Defending the "Bad Immigrant": Aggravated Felonies, Deportation, and Legal Resistance at the Crimmigration Nexus

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DEFENDING THE “BAD IMMIGRANT:” AGGRAVATED FELONIES, DEPORTATION, AND LEGAL RESISTANCE AT THE CRIMMIGRATION NEXUS

by

SARAH ROSE TOSH

A dissertation submitted to the Graduate Faculty in Sociology in partial fulfillment of the requirements for the degree of Doctor of Philosophy, The City University of New York

2019
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This manuscript has been read and accepted for the Graduate Faculty in Sociology in satisfaction of the dissertation requirement for the degree of Doctor of Philosophy.

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ABSTRACT

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by

Sarah Rose Tosh

Advisor: David Brotherton

This dissertation explores the development and effects of the “aggravated felony”—an expansive legal category that has spurred the detention and deportation of hundreds of thousands of immigrants, including many green-card-holding lawful permanent residents, over the past thirty years. Offenses in this category need not be “aggravated” nor “felonies,” but rather, include a broad range of criminal convictions, including misdemeanors, ranging from check fraud and simple drug possession to drug trafficking and murder. Non-citizens in removal proceedings based on aggravated felony convictions are mandatorily detained and almost certainly deported—usually without legal representation. Still, despite growing academic interest in deportation and the widespread acknowledgement of criminal justice system inequities, there is very little sociological research on criminal deportation, and none focused directly on the aggravated felony. With an aim toward filling this gap, this dissertation employs critical perspectives and qualitative methods to examine the social forces that contributed to the development of the aggravated felony—from its creation in the Anti-Drug Abuse Act of 1988 to its extreme expansion in the punitive immigration laws of 1996—as well as its contemporary effects on immigration court processes and outcomes in New York City—the only city in the country to guarantee lawyers for detained immigrants facing removal and an increasing focus of the Trump deportation regime. Drawing on 39 interviews with lawyers and outer court actors, a year of ethnographic immigration court observation in NYC, and the analysis of governmental and organizational archival data, findings confirm and expand upon existing critiques of the aggravated felony, while also revealing innovative and understudied strategies of resistance to the category’s extreme effects. By demonstrating how immigration enforcement and deportation work to doubly punish groups already disproportionately targeted by the criminal justice system, this study provides an illustrative example of how criminal justice disparities—especially those related to race and ethnicity—are reproduced through immigration law. Furthermore, by describing creative forms of legal resistance that have emerged in the unique policy conditions of NYC, this dissertation has key implications for advocates and legislators concerned with creating equal systems of justice and protecting the rights of immigrants nationwide.
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Table of Contents

1. Introduction---------------------------------------------------------------2
2. Literature Review----------------------------------------------------------9
3. Methods, Data, and Analysis----------------------------------------------29
4. Moral Panic and the Development of the Aggravated Felony------------------45
5. Immigration Court Impacts of the Aggravated Felony-----------------------71
6. The Aggravated Felony and the Reproduction of Inequality------------------104
7. Legal Resistance to the Aggravated Felony---------------------------------144
8. Conclusion---------------------------------------------------------------182

Appendix A: Alphabetized List of Aggravated Felonies------------------------191
Bibliography-----------------------------------------------------------------193

Tables and Figures:
Figure 1. Total Numbers of Deportations from the United States (1998-2018) -------- 16
Figure 2. Number of Immigrants Ordered Deported in New York City Immigration Courts (1998-2018) -----------------------------------------------34
Figure 3. Major Elements of Moral Panic -------------------------------------51
Table 1. Major Laws Shaping the Development of the Aggravated Felony Category (1988-1996) -------------------------------------------------------------------64
Table 2. Forms of Relief from Deportation, Numbers Granted in 2017, and Availability to Non-Citizens Convicted of Aggravated Felonies -----------------------------------78-79
Figure 4: The U.S. War on Drugs and Streams of Immigration and Deportation 119
Table 3. Precedential Supreme Court Decisions Affecting Interpretation of Aggravated Felony -----------------------------------------------------157
1. Introduction

The idea that certain immigrant groups are to blame for social problems like drugs and crime, and that their exclusion or removal will therefore help to solve these problems, is an ongoing theme throughout American history. From the Chinese Exclusion Act of 1882, which drew on societal attitudes linking Chinese immigrants with opium, to the prohibition of marijuana in the 1930s with the support of racist campaigns associating the drug with “dangerous” Mexican immigrants, the United States has a long history of passing legislation based on supposed links between immigration, drugs, and crime (Gyory 1998; Recio 2002). Today, the trope of immigrant criminality is hyper-visible in President Donald Trump’s efforts to expand immigration enforcement, increase deportation, and build a wall on our southern border, as well as his infamous campaign-trail assertions that Mexican immigrants are “bringing drugs,” “bringing crime,” and are “rapists” (Lee 2015). However, it is also visible in liberal proposals for immigration reform that call for the amnesty of immigrants deemed deserving (i.e., families, children, students) by contrasting them to those deemed undeserving (i.e., so-called criminal aliens). For example, Obama, whose administration presided over the deportation of close to three million immigrants, more than any administration before, emphasized the need to remove “criminals, gang bangers, people who are hurting the community, not…folks who are just here because they’re trying to figure out how to feed their families” (Thompson and Cohen 2014). This false dichotomy between good and bad immigrants not only relies on the idea that those deemed criminal could not possibly have positive ties to their families and communities, but it also combines all immigrants with any type of criminal history into one monolithic category: criminal aliens who are deserving of deportation. With immigrant criminality on the forefront of the national conversation, and the deportation of “criminal aliens” framed as a top political
priority, there is an increased need for critical research that seeks to better understand affected populations and the legal basis for their removal.

The “aggravated felony,” first introduced in the Anti-Drug Abuse Act of 1988 and expanded upon several times in the subsequent decade, refers to a category of crimes for which non-citizens—both documented and undocumented—can be deported under immigration law. Although immigration law is federal, the 35 offense types listed in the Immigration and Nationality Act’s (INA) definition of an aggravated felony\(^1\) can also be applied to a wide gamut of state-level offenses. In fact, aggravated felonies need not be “aggravated” nor “felonies,” but rather, encompass a broad range of crimes, including misdemeanors, ranging from check fraud and simple drug possession to drug trafficking and murder (Yates, Collins, and Chin 2005). Immigrants convicted of aggravated felonies are subject to mandatory detention and almost certain deportation, as they are ineligible for almost all forms of legal relief from removal (Podgorny 2008). Furthermore, due to the administrative, or civil, status of immigration law, deportation proceedings are not subject to the same due process requirements as criminal law. Therefore, immigrants convicted of aggravated felonies can be detained for months or even years without bond, are not guaranteed lawyers, and can even be deported without an opportunity to plead their case in court, through a process of expedited administrative removal (Cook 2003). As a ground of deportability, it is the federal government’s burden to prove that an immigrant’s conviction actually qualifies as an aggravated felony. However, this deportability usually goes uncontested, as only 14% of detained non-citizens manage to secure legal representation for their removal proceedings (Gyory 1998; Recio 2002). Once deported for an aggravated felony,

\(^1\) See Appendix A.
immigrants are barred from ever returning to the United States, and are subject to enhanced criminal penalties for attempted re-entry (Bennett 1999).

Although the Department of Homeland Security (DHS) does not readily release statistics on the number of deportations based on aggravated felonies, estimates hold the category accountable for the detention and removal of hundreds of thousands of immigrants over the past 30 years—many of them legal permanent residents (LPRs) or other long-term residents (TRAC Immigration 2006, 2016). From 2002 through 2018, almost 150,000 aggravated felony charges were asserted in deportation proceedings opened in U.S. immigration courts, and from 2012-2018, aggravated felonies accounted for 30% of criminal deportation cases opened in immigration courts (TRAC Immigration 2011, 2019d). While the outcomes of these proceedings are unclear, numbers of aggravated-felony-based-deportations are likely even higher when accounting for expedited removals—statistics that have yet to be released. Based on a combination of data sources, it appears that aggravated felonies impelled close to 200,000 total removals in 2014 and 2015 alone (Gonzalez-Barrera and Krogstad 2016; U.S. Department of Homeland Security 2015, 2016) and although total yearly deportations have decreased in the years since 2014, criminal convictions remain a key basis of removal. ICE has reported that 56% of 482,204 total deportations in 2017 and 2018 were criminal removals, although it is not clear how many of these were based on aggravated felonies (U.S. Immigration and Customs Enforcement 2017, 2018c). While immigration enforcement under Trump has expanded beyond Obama’s purported focus on “serious criminals” to include many who have no criminal history at all (Medina 2017), ICE’s continued emphasis on drug crimes and other crimes classified as aggravated felonies, ensures that the category remains prominent (Bialik 2018; U.S. Immigration and Customs Enforcement 2017). As the Trump administration aims to ramp up the deportation
of immigrants convicted, or even suspected of, crimes, the aggravated felony endures as a key tool of the contemporary deportation regime (Aja and Marchevsky 2017; Shear and Nixon 2017).

While there is a growing sociological literature on the ways that immigrant enforcement and deportation criminalize and punish the undocumented and their families (Abrego 2014; Aranda and Vaquera 2015; Dowling and Inda 2013; T. Golash-Boza 2015; Gonzales 2011; Menjívar and Abrego 2012; Welch 2002), and a wide body of criminological research that describes the disparate outcomes of various criminal justice system processes (Beckett and Sasson 2004; Bobo and Thompson 2006; Chambliss 2003; Reinarman and Levine 1997; Tonry 1995) neither field has devoted serious attention to the topic of criminal deportation (exceptions include Brotherton and Barrios 2011; Golash-Boza 2015; Newstead and Frisso 2013). By failing to critically engage with immigration system outcomes for non-citizens with non-immigration-related criminal convictions, our fields run the risk of upholding a “good immigrant, bad immigrant” binary that lumps all immigrants with criminal records into a monolithic group that is undeserving of deportation. There is no existing sociological or criminological research focused on the aggravated felony category in particular, despite its unique legal significance and serious consequences for immigrants and their families. Most of the current literature regarding aggravated felonies is published in law journals, where legal scholars have examined the written policy, an approach which focuses on inconsistencies between abstract legal principles and the Constitution, international governing doctrines, or existing judicial decisions (Bennett 1999; Cook 2003; Miller 2003; Podgorny 2008; Yates et al. 2005). This literature is key in informing a historical analysis of the law, and in better understanding its on-the-books legal implications. However, it does not include a systematic assessment of the way in which immigration court
actors experience the aggravated felony’s everyday outcomes, nor does it look deeply into the cultural and structural context from which the category emerged.

In order to fill this gap, this dissertation qualitatively examines the historical development of the aggravated felony, as well as its everyday outcomes in today’s deportation regime, through an exploration of the following two research questions:

1. How have social, political, and cultural forces affected the historical development of the aggravated felony legal category?
2. How does the aggravated felony legal category affect everyday immigration court processes and outcomes for non-citizens with criminal records?

Spurred by law and society’s distinction between the law-on-the-books and the law-in-action, this dissertation is the first qualitative socio-legal analysis of the aggravated felony category. An initial investigation draws from legislative archives, historical research, and critical theory to better understand the cultural and structural factors that shaped the category’s development, from its inception in the Anti-Drug Abuse Act of 1988 through its extreme expansion in the sweeping immigration legislation of 1996. Employing a critical criminological approach, findings emphasize the importance of broader punitive turns in drug, crime, and immigration policy, as well as a racialized moral panic about immigrant criminality in a context of growing multiculturalism and neoliberal economic restructuring. This historical exploration is followed by an examination of modern immigration court processes and outcomes for immigrants with alleged aggravated felony convictions, based on a case study of New York City (NYC).

While best known as a longtime immigration hub and vocal “sanctuary city,” several thousand immigrants are deported from NYC each year, and in recent years, the city has been specifically targeted by federal immigration enforcement under the Trump presidency. In the
President’s first year in office, the city experienced an 88% percent increase in immigration arrests and a 150% increase in deportations (Stringer 2019; TRAC Immigration 2018a). Furthermore, as the first municipality in the country to guarantee legal representation for detained immigrants facing deportation (Stave et al. 2017), NYC presents a unique opportunity to demonstrate the harsh effects of the aggravated felony despite “best case scenario” court conditions, while also exploring the potential for resistance through the law.

Drawing on 39 interviews with lawyers and advocates, a year of ethnographic immigration court observation, and governmental and organizational archival data, findings contextualize and elaborate on existing critiques of the aggravated felony category, while also revealing innovative and understudied strategies of resistance to the category’s extreme effects. I argue that the intertwining of drug, crime, and immigration policy that underlies the harsh and racially disparate outcomes of the aggravated felony category, also provides the grounds for emergent forms of legal resistance.

This dissertation provides an illustrative example of the way punitive policies regarding drugs, crime, and immigration contribute to the disproportional criminalization of immigrants of color. Findings underscore the central place of law in the social construction of race, and demonstrate the way that deportation works to doubly punish groups already targeted by the criminal justice system. Findings also emphasize the key place of drugs and their historical and ongoing racialized criminalization in the social control of immigrants. However, in addition to illustrating ways in which the law can create and uphold inequality, this research also confirms the law’s role in creating opportunities for resistance. The key role of the criminal justice system in observed forms of legal resistance is significant for the study of “crimmigration,” a concept that has to this point mostly been employed to understand the ways intertwining criminal justice
and immigration systems criminalize and punish immigrants. This dissertation expands upon crimmigration research by identifying ways that this intertwining can also create possibilities for resistance. Lastly, by highlighting forms of legal resistance that have emerged in the unique policy and organizational conditions of NYC, this study has important implications for advocates and legislators concerned with protecting the rights of immigrants and creating equal systems of justice nationwide.

Chapter Two provides a review of relevant literatures, followed by details on the study’s methodology, including theoretical backing, research design, data, and analysis, which can be found in Chapter Three. Chapter Four describes the development of the aggravated felony category, employing moral panic theory and historical data to better understand how cultural and structural conditions made the folk devil of the “criminal alien” particularly salient in the advancement of punitive policy over the course of the 1980s and 1990s. Chapter Five draws from my ethnography and interviews to examine the everyday outcomes of the aggravated felony category. Chapters Six and Seven draw from the same data, plus judicial decisions and organizational literatures, to describe the role of the aggravated felony in reproducing criminal justice system inequalities, as well as observed strategies of legal resistance. The final chapter synthesizes major findings and discusses implications for policy and future research.
2. Literature Review

This dissertation explores the development and effects of the aggravated felony category, an understudied aspect of immigration law, and a key tool in today’s deportation regime. Existing on the fault lines between drug, crime, and immigration policy, the aggravated felony category must be understood in the context of cultural and legal phenomena that are both longstanding and distinctly modern. While deportation, and criminality-based deportation in particular, have existed since this country’s inception, the past four decades have seen unprecedented levels of immigration enforcement, detention, and removal, in the United States and across the globe (Brotherton and Barrios 2011; Brotherton and Kretsedemas 2018; T. M. Golash-Boza 2015b; Kanstroom 2012). The aggravated felony is a direct result of a punitive turn in immigration, crime, and drug policy which occurred over the course of the 1980s and 1990s (Feeley and Simon 1992; Garland 2001; Simon 2001), and a key example of the increasing intertwining of immigration and criminal justice policy—referred to by legal scholars as the “crimmigration” (Stumpf 2006)—over the past four decades. This dissertation draws on critical theory to examine how cultural and structural factors unique to the late-modern era combined with longstanding and racialized conceptions of immigrant criminality toward the punitive development of the aggravated felony. Furthermore, this research sheds light on the on-the-ground workings of today’s deportation regime, and reveals once again the way in which laws—including those at the crimmigration nexus—can exacerbate inequality, while also providing unique opportunities for resistance. This chapter provides a review of relevant literatures on the history of the “criminal alien” in the United States; the punitive turn in American drug, crime, and immigration policy; the modern deportation regime; theories of deportation; the “crimmigration nexus,” law and inequality; and resistance through the law.
**History of the “Criminal Alien” in the United States**

Although the aggravated felony category was first introduced in 1988, criminal activity as a basis for immigrant inadmissibility or deportation is not a new development in the United States. Since the late 1700s, even before the federal government took any part in regulating immigration, states began barring entry of convicted criminals from other countries (Cook 2003).

In the late 1800s, in response to lawsuits related to the Chinese Exclusion Act, “the Supreme Court—eager to find a home for the power to control immigration—ruled that the immigration mandate was tantamount to the plenary—or unconditional and unimpaired—power of the government to conduct international relations and commerce,” (Coleman 2007:61). This decision placed exclusive control over immigration policy in the hands of Congress and the executive branch of the federal government, with limited judicial oversight and without a requirement to adhere to general legal doctrine. The federal government’s first efforts toward controlling immigration in this period placed a heavy emphasis on criminal history as a basis for inadmissibility, with laws banning convicts exiled from their countries of origin, as well as "idiots," "lunatics," and "persons likely to become public charges" (Cook 2003:298). In 1891, Congress passed a law to include individuals who had committed crimes exhibiting "moral turpitude" to those denied admission into the country. Legal scholar Diana Podgorny (2009: 291) explains,

> Courts have never clearly defined the term "moral turpitude." However, the term is generally understood to connote something more than mere illegality or criminality, and consequently, it is evaluated based on moral, rather than legal, standards. Courts have described moral turpitude as "an act of baseness, vileness, or depravity in the private and social duties which a man owes to his fellow men or to society in general, contrary to the accepted and customary rule of right and duty between man and man."

The term’s ambiguous definition made it a useful tool in early efforts of the federal government to restrict immigration by "undesirable" potential citizens. While crimes of moral turpitude were used to exclude non-citizens throughout the turn of the century, it was not until 1917 that the
federal government put in place its first official deportation policy, and by 1938, immigrants could be deported for felonies or crimes involving moral turpitude, but only if they were committed within five years of admission into the country (Cook 2003; Kanstroom 2012).

These relatively limited criminal grounds for deportation remained in place for most of the twentieth century. Then, in the 1980s, amidst growing calls for a federal response to the dual "crises" of undocumented immigration and immigrant criminality, Congress passed a slate of legislation that expanded the state’s ability to investigate and deport immigrants for criminal offenses. The Immigration Reform and Control Act (IRCA) of 1986 allowed for expedited deportation of criminal aliens by the Attorney General, and the Anti-Drug Abuse Act (ADAA) of 1986 required the INS to coordinate with local law enforcement officials to investigate drug cases involving non-citizens (Yates et al. 2005). However, it was the ADAA of 1988 which really set the stage for the massive expansion of deportation as punishment for criminal offenses in the years to come. With a stated aim of fighting drug trafficking, which had been heavily linked to immigration by policymakers and the media, the ADAA of 1988 amended the Immigration and Nationality Act (INA) of 1965 with language specifically aimed at allowing for the more severely punitive treatment of criminal aliens, through the creation of the aggravated felony legal category. Over the course of the 1990s and 2000s, the bases for criminal removals continued to expand, and an emphasis on enforcement, detention, and deportation of “criminal aliens” became the driving force of immigration policy.

This history of excluding and removing immigrants from the U.S. based on criminal activity has gone hand-in-hand with a longstanding rhetoric that calls for more restrictive and punitive immigration policy linking certain immigrants with crime, drugs, and other social ills. The Chinese Exclusion Act of 1882 was buttressed by moral crusades against the evils of opium,
a drug widely used and accepted in the United States for many years before then, alongside racist claims that Chinese immigrants were morally weak and chronic users of drug. A similar association between Mexican immigrants and marijuana was used throughout the twentieth century, both to support the prohibition of marijuana, and to support exclusionary immigration policies toward Mexicans (Gyory 1998; Recio 2002). Panics relating Mexicans to drug use and drug trafficking feed into a broader outlook that frames Latino immigrants as violent, playing into what Chavez (2008: 3) has deemed the Latino threat narrative: “part of a grand tradition of alarmist discourse about immigrants and their perceived negative impacts on society.”

Such stereotypes linking immigrants—and Latino immigrants in particular—with drugs and crime, persisted throughout the 20th century, and are perhaps stronger than ever today. This is evident in widespread support for the immigration policy platform of our current president. However, despite the continuing political popularity of the “criminal alien” trope, it has long been found to have little basis in reality. Research has consistently shown that immigrants are actually less-likely to commit crimes than their native-born counterparts (Ewing, Martinez, and Rumbaut 2015; Hagan, Levi, and Dinovitzer 2008; Martinez, Jr. and Valenzuela, Jr. 2006; Percival and Currin-Percival 2013; Zatz and Smith 2012), and some has even indicated that immigration has actually played an important role in decreased crime in urban areas (Martinez, Jr. and Lee 2000; Sampson 2008; Wadsworth 2010). Still, stereotypes linking immigration and crime continue to inform immigration policy and processes—including the development of the aggravated felony category, as Chapter Four will explain.
The Punitive Turn in Drug, Crime, and Immigration Policy

While current immigration policy platforms draw from longstanding tropes linking immigrants and crime in the United States, they are also uniquely influenced by the legislative legacy of the past four decades. Over the course of the 1980s and 1990s, drug-control policy, crime-control policy, and immigration policy in the United States all went through dramatic shifts, the results of which remain significant today (Simon 2001; Stumpf 2006)—including in the evolution of the aggravated felony category. While the War on Drugs was officially declared by President Nixon in 1971, its modern manifestation came of age in the 1980s with a proliferation of anti-drug rhetoric, spending increases, and interdiction-centered policy under President Reagan. From the mid-1980s to the mid-1990s, the country witnessed the continuous induction of increasingly punitive drug legislation focused on criminalization and enforcement over prevention and treatment. This decisive shift in policy was manifest in laws like the Anti-Drug Abuse Acts of 1986 and 1988 which ushered in harsher penalties and mandatory minimum sentences for drug offenders (Rowe 2006). Bush’s $7.8 billion National Drug Control Strategy of 1989 continued in this vein, with an emphasis on stronger law enforcement, mandatory sentencing, and increased arrests and incarceration (Lusane and Desmond 1991:71). Laws like these set the tone for drug control policy for years to come.

With the invigorated focus on drugs came an era of “get-tough-on-crime” criminal justice policy characterized by retributive laws, increased enforcement, and astronomical levels of incarceration (Chambliss 2003; Lusane and Desmond 1991; Rowe 2006). Between 1972 and 1988, government funding for criminal justice increased fivefold (Chambliss 1995:237). The “get-tough” paradigm became the ruling American crime control framework, and subsequent administrations continued to throw more and more money into law enforcement and criminal
justice. The Crime Control Act of 1993 and the Violent Crime Control Act of 1994, both passed by the Clinton administration, pledged $23 billion and $30 billion respectively, making the 1994 act the most expensive crime bill in American history (Chambliss 2001:135). Increased funding for law enforcement and prisons, combined with extensive mandatory minimum sentencing laws, three-strikes provisions requiring extended or life sentences after three felonies, and extremely aggressive policing tactics all contributed to unprecedented increases in incarceration. From 1980 to 2000, the United States quadrupled its prison population and become the most incarcerating country in the world (Chambliss 2003:295). The harsh laws of the War on Drugs played an important role in this increase (Chambliss 2003; Meares 2003).

At the same time, immigration policy in the United States also became more criminalizing and punitive, as law after law expanded the range of deportable offenses and cut away due process rights for undocumented immigrants and so-called “criminal aliens” (Warner 2005; Welch 2003). Like the shifts in drug and crime policy, the new crack-down on immigration was typified by the same “get-tough” rhetoric, and was also implemented through many of the exact same laws. For example, the Anti-Drug Abuse Act of 1986 was the first law to make any drug offense to the federal schedule of drug classifications a basis for inadmissibility to, and deportability from, the United States. This made it so that someone who had been fined for a small quantity of marijuana at any point in their life would face deportation or permanent barring from the United States in the same way that a major drug trafficker would. The Anti-Drug Abuse Act of 1988 continued this expansion of deportable crimes with the creation of the aggravated felony distinction. The Violent Crime Control and Law Enforcement Act of 1994 further restricted the rights of immigrants with aggravated felonies and made it so these
“criminal aliens” were no longer entitled to a due process hearing before deportation (Kurzban 2008; Warner 2005).

The continual expansion of deportable offenses and cutting away of due process rights of immigrants, which was inextricably linked to antidrug and anticrime legislation throughout the late ‘80s and early ‘90s, culminated in the Illegal Immigration Reform and Immigration Responsibility Act of 1996 (IIRAIRA). This landmark legislation, along with the Anti-Terrorism and Effective Death Penalty Act of 1996, gave the (now-defunct) Immigration and Naturalization Service (INS) unprecedented funding and authority in the fight against undocumented immigrants and so-called criminal aliens (Kanstroom 2012; Welch 2003). IIRAIRA and AEDPA greatly expanded the aggravated felony category, removed the last remnants of due process rights for immigration cases, and made the immigration officer “judge, jury, and executioner” in deciding whether a person could enter the United States or whether a person could be deported (Kurzban 2008: 65). The significance of these laws is a running theme throughout this dissertation, and many of the findings presented in subsequent chapters point to a need for their reform.

The Modern Deportation Regime

The exclusion and expulsion of bodies from sovereign borders has been a tool invoked throughout history and all over the world (Walters 2002). In the United States, immigrant removal and repatriation have been used to varying degrees since the early years of the nation (Brotherton and Barrios 2011; Brotherton and Kretsedemas 2018; Welch 2003). In its general
modern usage, deportation refers “to the removal of aliens by state power from the territory of that state, either ‘voluntarily’, under threat of force, or forcibly” (Walters 2002:4). Before 1990, deportation rates in the U.S. never surpassed 40,000 removals a year, with an average of 18,275 removals per year from 1900 to 1990 (Flynn and Flynn 2018:118). These numbers stand in juxtaposition to the hundreds of thousands of immigrants removed each year in the twenty-first century, as seen in Figure 1 below. While the U.S. is the world leader in rates of deportation, recent decades have also seen renewed anti-immigrant sentiment, punitive immigration enforcement, and increased deportation in immigrant-receiving countries around the world (Brotherton and Kretsedemas 2018; D. C. Brotherton and Tosh 2018).

