigrant sentiment ran high and the United States rejected membership in the League of Nations.\textsuperscript{92} Many of these restrictive laws were intended to prevent the migration of European refugees in the wake of World War I,\textsuperscript{93} or, put another way, to guard against the metaphorical “flood” of refugees. The rigid structure of immigration laws and the quota system dovetailed with growing anti-Semitism and isolationism in the U.S.\textsuperscript{94}

\textit{C. 1930-1952: Red Scare, Braceros, and Japanese Internment}

\textsuperscript{89} Ngai, \textit{supra} note 74, at 61 (quoting the INS \textit{ANNUAL REPORT 12-13} (1925)).


\textsuperscript{91} Chacón at 1837.

\textsuperscript{92} Ngai, \textit{supra} note 74, at 236-237.

\textsuperscript{93} Ngai, \textit{supra} note 74, at 236-237.

\textsuperscript{94} Ngai, \textit{supra} note 74, at 236-237.
The attitude of isolationism persisted throughout the 1930s, resulting in Congress’s refusal to assist those fleeing the spread of fascism in Europe.\textsuperscript{95} Senator Pat McCarran invoked the immigration is an invasion metaphor by arguing that immigration policy was a “matter of internal security.”\textsuperscript{96} Decision makers in the Senate considered “the Communist movement in the United States…an alien movement, sustained, augmented, and controlled by European Communists and the Soviet Union.”\textsuperscript{97} The situation was seen as so dire, that the Senate Judiciary Committee believed in 1950 that the threat was so immediate that provisions to deport, exclude, and denaturalize Communists had to be included in the Internal Security Act, rather than waiting for the general amendments to the U.S. immigration law.\textsuperscript{98}

European Communists were not the only Communist threat immigration law sought to address. Though the Chinese exclusion laws had been repealed in 1943, the annual quota for Chinese immigrants was 105.\textsuperscript{99} In December 1955, a white paper penned by Hong Kong consul general, Everett F. Drumright was submitted to the State Department linking Communist infiltration to fraud in the immigration system, citing a vast “criminal conspiracy,” including a black market with blood-type matching services to

\begin{footnotes}
\item Ngai, \textit{supra} note 74, at 237.
\item Ngai, \textit{supra} note 74, at 237 (internal quotation omitted).
\item Ngai, \textit{supra} note 74, at 237.
\item Ngai, \textit{supra} note 74, at 237.
\item Ngai, \textit{supra} note 74, at 203.
\end{footnotes}
help applicants overcome new regulations.\textsuperscript{100} Drumright argued that Chinese cultural practices including polygamy, adoptions, and multiple naming were “a perfect alibi” for immigration fraud.\textsuperscript{101} The Chinese Confession Program for adjustment of status began at the INS San Francisco office in 1956.\textsuperscript{102} The program provided that the INS would do what was possible under the law to help Chinese who voluntarily confessed to entering the U.S. fraudulently with adjusting their adjust status.\textsuperscript{103} The government would offer immunity from prosecution to those who confessed and testified against others. In the face of virulent anti-Communism, the fear of large-scale deportations, and risking criminal prosecution for themselves and their families, many Chinese who found themselves under investigation ultimately confessed.\textsuperscript{104}

Communists were not the only group being targeted for removal during this time. Between 1929 and 1939 approximately one million individuals of Mexican descent were forcibly removed to Mexico in what has been called the “Mexican Repatriation.”\textsuperscript{105} Tactics including roundups for mass deportations, repatriation, violence, and fear were used to drive both Mexican citizens and United States Citizens of Mexican descent from the U.S.\textsuperscript{106}

\textsuperscript{100} Ngai, \textit{supra} note 74, at 209.  
\textsuperscript{101} Ngai, \textit{supra} note 74, at 210.  
\textsuperscript{102} Ngai, \textit{supra} note 74, at 218.  
\textsuperscript{103} Ngai, \textit{supra} note 74, at 218.  
\textsuperscript{104} Ngai, \textit{supra} note 74, at 219.  
\textsuperscript{105} Vazquez, \textit{supra} note 77, at 652.  
\textsuperscript{106} Vazquez, \textit{supra} note 77, at 652.
Over 400,000 Mexicans and Mexican Americans were repatriated to Mexico during the early 1930s.\textsuperscript{107} This created a labor shortage that agricultural workers used to push for higher wages and began to strike.\textsuperscript{108} Southern conservatives fought to exclude agricultural workers from the New Deal labor and social legislation, succeeding in exempting them from coverage under the National Labor Relations Act of 1935, the Social Security Act of 1935, or the Fair Labor Standards Act of 1938.\textsuperscript{109} This meant that agricultural workers were denied the right of collective bargaining and labor organizing, social insurance for the aged, and minimum wage protections.\textsuperscript{110}

In response to the labor shortage, the United States began the Bracero program of “guest workers” for the sugar-beet harvest of 1942.\textsuperscript{111}

Between 1948 and 1964, an average of 200,000 braceros were brought to the U.S. each year to work on large industrial farms and on the railroad.\textsuperscript{112} The program was conceived as a solution to illegal immigration, but because the Mexican government insisted that Texas, Arkansas, and Missouri employers be excluded from the bracero program due to the racial discrimination in those states, the program actually resulted in increased

\textsuperscript{107} Ngai, supra note 74, at 135.
\textsuperscript{108} Ngai, supra note 74, at 135.
\textsuperscript{109} Ngai, supra note 74, at 136.
\textsuperscript{110} Ngai, supra note 74, at p. 136.
\textsuperscript{111} Ngai, supra note 74, at 138.
\textsuperscript{112} Ngai, supra note 74, at 138-39.
illegal immigration. Following the end of World War II, the employment of undocumented laborers boomed, prompting one Texas official to say “[t]here have always been wetbacks in Texas, but they didn’t become a national and international problem until the Spring of 1947.”

Mexicans who entered the United States without inspection, including many who crossed the Rio Grande River, were frequently referred to as “wetbacks,” though many jumped the border fence, presented false documents at the border, overstayed a valid visa, or were smuggled into the country in the trunk of a car. Those opposed to the employment of undocumented Mexican labor equated “wetbacks” with “misery, disease, crime, and many other evils.” An official with the Immigration and Naturalization Service (“INS”) again voiced the popular view official that undocumented laborers, or “wetbacks,” were “illegal” and therefore criminal by definition. Because by entering without inspection, he reasoned, a “wetback” begins his time in the United States by breaking a law, “it is easier and sometimes appears even more necessary for him to break other laws since he considers himself to be an outcast, even an outlaw.” Around the same time, this view was also shared by the district attorney of Imperial County,

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113 Ngai, *supra* note 74, at 147.
116 Ngai, *supra* note 74, at 149.
117 Ngai, *supra* note 74, at 149.
118 Ngai, *supra* note 74, at 149.
California, who stated that “wetbacks” were “criminal types from Mexico,” and that the group also included “destitute females from Mexico [who] cross the line and are transported by wildcat taxis and trucks to the various ranches…for purposes of prostitution.” In March 1954, New York Senator Herbert Lehman told the Senate that “[t]heft, murder, and drug trafficking are all plaguing the law enforcement officers of the …Southwest where the uncontrolled human wave of wetbacks washes most of this flotsam and jetsam.”

A 1956 article in the Journal of Law and Contemporary Problems attempted a critical analysis of the “wetback problem” during the bracero era described a statement made to the Senate Labor Committee on “the lawlessness which this illegal immigration engendered.” The witness testified that “…the heavy influx of illegal immigrants…has developed a feeling of disrespect for and contempt of the laws of the land. When our immigration and labor laws are flaunted [sic] and openly disregarded, it is only logical to expect a general moral decadency on the part of the citizenry in general.”

Media focused on crimes committed by, and frequently perpetrated

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119 Ngai, supra note 74, at 149.
120 Ngai, supra note 74, at 248.
122 Hadley at 348.
against, noncitizens, allowing both to contribute to the increase in the crime rate attributed to “illegal aliens,” with specific attention to drug crimes, crimes of violence, or theft crimes. While recognizing that not all Mexican immigrants were criminals, a 1953 editorial published in the San Antonio Evening Express insisted that “the traditions and conditions that make up the ‘wetback system’ account for much of the alien crime and misdemeanor rate and produce the surroundings that make it possible and even encourage it.”

Others challenged the idea that the vast majority of undocumented immigrants were migrant agricultural laborers:

The wetback Pachucos subdivide roughly into two classes. In one is found the criminals, the marijuana peddlers and users, the falsifiers of identity documents, the smugglers, the prostitutes, and the homosexuals. The other class takes in those of higher intelligence with trade or partial professional backgrounds who are not interested in agricultural work and will not accept parole to such work when apprehended, usually in the act of being

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123 Hadley at 347.
124 Hadley at 347.
smuggled to the northern industrial centers.\textsuperscript{125}

Despite a lack of comprehensive statistics on the impact of migrant populations on crime rates, some commenters relied on reports from individual law enforcement officers to make sweeping conclusions:

Reliable statistics on Wetback contribution to criminal activity are not available. But reports of individual enforcement officers indicate that it is substantial. The Yuma County, Arizona, court records for a six-month period show that 75 percent of the crimes committed were by or against Wetbacks. Similarly, the district attorney of Hidalgo County, Texas, stated that aliens committed 75 percent of felonies in his county, 95 percent of the burglaries, and that 50 percent of the murder cases were those of aliens. To such statements can be added a flood of newspaper reports tending to show that the Wetback has aggravated problems of law

\textsuperscript{125} Hadley at 335.
ALIENS, AGGRAVATED FELONS, AND WORSE

enforcement wherever he has been encountered.\textsuperscript{126}

The characterization of “wetbacks” as criminal or of poor moral character fit with the prevailing stereotype of Mexicans, whether documented or not.\textsuperscript{127}

Some commenters recognized that factors such as poverty or social instability may be the cause of the perceived bad behavior of noncitizens, rather than race, there was concern that the image of undocumented migrants as criminals and degenerates would exacerbate already strained relations between the white and Hispanic populations in the Southwest.

