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**A New Look at the US War on Drugs and the
Colorblind Criminalization of Latinx Immigrants**

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ABSTRACT

This paper examines the systemic racism operating behind the over-criminalization of the US immigration system, a relatively recent transformation occurring as a product of the War on Drugs. The unprecedented scale of deporting and detaining Latinx immigrants, in combination with the political effort to scapegoat this community as a “threat to national security,” shares commonalities with the heinous mass incarceration and criminalization of African Americans. Both processes thrive on an artificial appearance of “colorblind” impartiality, as the War on Drugs has ensured that racial bias remains implicit, not explicit, in these policies. However, as the increasingly punitive immigration system has entangled itself with the criminal justice system, the distinctive pattern of anti-Latinx racism obscures from public consciousness. In response, this paper attempts to weave a comprehensive narrative that contextualizes the myth behind the so-called “illegal immigrant.” It proceeds by analyzing and connecting works of literature discussing the changes in immigration law, public discourse, and foreign policy occurring at the intersection of the War on Drugs.

INTRODUCTION

When declaring a national emergency in order to move forward with his US-Mexico border wall, President Trump claimed on February 15, 2019: “*we are talking about an invasion of our country, with drugs, with human traffickers, with all types of criminals and gangs*”. These statements echo the xenophobic rhetoric behind his notoriously racist presidential campaign: “*when Mexico sends its people, they’re not sending their best. ... They’re bringing drugs. They’re bringing crime. They’re rapists*”.

Although many can identify such efforts to demonize and scapegoat immigrants, the purported connection between drugs, danger, crime, and migration continues to dominate our country’s political discourse. And this translates into policy – as reflected in our current era of “mass deportation”. Without correlated increases in violent crime, the federal government has recently deported and detained an unprecedented amount of people, often justifying these measures out of a concern for “national security”. Federal prisons have never held so many detainees – and notably, the majority of those detainees are Latinx individuals (Eagly 12). Furthermore, heinous new policies like separating, detaining, and tear-gassing families at the border alarms international bodies like the United Nations, who reassert the universal human right to seek asylum.

Overlaying the sensationalization of undocumented immigration as a national security crisis is another phenomenon – the US’s demonstrated obsession with prosecuting illicit drug activity, tracing back to the War on Drugs enacted in the 1980s. It is no mere coincidence that Trump begins by emphasizing *drugs* in each of his statements. Somehow, talk about drugs and

talk about immigration seems to operate hand in hand – and moreover, these topics often allude to racial stereotypes about how “Mexicans,” or rather, Latinx individuals, pose some kind of criminal threat to the United States. We must question the institutional underpinnings reinforcing these kinds of statements, as they blatantly target an already marginalized Latinx and immigrant community. This paper will investigate these issues, posing the following research question:

How has the War on Drug’s “colorblind” criminalization within the US’s criminal justice system expanded to affect immigration policy and enforcement?

In answering this research question, this paper’s integrated literature review and analysis divides into the following five sections:

The first section introduces how existing racial scholarship on the War on Drugs can be redirected towards immigration. Michelle Alexander’s *The New Jim Crow* aptly dissects how the War on Drugs manifested mass incarceration as a vehicle for systemic racism in officially “colorblind,” or race-neutral, terms, thus allowing the media to perpetuate damaging stereotypes of the “criminalblackman”. As Alexander admits herself, such scholarship focuses only on the experiences of African Americans in criminal justice system, at the expense of *muting the relevant narratives of Latinx individuals caught in the immigration system*. In response, this paper sets out to fill these gaps and broaden the conversation; in the following sections, it will use the key elements of Alexander’s argument as a *framework* to draw connections to the drug war’s similar “colorblind” transformation of immigration law as a means of criminalizing the Latinx community and feeding the racist construction of the “*illegal immigrant*.”

The second section traces the nature of this transformation – specifically, how immigration enforcement has become increasingly criminalized to serve as an instrument to

anti-drug enforcement. Beginning with War on Drugs-era changes in policy, our immigration system has come to effectively operate *as part of the criminal justice system*. The drastic escalation of deportation and detention as forms of *punishment* within immigration enforcement closely resembles the phenomenon of mass incarceration as a form of social control. Like the overzealous anti-drug enforcement identified in Alexander's work, immigration enforcement relies on a *volume approach* that affords an unusually high level of discretion to police, whose bias can account for the disproportionate amount of Latinx immigrants who have been hauled into our federal prisons.

The third section seeks to explain the political motives behind the criminal transformation of immigration law. This section uncovers a *positive feedback loop* wherein politicians have garnered support for these legislative changes by *capitalizing on inflammatory, nativist rhetoric* that *displaces the blame* for international drug violence onto innocent, individual migrants. Redacted from mainstream public perception, the true culprit proves to be a history of interventionist, neoliberal US foreign policy in Latin America (which was largely waged in the name of the drug war itself). Ironically, migrants are escaping the conditions the US exacerbated in these countries, yet find themselves even more marginalized when unduly scapegoated and branded as "illegals" who are "predisposed" to illicit drug involvement due to their lack of legal entry or status.

The fourth section confirms the distinct *racialization* process occurring within this nativist criminalization of immigration, revealing the truly "colorblind" manipulation of topics like drugs and migration. Specifically, the white supremacy pervading dominant American culture upholds the "*Latino Threat Narrative*," which encourages treatment of Latinx

immigrants as greater “criminals” than other immigrants, purely on account of their race. The racial stereotypes behind the “illegal immigrant” here prove to resonate with the construction of the “criminalblackman” – both of these socially-constructed personas allow racist associations of “criminality” to perpetuate widespread racial profiling as part of drug and immigration enforcement. Such conflation of nativism and anti-Latinx racism exemplifies *proxy-discrimination*, wherein association with undocumented migration becomes a pretense to impose criminality on Latinx individuals.

