

CRIMINALIZING THE UNDOCUMENTED:  
EXAMINING THE PUNITIVE TURN  
TOWARDS UNDOCUMENTED MIGRANTS  
AND THE RESULTING CONSTITUTIONAL RIGHTS VIOLATIONS

By

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### **Abstract**

During the last two decades, anti-immigrant ideology has gripped the public's imagination, exerting tremendous influence on immigration enforcement practices. This ideology supports the view that undocumented migrants are not subject to equal protection under the U.S. Constitution. Following the work of critical legal scholar, Juliet Strumpf, this thesis argues that this anti-immigrant ideology of "crimmigration" is being implemented through detention and deportation practices that routinely violate the right of Due Process guaranteed to illegal aliens by the U.S. Constitution. As highly revered as the Constitution is by U.S. citizens, the courts, legislative and executive branches of the government, and the general public are loathe to extend its protection to non-citizens. This phenomenon of crimmigration leads to practices, such as detainment of undocumented immigrants, which systematically violate Constitutional rights on a massive scale.

## Introduction

“Give me your tired, your poor, your huddled masses yearning to breathe free, the wretched refuse of your teeming shore. Send these, the homeless, tempest-tossed to me, I lift my lamp beside the golden door!” The famous inscription on the Statue of Liberty serves as a warm greeting for those migrating to America, as well as a humble reminder to those already here about the nature of America’s birth. We are, after all, a nation founded by immigrants. Current government policy, public opinion and immigration law display a markedly different attitude towards migrants however. There is a widespread distrust of, and animosity towards, illegal immigrants. After an executive order issued by President Trump on February 21, 2017, nearly all of 11 million undocumented residents currently in the United States are at risk of deportation. Currently, the only group shielded from deportation will be so-called "dreamers", those who were brought to the US as children but do not have citizenship. (Lawler, 2017) The targeting of all undocumented migrants is a fairly recent theme in America’s Immigration policy evolution. Prior to a paradigm shift in the late 1980’s, immigration law was consciously kept separate from criminal law. Since then, however, the two fields have become intertwined. This entanglement of criminal and immigration law, or “cimmigration”, results in violation of Constitutional rights undocumented migrants are entitled to. Specifically, the detention and deportation process routinely violates the right to Due Process guaranteed to illegal aliens by the U.S. Constitution. As highly revered as the Constitution is by US citizens, the courts, legislative and executive branches of the government, and the general public are loathe to extend its protections to non-citizens. This phenomenon of cimmigration leads to practices, such as

detainment of undocumented immigrants, which systematically violate Constitutional rights on a massive scale.

## **I. Immigration Before Crimmigration**

An examination of America's immigration laws shows a clear evolution of the punitive nature of the policy, and provides the proper context for understanding the juxtaposition between pre- and post-crimmigration America. While the deportation of non-citizens have occurred essentially since the foundation of America, (The Alien and Sedition Acts of 1798 authorized the deportation of dangerous non-citizens) punitive measures were exceedingly rare during our country's early history (The Alien and Sedition acts were repealed and/or let expire shortly after passage). Immigration policy from until the late 1800's was primarily concerned with determining who was eligible to become a naturalized citizen. The first attempt at broad federal oversight of immigration didn't occur until 1882, and there were no quotas limiting the number of individuals who could enter the country until 1920. (Ngai, 2014) In 1882, two legislative initiatives were passed by Congress. One, the Chinese exclusion act, barred all Chinese laborers for a period of 10 years. The other "...established certain classes of people deemed excludable... convicts, lunatics, idiots, and those likely to become a public charge." (Ngai, 2014) Here we see the first instance of exclusionary policy regarding immigration. In the same year, we see bases for exclusion including both nationality, as well as individual characteristics. While the list of "excludable characteristics" would grow, enforcement remained rather weak. Even though such individuals would be turned away at points of entry, there was very little the federal or state governments could do should these individuals evade detection and enter the country. (Ngai, 2014)

The initial construction of America's deportation system occurs pre-World War II, with the first data on criminal deportations becoming available in 1908. During this infancy period, between 1908 and 1917, aliens could only be deported for crimes committed at the time of entry, and not for any committed after admission into the U.S. In 1917, however, legislation was passed allowing for the deportation of aliens "sentenced to jail for two or more crimes involving moral turpitude". (King et al., 2012) During the time period between 1908 and 1920, an average of merely 2 or 3 thousand aliens were deported, and these were mainly removed from asylums, hospitals and jails. At this point, "...mere entry without inspection was insufficient grounds for deportation." (Ngai, 2014) Then, Congress passed the Immigration act of March 4, 1929, which classified unauthorized entry and reentry after deportation as a misdemeanor and felony, respectively. This caused a fairly substantial increase in deportations, tripling the number of annual deportations. (Ngai, 2014) The next major development in immigration policy comes in 1940, with the Alien Registration Act. This act required the registration and fingerprints of any alien seeking to enter the United States, or already present in the country. Noncompliance involved the possible consequence of deportation. The Alien Registration Act "...expanded the state's capacity to track and monitor non-citizens and systematized the entire deportation apparatus." Furthermore, the act added new grounds for criminal deportation, such as possession of weapons. Legislation gradually became more and more focused on criminal deportations throughout the next few decades. However, despite the text of the legislation, and the uptick in deportations, on a large, national scale, unauthorized entry was largely handled by Border Patrol as a civil, rather than criminal offense. (Macías-Rojas, 2016)