In the agricultural communities of the Southwest, antisocial behavior on the part of the Wetback element aggravates an already sensitive cultural condition. Since the Wetback is likely to be identified with the Spanish-speaking citizen population, the latter suffers stigma arising from the alien’s conduct. The result, manifested in community rejection and


\textsuperscript{127} Ngai, supra note 74, at 149.
racial discrimination, is a widening of the schism between the English- and Spanish-speaking citizenry.\textsuperscript{128}

Others believed that “wetbacks” were “superficially indistinguishable from Mexicans legally in the United States.”\textsuperscript{129}

Many in the Southwest believed that “[t]he economic and social consequences of this illegal Mexican immigration were severe, disruptive, and harmful. Specifically, they involved displacement of American workers, depressed wages, increased racial discrimination toward Americans of Mexican ancestry, illiteracy, disease, and lawlessness.”\textsuperscript{130} In response to the growing number of undocumented laborers in the Southwest, especially in south Texas and southern California, and the fear and animosity felt toward that population, the government began “Operation Wetback” in 1954.\textsuperscript{131} “Operation Wetback” resulted in the deportation of approximately 3.7 million individuals of Mexican heritage.\textsuperscript{132} The program was envisaged and carried out as if it was a military operation as evidenced by the language used to describe both the situation and the means to address that situation.\textsuperscript{133}

\textsuperscript{128} Wetbacks, supra note 123, at 291-292.
\textsuperscript{129} Ngai, supra note 74, at 149.
\textsuperscript{130} Hadley at 344.
\textsuperscript{131} Vazquez, supra note 77, at 652-53; Ngai, supra note 74, at 155-56.
\textsuperscript{132} Vazquez, supra note 77, at 653.
\textsuperscript{133} Ngai, supra note 74, at 155-156.
Commissioner General of the INS at the time, Joseph M. Swing, a retired army general, described the “alarming, ever-increasing, flood tide” of undocumented Mexican laborers as “an actual invasion of the United States” and began Operation Wetback with what he called a “direct attack…upon the hordes of aliens facing us across the border.” The INS commenced a “full mobilization” of its resources in “direct action at the line.” This included more than seven hundred officers and investigators, hundreds of vehicles, and several airplanes, which were used to locate targets and direct teams on the ground in apprehending laborers. That same time period saw an increase in bracero program contracts of more than one hundred percent.

Mexican laborers were not the only group targeted for removal from the United States during this time. Because the government believed that all Japanese in America were “racially inclined to disloyalty,” it interned 120,000 Japanese Americans in camps, two-thirds of whom were citizens. The orders posted in western Washington, Oregon, and California in March 1942 ordered the removal of “all persons of Japanese ancestry, both aliens and non-aliens.” The phrase “non-aliens” referred to U.S. citizens, but by changing the terminology, the government effectively stripped those citizens

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134 Ngai, supra note 74, at 155.
135 Ngai, supra note 74, at 155-156.
136 Ngai, supra note 74, at 156.
137 Ngai, supra note 74, at 175.
138 Ngai, supra note 74, at 175.
of the rights inherent in their citizenship.\textsuperscript{139} The United States was at war with Germany and Italy as well, though neither German Americans nor Italian Americans were rounded up and forcibly removed from their homes en masse. In explaining this disparity, the a government official remarked that “[w]e believe that when we are dealing with the Caucasian race we have methods that will test the loyalty of them…But when we deal with the Japanese we are in an entirely different field and cannot form any opinion that we believe to be sound.”\textsuperscript{140} General John L. DeWitt explained that “the Japanese race is an enemy race” and believed that even when it came to native-born American citizens, “the racial strains are undiluted.”\textsuperscript{141}

\textit{D. 1952-Early 1980’s: Modernization of Immigration Law}

In 1952, Senator Pat McCarran, Senate sponsor of the McCarran-Walter Act, explained the need for the proposed legislation: “Criminals, Communists and subversives are even now gaining admission into this country like water through a sieve.”\textsuperscript{142} The Act, he argued, was necessary to preserve “this Nation, the last hope of western civilization[,]” adding, “[i]f this oasis of the world shall be overrun, perverted, contaminated, or destroyed, then the last

\begin{footnotes}
\footnote{\textsuperscript{139} Ngai, supra note 74, at 175-76.}
\footnote{\textsuperscript{140} Ngai, supra note 74, at 176.}
\footnote{\textsuperscript{141} Ngai, supra note 74, at 176.}
\footnote{\textsuperscript{142} Igor I. Kavass Bernard D. Reams Jr., The Immigration of 1990 A Legislative History of Pub. L. No. 101-649, 102 (1997).}
\end{footnotes}
flickering light of humanity will be extinguished.”\textsuperscript{143} Congress passed the omnibus McCarran-Walter Immigration and Naturalization Act (INA) in 1952 to replace the Immigration Act of 1917.\textsuperscript{144} The 1952 Act, as amended, remains the foundation of U.S. immigration law.\textsuperscript{145}

The INA provided relief from deportation for noncitizens who could establish a “clear probability of persecution on account of race, religion, nationality, political opinion or membership in a particular social group upon return to their homeland.”\textsuperscript{146} This relief was further developed by the Refugee Relief Act of 1953 which distinguished between a “refugee” an “escapee” and a “German expellee”\textsuperscript{147} The Refugee Relief Act also imposed numerical

\textsuperscript{143} Ngai, supra note 74, at 237.
\textsuperscript{144} Ngai, supra note 74, at 237.
\textsuperscript{145} Ngai, supra note 74, at 237.
\textsuperscript{146} Eli Coffino, A Long Road to Residency: The Legal History of Salvadoran & Guatemalan Immigration to the United States with a Focus on NACARA, 14 CARDOZO J. INT’L & COMP. L. 177,179 (2006).
\textsuperscript{147} Refugee Relief Act of 1953, P.L. 203, Ch. 336, p. 400-407 (1953). Sec. 2. (a) “Refugee” means any person in a country or area which is neither Communist nor Communist-dominated, who because of persecution, fear of persecution, natural calamity or military operations is out of his usual place of abode and unable to return thereto, who has not been firmly resettled, and who is in urgent need of assistance for the essentials of life or for transportation.

(b) “Escapee” means any refugee who, because of persecution or fear of persecution on account of race, religion, or political opinion, fled from the Union of Soviet Socialist Republics or other Communist, Communist-dominated or Communist-occupied area of Europe including those parts of Germany under military occupation by the Union of Soviet Socialist Republics, and who cannot return thereto because of fear of persecution on account of race, religion, or political opinion.

(c) “German expellee” means any refugee of German ethnic origin residing in the area of the German Federal Republic, western sector of Berlin, or in Austria who was born in and was forcibly removed from or forced to flee from Albania, Bulgaria, Czechoslovakia, Estonia, Hungary, Latvia, Lithuania, Poland, Rumania, Union of Soviet Socialist Republics, Yugoslavia, or areas provisionally under the administrator or control or domination of any such countries, except the Soviet zone of military occupation of Germany.
limitations on refugees/escapees/German expellees of various ethnic backgrounds and/or living in certain locations, and Section 14 (a) prohibited benefits under the act from being given to any individual who “personally advocated or assisted in the persecution of any person or group of persons because of race, religion, or national origin.”

In May 1955, President Eisenhower urged Congress to reaffirm the “great tradition of sanctuary” in America, and proposed ten amendments to the Refugee Relief Act of 1953. These amendments included relaxing strict requirements relating to specific categories, including numerical limits, individual sponsorship requirements, documentation requirements, and health standards. Eisenhower also requested that family members be allowed to follow to join instead of requiring that the entire family enter at the same time, that the definition of “refugee” be expanded to include those who had been resettled elsewhere or who were still living in their home country, and that relief to those in the United States not be limited to those who could show “lawful entry as a bona fide immigrant.” Many of Eisenhower’s requests were eventually incorporated into the law, but other

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148 Refugee Relief Act of 1953, P.L. 203, Ch. 336, p. 400-407
151 Id.
152 See Immigration and Nationality Act § 101(a)(42)(A) (providing a single definition
provisions, such as the bar to refugee or asylee status to those who have been firmly resettled in another country remain in force today.153

In 1960, Congress passed a revision requiring an advisory report in the number or refugee-escapees who availed themselves of resettlement opportunities in other countries between July 1, 1959 and June 30, 1960 and then every six months thereafter.154 The new law limited the number of refugee-escapees that could be paroled into the US to twenty-five percent of the number of refugee-escapees resettled outside the United States.155 The Immigration Act of 1965 revised the INA to require that a refugee prove that he or she was fleeing a Communist country or a country in “the general area of the Middle East.”156

The 1965 Act also replaced the national origins quotas with a system that allowed each country 20,000 immigrant visas per year, raised the annual cap on global admissions to 300,000, and introduced equity to the immigration system.157 These changes led to a major change in migration patterns to the

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153 Immigration and Nationality Act § 101(a)(42)(B) (allowing the President to designate as refugees people living in their country of nationality under special circumstances); Immigration and Nationality Act § 207(a) (allowing the President to determine the number of refugees to admit during a fiscal year); Immigration and Nationality Act § 207(c)(2) (allowing spouses and children to follow to join); Immigration and Nationality Act § 208(b)(1)(B)(ii) (allowing that an applicant’s credible testimony may be sufficient to sustain the applicant’s burden of proof).
157 Ngai, supra note 74, at 227.
U.S. in the decades to come.\textsuperscript{158} Other changes included raising the age at which U.S. citizens could petition for their parents to twenty-one.\textsuperscript{159}

The Refugee Act became law in March 1980, providing for the first time explicit systematic procedures for the admission of refugees to the United States and replacing the previous legislation which served America’s geopolitical position, as opposed to humanitarian concerns.\textsuperscript{160} The new law allowed the administration to consider foreign policy in determining which groups qualified as refugees and gave the Attorney General discretion in determining the definition of “persecution.”\textsuperscript{161} The Refugee Act changed the definition of “refugee” so it applied to all those seeking refuge from persecution regardless of the region, nation, or political system they were fleeing in accordance with the 1967 UN Protocol Relating to the Status of Refugees.\textsuperscript{162} The Act also increased the maximum number of refugees who could be admitted annually from 17,400 to 50,000, required that Congress be consulted prior to the admission of the refugees, and created a procedure for meeting emergency needs above the 50,000-refugee limit.\textsuperscript{163} The Act also provided support for resettled refugees such as medical benefits and monetary

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\item \textsuperscript{158} Ngai, \textit{supra} note 74, at 227.
\item \textsuperscript{159} Pub. L. 89-236 § 1, 79 Stat. 911, 911 (1965).
\item \textsuperscript{160} Moore, \textit{supra} note 153, at 155-156.
\item \textsuperscript{161} Coffino, \textit{supra} note 143, at 180.
\item \textsuperscript{162} Moore, \textit{supra} note 153, at 157.
\item \textsuperscript{163} Moore, \textit{supra} note 153, at 157.
\end{itemize}
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The new Refugee Act was soon tested with the arrival of more than 120,000 Cuban refugees between April and June 1980. These refugees came from Mariel, Cuba and thus became known as the “Mariel Cubans” or the “Marielitos.” In May 1980 American officials noticed that some of the refugees were “more hardened and rougher in appearance.” This led the White House to accuse Cuba of “taking hardened criminals out of prison and mental patients out of hospitals and forcing boat captains to take them to the United States.” Representative from New York, Elizabeth Holtzman, who was the head of the House Subcommittee on INS activities, stated that “as many as 700 ex-convicts had been rounded up by the Cuban government and given a choice of going to the United States or back to jail.” An INS official told People magazine that as many as “85 percent of the refugees are convicts, robbers, murderers, homosexuals and prostitutes.” Statistics indicated however that of the total number of Mariel Cubans, less than one half of one percent had serious criminal backgrounds. This group was characterized as

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164 Moore, supra note 153, at 157.
166 Hamm at 45.
167 Hamm at 51.
168 Hamm at 51.
169 Hamm at 55.
170 Hamm at 56.
171 Hamm at 58.
“vagrants, murderers, homosexuals and scum.”  