The final section condemns the particular exploitation of the immigration system’s lack of criminal rights as an *opportunistic means* of targeting a community of color, which is by definition, already vulnerable. In the name of the drug war, policy-makers have over-criminalized the immigration system without implementing any counterbalances of the criminal rights available to all defendants in the criminal justice system. In other words, the system punishes immigration respondents like it does criminal defendants, but does not protect them like it does criminal defendants. Namely, the relatively weak Fourth, Fifth, and Sixth Amendment protections in immigration adjudication effectively *sanctions* the systemic racism occurring at the level of enforcement, turning a blind eye to widespread abuse, and churning out “criminals” who validate the racist narrative of the “illegal immigrant”. Thus, through the lens of immigration, the Latinx community categorically faces an alarming violation of due process, as they are especially susceptible to *expedited criminalization, punishment, and disenfranchisement* without such protections.

THEORETICAL FRAMEWORK

This paper mainly applies the theoretical framework of Critical Race Theory (CRT) in its analysis of the policy and discourse occurring at the crossroads of anti-drug and immigration enforcement. According to Delgado, Stefancic, and Harris, CRT is a legal movement that “questions the very foundations of the liberal order, including equality theory, legal reasoning, Enlightenment rationalism, and neutral principles of constitutional law” (Critical Race 3). CRT posits the following: racism is the norm for people of color; both elite and working-class whites have little incentive to dismantle racism, as both groups benefit from it; race is a pure social construction; minority groups are racialized differently throughout time, as the nature of socio-economic exploitation continually changes; and finally, people of color possess a unique power to voice their own narratives (8-11). In accordance with CRT, this paper’s examination of the legislation and policies refuses to remain “colorblind” or “race-neutral” in its analysis – it demands racially-conscious answers to a phenomenon that disproportionately impacts people of color.

Asserting that racial issues extend further than a black-white binary (77), LatCrit is theoretical framework branching from CRT that seeks to address the relative “invisibility” of the Latinx community in critical race analyses. Identifying the issue of “proxy discrimination,” wherein Latinx individuals are targeted for their “foreign name, accent, or ancestry,” LatCrit “deploys the sociological notion of nativism to name and explain the recent spate of measures aimed at foreigners and immigrants” (93). An example of such a measure is the dissemination of “probable cause laws that encourage police to stop and question the foreign-looking” (93). In

addition to embracing the interrogative framework of CRT, this paper will employ these key LatCrit principles, seeking to assert a new “visibility” for the Latinx community in their proxied racialized discrimination through the sensationalization of the “illegal immigrant”. Nativism and racism cannot be understood as separate forms of bigotry and oppression.

POSITIONALITY

This paper at times interchangeably refers to both the immigrant and Latinx communities. However, the term “immigrant,” in this context, refers to an individual who identifies as both an immigrant and as Latino/Latina/Latinx. Following CRT’s principle that people of color can and should voice their own narratives, I would like to make the following clarification. Although I am a daughter of immigrants who struggled to find their place in the US, I recognize that my background as an Indian American has not been subject to the particular *systematically driven* racism discussed in this paper. The narrative of the so-called “illegal immigrant” caught in the War on Drugs is not my own to voice. As an aspiring immigration lawyer and reformer, I extrapolate upon these issues from an academic, rather than personal, understanding. I intend to use these privileges to help provide *visibility* to this issue from a position of allyship. For these reasons, I seek to learn from a place of empathy, solidarity, and deference, and offer this paper as invitation for further conversation and action.

LITERATURE REVIEW AND ANALYSIS

I. The “Newer” Jim Crow: Bringing Visibility to Immigration Law and the Latinx Community

There exists substantial scholarship on the impact of the War on Drugs on our *criminal justice system*, primarily focusing on the phenomenon of mass incarceration in recent decades. Michelle Alexander’s 2012 book, *The New Jim Crow: Mass Incarceration in the Era of Colorblindness*, first posed a clear argument that mass incarceration is the new racial caste system used to marginalize and control black Americans, in place of Jim Crow era segregation and, preceding that, slavery. Importantly, Alexander argues that the ideological War on Drugs is the main channel through which this system operates. At the time of the war’s declaration under Reagan, only 2% of the US population thought drugs were the most pressing national issue, and yet, in the time between 1980 and 1984, federal anti-drug funding increased drastically, from \$8 million to \$95 million (49). Furthermore, since the start of this “war,” the US prison population has from an initial 350,000, to over 2.3 million today (93). Alexander stresses that this new racial caste system is different because it is officially “colorblind,” and operates without explicit mention of its racialized aim. Like segregation and slavery, politicians introduced mass incarceration to capitalize on the “vulnerability and racism of working-class whites” (45). Despite explicit racial intent, the disproportionate representation of race speaks for itself – although the majority of people using and dealing illegal drugs is white, 75% of those imprisoned for drug offenses have been people of color, primarily, African Americans (98).

According to Alexander, the broad “war” has conveniently granted law enforcement an unusually high level of discretion in predicting where drugs are. Failing to target the declared “enemy” of high-level drug kingpins, they instead overwhelmingly pursue minor offenses like possession for non-dangerous drugs like marijuana, targeting lower income communities of color. Driven by financial incentives like drug forfeiture laws and federal grant programs, police are motivated to stop and search as many people as they can in a volume-based approach, hauling more and more people into jails and prison (185). After interacting with an overwhelmed public defender system, most detainees quickly become convicts under the strong pressure to make plea bargains to avoid harsh mandatory minimum sentences, even when innocent (186). Furthermore, released convicts find themselves permanently marginalized and stigmatized through “invisible punishment,” as they have been socially, economically, and politically branded with the “prison label” (186). American views of blackness and criminality have thus conflated into the single stereotypical archetype of the “criminalblackman,” (107) only reinforced by racist media representations.