This began to change during the 1980's and 1990's, during a key 15-year period where Congress passed a flurry of legislation, such as the Immigration Reform and Control Act of 1986, the Refugee Assistance Extension Act of 1986, the Crime Control Act of 1990, the Immigration Act of 1990, and the Violent Crime Control and the Law Enforcement Act of 1994. These laws marked the beginning of a policy trend closely intertwining criminal law and immigration law, two fields previously kept separate. "Even when the former Immigration Service fell under the Department of Justice, the immigration and criminal justice systems operated independently. Immigration enforcement's objective has been to regulate, not punish, migration across international borders. Criminal law enforcement, on the other hand, relies on punishment, imprisonment, and has been orientated towards local crime control." (Macías-Rojas, 2016)

As we will examine in the next section, discussing the converging of immigration and criminal law, it is important to realize that the two fields were not always intertwined in this manner, but prior to the end of the twentieth century, were largely separate and independent fields. Of course, the gradual evolution of the increasingly punitive nature towards immigration policy has been observed since the first exclusionary policies prior to 1920. However, this slow-moving trend is very much distinct from the incredibly abrupt paradigm shift which we will see occurs in the late 1980's. While deportations did occur prior to the 1980's, the important point to consider is that punitive legislation was rarely utilized, and the principal motivating factor for removal was not involvement in criminal activity. (Hernandez, 2015) Overall, illegal entry or reentry were not prosecuted frequently. Immigration law remained firmly encamped within civil law, sorting through the administrative matter of who was authorized to be in the country. This is

in sharp contrast with the criminalization of immigration-related activity, and the use of detention and deportation as a punitive measure following the late 1980's, as will be discussed in the next section.

## **II. Crimmigration**

For much of America's history then, immigration policy and enforcement had relatively little to do with criminal law. This is in stark contrast with today's environment, as we will soon see. Law professor Juliet Stumpf, in her landmark article, *The Crimmigration Crisis: Immigrants, Crime and Sovereign Power*, first examined an overlapping and entanglement of criminal law and immigration law. The core concept of crimmigration, however, is not limited to law and legal enforcement, but is also present in areas of public opinion and government policy.

### **i) Crimmigration in Law**

Stumpf describes crimmigration as the intersection of criminal and immigration law, with the result that "...aliens [have] become synonymous with criminals." As discussed above, this intertwining of the two fields is a recent development, as they were historically independent of each other prior to the early 1980's. Since then, however, immigration law and criminal law have lost the majority of their separate identities. In her discussion of crimmigration, Stumpf identifies three key areas where criminal law and immigration law have become merged.

The first occurs in the overlapping of the substance of both fields of law. Prior to 1980, deportations occurred at a much lower rate than we see now, and were generally limited to individuals with criminal backgrounds in serious crimes, such as murder, voluntary manslaughter, kidnapping, robbery, and aggravated assaults. It was rather uncommon for a



permanent (but undocumented) resident to be deported, even if they were charged with a serious crime. Since then, the list of deportable crimes has gradually but steadily expanded to encompass a wider range of illegal activity, from drug or weapons trafficking to a myriad of non-violent felonies. However, what is even more telling has been the criminalization of immigration itself. In the 1980s and 1990s, immigration law violators began to be punished with criminal law, with Congress enacting a flurry of statutes. For example, an individual with a prior felony conviction could be imprisoned for 15 years for entering the United States without authorization. As established earlier, historically, immigration offenses were treated in a distinct and separate manner than criminal offenses. It was a very rare occurrence for anyone to be deported based solely for immigration-related reasons, and the vast majority of deportations were undocumented individuals who committed a crime while residing in the United States. The Immigration Reform and Control Act, passed in 1986, "...criminalized hiring unauthorized workers, with the possibility of six months imprisonment", as well as criminalizing marrying solely to avoid immigration laws, and assisting an undocumented citizen to enter the border. In 2004, illegal immigration became the "single largest type of crime prosecuted in federal courts." Immigration cases have continued to dominate the criminal courts, with more criminal immigration cases being presented than for any other type of federal crime. (Strumpf, 2006)

Strumpf identifies a second way in which the two fields have become merged: in similarities of enforcement. Immigration enforcement has increasingly paralleled criminal law enforcement. In the past, Congress was very wary about certain actions of the Border Patrol, specifically making arrests without warrants, and operating as far as 100 miles inland from the

border. Concern was expressed about the authority of the Border Patrol to do such things, as it was not a criminal law enforcement agency. Currently, however, the Border Patrol are essentially indistinguishable from criminal law enforcement agencies. Border Patrol agents are authorized to “...conduct surveillance, pursue suspected undocumented aliens, make stops, and effectuate arrests.” (Strumpf, 2006) The agency rivals that of any police force, consisting of 21,000 agents, boasting bulletproof vests, tactical gear, a fleet of vehicles, and an armory boasting of handguns, shotguns, automatic rifles, submachine guns, sniper rifles and grenade launchers. (U.S. Border Patrol, 2015) Even more telling of the entanglement between immigration and criminal law enforcement is how undocumented citizens have become increasingly subject to the scrutinization of actual police forces. State governments have begun to direct their police forces to enforce immigration laws with renewed vigor. This is a role not traditionally taken on by state or local policemen. (See INA, 8 U.S.C. § 1357(g) (2000) (authorizing the Attorney General to enter into agreements with states to deputize state officers and employees to perform the functions of immigration officers).