Figure 1. Total Numbers of Deportations from the United States, by Fiscal Year (1998-2018) (TRAC Immigration 2018a; U.S. Department of Homeland Security 2016)

The 2016 election of President Donald Trump brought the issues of immigration enforcement and deportation into sharp focus in the U.S. Like the rhetoric leading up to the U.K.’s Brexit vote of the same year, the Trump presidential campaign was rife with xenophobia
and promises of the exclusion and removal of immigrants and refugees (Conlon 2018). Indeed, in January 2017, within his first week in office, Trump signed three executive orders aimed toward ramping up immigration enforcement and deportation (Shear and Nixon 2017). These orders directly increased the authority of Immigration and Customs Enforcement (ICE), leading to a surge in brazen arrests and raids, many in unprecedented locations, stoking intense and widespread fear among immigrant communities (Kopan 2018; Kulish, Dickerson, and Nixon 2018; Mettler 2017; Santos 2018; Schrank 2017). ICE reported making 43% more arrests during Trump’s first year in office than during the same period in 2016. However, despite overseeing 226,119 deportations in 2017 and 256,085 in 2018, the Trump administration has yet to surpass the annual removal rates of any year under President Barack Obama and several years under President George W. Bush, as seen above in Figure 1 (Bever and Paul 2018; Golash-Boza 2018; Miroff 2017; U.S. Immigration and Customs Enforcement 2017, 2018c).

The astronomical deportation rates of the first decades of the twenty-first century can largely be attributed to the punitive turn described in the previous section. A decade of increasingly severe legislation on immigration culminated in IIRIRA and AEDPA of 1996, laws that set the stage for massive increases in deportation in the years to come (Kanstroom 2012; Welch 2003). From 2000-2008, President Bush set the record for removals under any president, only to be surpassed by his successor President Obama, who oversaw the deportation of more than two million people within his eight-year term, earning himself the nickname “deporter in chief” (Golash-Boza 2018). Despite the slight lag in deportation rates in 2017, which has been attributed to court backlogs and a decrease in border-crossing attempts, it is clear that deportation is set to increase in coming years, as the Trump administration works to broaden the scope of immigration enforcement and ramp up detention and removals(Kulish, Dickerson, and Nixon


In addition to examining the aggravated felony category in particular, an important tool of modern immigration enforcement, this research also provides a specifically-situated case study of the deportation regime in the first years of the Trump administration.

*Theories of Deportation*

The study of deportation, as a practice, complicates many of the assumptions of mainstream migration studies, in part because “definitions of ‘origin’ and ‘membership’ are disrupted by the act of removal” (Coutin 2015). Still, a number of theorists have explained immigrant exclusion and deportation through the lens of state sovereignty and social membership. Walzer (1983) sees membership as a crucial factor for the creation of viable communities in the modern world, and insists that sovereign states must have the ability to decide on the admission of new members. However, he is just as resolute that once admitted, new residents must be given a path to citizenship, as the existence of citizens and non-citizens in one state results in a type of caste-system that is inevitably not egalitarian.

Similarly, Giorgio Agamben’s (1998, 2005) theory of sovereign power—frequently invoked in studies of migrant detention and deportation (Bigo 2004; Mountz 2011; Rajaram and Grundy-Warr 2004; Tsoukala 2011)—relies on the premise that the nation-state can only sustain itself through acts of exclusion. Agamben argues that the development of nation-states is based on the creation of in-groups, or citizens, who are legally protected and given rights, and out-groups, who are denied basic rights and reduced to bare life. “Sovereignty is thus exercised by inclusive exclusion, acting on itself by defining what is not,” (Flynn and Flynn, 2018: 118). Walters (2002) also sees deportation an inevitable product of modern population management, as
well as a constitutive practice, or a “technology of citizenship,” necessary in the reproduction of our system of sovereign states.

Critical scholars have emphasized the key role played by race in these processes of exclusion, both historically and in today’s deportation regime. Gyory (1998) and Calavita (2000) highlight the centrality of race and racialization in the enactment and enforcement of the Chinese Exclusion Acts of the late 1800s. Ngai’s (2004) historical analysis of U.S. immigration law depicts the way in which deportation procedures on the Mexican/American border and administrative reforms surrounding deportation for European immigrants heavily contributed to the deportability and “illegality” of Mexican immigrants as opposed to other groups. Nevins (2002) explains how the militarized border patrol initiatives that emerged in the 1990s served to reinforce and naturalize conceptions of Mexicans as the dangerous Other, and Chavez (2008) traces the relationship between punitive immigration policy and an institutionalized “Latino threat narrative” in the United States.

Other critical theories of deportation frame the practice as a tool used by neoliberal governments to control a vulnerable surplus population of immigrant workers (DeGenova 2010; T. M. Golash-Boza 2015a; Harrison and Lloyd 2012; Theodore 2007). Drawing on Agamben, DeGenova (2010) proposed the concept of a “deportation regime,” to describe the emergence of security state mechanisms to discipline the minds and bodies of immigrant laborers. In on deportation. Employing a similar lens, Golash-Boza (2015a) foregrounds the subjectivities of immigrants, analyzing them in reference to the desires of neoliberal governments whose policies of market-based panaceas are predicated on the flexibility, utility, and disposability of a globalized work force. In this model, immigrant “illegality” and “deportability” are seen as disciplinary techniques which render non-citizen labor vulnerable and malleable to the needs of
the precarious neoliberal labor market (DeGenova 2002, 2004), and the deportee is viewed as a subject/object created, and often exploited, by the state and other structural entities (see also Hiemstra 2010).

When it comes to theorizing criminal deportation, sociology of migration’s concept of segmented assimilation attempts to account for distinct barriers to incorporation faced by different immigrant groups within highly stratified Western societies, conceptualizing immigrant criminality as the result of “downward” assimilation, or under-resourced groups’ assimilation into a criminal “underclass” rather than mainstream society (Portes 2007; Portes and Rumbaut 1996). Contradicting these traditional theories of assimilation, Young (1999, 2003b) uses the concept of “social bulimia” to describe the “inclusion/exclusion” inherent in contemporary immigration-receiving societies. Young argues that late modern societies consume and culturally assimilate immigrants and other “underclass” groups, through education, the media, and participation in the marketplace, indoctrinating them with the “image of what is a normal lifestyle, what goods and level of comfort can be expected if we play the game” (Young 1999:395)—in the U.S., “the American Dream.” When marginalized groups who are systematically propagandized with an image of what they will gain from engaging in meritocracy come up against the many structural barriers that actually surround these promised rewards, it is only rational that some members of these groups will resort to illegal opportunities. Drawing from Merton (1938), Young (1999) asserts that crime is the result of concomitant cultural inclusion and structural exclusion. Therefore, “as migrant groups become more like the majority culture, they experience higher levels of relative deprivation, and discontent in response to their poverty and their level of crime increases” (Young 2003b:457). From this perspective, criminal deportation, especially that of long-term and legal permanent residents—often the focus of the
aggravated felony category—is actually a story of successful cultural assimilation, combined with simultaneous structural exclusion. This process is illustrated by Brotherton and Barrios (2011) in their qualitative account of Dominican deportees “banished to the homeland” after being convicted of crimes in the United States.

This dissertation draws from and contributes to existing theoretical perspectives that emphasize the interconnection between deportation and race, as well as deportation’s relationship with neoliberalism. As will be explained further in Chapter Four, the development of the aggravated felony is in part, an outcome of an ongoing racialized narrative linking non-white immigrants with drugs and crime, made salient in an era of multiculturalism and neoliberal economic restructuring. In addition, as Chapter Six will describe, punitive immigration court outcomes of the aggravated felony reproduce and reinforce inequalities already engrained in the criminal justice system, and highlight the immigration system’s refusal to account for structural roots of crime in defining the “bad immigrant” who is deserving of deportation.

*The Crimmigration Nexus*

Over the past few decades, as immigration law in the United States has become more and more concerned with criminalization and punishment, criminal law has also expanded its reach and ability as it has taken on some of the judicial impunity of traditional immigration law. Legal scholar Juliet Stumpf (2006) famously coined the term “crimmigration” to describe the growing convergence between these two legal bodies. Taking up the issue at a theoretical level, Stumpf examines the way in which both criminal law and immigration law are systems which decide inclusion and exclusion based on membership theory. Just as criminal law is increasingly used to remove citizenship rights from those deemed unworthy of maintaining societal membership,
immigration law is used to deny these rights from those deemed unworthy of the initial extension of such membership. Stumpf (2006:397) explains, “When membership theory is at play in legal decisionmaking, whole categories of constitutional rights depend on the decisionmaker’s vision of who belongs.” As criminal law and immigration law converge, the harshest elements of each are emphasized, the state’s role in determining who should be included and who shouldn’t becomes central, and we are left with ever increasing, and ever more vulnerable, populations of “outsiders” who are denied constitutional rights.

The crimmigration nexus is concretely evident in the increasing use of criminal law enforcement techniques to administer immigration law, from the intense militarization of the southern border (Andreas 2012; Nevins 2010) to the dramatic growth of local and state police involvement in immigration law enforcement (Armenta 2012; Coleman 2012; Kretsedemas 2008; Provine et al. 2016; Varsanyi 2008). It is also apparent in the punitive conditions of US immigration detention centers, despite their official purpose of “administrative confinement,” rather than criminal punishment. In 2016, of the 353,000 or so immigrants detained by ICE, almost three-quarters were housed in private detention centers (Luan 2018)—which have been widely criticized for poor conditions and lack of oversight (Doty and Wheatley 2013; Hamilton 2011; Small and Altman 2018; Wessler 2016). The remainder are primarily housed in county and city jails contracted by ICE, where detained immigrants are held alongside citizens convicted of criminal offenses.

The development and repercussions of the aggravated felony legal category are another clear example of the crimmigration nexus, as a category that was ostensibly created to combat drug trafficking and other criminal offenses has expanded the punitive capabilities of immigration law, and simultaneously, has made certain criminal offenders (non-citizens) exempt from the
normal protections of criminal law (i.e., Constitutional requirements of due process). By defining
the detention and deportation of immigrant offenders as an administrative function of
immigration law, our legal system has concurrently harshened punishment for drug offenses and
other crimes and made the legal standing of immigrants—both legal permanent residents and the
undocumented—deeply tenuous. This body of legal scholarship is vital to understanding the
legislative development of the aggravated felony outlined in Chapter Four, as well as the
aggravated felony’s role in reproducing criminal justice system inequality, described in Chapter
Six. Furthermore, in strategically drawing from both criminal and immigration law, observed
tactics of legal resistance (presented in Chapter Seven) expand the concept of crimmigration
beyond purely punitive outcomes.

Law and Inequality

There is a long tradition of critical scholarship in criminology and the sociology of law
that focuses on the relationships between law, punishment, and inequality. In a seminal work in
law and society, Galanter (1974) described how the inner-workings of the legal system reproduce
inequality by privileging “haves” over “have-nots.” On a more theoretical level, Marxist
perspectives of law and deviance find the basis for the development and operation of
contemporary legal system in the needs of the ruling economic system. For example, Spitzer
(1975) describes the way in which capitalist societies use law and punishment to turn surplus
populations that threaten the capitalist social order into deviant populations that can be subjected
to social control. Reiman’s (1979) classic text, The Rich Get Richer and the Poor Get Prison
challenges the idea that the aim of the criminal justice system is to fight crime, and claims that it
instead exists to project to the American public a visible image of crime as a threat from the
poor. To do so, the justice system disadvantages the poor at every stage, while largely ignoring the far more harmful crimes of the rich.

Critical race theory developed out of the critical legal studies movement in the late twentieth century United States. Theorists in this tradition examine the intersections between race, law, and power, with an emphasis on the way in which the law works to maintain white supremacy (Delgado and Stefancic 2001). Critical race theory works from the assertions that while race itself is socially constructed, racism is an ordinary, everyday experience for people of color, and therefore a justice system that claims to be neutral will inevitably reinforce inequality. One important strand of this perspective works to explain how law helps to construct and define racial categories. For example, in White by Law, Haney-López (2006) describes how law has shaped and naturalized the category of “whiteness” over time, in part by defining it as superior to “non-whiteness.” Further, he argues that “color blindness” sustains racial hierarchies and “law no longer contributes to racial justice but instead legitimates continued inequality” (Haney-López 2006:166).

A wide body of critical literature on the relationships between race and the law came about in response to the punitive policy around drugs and criminal justice that emerged in the 1980s and 1990s. Wacquant (2001) frames the modern prison system as the latest in a sequence of “peculiar” institutions that have historically been used to define, seclude, and control African Americans since slavery, a similar idea to that expanded upon with great historical and legal detail by Michelle Alexander in The New Jim Crow (2012). The punitive laws of the War on Drugs are seen as particularly stratifying in their disproportional criminalization of low-income Black Americans. By focusing on the new “drug menace” of crack-cocaine and its association with Black inner-city communities, increasing coverage of drugs in the 1980s and ‘90s helped
create a state of panic which drew on existing racial fear and division, and the unprecedentedly punitive policy of the period only served to further racial stratification (Alexander 2012; Bobo and Thompson 2006; Chambliss 2003; Mauer 1999; Reinarman and Levine 1997). Provine (2007) provides a history of race in anti-drug campaigns from the temperance movement of the early 1900s, to the crack panic at the end of the century, showing how racist narratives have consistently provided the foundations for punitive and restrictive laws related to drugs. Tonry (1995) details the racial disproportionalities inherent in Drug War policy and enforcement, and mass incarceration of the late twentieth century, and argues that law was used deliberately by the Reagan and Bush administrations in ways that would increase racial stratification.

Another body of critical work on the intersections between race and the law interrogates immigration policies throughout U.S. history. For example, Gyory (1998) and Calavita (2000) show the processes of race-making undertaken by politicians and administrative officials in building support for and enforcing the Chinese Exclusion Act of 1882. Other scholars have argued how policy and enforcement directed at Mexican immigrants have served to produce and reinforce inequality. DeGenova (2004), Ngai (2004), and Dauvergne (2008) emphasize a dialectical relationship between the evolution of U.S. immigration law and the racialized development of the “illegal” identity, most often associated with Mexican immigrants. These theorists stress that increased numbers of unauthorized immigrants, as well as the parallel emergence and naturalization of the “illegal” label are direct results of restrictive policies, both historical and contemporary. Nevins (2010) contends that even our conception of the border as a boundary which clearly demarcates categories of people is not a given, but rather has been naturalized in our national consciousness through a variety of legal and cultural processes. The naturalization of the border and the concept of “illegality” work to justify the exclusion of
immigrants from Mexico and other countries in Latin America, as well as their unequal treatment within the United States.

This dissertation draws from existing literature on law and inequality in the presumptions that, (1) one function of law is the production and reification of various forms of inequality, (2) race is socially constructed, and (3) law and social control measures play an important role in the social construction of race. Findings on the development of the aggravated felony category, discussed in Chapter Four, show how racialized conceptions of the “criminal alien” contributed to the instatement of punitive laws. Furthermore, findings elaborated in Chapter Five, show how laws and legal processes at the intersections between immigration, drug, and criminal justice policy contribute to inequality. As an immigration law born from drug policy and focused on various criminal offenses, the aggravated felony category works to reproduce well-documented racial disparities in drug, criminal justice, and immigration policy.

Resistance through the Law

The study of law and society recognizes the duality of law, as a key force of inequality that can, at times, become a potent tool for resistance. Gramsci’s (1971) concept of “hegemony” is used to describe the way that law shapes our lives, often in repressive and stratifying ways, while simultaneously naturalizing its own effects. Calavita (2010:37) explains, “the ability of law to create social realities that appear natural by inventing many of the concepts and categories we think with, means that it insinuates itself into our everyday worlds and wields extraordinary power.” As described in the last section, this power is often used to uphold unequal social hierarchies. However, at times, the distinctive power of law is also successfully harnessed by those resisting persecution and injustice. As editors Hirsch and Lazarus-Black (1994:20) write in
the introduction to *Contested States*, a volume containing several case-studies of oppressed groups that successfully gain rights through laws that otherwise subjugate them, “law is at once hegemonic and oppositional.” Abel’s (1994) study of apartheid in South Africa shows how the power of the law for those opposing white elites directly stemmed from its hegemonic power as a culturally legitimate institution. *Law and Globalization from Below*, edited by de Sousa Santos and Rodriguez-Garavito (2005), provides further illustration of the way that social movements can use the law as a tool, without giving in to the normalizing processes of globalized hegemonic governance. Through their concept of “subaltern cosmopolitan legality,” de Sousa Santos and Rodriguez highlight various bottom-up movements challenging neoliberal globalization, and describe the emergence of a counter-hegemonic “global justice movement.”

Still, scholarly opinions on the place of law for social movements remain mixed. Calavita (2010) reviews critiques of the attempted use of law for social change, explaining how adjudication’s focus on the individual case, or on specific legal rights, can distract from larger structural processes that may be better addressed through social activism. Critical legal studies scholars have questioned the use of “rights talk” by social movements, arguing that legal rights are actually incoherent and indeterminate, and that attempts at progress through legal decisions and rights can limit or even impede movements for social change (Gordon 1998; Tushnet 1994). These type of arguments have been refuted by critical race theorists and feminists, who contend that they come from a specifically privileged white male positionality where rights are a given (Delgado 2013; Matsuda 1987; Minow 1987; Williams 1991). Another critique of resistance through law comes from Rosenberg (1991:35), who argues that “court decisions are neither necessary nor sufficient for producing significant social change.” However, the supposed bases of this claim were hotly disputed by other law and society theorists (see Feeley and Simon 1992;
McCann 1994). With regard to immigration law specifically, Kretsedemas (2018) described a “controlled expansion” of restrictive local laws even in periods when the Supreme Court has been active in striking down the most controversial, and argues that progressive court decisions must invoke Constitutional arguments in order to set precedent that truly protects the rights of immigrants. In a seminal review of literature in the field, McCann (McCann 2006:35) stresses the importance of the contexts in which struggles occur, and argues that the law, as a tool, is not inherently empowering or disempowering for citizens, but rather, “secur[es] the status quo of hierarchical power while sometimes providing limited opportunities for episodic challenges to and transformations in that reigning order.” One way that movements attempt to harness the power of rights and the law is through partnerships with lawyers motivated to use their skills toward an end of social justice. Scholarship on “cause lawyering” describes the motives and ethical quandaries for lawyers turned advocates, as well as the difficulties and strategies of using law for social justice (Ashar 2007; Sarat and Scheingold 1998, 2006; Scheingold and Sarat 2004).

This dissertation contributes to the debate on the role of law as a tool for resistance, by describing how the same bodies of laws that create the punitive and unequal effects of the aggravated felony category, are also used by lawyers and advocates working to defend the rights of immigrants with criminal records. Observed strategies of resistance, as described in Chapter Six, are distinctly legal, and are largely invoked by lawyers who are motivated more by professional commitments than social justice aims. In the next chapter, I will detail the research design, methodology, and processes of analysis of this project, before moving on to the development of the aggravated felony category, its qualitative outcomes, and the legal resistance with which it is met.
3. Methods, Data, and Analysis

Through archival analysis, courtroom ethnography, and in-depth interviews with immigration lawyers and immigration court judges, this dissertation explores the following research questions:

1. How have social, political, and cultural forces affected the historical development of the aggravated felony legal category?

2. How does the aggravated felony legal category affect everyday immigration court processes and outcomes for non-citizens with criminal records?

This study was approved by the John Jay College of Criminal Justice, City University of New York (CUNY) Internal Review Board (IRB). This chapter outlines my research design, including theoretical backing, data sources, data collection methods, setting, population, and methods of analysis.

**Historical Data and Critical Criminology**

My first research question draws from critical criminological perspectives that emphasize the importance of historical context in understanding the development of punitive laws. Critical criminologists such as Taylor, Walton, and Young (1973) argue that both deviant behavior and social control responses should be viewed as products of the same cultural and structural conditions from which they arise. In this perspective, punitive policies gain power through their symbolic salience in the context from which they emerge. Therefore, to understand the power of the aggravated felony in today’s deportation regime, it is important to consider its history. With this theoretical backdrop in mind, my empirical examination of my first research question drew on several historical data sources. First, in order to create a historical timeline of the aggravated
felony category’s development, and to assess the existence of punitive social control measures, I reviewed legislation and federal agency rules related to the category since its inception in 1988, as well as relevant law journal articles. To better understand the social, political, and cultural factors that affected the aggravated felony’s development, I reviewed public opinion research, media studies, policy histories, content analyses of congressional proceedings, and other secondary sources. Congress.gov, the official website of US Congress, houses a free, easily-searchable, online database of all legislation dating back to 1995 (U.S. Congress 2017). The Federal Register provides a similar public database of federal agency rules and rule changes, as well as presidential documents such as executive orders, proclamations, and administrative orders dating back to 1994 (U.S. Office of the Federal Register 2017). Pre-1995 legislation, the pre-1994 Federal Register, and law journal articles were accessed through the comprehensive databases of LexisNexis. Other secondary analyses were accessed through GoogleScholar and the Mina Rees Library at the Graduate Center, City University of New York.

The Law in Action

My second research question draws on a central concern of law and society, the distinction between “the law in action” and “the law on the books” (Calavita 2010; Feeley 1979). Through court ethnography and interviews, scholars examine how court actors understand, interpret, and apply the law to real cases and people, often revealing nuanced ways in which inequalities are perpetuated through the courtroom process (Brotherton 2018; Paik and Harris 2015). Other work in the field stresses the importance of in-depth interviews to qualitatively examine “legal consciousness,” or the ways in which people negotiate and understand law as a constraint and/or tool of their everyday lives (Ewick and Silbey 1998; Nielson 2000). As
mentioned in the introductory chapter, this dissertation is the first qualitative study of the aggravated felony category in particular. While legal scholars have astutely analyzed and critiqued the content of the law on the books (Cook 2003; Miller 2003; Podgorny 2008; Yates et al. 2005), this research examines the law in action, through courtroom ethnography, in-depth interviews, and archival analyses of court decisions and organizational resources.

Immigration Court Processes

Understanding this dissertation’s examination of the qualitative effects of the aggravated felony category requires some knowledge of immigration court processes and actors. In addition to deportation—known as removal—proceedings, immigration courts in the United States can grant non-citizens legal permanent residency (green cards) and hear appeals related to claims of asylum, among other functions. However, this research is focused on removal proceedings in particular, since aggravated felonies are officially a grounds of deportability, despite other consequences. It is important to note that removal proceedings in immigration court are not the only forum through which immigrants are deported from this country. Since 2004, immigration officers have used administrative processes of expedited removal to deport undocumented immigrants apprehended at—or close to—the border, as well as many non-LPRs convicted of aggravated felonies (Cook 2003; Koh 2017). While remaining mindful of these concomitant processes, this project focuses on removal proceedings in immigration court, which provide an observable opportunity to assess the effects of the aggravated felony.

The 58 immigration courts in the United States, as well as the appellate Board of Immigration Appeals (BIA), are overseen by the Executive Office for Immigration Review (EOIR), an agency of the Department of Justice (DOJ). Also relevant to removal proceedings are
the three Department of Homeland Security (DHS) agencies that were created in 2003 to replace the former Immigration and Naturalization Service (INS) (Homeland Security Act of 2002). U.S. Citizenship and Immigration Services (USCIS) is responsible for services such as visa applications, naturalization petitions, and affirmative asylum applications. U.S. Customs and Border Protection (CBP) carries out inspections in border regions, and Immigration and Customs Enforcement (ICE) is responsible for all interior enforcement. DHS agencies identify the non-citizens they place in removal proceedings in a variety of ways. Some immigrants are, of course, apprehended at the border by CBP. Others, including many of those with aggravated felonies, are picked up by ICE at local and state jails and prisons after a criminal sentence or arrest, or are arrested by local law enforcement agencies that have official agreements with ICE. Others are identified for deportation by USCIS after unsuccessfully applying for affirmative benefits, and still others are picked up by ICE in community or workplace raids.

Once an immigrant is apprehended or otherwise identified for removal, deportation proceedings are initiated through a charging document known as a Notice to Appear (NTA) (Stave et al. 2017). If the respondent—as immigrants in in deportation proceedings are called—has previously been admitted to the United States, the NTA will report grounds of deportability. Otherwise, it will report grounds of inadmissibility (American Bar Association 2012). While many crimes that are considered aggravated felonies may also fit under other grounds of inadmissibility, the aggravated felony category itself is only a grounds of deportability. As such, most of the cases described in this dissertation are based on these grounds. The government, who is represented in immigration court by trial attorneys under the Assistant Chief Counsel of ICE, has the burden of proving deportability in immigration court. Once in deportation proceedings, initial arguments in front of an immigration judge are made at “master calendar hearings,” where
many cases are heard in quick succession, and then in subsequent individual “merits hearings,”
where immigrants—and their attorneys, if they have them—can contest the grounds of
deportability and/or argue for official forms of relief from deportation for which they are
eligible. Immigrants who are detained—but not mandatorily detained—can also schedule bond
hearings to plead their case as to why they should be released on bail. Once all evidence has been
presented, immigration judges unilaterally make decisions on deportability, relief, and bail,
although appeals can be made to the BIA and then through the federal appellate court system
(Executive Office for Immigration Review 2018). As will be demonstrated in subsequent
chapters, every step of this process is affected by an alleged aggravated felony conviction.