The INS set up relocation camps to process the arriving refugees according to law, but there were long waits in detention due to the case-by-case review and medical examination of large number of refugees. Once processed, the refugees would be put on “parole,” meaning that if there was no violation of the law, the refugee would become eligible for permanent residence after seven years. A small percentage of the Marielitos were taken into custody and detained indefinitely at prison or detention facilities run by state or federal authorities for parole violations including lacking a fixed address, means of support, or an appropriate sponsor or for violation of travel restrictions or curfew. Others were detained indefinitely for crimes including driving without a license, shoplifting, or possession of small amounts of marijuana. This information was quickly disseminated to the public. INS general counsel Mike Inman told “Nightline”:

Some 2,700 Marielitos have been found to be guilty of committing serious crimes. We are trying to protect the citizens of this country by
preventing [these] people from being released into society. We have a decision to make whether to detain someone who we think is violent or to let that person on the street and subject the citizens of this country to violence. And between the two alternatives, I think it’s appropriate to take the conservative approach rather than put the citizens of this country at risk.177

INS district director in Atlanta described the detainees in Atlanta by saying

We’ve got everything from skyjackers, arsonists, rapists, murderers, aggravated assaults, crimes of virtually every type you can think of. A couple hundred are hard-core deviates that do strange things. They are psycho cases. I would be for keeping these people in jail for the rest of their lives before I

177 Hamm at 79.
would take a chance of letting one harm your child.\textsuperscript{178}

It is common for political considerations to trump humanitarian concerns, and the refugee admissions process as well as the number and origins of refugee populations admitted are therefore frequently inconsistent with international need.\textsuperscript{179} The Haitian boat people arriving in south Florida in 1981 are one such example.\textsuperscript{180} The 1980 Refugee Act established admission procedures for standard refugees or those of “special concern,” but President Jimmy Carter elected not to follow those procedures, stating that “[o]ur laws never contemplated and do not adequately provide for people coming directly to our shores the way the Cubans and the Haitians have done recently.”\textsuperscript{181} In summer 1981, the United States instituted a new policy with regards to the detention of noncitizens.\textsuperscript{182} Prior to the new policy, noncitizens were routinely released during the pendency of their immigration cases, unless it was determined that the noncitizen represented a security threat or flight risk.\textsuperscript{183} Under the new program, arriving Haitians were consistently

\textsuperscript{178} Hamm at 80.
\textsuperscript{181} Moore, \textit{supra} note 153, at 157-158.
\textsuperscript{182} Helton, \textit{supra} note 177, at 204.
\textsuperscript{183} Helton, \textit{supra} note 177, at 204.
detained, first at Camp Krome near Miami, and then transferred to federal prisons and detention facilities nationwide. The program was later found by the courts to be improperly implemented and a program of intentional discrimination. In response to this determination by the courts, in July 1982, the U.S. promulgated a new detention rule that provided for the detention of all arriving noncitizens who lack valid travel documents, including asylum seekers. This rule has resulted in the detention of individuals who the government agrees are bona fide refugees for periods up to and exceeding one year.

The role of foreign policy in refugee admissions was also evident during the height of the civil wars in Central America from 1980 to the early 1990s, resulting in extremely low rates of asylum approval for Guatemalans and Salvadorans. Only one Salvadoran asylum application was granted in 1981, prompting the United Nations High Commissioner for Refugees (UNHCR) to request that the Reagan Administration revise its policy regarding Salvadoran asylum applications. This request does not appear to have been granted, as between 1984 and 1988, the INS approved only 2.5%
of asylum applications filed by Salvadorans.\textsuperscript{190} Guatemalans had similar difficulty obtaining asylum: in 1982, four Guatemalans asylum applications were approved, in 1985, eleven applications were approved, and in 1987, seven Guatemalans received asylum. In 1987, the Nicaraguan Review Program was started by Attorney General Edwin Meese to protect Nicaraguans in the United States from deportation.\textsuperscript{191} Ten times more Salvadorans than Nicaraguans were entering the United States in search of safety in the 1980’s, but Salvadorans did not receive similar protection until 1990 when they received Temporary Protected Status.\textsuperscript{192} Guatemalans finally received similar protection following the settlement in \textit{American Baptist Churches v. Thornburgh}\textsuperscript{193} (ABC) in 1991 which entitled certain Salvadorans and Guatemalans de novo review of their asylum applications.\textsuperscript{194} The ABC settlement agreement also stated that the standard for evaluating fear of persecution should be the same for all groups and that foreign policy concerns should not impact the evaluation of a refugee’s fear of persecution.\textsuperscript{195}

\textsuperscript{190} Coffino, \textit{supra} note 143, at 180.
\textsuperscript{191} Coffino, \textit{supra} note 143, at 184.
\textsuperscript{192} Coffino, \textit{supra} note 143, at 184.
\textsuperscript{194} Coffino, \textit{supra} note 143, at 184.
\textsuperscript{195} Coffino, \textit{supra} note 143, at 187-188.
In 1986 Congress passed the Immigration Reform and Control Act (IRCA).\(^\text{196}\) IRCA prohibited employers from knowingly hiring or continuing to employ individuals without work authorization and criminalized the use of false documents to evade employer sanction laws.\(^\text{197}\) That same year, the Marriage Fraud Amendments criminalized marrying with the intention of evading immigration laws.\(^\text{198}\)

The term “aggravated felony” appeared in the Anti-Drug Abuse Act of 1988 where it encompassed only murder, drug trafficking, and weapons trafficking.\(^\text{199}\) This act increased the sentences for those convicted of unlawful reentry if the individual had previously been deported as a result of a felony, and the act also instituted mandatory detention for aggravated felons.\(^\text{200}\) The Immigration Act of 1990 and the Violent Crime Control and Law Enforcement Act of 1994 raised sentences for various crimes relating to immigration violations and added crimes of violence for which the sentence was five years or more to the list of “aggravated felonies.”\(^\text{201}\)


\(^{197}\) Id. at 476-477.

\(^{198}\) Id. at 477.


Following the Oklahoma City Bombing in 1995 there was a rise in concern about domestic terrorism and immigrant crime. At a rally in Washington, D.C. shortly after the bombing, one protestor claimed “[t]here’s a lot of crime going on (that) is committed by immigrants … There are many cases of immigrants murdering our children.” In 1996 Congress responded to these concerns, passing sweeping immigration reforms including the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) and the Anti-Terrorism and Effective Death Penalty Act (AEDPA). During debates on IIRIRA, Senator Graham of Florida stated “[c]learly, it is a national responsibility delegated singularly to the Federal Government under our U.S. Constitution to protect our borders and assure that in all areas, including immigration, that we live by the rule of law and not by the rule of the jungle.” Senator Bob Dole of Kansas went a step further, tying illegal immigration to crime and an affront to U.S. sovereignty. “The bill also provides strong measures for perhaps the ultimate insult to our national sovereignty. This is the case when those who violate our immigration laws, the[n] violate our criminal laws as well.”

204 142 CONG. REC. S.4581 (daily ed. May 2, 1996).
In the House, Representative Smith of Texas, one of the sponsors of IIRIRA, painted a dire picture of immigrant crime.

Over one-quarter of all Federal prisoners are foreign born, up from just 4 percent in 1980. Most are illegal aliens that have been convicted of drug trafficking. Others, like those who bombed the World Trade Center in New York City or murdered the CIA employees in Virginia, have committed particularly heinous acts of violence. Illegal aliens are 10 times more likely than Americans as a whole to have been convicted of a Federal crime.206

Representative Waldholtz of Utah read a letter from the Salt Lake City Police Department regarding a spike in homicide rates which the author asserted were a result of violent undocumented immigrants. “Of the 27 homicides, 14 of the victims were undocumented aliens (52%) and 8 of the suspects were undocumented aliens (30%). These statistics clearly show that criminal undocumented aliens are violent and dangerous to our community.”207 Representative Doolittle of California added that “the first

drive-by shooting in a rural town in my district was committed by an illegal alien.”

In advocating for legislative changes limiting appeals for Senator Abraham of Michigan voiced concern about “criminal aliens” abusing the process:

Noncitizens in this country who are convicted of committing a variety of serious crimes are deportable and should be deported. These are not suspected criminals: These are convicted felons. And there are about half a million of them currently residing on U.S. soil. More than 50,000 crimes have been committed by aliens in this country recently enough to put the perpetrators in State and Federal prisons right now.

Senator Abraham cited an example of Lyonel Dor, an undocumented immigrant who had been convicted of participating in the murder of his aunt, who, after serving his criminal sentence had extended his stay in the United States for five years by requesting and receiving “unending” review of his

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Senator Abraham stated “Illegal immigrants are deportable. Illegal immigrants who help murder their aunts are deportable…This example is far from unique. To the contrary, it is rather typical. I could cite many, many others. It is time for this to stop.”

IIRIRA and AEDPA expanded the list of crimes constituting aggravated felonies, eliminated of judicial discretion for noncitizens convicted of aggravated felonies, increased sentences for those assisting unauthorized entry, and created programs for state and local cooperation in immigration enforcement. The number of removals more than doubled in the period between 1996 and 1998.

F. 2001-2011: Militarization of the Border, Increased Enforcement, and State Intervention

Just as the Oklahoma City bombings prompted the passage of sweeping reforms to the INA, Congress added several expansive terrorism-related bars to immigration relief. Conservative blogger, political commentator, and author Michelle Malkin asked in 2002 “[h]ow do we protect ourselves from

210 Id.
211 Id.
foreign homicidal evildoers and the hapless bureaucrats who let them roam across our fruited plain?”

She then tied terrorism to securing the border by writing that “[t]he September 11 hijackers all came through the front door, but illegal immigration through Canada and Mexico is the passageway of countless terrorist brethren.”