Finally, a third way in which criminal law and immigration law have intertwined is in their procedural parallels. (Strumpf, 2006) Despite having vastly different Constitutional origins, procedures for criminal and immigration law have become uncomfortably similar. The physical liberty of the individual in question is at stake in both procedures, and hinges on the decision of a judge. Cesar Hernandez writes in his article, *Creating Crimmigration*, “...this “intertwinement” has rapidly expanded in the United States and changed the procedure and substance of criminal and immigration law such that as a person becomes entangled in one, she suffers increasingly

adverse consequences in the other.” For example, involvement in criminal activity is directly tied to an individual’s likelihood to be allowed to remain in the country. In *Padilla v. Kentucky*, the Supreme Court acknowledged that criminal involvement frequently leads to “presumptively mandatory” deportation. Additionally, federal and state governments frequently punish immigration-related activities through criminal courts and respective penal systems.

Membership Theory, or the idea that only members of any particular social contract have claim to rights and liberties, is introduced by Strumph, who argues that it seriously influences proceedings and ideology. She states, “Introducing membership theory into criminal law, and especially into the uncharted territory of crimmigration law, undermines the strength of constitutional protections for those considered excludable...whole categories of constitutional rights depend on the decisionmaker’s vision of who belongs.” (Strumpf, 2006) Immigration law presumes non-membership, a presumption which gives the federal government essentially unlimited discretion to deport non-members (undocumented immigrants), even those without criminal charges.

## **ii) Crimmigration in Federal and State Enforcement**

Throughout the past two decades, efforts from federal agencies, such as the Border Patrol and state legislators have made engaging in basic daily activities, such as driving or applying for a job, a riskier prospect for undocumented citizens. The two efforts are somewhat linked, with Border Patrol enforcement becoming increasingly hostile towards undocumented migrants as progressively punitive legislation is passed by individual states. 2010 marked a turning point in the passage of punitive immigration legislation following Arizona’s infamous SB1070, which

directed state law enforcement officers to determine and individual's immigration status during a "lawful stop, detention, or arrest" if there is "reasonable suspicion" that the individual is undocumented. As a general trend, "...these recent state-based initiatives (1) give law enforcement the authority to detain those they "reasonably suspect" to be in the country unlawfully, (2) criminalize the failure to apply for or carry their documentation papers, (3) criminalize the application or solicitation of work by undocumented residents, (4) authorize warrantless arrests of suspected undocumented residents, (5) criminalize the transportation and harboring of undocumented residents, (6) interfere with the provision of public benefits, (7) require schools to determine immigration status prior to enrollment, and deny post-secondary schooling to certain groups of lawful immigrants..." A sponsor of Alabama's anti-immigration legislation, HB56, stated prior to passage that "This [bill] attacks every aspect of an illegal immigrant's life. They will not stay in Alabama...[T]his bill is designed to make it difficult for them to live here..." (Smith, 2012) This sentiment highlights the extent to which anything and everything related to immigration has become to be treated criminally, rather than civilly.

The U.S. Border Patrol, as mentioned earlier, is another example of anti-immigration policies and actions. Border Patrol is an agency in the Department of Homeland Security, whose original intended purpose upon conception was to "...patrol the land border and stop smuggling." (Trevino, 1998) In the decades following the agency's inception, more and more agents have begun to be permanently stationed on the border, with priority being placed on preventing illegal crossings. Border patrol agents make more arrests than any other US law enforcement agency per year, and often prioritize arresting/expelling undocumented citizens over

the safety and wellbeing of the migrants. (Trevino, 1998) Furthermore, Border Patrol agents have a great deal of discretionary authority, and can interrogate individuals, and even make arrests, without a warrant.

The intertwining of criminal and immigration law and policy has permeated into the Border Patrol, helping to contribute to a rather impersonal attitude towards migrants and the militarization of the agency. As migrants began to be thought of primarily as criminals, the Border Patrol begins to act as more a punitive enforcement agency, operating similarly to other law enforcement agencies. A 2012 ACLU report on human rights violations along the US-Mexico border stated, “Moreover, CBP agents systematically use excessive force, including deadly and lethal force, and these abuses are subject to minimal oversight and accountability.” Additionally, illegal immigrants are hesitant to report incidents of abuse, in fear doing so will lead to their arrest or deportation, and so Border Patrol agents act with impunity, knowing they will not be held responsible for their actions. (Kino Border Initiative, 2015) A report released by Human Rights Watch-America in 1992 documented numerous cases of abuse against illegal immigrants by Border Patrol agents. The report detailed a routine abuse of illegal immigrants, including cases of beatings, shootings, rape, and torture. America’s Watch also accused the INS of not adequately training or supervising its immigration agents and of covering up incidents of abuse. A recent study also found that “...80 percent of new hires by the border patrol had failed their polygraph test and/or had a criminal history.” (Kino Border Initiative, 2015) And in 1996, Mexico’s Foreign Ministry issued a press release claiming it “...registered 72,864 incidents of abuse of Mexican illegal immigrants at the hands of U.S. officials in 1995.” (Trevino, 1998)

Things have not gotten better with time. A report released in 2011 by *No More Deaths* documented 30,000 instances of abuses over a 2 and a half year period from November 2008-March 2011. In fact, the frequency of abuses seems to be increasing. “The rates of alleged abuse of some kind—including physical abuse, verbal abuse, and theft of belongings—grew consistently from 2007 through 2012.” (Kino Border Initiative, 2015)