Case Study of New York City

My qualitative analysis of the effects of the aggravated felony category on everyday
immigration court processes and outcomes is based on a case study of New York City (NYC). Long known as an immigration hub, 3.1 million of the city’s 8.6 million residents are
immigrants, whether undocumented, green card holders or other lawful residents, or naturalized
citizens (The Marshall Project 2018). Still, while local politicians often tout NYC’s status as a
“sanctuary city,” several thousand immigrants are ordered deported by the city’s immigration
courts per year. These numbers have only increased in the past two years, as seen below in
Figure 2 (TRAC Immigration 2018b). Increased deportation in this period has stemmed from
heightened immigration enforcement under the Trump administration. Comparing 2018, the
President’s first full year in office to 2016, the final year of the Obama administration, 150
percent more deportations were made from NYC, and ICE made 88 percent more arrests.
Furthermore, 20,000 deportation proceedings were opened against immigrants living in the city
during 2018, an all-time high and a more than 30 percent increase from 2016 (Stringer 2019:12). The majority of deportation proceedings in NYC are held at 26 Federal Plaza, one of the largest immigration courts in the country with 35 sitting judges. However, all detained cases—including most aggravated-felony-based cases—are held at Varick Street Immigration Court, where there are three sitting judges. Despite its size difference with Federal Plaza, Varick Street is one of the most active detained immigration courts in the country, deporting over 1,000 people in 2018—the majority of them to Latin America and the Caribbean (TRAC Immigration 2018b).

Figure 2. Number of Immigrants Ordered Deported in New York City Immigration Courts, by Fiscal Year (1998-2018) (TRAC Immigration 2018b)

Increases in enforcement and attempts at deportation under the Trump administration have only added to already severe immigration court backlog, both in NYC, and around the country. By the end of the 2018 fiscal year, there were 809,041 pending cases in U.S. immigration courts, a more than 50 percent increase since Trump took office (TRAC Immigration 2019c). The federal government shutdown that began on Christmas Eve 2018—ironically based on the President’s unmet demands for Congressional funding to build a wall on
the border between Mexico and the United States—only intensified the growth in backlog, with over 86,000 scheduled immigration court hearings cancelled by the government’s reopening on January, 25, 2019 (TRAC Immigration 2019a). Backlog in NYC immigration courts—already exorbitant, with a total of 68,289 pending cases in 2016—was also exacerbated over the past two years. By the end of 2018, NYC was home to the most backlogged immigration court in the nation, with 100,559 cases pending at Federal Plaza, in addition to another 877 pending detained cases at Varick Street (Brown 2018; TRAC Immigration 2019c). While there is less relative backlog at Varick Street, the effects of any backlog in detained courts are severe, as respondents are continually detained throughout the long periods between hearings. This topic will be touched upon in more detail in Chapter Five.

The sheer volume of cases within NYC’s immigration court makes it an important site for any study of the legal workings of today’s deportation regime. However, it is the city’s provision of legal representation for immigrants that makes New York particularly interesting for this project. Due to immigration law’s civil—as opposed to criminal—status, non-citizens facing deportation in most of the United States have no guarantee of legal representation in immigration court. While legal representation has been shown to play an important role in determining immigration court outcomes, only 37% of all immigrants, and just 14% of detained immigrants, are able to secure legal representation for their removal proceedings (Eagly and Shafer 2015:7–8). Although legal service organizations around the country work to fill the growing need for low-cost, public, and pro-bono lawyers, access to council varies greatly based on socioeconomic status, detention status, nationality, and location. Beginning in 2013, NYC has guaranteed universal representation for detained immigrants in deportation proceedings through the New York Immigrant Family Unity Project (NYIFUP). The NYIFUP program works by funding
immigration removal defense units within existing public defender offices, namely The Legal Aid Society, Brooklyn Defender Services, and The Bronx Defenders. Funded by the New York City Council, NYIFUP provides free legal representation for all immigrants whose deportation proceedings begin at Varick Street and whose household limit does not exceed 200 percent of the federal poverty guidelines. Since this unique project’s induction, 48% of NYIFUP clients have successfully appealed removal, as compared to 4% of detained cases in the same court pre-NYIFUP (Stave et al. 2017:6). Universal representation in immigration court is especially important for non-citizens with criminal records, as they are more likely to be detained, and are also less likely to be represented by existing legal service providers for a variety of reasons, as will be discussed further in Chapters Five and Seven.

By studying NYC, this dissertation looks at the “best case scenario” for immigrants with aggravated felony cases, who are mandatorily detained and far less likely to secure legal representation in other contexts. In some ways, this is a limitation of this study, and planned comparative research in places without a universal representation model will certainly yield additional interesting results. However, from a law and society perspective, NYC presents a unique opportunity to examine the ways that legal actors understand and respond to a legal category with far-reaching and punitive results. Furthermore, the fact that the observed effects of the aggravated felony category are still so expansive, severe, and unequal in NYC, despite the “best case scenario” context, speaks to injustice inherent to the law itself. This will be illustrated and discussed further in Chapters Five and Six. Distinctly legal strategies of resistance, elaborated in Chapter Seven, were not an expected finding of this study, in part because most legal literature on the aggravated felony emphasizes the punitive and unjust outcomes of the law (Bennett 1999; Cook 2003; Legornsky 2007; Miller 2003; Podgorny 2008; Yates et al. 2005),
with few exceptions (Das 2011; Sweeney 2011; Welch 2004). However, as innovative legal responses quickly emerged in my interviews and ethnography, it became clear that their development and implementation was due, in part, to the universal representation model and other key policy and organizational developments in NYC. Therefore, through this case study of NYC, I am able to identify policy implications for advocates and legislators concerned with protecting the rights of immigrants nationwide.

_Courtroom Ethnography_

As part of my examination of the effects of the aggravated felony category on everyday immigration court processes and outcomes, I conducted ethnographic court observation at Varick Street immigration court. From October 2017-September 2018, I attended removal hearings 1-3 times a month, with about four hours spent at the court during each visit. The large majority of observed hearings concerned respondents with alleged aggravated felony convictions. Although immigration court proceedings are technically open to the public, Varick Street is an isolated and largely unnoticed court, on the eleventh floor of a government building in Manhattan’s West Village. Before conducting this research, I had walked past the building many times without realizing its content. In order to reach the court, one must first go through a security screening and metal detector, which often has a long line, before taking an elevator to the eleventh floor, and following a winding industrial hallway to the windowless and drab court waiting room. This usually requires an 8:00 a.m. arrival for an 8:30 am start time, as most of the trials I attended were scheduled. Still, things rarely started on time on Varick, and there were often breaks in hearings, so part of my time was always spent in the waiting room, where respondent’s families and lawyers discuss cases and court developments.
The waiting room, and courtrooms, which are behind a closed door with a large “DO NOT KNOCK” sign on it, are all manned by security guards from private security companies. ICE officers are also present, as they transport respondents from the detention centers in New Jersey and Upstate New York to the downtown Manhattan courts, but they are not usually in the courtroom or waiting room (although exceptions will be discussed in Chapter Five). The three courtrooms behind the closed door at Varick Street are small, usually with two short rows of wooden bench seats facing the raised desk where the judge, Department of Homeland Security (DHS) lawyer, and translator (in most cases) are joined by the respondent and the defense attorney. At most, the court rooms also contain another small desk for a clerk, and one or two short benches along the sides of the room, where security guards and waiting respondents sit. Despite the court being officially open to the public, there were rarely other observers besides myself, families (in some cases), and occasional groups from the New Sanctuary Coalition, a local immigrant-rights organization. Observers were most often placed in the second row of bench seats, although at times I was moved to the front row, where waiting defense attorneys usually sit.

My initial visits to Varick Street were in accompaniment of my dissertation advisor, David Brotherton, who testifies as an expert witness in removal hearings, based on his knowledge of the conditions faced by Dominican deportees (Brotherton and Barrios 2011). Once I began making connections and conducting interviews, I began to also observe court on the invitation of lawyers I had met, in addition to continued accompaniment of Dr. Brotherton. On a

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2 In June 2019, ICE announced that they would no longer be physically bringing detainees to Varick Street for their court appearances, and they will therefore have to appear from the detention center, using video-conferencing technology (Robbins 2018). At the time of writing, ICE is still refusing to bring detainees to Varick Street for their hearings (Goldbaum 2019).
few occasions, after becoming more familiar with Varick Street security guards, clerks, and judges, I attended court on my own, and was allowed to enter and take notes, usually upon identifying myself as a student. However, since my aim was to observe hearings of respondents with aggravated felony allegations, I more often attended specific cases at the invitation of lawyers or Dr. Brotherton. Cases at Varick Street, like in other immigration courts, are frequently continued/postponed, with detained respondents appearing in front of the judge on several occasions, each often a few months apart (Stave et al 2017). I followed certain cases over the course of a few hearings, while others I only observed on one day. While at court, I took detailed field notes on proceedings and interactions between court actors, with particular attention paid to hypothesized themes based on my review of the literature, including due process, punitiveness, judicial discretion, the “good immigrant, bad immigrant” binary, and intersections between criminal and immigration law.

Interviews

In addition to courtroom ethnography, I conducted 39 in-depth, semi-structured interviews with lawyers and other immigration law actors. Lawyers’ specific positionality between the state and the detainee make them uniquely situated to report effects of the aggravated felony on immigration law processes and outcomes, as well as its effect on their clients themselves. While defense attorneys’ voices are certainly not a replacement for those of immigrants experiencing deportation proceedings, lawyers are part of the very limited contact detainees are allowed with the outside world. Therefore, immigration lawyers often possess a rich knowledge of their clients’ cases and experiences in the immigration system, hard to obtain firsthand due to the difficulties of gaining access to detention centers. Future research could
expand upon this study’s findings on the effects of the aggravated felony by speaking to deportees who have experienced the detention and removal process, as other related research has done (Brotherton and Barrios 2011; T. M. Golash-Boza 2015a; Hagan, Rodriguez, and Castro 2011; Hiemstra 2014; Phillips, Hagan, and Rodriguez 2006). My focus on practitioners is also based, in part, on law and society perspectives that stress the importance of examining the everyday decisions of legal actors in order to understand the way in which laws are developed and enforced (Calavita 2010; Feeley 1979; Kupchik 2003; Paik 2011; Sudnow 1965). Lastly, the complexities of immigration law—related to the aggravated felony in particular—are difficult to comprehend, even for skilled attorneys in other fields of law (Stave et al. 2017). By speaking with lawyers in NYC, unique in its universal representation of detained immigrants, this study is able to describe legal responses to the aggravated felony that could not be understood simply by observing court proceedings as a researcher with no legal background.

Although the majority of my sample consists of immigration lawyers, I expanded sampling to include criminal lawyers and advocates, as well as an immigration law social worker, as unexpected findings in initial interviews revealed the importance of activism, social context, and criminal law interventions in strategies of legal resistance to the aggravated felony. Eligibility criteria for the study included: experience with U.S. immigration law, criminal law, or immigration advocacy; ability to speak and understand English; and ability to understand and provide informed oral or electronic consent. In order to recruit participants, I drew on my personal networks, the networks of my dissertation committee members, and connections made in immigration court. Additionally, I repeatedly sent recruitment information to the online-mailing lists of local and national organizations concerned with the rights of immigrants, as well as to the email addresses of individual lawyers identified through the websites of local law
offices and legal service providers. As I got further into the interview process, I also engaged in snowball sampling, and gained several participants based on referrals from those I had already interviewed.

I conducted interviews with a total of 39 participants, including 31 immigration lawyers, 4 criminal lawyers, 3 advocates, and 1 social worker, although a few of the immigration lawyers had also partially transitioned into advocacy work. All participants, besides one immigration lawyer, one criminal lawyer, and one advocate, practiced in NYC or the surrounding area, most of them currently, but a few within the past several years. 19 out of 39 participants currently or had recently worked for NYIFUP providers, and another 15 were employed by other non-profit organizations—resulting in a total of 24 “public” attorneys—as I refer to them throughout this dissertation. Only 5 lawyers from the private bar were interviewed in this study. However, this is fairly representative, as the majority of represented cases on the Varick Street detained docket are represented by NYIFUP attorneys (Stave et al 2017).3 Participants had an average of 11 years of experience related to immigration law, ranging from 2 to 30 years. 29 of those interviewed were women, and 10 were men. This proportion was not intentional, and while it does seem reflective of who I observed doing this work most at Varick Street, it may only be reflective of who my recruitment strategies reached and appealed to.

Interviews were in-depth and semi-structured, and each lasted about one hour. In order to fit into the busy schedules of lawyers, I offered the option of being interviewed over the phone, which about half of my participants opted for. In-person interviews were conducted at cafés, restaurants, and lawyers’ offices. All interviews were recorded and later transcribed, with

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3The fact that the majority of cases at Varick Street qualify for NYIFUP speaks to the socioeconomic status of the criminalized populations that pass through this detained immigration court. As the income limit for NYIFUP eligibility is 200 percent of the federal poverty rate, or $24,280 per year for a single-person household in 2018.
participants’ full knowledge and consent. Upon transcription, names and other identifying information were removed and participants were assigned codenames, which will be used throughout this dissertation. Interview questions asked about participants’ general experience with immigration law; their average caseload; how changes in immigration policy have affected their work over time; the role of aggravated felonies in their work; common case characteristics of aggravated felony cases; common outcomes of aggravated felony cases; how immigrants usually enter deportation proceedings related to aggravated felony convictions; developments under the Trump administration; and how the aggravated felony category has affected due process, discretion, punishment, and the boundaries between criminal and immigration law.

Although most interviews followed this general structure, I was careful to allow space for participants to guide the dialogue. This is how I quickly began to learn about forms of legal resistance I did not expect to find. Over time, as I reached levels of saturation with some of my initial questions, interviews included more discussion of strategies and tools used to defend immigrants with aggravated felony convictions, as well as implications for policy. Questions also varied when interviewing different types of practitioners, as the emphasis moved to their particular relationships with the aggravated felony category. Interviews with advocates often expanded to include more discussion of structural issues, in addition to the place of advocacy in legal decisions and policy developments that have affected the aggravated felony. The social worker spoke to the way that practitioners work with immigration defense teams work to inject structural concerns into the immigration court process, and interviews with criminal defenders delved into the processes through which criminal law plays into the defense of immigrants with potential aggravated felony convictions.
Additional Data

Beyond my court ethnography and interviews, my examination of the on-the-ground effects of the aggravated felony category also drew on my ethnographic observation of two large immigration law conferences, both focused on strategies and skills for defending immigrants with and without criminal records, as well as several smaller workshops and events for lawyers and advocates, related to various aspects of immigration policy and enforcement. In addition, I reviewed a variety of precedential court decisions important for defending clients with aggravated felony convictions, as identified to me by interview participants. These decisions, from the Board of Immigration Appeals (BIA), federal circuit courts, and the Supreme Court, were retrieved through justice.gov, as well as findlaw.com. Lastly, I reviewed legal resources made publicly available on the websites of immigrant advocacy organizations in the NYC area.

Data Analysis

Analysis of my first research question (how have social, political, and cultural forces affected the historical development of the aggravated felony legal category?) is based on moral panic theory, a critical criminological perspective which works to explain seemingly overblown responses to perceived social problems. More specifically, this research examines the role of a moral panic about immigrant criminality in the legal development of the aggravated felony category. First, collected legislation, executive orders, and federal agency rules, as well as information from relevant law journal articles, was compiled into a detailed timeline of the category’s development. Next, based on early formulations of moral panic theory (Cohen 1972; Young 1971), I identified several factors that must be present in order for an uptick of concern about an issue to constitute a moral panic. Key elements include media attention, public opinion,
and punitive social control responses—often pushed by advocates with personal or professional stake in the issue at hand. Furthermore, since the power of moral panic draws from the societal conditions from which it emerges, such an evaluation must also account for broader historical conflicts and circumstances that lend the panic its symbolic significance. To assess the existence of these factors, I reviewed public opinion research, media studies, policy histories, content analyses, and other historical data. The results of this investigation will be presented in the next chapter.

Analysis of my second research question (how does the aggravated felony legal category affect everyday immigration court processes and outcomes for non-citizens with criminal records?) drew from my ethnographic field notes and transcribed interviews, as well as amassed precedential court decisions and organizational resources—all of which were coded thematically using Atlas.ti. This analysis was primarily exploratory, aimed toward identifying the themes that emerged from the data, without a specific hypothesis in mind. However, I did postulate a few themes based on the literature, which helped to guide my analysis. These included the effects of the aggravated felony category on punishment, due process, and judicial discretion, as well as the overlap between immigration law and criminal law in aggravated felony-related deportation cases. I also looked for nuances absent from, or incongruent with, reviewed legal scholarship, based on law and society’s distinction between the law on the books and the law in action (Calavita 2010; Feeley 1979). The results of this analysis will be presented in Chapters Five, Six, and Seven.
4. Moral Panic and the Development of the Aggravated Felony Category

As the previous chapter explained, critical criminologists have long argued that deviance and social control responses must both be viewed as products of the specific structural and cultural contexts from which they emerge (Taylor et al. 1973). Therefore, in order to fully understand the contemporary effects of aggravated felony category, we must first inspect the backdrop that birthed it. To examine my first research question (how have social, political, and cultural forces affected the historical development of the aggravated felony category?), I draw on moral panic theory, popularized by critical criminologists Jock Young (1971) and Stanley Cohen (1972), and a useful tool for those who seek to understand the development of punitive responses to perceived social problems. Moral panic is defined as follows,

A condition, episode, person or group of persons emerges to become defined as a threat to societal values and interests; its nature is presented in a stylized and stereotypical fashion by the mass media; the moral barricades are manned by editors, bishops, politicians and other right-thinking people; socially accredited experts pronounce their diagnoses and solutions; ways of coping are evolved or (more often) resorted to; the condition then disappears, submerges, or deteriorates and becomes more visible (Cohen 1972:1).

However, while the original formulation of the concept was theoretically precise and based in a particular historical context of social transformation and cultural conflict, it has since been diluted as a catchphrase of sorts, used by a variety of commentators in reference to any issue that attracts even a minor flurry of media attention and/or public outrage (Garland 2008; McLaughlin 2014; Young 2009). Young (2009, 2011) warns against this expansion of the moral panic concept beyond its theoretical boundaries and emphasizes that, in assessing the existence of a moral panic, one must look for specific criteria concerning the panic itself and also for particular social and cultural conditions in the context in which it occurs.
In this chapter, I evaluate the thesis that a racialized moral panic about immigrant criminality played an important role in the development of the aggravated felony category, part of a broader punitive turn in U.S. drug, crime, and immigration policy over the course of the 1980s and 1990s. By beginning with a review of the scholarly tradition and historical context from which moral panic theory arose, I strive to maintain the full strength of the concept in my subsequent examination of modern panics linking drugs, crime, and immigration. In following sections, I apply moral panic theory in an assessment of societal fear and public policy linking drugs, crime, and immigration in the United States in this period, with a focus on the development of the aggravated felony. By examining the content of the alleged moral panic about immigrant criminality in the specific historical context in which it arose, I aim to better understand the symbolic power of the panic and thus, its influence in the shaping of policies that continue to have widespread and severe effects.

*Moral Panic Theory*

Moral panic theory was born out of a revolutionary period in criminology and the sociology of deviance. Societal transformations and cultural conflicts that manifest in Great Britain and the United States in the 1960s and 1970s were paralleled by major changes in the scholarly study of deviance and crime. Prevailing functionalist theories of the mid-1950s were questioned by American New Deviancy scholars who emphasized individuals’ creation of deviant subcultures in response to societal constraints (see Cohen 1956 and Matza 1967) and examined the ways that official definitions of deviance contribute to the pathologization of deviant acts and the exacerbation of harm through stigma and self-fulfilling prophecies (see Becker 1963 and Goffman 1963). In 1968, a group of critical British criminologists and
sociologists formed the National Deviancy Conference as a forum for radical theories of deviance which drew upon the micro-level advances of American New Deviancy theorists. With the assertion that both deviant behavior and social control responses should be viewed as products of the same cultural and structural conditions, situated within the historical context from which they arise, the new British scholars pushed for a more macro-level, historically-situated, and politically-oriented study of deviancy (Young 2011).

Although the concept of “moral panic” was first used by media theorist Marshall McLuhan (1967), Young’s (1971) study about the public condemnation of hippie drug users in Notting Hill introduced the term to the sociology of deviance (McLaughlin 2014). Drawing from Becker (1963), Young explained how “moral crusaders” fanned the flames of public indignation about drugs toward the end goal of harsher rules and enforcement. He saw mass media attention to the issue as condemning and seducing at the same time, creating a “spiral of public fear and indignation that pushes for the action of control agencies” (Young 2009:6). Most importantly, Young found that the panic was not about the drugs themselves, but rather about the people who were using them and the culture they represented. In his analysis, the existence of the hippie culture and the moral indignation which came in response to it could both be attributed to the same major value shifts and economic transformations happening in greater society at the time. The hippies and the drugs they used served as symbols of a free and self-indulgent culture that challenged fiercely-held societal values emphasizing discipline and deferred gratification. The same inconsistencies and problematics that led the hippies to reject the meritocratic fantasies of mainstream society also existed somewhere in the back of the minds of those still holding tight to the status quo. In this sense, the symbolic power of a moral panic about hippie drug-takers was
based in the mainstream public’s indignation, and simultaneous desire for, a freedom they could not allow themselves (Young 2009).

In the seminal work *Folk Devils and Moral Panics* (1972), Stanley Cohen further developed moral panic theory based on a case study of the intense societal outcry provoked by the 1964 conflicts between “Mods” and “Rockers,” two British youth subcultures of the era. In the panic studied by Cohen, a series of relatively minor bouts of teenage fighting and vandalism in seaside resort towns resulted in an outpouring of media sensationalism, public indignation, and social control measures aimed toward dealing with the problem of youth violence and “hooliganism.” Furthermore, the subcultural groups involved came to be villainized and persecuted as dangerous delinquents. For Cohen, the creation of “folk devils,” or deviant stereotypes that are used to identify and demonize the human source of the supposed problem, is essential to the creation of a moral panic. Like the hippies who became a personified symbol of drug-use in Young’s study, Mods became a symbol of youth delinquency and violence.

In Cohen’s formulation, moral panics often begin with an initial escalation of media attention to an issue, which is followed by a process of “sensitization” among the public as a whole. He explains, “Any item of news thrust into the individual’s consciousness has the effect of increasing the awareness of items of similar nature which he might have otherwise ignored” (Cohen 1972:80). In this process, people begin to see outcomes and behaviors, which they would give little attention to under normal circumstances, as negative effects or deviant acts attributable to the subject of the moral panic and the groups associated with it. In the case studied by Cohen, a media uproar about youth hooliganism led people to define all kinds of normal rule breaking by youth as being part of the “Mods and Rockers phenomenon” (Cohen 1972:81).
This sensitization in the general public is exploited by “moral entrepreneurs” and interest groups as they vie for support for their cause and work to shift policy (Cohen 1972; see also Becker 1963). Attention to the issue is “diffused” to jurisdictions beyond the locality where the initial problem occurred, as politicians and social control agencies become involved in efforts to control the deviant behavior under focus. Enforcement is “escalated” and the whole culture of control becomes more stringent in order to respond to what is has been framed as an urgently dangerous phenomenon, and finally, new methods of control are “innovated” as lawmakers expand current policy or create new rules with regards to the behaviors and groups implicated by the moral panic (Cohen 1972). Such measures often have adverse effects, as stigmatization and criminalization end up increasing the amount of social harm linked with what began as a fairly minor problem (Cohen 1972; Young 2009).

Cohen’s elaboration of moral panic theory was based on an attempt to explain how a relatively innocuous and unoriginal problem can trigger such intensely disproportional societal reactions. Therefore, one central criterion in assessing the existence of a moral panic is that the initial increase in media attention and social indignation is seemingly overblown and unreasonable in relation to the actual harm caused by the issue or issues it is concerned with (Cohen 1972; Goode & Ben-Yehuda 1990). However, this does not mean that moral panics can be simply viewed as irrational overreactions to random issues. Instead, just as Young (1971) demonstrated in his initial formulation of the concept, Cohen (1972) clearly emphasizes that the content of moral panics and the folk devils which they persecute are symbolic points of focus that obtain their strength from anxieties and tensions within the greater cultural and structural context. In conceptualizing these underlying anxieties and tensions, early formulations of moral
panic theory drew from Nietzsche’s concept of *ressentiment*—a form of moral indignation that is directly concerned with punishing behavior from which one draws no actual harm (Young 2009).

In the context observed by Cohen (1972), a parent culture engrained with post-war austerity and emphasizing hard work and delayed gratification was already coming under assault by an emergent teenage culture centered on consumption and instant satisfaction (see also Young 2009). Working-class youth saw little reason to adhere to the traditional value system espoused by their parents. In this context,

The Mods and the Rockers symbolized something far more important than what they actually did. They touched the delicate and ambivalent nerves through which post-war social change in Britain was experienced. No one wanted depressions or austerity, but messages about “never having it so good” were ambivalent in that some people were having it too good and too quickly…Resentment and jealousy were easily directed at the young, if only because their increased spending power and sexual freedom. When this was combined with a too-open flouting of the work and leisure ethic, with violence and vandalism […] something more than the image of a peaceful Bank Holiday at sea was being shattered. (Cohen 1972:218).

Therefore, just as Young’s moral panic about hippie drug-takers drew its symbolic power from the mainstream society’s simultaneous fear of and desire for the self-indulgence and freedom of hippie culture, the moral panic about violent youth subcultures drew its symbolic power from the older generation’s *ressentiment* of young people who so blatantly rejected a meritocratic value system which they too had reason to question.

By contextualizing the moral panics which they studied in the societal transformations of their time, the original formulations of moral panic theory put forth by Young and Cohen show how the deviance of emergent youth subcultures and the societal indignation they were met with both stem from the same structural strains and cultural transformations. More generally, they demonstrate that rather than viewing moral panics as the spontaneous accumulation of societal attention to a random issue, we must see them as important symbolic events, which often have very real consequences. Only through a thorough examination of the societal conditions that give moral panics their symbolic power, can we begin to understand the real, and often lasting, effects
that such panics can have. In subsequent sections, I evaluate the role of a moral panic linking immigrants with drugs and crime in the development of the aggravated felony category.