In her introduction, Alexander herself acknowledges that her work focuses on the particular plight of African Americans, at the expense of muting the narrative of many immigrants and Latinx individuals also targeted by mass incarceration (16). Ironically, Alexander exhibits a subtle form of the very colorblindness that she rails against. LatCrit’s specific calls for visibility within the color spectrum prove especially relevant in this case – Alexander, like many others involved in the CRT movement, adheres to a black/white binary in her discussion of systemic racism through the law. Nonetheless, this oversight does not take away from the value of her argument (nor does it invalidate the original application centered

around the African-American community). Important parallels can and should be drawn from Alexander's key points in the context of the increasingly severe and unjust enforcement and adjudication of *immigration law* in recent decades.

The "illegal immigrant," not unlike the "criminalblackman," is a racist construction (arguably a more "colorblind" one) that pervades American public perception of the Latinx community. This has not risen out a vacuum, but rather, a deliberate, systematic effort to exploit and marginalize another community of color. This paper, in an attempt to understand this context, will thus proceed by examining specific connections to the key points in Alexander's argument. It seeks to weave a comprehensive understanding of the continued legacy of the War on Drugs by drawing upon works of literature relating to immigration law, political discourse, and foreign policy.

II. The Criminalization of Immigration Law via the Criminalization of Drugs

Understanding immigration law's practical *application* as a matter of criminal justice is critical to contextualizing the amplified criminalization and punishment of "illegal" or undocumented migration. This section will accordingly demonstrate how the drug war has imparted its punitive nature upon immigration enforcement, utilizing this new escalation of detention and deportation to serve as an instrument to anti-drug enforcement.

Technically, immigration law remains separate from criminal law and the judicial branch. Immigration courts and judges fall under the jurisdiction of the Department of Justice (DOJ), and the enforcing bodies of Immigration and Customs Enforcement (ICE) and Customs and Border

Patrol (CBP) remain under the Department of Homeland Security (DHS). While most immigration matters are consequently considered civil (instead of criminal) law, César Cuauhtémoc García Hernández makes a compelling argument in his article “Immigration Detention as Punishment” that our immigration legal system, in all practical matters, actually functions like the criminal justice system due to its highly punitive nature. He asserts that detaining civil immigration respondents pending trials and/or removal orders still “constitutes penal incarceration” (1346).

García Hernández examines various legislation passed “during a key period of about fifteen years from the early 1980s to the mid-1990s, [when] the US Congress drastically expanded the executive branch’s power—and at times obligation—to confine people pending immigration proceedings largely by tapping the nation’s growing concern about drug activity,” finding that “immigration detention [w]as a central tool in the nation’s burgeoning war on drugs” (1349). Specifically, he focuses on the Anti-Drug Abuse Act of 1988, in which the Attorney General, (the head of the DOJ and therefore, the head of immigration law), required that the Defense Department catalog all available “detention facilities for felons, especially those who are a federal responsibility such as illegal aliens and major narcotic traffickers.” From the outset, these two groups of offenders – “illegal aliens” and narcotic traffickers – link to each other under the pretext of the War on Drugs.

Moreover, one can extrapolate that the 1988 Act began developing a distinct *plan* to imprison immigrants under the guise of the drug war by also *supplying the means* to fill these facilities. For example, according to Garcia Hernández, another key provision authorized the immigration enforcement agents of ICE’s predecessor, the Immigration and Naturalization

Service (INS), to merge with anti-drug enforcement by sharing equipment, and even expanding local forfeiture programs to fund prisons (1365). Financial incentive here emerges in clear connection to programs discussed in Alexander's analysis. Furthermore, the act first authorized INS "exclusively to assist [f]ederal and local law enforcement agencies in combating illegal alien involvement in drug trafficking and crimes of violence." Finally, a subsection entitled the "Narcotics Traffickers Deportation Act" granted authority to state and local officials to ask the INS to "issue a detainer" to those arrested of drug offenses and "believed to be in the United States without permission" (1363).

Citing the Supreme Court's decision in *United States v Salerno* that it is the *intent* behind enacted legislation that determines whether the ensuing detention is deemed criminal or civil, García Hernández argues that immigration detention is in fact criminal detention, considering its entanglement within these key War on Drugs policies aimed at punishing and stigmatizing drug activity. Accordingly, these findings should negate the court's decision that indefinite ICE detention while awaiting enforcement of a removal order is "civil, not criminal" and "nonpunitive in purpose and effect" (*Zadvydas v. Davis*). Civil detention serves the purpose of ensuring trial attendance, whereas the interlacing of immigration violations with drug crimes, as demonstrated in the 1988 Act's changes, clearly extends the original form of criminal punishment. García Hernández concludes that this "imprisonment architecture" was what "made immigration mass incarceration politically feasible and legally possible" in the first place (1414).

Constructed over this essentially punitive foundation, modern immigration policy has then only become increasingly intertwined with the criminal justice system in the following decades. This is evident from the assertions made by Jennifer M. Chacón in her article

“Criminalizing Immigration,” (which is fittingly situated within the Academy for Justice’s *Reforming Criminal Justice* project). While Garcia Hernández mainly questions the purportedly “civil” intention of immigration detention pending civil removal proceedings, Chacón focuses on the deliberate shaping of “criminal enforcement systems” to “manage migration through the enforcement of criminal laws” (208), effectively fortifying a distinct “pipeline” (206) between the two. She argues that the federal criminal system’s over-prosecution of the immigration crimes of misdemeanor illegal entry and felony reentry anticipates a “burgeoning second wave of racialized mass incarceration spurred by this new wave of mass criminalization” (205). Aligning with Alexander’s findings, uneven racial distribution again speaks for itself: although minorities in the US population, approximately 57% of federal prisoners are Hispanic and 40% are foreign nationals (209).