A long series of legislation through the last two decades have served to increase the number of Border Patrol agents, station more agents along the border permanently, give them more authority and discretion, and give them military-grade weapons. All of these factors, combined with the fact that they are essentially not held accountable for their actions, embolden agents to act more and more hostilely towards immigrants. This “us versus them” ideology is implied in state legislation, such as SB1070, and is systematically evident in federal agencies like the Border Patrol. (Cantor et al, 2014)

### **iii) Crimmigration in Public Opinion**

The idea of crimmigration is not limited to legal matters and government polices/ agencies. A fear of immigrants, and close sense of association between immigration and crime is also evident in the public opinion of US citizens. According to Gallup data from 2015, 39% of individuals polled indicated they worry about illegal immigration “a great bit”. 77% of Americans said it was “very important”, and 43% stated it was “extremely important” that the government take steps to control U.S. borders to halt the flow of illegal immigrants into the U.S. While public opinion has historically been opposed to high levels of immigration, in the last few decades the public has listed “crime” or “increased risk of crime” as the rationale for their

opposition to high immigration levels. This is in sharp contrast to reasons given prior to the late 1980s, where primarily economic justifications, such as lowered job ability, abounded. (Brader et al. 2008)

Much of the hesitation Americans feel towards immigrants stems from several sources, including a perceived threat to America's cultural identity, as well as fear that immigrants are taking economic resources, such as welfare programs and jobs. However, by far the largest cause of distrust is a fear to both collective and local safety. Americans overwhelmingly believe that immigrants are more likely to commit crimes, especially violent ones, than natural-born citizens. A recent study by Jörg L. Spenkuch states that nearly three quarters of Americans believe that legal immigration increases crime. While generally such ideologies are primarily held by those living in areas with low immigrant populations, nearly half in Phoenix (46%) and Las Vegas (45%) believe that Latin American immigrants "significantly" increase crime. (Pew Research Center, 2006) Predictably, illegal immigrants are given even less trust. Jennifer Eberhardt and her colleagues' researched discovered that "...the terms 'Latino,' 'illegal,' and 'criminal' are closely linked in public opinion". (Haynes, et al. 2016)

This belief remains rooted in the cultural belief of the American people even when countless studies, spanning decades of data, conclude that areas with high populations of immigrants are not more subject to crime than areas with mainly natural-born citizens. In fact, in some cases, areas with large populations of immigrants even boast lower crime rates than the national average. (Wang, 2012) Some theorize that this false perception stems from the idea of

“the minority threat prejudice”, which holds that prejudice and hostility are reactionary measures to perceived threats from a minority group. (King and Wheelock, 2007)

One key reason why immigrants are viewed as perceived threats is how they are portrayed by the media. Media framing is a well-established Communication theory, and shows how issues framed by mass media can significantly impact public perception and opinion. According to Media Theory, “...while public opinion does not directly move with whatever slant the news is taking, the news media play an influential role in shaping *what* and *how* people think about an issue.” (Haynes, et al. 2016) There are more than one ways framing can affect public opinion. Framing may introduce new information, which can lead the individual to change his/her belief and/or opinion on the issue. Additionally, media coverage can “...prime an issue by bringing associated beliefs and feelings to the forefront of consideration.” Finally, media coverage can increase the weight of specific considerations, leading the individual to believe these considerations are more important than others, possibly leading to changes in overall attitudes on policy issues.

One subtle, yet widespread, example of framing is in the term used to refer to those without legal status. “Illegal immigrants” conjures up negative associations, with researchers Masuoka and Junn arguing that “...drawing distinctions between “illegal” and “legal” directs attention “to the values of fairness, the importance of law, and protection of national identity as justification for more punitive immigration policies.” ((Haynes, et al. 2016) Studies have found that “...labeling unauthorized Mexicans in the U.S. as “illegal aliens” rather than describing them as “undocumented workers” increased the perceptions of threat and



prejudice.” (Ommundsen et al., 2014) In fact, realizing the negative connotations such terms can have, in 2013, the Associated Press update its “AP Stylebook” with instructions to use the term “illegal” only in relation to actions, not people. As such, the stylebook no longer sanctions the terms, “illegal alien, an illegal, illegals, or undocumented.” (Colford, 2013)

The rise and continuing existence of Crimmigration is undeniable and widespread. As evidenced above, the overlap of criminal and immigration law has very dire consequences for undocumented migrants. As serious as some of these consequences are, from violence at the hands of the Border Patrol to punitive and targeted state legislation, there is a far more fundamental and all-encompassing way that Crimmigration harms undocumented migrants. The merging of criminal and immigration law has led to the rise of a detention and deportation process that systematically violates Constitutional rights of undocumented migrants, as seen in the next section.

### **III. How Crimmigration Leads to Violation of Constitutional Rights**

A majority of Americans are loathe to extend any rights or protections to non-citizens. A 2014 Rasmussen report found that an overwhelming 68% of voters believe that “...illegal immigrants should not have the same legal rights and protections that U.S. citizens have.”