Prosecutions for violations of immigration laws boomed in 2004 and 2005 becoming the single largest category of federal criminal prosecutions. By 2004, new bills were being introduced to target the undocumented and noncitizens with criminal records. Representative Charlie Norwood, a Georgia Republican defended a bill he authored: “‘While La Raza and that crowd storm the countryside to rail against the enforcement of immigration laws in this nation, the light of hope held by immigrants and others wanting to live in neighborhoods free from criminal aliens and their violent crimes just grew a little dimmer.’” Rep. Norwood also argued that “ICE needs help in capturing the thousands of convicted aliens now loose on the streets of America-including convicted murderers, rapists, drug dealers and child

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216 Id. at 8.
217 Chacón, supra note 87, at 1846; Timely New Justice Department Data Show Prosecutions Climb During Bush Years, TRAC REPORTS (Sept. 28, 2005), http://trac.syr.edu/tracreports/crim/136/
219 Id.
molesters…” A year later, Mary Loiselle, field office director for ICE commented on the removal of noncitizens with criminal convictions. “Criminal aliens have no right to be in the United States. They continue to commit violent crimes and terrorize our communities.”

In 2005 the House of Representatives passed the Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005. This bill included provisions criminalizing transportation of undocumented individuals when the “transportation or movement will aid or further in any manner the person’s illegal entry into or illegal presence in the United States,” which criminalized the provision of humanitarian aid for migrants with medical issues in the deserts of Arizona. The bill also criminalized unlawful presence, required that individuals who have violated certain civil immigration laws be included in the National Crime Information Center database, and strengthened ICE relationships with local law enforcement. The bill did not pass in the Senate.

In 2007 President Bush pressed again for comprehensive immigration reform. The resulting bill, the Comprehensive Immigration Reform Act of

220 Id.
221 Gary Emerling, Deported illegals include criminals, THE WASHINGTON TIMES, July 14, 2005, at B01.
2007,\textsuperscript{227} did not include some of the more extreme measures proposed in 2005, but did add to the list of aggravated felonies, including drunk driving and sexual abuse of a minor even when the minority of the victim is not established.\textsuperscript{228} The bill also made membership in a criminal street gang a removable offense.\textsuperscript{229} Though the bill was never voted on, criminal street gangs comprised of undocumented immigrants remain a concern for legislators. During a House subcommittee meeting in June of 2008, Texas Republican Lamar Smith stated: “As part of our efforts to prevent violent crime and curb the expansion of gangs in our communities, we need to address the flow of illegal immigration. That's because some of the most dangerous gangs in America today are comprised primarily of illegal immigrants.”\textsuperscript{230}

In 2010 the Arizona legislature passed Senate Bill 1070, the Support Our Law Enforcement and Safe Neighborhoods Act. S.B. 1070 criminalized undocumented individuals who seek or engage in work\textsuperscript{231} and documented noncitizens who fail to complete or carry an alien registration document.\textsuperscript{232} The law also authorized officers to arrest without a warrant anyone the officer

\begin{itemize}
\item \textsuperscript{227} S. 1348, 110th Cong. (2007).
\item \textsuperscript{228} S. 1348, 110th Cong. § 203, 225 (2007).
\item \textsuperscript{229} S. 1348, 110th Cong. § 205 (2007).
\item \textsuperscript{231} S.B. 1070 § 5 (C), 2010 Leg., 49th Sess. (Ariz. 2010).
\item \textsuperscript{232} S.B. 1070 § 3, 2010 Leg., 49th Sess. (Ariz. 2010).
\end{itemize}
has probable cause to believe has committed an offense rendering that individual removable,\textsuperscript{233} and required law enforcement officers to verify with the federal government the immigration status of anyone with whom the officer had lawful contact if a reasonable suspicion existed that the individual was undocumented.\textsuperscript{234} Civil rights groups filed a legal challenge of these four provisions, and the courts enjoined the state from implementing these provisions on the grounds that they were preempted by federal law.\textsuperscript{235} The case brought media attention to the state of Arizona and the immigration debate. Arizona Governor Jan Brewer announced that “[o]ur law enforcement agencies have found bodies in the desert either buried or just lying out there that have been beheaded.”\textsuperscript{236} Governor Brewer also stated that the majority of unauthorized immigrants “are coming here and they’re bringing drugs, and they’re doing drop houses and they’re extorting people and they’re terrorizing families. That’s the truth.”\textsuperscript{237} Arizona State Senator Sylvia Allen was quoted as saying that “in the last few years 80 percent of our law enforcement that have been killed or wounded have been by an illegal.”\textsuperscript{238} She also commented “[w]e cannot sacrifice our safety to the murderous greed of drug cartels. We

\textsuperscript{233} S.B. 1070 § 6, 2010 Leg., 49th Sess. (Ariz. 2010).
\textsuperscript{234} S.B. 1070 § 2, 2010 Leg., 49th Sess. (Ariz. 2010).
\textsuperscript{236} Dana Milbank, \textit{Headless myths from shameless leaders}, \textit{THE WASHINGTON POST}, July 11, 2010, at A15.
\textsuperscript{237} Id.
\textsuperscript{238} Id.
cannot stand idly by as drop houses, kidnappings, and violence compromise our quality of life.”

G. 2012-2015: Executive Action, Unaccompanied Minors, and Family Detention

In the lead up to the 2012 presidential election, President Obama, who came out in favor of Comprehensive Immigration Reform, announced his Deferred Action for Childhood Arrivals program which allowed young people who entered the United States before their sixteenth birthday, had been physically present in the United States since June 14, 2007, and who met certain other requirements to apply for deferred action. Following the announcement of the program, President Obama faced criticism for his “anti-enforcement agenda.” House Science, Space, and Technology Committee Chairman Lamar Smith, a sponsor of IIRIRA, stated that “[t]he Obama administration could have prevented these senseless crimes by enforcing our immigration laws… But President Obama continues to further his anti-enforcement agenda while innocent Americans suffer the consequences. His unwillingness to enforce immigration laws puts our communities at risk and costs American lives.” These statements were made despite the fact that

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241 Stephen Dinan, Report cites killings blamed on non-deported illegals; Republicans
President Obama has removed more people in the first five years of his presidency than were removed between the years 1892 and 1996.\footnote{U.S. DEPT. OF HOMELAND SECURITY, 2013 Yearbook of Immigration Statistics, Enforcement Actions, Table 39, Aliens Removed or Returned: Fiscal Years 1892 to 2013, available at http://www.dhs.gov/yearbook-immigration-statistics-2013-enforcement-actions.}

In 2014, Texas Governor Rick Perry appeared on CNN’s “State of the Union” and claimed that “203,000 illegal immigrants who have come into Texas since 2008 and booked into Texas county jails have been responsible for more than 3,000 homicides and almost 8,000 sexual assaults.”\footnote{Alexander Bolton, CNN anchor clashes with Perry over border crime statistics, THE HILL (Aug. 3, 2014), http://thehill.com/blogs/blog-briefing-room/214161-cnn-anchor-clashes-with-perry-over-border-crime-statistics#ixzz39eBWzVRN.} When the host challenged Governor Perry’s statistics by pointing out that a number of fact-checkers had described the homicide figure was “wildly off,” Perry asked “[w]hat are the number of homicides that are acceptable to those individuals? How many sexual assaults do we have to have before the president of the United States and Washington, D.C., acts to keep our citizens safe?”\footnote{Id.}

The recent influx of families and unaccompanied children arriving at the southern border after fleeing extreme violence in Honduras, El Salvador, and Guatemala is reminiscent of the Central American refugees who fled the civil wars in many of the same countries in the 1980’s and early 1990’s. Like those who came before them, many have characterized these families and children

as economic migrants rather than refugees.\textsuperscript{245} Remarks made by David A. Martin in 1982 are as true in 2015 as they were when they were made:

Usually the term “refugee” is a label of approval. It evokes support and sympathy; it invites people to roll up their sleeves and pitch in to help out. For that reason, if a government decides that it must try to avoid obligations to people who have migrated in large numbers, or that it will treat them harshly, deter them, repel them, incarcerate them, it probably will work hard to have them characterized as something other than refugees—perhaps as illegal immigrants or economic migrants or some other label…If government officials conclude, in good faith, for good reasons, that the people are not refugees and instead are illegal immigrants or economic migrants, they may feel it is incumbent upon them—maybe not welcome but necessary—to respond by deterring, or deporting,

or incarcerating the people who come in. 246

As frequently happens when faced with a large number of potential immigrants, fear of the “flood” or “invasion” leads to dire warnings about who is immigrating:

America has always welcomed those fleeing political persecution abroad. But Lady Liberty would have a heart attack if she knew who was exploiting her generosity now. The land of the free has become the new home of some of the world’s most depraved thugs. Among them—living among us—are known or suspected warlords, women-beaters, psychological torturers, butchers, and other violent war criminals. 247

The “surge” of unaccompanied minors from Guatemala, Honduras, and El Salvador in the summer of 2014 coincided with the outbreak of Ebola in West Africa, which led Indiana Representative Todd Rokita to state that fellow Indiana Representative Larry Bucshon, a heart surgeon, had expressed


247 Malkin, supra note 212, at 123.
concern over the unaccompanied minors from a public health perspective.\textsuperscript{248} Rep. Rokita said “we need to know just from a public-health standpoint, with Ebola circulating and everything else,” before clarifying that Ebola was his own addition to Rep. Bucshon’s concerns.\textsuperscript{249} Rokita said. “No, that's my addition to it, not necessarily his - but he said we need to know the condition of these kids.”\textsuperscript{250} Media commentators also warned that the unaccompanied children were “seasoned criminals and gangbangers.”\textsuperscript{251}

The fall of 2013 into 2014 also saw large number of mothers with children arriving from the same countries.\textsuperscript{252} These mothers and children were detained in family detention centers in Berks County, Pennsylvania, and Artesia, New Mexico, and later at newly constructed family detention centers in Karnes County and Dilley, Texas.\textsuperscript{253} The Obama administration defended the continued use of family detention and the Department of Homeland Security (“DHS”) opposed bond for these women and children, arguing that the “mass migration” of these families has been “recognized as a national


\textsuperscript{249} \textit{Id.}

\textsuperscript{250} \textit{Id.}

\textsuperscript{251} Campbell 1117-18.


security threat by the [attorney general] … [and] it will encourage human trafficking.”  

DHS supported this argument by citing to a 2003 ruling by then-Attorney General Ashcroft denying bond to a Haitian immigrant because “I have determined that the release of respondent on bond was and is unwarranted due to considerations of sound immigration policy and national security that would be undercut by the release of respondent and other undocumented alien migrants who unlawfully crossed the borders of the United States.”