According to Chacón, the Secure Communities program and INA section “287(g) agreements” each exemplify the criminal justice system’s undeniable shift towards the “mass criminalization” of immigration enforcement. Expanding upon the Criminal Alien Program’s decades-long partnership using federal jail and prison screening to locate almost half of the individuals apprehended by DHS, the Secure Communities Program “require[s] the fingerprints of all state and local arrestees to be run through the DHS’s IDENT database to determine the immigration history of the arrestee” (211). According to Chacón, the “arrest decisions” of state or local law enforcement “are the ‘discretion that matters’ when it comes to determining whether or not the DHS receives information” (211). This especially holds true as 48-hour ICE holds can be made upon arrest *regardless* of further pursuit of criminal charges. Alexander’s concerns about the high level of discretion afforded to police in the drug war resonate here. More directly,

section 287(g) agreements authorize sub-federal officials to act in the *same capacity* as federal immigration enforcement with DHS training and supervision. Like the failure to capture “drug kingpins” in the drug war, these programs do not target serious offenders, but rather, individuals guilty of misdemeanors and traffic violations (213). While Obama recognized these weaknesses and repealed these programs, Trump has reinstated both via executive order, with no qualified prioritization for screening foreign nationals beyond *alleged* criminal activity – with or without legal status (212). And of course, as foreign nationals, these individuals are inherently susceptible to *allegations* of the “*criminal activity*” of undocumented migration.

Already subject to increased policing, immigrants face further injustice at the hands of overburdened public defender system. Prosecutors’ use of “high-volume drug plea strategies” exploits the inaccessibility of effective public representation. Misdemeanor pleas typically receive “nominal” counseling, with one attorney assisting “6 to 10 defendants pleading at a time” (209-210). While Alexander traces how the control of African Americans manifests within the high discretion of criminal justice agents, Chacón asserts that these supposed “bargains” act as a “blunt instrument to support border control goals,” (209). Thus, the immigrant community, containing the individuals proven to be disproportionately swept up by these volume-driven systems, becomes caught in the proxied pipeline between anti-drug and anti-immigration enforcement.

Aggravated felonies serve as another key example of a conflation between immigration and criminal law that originates in War on Drugs legislation, yet increasingly functions like a “pipeline” in recent decades. In her article, “Rethinking the Increased Focus on Penal Measures in Immigration Law as Reflected in the Expansion of the Aggravated Felony Concept,” Diana

Podgorny examines the 1988 Act through a different lens from Garcia Hernández, emphasizing the policy's failure to effectively address crime. The 1988 Act established that certain types of criminal convictions, classified as "aggravated felonies," triggered additional immigration penalties like detention, expedited removal proceedings, longer bars to re-entry, and in cases with sentences of at least five years, automatic mandated deportation (292). The only three crimes qualifying aggravated felonies at the time were murder, weapon trafficking, and drug trafficking (292). It should here be noted that by equating consequences for drug involvement and *murder*, Congress clearly intended to escalate perception of drug activity as a serious, violent criminal offense that somehow warrants additional punishment affecting immigration status.

Podgorny calls attention to the fact that the definition of an aggravated felony has since been changed so that the criminal conviction "no longer [need] be either aggravated or a felony" (288). Although counterintuitive, this disparity may not be a pure coincidence – preserving the harsh name despite its misleading implications aligns with overarching patterns of inflating the degree of crime and "danger" surrounding violations of immigration law. The main change creating this disparity took place under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA). IIRIRA reduced the sentencing requirement from five years to only one, drastically increasing the scope of possible triggers (296), many of which could be lower-level drug-related crimes, like possession. Again identifying the problem of heightened and unchecked discretion, Podgorny warns, "conviction of a crime [became] grounds for removal without any real possibility of relief, by vesting the power of expedited removal in individual immigration officers whose decisions are subject to neither judicial nor administrative review" (297). Echoing the volume approach discussed by Alexander, aggravated felonies evoke

additional alarm due to the *automatic* nature of these triggers and punishments, free from any individualized assessment of the facts and merits of a case against deportation. After all, it becomes much easier to dehumanize and stereotype a group when its members are treated less and less like individuals with unique sets of circumstances.

III. The Feedback Loop of Anti-Immigrant Policy and Sensationalist Discourse

While Podgorny's criticism of the post-IRRIRA aggravated felony focuses on the impracticality of removing many legal permanent residents "who pose no actual threat to society" (Podgorny 302), wider evaluations should still be made about the unjust treatment of those who are undocumented, and consequently branded "illegal aliens". Her statement in itself raises the question – who *does* pose an "actual threat" and *why*? Undocumented individuals, in contrast to those with legal status, are not perceived as equally "harmless" due to their immigration status (or lack thereof). Beyond Podgorny's own equivocal stance, a blatant anti-immigrant agenda is evident in the statements of those behind key legislation like IRRIRA. According to Podgorny's footnote, one such figure, Rep. Orrin Hatch, publicly professed his belief that "a lot of our criminality in this country today happens to be coming from criminal, illegal aliens who are ripping our country apart. A lot of the drugs are coming from these people" (300). Trump's contemporary nativist rhetoric here finds roots in the War on Drugs and ensuing concerns over "national security" (300). This section will demonstrate how powerful such discourse can be, as it sustains feedback loop of increasingly harsh and unsound immigration policy that points to "threats" where they do not exist. Politicians have strategically criminalized

and scapegoated individual immigrants in an effort to disguise the US government's true culpability for drug-related violence.

In order to comprehend the hypocrisies and diversion tactics encompassed within the inflammatory, xenophobic rhetoric used to justify such legislation, one can look towards the work of Patrick William Kelly. He argues that media and popular culture reinforce ignorance over US interventionism and responsibility for international drug trafficking, deflecting the blame towards a "culturally corrupt" Latin America. In "Disfiguring the Americas: Representing Drugs, Violence, and Immigration in the Age Of Trump," Kelly urges departure from the "willful and often deliberate disfiguring" of the truth of "entangled histories of U.S. policies on free trade, immigration, and the war on drugs that have underpinned the increase in political violence and economic dislocation throughout the Americas" (212-213). Considering how draconian immigration policies like aggravated felonies inflate the degree of "crime" involved in undocumented migration, it is easier to minimize the US government's "complicity in the origins and structural maintenance of drug violence" (213).