Unknown to most voters, however, undocumented residents are, in fact, entitled to the many of the same rights and protections as citizens and documented immigrants. The language of the Equal Protection Clause specifies that the Constitution protects all “persons” within the United States’ jurisdiction from the deprivation of life, liberty or property without due process of

law. Furthermore, no state shall "...deny to any person within its jurisdiction the equal protection of the laws". The choice to use the term "person" as opposed to "citizen" is a significant one, as the courts have realized. There is a long history of civil cases where the plaintiff's illegal residency status was deemed irrelevant. (Lee, 2008) Peter Munuz, in the California Law Review, states, "...it appears that physical presence within the United States, except in rare instances, endows an individual with certain rights. The word 'person', as used in the fifth and fourteenth amendments should be taken to mean literally every human being physically present within the borders of the United States. All aliens - those legally present and those illegally present - are entitled to due process of law." (1975) Despite this, however, the protection of due process is essentially never extended to undocumented immigrants. Migrants awaiting deportation are held against their will in detention centers without any semblance of due process, as will be explained in detail shortly. There is a huge disparity between the rights undocumented immigrants should be afforded according the language of the Constitution and how the text is actually interpreted. "Immigration law has become an isolated speciality within American Law, where normal constitutional reasoning does not necessarily apply." (Neuman, 2010) Despite the Supreme Court confirming in *Yick Wo v. Hopkins* that an alien is clearly a "person" protected by the Equal Protection Clause, undocumented immigrants are routinely deprived of base rights.

Immigration law, as it currently operates, is intertwined with criminal law, and thus seemingly stands outside of the Constitution's protective umbrella, with traditional application of the Equal Protection Clause rarely, if ever, occurring. And, as discussed earlier, there exists an attitude of mistrust, and even disdain, in the general public, as well as state and federal

governments. The result of this bizarre cocktail is the routine deprivation of rights for undocumented immigrants residing within the U.S.

The clearest and most common example of the violation of the due process of undocumented citizens occurs in the involuntary detention they are placed in while awaiting deportation hearings. Citizens are held for months at a time without stepping foot in a court, seeing a jury, speaking to a lawyer, or being officially charged. David Cole states, "Immigration detention is by definition "preventive" because the INS has no authority to detain for punitive purposes." Detention deprives individuals of their physical liberty without any hint of criminal guilt. In criminal cases, defendants are offered bail unless they demonstrate they are dangerous, or are a flight risk. Detained immigrants are not even afforded this luxury, and are not given the opportunity to convince a judge that they are not a flight risk. In fact, there is no aspect of such detainment that follows some semblance of normal court proceedings. "Those held on immigration charges have been detained and tried entirely in secret. Pursuant to a directive from the Attorney General, their cases are not listed on any public docket, and the immigration judges presiding have been instructed to neither confirm nor deny that the case exists if asked. Every aspect of the proceedings, no matter how routine, is closed to the public, to the press, and even to family members." (Cole, pg. 4)

Due processes are supposed to restrain the actions of the government, and prevent the liberty of a noncitizen from being taken away. However, the immigrant detention process consistently acts as if it is immune from such restrictions. Various Supreme Court precedence supposedly guarantees, at the very minimum, a fair hearing where the necessity for detention of

an individual may be argued. By definition, detention without such a showing is a violation of Due Process, which we established earlier is afforded to non-citizens. “It [detention] must be accompanied by a hearing in which the person subject to detention is afforded a meaningful opportunity to be heard. And it must be justified by a showing that the detained individual is in a pending criminal or immigration proceeding and poses a risk of flight or danger to the community, or is a danger in part because of a mental disability that impairs her ability to control her dangerous conduct.” (Cole, pg.1038) The U.S. government seems to be unfazed with allowing such Constitutional violations on a regular basis. In an exceedingly brazen move, in 1996, Congress imposed mandatory detention “...of *all* aliens subject to executable removal orders, at least for ninety days.” (Cole, pg. 1022) Violations of the Due Process clause is no longer merely ignored by the American government, but is now prescribed by it.

The very act of preemptive detention is a severe and significant violation of a non-citizen’s Constitutional rights. Conditions within these detention centers further violate detainees basic human rights, as I will demonstrate in the next section.

#### **IV. Detention**

##### **i) Detention Overview**

The detention of undocumented immigrants in the United States occurs on a truly large scale. While immigration has a long history in the United States, mass detention of undocumented immigrants is a fairly recent phenomenon, with the number of individuals kept in detention centers having increased 85% since 2005. (Silverman & Nethery, 2015 ) Prior to the 1980s, approximately 30 individual were in detention centers per day. (CIVIC, 2015) Currently, the U.S.

detains approximately 34,000 individuals on any given day, or approximately 380,000 to 442,000 per year, in over 250 centers, both government and privately owned. (Regan, 2016) What makes these statistics even more troubling is the revelation that in 2009, Congress added a “bed-mandate” as a condition for the Department of Homeland Security to receive full funding. By 2014, the number of detainees ICE is required to incarcerate daily became an even 34,000. (National Immigration Forum, 2013) The Migration Policy Institute approximated the average length of detention for an individual still awaiting a removal determination was 81 days. Many are detained for far longer however, with Department of Homeland Security 2011 data revealing that between 4,000 and 13,000 individuals were kept in detention facilities for over a year. (Hernandez, 2014)

This treatment is inappropriate, as legally, undocumented citizens kept in detention centers are considered civil detainees, not criminals. Being in the United States without the proper documentation is not a criminal act, and individuals in detention centers are not serving prison sentences. (*Kansas v. Martinez, 2007*) Any individual sentenced to any sort of prison time has already served their sentence before being sent to a detention center. In the case *Bell v. Wolfish*, the Supreme Court states detainees are only kept in detention centers to ensure the the accused appears for legal proceedings, specifically deportation hearings. The Court specified that detention is expressly not intended to punish. Detention centers also run a high financial cost. A vast majority of the detention centers in America are not owned nor operated by the US Government, but instead by private companies. The US government pays approximately 2 billion dollars per year to private detention centers, or \$5.6 million per day. (Regan, 2016)