On November 20, 2014, President Obama again announced an executive program that would provide for Deferred Action for certain parents of US citizens as well as expansions to the existing Deferred Action for Childhood Arrivals program. He also revised the enforcement priorities guidelines for Immigration and Customs Enforcement. The new system has three tiers of priorities. The first tier is those deemed as threats to national security, including individuals involved in or suspected of terrorism or espionage, as well as those convicted of felonies, “aggravated felonies,” and offenses

relating to involvement in a criminal street gang. This tier also includes those apprehended attempting to enter the U.S. unlawfully. The second highest priority are “misdemeanants and new immigration violators” including individuals with three or more misdemeanor convictions, convictions for “significant misdemeanors,” those who are found to have abused the visa waiver program, and those who cannot show they were present in the U.S. prior to January 1, 2014. The third priority category is for individuals who have had a removal order entered against them on or after January 1, 2014.

In his press conference announcing these changes, President Obama used the statement “felons not families, criminals, not children” to describe those who would now be targeted for removal. It is worth noting that a criminal conviction is not required for five of the classes identified in the revised priorities, and a felony conviction is only required for one of the classes identified for priority enforcement. However, given the “felons, not families” frame espoused by the administration, it would be reasonable for an average citizen to believe that many, if not all, of those in removal proceedings and

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258 Id. at A. Priority 1 (a), (c), (d), and (e).
259 Id. at A. Priority 1 (b).
260 Id. at A. Priority 2.
261 Id. at A. Priority 3.
263 An “aggravated felony” is not necessarily a felony. See section IV (A) infra for a more in-depth discussion of the definition of “aggravated felony.”
being removed from the U.S. are felons.

The prevailing immigration metaphors are deeply entrenched in the American psyche, and throughout the last two centuries it is easy to observe them resurface, directed at new populations of immigrants. It is also plain how those metaphors have influenced the laws passed by Congress and the government policies governing immigration enforcement.

III. THE LANGUAGE OF “CRIMINAL ALIENS”

If someone replaces the words ‘heroic’ and ‘virtuous’ with ‘fanatical’ for long enough, he will come to believe that a fanatic really is a virtuous hero, and that no one can be a hero without fanaticism.\(^\text{264}\)

The prevailing immigration metaphors that have developed over time can be seen, not only in court decisions and media. Many programs instituted by various immigration enforcement agencies have been named to evoke a “dog whistle” response from the population. For example, Immigration and Customs Enforcement has “fugitive operations,” the “criminal alien program,” and the jail status check program formerly known as “secure communities.”\(^\text{265}\) Customs and Border Protection had “Operation Hold the

\(^{264}\) Klemperer, supra note 1, at 16.

Line” and “Operation Gatekeeper” in the early 1990’s. Even the practice of administratively closing removal cases for individuals who are not enforcement priorities is referred to as “prosecutorial discretion.”

The following sections analyze selected terms from the Immigration and Nationality Act that serve to strengthen and lend credibility to the leading immigration metaphors, particularly the “immigrants are dangerous criminals” metaphor. Some of these terms are per se harmful. For example, the use of the term “alien” and its derivatives is damaging to immigrants, their families, and US citizens who are assumed to be immigrants due to their race or religion. Other terms such as “aggravated felony,” “drug trafficking,” and “conviction” are damaging because they play on the shared cultural understanding that has grown from the prevailing immigration metaphors to create a misleading and opaque legal system.

A. Alien

In the immigration context, an alien is “any person not a citizen or national of the United States.” Merriam-Webster defines “alien” as: “1 a: belonging or relating to another person, place, or thing: STRANGE b:
relating, belonging or owing allegiance to another country or government: FOREIGN c: EXOTIC 2: differing in nature or character typically to the point of incompatibility.” 269 The use of this term of art emphasizes noncitizens’ “otherness,” to alienate is to “make unfriendly, hostile, or indifferent, especially] where attachment formerly existed.” 270 As used in popular culture, the term “alien” calls to mind images of inhuman invaders from outer space. 271 Hollywood has taught moviegoers that “aliens” are dangerous, intent on destroying our civilization, and should be killed for the benefit of humankind. 272

The first group of disfavored “aliens” was the British following United States independence. 273 Concern that state courts may not be treating British creditors fairly prompted the framers to give federal courts “alienage” jurisdiction to hear disputes between citizens and noncitizens. 274 “Alien” quickly grew to have racial connotations, however. A 1790 law restricted naturalization to “free white person[s].” 275 While an amendment was made

269 MERRIAM WEBSTER’S COLLEGIATE DICTIONARY 30 (11th ed. 2004).
270 MERRIAM WEBSTER’S COLLEGIATE DICTIONARY 31 (11th ed. 2004).
272 See Neighborhood Watch (Twentieth Century-Fox Film Corporation 2012), Independence Day (Twentieth Century-Fox Film Corporation 1996), Alien (Twentieth Century-Fox Film Corporation 1979).
273 Johnson, supra note 271, at 265.
274 Johnson, supra note 271, at 265.
following the Civil War to allow persons of African descent to naturalize, the “white” requirement remained an essential part of American naturalization law until 1952.

Who was “white” became a complex and flexible issue that became a matter for the Supreme Court. The signing of the Treaty of Guadalupe Hidalgo in 1848 conferred United States citizenship on those residing in the territories Mexico ceded to the United States. Other instruments granted the right of naturalization to Mexicans. As a result, Mexicans were considered legally white for the purposes of naturalization. The determination of who qualified as “white” was not so neatly answered in other cases. In Ozawa v. United States, the Supreme Court considered whether a Japanese man was eligible to naturalize. The Court concluded that Congress intended to “confer the privilege of citizenship upon that class of persons whom the fathers knew as white, and to deny it to all who could not be so classified.” The Court rejected the “color test,” as skin color “differs greatly among persons of the same race, even among Anglo-Saxons, ranging by imperceptible gradations from the fair blond to the swarthy.

279 Ngai, supra note 74, at 50.
280 Ngai, supra note 74, at 54.
281 Ngai, supra note 74, at 54.
282 Ozawa, 260 U.S. at 178.
283 Ozawa, 260 U.S. at 195.
brunette, the latter being darker than many of the lighter hued persons of the brown or yellow races.” 284 The Court ultimately equated “white” with “Caucasian” and determined that Ozawa was not eligible to naturalize. 285

A year later, the Court retreated from the “Caucasian” definition of “whiteness” when Bhagat Singh Thind, an Indian national, sought naturalization. 286 The Court conceded that the “blond Scandinavian” and the “brown Hindu” may have “a common ancestor in the dim reaches of antiquity,” but concluded that that common ancestor may have been “sufficiently differentiated from both of his descendants to preclude his racial classification with either.” 287 The Caucasian race had come to include so many groups, including Hindu, Polynesian, and the Hamites of Africa, that the Court believed that “the average well informed white American would learn with some degree of astonishment that the race to which he belongs is made up of such heterogeneous elements.” 288 At the time the 1790 naturalization law was written, most of the immigrants arriving in the United States hailed from Northwest Europe or the British Isles, and when the Congress “extended the privilege of American citizenship to ‘any alien being a free white person’ it was these immigrants—bone of their bone and flesh of

284 Ozawa, 260 U.S. at 197.
285 Ozawa, 260 U.S. at 198.
286 Thind, 261 U.S. at 207-08.
287 Thind, 261 U.S. at 209.
288 Thind, 261 U.S. at 211.
their flesh—and their kind whom they must have had in mind.” The Court determined that Thind was not “white” and was therefore ineligible for naturalization. In so holding, the Court emphasized the “otherness” of non-white aliens:

What we now hold is that the words ‘free white persons’ are words of common speech, to be interpreted in accordance with the understanding of the common man, synonymous with the word ‘Caucasian’ only as that word is popularly understood. As so understood and used, whatever may be the speculations of the ethnologist, it does not include the body of people to whom the appellee belongs. It is a matter of familiar observation and knowledge that the physical group characteristics of the Hindus render them readily distinguishable from the various groups of persons in this country commonly recognized as white. The children of English, French, German, Italian, Scandinavian,

289 Thind, 261 U.S. at 213.
and other European parentage, quickly merge into the mass of our population and lose the distinctive hallmarks of their European origin. On the other hand, it cannot be doubted that the children of Hindu parents would retain indefinitely the clear evidence of their ancestry.\textsuperscript{290}

Those who were not “white” were ineligible to naturalize and remained aliens, regardless of length of residency or ties to this country. Aliens were prevented from owning land in many jurisdictions, and “aliens ineligible for naturalization” precluded from many professions.\textsuperscript{291}

The Treaty of Guadalupe Hidalgo was signed in 1848 and granted citizenship to all Mexican nationals living in the territories ceded to the United States.\textsuperscript{292} Because of this, Mexicans were considered “white” at the federal level for purposes of naturalization,\textsuperscript{293} but the individual states determined whether those Mexican nationals could enjoy all the benefits of citizenship.\textsuperscript{294} The determination of “whiteness” now occurred at the state

\textsuperscript{290} Thind, 261 U.S. at 214-25.
\textsuperscript{291} Ngai, supra note 74, at 39-40.
\textsuperscript{292} Vazquez, supra note 77, at 646.
\textsuperscript{293} Ngai, supra note 74, at 55.
\textsuperscript{294} Vazquez, supra note 77, at 646.
level and was generally based on whether an individual was descended from a “white” country.\textsuperscript{295} Mexicans membership in the racialized “alien” population was fortified following the imposition of quotas by virtue of their unlawful presence in the Southwest.\textsuperscript{296}

In Bender and Braveman’s Rhetoric of Exclusion, the term “alien” is an example of the rhetoric of self/other; it is a term designed to emphasize the difference between citizens and noncitizens, and devalue the noncitizen, thereby justifying the privileges of citizenship.\textsuperscript{297} “Alien” has developed a pejorative connotation as a result of the historical and racial context, helped along by popular culture influences.\textsuperscript{298} This disparaged population has further been divided into “good” and “bad.” The good immigrant/bad immigrant dichotomy allows for the demonization of “bad immigrants” while providing a mechanism for discounting immigrants’ positive contributions to society as exceptions to the “norm.”\textsuperscript{299} As Iowa Representative Steve King remarked in explaining his opposition to the DREAM Act,\textsuperscript{300} “They aren’t all valedictorians. They weren’t all brought in by their parents. For every one

\textsuperscript{295} Vazquez, supra note 77, at 646.
\textsuperscript{296} Ngai, supra note 74, at 55.
\textsuperscript{297} Bender & Braveman, supra note 260, at 138-139.
\textsuperscript{298} Johnson, supra note 271, at 267.
\textsuperscript{299} For an in-depth discussion about the dangers of the good immigrant/bad immigrant narrative see Elizabeth Keyes, Beyond Saints and Sinners: Discretion and the Need for New Narratives in the U.S. Immigration System, 26 GEO. IMMIGR. L.J. 207 (2012).
\textsuperscript{300} Development, Relief, and Education for Alien Minors Act, which would provide legalization and a path to citizenship for individuals who entered the United States before their sixteenth birthday and who complete at least two years of higher education or military service. The bill has been introduced several times but has not become law.
who’s a valedictorian, there’s another hundred out there who weigh a hundred and thirty pounds—and they’ve got calves the size of cantaloupes because they’re hauling seventy-five pounds of marijuana across the desert.”301 The “bad alien” narrative has given rise to the terms “illegal alien” and “criminal alien,” both of which have also developed problematic connotations.