Features of Moral Panic Predicating the Development of the Aggravated Felony

Based on the original formulations of moral panic theory (Cohen 1972; Young 1971), and depicted in Figure 3 below, several factors must be present for societal attention to an issue to constitute a moral panic. One major element is the folk devil, or the personified symbol of the supposed problem. Also key are media attention and public sensitization to the issue or issues under panic. Further, moral panics result in exaggeratedly punitive, yet lasting, social control responses. In this section, I assess the existence of these elements in a moral panic linking immigrants with drugs and crime throughout the 1980s and 1990s—contributing to the development of the aggravated felony category throughout the same period. In following sections, I will examine the broader societal context from which a panic draws symbolic salience, as well as the role of moral crusaders and entrepreneurs in transforming panic into policy.

Figure 3. Major Elements of Moral Panic
As discussed in Chapter Two, the folk devil of the criminal alien is a long-entrenched figure in the American imagination. From the Chinese Exclusion Act of 1882, which drew on societal attitudes linking Chinese immigrants with opium, to the prohibition of marijuana in the 1930s with the support of racist campaigns associating the drug with “dangerous” Mexican immigrants, this country has a well-established history of passing legislation based on supposed links between immigrants, drugs, and crime (Gyory 1998; Kanstroom 2007; Recio 2002; Warner 2005). Furthermore, despite existing in the now-United States before even the English colonies, Mexicans and other Latinos have continually been vilified as a “threat” to the so-called “American” way of life (Chavez 2008). Following in this tradition, the scapegoat of the (almost always Latino) immigrant offender was a popular media image invoked throughout the 1980s and 1990s that served as fodder for public fear and indignation that supported expensive, marginalizing, and less-than-effective policies. As Kurzban (2008:66) explains,

The antidrug and anticrime rhetoric…could be dragged out and used or reused to keep people in a state of fear and anxiety by recalling specific cases of noncitizens who may have been dangerous and/or engaged in criminal conduct. Often one story, repeated endlessly in the corporate media, was sufficient to demonstrate how necessary undemocratic measures were to protect we the people.

Throughout this period, the Mexican-U.S. border was painted as a “war zone” which must be contained by militarized action (Chavez 2013), and the stereotype of the Latino “criminal alien”—often tied with drug trafficking—was commonly invoked by entertainment and news media (Bender 2005; Brown 2016; Taylor and Bang 1997; Vargas and dePyssler 1998; Warner 2005).

The reinvigorated scapegoat of the criminal alien was symbolically strengthened through general media attention and public sensitization to the issues of crime, drugs, and immigration. Various researchers have reported increased attention to crime by the media in the later decades of the twentieth century (Barlow, Barlow, and Chiricos 1995; Cavender 2004). Garland (2001)
describes a “culture of control” which emerged in the late 1970s and early 1980s, as the prominent American ideology regarding crime control shifted from the aim of rehabilitation to the aim of punitive retribution. Drugs, in particular, were the focus of a great deal of media and public attention during this period, especially with the arrival of crack-cocaine in the mid-1980s (Belenko 2000; Reinarman and Levine 1997). Various studies have reported increased proportions of articles about drugs in the late 1980s and early 1990s, as well as the use of sensational graphics, numbers, and frames that exaggerated the severity of the drug-related problems (Beckett and Sasson 2004; Chermak 1997; Orcutt and Turner 1993). As the subject of drugs overtook the media, public opinion followed suit (Meares 2003). Between 1986 and 1989, the proportion of Americans who rated drug abuse as the country’s most important problem shot from 3 to 64 percent (Berke 1989).

Similarly, while there is a long tradition of negative media and societal stereotyping of immigrant newcomers to the United States (Bender 2005; Warner 2005), there was a dramatic shift in public sentiment around immigration that began in the 1980s. Throughout the 1960s, 1970s, and early-1980s, both public opinion and public policy demonstrated at least a nominal focus on human rights and humanitarian values when it came to the regulation of immigration to the United States. During this period, immigration policy emphasized family reunification for naturalized citizens and lawful permanent residents, the generous admittance of—and the provision of public welfare benefits for—refugees, and respect for the natural rights of immigrants. However, in the early 1980s, public opinion on immigration shifted drastically, “from a willingness to absorb and generously resettle refugees and a tolerance of illegal immigration to a growing sense of crisis that the United States had ‘lost control of its borders’ and that U.S. immigration policy was dangerously adrift” (Miller 2003:8). Analyses of public
opinion surveys over the course of the early- to mid-1990s reflect this evolution, reporting predominantly negative views of immigrants during this period (Lapinski et al. 1997; Muste 2013; Pantoja 2006).

Public sensitization to the issues of drugs, crime, and immigration in the 1980s and 1990s was reinforced by political prioritization and repressive social control measures in all three policy areas—the “punitive turn” described in Chapter Two—pushed by Democrats and Republicans alike (Macías-Rojas 2018; Murakawa 2014). The image of immigrant as criminal was strengthened by the disproportional criminalization of Latinos (alongside other communities of color) under newly punitive laws (Hagan and Palloni 1999). From the mid-1980s to the mid-1990s, the United States witnessed the continuous induction of increasingly punitive drug policy, prioritizing criminalization and enforcement over prevention and treatment (Alexander 2012; Reinarman and Levine 1997). Domestically, the policing and enforcement of the Drug War disproportionately focused on poor Black and Latino communities (Alexander 2012; Small 2001), while internationally, there was a heavy focus on the interdiction of drugs from Mexico and Latin America (Andreas 2012; Mauser and Francis 2011; Payan 2006). Hence, both major fronts of the highly publicized U.S. War on Drugs helped to further solidify assumed connections between Latino immigrants, drugs, and criminality.

Alongside the galvanized emphasis on drugs came a “get-tough-on-crime” criminal justice framework, comprised of punitive laws, militarized enforcement, and mass incarceration (Lusane and Desmond 1991; Rowe 2006). Throughout the 1980s and 1990s, the “get-tough” paradigm became the ruling American crime control framework, as the United States quadrupled its prison population and become the most incarcerating country in the world (Chambliss 2003:295). The punitive laws of the War on Drugs played an important role in this increase,
bolstering the severely disproportionate representation of Black and Latino communities in the growing prison population (Alexander 2012; Bobo and Thompson 2006). Immigration policy in the United States also became more criminalizing and punitive during this era, with a focus on undocumented immigrants and so-called “criminal aliens” (Brotherton and Kretsedemas 2008; Warner 2005; Welch 2003)—as seen in the above described development of the aggravated felony. An increased focus on criminal deportation, combined with the militarization of the U.S.-Mexico border, intensified (and highly-racialized) policing of immigrant communities, and expanded incarceration for immigration offenses all served to reinforce the image of the dangerous, Latino criminal alien throughout the 1980s and 1990s (Hagan and Palloni 1999, 1999; Nevins 2002; Romero 2006; Warner 2005).

When one looks at the facts, punitive approaches to the issues of drugs, crime, and immigration seem to have more basis in moral panic than in any evidence of their ability to actually ameliorate social harms associated with these issues. The escalation of the War on Drugs came at a time when American drug use was actually in a state of decline (Bertram et al. 1996; Tonry 1995), and although crime rates in the United States had been rising since the 1960s, many researchers have shown that punitive drug-control and crime-control policy frameworks were introduced and continued despite little to no evidence of their ability to achieve purported aims of curbing drug use, drug trafficking, and violent crime (Andrews and Bonta 2010; Bertram et al. 1996; Gray 2001; Mauer 1999). Furthermore, while immigration to the United States was certainly on the rise during the 1980s and 1990s, there is a large body of research demonstrating that the supposed link between immigration and crime is groundless as well (Adelman et al. 2017; Hagan et al. 2008; Lee and Martinez, Jr. 2009; Light and Miller 2018; Ousey and Kubrin 2018; Wadsworth 2010; Zatz and Smith 2012). Despite this, the United States
has continued to deal with immigration in more and more punitive ways, with an ongoing focus on so-called “criminal aliens.”

Therefore, several elements of moral panic—including a scapegoated “folk devil,” amplified media attention, intensified public sensitization, and disproportionately punitive social control responses—are apparent in the era from which the aggravated felony developed. Yet, as is made clear in the original formulations of moral panic theory discussed above, the eruption of a moral panic cannot simply be chalked up to media misinformation, public notice, and irrational policy responses. Instead, one must remember that the specific content of a panic gains its power from the unique context in which it arises. In the following section, I analyze the role of context in empowering a panic about immigrant criminality to influence the development of the aggravated felony, before examining the role of moral crusaders in the transformation of panic into policy.

*Contextualizing Panic: Immigrant Criminality’s Symbolic Salience in Neoliberal Late-Modernity*

As the original theories of moral panic theory maintain, it is context that gives a panic the power to influence law and social control in lasting ways. Therefore, in this section, I evaluate the role of more general developments in the 1980s and 1990s United States in providing a panic about immigrant criminality with the power to impact policy. I argue that the period of history from which the aggravated felony emerged was characterized by specific cultural and structural forces, which combined to enflame societal insecurities in a way that made a racialized panic about immigrant criminality so resonant and influential.

The creation of folk devils, an essential aspect of moral panic, is a form of “othering” which allows members of a host society to place the blame for perceived problems on those seen
as alien and different, while at the same time asserting their own identity and solidarity as part of the norm. In *The Vertigo of Late Modernity*, Young (2007:141) describes the contemporary roots of racist and nationalist othering as “a vertigo of insecurity” based in the “disembeddedness of late modern society, the shock of pluralism, the fear of the ever possible loss of status or of downward mobility.” In the case at hand, the othering of immigrants through the reinforcement of the criminal alien folk devil was particularly powerful in the context of the late-1980s and early-1990s U.S.—an era characterized by economic shifts that increased social inequality, ideological shifts concerning the government’s place in dealing with social problems, and demographic shifts toward an increasingly diverse nation.

During the last three decades of the twentieth century, ruling economic doctrine around the world underwent a radical shift. Drawing from Austrian economist Friedrich von Hayek’s (1944) treatise, *The Road to Serfdom*, and elaborated by American economist Milton Friedman and his University of Chicago colleagues in the 1950s and ‘60s, the emergence of now-dominant neoliberalism ran directly in the face of the ruling economic ideology at the time. Contrary to the state-centered, Keynesian economic policies popular in the post-war period, Hayek, Friedman, and their acolytes called for a system that would ensure individual freedom through the achievement of completely unfettered economic markets. Policy based on this utopian dogma of freedom and choice is characterized by “the three trademark demands” of “privatization, government deregulation and deep cuts to social spending” (Klein 2007:10). Neoliberal policy was instituted with a vengeance throughout the “developing world” beginning in the 1970s, especially in South America, where it was backed intellectually by Friedman and other Chicago School economists and militarily by the United States government. However, it wasn’t until the 1980s that this economic framework truly made its mark on policy in the United States, as the
fervently neoliberal Reagan administration worked to deregulate the markets and dismantle governmentally-provided social programs, contributing to increased economic inequality and insecurity (Harvey 2007; Klein 2007).

Peck and Tickell (2002) explain the way in which this period of “roll-back neoliberalism” in the 1980s, was followed by the “roll-out neoliberalism” of the 1990s, a period of statecraft during which pervasive systems of neoliberal regulation and control were constructed, “concerned specifically with the aggressive reregulation, disciplining, and containment of those marginalized or dispossessed by the neoliberalization of the 1980s” (Peck & Tickell 2002:389). By linking a move toward more punitive frameworks around drugs, crime, and immigration with a need to protect the country from criminal aliens, a moral panic about immigrant criminality lent important support to policies that may have seemed oppressive and cruel if they were seen as negatively affecting native, white Americans instead of immigrant others and other marginalized minorities. Furthermore, from this viewpoint, middle- and lower-class economic insecurity exacerbated by neoliberal deregulation and removal of social programs could be blamed on an undeserving immigrant other, rather than on structural inadequacies or elite power. The growing power of corporate media made it even easier to frame the “deterioration of everyday life” felt by the middle classes as something to be blamed on a criminal alien folk devil (Kurzban 2008:67; see also Corva 2008).

Such viewpoints were further supported by the ideological shift that undergirded neoliberal economic restructuring. According to Garland (2001), the punitive turn in American criminal justice policy can largely be attributed to changing societal perspectives concerning the place of the government in relation to social problems. Over the course of the 1970s, American public opinion decisively shifted away from the welfare-state economic policy of the post-war
era and towards a neoliberal belief in individualism and free-market competition, a philosophical transformation that culminated in Reagan’s 1980 election. The Reagan administration quickly discarded any remnants of a criminal justice framework that privileged government-funded social programs and offender rehabilitation as important tools in crime prevention, and pushed for retributive policy that moved the onus of blame away from societal problems and onto individual offenders—an ethos that would characterize criminal justice for many years to come (Mauer 1999; Garland 2001). Directed at established folk devils, this neoliberal culture of personal responsibility easily slips into a desire to punish and humiliate—an impulse characteristic of late modernity—which Young (2003a) asserts can only be understood through a “sociology of vindictiveness.”

Another way of understanding this ideological shift is through Foucault’s (1991) concept of governmentality, most often utilized to describe the ways that modern governments exercise power over the populations under their control. As opposed to the top-down sovereign model of previous eras, Foucault (1991) argues that, beginning in the 19th century, liberal states moved toward a model where the workings of power are diffused throughout the population. In this transition from sovereignty to governmentality, there has been a devolution of power and responsibility away from the authority of the state, and instead, power and responsibility have become internalized in subjects themselves—through internalized morals of self-control, which Foucault (1988) conceptualizes as “technologies of the self.”

Rose (1996:54) describes the “advanced liberal governmentality” of the late-twentieth century, an era when political regimes work to “create a distance between the decisions of formal political institutions and other social actors”—emphasizing these actors’ freedom and therefore, responsibility. It is here that we see the emergence of the neoliberal subject. Brown (2003)
describes how modern neoliberalism is more than just an economic project, but rather, it is a political rationality that requires and creates a specifically governable citizen. She explains, “neo-liberalism carries a social analysis which, when deployed as a form of governmentality, reaches from the soul of the citizen-subject to education policy to practices of empire” (Brown 2003: 3). Under neoliberalism, market rationality becomes not only an economic aim, but also a method of governance, and even further, the individual morality instilled in its subjects.

In this era, technologies of self are centered on the ethic of individual responsibility. As Brown (2003:5) explains, “neo-liberalism equates moral responsibility with rational action; it relieves the discrepancy between economic and moral behavior by configuring morality entirely as a matter of rational deliberation about costs, benefits, and consequences.” The flip side of this neoliberal governmentality is that those who do not self-discipline or risk-avert avidly enough are seen as wholly responsible for the consequences they subsequently face. Therefore, with its emphasis on personal choices and individual responsibility, neoliberal governmentality played an important role in the legitimation of punitive policy shifts in drug, crime, and immigration policy. As Corva (2008:180) explains,

The enactment of criminal law is crucial to the liberal production of illiberal subjects, because it constructs them as “free” choice-having, “free” choice-making individuals, rather than as embedded in social relations of domination that already restrict their possibilities for social, political, and economic inclusion. Their “bad” decisions to break the law justify their formal exclusion from the liberal order, making them subject to the application of the penal apparatus of the state.

By framing drug use, crime, and immigration as personal failings rather than symptoms of broader structural inadequacies, neoliberal governmentality works to “responsibilize” those caught up in the growing punitive apparatuses of the neoliberal state, and creates the grounds for an idealized scapegoat on which all of these supposed problems can be blamed.

Young (2007) describes how a mainstream perspective that refuses to view crime and disorder as attributable to problems inherent in advanced capitalist societies (i.e., extreme
inequality and stigmatization) must look elsewhere for the source of such social ills. Drug use is one place where blame can be placed, and alongside native-born racial and ethnic minorities, “the immigrant other is a very useful addition to such a narrative of denial. As an outsider, an alien, the immigrant…brings in crime to society, it is obviously not a problem of the social order but the problem group imported into society” (Young 2007:143). Therefore, a moral panic linking immigrants with drugs and crime served to affirm a prevailing societal narrative that individualized the source of social disorder, while ignoring the role of rampant structural inequality.

Lastly, the demographic shifts becoming more pronounced in the United States of the 1980s and ‘90s contributed cultural fear and insecurity to a context where a moral panic about immigrant criminality could flourish. Massey (1995) explains how, after the United States went through a “long hiatus” from about 1931-1970 during which immigration was fairly limited, a “new regime” of large-scale, non-European (mainly from Latin America and Asia) immigration began, which continued through the end of the century (Massey 1995:633). By 1998, Mexico was the largest single source of immigrants to the United States (Martinez, Jr. and Lee 2000:495). Growing pluralism—combined with a longstanding “Latino threat narrative” (Chavez 2008)—served to exacerbate cultural insecurities that were manifest in nativism and the racist othering of Mexicans and other Latino immigrants (DeGenova 2004; Massey 1995). The othering of new and growing groups through criminalization is not novel, in the United States or elsewhere (Martinez, Jr. and Lee 2000; Martinez, Jr. and Valenzuela, Jr. 2006; Preston and Perez 2006), and by linking immigration with drugs and crime, a moral panic about criminal aliens was a perfect avenue for such exclusion.
Therefore, in addition to the elements of moral panic identified above—folk devil, media attention, public sensitization, and punitive social control responses—the context of the 1980s and 1990s was characterized by structural and cultural factors that gave symbolic salience to a moral panic about immigrant criminality. Still, to fully assess the way in which this panic linking drugs, crime, and immigration played a role in the aggravated felony category’s development, we must examine the actors involved. Original formulations of moral panic theory acknowledge the important role of moral “crusaders” or “entrepreneurs” in drawing attention to issues under panic and pushing for more stringent rules and regulations—often with personal motivations (Becker 1963, Young 1971, Cohen 1972). In the following section, I describe the role of key actors who enabled the translation of a moral panic about immigrant criminality into entrenched punitive policies—including those that created and expanded the aggravated felony.

Panic to Policy: Moral Crusaders in the Development of the Aggravated Felony

In order to understand the way that moral panic becomes policy, one must look for the actors that Becker (1963), Young (1971), and Cohen (1972) refer to as “moral crusaders” or “moral entrepreneurs.” Often leading interest groups, organizations, and social movements, moral entrepreneurs work to bring public and media attention to the issue under panic. At times they are politicians themselves, and at others, they enlist the support of legislators who can build political clout by responding to widespread indignation and fear about a particular group.

In the case of the aggravated felony category, the reified folk devil of the immigrant criminal was invoked by moral entrepreneurs and lawmakers in order to pass increasingly stringent policy with regard to immigrants with criminal records. In the mid-1980s, the majority of national attention to immigration was focused on the issue of unauthorized immigration.
Republican Senator Alfonse D’Amato of New York was one of the first politicians to raise the issue of immigrant criminality in this period, requesting in 1985 that the U.S. Government Accounting Office (GAO) inspect the performance of the (now-defunct) Immigration and Naturalization Service (INS) in removing non-citizens with convictions in the NYC area. Playing off the fears of his conservative constituents during a period of intensified racial tensions and crime in the city, D’Amato claimed that criminal aliens are “savaging our society” and pushed for action by Congress (Schuck and Williams 1999:426; see also Kanstroom 2007). Democratic Senator Lawton Chiles from Florida, another state with a large immigrant population, stood by D’Amato in his crusade against criminal aliens, claiming that “[a]lien felons are rapidly becoming the most violent network of organized criminals in the country” (Swearingen 1988). Chiles organized 1987 and 1988 hearings on INS’s failure to effectively remove immigrants with convictions, and proposed the legislation that the Anti-Drug Abuse Act (ADAA) of 1988, the law creating the aggravated felony, was largely based on (Schuck and Williams 1999).

Born out of drug policy, administered through immigration law, and triggered based on criminal offenses, no other legal distinction has penalized immigrants with criminal convictions to the extent or severity of the aggravated felony. As seen in Table 1 below, the category’s original manifestation in the ADAA of 1988—passed by a Democratic Congress and signed by the Republican President Reagan—made it so that non-citizens (both documented and undocumented) convicted of murder, weapons trafficking, or drug trafficking became subject to deportation. Based on the ADAA of 1988, immigrants with aggravated felony convictions could be subject to mandatory detention while awaiting trial for deportation, and for those with prison sentences of at least five years, deportation was mandated. Once deported, non-citizens convicted of aggravated felonies were barred from returning to the U.S. for ten years (Cook
immigrants were deported over the course of the 1980s alone for criminal or narcotics violations, as compared to 48,000 criminality-based removals from 1908 to 1980 (Yates et al. 2005:886).

Table 1. Major Laws Shaping the Development of the Aggravated Felony Category (1988-1996)

<table>
<thead>
<tr>
<th>Year</th>
<th>Legislation</th>
<th>Implications Relevant to Aggravated Felony</th>
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<tbody>
<tr>
<td>1988</td>
<td>Anti-Drug Abuse Act (ADAA)</td>
<td>-Creation of aggravated felony category including murder, drug trafficking, weapons trafficking</td>
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<tr>
<td></td>
<td></td>
<td>-Deportation, mandatory detention, and 10-year re-entry bar</td>
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<tr>
<td>1990</td>
<td>Immigration Act</td>
<td>-Includes lesser drug crimes and all violent crimes with prison sentences of at least five years</td>
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<tr>
<td></td>
<td></td>
<td>-20-year re-entry bar</td>
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<tr>
<td></td>
<td></td>
<td>-Bars 212(c) waiver for those imprisoned at least five years</td>
</tr>
<tr>
<td>1991</td>
<td>The Miscellaneous and Technical Immigration and Naturalization Amendments</td>
<td>-Non-citizens can be deported for aggravated felony convictions still under appeal in criminal court</td>
</tr>
<tr>
<td>1994</td>
<td>Violent Crime Control and Law Enforcement Act</td>
<td>-Creates processes of expedited administrative removal for non-LPRs with aggravated felonies</td>
</tr>
<tr>
<td>1994</td>
<td>Immigration and Technical Corrections Act</td>
<td>-Includes more offenses, such as those related to weapons, theft, burglary, fraud, and prostitution</td>
</tr>
<tr>
<td>1996</td>
<td>Antiterrorism and Effective Death Penalty Act (AEDPA)</td>
<td>-Includes variety of less serious crimes</td>
</tr>
<tr>
<td></td>
<td></td>
<td>-Excludes all immigrants with aggravated felonies from 212(c) waiver of deportation</td>
</tr>
<tr>
<td>1996</td>
<td>Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA)</td>
<td>-Includes wide variety of minor crimes</td>
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<tr>
<td></td>
<td></td>
<td>-Mandatory detention without bail</td>
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<tr>
<td></td>
<td></td>
<td>-Removal of virtually all judicial discretion and options for relief from deportation</td>
</tr>
<tr>
<td></td>
<td></td>
<td>-Applies retroactively</td>
</tr>
<tr>
<td></td>
<td></td>
<td>-Permanent ban on re-entry</td>
</tr>
</tbody>
</table>

Throughout the late-1980s and early- to mid-1990s, the issue of immigrant criminality became an increasingly relevant factor in policymaking. The aggravated felony category expanded and became increasingly stringent in its effects over the course of the same period—as seen in Table 1 above—culminating in the immigration overhaul of 1996. Just two years after its creation, the aggravated felony category was expanded by the Immigration Act of 1990 to
include lesser drug crimes and violent crimes with prison sentences of at least five years, offenses that "are far less serious than the crimes denoted in the ADAA" (Cook 2003:300), and made it so that both state- and federal-level drug offenses with sentences of at least one year were considered aggravated felonies, and therefore were subject to detention and deportation (Yates et al. 2005). The 1990 Act also made it so that immigrants deported based on aggravated felonies could not return to the U.S. for twenty years after their conviction, as opposed to the previous ten, and perhaps most importantly, it began the erosion of judicial discretion that would only intensify over the next several years.

Before 1990, legal permanent residents in the United States convicted of crimes, including aggravated felonies, could apply for a 212(c) waiver of deportation. In order to qualify for 212(c) waiver, a non-citizen had to demonstrate that deportation would cause “extreme hardship” to their self or their family, that they had accrued at least seven years of continuous presence in the United States, that their individual absences from the United States were "brief, casual, and innocent," and that they had good moral character (Podgorny 2008:292). These factors made it easier for immigrants with strong family ties to the United States to avoid deportation. Under the Immigration Act of 1990, immigrants convicted of aggravated felonies who were imprisoned for at least five years became ineligible for this waiver, removing the discretion of the Attorney General to consider mitigating factors for a whole category of deportation cases (Cook 2003).

The Miscellaneous and Technical Immigration and Naturalization Amendments of 1991 made it so immigration authorities were not required to stay the deportation of an immigrant convicted of an aggravated felony while their case was in court of appeals, unless the court specified otherwise. The Violent Crime Control and Law Enforcement Act of 1994 gave the
Attorney General new authority to deport certain noncitizens with aggravated felonies, who are not Lawful Permanent Residents (LPRs), outside of immigration court—through processes of expedited administrative removal. The category was further expanded by the Immigration and Technical Corrections Act of 1994 to include additional firearms and explosives offenses, more theft and burglary offenses, and additional types of fraud and prostitution, among other crimes (Miller 2003). Moreover, throughout the 1990s, several federal rules were enacted to either preclude immigrants with aggravated felony convictions from receiving special visas and other affirmative benefits (Visas 1991, Administrative Naturalization 1995, Petition to Classify Alien 1996), or to more efficiently facilitate their removal (Procedure for Automatic Termination 1995, Administrative Deportation Procedures 1995).

However, it was the Antiterrorism and Effective Death Penalty Act (AEDPA) and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996—both passed by a Republican Congress under Democrat President Clinton—that broadened the scope of the aggravated felony category in unprecedented ways. AEDPA "expand[ed] the aggravated ‘grab-bag of convictions’ to include less serious crimes, such as bribery, counterfeiting or mutilating a passport, obstruction of justice, gambling offenses, and transportation for purposes of prostitution" (Cook 2003:305). Furthermore, this act made it so that all immigrants convicted of aggravated felonies, not just those with prison sentences of five years or more, were ineligible for 212(c) discretionary relief. IIRIRA, passed just six months after AEDPA, further expanded the list of crimes that qualify as aggravated felonies to include petty larceny, assault, second-degree theft, burglary, sexual abuse, and the transport of an illegal alien into the U.S., alongside other offenses (see Appendix A for a full and current list). It also greatly reduced the monetary minimums for a conviction of fraud, deceit, money laundering, and tax evasion, and reduced the
sentencing requirement defining less serious crimes as aggravated felonies from five years to one year (Cook 2003; Podgorny 2008).