## ii) Conditions are Prison-like

Detention centers operate uncomfortably similarly to prisons, despite continued reassurance that detainees are not treated like criminals. Oftentimes, actual penal facilities are used to house detainees, such as the Pima County Jail: one of five facilities in Arizona used for the long-term detention of immigrants. (Pratt, 2016) The prison-like conditions detainees are exposed to are unacceptable, given that the U.S. Court of Appeals for the Ninth Circuit has ruled that civil detainees are entitled to “more considerate treatment” than those detained as part of a criminal process. Human rights organizations, such as the ACLU have maintained that detention centers are not complying with the Court’s ruling. (2012) Government inspections of detention centers have reached similar conclusions. According to the Department of Homeland Security’s review and evaluation of ICE’s system of immigration detention, “With only a few exceptions, the facilities that ICE uses to detain aliens were originally built, and currently operate, as jails and prisons to confine pre-trial and sentenced felons. Their design, construction, staffing plans, and population management strategies are based largely on the principles of command and control. Likewise, ICE adopted standards that are based on corrections law and promulgated by correctional organizations to guide the operation of jails and prisons.” (Schiro, 2009) A 2015 USCCR Statutory Enforcement Report stated that, “Evidence suggests that DHS is not fully implementing select portions of the [National Detention] Standards, to the detriment of immigrant detainees”. Because the majority of detention facilities are operated by private organizations, living spaces vary vastly from center to center. In some facilities, detainees are kept in two-person cells equipped with beds and a toilet for the majority of the day while in others, detainees are crowded into massive rooms with dozens of beds and essentially no private

space. Warden Daniel Martin, of the Donald W. Wyatt Detention Facility in Rhode Island had the following to say about his facility, and those who would call it a prison: “We call it a detention center, but as far as the structure, the escape risks, and the quality of life—they’re basically the same. (Dow, 2004)

Detainees are also subject to measures of punishment involving solitary confinement. The practice of keeping detainees in solitary confinement is troubling, seeing as it is a strictly punitive measure and has no place in a civil detention. According federal data, “detainees in solitary are routinely kept alone for 22 to 23 hours per day...according to interviews with current and former detainees and a review of case records involving more than three dozen immigrants since 2010.” (Urbina and Rentz, 2013) During this time, no contact with other detainees is permitted. In other, more extreme cases, government data revealed that several dozen individuals were held in solitary confinement for up to 75 days. This is especially troubling considering the UN has defined a time period of 15 days being the point at which psychological effects of solitary confinement can become irreversible. (National Immigrant Justice Center, 2012)

In addition to the physical living conditions detainees face, everything about their day-to-day routine has been altered by detention, allowing no remnants of normalcy to remain. Detainees are under constant surveillance, which is a severe dehumanizing effect on its own right. Being under surveillance can lead to increased stress and anxiety, which create their own health problems. (Harvard Health, 2012) Detainees also face constant visual reminders that they are seen as less than equal, or less than human, from the physical walls and barbed wire intended to prevent them from leaving the facility, to the color-coded, inmate-like jumpsuits they are

required to wear while in detention. Every action or decision related to personal independence is stripped from them. Detainees must ask permission to use the restroom, and have no say in their food, sleeping arrangements or anything else, and all their personal items are confiscated.

Detainees' family members are prohibited from bringing any items purchased outside, and so any possessions must be purchased through the facility's commissary (items whose prices are marked up considerably). (Hernández, 2014) Furthermore, every aspect of the inmate's social lives is controlled and restricted by those in charge at the detention facilities. Recreational time, telephone privileges and even family visiting times are all tightly restricted. In person visitations are limited to, in some cases, a mere 30 minutes per week, and times are only offered during extremely limited windows. (Small, 2016)

A personal account from Marco Antonio Galdino, a Brazilian detainee held in several detention centers, including Florence and the Pinal County PRison , explains just how all-encompassing detention is. In 1966, Marco traveled from San Paolo, Brazil to Salt Lake City, Utah on six-month travel visa. He remained in Utah after the visa expired, partly due to threats from his father, threatening to kill Marco in he returned to Brazil on account of Marco's homosexuality. Marco found work in Utah and lived there until 2005, when he was pulled over for not using a turn signal, which triggered a deportation case. Because Marco had a criminal record for possession of an illegal substance, he faced mandatory detention. In interviews with Margaret Regan, Marco described "food on dirty trays, worms found in food, bugs and and worms found in the faucets, receiving dirty laundry, and being overcrowded with ten other men in one cell and only one toilet." (Regan, 2016) At Pinal, visitation with family was severely limited. Any in-person visits or physical contact was denied. The only contact allowed was



verbal communication through a grainy video screen. Furthermore, immigrant detainees were not permitted the simple luxury of being outside. “We never go outside”, Marco stated, going onto describe how the only sunlight they had access to came through a a single open-air window for only a brief period every day. Marco described how the prisoners took turns standing in the sunlight, desperate for any experience that bore a semblance of being outside. He further went on to outline the brutal monotony of his daily routine. “I wake up at five...at six I have breakfast. Then I go back to the room and sleep till nine or ten.” The only activities Pinal offered were TV or a small law library, before detainees were locked up in their rooms again at eight at night. Marco endured these conditions at Pinal and other detention facilities for over six years. (Regan, 2016)