1. Illegal Alien/Immigrant

In 1929, entry at a point not designated by the U.S. government or by means of fraud or misrepresentation, was made a misdemeanor, and reentry after a deportation was made a felony.302 With this change in the law the “illegal alien” was born. The Border Patrol was created by the same legislation to police the U.S./Mexico border and enforce the new restrictions.303 “Illegal alien” has high social recognition, although does not feature prominently in the INA itself.304 The term is an important extension of the statutory term “alien” and therefore warrants exploration.

302 Chacón, supra note 87, at 1837-1838.
303 Chacón, supra note 87, at 1837.
304 See INA §280(b)(3)(A)(iii) (requiring the Secretary of the Treasury to refund from the Immigration Enforcement Account expenses incurred by the Attorney General for the “for the repair, maintenance, or construction on the United States border, in areas experiencing high levels of apprehensions of illegal aliens, of structures to deter illegal entry into the United States.”); INA §286(r)(3)(ii) (providing for the expenses associated with the detention of “illegal aliens.”).
“Illegal” is defined as “not according to or authorized by law.” Actions and objects could be considered “illegal” if they are not authorized by law, but because the law does not control or regulate the existence of human beings, illegal is not an appropriate adjective to use in describing a person. “Illegal” does not necessarily mean “criminal,” which refers to the violation of penal laws. The term “illegal aliens,” however, implies criminality.

The choice of language is very important to the image which the authorities project to their population and the world. Being an immigrant becomes associated, through the use of language, with illegal acts under the criminal law... Illegal immigration as a concept has the effect of rendering suspicious in the eyes of the population (including public officials) the movement of persons across international borders. The suspicion is linked to criminal law—the measure of legality as opposed to illegality.

305 MERRIAM WEBSTER’S COLLEGIATE DICTIONARY 618 (11th ed. 2004).
306 BLACK’S LAW DICTIONARY 426 (9th ed. 2009).
307 Johnson, supra note 271, at 276.
Comments on news stories regarding “illegal aliens” frequently assert that the individuals in question “broke the law” and “are criminals.” This is not necessarily accurate. While entry without inspection is a federal misdemeanor, overstaying a visitor or other visa is not a crime, but rather a violation of civil immigration law. An estimated forty percent of the more than eleven million “illegal aliens” currently in the United States entered on a valid visa and overstayed. Unlawful presence, or remaining in the United States without valid immigration status, is not a crime, despite the efforts of anti-immigrant lawmakers in 2005. “Illegal” is also a perfect example of a “dog whistle” term, in that it allows the speaker to appeal to racial fears without invoking race directly. The term should be equally applicable to Europeans, Australians, or Canadians who overstay or otherwise violate the conditions of their visas, yet this term is used almost exclusively to describe the Central American immigrant. Additionally, the term has taken on racial connotations as it is most frequently used to describe migrants of Mexican or Central American nationality.

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310 INA §237(a)(1)(C).
313 Haney López at 122-23.
314 Haney López at 122-23.
315 Johnson, supra note 271, at 277; Kevin R. Johnson, Public Benefits and Immigration:
The term “illegal” is an example of *explicit group-targeted difference language and stereotyping*. Naming legitimates the exclusion of the named group by the choice of the name itself.\(^\text{316}\) By choosing to label noncitizens that lack immigration status as “illegal” we have, by virtue of the term itself, excluded these individuals from law-abiding society. Also prevalent in the anti-immigrant movement is blame the victim.\(^\text{317}\) “They broke the law,” “they are criminals,” “they don’t deserve to be here” are common themes in public discourse.

These arguments seem to suggest that by crossing the border without inspection or overstaying a visa, undocumented noncitizens have somehow come to deserve the marginalization, abuse, and injustice they face in the United States. Blame the victim ties in closely with decontextualizing in this case. Decontextualizing refers to the consideration of an issue outside the political, historical, or social context that gave rise to the issue.\(^\text{318}\) In popular media, it is rare that the issue of unauthorized immigration is discussed with reference to United States foreign policy decisions which have created the conditions in many countries that drive migration.\(^\text{319}\) Those who argue that if

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\(^\text{316}\) Bender & Braveman, *supra* note 260, at 139.

\(^\text{317}\) Bender & Braveman, *supra* note 260, at 139.

\(^\text{318}\) Bender & Braveman, *supra* note 260, at 140.

\(^\text{319}\) For instance, U.S. involvement played a crucial role in the civil wars that tore apart Central America for the last half of the twentieth century. *See* STEPHEN SCHLESINGER, STEPHEN KINZER, JOHN H. COATSWORTH, & RICHARD A. NUCCIO, Bitter Fruit: The Story of the American Coup in Guatemala, Revised and Expanded (David
these individuals had “just come legally” everything would be fine
demonstrate a lack of understanding of the current barriers to “legal immigration” in this country.320

2. Criminal Alien

Noncitizens who have had contact with the criminal justice system are
collectively referred to as “criminal aliens,”321 regardless of the gravity of the
offense. In compiling data ICE frequently cites numbers of all apprehended
individuals with criminal records, whether the record is for minor traffic
offenses like driving without a license, unlawful entry (to the United States),
petty crimes, or murder.322 The graph showing that 225,390 “criminal aliens”

Rockefeller Center for Latin American Studies, rev. ed. 2006); The Contras, Cocaine, and
Covert Operations, National Security Archive Electronic Briefing Book, available at
http://www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB2/nsaebb2.htm. The North American
Free Trade Agreement (NAFTA) flooded the Mexican market with government subsidized
agricultural products, driving Mexican farmers out of business and eliminating a major
source of employment. See David Bacon, How US Policies Fueled Mexico's Great
Migration, THE NATION (Jan. 4, 2012), http://www.thenation.com/article/165438/how-us-
policies-fueled-mexicos-great-migration#.

320 See Shikha Dalmia & Mike Flynn, What Part of Legal Immigration Don’t You
Understand?, http://reason.com/assets/db/07cf533db1d06350cf11dd5942ef5ad.jpg (last

321 See e.g. INA §236(c) (Detention of Criminal Aliens); INA §236(d) (Identification of
criminal aliens); INA §238(a) (Removal of Criminal Aliens); INA §241(i)(3) (defining
“undocumented criminal alien”). While most of the references in the INA itself refer to
individuals convicted of aggravated felonies, controlled substance offenders, those with
multiple misdemeanor offenses, or those who represent national security concerns, the
Immigration and Customs Enforcement statistics use the term more generally, defining
“Criminal Offender” as “An individual convicted in the United States for one or more
criminal offenses. This does not include civil traffic offenses.” See Immigration and Customs
Enforcement, FY 2014 ICE Immigration Removals, Overview, http://www.ice.gov/removal-
statistics/.

322 ICE, Criminal Aliens Removed From the US, FY2001-2012, available at
were removed from the United States in Fiscal Year 2012 is accompanied by a small footnote indicating that of that total, 1,215, or 0.05% of the total had been convicted of homicide and 5,557 or 2% of the total had been convicted of undefined “sexual offenses.”\footnote{U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, FY 2001-2012 ICE Immigration Removals (), available at http://www.ice.gov/removal-statistics/} When reported in the press, the total number or “criminal aliens” removed in a given time period is frequently accompanied by the phrase “including” and a list of serious and often violent offenses.\footnote{See supra notes 2-7, 41.} These numbers and the way they are presented both by the Administration and by the press give the impression that a much larger proportion of the immigrant population is a dangerous threat.

After ICE reiterated its “enforcement priorities” which focus squarely on locating and removing “criminal aliens,” individuals with decades old convictions suddenly found themselves caught up in ICE raids and in removal proceedings.\footnote{Terrence T. McDonald, Union City man being held by immigration authorities was convicted twice in 1980s, lawyer says, THE NEW JERSEY JOURNAL (Jan. 23, 2012), http://www.nj.com/journal-news/index.ssf/2012/01/immigration_authorities_cite_t.html#4; Kirk Semple, Governor Pardons Six Immigrants Facing Deportation Over Old Crimes, N.Y. TIMES (Dec. 6, 2010), http://www.nytimes.com/2010/12/07/nyregion/07pardon.html?_r=0.} The current leadership of ICE has expressed that if Congress grants the department funding to remove 400,000 individuals, the department is obligated to remove 400,000 individuals, no less.\footnote{Elise Foley, Deportation Hits Another Record Under Obama Administration, THE}
these goals while adhering to the stated enforcement priorities, ICE has begun culling databases for individuals convicted of driving without a license or denied license renewals for presenting consular cards as identification, and setting up secondary inspection at established Driving While Intoxicated traffic checkpoints. These individuals are then grouped with the other “criminal aliens” and their conduct conflated with the most serious crimes in the category.

If we are to discontinue the use of the terms “alien,” “illegal alien,” and “criminal alien,” what words would be appropriate? In the case of “alien,” simply substituting the word “noncitizen” in the statutes and common parlance would be a viable option. The meaning is the same, without the added connotations, popular culture images, and historical context. Some progress has been made in changing the language used by the media. In April 2013 the Associated Press (AP) made the decision to stop using the term “illegal immigrant.” This decision was made as the AP began eliminating labels from the Stylebook and in acknowledgement that “while labels may be


more facile, they are not accurate.” This change could have a significant impact on other media outlets given that the AP Stylebook is one of the most widely used in print media. Not all editors were supportive of this change, claiming that the term “illegal immigrant” is “clear and accurate; it gets its job done in two words that are easily understood.” This claim is questionable however, as the term fails to capture the differences between those who entered without inspection and those who overstayed a visa. Both are equally “illegal,” though there are several important differences both in criminal and immigration law. Ms. Sullivan, the Times public editor explained that “[i]n neither case is there an implication that those described that way necessarily have committed a crime, although in some cases they may have.” Ms. Sullivan seems to acknowledge that the terminology may indeed have a negative impact, adding that “[t]he Times rightly forbids the expressions ‘illegals’ and ‘illegal aliens.’