Furthermore, the ‘96 laws made it so that an individual did not actually need to be convicted of any crime in order to be considered an aggravated felon. Along with AEDPA, IIRIRA, “mandated that potential aggravated felony adjudications deferred by judges, regardless of the absence of sentencing, were still to count as convictions warranting deportation from the US if immigration authorities could find sufficient evidence that a crime was committed” (Coleman 2007:58). IIRIRA also expanded administrative removal, and made it so all non-citizens facing aggravated-felony-based deportation subject to mandatory detention without bail. In addition, IIRIRA completely repealed the 212(c) provision of the INA—supplanting it with new language that excludes all immigrants convicted of aggravated felonies from discretionary relief from deportation, and made it so that once deported, immigrants convicted of aggravated felonies are permanently barred from returning to U.S. (Cook 2003; Miller 2003). In addition, under IIRIRA, any non-citizen with a previous conviction considered an aggravated felony under newly expanded definition became deportable—making it so non-citizens, including LPRs and other long-term residents, often with fairly minor criminal histories, could be deported “with virtually no legal recourse, for past offenses that were not deportable crimes at the time of conviction” (Miller 2003: 12). Combined with new limits on judicial discretion, the retroactivity of the IIRIRA effectively removed the potential for rehabilitation to be taken into consideration in the detention and deportation of immigrants with previous aggravated felony convictions, and effectively targeted many long-time residents of the U.S.

Newton (2008) compares the symbols and imagery present in the legislative development of IIRIRA with that of the Immigration Reform and Control Act of 1986, through discourse
analysis of the Congressional Record. In the mid-1980s, she found a nuanced discussion of the complex push and pull factors driving “illegal immigration.” By the mid-1990s, the conversation had shifted to paint immigrants as unlawful and undeserving. Two important storylines that emerged in congressional hearings leading to the passage of IIRIRA were what Newton (2008) refers to as “The Criminal Alien Narrative,” which labeled immigrants, and especially those who are undocumented, as inherently criminal, and “The Lawless Border Narrative,” which painted the border as a “breeding ground for smugglers, drugs, violence, and generalized chaos” (p. 118). These narratives were exemplified in statements like, “We look at the drugs coming across the flow, and on those drug ride-alongs, 99 percent have involved legal aliens,” and with regard to the border, “Smuggling is organized crime, both the smuggling of people and drugs. You have certain parts of turf that are staked out by these criminals. You don’t just move from Tijuana over to Mexicali for example without getting your kneecaps blown off…” (Newton 2008: 218-219).

Moral entrepreneurs, in the form of anti-immigration interest groups and legislators alike, played an important role in transmuting societal panic about immigrant criminality into the punitive immigration law overhaul of 1996. Organizations like the Federation for American Immigration Reform, classified as a white supremacist hate group by the Southern Poverty Law Center (2018), gained power and influence throughout the 1990s as they “fueled and echoed” concerns about the links between immigration and crime (Friman 2008:5). By the mid-1990s organizations that only drew “meager support” during the 1980s (Tichenor 1994:12), were working directly with policymakers in the drafting of punitive legislation. Noted legal scholar Ira Kurzban reflects on the central role of anti-immigrant moral entrepreneurs in the drafting and passage of IIRIRA:
Lamar Smith, who was the Chairman of the House Immigration Subcommittee at the time, rewrote the immigration laws by hiring lawyers from FAIR (Federation for Immigration Reform), an anti-immigration group. He knew he could not simply eliminate all waivers so he and his staff rewrote the waivers to make them far less useful to most people. The Republican members of Congress deferred to Smith and the Democrats were only provided the IIRIRA legislation less than 72 hours before there was a vote. As an author on immigration law, it took me several months to go through the legislation. It is unimaginable that anyone except Lamar Smith and the lawyers who worked with him had any idea of the depth and breadth of changes they proposed and rammed through Congress. (Rodriguez 2013:8)

Republican Texas Congressman Lamar Smith was a central political actor in the passage of both IIRIRA and AEDPA. In support of the eventual AEDPA provisions that expanded the aggravated felony category and “streamlined” the deportation process, Smith argued that these actions were necessary to “counter the escalation of crime [sic] robbing Americans of the freedom to walk their streets, the right to feel secure in their homes, and the ability to feel confident that their children are safe in their schools” (Friman 2008: 140). Furthermore, the Clinton Administration and other Democratic lawmakers saw passing and enforcing the harsh immigration bills as an opportunity to demonstrate their lack of leniency for “criminal aliens” and undocumented immigrants (Lind 2016; Macías-Rojas 2018). Therefore, from the ADAA of 1988 to AEDPA and IIRIRA of 1996, it is evident that actors from both ends of the political spectrum drew on the symbolic salience of a panic regarding immigrant criminality to pass the punitive policies that created and expanded the aggravated felony.

Conclusion

Throughout this country’s history, calls for more restrictive and punitive policy have often been based on purported links between immigrants, drugs, and crime. However, the punitive treatment of immigrants with criminal convictions that has emerged from the policy developments of the 1980s and 1990s—and from the expansion of the aggravated felony category in particular—is like nothing seen before, either in terms of the number of immigrants affected or the severity of their treatment. Furthermore, the political focus on “criminal aliens”
throughout this era—during periods of both Republican and Democratic leadership, and despite a lack of actual evidence linking immigration with crime—indicates the symbolic strength of this trope in the creation of lasting policy. Therefore, as moral panic theory dictates, we must examine not only increased attention to the issue of immigrant criminality, but also to contextual determinants of the era, which potentially gave the “criminal alien” trope the symbolic salience necessary to contribute toward the evolution of such unprecedented policy responses.

Through an analysis that stresses the importance of context in understanding the emergence and symbolic power of moral panics, we are better able to understand how seemingly irrational and overblown responses to perceived social problems can have lasting effects on policy. Despite the undeniable influence of a variety of factors in the development, implementation, and maintenance of any policy framework, the symbolic salience of a moral panic linking immigrants with drugs and crime during a period of diversification and economic transformation appears to be an important element which allowed for the creation and expansion of the aggravated felony, a key legal tool in today’s deportation regime. In the following chapter, I describe the effects of the aggravated felony category on contemporary immigration court outcomes and processes, based on my research in New York City.
5. Immigration Court Impacts of the Aggravated Felony

In the previous chapter, I outlined the historical development of the aggravated felony category—based on a close reading of relevant legislation, regulations, and legal analyses—and argued that a moral panic about immigrant criminality played a key role in driving this development. In this chapter and the two following, I move beyond the “law on the books” to describe the “law in action.” Based on court ethnography and interviews with immigration law actors in New York City (NYC), this chapter begins to describe findings related to my second research question (how does the aggravated felony legal category affect everyday immigration court processes and outcomes for non-citizens with criminal records?).

While following chapters will elaborate inequalities perpetuated by the aggravated felony, as well as unexpected forms of legal resistance observed during this research, the findings presented in this chapter illustrate the everyday impacts of the aggravated felony category on the removal cases of immigrants with criminal records. In describing these findings, this chapter confirms, illustrates, and expands upon existing critiques of the aggravated felony. Drawing from key themes in the literature, I begin by describing the expansiveness of the category and its perceived overuse in immigration court. This is followed by an assessment of aggravated felonies’ effects on immigrants’ chances for relief from deportation, and an exploration of observed and reported due process violations related to the aggravated felony. Finally, I address changes in the Trump era, and argue that the expansive, severe, and unjust effects of the aggravated felony in the “best case scenario” of NYC underscore injustice inherent in the law itself and illustrate the power of moral panic to influence policy in lasting ways.
“Doesn’t Have to be Aggravated or a Felony:” Expansiveness of the Aggravated Felony

One recurring theme in the legal literature on the aggravated felony category is its expansiveness. Despite its severe name, “the aggravated felony provision encompasses the widest range of crimes” of the criminal categories for which immigrants can be deported (Cook 2003: 298). In the last chapter, I explained how the category developed from its enactment in the Anti-Drug Abuse Act of 1988, through its extreme expansion in the immigration laws of 1996. With no major legislative immigration reform in the years since, the Immigration and Nationality Act (INA) definition of an aggravated felony is still based on the list of 35 offense types arrived on in the ‘96 laws (see Appendix A). Furthermore, since immigration law is federal, each of the offense types listed in the INA can be applied to a myriad of state-level offenses.

In my interviews, several lawyers discussed what they saw as a disconnect between the “aggravated felony” label and the many crimes it encompasses. George, who had worked as a public immigration lawyer and advocate for over thirty years, discussed the importance of the category’s expansion, remarking, “the first sort of contradiction or almost oxymoron is that something doesn’t have to be aggravated or a felony to be an aggravated felony.” He explained how since ‘96, “A theft crime with a one-year sentence is an aggravated felony, and a suspended sentence, which is where you don’t have to serve your time, counts as a sentence for the purpose of the aggravated felony laws.” Brianna, a private immigration lawyer who had been working in the field for ten years, said the “broadening of the category” has “caught a lot of people in the crosshairs.” She felt the name was “misleading” as it implies “supervillain” despite the wide variety of state offenses included. Brianna explained, “let’s say it’s a misdemeanor or a low felony in your state, but in front of immigration they consider it a felony. It could just be a
violation in your state, but let’s say how you get charged or how you get sentenced or whatever, it becomes a [felony].” May, a public immigration lawyer for five years, felt reform was needed to at least make the category fit its title. She joked, “it would be nice if we could have a case being like, ‘the phrase “aggravated felony” means something, right?’ Like it has to be a felony. Or there has to be some aggravating factor.”

Several lawyers spoke to disproportionality in the aggravated felony definition, citing its inclusion of crimes they believed to vary greatly in terms of severity. Seth, a public defender and immigration lawyer for almost 25 years, said “I think some of the crimes are things that probably most people would think should be in the aggravated felony, like slavery, like murder, like rape.” He continued,

“I think the public starts—to the extent that they think about it—starts wondering [in cases when] the rape is statutory rape and it involves like an 18-year-old guy with his 16-year-old girlfriend, and it’s consensual to the extent that a 16-year-old can give consent. I think people think, ‘Hmm, should that really bar all immigration relief and make you mandatorily deportable?’ But then I think things like shoplifting, for which someone happened to get a year in jail, I think most people would probably say that’s not something that should lead to you being barred from all forms of relief.”

May said, “It’s so ridiculous and disproportionate, like if you read the list. It’s like, ‘Okay murder, rape, sexual abuse of a minor, drug trafficking—okay that sounds pretty bad, that sounds like, okay maybe there should be some consequences.’” She continued, “But then you’re like, ‘Huh, theft ag fel? I stole a tiny thing once.’” Brianna explained how a bounced check could possibly qualify as an aggravated felony, and said, “they put that in the same category as murder. They put that in the same category as rape. They put that in the same category as literally taking a baseball bat and beating the shit out of someone. And that’s not fair.”

The majority of immigration lawyers interviewed reported examples of minor crimes technically considered aggravated felonies. Jackie, an immigration lawyer and advocate with
eight years of experience, explained how a subway turnstile jump is a theft offense with a maximum sentence of one year in New York State, which—if so-sentenced—constitutes an aggravated felony. She said, “That’s how wide and broad it is…even though it’s not likely, you could be convicted of an aggravated felony for not paying $2.75 on the subway.” Pia, a public immigration lawyer with six years of experience, explained, “It does come up quite often, because it’s so broad, that you’ll even see low level offenses.” She added, “these broad definitions are really leading to the mass deportation of individuals,” and mentioned a client who had been convicted for petty larceny for stealing detergent from a bodega because he was homeless, continuing, “You know, that’s the level of types of offense that with a certain sentence could lead to this kind of massive consequence.” Petty theft offenses, minor drug crimes, and driving under the influence (DUI) were common among the many examples provided by lawyers as illustration of the wide variety of convictions that could potentially be deemed aggravated felonies.

Some also explained how certain types of crimes included in the INA’s definition of the category sound more severe than the convictions they are applied to in practice. For example, Jon, a private criminal and immigration lawyer for six years, described a case regarding a client convicted of a child pornography misdemeanor, classified as an aggravated felony, based on the “attempted possession” of internet pornography which turned out to include a sixteen-year-old girl. Marco, a public immigration lawyer for five years, explained how in New York, “any sort of possession with intent to distribute pretty much qualifies as a drug trafficking conviction, even though possession with intent to distribute is sometimes without intent of being remunerated by any financial gain.” He felt it was “absolutely insane” that someone could just be “sharing, I don’t know, some like molly with friends and that can be…a drug trafficking aggravated felony.”
(The central role of drug crimes was an ongoing theme throughout my interviews, as will be discussed further in the following chapter.)

Raina, a public defender and immigration lawyer with six years of experience, referred to fraud offenses where the loss to the victim is over $10,000 being included as aggravated felonies as particularly “unfortunate,” explaining, “if you think about fraud offenses, that could be welfare fraud. That could be I signed up for Medicaid and I didn’t necessarily qualify for it the whole time.” Raina continued, “when people are convicted of welfare fraud…it’s oftentimes when people are making a little bit more than what the threshold amount is, or they were told by whoever was registering them, ‘just write that you earn this much so I can register you’…it’s a very easy thing to get caught up in.” She went on to describe a previous client charged with an aggravated felony because she had taken “a couple thousand dollars” from her employer to make her rent and not be evicted. She paid it back soon after, Raina explained, “but had already messed up all the books, and then the employer charged and convicted her, and not only did she get convicted for the small amount that she took, but like for all of the mess ups in the books. So things like that can happen.”

The expansiveness of the aggravated felony category as written is compounded by a perceived overuse by Immigration and Customs Enforcement (ICE). Cally, a public immigration lawyer with four years of experience, said, “they often will charge things that we disagree with being aggravated felonies,” a sentiment prevalent among interviewees. Jane, a public immigration lawyer for eight years, explained how “what constitutes an aggravated felony is highly contested between immigrant advocates and attorneys, and ICE.” She reported, “ICE will always lodge the most serious immigration charges that they possibly can. So they always take an aggressive interpretation of the law…So yeah, we very oftentimes think they have an overly broad interpretation of what constitutes an aggravated felony.”
George, alongside several others, referred to seminal Supreme Court cases that have overturned certain ICE interpretations surrounding the aggravated felony category, as will be discussed in more detail in Chapter Seven. George explained, “they’re saying everything is an aggravated felony, and their interpretations, which like I said, have often been found to be wrong, are so excessive that even the Supreme Court, which is hardly a neutral arbiter, rejects them, and they go ahead and continue to do it anyway.” However, despite wins at the Supreme Court level, many immigrants are without the resources or knowledge to contest their aggravated felony in immigration court, where the burden of proof falls on the respondent. Therefore, interpretations by ICE are especially harmful in a context where most people with aggravated felonies are forced to fight their case from detention and without legal representation—circumstances elaborated later in this chapter.

“The Immigration Law Death Penalty:” Severity of the Aggravated Felony

A second major theme in the legal literature on the aggravated felony category is the severity of its effects on non-citizens’ chances for avoiding deportation (Johnson 2001, Miller 2003, Podgorny 2008, Lang 2015). Despite key innovations by lawyers and advocates in NYC (touched on in Chapter Three and discussed further in Chapter Seven), this severity was emphasized throughout my interviews and ethnography. At an observed conference panel for practitioners of “crimmigration law,” it was stressed that the aggravated felony is the most important criminal category for non-citizen clients to avoid. Panelists even referred to the aggravated felony as the “immigration law death penalty,” since it can have such deleterious effects on immigrants’ deportation cases. This outlook was reflected in many of my interviews. Jackie posited, “I think it’s completely bleak. The number of people who can make some kind of claim that they should be able to stay here after being convicted of an aggravated felony is so
low, and the number of people that may have a claim but without the resources to win one of those claims...it’s ridiculous.” Pia concurred, referring to the consequences that stem from aggravated felonies, as “so so so so devastating…very often mandatory detention, mandatory deportation, essentially not eligible for any possible defense, with very limited exception.” Jess, a public immigration lawyer working in the field for 11 years, said that an aggravated felony conviction will “negatively impact every step of the immigration process.” She went on to explain how an aggravated felony makes a person both deportable and subject to mandatory detention, which negatively affects their ability to argue their case. Among all the effects, Jess felt that limits to relief were the most harmful, saying, “if you are correctly categorized as having committed an aggravated felony, a lot of that stuff will ultimately not matter, because it’s going to prevent you from getting any type of relief from removal in the first place.”

The concept of “mandatory deportation” was raised in several interviews to explain the extent to which the aggravated felony bars conventional forms of relief from deportation. Barb, a public immigration lawyer and educator with thirty years of experience in the field, stated, “it’s just a huge problem to have this category that has such enormous consequences…makes you subject to mandatory detention, makes you subject to mandatory deportation…It has all these consequences. So it’s a real problem to have that definition to begin with.” Marco attributed the label of mandatory deportation to the fact “that you are pretty much ineligible for any sort of immigration relief. There are very very few forms of immigration relief that you are eligible for.” He went on to emphasize limits on relief from deportation as “the most harmful thing that aggravated felonies do.” Emily argued that Congress intended the law to trigger “automatic deportation,” saying, “when I have clients [with aggravated felonies.] I often have to advise them that there are very little options for them to stay.” Amy, a public immigration lawyer with ten
years of experience, referred to the aggravated felony as the most severe out of the various
criminal bars to relief, saying “certainly the aggravated felony category is the most serious one
that we have to avoid, because it ends up barring so many things.”

While aggravated felonies do not actually ensure “mandatory deportation,” they do cut
immigrants off from almost all available forms of legal relief from removal. As seen in Table 2
below, non-citizens in removal proceedings based on aggravated felonies are wholly barred from
voluntary departure, cancellation of removal, and asylum, and many are also barred from
withholding of removal, some of the most common forms of relief from deportation (Executive
Office for Immigration Review 2018). Although voluntary departure can hardly be considered
much of a form of relief, it does allow many non-citizens to leave “on their own will” without a
formal order of deportation. People with aggravated felonies are barred from this route, are
banned from ever returning to the U.S. after deportation, and are subject to enhanced criminal
penalties for re-entry with an aggravated felony.

Table 2. Forms of Relief from Deportation, Numbers Granted in 2017,
and Availability to Non-Citizens Convicted of Aggravated Felonies

<table>
<thead>
<tr>
<th>Relief Type</th>
<th>Total Number Granted in 2017</th>
<th>Availability to People Convicted of Aggravated Felonies</th>
</tr>
</thead>
<tbody>
<tr>
<td>Voluntary Departure</td>
<td>14,143</td>
<td>Barred</td>
</tr>
<tr>
<td>Cancellation of Removal</td>
<td>6,222</td>
<td>Barred</td>
</tr>
<tr>
<td>212(c) waiver</td>
<td>401</td>
<td>Available for some with pre-1996 convictions</td>
</tr>
<tr>
<td>Asylum</td>
<td>10,654</td>
<td>Barred</td>
</tr>
<tr>
<td>Withholding of Removal</td>
<td>1,265</td>
<td>Available to those who have not been convicted of a “particularly serious crime”</td>
</tr>
<tr>
<td>Withholding of Removal under the Convention Against Torture</td>
<td>760</td>
<td>Available to those who have not been convicted of a “particularly serious crime”</td>
</tr>
<tr>
<td>Deferral of Removal under the Convention Against Torture</td>
<td>175</td>
<td>Available</td>
</tr>
<tr>
<td>T Visa</td>
<td>672</td>
<td>Available to those who are victims of trafficking and are providing helpful information to law enforcement</td>
</tr>
<tr>
<td>--------</td>
<td>-----</td>
<td>-------------------------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>U Visa</td>
<td>10,031</td>
<td>Available to those who are victims of serious criminal abuse and are providing helpful information to law enforcement</td>
</tr>
</tbody>
</table>

Sources: (Executive Office for Immigration Review 2017; U.S. Citizenship and Immigration Services 2018)

Cancellation of removal is a common form of discretionary relief, available to Lawful Permanent Residents (LPRs) made deportable based on criminal grounds (that are not aggravated felonies), as well as certain undocumented immigrants who can demonstrate lengthy residence and strong ties to the United States. Aggravated-felony-based ineligibility for cancellation of removal makes it so that discretionary factors cannot be taken into account in immigration court. As explained in Chapter Four, the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996 repealed the 212(c) provision of the Immigration and Naturalization Act (INA) which had, until then, provided a key waiver of deportation that LPRs convicted of crimes were eligible to apply for. “This discretionary provision allowed the Attorney General to consider mitigating factors, such as the individual’s permanent residence status, his length of residence in the United States, and the effect of his deportation on family members” (Cook 2003: 301-302). IIRIRA replaced this provision with a new form of relief, cancellation of removal, for which non-citizens with aggravated felony convictions are completely ineligible. This made it so that discretionary factors became mostly irrelevant in aggravated-felony-based removal proceedings, a problem regularly raised in my interviews with lawyers. Naomi, a public immigration lawyer with ten years of experience, said, “it’s particularly aggravated felonies that both make you deportable and strip the court of any power to look at your equities and decide what your life is like now.” Pia said it’s “critical” for non-citizens “to avoid at all costs being convicted for something categorized as an aggravated felony, because...it takes away really, essentially, all discretion from judges, in most instances, to consider a lot of other factors, for example
someone’s family, their ties.” She went on to say that an aggravated felony conviction “severely limits what form of relief they will be eligible for, and also really means the judges can’t consider super compelling humanitarian factors that don’t fit in nicely to the CAT requirements”—referring to the difficulty of arguing for relief under the Convention Against Torture, which will be discussed further below.

Bars to discretionary relief are seen as being particularly problematic in the context of the retroactive application of the aggravated felony, another development of the 1996 laws. The retroactivity built into these reforms—also described in Chapter Four—made it so that non-citizens could be deported for crimes that weren’t even considered aggravated felonies at the time of conviction. Below, Seth describes the striking combination of retroactivity with bars on judicial discretion that stemmed from the ‘96 laws,

“...the complete abolition of 212c relief and its replacement by cancellation of removal with the ag fel bar contained within it. That really was a huge stripping away of discretion from the courts, so it meant that it didn’t matter what you had done with your life or what the countervailing equities might be. And then the retroactivity of the definition meant that you could have done something at a very early stage here, led a perfect life since then. And I think for a lot of people who aren’t sympathetic to people’s criminal convictions, I think that would strike a lot of people as unfair.”

In 2001, the Supreme Court ruled that 212 (c) waivers must remain available to LPRs in removal proceedings who were eligible at the time of their pre-1996 guilty pleas (INS v. St. Cyr 2001). While several lawyers did mention this shift as helpful, it only affects a limited group of non-citizens in removal proceedings, and becomes less and less relevant with almost a quarter century now since 1996. In 2017, 401 non-citizens received 212(c) relief nationwide, compared to 6,222 who were granted relief under cancellation of removal—although none of them with aggravated felonies (Executive Office of Immigration Review 2017).
It is common for immigrants to be placed in deportation proceedings based on alleged aggravated felonies years—or even decades—after serving their sentence for the convictions in question. Below, Marco explains the results of this model, emphasizing the way in which limits on discretion affect immigration courts’ ability to account for rehabilitation.

“Some of our clients and the families of our clients are so surprised and so shocked that if you had a conviction, no matter how old the conviction is, if this conviction is an aggravated felony, there’s completely—it doesn’t matter how long you’ve lived here, the family you have, the rehabilitation, nothing, absolutely nada matters, because in the end they’re just statutorily ineligible for that form of relief. I mean it’s shocking news that we need to deliver to both the client and the family.”

Lawyers often offered examples of cases where they believed discretionary factors should have been taken into account, but were not, due to aggravated felony bars. These were most commonly removals based on older aggravated felony convictions, where community ties and rehabilitation were clear. Cori, a public immigration lawyer with twelve years of experience, described one client who would be an “excellent candidate” for Cancellation of Removal, if it weren’t for a dated conviction from the 1990s. She said that “he’s been out of trouble for several years,” and, “he’s an older man, is disabled, has a young baby...But he’s really precluded from every sort of relief whatsoever by this conviction that occurred in ‘95.” Marco described a similar case of his own—a client who had been recently placed in deportation proceedings based on a 1997 conviction for which he had served a five-year probation, “after this person had been completely giving back to the community, had a family, had multiple jobs, had an absolutely stable life.” Despite several years of immigration law experience, Marco expressed incredulity at the situation, continuing, “the fact that he has completely rehabilitated, reintegrated, is not taken into account at all, because his old conviction automatically triggers what is pretty much called mandatory deportation.”
The inability of immigration judges to account for discretionary factors in these cases is further problematized by the fact that many non-citizens in removal proceedings related to aggravated felonies are green card holders/LPRs, who have deeply entrenched relationships with families, communities, and other institutions in the United States (Johnson 2001, Cook 2003, Baum et al. 2010, Lang 2015). As a grounds of deportability, the aggravated felony category is most often applied to people who have already been admitted to the U.S. at a port of entry, either as a visitor or resident (Area 2018). Furthermore, the use of administrative removal for certain undocumented people with aggravated felony convictions makes it so that those who actually make it to immigration court are even more likely to be green card holders (Koh 2017). Although the Department of Homeland Security (DHS) does not currently release data on the number of LPRs deported, a 2010 study out of the University of California-Berkeley School of Law reported an average of 8,700 green card holders deported each year on criminal bases, or close to ten percent of total deportations at the time (Baum, Jones, and Barry 2010:4)—numbers the authors’ primarily attributed to aggravated felonies and their negative effects on discretion. Furthermore, 30% of the detained immigrants represented in removal proceedings by the New York Immigrant Family Unity Project (NYIFUP) (described in Chapter Three), are lawful permanent residents (Stave et al. 2017:18). The impacts on LPRs came up in several of my interviews with lawyers. For example, May explained that the typical aggravated felony case they receive at the public legal providers is a green card holder “who has lived here for a long time and has a lot of ties to the community.” She said such cases are both “emotionally very difficult” and “legally very difficult” due to “the fact that you are barred for all forms of relief by an ag fel.” May found it especially problematic that aggravated felonies bar cancellation of removal, which she identified as “most of our lawful permanent residents’ best option for relief.”
In terms of fear-based relief, non-citizens convicted of aggravated felonies are made ineligible for asylum, and those with sentences longer than five years, or others with so-deemed “particularly serious crimes” are ineligible for withholding of removal. Asylum is a key international protection, for which an applicant must show that they have suffered past persecution in their home country or that they possess a well-founded fear of persecution if returned—based on one of the five protected grounds of race, religion, nationality, political opinion, or membership in a particular social group. In order to be granted asylum, applicants must apply within one year of entering the U.S., and must establish that their likelihood of persecution is ten percent or higher (Area 2018). Once granted, asylum allows immigrants the opportunity to apply for legal permanent residency or if already an LPR, the reinstatement of their green card. Withholding of removal has no time limit, and is based on the same grounds of persecution as asylum. However, while a grant of withholding of removal prevents a person from being deported, and allows them to work legally within the U.S., it does not allow them to apply for lawful permanent residency. Furthermore, the burden of evidence is higher, as applicants for withholding of removal must prove that it is more likely than not that they will be persecuted upon return. Therefore, it is far less statistically likely for a person to be granted withholding of removal than for a person to be granted asylum. As seen in Table 2, 10,654 people were granted asylum by U.S. immigration courts in 2017—37% of decided applications. That same year, just 1,265 people were granted withholding of removal—a mere 5% of decided applications (Executive Office of Immigration Review 2017).