### **iii) Violence and Sexual Assault**

Detainees are often victims of violence and sexual assault from guards. Private detention facility staff are, on average, grossly undertrained and treat detainees with violence far exceeding appropriate levels of force. (Ackerman & Furman, 2014) Although detainees’ claims of violence cannot always be substantiated, they are numerous. Furthermore, numerous accusations of sexual assault have been levied against various detention facilities. ICE’s own data system reported 215 allegations of sexual assault from 2009-2013. However, in a 2013 study, the GAO reported that, “ICE data did not include all reported allegations.” At some facilities, up to 70% of allegations went unreported to ICE headquarters. (GAO, 2014) Additionally, it is sometimes difficult for victims to report abuse. The GAO study revealed that 14% of calls to a designated sexual assault hotline were not answered, or prevented from going through by some other complication. (GAO, 2014) Joanne Lin, a legislative counsel with the American Civil Liberties Union further states

that, "Many immigration detainees do not speak or read English well, and do not know what their legal rights are in the United States... Traumatized by the sexual assaults, they are understandably loath to report the abuse to the same government authorities that have the power to rape, detain and deport them." Additionally, even those not victim to sexual assault still may face invasive strip searches while already in detention. (*Wong v. Beebe*, 2013)

#### **iv) Food**

There are also concerns with the quality of food provided to detainees. Generally speaking, the food is very low quality, lacking in vital and necessary nutrients. Furthermore, there is an essentially nonexistent variety of meal options. This is especially troubling for individuals with dietary or religious restrictions, as an absence of suitable alternatives may lead to lack of necessary nutrients. (Small, 2016) The USCCR report concluded that, "...an investigation of Willacy County Correctional Facility exposed complaints stating that food was "cold and often spoiled." Furthermore, the Commission notes testimony that all detainees at Willacy had lost an average of 10 pounds. One individual testified to having seen maggots in food while visiting Willacy. There have also been riots and hunger strikes protesting rotten and insufficient food at Etowah County Detention Center. Another hunger strike took place at Stewart, located in Lumpkin, GA, after detainees asserted that they were being served maggot-filled food." These findings led the commission to state that certain detention facilities are not fully adhering to contractually set standards and are not providing detainees with nutritious food in sufficient quantities.

**v) Health Care**

Another major area of concern is the quality and amount of coverage of health care available to detainees. Currently, detainees, regardless of legal status, have rights to request health care, have their requests met in a timely manner, access to 24-hour emergency services, and treatment for chronic conditions. Essentially, they are guaranteed continuity of care from admission to transfer, discharge, or removal, including referral to community-based providers when indicated. However, these standards are often not met. The USCCR report identified several instances where detainees have died due to a direct lack of proper medical care. An ACLU report specified that a staggering 131 people have died in immigration custody between 2003 and 2012. (Shahshahani, 2016) The same report gave details on specific scenarios where violations of health rights on an massive scale occurred. Stewart Detention Center, a facility owned by CCA (Corrective Corporation of America) is one of the largest in the country, with a detainee capacity of over 1700. Yet between April 2009 and summer of 2012, a time span of over three years, there was no doctor staffed at the facility. Currently, the facility staffs one doctor and seven nurses, resulting in a nurse to detainee ratio of 1:250. Even when health care is provided to detainees, it is rarely done so in a timely and professional manner. Stacey Tovino of Boston Law College summarizes various studies on the issue, concluding, "Immigration detention centers routinely fail to provide physical and mental health examinations of detainees within a reasonable time following their detention. When examinations are conducted, detention centers frequently misdiagnose or fail to diagnose chronic and acute health conditions. When a health condition is diagnosed, some detention centers fail to create, document, and implement appropriate plans of care." (Tovino, 2016) ICE came to the same conclusion in an a report investigating detainee Jose

LopezGregorio's death, stating "Medical care in this facility does not meet ICE standards...The most significant concern was found..[at] the lack of responsiveness to requests for sick call[s] . . ."

In addition to a lack of proper medical care, detainees also faced extensive threats to their mental health during their time in these facilities. A 2006 study on the effects of detention on the mental health of refugees stated that, "...prolonged detention exerts a long-term impact on the psychological well-being of refugees...refugees recording adverse conditions in detention centers also reported persistent sadness, hopelessness, intrusive memories, attacks of anger and physiological reactivity, which were related to the length of detention." The study was one of the first to also conclude that the adverse mental effects continued to impact the detainee long after he/she was released from detention. (Steel, 2006) Temporary detention has been found to trigger a host of psychological harm, including high rates of depression, Post Traumatic Stress Disorder, and anxiety. (Coffey, 2010) Unsurprisingly, researchers have found that "...the extent of their [detainees] mental ill health is correlated with the length of time spent in detention". (Coffey, 2010) A significant amount of detainees commit suicide during their time in detention facilities. Of the 144 detainee deaths between 2004 and 2014, the Center for Health and Human Rights disclose that 13.4% of deaths were due to suicide or self-harm injuries. (Granski, 2015) This is much higher than the national average, where suicide accounted for 1.6% of all deaths in 2012 according to the CDC. (Heron, 2015) Psychological distress can reveal itself in less obvious ways, however. Detention, especially long-term detention, researchers found, led to extreme difficulties for the detainees, after they were released. "These were manifest as ongoing

experiences of insecurity and injustice, difficulties with relationships, profound changes to view of self and mental health symptoms.” (Coffey, 2010) Researchers examined 17 individuals who were detained in an immigration detention facility in order to examine how they had recovered from their ordeal. According to the study, the participants displayed “...clinically significant levels of depression and symptoms of post traumatic stress disorder. It is contended that the enduring nature of these adverse psychological effects can be understood in terms of changes to core belief systems affecting views of the self and relationships, and values about justice and humanity.” Significant damages to perceptions of self-worth, family relationships, values of justice and a general positive outlook on life were all described by participants. Even if physical needs (such as nutritious food and proper medical care) are satisfied, detention has serious, long term psychological consequences, which affect detainees long after their release.