There are several options for terminology that would be less inflammatory than “illegal alien” or “illegal immigrant.” In 1975 the UN

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329 Id.
332 Johnson, supra note 271, at 277; compare INA §212 with INA §237.
333 Sullivan, supra note 329.
334 Id.
General Assembly recommended the use of “non-documented or irregular migrants/workers” as a standard phrase.\textsuperscript{335} “Irregular migrant” is commonly used in several countries.\textsuperscript{336} Migrating to the United States without first having received approval from the relevant authorities could be called “extra-administrative immigrant,”\textsuperscript{337} which would be accurate and would apply to both those who entered without inspection as well as those who entered with inspection and overstayed or otherwise violated the terms of their visa. Professor Jennifer Koh has argued for the term “allegedly removable,” which takes into account the complex nature of determining who is removable from the United States and that many individuals without immigration status may be eligible for various forms of relief from removal.\textsuperscript{338} Though each of these could be adopted as a replacement for the term “illegals” the term “undocumented” has become widely used in the United States, and most importantly, has been adopted by the community, it is perhaps the best option for common use.\textsuperscript{339}

\textsuperscript{335} Grange, supra note 307, at 7 (citing G.A. Res. 3449/XXX, U.C. GAOR, 30th Sess., (Dec. 9, 1975)).
\textsuperscript{336} Grange, supra note 307, at 7.
\textsuperscript{337} In the same way the Obama administration’s use of drones to target and kill United States citizens on foreign soil fails to follow the established court process and is referred to as “extra-judicial killing,” an individual who immigrated to the United States without following the established administrative process through the Department of State or the US Citizenship and Immigration Service is an “extra-administrative immigrant.”
\textsuperscript{338} Jennifer Lee Koh, Rethinking Removability, 65 FLA. L. REV. 1803, 1869 (2013).
An alternative to the term “Criminal Alien” is less straightforward. Given the expanded meaning of “conviction” as discussed in subsection C, any terminology using the words “convict” or “conviction” are problematic. Noncitizens who have been found criminally liable is not nearly as neat and concise as the term “criminal alien,” but it is inclusive of those who have no conviction but who are nonetheless removable under the criminal grounds of the INA.

B. Aggravated Felony

The term “aggravated felony,” a term which exists only in immigration law, first appeared in the Anti-Drug Abuse Act of 1988 in a subtitle cited as the “Violent Criminal Alien Deportation Act.”\(^{340}\) Aggravated felony included only murder, kidnapping, rape, drug trafficking, and weapons trafficking.\(^{341}\) This act also instituted mandatory detention for aggravated felons.\(^{342}\) Crimes of violence for which the sentence was five years or more were added to the list of “aggravated felonies” by the Immigration Act of 1990 and the Violent

Crime Control and Law Enforcement Act of 1994.\textsuperscript{343} 1996 saw drastic revisions to U.S. immigration law, including the expansion of crimes constituting aggravated felonies.\textsuperscript{344} In fact, an “aggravated felony” need be neither a felony nor aggravated.\textsuperscript{345} In addition to expanding the list of offenses in the definition of aggravated felony,\textsuperscript{346} Congress has also shortened the sentence required to qualify certain types of crimes as an aggravated felony from five years or more to one year or more.\textsuperscript{347} In general, misdemeanor is a crime for which a sentence of up to one year, or 365 days or less, can be imposed.\textsuperscript{348} A felony is generally a crime for which more than one year, or 366 days or more, can be imposed.\textsuperscript{349} In drafting the definition of “aggravated felony” Congress disregarded this distinction, making the cut off for avoiding an aggravated felony conviction a sentence of 364 days or less. This one day discrepancy can have devastating effects.\textsuperscript{350} As will be

\begin{itemize}
  \item \textsuperscript{345} \textit{See Guerrero-Perez v. INS}, 242 F.3d at 737 (holding that convictions for State-level misdemeanors can constitute aggravated felonies when they fall into a category listed in INA §101(a)(43)); \textit{but see Lopez v. Gonzalez}, 549 U.S. at 60 (holding that “a state offense constitutes a ‘felony punishable under the Controlled Substances Act’ only if it proscribes conduct punishable as a felony under that federal law.” The respondent’s South Dakota felony conviction for aiding and abetting the possession of cocaine was therefore not an aggravated felony under INA §101(a)(43)(B)).
  \item \textsuperscript{346} INA § 101(a)(43).
  \item \textsuperscript{347} INA §101(a)(43)(F), (G).
  \item \textsuperscript{348} \textit{BLACK’S LAW DICTIONARY} (9th ed. 2009) \textit{Cf.} with note 19.
  \item \textsuperscript{349} \textit{BLACK’S LAW DICTIONARY} (9th ed. 2009).
  \item \textsuperscript{350} Murray-Tjan, Laura, A Tale of Two Typos, \textit{HUFFINGTON POST BLOG}, (July 8, 2013),
\end{itemize}
discussed further in a subsequent section, a noncitizen need not actually serve a single day, as immigration law treats suspended sentences as if the individual had actually served the entire sentence.

In other areas of law, the modifier “aggravated” indicates the existence of factors such as an increased level of violence, the presence of a deadly weapon, or reckless disregard for the safety of others. This is not the case in the Immigration and Nationality Act definition of “aggravated felony.” Many non-violent offenses can constitute aggravated felonies, such as shoplifting, forgery, fraud, or selling a single marijuana cigarette. When asked to interpret the aggravated felony of “illicit trafficking in a controlled substance,” Justice Stevens noted this disparity.

We do not usually think of a 10-day sentence for the unauthorized possession of a trivial amount of a prescription drug as an “aggravated felony.” A “felony,” we have come to understand, is a “serious crime usu[ally] punishable by imprisonment for more
than one year or death.” An “aggravated” offense is one “made worse or more serious by circumstances such as violence, the presence of a deadly weapon, or the intent to commit another crime.” The term “aggravated felony” is unique to Title 8, which covers immigration matters; it is not a term used elsewhere within the United States Code. Our statutory criminal law classifies the most insignificant of federal felonies—“Class E” felonies—as carrying a sentence of “less than five years but more than one year.”

When the term “aggravated felon” is used in the media, it is not accompanied by the INA definition, leaving the consumer to interpret the phrase according to his or her existing knowledge and assume that the individuals involved are dangerous, violent offenders. Furthermore, the more heinous the crime, the more likely it is to receive coverage. Confirmation Bias is a cognitive bias that causes a person to seek and take greater notice of facts and stories that confirm and support the beliefs the person already holds. When terrible crimes receive widespread media coverage, people who are already disposed to believe that immigrants are dangerous criminals

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354 Raymond S. Nickerson, Confirmation Bias: A Ubiquitous Phenomenon in Many Guises, 2 REV. OF GEN. PSYCHOLOGY 175, 177 (1998).
will use the highly publicized case as “proof” that their belief is valid. This belief is, however, refuted by the majority of empirical studies, both those conducted during the immigration boom in the early twentieth century and those using data from the past three decades. In fact, the more recent studies actually suggest that increased immigration is partially responsible for the decrease in homicide and robbery in major urban areas in the decade leading up to the millennium.

The designation “aggravated felon” carries significant immigration consequences. INA §236(c) requires the detention of noncitizens convicted of certain crimes, including aggravated felonies. These individuals are not able to have their detention reviewed by an immigration judge to determine whether they should be detained or released on bond or into an alternative program. While ICE reports that the average detention time is thirty days, it

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357 INA § 236 (c) Detention of Criminal Aliens.- (1) Custody.-The Attorney General shall take into custody any alien who— (A) is inadmissible by reason of having committed any offense covered in section 212(a)(2), (B) is deportable by reason of having committed any offense covered in section 237(a)(2)(A)(ii), (A)(iii), (B), (C), or (D), (C) is deportable under section 237(a)(2)(A)(i) on the basis of an offense for which the alien has been sentence [sic] to a term of imprisonment of at least 1 year, or (D) is inadmissible under section 212(a)(3)(B) or deportable under section 237(a)(4)(B), when the alien is released, without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense.
is frequently much longer for detainees who are contesting their cases.\textsuperscript{358} For Fiscal Year 2010, the average number of days it took to complete a contested case on the detained docket was 159 days in York, Pennsylvania, 61 days in Miami, and 224 days in New York City.\textsuperscript{359} Detained cases can take more than a year, especially if appeals are filed.\textsuperscript{360}

Prior to 1990, Immigration Judges also had the discretion to prevent deportations in cases where the circumstances indicated that deportation was not warranted.\textsuperscript{361} This included the vast majority of aggravated felony cases. In 1990, the aggravated felonies eligible for a discretionary waiver were limited.\textsuperscript{362} In 1996 IIRIRA repealed the discretionary and replaced it with a much more limited form of relief available only to Lawful Permanent Residents and explicitly unavailable to anyone convicted of an aggravated felony.\textsuperscript{363} Under current law there are very few highly specific forms of relief available for anyone convicted of an aggravated felony, and of those, some are only available to individuals with less serious convictions.\textsuperscript{364}

\begin{footnotes}
\item[359] \textit{Id.} at 13.
\item[361] Former INA §212(c) Immigration and Nationality Act 1952 Pub.L. 414; 182 Stat. 66 at 187.
\item[362] Immigration Act 1990 amended INA §212(c) to exclude individuals who were sentenced to more than five years.
\item[364] See \textit{e.g.}, Witholding of removal in INA § 241 and Deferral of Removal under the United Nations Convention Against Torture.
\end{footnotes}
of these legislative changes, an Immigration Judge cannot consider factors such as United States Citizen family members, ties to the community, length of residence or time since conviction, rehabilitation, or any other humanitarian concerns short of torture or persecution in the country of origin.

The term “aggravated felony” could be replaced by the term “non-waivable offense.” “Non-waivable offense” captures the essential aspects of this class of criminal convictions, because although there are a few exceptions, a noncitizen convicted of one of these offenses is not eligible for the forms of relief that waive criminal grounds of inadmissibility or deportability. “Non-waivable offense” describes the immigration consequences of the offense without suggesting violence or inflated severity.