While asylum is barred for all non-citizens with aggravated felony convictions, withholding of removal is also barred for many, due to wide use of the “particularly serious crime” classification within the aggravated felony category. In my interviews, Barb referred to
this classification as one “that has been vastly over read by the government.” Seth discussed the classification’s expansion and explained how even “small drug trafficking offenses” like “selling ten dollars’ worth of crack” are often categorized as particularly serious crimes that make immigrants ineligible for withholding of removal. Lawyers also pointed out criminal bars to such protections as being inconsistent with the stated purpose of fear-based relief, in making the process more difficult for those seeking refuge from persecution. For example, Pia referred to aggravated felony bars on asylum as harmful to non-citizens “who may be able to show fear of prosecution on protected grounds, you know, due to race, national origin, things that we’ve decided are really really important to protect and preserve.”

The only forms of fear-based relief available to many people convicted of aggravated felonies are those based on the international Convention against Torture. The United Nations Convention Against Torture and Other Cruel, Inhumane, or Degrading Treatment or Punishment was enacted into U.S. law in 1998. The Convention states that “[n]o State Party shall expel, return, or extradite a person to another state where there are substantial grounds for believing that he would be in danger of being subjected to torture” (Kurzban 2016:737). There are two types of relief under the Convention Against Torture (CAT): withholding of removal and deferral of removal. Like the withholding of removal explained above, both forms of CAT relief are based on a “more likely than not” standard. However, while general withholding of removal may be founded on various forms of persecution, CAT requires a respondent to establish that there is more than a 50 percent chance that they will be tortured or otherwise injured upon return to their home country, either at the hands of the government or with government acquiescence (Area 2018). Furthermore, withholding of removal under CAT is also like general withholding of removal in that it prevents future deportation, and is limited to those who have not been
convicted of offenses deemed to be “particularly serious crimes.” However, the many who are unable to prove that their conviction is not “particularly serious” are limited to deferral of removal under CAT, a tenuous form of relief which affords no real status, and can even be reversed at a later date if home country conditions change. As seen in Table 2, only 760 people were granted withholding of removal under CAT in 2017—4% of decided cases—while just 175 were granted deferral of removal under CAT—a grant rate of less than 1% (Executive Office of Immigration Review 2017).

The difficulties of meeting the standard for relief under CAT was a common thread throughout my interviews and court observation. The best chance to win such cases was widely agreed upon to be through the use of an expert witness, a tactic I will discuss further in Chapter Seven. In general, lawyers did not regard CAT relief as a very hopeful option, as exemplified by Marco’s quote below.

“The problem with this form of relief is that it is incredibly hard to get, and the burden can be so high, that one, of course not everyone is afraid of going back to their home country, so they are simply not applying for that form of relief, and second, it’s so so hard to get, so even if you’re afraid of going back and you have valid reasons, and valid concerns that you will be tortured if you go back, our experience is that most of our clients get deported at the end regardless of their eligibility for that form of relief.”

Seth had a similar perspective. He referred to the intense burden of evidence in such cases, arguing that it’s almost impossible to win a CAT claim without an expert witness, “unless you’re a well-known figure in your country who is fleeing, who has been clearly tortured by government officials, and there are Amnesty International reports out about you or someone in exactly the same situation as you.” He said perhaps with official reports specifically speaking to your exact case characteristics, as well as medical documentation of the torture and violence you’d experienced, “you could possibly win without an expert witness, although it would probably be good to have a doctor come testify on your injuries as well.” While it is common
knowledge that many immigrants to the United States are fleeing violence, it is not the always the type of violence that CAT relief is designed to protect from. Gang violence in the Northern Triangle (Guatemala, Honduras, and El Salvador), or narcocartel-power in Mexico and the Dominican Republic are not easily framed as grounds for relief under the Convention Against Torture.

The aggravated felony bars on more fitting forms of relief for people seeking protection from such circumstances are made even more ironic when the crimes triggering these bars are also shaped by the power of gangs and drug cartels. In one hearing I observed, a 40-year-old man from Guatemala had come to the U.S. in his early twenties, fleeing the control of a powerful gang he was forced to join at the age of 14. However, after building a life here—including a young family and small business—he is cut off from all forms of relief besides CAT, which he is unlikely to receive, based on serious crimes he committed under gang coercion in his youth. Similarly, Marco described a client who had fled violence in his home country by way of drug trafficking. The client was caught at the border with drugs in his suitcase—a crime that would most likely end up cutting him off from the protection he was seeking. Marco explained that this man “was kind of taking a separate shot to get here, because he was in danger in his home country, and it was like a risky, foolish way to try to get safe and have a way to start his life over again here,” and continued that because the client was discovered with drugs, “what would otherwise be a pretty straightforward asylum case, is a likely losing Convention Against Torture case, because the standard is so high.”

In many of the cases I observed, the crime that made the respondent deportable was related to the country conditions being fled. Furthermore, there were several where respondents’ fears of return were based on them having cooperated with the U.S. government to indict
transnational criminal organization higher-ups after their original conviction. In certain cases, immigrants who cooperate with law enforcement, and who have also been victims of trafficking or other serious abuse, are eligible for protection through the T or U Visas (U.S. Citizenship and Immigration Services 2017)—as seen above in Table 2. While these forms of relief to deportation are technically available to people convicted of aggravated felonies, in practice, they are difficult to obtain, with a backlog of close to 200,000 applications between the two categories (U.S. Citizenship and Immigration Services 2018). In my research, I regularly observed cases where immigrants had cooperated with law enforcement, yet were not eligible for the T or U Visas. In one case, a man had been convicted of a few robberies in the early 2000s while working in a minor capacity for a transnational drug gang. He had then cooperated with U.S. law enforcement, and quite a few people were picked up because of him—including gang higher-ups. After cooperating, the man was threatened through his lawyer, and there was an attack on his family home in the Dominican Republic, where his brother was shot. Another man in a similar situation was asked by his lawyer in court, “what will happen to you if you are deported?” The man answered, “They will torture and kill me,” referring to the drug gang he had worked for, who he had cooperated against with U.S. federal authorities. A third case was of a sailor who had climbed to the high rungs of a narco-organization and trafficked drugs throughout the region, and then, once caught, gave vital information to a grand jury, leading to several arrests. In court, he described threats from the organization, and claimed, “there is a stamp on my life if I return.” Although at times these arguments can prove successful, as will be discussed in Chapter Seven, they are extremely difficult in the CAT context, which is designed to protect from torture at the hands of, or with the knowledge of, government officials—not necessarily the violence of criminal organizations. Furthermore, mandatorily detained and without a lawyer—as is the
situation of most immigrants facing deportation based on aggravated felony convictions around the country—CAT claims become almost impossible, as the next section will illustrate.

“Certainly a Due Process Violation:” The Aggravated Felony and Legal Rights

A third theme in the existing literature on the aggravated felony is the category’s effects on immigrants’ legal rights. Courts have consistently upheld that non-citizens, even those without legal status, are entitled to Constitutional protections of due process—the ability to exercise the rights and court processes afforded to them by U.S. law. However, in practice, as an administrative body, immigration law has not been held to the same due process requirements as criminal law, such as the compulsory provision of legal representation (Kaufman 2008). Furthermore, the aggravated felony category has been credited for further erosion of the due process that does exist in immigration law, through mechanisms such as administrative removal and detention without bail (Cook 2003, Warner 2005, Kurzban 2008). In my interviews, legal processes related to the aggravated felony category were frequently cited as infringing upon immigrants’ due process rights.

While there is universal legal representation for detained immigrants in NYC through NYIFUP, only 14% of detained immigrants nationwide are represented in their deportation proceedings (Eagly and Shafer 2015:8). Despite the locale, lack of representation was often mentioned in my interviews as a key due process concern in immigration law—compounded by detention. When asked how the aggravated felony has affected due process, Pamela, a public immigration lawyer with three years of experience, said, “I think it usually is in the context of not having an attorney…Because it’s such a complicated area of law [and] you don’t have anyone to raise these arguments for you.” This was echoed by many other interviewees. Lisa, an immigration lawyer and educator working in this field for more than 20 years, said, “The idea of,
you know, civilly detaining them, denying them liberty, and then putting them through this banishment process without council, just doesn’t seem to make a lot of sense, based on what we consider to be a fair and just system.”

The specific difficulty of winning the forms of relief that are not barred by aggravated felonies, such as withholding of removal and deferral of removal under the Convention Against Torture, was cited as making the lack of guaranteed legal representation particularly unjust. Jackie gave an example of a recent case to illustrate this concern, quoted below.

“I just ended a client who had been convicted of an aggravated felony drug sale offense, and we put on a withholding case for him...And my brief to the court was over 600 pages...It was helpful that he had me to do that, because it was very unlikely that he would have been able to...he has a claim basically that he was going to be retaliated against by drug dealers in Jamaica who are powerful enough to evade any kind of lawful sanctuary that he’d be able to get from the government there. So I had to do things like prove that a specific person had been deported to Jamaica already, right? That’s not anything that he could’ve done by himself. I ordered all of these records...We hired two experts for his case. So he couldn’t have done that without an attorney. And most people, the vast majority of people who are detained have no council.”

Greg, a private immigration lawyer for eight years, claimed to enjoy crimmigration work specifically because of its legal difficulty, and said “If you don’t have a lawyer, you can’t do a withholding or a CAT case, or really even an asylum case. It’s virtually impossible.”

The difficulty—or virtual impossibility—of a respondent defending against removal based on an aggravated felony without a lawyer, is exacerbated by detention—mandatory for immigrants facing deportation based on aggravated felonies. Whether arguing for fear-based relief or contesting removability, a process that will be described in Chapter Seven, fighting aggravated-felony-related deportation is lengthy and complex—often taking several months or even several years. This is not an easy undertaking while mandatorily detained. Jackie explained how either way, aggravated felony cases “are going to be the most legally complicated, factually
complicated to prove” and expressed dismay at the fact that “everybody’s doing that from detention and without any opportunity to leave.”

Many lawyers felt that detention, and mandatory detention in particular, is not only a breach of due process, but further impedes justice by deterring many immigrants from fighting their deportation at all. Cecy, a public immigration lawyer for two years, explained how in cases involving aggravated felonies, in addition to having such limited relief already, “the fact that they’re going to be in detention, throughout the entirety of their immigration court proceedings, without any hope in sight…does discourage people sometimes from even trying to seek relief under the Convention Against Torture.” She found this to be “really problematic” not only due to families being separated by detention, but also, because people may want to pursue “legitimate forms of relief that they’re eligible for and they might meet the standards for, but the idea of jail is too much.” Barb also saw detention as a key obstruction to winning aggravated-felony-based removal cases. She said, “it’s this lengthy process. People have to be willing to endure detention…a lot of people will do it because they’re permanent residents and their whole life is here and they can’t imagine being deported, but I think a lot of people, even when they can’t imagine that, they think, you know, ‘It’s gotta be better to be out and not be locked up.’”

Several interviewees maintained that this effect of detention is no coincidence, arguing it is purposely designed to deter immigrants from seeking relief from deportation. George said, “where a person has to be locked up to vindicate their rights, that’s a very effective tool to give up their rights.” Jackie called mandatory detention “a coercive measure that tries to get people to not fight their cases.” And both Barb and Jackie referred to ICE officials saying things like “Well the person is only detained because they’re not accepting their deportation order” or "You know, the individuals being held have discretion too. They can always sign themselves out and go to
another country," in response to criticisms of lengthy and seemingly arbitrary detainments. The harsh conditions of immigration detention, as described by Cecy below, further compound this deterrent effect.

“It’s so interesting because detained is supposed to be a detention facility not a jail, but when you talk to people who have been, let’s say they’ve been in federal prison after being sentenced, they talk about the differences between the ICE detention facilities and how much worse they are, just in terms of the quality of life, and just the way that they’re treated, which just makes it really difficult...So for people who might not necessarily have been in jail for a long time or ever before, now they’re faced with these really terrible conditions, and even people who have been transferred to those detention facilities from other places, there’s a stark difference in that the conditions are pretty terrible, in terms of just like food and privacy and everything.”

As explained in Chapter Two, almost three-quarters of immigrants in the 200 or so immigration detention centers around the country are housed in privately-managed facilities, with the rest primarily held in county and city jails contracted by ICE (Detention Watch Network 2013; Luan 2018). Numerous researchers have reported on these facilities, emphasizing poor conditions, lack of oversight, profit-seeking management, and the punitive treatment of detainees (Brotherton 2018; D. Brotherton and Tosh 2018; Doty and Wheatley 2013; Dow 2005; Golash-Boza 2009; Wessler 2016).

The unjust nature of mandatory detention without bail, as initially and currently triggered by the aggravated felony, was a particular area of concern for many of my participants. This issue became more prominent about halfway through my study, in February 2018, when the Jennings v. Rodríguez decision by the Supreme Court ruled that detained immigrants do not have a statutory right to periodic bond hearings. This overturned a 2015 decision by the U.S. Court of Appeals for the Second Circuit (encompassing New York, Connecticut, and Vermont), which

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5 This decision was reinforced by the March 2019 Supreme Court decision Nielsen v. Preap, where the court ruled that detained immigrants made deportable based on criminal convictions are not entitled to a bail hearing, no matter how long they were out of criminal custody before being apprehended by immigration enforcement.
held that immigrants who are mandatorily detained must be given a bail hearing after six months of detention. This decision, called *Lora v. Shanahan*, was an important win for mandatorily detained immigrants in NYC and the rest of the Second Circuit. Still, some lawyers said its helpfulness for people convicted of aggravated felonies was limited. Speaking before *Lora* was overturned, Jon explained how the demonization of immigrants with many of the crimes that are classified of aggravated felonies made it so the required bond hearing only meant so much. He said,

“If the crime involved violence of any kind, or actual drug sales, you know you’re going to have a tough time convincing a judge to let you out, even when you get to that *Lora* hearing, where it’s supposed to be the government’s burden to prove that you’re a danger to the community, but a lot of judges sort of say, ‘Well, I consider drug dealing to be a dangerous offense. Y’know, this happened recently, so no. I find the government has met its burden,’ so you’re going to remain in for the majority of your proceedings.”

Speaking after *Lora* was usurped by *Jennings*, Laura, a public immigration lawyer for three years, admitted, “what was good about *Lora* was that…yeah, people were able to get bond hearings.” However, she went on to qualify that while “a really old aggravated felony might have actually been able to get out on bond” under *Lora*, for people with more recent aggravated felonies, “if you get a bond hearing but you don’t have really good facts in your case, it doesn’t matter, because the judge is going to deny you bond or set it prohibitively high anyway.”

Still, the *Jennings* decision was seen as a major blow to the rights of immigrants who are subject to mandatory detention, like those with convictions alleged to be aggravated felonies. Cori said,

“now that *Jennings* came down the Supreme Court, and *Lora* has been reversed, we’re back to a world where someone with an aggravated felony or some other conviction that makes mandatory detention…where those people, because they want to fight their case, they want to appeal it, and like keep it going, they could be looking at years in detention.”
Pia agreed, saying, “in practice, unfortunately it's a huge setback, where people were getting these automatic hearings and they’re not anymore.” Especially considering that so many people are detained based on convictions that are quite old, she found it “extremely unfair that the judge can’t even look at whether you deserve to be detained or not.” Laura agreed that the system was unjust. She identified immigration detention in general as an intrusion on due process, and especially mandatory detention without bail. Laura elaborated,

“First of all, you get detained, you don’t even see a judge usually for like a month, right? And you’re just sitting there. And you can lose your job, you can lose your apartment. You miss your kid’s first birthday, all of that is completely awful, and the thing is that you’re not even eligible to get a bond hearing because you have a certain criminal conviction...I think that’s certainly a due process violation...”

Jane also saw detention without bail as a violation of immigrants’ legal rights, and explained how another area of litigation pursued by immigration lawyers with clients who are mandatorily detained is “arguing that it is unconstitutional to hold people for prolonged periods of time without giving them a bond hearing.”

While detention and lack of representation were the due process violations most commonly mentioned in my interviews, they were not the only ones that I encountered in this research. Ethnographic observation at Varick Street was an ever-changing experience, with new apparent injustices surfacing at each visit. One week early in my research, a group of angry defense lawyers in the court waiting room discussed the unconstitutionality of a new move by DHS in NYC immigration courts. Beginning that week, government trial attorneys had begun forcing respondents to “plead to” (admit or deny) alleged grounds for deportation before making them privy to the actual allegations or evidence. On this day, I had been invited to observe by Nicole, a public immigration lawyer with 15 years of experience. In court, she argued that the government must show their evidence. The DHS attorney contended that they had no burden of
evidence until pleading is complete. Nicole told the court it was a “grave injustice,” that her client has been detained for a month with no evidence presented. However, this month of detention was enough for her client. He pled guilty that day and was deported to Mexico, waiving his right to appeal—with no grounds of deportation ever demonstrated.

Another of Nicole’s cases I observed was an instance of wrongful deportation. Her client had been prematurely sent back to the Dominican Republic while in the midst of fighting for CAT relief from removal. The respondent’s fear-based claim was related to his cooperation with U.S. federal law enforcement to indict drug-cartel higher-ups after his original aggravated felony conviction. After his wrongful deportation, the man had spent six months in the Dominican Republic before authorities agreed to facilitate his return to the U.S. During this time, he had been threatened and violently attacked by associates of the drug dealers he had implicated. Once returned to the U.S., the man had already spent eight more months in detention by the time I began to observe his case. Ten months later, at the end of my ethnography, the man was still detained and his case was still undecided. Such lengthy detention was in part based in long periods between each hearing (usually about three months, due to court backlog), but also to the amount of time spent by Nicole arguing against various due process violations that could have important influences on the case. In one particularly contentious hearing, she objected to the fact that there were plainclothes ICE officers present in the courtroom—an unusual occurrence, as security is always provided by private contractors. Nicole asked for a reason for this additional security (which the DHS attorney refused to provide), and objected to the presence of these unknown actors for the sensitive testimonies scheduled that day. She explained how given the history of the case, where the respondent was lied to and wrongfully removed by ICE deportation officers, this was creating a clear environment of intimidation in the courtroom. The DHS
attorney and judge expressed annoyance at Nicole’s objections, and ultimately the officers were allowed to stay.

An ongoing due process concern throughout my research was translation—every hearing I observed had a translator working in some capacity. This is representative of the norm across the country, where the vast majority of immigration court hearings use language interpreters—with only 11% of such hearings conducted solely in English in 2015 (Agrawal 2017). Federal law requires immigration courts to provide “meaningful access” for respondents with limited proficiency in English—defined by the Department of Justice (DOJ) as the provision of interpreters during hearings, screening of translators, training around translation for judges and other court personnel, and translation of all “vital documents.” Despite DOJ enforcement of such standards in other types of courts around the country, research has found immigration courts—run by the DOJ directly—to be inadequate in their adherence to the Department’s own regulations (Abel 2011).

A longstanding complaint of immigrant advocates is the fact that interpreters are often only asked to translate questions or statements directly addressed to the respondent, as opposed to the entirety of proceedings. In 1989, a federal judge in Southern California ruled that this type of partial translation violated immigrants’ due process rights, but this precedent never caught on (Appleseed and Chicago Appleseed 2009; Mallya 1992). Incomplete translation is particularly harmful in the cases of immigrants who lack legal representation—like the vast majority of detained aggravated felony cases—where respondents without English proficiency have even less chance of successfully fighting their deportation (Abel 2011). In my research, I only observed one hearing where the interpreter appeared to be translating the entirety of proceedings.

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6 Almost all translation was in Spanish, although one case required Russian.
even sitting beside the respondent on the bench while other witnesses were on the stand. My feeling of surprise at this instance speaks to how normalized partial translation was in the immigration court I observed. Lengthy and complex legal arguments and testimonies regarding respondents’ cases would go completely untranslated, often with uncomprehending respondents sitting blankly, looking down at their hands, almost as if props in their own trials. In the rare instance when a lawyer would request that the entire hearing be translated, judges and government attorneys were visibly annoyed with the extra time it took, and invariably, proceedings would devolve back into partial translation.

Another issue in this area is the inconsistent quality of immigration court interpreters, who are not required to undergo any specific training or certification. Instead, they are screened internally by the Executive Office of Immigration Review (EOIR), the department of the DOJ responsible for running immigration courts, as well as private contractors—through screening processes that are not transparent and have been critiqued by state court systems for being inadequate (Abel 2011). Research has found a great deal of variance among translation quality in immigration courts, including the observation of egregious errors and the inappropriate insertion of personal opinions by translators (Appleseed and Chicago Appleseed 2009; National Lawyers Guild 2011). In my own research, translator quality seemed to vary greatly, and on several occasions, translation errors were noticed by Spanish-speaking or Spanish-proficient defense attorneys—errors that would not have been picked up in cases where immigrants go unrepresented. There was also the problem of regional language differences, as interpreters were often from different countries than respondents. On one occasion, a respondent repeatedly referred to the “banda” or “gang” who he feared persecution from if returned to his home country. The interpreter continually translated the word as “band,” another possible meaning of
the Spanish word, until the defense lawyer finally picked up on the discrepancy. Such issues of translation were especially prevalent in CAT cases, where interpreters were vital to allow the full understanding of telephonic testimonies by witnesses speaking to home country conditions.

A development that occurred within the later months of my research compounded the difficulty of adequate translation, while also presenting new due process concerns of its own. In June 2018, ICE announced that they would no longer be physically bringing detainees to Varick Street for their court appearances, and they will therefore have to appear directly from detention centers, using video-conferencing technology (Robbins 2018b). This was purportedly in response to an anti-ICE occupation outside Varick Street, but interviewees generally felt that ICE was exploiting the protest as an excuse. Although the use of video conferencing is common in detained immigration courts around the country, it has been critiqued by advocates and scholars for violating due process, interfering with judges’ ability to assess respondent credibility, and obstructing immigrants’ ability to fully participate in the judicial process (Eagly 2015; Haas 2006; Leung 2014).

In the several hearings I observed that used video conferencing, there was a noticeable impact. First, there were delays due to technical issues and backlog, especially on days when multiple immigrants detained at the same jail were concurrently scheduled for hearings. In court, respondents—appearing on large television screens set up in each courtroom—seemed even more detached and isolated—and even less of the proceedings were translated. In addition, lawyers expressed intensified concern that respondents with sensitive cases would fear divulging key facts due to the possibility of being overheard by jail guards and other detainees. Another hearing of Nicole’s aforementioned client who was wrongfully deported occurred soon after the introduction of video conferencing. Nicole argued that court going forward with her client not
present was a violation of his due process rights, but after quite a bit of back and forth on this issue, the hearing commenced, albeit at a snail’s pace, as the judge, in response to Nicole’s concerns, had the interpreter translate far more than she usually would—although still not all of the proceedings. In addition, the video conferencing made it even more difficult for the respondent to understand the interpreter—who was already from a different country than him. The respondent appeared confused, the translator was visibly overwhelmed, and the judge seemed harried as she tried to only allow people to speak two sentences at a time.

Lawyers at Varick Street found the new policy to be additionally harmful to due process in that it prevented them from meeting with their clients before or after their hearings. This was common practice at the detained court before the introduction of televideo, due to the practical difficulties of meeting with clients at detention centers. In addition to intense security screening and limited visiting hours at jails, most respondents at Varick Street were detained in New Jersey or Upstate New York—trips made even more difficult by public lawyers’ heavy caseload and a lack of public transportation. At the time of writing, ICE is still refusing to bring detainees to Varick Street for their hearings, and a joint lawsuit has been filed by the NYIFUP providers, stating that the videoconferencing is “merely pretext for the true reasoning behind the policy—limiting due process, access to the courts and counsel for immigrants in an effort to rush deportations and deport more people” (Goldbaum 2019).

“This is Not Anything New:” Aggravated Felonies in the Trump Era

The contemporary push “to rush deportations and deport more people” was a common theme that came up in response to interview queries regarding changes under the Trump administration. The aggravated felony and the problems associated with it are not new developments, as the previous chapter makes clear. However, conducting this research when I
did—in the context of an administration vocal and active in its fight to intensify immigration enforcement and increase deportation, with a supposed focus on immigrants with criminal records—required the timely documentation of related changes.