## **V. Reform and the Future of Immigration Detention**

Considering recent political trends, and the new administration’s punitive stance towards undocumented migrants and the seeming lack of concern for the protection of their human rights, it seems exceedingly likely that the trend of increasingly punitive immigration legislation will continue to be passed in the future, and detained immigrants will continue to have their Constitutional and human rights violated. Advocating for reform is a task as necessary as it is daunting. Attempting to unravel the areas of immigration and criminal law seems impossible given the extent to which the fields have become intertwined, and how much policy has resulted from the consequent ideology. However, the consequences of crimmigration are too serious to

ignore. As we have examined, detention, a product of the crimmigration ideology, violates the Constitutional rights of noncitizens, as well as their human rights, subjecting them to inhumane conditions failing to even meet minimal standards required for penal facilities. Reform then, is imperative. But what form should it take?

While it seems evident the judiciary branch should initiate the reform, given the violation of Constitutional rights, the Supreme Court has been hesitant to intervene in immigration detention. (Fan, 2015) For example, in 2003, the Court refused to hear a challenge to mandatory detention, and has not been involved in a significant sense since then. Reform then, must occur in the political branches. Former federal prosecutor and author, Professor Mary Fan, argues that a middle-ground reform will be the most effective, stating “Reform proposals must avoid the trap of all-or-nothing thinking and accusation of radicalism. Reform of criminal immigration laws need not entail abolition or wholesale decriminalization.” Essentially, legislation advocating blanket amnesty, for example, faces an impossibly formidable task in passing both legislative houses, and being signed into law. Legislation attempting to eliminate, or at least significantly lessen the violation of rights undocumented citizens experience, may face a reasonable chance of getting passed. The first step which must be taken is repealing the mandatory detention of arriving aliens. This policy gives no chance for due process to occur, or for the alien to be released on bond. While technically the Attorney General has the ability to release undocumented immigrants on bond, or grant them conditional parole, these options are circumvented by mandatory detention.

While individuals with criminal records or convictions will likely face detention regardless of immigration reform, those without criminal charges would be greatly benefited by

the adoption of policies which forego detention for alternative supervision strategies. Congress has allocated funds, and directed ICE, to explore alternatives to immigration detention, such as GPS monitoring, radio frequency monitoring, and telephonic reporting. A hypothetical policy that fits undocumented immigrants with GPS ankle bracelets, rather than forcibly detain them, in order to ensure appearance at a court date has a reasonable chance of being passed, as it does not require the anti-immigrant legislators to significantly change their worldview. As Fan mentions, the “intractable divide in worldviews” between supporters and opposers of punitive immigration legislation is a significant obstacle to reform. Individuals who see undocumented immigrants as nothing more than ‘illegals’ breaking US law are unlikely to support the extension of Constitutional rights to them, viewing such rights as a luxury for citizens only. However, by arguing that such a program would significantly reduce cost to the taxpayer, support is much more easily gathered across the aisle. Such an argument is likely to “...make the case for reform in terms that implicate the interests and values of hierarchs as well as egalitarians.” (Fan, 2015) Of course, such a scenario is far from a perfect situation for the undocumented citizen in question. However, it would at least allow individuals to stay at their own home, see their family, and avoid the many significant harms experienced in detention facilities.

## **VI.**

### **Conclusion**

Immigration policy in America has had a long and complex history. While initially immigration law remained completely separate from criminal law, the two fields merged rather aggressively in the late 19080’s. The new phenomenon of Crimmigration affected not only legal practices, but federal/state policies and public opinion as well. The new punitive nature of

immigration law led to several changes in the treatment of undocumented migrants. Arguably the most severe consequence was the routine violation of the right to Due Process as defined under the fourteenth amendment.

It remains unknown exactly why this blatant violation of Constitutional rights has been allowed to continue for so long. The majority of the public seem apathetic towards the plight of non-citizens, and the courts are hesitant to intervene. I believe it is not unreasonable to assume that Crimmigration plays a major role in the continuing abuse of the rights of undocumented immigrants. I think what makes this problem unlikely to be solved in the near future is that, unlike the unequal treatment of other minority groups in history, in this case, the subjugation is sustainable. Denying women and African-Americans rights was never going to be able to last forever. Yet unlike those minority groups, it seems undocumented migrants lack even minimal power or channels to improve their position, and without the direct intervention of the court system, it seems unlikely their situation will improve. Traditionally, minorities in America have won representation and protection of rights through collective political action. Undocumented migrants, however, lack the means of participating in conventional political channels. With no political voice or means of representation, undocumented migrants are unable to push back against punitive legislation or take any sort of effective action against the violation of their Constitutional rights. I believe that only another major paradigm shift will result in the proper extension of Constitutional rights to undocumented migrants.



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