Kelly redirects attention to the following three relevant facts: that (1) "Americans are the primary consumers of illicit drugs"; that (2) neoliberal "free trade policies, such as the North American and Central America Free Trade Agreements (NAFTA and CAFTA), pushed many desperate peasants into the drug industry when they lost their jobs to more competitive American corporations"; and that (3) the US has "funnel[ed] billions of dollars to the Colombian and Mexican governments," who fund the paramilitary organizations enacting the majority of violence (213).

Building upon these key findings, Julien Mercille elaborates on *why* American demand for illegal drugs must be addressed and *how* “the war on drugs has served as a pretext to intervene in Mexican affairs and to protect US hegemonic projects like NAFTA, rather than as a genuine attack on drug problems” (1637). In his article, “Violent Narco-Cartels or US Hegemony? The Political Economy of the 'War on Drugs' in Mexico,” Mercille clarifies how cheaper importation of subsidized goods under NAFTA caused a “loss of about 2.3 million jobs in the agricultural sector,” (1642) and thus displaced and dispossessed farmers, creating the desperation necessary to either emigrate or join the more lucrative drug market. Departing from the neoliberal supply-side approach that created such problems in the first place, Mercille cites the Latin American Commission on Drugs and Democracy’s unwavering claim that “the long term solution for the drug problem is to reduce drastically the demand for drugs in the main consumer countries,” (1650) which evidently includes the United States (1637). As seen with the disproportionate prosecution of black Americans for the majority-white issue of drug involvement, immigrants face excessive prosecution for an issue actually driven by non-immigrants. The United States’ rejection of this “consensus on drugs policy,” as seen in using “64 percent of the drug control budget to interdiction and to arresting, prosecuting, and incarcerating drug offenders” (1650) thus demonstrates a greater commitment to economic and political gain than to the actual alleviation of the “drug problem”.

Wendy Vogt supplements Kelly’s argument about US economic investment in the illicit drug market in her article, “The War on Drugs is a War on Migrants,” while uniquely centralizing the narrative of the innocent individual migrant caught in such an exploitative *system*. She stresses that bars to legitimate entry (as the result of increasing state and border

security) force migrants down dangerous paths risking “abuse, extortion, kidnapping, rape, dismemberment and death,” and moreover, that this “present-day violence against migrants cannot be separated from longer trajectories of [...] neoliberal restructuring and the hemispheric war on drugs” (1). Specifically, she notes how Plan Colombia saw that US military aid would only *shift* drug trafficking from the Caribbean corridor to these land routes across Central America and Mexico, forming a “guise” of improved security that would in actuality “empower a new network of cartels” (3). With the escalation of the drug war, the US’s “multi-billion dollar security-industry,” would then profit from these new land networks through the “Mérida Initiative and the Central American Regional Security Initiative (CARSI) to train, fund, and equip military and police units in Mexico and Central America” (3). Vogt stresses that “such programs do not increase citizen security, but rather fuel new markets for the illicit movement of drugs, weapons and people,” (3) entrapping migrants within a “clandestine cycle of violence” (1). This “clandestine violence” echoes Alexander’s warnings of the dangers of policies that are on the surface, “colorblind” promotions of law and order, but in reality, exploit a desperate, impoverished group of people of color.

In “Blaming Immigrants: Nationalism and the Economics of Global Movement,” Neeraj Kaushal expands on Vogt’s identified failure of the hemispheric War on Drugs by calling for new qualitative metrics to evaluate successful border enforcement, rather than a simple quantitative assumption that increasing enforcement will increase security. According to Kaushal, reducing legitimate threats of international trafficking and terrorism should not rely on “restrictions on immigration from certain countries or immigrants of certain ethnic or religious groups,” (163) but rather, abandoning the use of simplistic “measures of fortification,” like

“length of fence, number of border personnel, positioning of border surveillance, and creation of detention facilities” as measures of success. Prioritizing efficiency, Kaushal concludes that ignoring impact in such a manner is “an exercise in futility” (163). Applying contemporary policy debates, Trump’s “border wall” should be subject to such questioning, as the logic behind this form of increased fortification seems to rely purely on quantitative, rather than qualitative, reasoning. A positive feedback loop emerges from such reasoning, wherein more unauthorized migrants = more “criminals” = more “danger” = more border control = more illegal migration.

Returning to Kelly’s evaluation of the popularity of narcoterrorism in mainstream media, it is no surprise that “a newly invigorated anxiety and aggression” about drug violence is easily “displaced on Latinos and the ‘problem’ of ‘illegal’ immigration”(Kelly 221). Like the stereotypical “criminalblackman,” such representations mediate interaction with the “illegal immigrant”. Politicians like Trump and Hatch can therefore easily exploit and fortify this ignorance, justifying harsh new anti-immigrant policies by the redirecting focus on the source of drug violence towards individual migrants, who have been prematurely branded as criminals on account of their nationality. Kelly rightly calls for accurate representation of “the desperate journeys of poor Central American migrants, whose dislocation might be seen as caused by those neoliberal disruptions,” as “they should be seen as American problems too” (225). A greater appreciation can thus be awarded to Vogt’s efforts to humanize migrants with stories that create an empathetic counter-narrative to normalized public discourse of migrant criminality.

IV. The Distinction of Race

Thus far, this paper has advanced suggestions of racial motivations behind the criminalization of immigrants, by drawing parallels to Alexander's discussion of similar drug war-driven systemic racism, and by bolstering Kelly's assertion of a hypocritical American "deflection" of blame for drug problems towards the *nationality* of a "corrupt Latin-America". This section will more aggressively apply the principles of CRT and LatCrit to uncover the distinct racialization process amidst these policies and attitudes. This analysis grounds itself in support from another work of literature that explicitly identifies the role of whiteness in benefitting from the colorblind racialization of the "illegal immigrant". Exploiting and maintaining a racially unjust status quo, as discussed previously, is a key tenet of CRT. And, considering the nativist justifications behind harsh immigration policies directed towards Mexico and Central America, LatCrit proves especially pertinent. In short, this section reveals the truly "colorblind" nature of linking drugs and migration to target Latinx people.