Interestingly enough, despite Trump’s continual invoking of the “criminal alien” stereotype (Duda and Gearan 2018; Lee 2015; Medina 2017), the outcomes of his immigration enforcement agenda, as described in my interviews, have in some ways worked to deprioritize immigrants with previous convictions. Lawyers described ramped up enforcement and a “widening of the net” that resulted in the increased detention and deportation of individuals with no criminal records at all. Jon explained, “there are more and more people being detained. Community enforcement is up significantly. We’re seeing way way more people being taken into custody than we were.” Lisa described a return to “universal enforcement”—a move away from the Obama administration’s prioritization of “felons not families.” This expanded enforcement was seen as stoking widespread fear among immigrant communities. At the same time, lawyers saw immigration courts working to process more cases more quickly. Nicole explained how judges were overbooking hearings with increased regularity amidst intensified pressure to get through cases. A few lawyers referred to new DOJ instructions or quotas for immigration court judges to move cases, and relayed that such accelerated movement would inevitably have a negative effect on due process and respondents’ ability to put forth complicated aggravated felony cases.

*Matter of Castro Tum,* a May 2018 decision by the Attorney General to no longer administratively close cases—and to “recalendar” (reopen) those that were already administratively closed—was also seen as harmful for people with aggravated felony convictions. Administrative closure was encouraged by the Obama administration, as a way that
DHS could use their prosecutorial discretion to indefinitely suspend cases where it was clear that the respondent was not a danger to the community (Rabin 2013). Before Castro Tum, a few interviewees identified administrative closure as a solitary route through which discretion could play a role in cases based on aggravated felonies. After Castro Tum, attorneys immediately began to feel its effects. Cori mentioned that her client with a 1995 drug sale “would have been an excellent candidate for prosecutorial discretion” if it were not for the recent change. Working at one of the major NYIFUP legal providers and interviewed soon after the decision, she went on to say, “in the last week, we and other providers have seen a waterfall of motions to recalender cases like that, and I bet a lot of them are people with aggravated felonies.” Raina described an aggravated felony case of hers that had recently been recalendered. It had been administratively closed “because the underlying offense was a single offense that was kind of bogus.” Brianna spoke of two elderly clients of hers—pastors from Trinidad—whose cases had recently been reopened years after being administratively closed. She was shocked that this case was recalendered despite the couple having no criminal records, and remarked how it did not bode well for people who did.

While most lawyers reported feeling tangible effects of the current administration’s push for intensified enforcement and increased deportation, a few were keen to point out that most of what is going on under Trump is a continuation of former presidents’ policies. Nora, a public defender and immigration advocate for eight years, said, “Trump has definitely empowered ICE to do more, to be more brazen. But them grabbing our clients and taking them from court is not new, it’s just they’re doing it with a little bit more frequency now and little bit more boldness.” She felt the major change is that people are paying more attention to what’s going on now, and
remarked, “hopefully they don’t go to sleep after we elect a Democrat.” Alina, a public immigration lawyer for six years, concurred, saying,

“Yes, the immigration climate is horrible right now, but I think that something that’s important to highlight is the fact that a lot of things that are outraging people right now have been going on for years. They went on under Obama…it’s great that people are finally waking up and realizing this, but this is not anything new. People have been dying in detention centers for the longest…people have been separated from family…this was happening under other presidents and no one really seemed to care, and now people are really outraged.”

Emily added, “It really frustrates me when everyone is like, ‘Oh Trump, Trump, Trump, he’s so awful.’ He’s enforcing the laws that Congress passed under the Clinton administration, who’s a Democrat.” She said Congress needs to “do their job” and pass major immigration legislation, referring to the fact that there has not been meaningful reform since 1996—in the laws that expanded and harshened the aggravated felony category.

Conclusion

The legal literature on the aggravated felony emphasizes the expansiveness of the category, the severity of its effects on immigrants’ chances for relief from deportation, and its effects on due process in immigration law (Bennett 1999, Johnson 2001, Miller 2003, Cook 2003, Yates et al 2005, Podgorny 2008, Lang 2015). Based on my interviews with lawyers and my ethnographic observation of NYC’s Varick Street detained immigration court, this chapter described the aggravated felony “in action,” paying particular attention to these three areas. Findings show that not only is the category expansive as written—including many crimes that do not live up to the harsh “aggravated felony” label—but it is overused by ICE in immigration proceedings. In terms of severity, aggravated-felony-related bars to immigration relief written into the law are shown to be even harsher once the difficulty of attaining available forms of relief is made clear. Major problems include the lack of judicial discretion—despite many cases
involving old crimes and/or lawful permanent residents—and the difficulty of arguing for relief under the Convention against Torture—the only source of relief many people convicted of aggravated felonies are eligible for. Following the literature, interview participants described non-guaranteed legal representation and mandatory detention without bail to be the most important impediments to due process related to the aggravated felony. However, other potential violations that came up in the research included inconsistent translation, videoconferencing in lieu of bringing detainees to court, intimidation, and wrongful deportation. Lastly, while participants reported intensified enforcement and a widespread sentiment of fear under the Trump administration, most changes were seen as not particularly affecting immigrants with aggravated felonies, and several interviewees emphasized that the biggest problems for this population have been ongoing since 1996.

Despite the “best case scenario” of NYC—a “sanctuary city” with guaranteed legal representation for detained immigrants facing deportation—the harsh and expansive effects of the aggravated felony are evident. Although immigrant “detention” and “removal” are technically administrative processes, their clear punitive force is only intensified by the indiscriminate yet decisive outcomes of the aggravated felony category. The fact that the category’s massive enlargement and intensification by the immigration reforms of 1996 has not received a serious legislative reevaluation in the more than 20 years since speaks to the strength of the panic described in the previous chapter, as well as the ongoing power of the “criminal alien” folk devil in the decades since. The penultimate chapter will describe forms of legal resistance that emerged in this period, and the conclusion will speak to implications for theory as well as policy. First, however, the next chapter continues my qualitative examination of aggravated-felony-related outcomes through an assessment of “crimmigration” processes related
to the category—with emphasis on immigration court’s role in reproducing criminal justice system disparities and reinforcing a racialized “good immigrant, bad immigrant” binary.
6. The Aggravated Felony and the Reproduction of Inequality

The previous two chapters provided an in-depth analysis of the aggravated felony’s legal development, as well as its everyday impacts as observed and reported in my case study of New York City (NYC) immigration court. I have argued that a racialized moral panic linking immigrants with drugs and crime guided the evolution and entrenchment of the aggravated felony, allowing it to endure despite its expansiveness, severity, and negative effects on due process. This chapter continues the examination of my second research question (how does the aggravated felony legal category affect everyday immigration court processes and outcomes for non-citizens with criminal records?), and delves further into the category’s role in the reproduction of existing inequality.

Drawing from my in-depth interviews and ethnographic observation of the Varick Street detained immigration court, this chapter begins with a discussion of the aggravated felony in relation to the intertwining of immigration and criminal justice policy and enforcement—the “crimmigration nexus” (Stumpf 2006). I highlight the key role of drugs and drug policy in aggravated-felony-based deportation, despite wider societal movement away from drug criminalization and prohibition. Next, I describe how the aggravated felony’s entrenchment in the criminal justice system, combined with its harsh immigration outcomes (described in the previous chapter), result in the reproduction and exacerbation of existing criminal justice system disparities. Lastly, I explain how immigration court processes and outcomes related to the aggravated felony serve to erase such structural considerations, demonize immigrants with criminal records, and reinforce a racialized image of the “bad immigrant.” Findings demonstrate the punitive potential of the crimmigration nexus, as well as the role of law and legal processes in the reproduction of inequality.
As discussed in Chapter Two, the term “crimmigration” was coined by legal scholar Juliet Stumpf (2006) to describe the increasing entanglement of criminal law and immigration law within the final decades of the 20th century and the early decades of the 21st. Primarily concerned with ways that this intertwining has made both bodies of law more expansive and punitive, scholars of crimmigration have identified a variety of negative outcomes for immigrants ensnared at the nexus of these two legal bodies (Beckett and Evans 2015; García Hernández 2019; Jiang and Erez 2018). The aggravated felony—an immigration law category that is based on unfounded beliefs about immigrant criminality, born out of drug policy, and triggered by criminal convictions—is a key example of the crimmigration nexus. In my research, the importance of crimmigration connections was clear in the enforcement strategies through which immigrants with aggravated felonies were placed into removal proceedings, as well as in the convictions that made them deportable.

An important development that has emerged alongside the union of criminal law and immigration law within the past few decades is the devolution of immigration law enforcement to local jurisdictions (Provine et al 2016). For most of U.S. history, immigration was almost exclusively a federal matter, and local law enforcement bodies dealt mainly with matters of criminal law. However, the neoliberal “hollowing out” of the federal government, the emergence of policies that increasingly link deportation to criminal offenses, and the growing treatment of unauthorized immigration itself as a criminal offense, all contributed to an influx in local police departments’ attention to immigration enforcement (Varsanyi 2008; see also Kretsedemas 2008). Specific policies put in place through federal immigration policy over the past few decades—like
287(g) agreements and the Secure Communities program—officially place immigration enforcement capabilities into the hands of local police departments (Armenta 2012; Coleman 2012).

Created by the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996, the 287(g) program allows state, county, and municipal police officers to be trained and deputized as immigration agents by Immigration and Customs Enforcement (ICE)—capable of making immigration arrests, taking custody of immigrants for federal authorities, and transporting immigration detainees. Secure Communities is a program established in 2008, that facilitates the sharing of arrest data and fingerprints between local law enforcement agencies and ICE. Widely used in the early years of the Obama administration, both programs received intense criticism, most notably for their stirring distrust in law enforcement and government authorities among immigrant communities, as well as their enabling of racial profiling and other civil rights abuses (Alsan and Yang 2019; Coleman 2012; Lin 2010). In the face of this criticism, both programs went through overhauls in the later years of the Obama presidency, with the 287(g) program diluted and minimized between 2009 and 2016, and Secure Communities replaced by the Priority Enforcement Program (PEP) in 2015. In January 2017, in his first executive orders as president, Trump called for the expansion of 287(g) and the reinstatement of Secure Communities—terminating PEP (Golash-Boza 2018; Pham 2018). According to ICE, there are currently 287(g) agreements in place with 78 law enforcement agencies in 20 states, and the program has “trained and certified more than 1,514 state and local officers to enforce immigration law” (U.S. Immigration and Customs Enforcement 2018b). Secure Communities is currently implemented in “all 3,181 jurisdictions within 50 states, the District of Columbia, and five U.S. Territories” and since its reinstatement in 2017, has resulted in the deportation of “more
than 43,000 convicted criminal aliens”—also according to ICE (U.S. Immigration and Customs Enforcement 2018d).

As a “sanctuary city,” NYC law prohibits city law enforcement from participating in or cooperating with 287(g) agreements. Furthermore, the city refuses to honor detainers—requests by ICE to hold non-citizens charged or convicted of crimes, usually based on information received through Secure Communities—and has removed the ICE presence from Rikers Island, the city’s largest jail. Still, these measures only do so much for the city’s immigrants, and especially for those with potential aggravated felonies. ICE can still make arrests throughout the city, and they have increasingly targeted non-citizens in NYC in their homes and at criminal court appearances 4/29/2019 3:28:00 PM. Furthermore, the standing refusal to honor detainer requests only applies to those who have not been convicted of an expansive list of 170 “serious” crimes—many of which are considered aggravated felonies—although even for those with these crimes, ICE must present a judicial warrant (Robbins 2018a).

Local criminal justice system involvement in immigration enforcement came up in various ways throughout my research. While NYC law enforcement is prohibited from engaging in immigration enforcement, this was not the case throughout the rest of the state at the time of study. Since there is no immigration court on Long Island, immigrants picked up by ICE in Nassau and Suffolk counties are sent to NYC immigration court, and if detained and indigent, are eligible to be represented in court by the New York Family Unity Project (NYIFUP). In my interviews and ethnography, lawyers often spoke of the intense involvement of Long Island law enforcement with ICE. In one hearing I observed, Nicole, a public immigration lawyer for 15

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7 In November 2018, an appellate court in Brooklyn ruled that local law enforcement agencies in New York state cannot hold immigrants past their scheduled release date for purposes of immigration enforcement, without a judicial warrant (Fertig 2018).
years, expressed confusion at the Department of Homeland Security’s (DHS) contradicting assertions that her client had refused to speak with ICE, yet that he had told them his immigration status. She declared that Suffolk County jail officers were asking the immigration status of inmates and requested that the internal policies of the jail in question be subpoenaed. Later, she told me that her organization was “seeing a substantial amount of cases coming out of Suffolk County” at the time, which she thought had “a lot to do with Suffolk County’s law enforcement cooperation with ICE.” In this case, after being picked up during a traffic stop, her client—who was already on probation—had been brought to jail. There, police officers hit him with a flashlight to get him to disclose his immigration status.

Jane, a public immigration attorney for ten years, said she represented “a lot of Long Island residents” and said the area jails “still have agreements with ICE where they just turn people over directly.” Elena, a public immigration lawyer with eight years of experience, also worked with many clients from Long Island, and emphasized the amount of racial profiling that went on in the local policing of immigrants—especially related to gang enforcement. Lisa, who had 20 years of experience as an immigration attorney and educator throughout New York State, confirmed that local law enforcement passing immigrants directly over to ICE raises concerns in terms of constitutional protections against racial profiling. She said,

“now that profiling could exist without anyone ever finding out about it because they could stop the individual and give them right over to immigration authorities. And nobody would know about it because the due process protections that would kick in if that person was criminally charged wouldn’t because we’re in civil immigration court.”

Here we see how crimmigration processes erode the effectiveness of existing protections in criminal law as well as immigration law.

While several lawyers felt that NYC’s refusal to honor ICE detainer requests—a policy instated in 2014 at the urging of advocates—was an important win for local immigrants with
criminal records, most agreed that ICE had evolved their apprehension methods to the new circumstances. Nora, a public defender for eight years, thought that the detainer policy was an important victory, saying, “It’s better, in a sense because we’ve challenged the law on that.” However, she went on to qualify,

“But obviously things are much worse in that we’ve seen like a 900% increase of ICE just grabbing our clients after their case is called, because they don’t need an ICE detainer or an ICE hold. They physically just grab them anytime they are coming and going from their court dates. So that’s the negative. They’re finding another way.”

Since Trump entered office, ICE has been particularly vocal about their displeasure with the NYC’s detainer policy, issuing detainers they know will be turned down—in an attempt to shame the city for releasing “dangerous criminals” (Stringer 2019; U.S. Immigration and Customs Enforcement 2018a). The agency has also turned to more intrusive and expansive enforcement methods and blamed them on NYC’s refusal to honor detainers (Fisher 2018). ICE arrests in NYC increased by 88% between 2016 and 2018—the third-highest increase of all ICE field offices (Stringer 2018). When asked how her NYC-based clients with aggravated felonies usually entered deportation proceedings, Jane explained, “because NYC Department of Corrections will not turn people over directly to ICE, those people are mostly arrested at their homes, at their jobs, and with increasing frequency at court dates, or outside of courts in NYC.”

For people placed in deportation proceedings for aggravated felonies, these pick-ups often come years after the conviction that makes them deportable. Pia, a public immigration attorney with seven years of experience, spoke of one client who was arrested by ICE in a home raid a few years after his aggravated felony conviction. She said, “by the time I met him…he had been serving probation for three years, doing great on probation, was almost done. For a single offense, you know in twenty-something years in the country.” She went on to explain that this type of unexpected raid years after the original conviction is “quite common,” saying, “and that’s
three years later. I’ve had clients ten, fifteen, twenty years later picked up.” Although the source of ICE’s information is not always clear, several lawyers referred to a “lists” of immigrants with criminal records the agency would reference in order to pinpoint targets for raids. Lawyers also described how various forms of contact with authorities trigger searches of Secure Communities-era digitized databases that may identify a long-past aggravated felony. Sometimes unknowing lawful permanent residents (LPRs) come onto the radar of Customs and Border Protection (CBP) when reentering the country after a trip, or that of Citizenship and Immigration Services (USCIS) when trying to renew their green card or apply for citizenship—without knowing they are deportable. Raina, a public defender and immigration lawyer for six years, found these cases particularly upsetting, saying, “they are actually trying to avail themselves of the immigration laws, and then ICE is like, ‘Well, you know what, you’re subject to mandatory detention. We’re going to detain you and basically destroy your life.’”

Still, based on my interviews, one of the most common ways that immigrants are picked up for aggravated felonies—in the context of NYC’s detainer laws—is through further contact with the criminal justice system. Pamela, an immigration attorney with three years of experience, explained that although immigrants with very old aggravated felonies are often picked up at the airport or through other interactions with immigration officials, for those that are more recent, it is usually because they are “picked up for a new criminal thing, so then there’s a referral for that.” Oren, a public defender and immigration lawyer for fifteen years, saw this also affecting those with old offenses, especially those they might not even know are aggravated felonies. He said,

“you could be a permanent resident, have a very old conviction that has significant immigration consequences, and you haven’t traveled outside of the United States. You haven’t been in jail recently or whatever. You haven’t applied for citizenship or something. You haven’t come to immigration’s attention. You get arrested for a new
offense, even if it’s something minor, then suddenly that offense is flagged during the fingerprinting.”

Laura, a public immigration lawyer for three years, also felt this was the typical route. She said,

“That’s very common for our clients. They get picked up on something. When they’re fingerprinted at a precinct, ICE gets a data dump that has their address on it, and will often have their immigration status…and then will list their crimes, and if it’s an aggravated felony, they’ll pick them up.”

As explained above, under Secure Communities, states send fingerprints and information of arrestees to immigration authorities, including those taken in “sanctuary cities” like New York. Laura explained, “New York City doesn’t have any control over that, because those fingerprints also go to other federal databases, like the FBI and other federal agencies and they’re all connected.” Therefore, even with municipal-level sanctuary protections, criminal justice systems play a crucial role in the apprehension of immigrants with aggravated felony convictions.

Beyond the processes that facilitate the identification of non-citizens with potential aggravated felonies and their placement in ICE custody, criminal justice systems also play an obvious role in the original arrests and convictions that make such immigrants deportable. As described in the previous chapter, the 35 offense types listed in the Immigration and Nationality Act’s (INA) definition of the aggravated felony (see Appendix A) can each be applied to a plethora of state-level offenses. Therefore, differing criminal laws in each state play a vital role in what is considered an aggravated felony. As Zara—an immigration attorney, criminal defender, and advocate with ten years of experience—asserted, “you definitely see these geographic disparities in who is going to be labeled an aggravated felony, but the conduct is no different.” Since included misdemeanors require a one-year sentence to constitute an aggravated
felony, the key impact of sentencing laws was often mentioned by lawyers. As an example, Zara explained how while you can get probation with a suspended sentence in New York state,

“in a place like Georgia, the criminal procedure law requires a suspended sentence to accompany probation. That’s the only way you can get probation. And usually twelve months is the minimum suspended sentence that you get, so if you commit shoplifting in Georgia, and you just get this probationary sentence that’s accompanied by a suspended sentence…then that’s an aggravated felony.”

Laura, who had previously practiced law in Louisiana, spoke to the extremely harsh sentencing she had witnessed in their criminal justice system—including the example of a twenty-years-to-life sentence for the possession of drug paraphernalia containing heroin residue. When I confirmed that the while the various immigration courts make a difference, the criminal justice climates and laws that exist in each state or city are key as well, Laura responded, “Yeah, and I would imagine those are pretty correlated too,” implying that harsher immigration courts may also be in places with harsher criminal laws. Beyond variation from state to state, more general criminal justice system priorities also played a noticeable role in determining who fell into the aggravated felony dragnet. In the next section, I will describe the key role of the War on Drugs in establishing grounds for deportation based on aggravated felonies.

_The Aggravated Felony and the War on Drugs_

In Chapter Two and Chapter Four, I described the ramping up of the U.S. War on Drugs as part of the punitive policy turn of the 1980s and 1990s. Despite widespread criticism of the harmful and disproportionate effects of harsh drug laws and enforcement, U.S. drug prohibition and its associated mass incarceration have continued to thrive into the twentieth century (Coyne and Hall 2017; Wildeman and Wang 2017). Still, notwithstanding a general tough-on-crime

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8 This one-year limit also shaped certain strategies of resistance, as will be discussed in the next chapter.
posture by the Trump administration, there is some evidence that contemporary U.S. drug policy is moving away from the longstanding War on Drugs and toward a more humanistic approach. The widespread decriminalization and legalization of cannabis (Drug Policy Alliance 2018a), calls for a public health approach to the opioid epidemic (Frakt 2017; U.S. Health and Human Services 2017), and moderate movement away from mass incarceration (Clear and Frost 2015; Phelps and Pager 2016) all seem to indicate an erosion of the punitive prerogatives that have characterized U.S. drug policy and enforcement for more than forty years. Still, when it comes to U.S. law enforcement priorities at the federal, state, and international level, drugs remain high on the list—especially for immigrants and other people of color (Drug Policy Alliance 2018b; Meng 2015; Mitchell and Caudy 2017). The idea that immigrants are “bringing drugs” has been a key rhetorical tool of Trump’s crusade against immigration (Lee 2015; Martinez and Abrams 2019), and between 2012 and 2017, one out of every five immigrants deported based on Secure Communities data had a nonviolent drug offense as their most serious conviction (TRAC Immigration 2018c). Furthermore, the U.S. continues to fight a futile War on Drugs in Latin America and the Caribbean, which has only exacerbated problems of narco-cartel control and violence (Carpenter 2014; Nixon and Santos 2018).

In my interviews, drugs came up time and time again as the most commonly seen class of aggravated felony convictions. Victor—a criminal defender, immigration lawyer, and advocate for almost thirty years—explained, how in the 1980s and 1990s, “a lot of the [War on Drugs] carried over to the immigration area, and a lot of the cases where the federal agency was trying to apply the harsh consequences of the aggravated felony label were in the drug area.” May, an immigration lawyer at a public provider for five years, said drug trafficking offenses were “the most frequent ones we see.” Nicole concurred, saying, “drugs is always the most common. It’s
very common for our clients to at least have a controlled substance offense.” Although she qualified that they were not always aggravated felonies, Nicole said, “it’s rare that I have a client that has no controlled substance offense.” Marco—a public immigration lawyer for five years, at an NYC provider as well as various other locations throughout the country—said “Absolutely the biggest one is drug-related offenses. Drug-related offenses are the most common aggravated felony that our clients have.” When I asked, “across all the places you’ve worked?” he replied, “Across Arizona, Massachusetts, New York, it’s the most common offense.”

As discussed in the previous chapter, some lawyers expressed discontent with the disproportionality of the crimes that are grouped together by the aggravated felony category. Despite their central and original place in the category, drug crimes were often cited as not deserving the harsh outcomes the aggravated felony entails. To underscore this point, several lawyers referred to minor drug crimes they had seen charged as aggravated felonies. Jackie, an immigration lawyer and advocate with eight years of experience, reported that in the early 2000s, “the government was using a theory that upon your second marijuana conviction, you became an aggravated felon.” This has since changed, due to the work of lawyers and advocates—as will be touched upon in the following chapter. Still, even with an evolved definition that includes drug trafficking and not drug possession, many low-level drug offenses are classified as aggravated felonies. As mentioned in the last chapter, Marco relayed how even “sharing…molly with friends” could be considered a drug trafficking aggravated felony, and Seth, a public defender and immigration lawyer for close to 25 years, reported how “selling ten-dollars-worth of crack” could also make you deportable based on the category. Victor explained how state-level differences in drug-related offense types played a role in minor crimes being defined as aggravated felonies, as seen in the quote below.
Because even in the offenses that are trafficking offenses or at least labeled as trafficking offenses by criminal law jurisdictions, some of those offenses are quite minor as well… Here in New York, the lower level sale offenses can be pretty minor offenses where people receive pretty minor sentences, but even under the now narrower scope of the drug trafficking aggravated felony grounds, a lot of people are still being subjected to mandatory deportation under that ground.

After saying that in her experience, aggravated felonies were usually drug-related, Pamela mentioned that she’d seen DHS charge the sale of marijuana as a drug trafficking aggravated felony, something she found “pretty egregious.”

The particular demonization of drug crimes in the criminal justice system helps in creating the aggravated felony convictions that make people deportable. While some District Attorneys (DAs) have proved amenable to working with immigrants and their lawyers to achieve immigration-safe convictions—a strategy that will be discussed in the next chapter—special DAs focused on drug enforcement were seen as being particularly resistant to this tactic. The Office of the Special Narcotics Prosecutor of the City of New York (SPNYC), created by the New York State Legislature in 1971, is “the only prosecutorial agency in the country exclusively dedicated to the investigation and prosecution of narcotics felonies” (Office of the Special Narcotics Prosecutor for the City of New York 2016). Nora, a public defender for eight years, explained how DAs in this office were especially harsh and unforgiving of immigrants who had committed drug crimes. She explained, “Special narcotics is the worst DAs office because they’re separate from the Manhattan DAs in a separate prosecutors’ office. It’s a special narcotics prosecutors’ office. And they are just the dirtiest, the worst kind of cops, the worst kind of DAs.” Nora went on to describe the case of one client charged for a drug felony where she was confronted by a DA from this office, who “had no empathy for my client whatsoever. She didn’t care if he’d be deported.” The prosecutor,
“blatantly told me my client did not have the right to stay in the country, when I tried to
tell her that he’s not a citizen, he can’t plead to the drug felony and he’ll get deported…
that he doesn’t have family where he is from. And she basically just told me that he
didn’t have a right to stay here, because he came to ‘somebody else’s house and broke
their rules.’ It was so disgusting and racist.”

Options intended to lessen the punitive effects of drug war policies—like drug court—are not
helpful for immigrants with potential aggravated felonies, since these alternatives usually require
an original plea and sentence that are vacated once you have completed drug treatment and other
requirements. Nora explained, “Immigration doesn’t recognize the vacatur of any plea. They’re
just like, ‘Well, you pled originally. You still pled to it, and that’s what we go by.’” In the case
described above, Nora said that while she tried for several alternatives, including drug court,
eventually, the man was forced to take a plea that rendered him deportable.