1. Drug Trafficking

The term “drug trafficking” calls to mind images of dangerous transnational cartels and organized crime. The Anti-Drug Abuse Act of 1988 which introduced “drug trafficking” as an “aggravated felony” was focused on high-level drug traffickers working for and leading cartels. During

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365 An aggravated felony may be waived for an applicant for a U-Visa, available to individuals who are victims of violent crime and who cooperate with law enforcement. For individuals who entered guilty pleas prior to the repeal of former INA §212(c), those convictions may be waived if the applicant meets the other eligibility criteria. See INS v. St. Cyr, 121 S.Ct. 2271 (2001).
366 See INA §§ 208, 212(b), 240A(a).
367 See COLOMBIANA (Sony Pictures 2011); TRAFFIC (Universal Pictures 2000); SCARFACE (Universal Pictures 1983); Breaking Bad (Sony Pictures Television 2008-2013); The Wire (Blown Deadlines Productions 2002-2008).
the debate, one of the sponsors of the bill explained “[t]he additional INS criminal investigators assigned to [Organized Crime Drug Enforcement Task Forces] will be dedicated to bringing to justice the criminal aliens now heading or working for major organized crime and drug trafficking organizations.”368 “Drug trafficking” is defined as “[t]he act of illegally producing, importing, selling, or supplying significant amounts of a controlled substance.”369 For immigration purposes, however, drug trafficking is “any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46”370 or an attempt or conspiracy to commit such an offense.371

The INA definition proved to be ambiguous and has twice been interpreted by the Supreme Court. The first case, *Lopez v. Gonzales*, Mr. Lopez, a lawful permanent resident, was convicted by a South Dakota court of “aiding and abetting another person’s possession of cocaine.”372 South Dakota treated this as the equivalent of cocaine possession, a felony, and sentenced Mr. Lopez to five years in prison.373 The Immigration and Customs Enforcement Office of the Chief Counsel charged Mr. Lopez as an

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369 BLACK’S LAW DICTIONARY 1635 (9th ed. 2009) (emphasis added).
370 18 U.S.C. § 924(c)(2) as incorporated into the INA by INA §101(a)(43)(B).
371 INA §101(a)(43)(U).
aggravated felon, arguing that his conviction met the definition of a drug trafficking offense because cocaine possession is punishable under the Controlled Substances Act, and it is considered a felony under state law.\textsuperscript{374} The Court rejected this argument and focused on the language of the statute, stating that the argument was

\begin{quote}
incoheren[t] with any commonsense conception of “illicit trafficking,” the term ultimately being defined. The everyday understanding of “trafficking” should count for a lot here, for the statutes in play do not define the term, and so remit us to regular usage to see what Congress probably meant. And ordinarily “trafficking” means some sort of commercial dealing.\textsuperscript{375}
\end{quote}

Four years later, the meaning of “drug trafficking” was before the Court again. Mr. Carachuri-Rosendo, a lawful permanent resident, was convicted of possessing less than two grams of marijuana on one occasion and possession of one Xanax without a prescription on a second occasion.\textsuperscript{376} Mr.

\textsuperscript{374} Lopez v. Gonzales, 549 U.S. at 53.
\textsuperscript{375} Lopez v. Gonzales, 549 U.S. at 53-54 (internal citations omitted).
\textsuperscript{376} Carachuri-Rosendo v. Holder, 130 S.Ct. at 2580.
Carachuri-Rosendo was also charged as an aggravated felon convicted of drug trafficking.\textsuperscript{377} In this case, the government argued that because a conviction for simple possession of a controlled substance after a prior conviction is final may be punished as a felony under the Controlled Substances Act, Mr. Carachuri-Rosendo’s second possession conviction constituted a drug trafficking conviction.\textsuperscript{378} The Court rejected this argument and held that unless the second conviction is based on the fact of a prior conviction, meaning that the defendant is charged and convicted as a recidivist, the second conviction is not a drug trafficking conviction.\textsuperscript{379} Justice Stevens observed “that a reading of this statutory scheme that would apply and ‘aggravated’ or ‘trafficking’ label to any simple possession offense is, to say the least, counterintuitive and unorthodox.”\textsuperscript{380} He also commented that “[w]hile it is true that a defendant’s criminal history might be seen to be ‘made worse’ by virtue thereof, it is nevertheless unorthodox to classify this type of petty simple possession recidivism as an ‘aggravated felony.’”\textsuperscript{381}

Though the Court has used common usage to limit the situation in which a drug offense can be classified as “illicit trafficking,” it still applies to any drug distribution conviction, including attempted distribution, regardless of

\textsuperscript{377} Carachuri-Rosendo v. Holder, 130 S.Ct. at 2580.
\textsuperscript{378} Carachuri-Rosendo v. Holder, 130 S.Ct. at 2581.
\textsuperscript{379} Carachuri-Rosendo v. Holder, 130 S.Ct. at 2580.
\textsuperscript{380} Carachuri-Rosendo v. Holder, 130 S.Ct. at 2585 (emphasis in original).
\textsuperscript{381} Carachuri-Rosendo v. Holder, 130 S.Ct. at 2585.
quantity or sentence. While distribution does have the commercial element that was key to the Supreme Court’s analysis, it still encompasses offenses that may not be considered as grave enough to warrant the label of “illicit trafficking in a controlled substance.” A noncitizen convicted of attempting to sell a single marijuana cigarette is very different from a member of an international drug cartel. Certainly, this ground of deportability is affecting a wider array of individuals than the “criminal aliens now heading or working for major organized crime and drug trafficking organizations.”

A slight change of language to “drug distribution” from “drug trafficking” would be a more accurate term for individuals who have been selling small amounts of illicit substances. The term “drug distribution” still captures the “commerce” element relied on by the Supreme Court and is equally applicable to a drug king pin as to the small-time dealer.

C. Conviction

The term “conviction” brings to mind the result of a jury or bench trial during which the criminal defendant has been found guilty. However, for immigration purposes, a conviction includes both a formal judgment of guilt

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383 BLACK’S LAW DICTIONARY 384 (9th ed. 2009) (“Conviction: n. 1. The act or process of judicially finding someone guilty of a crime; the state of having been proved guilty. 2. The judgment (as by a jury verdict) that a person is guilty of a crime.”)
entered by a court following a trial or plea deal as well as cases where a formal adjudication of guilt has been withheld. This means that deferred judgment agreements, expungements, and other programs designed to alleviate the collateral consequences of a criminal conviction do not apply to noncitizens in the immigration context. Expungement and deferred judgment agreements allow an individual to essentially erase a conviction. They were created to allow individuals with criminal convictions who have avoided reoffending for a specified amount of time to avoid the myriad of collateral consequences of that conviction. These consequences include everything from denial of employment, housing, or government benefits. When the desirability of freeing a person from the disabilities imposed by a criminal record outweighs the need for the availability of records, generally meaning that the individual does not appear to pose a risk of recidivism, expungement is warranted.

A determination by a judge that the individual posed a low risk of recidivism and had lived for a specified number of years without being involved in criminal behavior is necessary for expungement. This determination is typically made only after a thorough investigation of the individual's criminal history and background. The determination is based on the judge's subjective judgment, and it is not uncommon for expungement applications to be denied even after the individual has satisfactorily completed the deferred judgment agreement.

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384 INA §101(a)(48)(A). The term "conviction" means, with respect to an alien, a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where-

(i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and

(ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed.


386 Id.

ALIENS, AGGRAVATED FELONS, AND WORSE

If the true purpose of deportation is to protect the American public from criminals and not to punish the noncitizen, then an expungement should be effective in an immigration context as well as for other collateral consequences. As the Supreme Court has articulated, deportation is more than a mere collateral consequence, it is a “severe penalty.”388 DHS officials have acknowledged that the immigration consequences of criminal “convictions” may seem harsh, but explain that permission to remain in the United States is a privilege and we are only asking that noncitizens behave as we expect our own citizens to behave.389

First, there is no crime for which a United States Citizen can be sentenced to

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389 See statements by Patricia Vroom, U.S. Immigration and Customs Enforcement Chief Counsel for Arizona in SENTENCED HOME (Independent Lens 2006).
banishment\textsuperscript{390} from the country.\textsuperscript{391} Second, many jurisdictions have provided alternatives to or relief from collateral consequences of traditional criminal punishment, that, while available to citizens and noncitizens alike, do not affect both groups in the same way. By defining “conviction” so expansively in the Immigration and Nationality Act, the United States Congress has indicated that noncitizens are to be held to a higher standard than citizens.

“Found criminally liable” would be a more accurate description of the reality for those who are placed in diversion programs, plead guilty, or who have had their convictions expunged.

\textsuperscript{390} See \textit{Fong Yue Ting}, 149 U.S. at 740-41 (Brewer, J., dissenting) (“Deportation is punishment. It involves—First, an arrest, a deprival of liberty; and, second, a removal from home, from family, from business, from property. In 1 Rap. & L. Law Dict. p. 109, ‘banishment’ is thus defined: ‘A punishment by forced exile, either for years or for life, inflicted principally upon political offenders; ‘transportation’ being the word used to express a similar punishment of ordinary criminals.' In 4 BI Comm. 377, it is said: ‘Some punishments consist in exile or banishment, by abjuration of the realm, or transportation.’ In Vattel we find that ‘banishment is only applied to condemnation in due course of law.’ But it needs no citation of authorities to support the proposition that deportation is punishment. Everyone knows that to be forcibly taken away from home and family and friends and business and property, and sent across the ocean to a distant land, is punishment, and that oftentimes most severe and cruel. Apt and just are the words of one of the framers of this constitution, President Madison, when he says, ‘If the banishment of an alien from a country into which he has been invited as the asylum most auspicious to his happiness, a country where he may have formed the most tender connections; where he may have invested his entire property, and acquired property of the real and permanent, as well as the movable and temporary, kind; where he enjoys, under the laws, a greater share of the blessings of personal security and personal liberty than he can elsewhere hope for; if, moreover, in the execution of the sentence against him, he is to be exposed, not only to the ordinary dangers of the sea, but to the peculiar casualties incident to a crisis of war and of unusual licentiousness on that element, and possibly to vindictive purposes, which his immigration itself may have provoked,—if a banishment of this sort be not a punishment, and among the severest of punishments, it will be difficult to imagine a doom to which the name can be applied.”

\textsuperscript{391} Although US citizens are not sentenced to banishment from the country, a number of cities, municipalities, and counties are using various forms of banishment from certain areas to enforce social control. See generally Katherine Beckett and Steve Herbert, \textit{Penal Boundaries: Banishment and the Expansion of Punishment}, 35 LAW & SOC. INQUIRY 1 (2010).
CONCLUSION

Altering the immigration metaphors, which have been entrenched in American culture for nearly two centuries, will be difficult. The current statutory language is used to add legitimacy to claims of dangerousness. When the language of the INA more accurately reflects the content of the law, it will impede the perpetuation of harmful stereotypes and represents an attainable incremental goal. A change in terminology would also be a first step toward creating a more transparent immigration system and combating misinformation.