In *Handcuffs and Chain Link: Criminalizing the Undocumented in America*, Benjamin Gonzalez O'Brien clearly states, "the immigrant-as-criminal narrative has been closely tied to race, with minority groups, both immigrant and native born, often portrayed as having greater propensities toward crime than whites" (2). At the heart of this "immigrant-as-criminal narrative" lies an essentialist misunderstanding of racial identity that implicitly advances white supremacy – to those who subscribe to this narrative, whiteness apparently translates to an innate innocence and superior sense of morality. CRT's insistence of the social construction of race quickly subverts this essentialist thinking, and uncovers the socialization process responsible for

creating this falsified *narrative*, not truth. By characterizing the act of entering the country without the proper documentation as a heinous “criminal” act in and of itself, and branding an entire group of foreign people of color as “illegal,” for doing so, it becomes more acceptable to convince fellow whites that these “illegals” will repeat further unlawful behavior within the country. Such nativism is entrenched in an equation of whiteness, nationality, and righteousness. Hence, speaking of “illegals” becomes a colorblind (albeit insensitive and dehumanizing) way of speaking about race.

Moreover, O’Brien distinguishes that “Latino immigrants are regularly portrayed as different from other immigrant groups,” as part of the phenomenon of the “Latino Threat Narrative,” which specifically portrays Latinx individuals as a “threat to the dominant culture in the United States;” as “criminals who drain social services;” and as an “invading force” (12). Trump remained consistent with this kind of word choice when manipulating the conversation around his emergency border wall: “we are talking about an *invasion* of our country”. He has clearly capitalized on this narrative, inflating Latinx immigrants as so great of a “threat” to the United States’ national security that their supposed “invasion” calls for declaration of a national emergency.

Not unlike the example of Rep. Orrin Hatch and IRRIRA, Governor Jan Brewer falsely claimed that “most undocumented immigrants were drug mules and associated with cartels” when arguing for the implementation of Arizona’s 2010 Senate Bill 1070, which has been notoriously nicknamed the “Driving While Latino Law” (109). Eventually dismantled, this policy would have allowed law enforcement to ask for proof of citizenship from those merely suspected to be undocumented – once again, affording an undue level of discretion to police. The

acceptance, or rather, encouragement, of racial profiling within this policy undeniably matches LatCrit's findings of "proxy discrimination" towards Latinx individuals on the basis of perceived lack of immigration status. And the presumption of drug involvement is another socially acceptable, colorblind way of advancing racial bias. Furthermore, the continued legacy of the War on Drugs, in over-scrutinizing low-level "drug mules" instead of addressing the larger systems responsible for actual violence, again proves pervasive. It motivates an ignorant and unfounded public perception of a shared criminality between immigration and drug involvement.

Connecting back to the previous section's discussion, O'Brien even identifies a similar kind of "feedback loop," that corroborates Kelly's findings, but additionally incorporates race. He first establishes, "the treatment of undocumented immigration as a crime-control issue by Congress influences media narratives, which in turn affect public opinion; public beliefs in immigrant criminality in turn help to reinforce policy making on the issue" (3). Trump and Brewer have played a role ancillary to that of Congress in attempting to enact policy through their executive power. But more importantly, in his own analysis, O'Brien draws connections to Alexander's similar War on Drugs-era discussion of the role of media in "mediating" perception of racial groups. He writes, "like blacks, undocumented immigrants are disproportionately portrayed in ways that suggest criminality and danger ... we can see the echoes of Ronald Reagan's talk of welfare queens and crack babies, both scare campaigns aimed at tapping into nativist or racist tendencies in the American public" (151). Interestingly, O'Brien's association of black and Latinx treatment itself "echoes" one of the main principles of CRT: that various minority groups are racialized differently throughout time, as the nature of socio-economic exploitation is constantly adapting. While the mass incarceration of African-Americans in the

criminal justice system is an ongoing problem that deserves continued attention, the oppressive mass deportation and detention of Latinx immigrants also needs to be addressed, as an interrelated (but perhaps more invisible) matter.

The compounding impact of such political rhetoric on public opinion clearly perpetuates racism at the level of individual bias. Like the way the War on Drugs first appealed to ideals of “law and order” to quietly incarcerate and disenfranchise African Americans on a mass scale, “research has shown that law-and-order concerns and out-group bias influenced whether individuals believed that undocumented immigrants should receive humanistic treatment”. Alarming, “this out-group bias was based on race rather than nationality, with Canadian immigrants ranked more highly on the humanistic-treatment scale than Latino immigrants, even though both had committed the same violation” (14). Remaining at the top of the racial hierarchy in the United States, the “out-group” of whites prove to be the ultimate “in-group” in possessing the sole power to determine *who* is worthy of “humanistic treatment”. Apparently, Canadians earn more empathy, trust, and forgiveness on account of their shared whiteness, whereas Mexican and other Latinx immigrants are punished more harshly for the same behavior, differing only in their racial identity (and extended association with criminality and corruption).

As a result of these processes, it is clear why O’Brien identifies Latinx immigrants as “impossible subjects,” a term originally used by scholar Mae Ngai to describe those people who are “part of the nation but also forever separate from it” (5). This contradiction embodies the fundamental marginalization set forth by CRT and LatCrit – people of color, or namely, Latinx/immigrant communities, are technically afforded membership in American society, but

practically removed from it, within the eyes of a “colorblind” legal system and status quo upheld by white complacency and exploitation.

V. The Political Expediency of Criminalizing a Racial Group Through a System With No Criminal Rights and Protections

While the previous sections have established the systemic racism targeting the Latinx community through the criminalization of immigration enforcement, this final section raises an additional concern over the *extremely exploitative nature* of this particular methodology of racial control. Despite operating like the criminal justice system, immigration law is still considered civil law, and consequently, criminal rights and protections afforded to defendants in criminal cases do not apply to most deportation cases, as these are *civil* removal proceedings. In maintaining their exponential feedback loop of anti-immigrant policy and discourse, policymakers have conveniently taken advantage of an imbalanced system that contains *no effective procedural protections* against misconduct. So not only is the Latinx/immigrant community subject to criminalization and oppression, they are subject to *expedited* criminalization and oppression.

What specifically expedites this criminalization is the inaccessibility of viable Fourth, Fifth, and Sixth Amendment protections otherwise afforded in the formal criminal justice system. In civil immigration cases, there is no effective protection from unlawful search and seizure under the Fourth Amendment – more specifically, the Exclusionary Principle’s prohibition of illegally obtained evidence except in extreme cases, as established under *Mapp v*

Ohio, does not apply. There is no protection from self-incrimination under the Fifth Amendment, and accordingly, there is no obligation during civil immigration arrests to inform people of their “Miranda” rights as ruled in *Miranda v Arizona*. And there is no right to a public defender if one cannot afford an attorney for their removal proceedings, a right proven to be guaranteed by the Sixth Amendment in all criminal cases after *Gideon v Wainwright’s* application of the Fourteenth Amendment.

In “A Diversion Of Attention? Immigration Courts and the Adjudication of Fourth and Fifth Amendment Rights,” Jennifer Chacón responds to the 1984 decision made in *INS v Lopez-Mendoza* that “when Fourth Amendment issues are raised at deportation hearings, the result is a diversion of attention from the main issues which those proceedings were created to resolve” (1564). Reducing potential violations of the Fourth Amendment to a mere “diversion of attention” or “distraction” would never be tolerated in criminal cases, as this is fundamental to due process. As Chacón contends, in a criminal trial, a “noncitizen could raise allegations of constitutional rights violations, and if a violation was established, he might well be able to argue that evidence illegally obtained in contravention of these constitutional protections ought to be suppressed for purposes of adjudicating the case against him. But in hundreds of thousands of cases each year, noncitizens are processed not in criminal courts, but in civil courts” (1566). In these civil cases, arrestees receive no Miranda warnings of the Fifth Amendment right to remain silent and the right to have an attorney present during questioning. Moreover, “the absence of an exclusionary rule in removal proceedings for evidence obtained in violation of Miranda provides another means of using the illegally obtained testimony of a noncitizen as evidence against that noncitizen in a highly punitive, albeit civil, proceeding” (1611). It is the government’s burden to

search, arrest, detain, interrogate, prosecute, and convict criminal defendants in a manner that does not violate their criminal rights, regardless of their actual innocence or guilt of the alleged crime. However, the *Lopez-Mendoza* precedent effectively holds ICE to no such burden in civil immigration cases. Immigration judges were “not designed to police the police,” (1568) as they are “heavily constrained by a body of law that formed at a time when immigration enforcement looked very different than it does today” (1569).

These transformative changes, part of both the intention and legacy of the War on Drugs, as affirmed by Garcia Hernandez, Chacón, and Podgorny, emerge throughout this paper. Policymakers have mutated immigration adjudication and enforcement in a way that criminalizes immigrants, without balancing out these changes with necessary checks of criminal protections. It is a simple consideration to make – if “ICE agents conduct militarized raids in both criminal and civil matters,” (1577) why aren’t the defendants afforded the same means of protecting themselves from misconduct in both instances as well? Without this counterbalance, enforcement officials can thus “circumvent” these constitutional protections without fear of any effective “sanctions” against violating them (1570). This holds especially true because, without counsel, self-represented immigration respondents are typically incapable of articulating these complex legal issues in court (1624). And even when represented by attorneys, the immigration judges overseeing these cases, who are supposed to focus on nothing more than the question of deportation according to *Lopez-Mendoza*, are not necessarily well-versed in Fourth Amendment-related issues (1630). Chacón challenges this discrepancy, acknowledging that the “seamless connection” having formed between criminal and immigration enforcement is reason

enough to argue that “adequately address[ing] suppression issues should now be identified as a core competency of the immigration judge and not a peripheral diversion of attention” (1627).

Turning towards the Sixth Amendment right to counsel, many are mistaken in believing that respondents in immigration cases do not get public defenders because they are not US citizens, but this is not the reason. *Gideon v Wainwright* applies the Fourteenth Amendment’s Due Process Clause that the state may not “deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws”. Due process must then apply to any “person,” not just to a citizen. Although respondents in removal proceedings have the formal right to have an attorney present under Title 8 of the US Code, they do not have the right to an attorney *at the government’s expense*. As with all other civil cases, immigration respondents must act as their own attorney when they do not have access to representation. Unlike civil cases, however, they are not merely litigating over civil disputes – they are often detained, and expected to argue against an ICE Trial Attorney about why they should not be deported, even when they do not speak English, even when they need asylum. When the high stakes of deportation and (often indefinite) detention pose a serious threat to an individual’s life and liberty, how is this lack of access to counsel *not* a violation of due process?

In “*Gideon’s Migration*,” Ingrid V. Eagly discusses the potential of expanding the criminal right to a public defender to immigration cases, given the recent integration of the two legal systems. While Eagly does not take a definitive stance over whether this *should* be implemented, she does point to evidence that suggests a need for such expansion, given the way that public defenders already often play an ad-hoc advisory role for immigration-related matters

in criminal cases. They “now advise clients on the immigration consequences of convictions, negotiate ‘immigration safe’ plea bargains, defend clients charged with immigration crimes, and in some model programs, even represent criminal defendants in immigration court” (2282).

Because immigration status is now so interlaced within criminal cases, there might be grounds for claiming a right to the Criminal Justice Act (CJA)’s funding for federal public defenders for any civil removal proceeding interacting with or initiated by the criminal justice system. (As established previously, these cases could include those with detained respondents, or respondents put in proceedings due to the Secure Communities Program, section 287(g) agreements, or aggravated felonies.) The Supreme Court’s 2010 decision in *Padilla v. Kentucky* already imposes an *obligation* for criminal defense attorneys to advise clients of how guilty pleas might affect immigration status, considering removal’s “close connection to the criminal process”. According to Eagly, “CJA funding specifically allows for the provision of representation on ‘ancillary matters’ necessary for the proper representation of criminal defendants,” including “immigration-related concerns” (2299). This paper has demonstrated how our immigration legal system operates as “ancillary” to the punitive War on Drugs and criminal justice system. Civil immigration respondents are still essentially “criminal defendants,” who would otherwise be in criminal proceedings where they would be entitled to a public defender, but, due to the strategic cherry-picking of policymakers, face the same kind of adversarial system under the different names of deportation and detention. These existing gaps – between what respondents *should* be entitled to and what they actually *are* – reflect the deliberate maintenance of a status quo that can be easily exploited for political gain.

While Chacón’s and Eagly’s discussions do not put race at the forefront of their discussions of the disparity between criminal and immigrant rights, they do make relevant concessions about these procedural limitations that can be further explored as racially pervasive. Chacón writes that “deportation has increasingly come to be used as an adjunct to criminal punishment, operating as a means of ‘post-entry social control’ ” (1574). This language matches Alexander’s identification of the racially-motivated phenomenon of mass incarceration as the “prevailing system of control” of African Americans (Alexander 223). Moreover, Chacón explicates how “immigration enforcement does not affect only noncitizens” due to the ubiquity of “mixed-status families” containing both documented and undocumented individuals. She clarifies, “because noncitizens and citizens share homes and neighborhoods, citizens and noncitizens who are lawfully present are subjected to enforcement actions as a collateral consequence [...] including prolonged stops, searches, interrogations, arrest, detention, and (in rare cases) even removal” (1599). As discussed previously, racial bias often permeates the discretion fueling the “volume approach” propagated by the War on Drugs. Therefore, the system not only sweeps up “families” and “neighborhoods,” but in aggregate, the Latinx community. Once again, these findings attest to the “proxy discrimination” that is integral to LatCrit. Eagly also references race, by affirming how the connection between economic and racial inequity hinders access to justice. In line with CRT’s rejection of the neutrality of constitutional law, Eagly acknowledges that, in addition to economic equality, “less explicitly, Gideon was also a case about racial equality ... [such] decisions can be understood as seeking a level playing field within a society fraught with racial inequalities” (2306). These socioeconomic inequalities manifest as barriers that are common to the Latinx/immigrant community – these

individuals have often been forcibly displaced from impoverished home countries, and/or economically exploited for cheap labor in the United States. Latinx immigrants thus face an arguably *categorical* lack of access to justice when they cannot afford attorneys in highly punitive civil immigration courts.

Not only have those waging the War on Drugs increasingly treated immigrant respondents like criminal defendants by punitively transforming immigration law, but also, they continue to feed the racist construction of the “illegal immigrant” by taking advantage of a broken, neglected system that is almost rigged to create “criminals” by denying respondents basic rights and protections. The result of cherry-picking punishment without protection is a clear violation of due process – a right that should be afforded to every person, not citizen, within US jurisdiction. Refusing to admit how this systematically threatens and targets a distinct racial group, by accelerating their disenfranchisement through either detention or removal, *must be characterized as colorblind*. Alexander’s original framework reminds us how colorblindness furtively upholds racial hierarchy, thus reinforcing CRT and LatCrit’s key finding that racism continues to be the “invisible” norm for Latinx people.

CONCLUSION

In conclusion, the War on Drugs proves to play an instrumental role in criminalizing our immigration legal system. It has imparted a punitive transformation on immigration policy, where the current scale of detaining and deporting Latinx individuals now resembles the decades-long phenomenon of mass incarceration of African Americans within the criminal justice system. These two forms of racial oppression share many structural similarities in the ways they create a high volume of “criminals” within each community through unjust systems of enforcement and adjudication, and in turn capitalize on the unbalanced results of such prosecution to suggest (in a socially acceptable, “colorblind” way) that each community is *predisposed* to criminality.

Nativist politicians like Trump have capitalized on this tacit, systemic criminalization of the Latinx immigrant community, by justifying increasingly harsh immigration policy through xenophobic, inflammatory rhetoric that feeds on the public’s artificially-inflated anxieties over drug violence and national security. Such rhetoric, reinforced by the media and popular culture at large, draws on racial stereotypes to continually associate drugs, migration, and criminality – topics that are on the surface, “colorblind,” but interact with each other in a clear racialization process aimed specifically at Latinx individuals. This scapegoating strategically blames the “illegal immigrant” for international drug violence, a problem that in reality, owes itself to larger policy failures of the US government.

While the War on Drugs is notorious for targeting people of color, it is vital to grasp its particularly “colorblind” exploitation of the Latinx community, whose unique issues are often

lost in a black-white binary understanding of race relations in the United States. When comparing mass incarceration and mass deportation/detention, a critical distinction arises wherein respondents in civil immigration proceedings effectively lack access to the criminal protections and judicial oversight afforded to defendants in the official criminal justice system. Although these protections often fail to be fully realized in criminal justice (which is another issue in and of itself), they are *procedurally absent* from immigration law. What results is an *unchecked, expedited* means of disenfranchising an already vulnerable community of color, which should evoke outrage from those fighting for social justice and racial equity.

The emerging field of Civic Engagement posits that real change can only occur with a widespread, grassroots movement that finds community-driven solutions to large-scale structural problems. Therefore, efforts towards reform and decriminalization of immigration policy should not only reject any “race-neutral” approach, but also, must actively *learn from* shared histories and establish cross-racial alliances across the larger movement for criminal justice reform. The ever-salient issues of mass incarceration, detention, and deportation prove to be closely interrelated, and so, the affected communities all possess a responsibility towards each other’s empowerment by dismantling the War on Drugs in its entirety. Colorblindness cannot be met with more colorblindness, as such complacency only extends the life of white supremacy into its next generation.

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