The impossibility of avoiding aggravated-felony-based deportation through drug court or
other rehabilitative alternatives to incarceration is an example of the way the criminalization of
addiction is exacerbated through the immigration system. Oren, a public defender and
immigration lawyer for 15 years, said, “if you’re a public defender for any period of time you
realize—and I’m just speaking loosely, but probably two thirds of clients, a little bit higher, are
in the criminal justice system because they’re mentally ill, they have a drug problem or they have
an alcohol problem.” Kayla—a social worker who had spent three years working on criminal and
immigration cases at a non-profit legal provider—said how under the current administration,

driving under the influence (DUI) and possession of an illegal substance are two top convictions
that ICE makes arrests based on. She felt this spoke to the criminalization of addiction and found
it problematic that “one DUI now lands you in this criminal danger zone.” In a June 2018 op-ed,
Kristin Anderson, an immigration social worker with The Bronx Defenders—one of the three
NYIFUP legal providers—explains how “the opioid epidemic and our broken immigration
system...are more connected than many think.” Despite the white face of the modern opioid


crisis, Anderson reminds readers that “black and brown people face just as great a risk of


dependence and a greater risk of being criminalized for it,” and writes, “Among immigrants, the


punishment for addiction can mean deportation.”


Several lawyers remarked on the disconnect between continously harsh immigration


consequences for drug offenses and the simultaneous easing of drug prohibition for white


Americans. Zara said, “As the War on Drugs is slowly ending, we haven’t seen that parallel shift


when it comes to immigration.” She explained how even conservative politicians have joined the


consensus that “mass incarceration was bad, prison sentences should be lowered, and these drug


sentences [should be re-examined],” yet “we haven’t seen that shift when it comes to


immigrants.” Zara explained how the federal immigration consequences of cannabis use remain,


even in states that have legalized its recreational use, saying,


In those very states, like Colorado, Washington, California, USCIS affirmatively—any
time someone applies for an immigration benefit, for a green card or for naturalization,


they go out of their way to ask them about marijuana use, even if nothing is flagged in their


application, specifically looking for ways—and people will often—you know it’s


not illegal in these states to use medical marijuana or to use a small amount of marijuana,


but that’s still a grounds to deny benefits and to deport people.”


Marco felt deportations based on marijuana convictions were especially ironic in a context where
decriminalization and legalization are spreading throughout the country. He remarked that while


these laws allowed drug use for white citizens, for the black and brown people in prison and


being deported, the new laws “don’t seem to apply to them.”


Furthermore, while immigrants are subject to harsher punishment for drug-related


offenses, they are also likely to have experienced structural conditions in the U.S. that make drug


convictions more likely—such as poverty and over-policing (Duck 2015; T. Golash-Boza 2015).


Cori, a public immigration lawyer with 10 years of experience, said she saw more controlled
substance aggravated felonies than any other type, a proportion she attributed to the War on Drugs and the fact that many of her clients “are from low-income communities that have historically had problems with the crack epidemic.” She said,

“More of my clients have controlled substance convictions or potentially still have controlled-substance addictions, or are in over-policed neighborhoods where if you did have any sort of drugs, or even if you didn’t, you’re getting stopped and frisked and everyone is getting picked up.”

With War on Drugs enforcement prerogatives now in place for decades, their impact was reported in cases of aggravated felonies both new and old. Cally, a public immigration lawyer with four years of experience, described a particularly painful case where a client from the Caribbean had been deported based on a drug offense that he was convicted of more than a decade before. She said this client “was an LPR, a green card holder, since he was a teenager.” When he was young, “by his own admission—I mean his family was really poor, and the friends in his neighborhood had nicer things and there was a way to get those things, and that way was selling drugs. And so he did that.” In his early 20s, the man was arrested for possession of cocaine with intent to sell. After serving time for the offense, he turned his life around. As Cally explained, “He had two U.S. citizen kids, he had fully rehabilitated. He’s lovely. He wasn’t a threat to the community at all.” Still, more than ten years after the original offense, the man was deported based on his aggravated felony conviction, with no chance for relief.

Just as poverty and over-policing work to exacerbate addiction, incentivize dealing, and intensify enforcement in the communities that many immigrants to the U.S. live in, the regional arms of the War on Drugs also contribute to the likelihood of drug-based aggravated felony deportations. These connections—which are contextualized by a long history of U.S. imperial intrusion in Latin America, as well as intensified domestic and regional inequality in the neoliberal era—are depicted below in Figure 4. As explained in Chapter Four, while the
domestic enforcement of the War on Drugs has disproportionately focused on poor communities of color (Alexander 2012, Small 2001), internationally, the focus has been on the interdiction of drugs from Mexico and Latin America (Andreas 2000, Francis and Mauser 2011, Payan 2006). These policies have failed to curtail domestic drug use or stem the flow of drugs into the country. Instead, U.S. drug prohibition—combined with a consistent demand for illicit substances—has actually served to exacerbate drug-related violence and cartel power in Latin America and the Caribbean, creating important push factors for immigration (Carpenter 2014; Mercille 2011; Nixon and Santos 2018; Youngers and Rosin 2005).

![Figure 4: The U.S. War on Drugs and Streams of Immigration and Deportation](image)

As migrants flee cartels and other drug-related violence in the region, there are some who are forced to transport drugs into the U.S., or who agree to do so in order to afford the expensive

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9 While gang involvement itself is not currently an aggravated felony, similar cyclical processes have been observed regarding U.S.-sponsored state violence in Central America, racialized gang enforcement in the U.S., migration, deportation, and increased violence [see Zilberg 2004, 2007].
journey across the border (De La Rosa 2018; Lynch 2017). Although the violent and coercive power of drug trafficking organizations is well-known, immigration court has little sympathy for the reasons why people “chose” to smuggle drugs into the country—indicative of the neoliberal ethos of personal responsibility described in Chapter 4. Even if it was the only option, once in immigration proceedings based on a drug trafficking aggravated felony, immigrants are mandatorily detained and cut off from most forms of relief from deportation. In the previous chapter, I described the example of Marco’s client, who was caught with drugs at the border in a last-ditch effort to flee violence in his home country and start a new life in the U.S. Marco explained that while the man would otherwise be eligible for asylum, with the drug-trafficking aggravated felony, he would most likely be deported. While a few cases like this came up in my research, cross-border drug-smuggling cases are most often adjudicated in states on the U.S.-Mexico border. After illegal entry and re-entry, drug-related offenses are the second most common category of criminal charges among those prosecuted in that region (Lynch 2017). This category is exemplified by unauthorized migrant “backpackers” who carry drugs into the U.S. on their backs—often under violent coercion or as part of the crossing fees required by coyotes and cartels (De La Rosa 2018; Slack and Whiteford 2011).

Although it has become more common for unauthorized migrants smuggling insignificant amounts of marijuana to be charged with misdemeanors in order to expedite their removal, those who have additional criminal histories or other aggravating factors are intentionally given sentences of 13 months, in order to trigger an aggravated felony (Lynch 2017). Even unaccompanied minors, who have been described as “prime targets for cartels and gangs on the border” (Junck 2015:2)—are not safe from the effects of the aggravated felony. Marco, who had previously practiced immigration law at the border in Arizona, relayed that his organization
would regularly see the cases of children forced to bring drugs into the country by narco-traffickers, who were then processed through the federal criminal justice system and convicted of drug trafficking convictions. Marco explained how, “those same children were often people who were seeking asylum in the country, and the only reason why they were caught in this trafficking scheme is because they wanted to make it to the other side of the border.” He found the application of the aggravated felony category in these situations as particularly unjust, saying, “And now…people who needed our protection end up being in deportation proceedings, mandatory detention, mandatory deportation, and sent back often to the same territories where the narco-traffickers control.”

In addition to first-time offenders coerced into bringing drugs across the border, some immigrants also end up in U.S. deportation proceedings after previous involvement with the drug trade in their home countries. In certain parts of Latin America and the Caribbean—including Mexico and the Dominican Republic—narco-cartel power, weak or corrupt public institutions, and widespread poverty result in little economic opportunity outside of the drug trade (Brotherton and Barrios 2011; Harp 2010; Mercille 2011; Watt and Zepeda 2012). Once someone is convicted of a drug trafficking aggravated felony, these country conditions are usually only considered in terms of relief under the Convention against Torture (CAT)—the only relief available to most people in the category—and cannot be viewed as mitigating factors for drug trade involvement. As discussed in the previous chapter, even those who cooperate with U.S. drug-enforcement authorities and helped to indict drug organization higher-ups have trouble meeting the burden of evidence for relief under CAT, despite rampant threats and obvious danger. In the next section, I will describe the way that broader criminal justice system
inequalities—drug-related and otherwise—are reproduced through immigration law processes related to the aggravated felony.

**The Aggravated Felony and Criminal Justice System Disparities**

As explained in Chapter Two, this dissertation draws from seminal works that describe socioeconomic inequities inherent in the criminal justice system (e.g. Galanter 1974, Reiman 1979, Spitzer 1975)—as well as more recent work conceptualizing the role of law and punishment in the social construction of race (e.g. DeGenova 2004, Delgado and Stefancic 2001, Haney Lopez 2006, Wacquant 2001)—to inform three presuppositions: (1) one function of law is the production and reification of various forms of inequality, (2) race is socially constructed, and (3) law and social control measures play an important role in the social construction of race. Above, I described the intense entanglement of aggravated-felony-based deportation with the criminal justice system—in terms of enforcement and apprehension methods, as well as the convictions that trigger the category’s harsh results in immigration court—with an emphasis on the role of drug policy and enforcement. However, while there has been a good deal of research on race-based inequalities in criminal justice—and in the War on Drugs in particular—there has been little sociological or criminological attention paid to the reproduction of these inequalities through processes of criminal deportation (exceptions include Armenta 2016; Brotherton and Barrios 2011; and Golash-Boza 2015). This section examines the role of the aggravated felony in the reproduction of criminal-justice-system inequalities—including those related to race, class, gender, immigration status, and mental health.

While mindful of the socially-constructed nature of race, critical scholars have examined the ways that racial categorizations and hierarchies are produced and reinforced through the law
and its enforcement. In recent decades, researchers have emphasized the extreme racial inequities emerging from the criminal justice policies and processes implemented during the punitive turn of the 1980s and 1990s (Alexander 2010, Mauer 1999, Wacquant 2001)—with a focus on racial disproportionality in the War on Drugs (Bobo and Thompson 2006, Chambliss 2003, Provine 2007, Reinarman and Levine 1997, Tonry 1995). Despite widespread reporting on resulting inequality—and state-level moves toward decarceration and drug decriminalization (Drug Policy Alliance 2018a; Greene and Mauer 2010)—the mechanisms and outcomes observed by these scholars remain. The U.S. continues to incarcerate more people than any other country in the world—largely due to the War on Drugs, with 47% of federal prisoners and 15% of state prisoners incarcerated based on drug law violations (Drug Policy Alliance 2018b)—and Black and Latino individuals are more likely to experience negative outcomes at every level of the criminal justice system (Kahn and Martin 2016, The Sentencing Project 2018). Therefore, immigrants who fall into these racial and ethnic categories are disadvantaged throughout the succession of criminal justice processes that generate an aggravated felony conviction. With the majority of contemporary immigration to the U.S. coming from Latin America and Asia, immigrants are likely to identify, or be identified as, Latino. Still, non-citizens are affected by the targeting and discrimination experienced by Black populations in the U.S. as well—due to racial diversity in Latin America combined with the fact that immigrants from the Caribbean and Sub-Saharan Africa account for 10% and 4% of the foreign-born population, respectively. In fact, the Black immigrant population increased fivefold from 1980 to 2016, making it so that one out of every ten Black individuals in the U.S. is now foreign-born (Anderson and Lopez 2018).

From police targeting and higher arrest rates, to harsher sentencing and disproportionate incarceration, Black and Latino immigrants are disproportionately affected throughout all of the
criminal justice system processes that produce an aggravated felony conviction. Racial profiling is an ongoing problem in policing (Vitale 2017)—particularly conspicuous in relation to Black and Latino youth and adolescents, who are more likely than White youth to be the focus of policing priorities (Kahn and Martin 2016). Black and Latino drivers are more likely to be searched and arrested at traffic stops—the most common police interaction in the U.S. (Stanford Open Policing Project 2019). General arrest rates are most often tracked by race, but not ethnicity, so nationwide numbers for Latinos are unknown (Eppler-Epstein 2016). Yet Black communities in the U.S. experience arrests at 2.5 times the rate of their white counterparts, and Black and Latino arrestees are far more likely to be placed in pretrial detention than white arrestees (Kahn and Martin 2016: 86). Furthermore, Black adults are 5.9 times more likely to be incarcerated than whites, Latinos are 3.1 times more likely, and while Black and Latino people comprise 29% of the U.S. population, they account for 57% of the U.S. prison population (The Sentencing Project 2018: 5-6). These groups are also more likely to receive mandatory minimum sentences—in 2011, 31% of these sentences were given to Black offenders, and 38% to Latinos (Drug Policy Alliance 2018b). Drug prohibition plays an important role in these discrepancies. Despite consistent reports showing that people of different races use drugs at similar rates, African Americans—13% of the U.S. population—account for 29% of drug arrests and 40% of those incarcerated based on drug law violations. Latinos, who comprise 18% of the U.S. population, account for 38% of people incarcerated in federal prisons for drug offenses and 47% of drug-related federal court cases (Drug Policy Alliance 2018: 1-2). Even in states that have legalized recreational cannabis use, such as Colorado and Washington—where police traffic stops and searches have decreased greatly—Black and Latino drivers are still far more
likely to be searched for drugs than their white counterparts (Stanford Open Policing Project 2019).

The racial disparities described above are compounded by related criminal justice system discrepancies around class, gender, and citizenship status. Incarcerated people of all races have lower pre-incarceration incomes than non-incarcerated people, and incarcerated people are highly concentrated at the lowest end of the national income distribution (Rabuy and Kopf 2015). Low-income Black and Latino neighborhoods are the common focus of aggressive policing tactics (Lofstrom and Raphael 2016), and men of color from these neighborhoods are consistently criminalized and targeted by the police (Rios 2011; Sewell, Jefferson, and Lee 2016). Noncitizens convicted of drug offenses are more likely to be sentenced to prison than citizens convicted of drug offenses—with young non-citizen Latino men and undocumented immigrants of all genders among the groups that are most likely to receive prison sentences upon conviction (Valadez and Wang 2017). Furthermore, as explained above, criminal justice system checks on racial profiling are sidestepped in the cases of immigrants, as local law enforcement agencies increasingly turn non-citizen arrestees directly over to immigration authorities who are not beholden to regulations against profiling (Lin 2010).

In NYC—like many large cities across the country—the entrenchment of “broken windows” policing throughout the 1990s, and its dominance in the decades since, has facilitated the aggressive use of police stops and misdemeanor arrests in Black and Latino neighborhoods (Lurie 2019; New York Advisory Committee 2018). “Broken windows” theory, introduced by conservative criminologists Kelling and Wilson (1982), rests on the assertion that the existence of neighborhood “disorder”—such as broken windows—leads to further disorder and eventually violent crime. This theory spurred a trend in law enforcement, also known as
“order maintenance” or “quality of life” policing, focused on punishing minor offenses with the aim of cutting off more serious crime before it begins (Geller and Fagan 2010; Vitale 2017). Closely tied to racialized panics about drugs that emerged in the same era, the rise of broken windows policing was buttressed by a criminalized image of young Black and Latino men (García Hernández 2019; Garland 2001).

Upon the New York Police Department’s (NYPD) adoption of broken windows theory, misdemeanor arrests in the city rose drastically, from 187,385 in 1994—the year order maintenance policing was first implemented under Mayor Rudolph Giuliani and NYPD Commissioner William Bratton—to 292,219 in 2010 (New York Advisory Committee 2018: iv). Such arrests can lead to dire consequences for non-citizens. As the previous chapter explained, misdemeanor convictions are often categorized as aggravated felonies. Perhaps more importantly, misdemeanor arrests and other minor contact with the criminal justice system are a key route through which immigrants with old aggravated felony convictions re-emerge on ICE’s radar. Increased arrests in NYC were largely concentrated in low-income Black and Latino neighborhoods, and were often accomplished through the controversial (and now-defunct) “stop-and-frisk” program. Police stops increased six-fold between the mid-'90s and mid-'00s, with a heavy focus on marijuana possession and an intensely disproportionate focus on Black and Latino men (Geller and Fagan 2010). Research has also found higher ratios of police stops and arrests in NYC neighborhoods with greater proportions of immigrants—despite lower crime rates in these same areas (Davies and Fagan 2012). Although street stops decreased dramatically after the NYPD’s use of stop-and-frisk was ordered unconstitutional by a federal judge in 2013, over 80% of NYPD stops in 2015 still targeted Black or Latino “suspects” (Mock 2017). Furthermore, while yearly misdemeanor arrests have decreased since 2010, they still account for
65% of total NYPD arrests, and 85% of people arrested for misdemeanors from 2015 through 2018 were Black or Latino (Innocence Project 2018; New York Advisory Committee 2018). Drug arrests continue to play an important role—despite NYC’s increasing decriminalization of marijuana since 2014, more than 90% of those arrested in recent years for marijuana possession are from these same groups (Innocence Project 2018; Wolfe 2018). The over-policing of Black and Latino populations is replicated in the city’s Long Island suburbs—also served by NYC immigration courts—with people of color in the area experiencing arrest at close to five times the rate of whites (Maier and Choi 2017). This problem is exacerbated by racial profiling in local police efforts at immigration enforcement, an ongoing problem in Long Island’s Suffolk County (Coyle and Solis 2018; Robbins 2017a).

Another category of criminal justice system inequity that came up in this research was that related to mental health. With the neoliberal decline in public services and concurrent expansion of crime control, the past 40 years have seen significant increases in criminal justice interventions in mental health. Police are largely the first responders to mental health calls, often leading to arrests of and violence toward those with mental health issues (Lamb, Weinberger, and Gross 2004; Vitale 2017). Researchers have found that at least 16 percent of those incarcerated in the U.S. suffer from severe mental health issues, and that inmates with mental health issues outnumber those remaining in state mental hospitals by more than tenfold—leading some to refer to prisons and jails as the country’s “new asylums” (Treatment Advocacy Center 2014:6). The overconcentration of mental health issues in the criminal justice system is exacerbated by racial and socioeconomic stratification, as underserved and marginalized communities are the most likely to be funneled into jails or prisons rather than receiving expensive private care (Dumont et al. 2013; Vitale 2017). Mental health treatment in prisons has
been found to be sporadic at best, and at worst, the cause of further psychological harm (Golembeski and Fullilove 2008; Reingle Gonzalez and Connell 2014; Treatment Advocacy Center 2014).

In NYC, the NYPD receives over 165,000 calls a year to deal with “emotionally disturbed persons” and has recently come under fire after killing ten individuals with mental health issues between 2015 and 2018 (Gorman 2018; Rodriguez 2018). As the nation’s third-largest jail, NYC’s Rikers Island is “by default, one of the largest mental-health facilities in the country” (Ford 2015). In 2017, 43% of those imprisoned at the Rikers jail complex had a mental health issue, and investigative reporting has shown rampant abuse, maltreatment, and violence at the facility (Roth 2018; Schwirtz 2018). In addition to conditions of incarceration, mental health inequities in the criminal justice system are exacerbated by co-occurring substance abuse disorders (Baillargeon et al. 2010; Peters, Wexler, and Lurigio 2015), the over-policing and criminalization experienced by communities of color (Sewell et al. 2016), immigrants’ pre-migration trauma (Keller et al. 2017), and immigrants’ fears of deportation and experiences of detention in the U.S. (Coffey et al. 2010). Therefore, Black and Latino non-citizens in NYC and surrounding areas—especially men, those with mental health and/or substance abuse issues, and those living in low-income areas and/or immigrant enclaves—are disproportionally more likely to experience the low-level criminal justice system contact that may ultimately result in aggravated-felony-based deportation.

Not surprisingly, immigration detention and deportation—and especially criminal deportation—are characterized by the same disparities that plague the U.S. system of criminal justice. Immigrants from Latin America experience the vast majority of deportations—over
95 percent—despite comprising about half of the U.S. foreign-born population (Johnson 2016; Mexican American Legal Defense and Educational Fund, National Day Laborer Organizing Network, and National Hispanic Leadership Agenda 2014; Radford and Budiman 2018). Latino non-citizens are also more likely to be deported if they live in areas with high-immigrant populations (Pedroza 2018). Black immigrants (who may also be Latino) account for only 8.7% of the foreign-born population and 7.2% of the non-citizen population, yet comprise more than 10% of all immigrants placed in deportation proceedings—and more than 20% of those in deportation proceedings based on criminal convictions (Morgan-Trostle, Zheng, and Lipscombe 2016; Raff 2017). 92% of all removals are of men, despite women accounting for close to half of the unauthorized immigrant population (Rosenblum and McCabe 2014). Furthermore, not only are many deportees from the U.S. sent back to regions of extreme poverty, they are also disproportionately from communities that are under- and precariously-employed in the U.S.—in line with analyses by critical scholars who theorize deportation as a tool used by the neoliberal state to control a vulnerable economic surplus population (DeGenova 2010, Golash-Boza 2017). Lastly, it is estimated that 15% of people in immigration detention are mentally disabled, and people in these circumstances are regularly tried and deported without representation or other due process safeguards in the immigration court system (Mehta 2010).

While national trends in the gender and socioeconomic status of deported immigrants largely hold in the populations deported from NYC, the city presents an interesting example in terms of the racial and ethnic breakdown of deportees. Due to the NYC’s large population of undocumented Chinese immigrants, the vast majority of deportations from the city’s immigration courts are to China. Yet, when one looks only at Varick Street—the detained immigration court where criminal deportations are most likely to occur—Chinese immigrants are deported at
insignificant rates, far lower than those of immigrants from Mexico, Central America, the Dominican Republic, and Jamaica (TRAC Immigration 2019b). While not claiming a representative sample, all but one of the removal hearings I observed at Varick Street were of Latino men, and my interviewees often referred to a concentration of immigrants from Latin America and the Caribbean among their experience with aggravated felonies—with specific mentions of the Dominican Republic and Jamaica. (Pamela shrugged, saying, “a lot of my clients are just Jamaican men who live in Brooklyn.”) Several interviewees connected such disparities to existing inequalities in the criminal justice system. Raina explained, “because of the intersections between the criminal [system] and the immigration system, what you see is there’s a disproportional representation of black and brown folks, and whatever is being criminalized there, is reflected in immigration proceedings.” She went on to emphasize the role of drug prohibition in this process—saying, “a lot of drug crimes come under that.” Others commented on the role of socioeconomic status. May, for example, explained the difficulties people with aggravated felonies face in securing legal representation by stating, “people who are targeted by the criminal justice system are people who are low income and can’t afford private attorneys.” This point is underscored by the fact that the majority of cases at the Varick Street detained immigration court qualify for NYIFUP representation, which has an income limit of 200 percent of the federal poverty rate (Stave et al 2017)—$24,280 per year for a single-person household in 2018.

Although most interviewees did not mention race or class specifically, there was definite acknowledgement of the role played by criminal justice targeting of “certain” communities in shaping the characteristics of those facing deportation for aggravated felonies. Laura concurred, “working at a public defender’s office in New York City I can really see how certain things
are—it’s basically some things in New York are legal for certain people and not legal for other people.” As mentioned above, drug policing was referenced as being particularly problematic, considering the different levels of criminalization across racial and socioeconomic lines. Cori asked,

“how did these people come into contact with the criminal justice system in the first place? What was going on in their communities that led them to potentially have any involvement in controlled substance use or distribution? Like some of my clients maintain that they were just in the wrong place at the right time, and I believe them.”

When I mentioned the wide use of drugs among different sectors of the population, she responded, “Right, and only certain people are actually getting in trouble for it.” Cecy, a public immigration attorney with two years of experience, said, “it’s just the over-policing of certain neighborhoods and it kind of leads to them falling eventually into deportation proceedings.”

The concentration of mentally ill people in the criminal justice—and subsequently, immigration—systems was mentioned by several interviewees. Laura explained,

The other thing with aggravated felonies is I think the swath of people who they encompass include a ton of people who have pretty serious mental illnesses, or substance trauma issues, but it all goes under the mental illness category, which is partially just reflective of our criminal system, but it’s also partially like, who are we deporting as a country? And it’s often the people who are the most vulnerable and need the most support and help and that’s often the people who do have these aggravated felony convictions.

Marco agreed, saying, “a lot of the clients that we serve who have aggravated felony convictions are people that are mentally ill.” He believed these are mainly people who “slipped through cracks in the criminal justice system” and “never got some sort of assessment to see whether they were competent to be prosecuted for the crimes that they allegedly committed.” He described the case of a mentally ill LPR client who had lived in the U.S. for thirty years before being deported for an old aggravated felony. The original conviction was a controlled substance felony in New York State—possession with intent to sell—a conviction the client did not remember or
understand due to his mental illness. Marco went on to say, “you fast forward in 2016, he was very very mentally ill, and he ended up going into a bodega in New York because he was hungry and he stole two boxes of sharp cheddar cheese and salami, and that brought him to the attention of the immigration authorities.” The man was mandatorily detained and deported to the Dominican Republic.

Therefore, we see the importance of existing criminal justice system inequalities in deportation proceedings related to aggravated felonies. Groups that are disproportionately targeted by the criminal justice system—namely Black and Latino men, those from low-income communities or immigrant enclaves, and the mentally ill—are disproportionately detained and deported. In the cases of those with aggravated felonies, intensely punitive outcomes in the immigration system (i.e. imprisonment without bail and permanent banishment from the country) often come after non-citizens have already served their criminal justice sentence. Therefore, existing inequalities in punishment are amplified by the immigration system. However, despite my participants’ acknowledgement of these processes, existing criminal justice system inequalities are largely brushed aside by the immigration system, in favor of an essentialist “good immigrant, bad immigrant” binary, which will be discussed in the next section.

*The Aggravated Felony and the “Good Immigrant, Bad Immigrant” Binary*

In the previous chapter, I explained the expansiveness of the aggravated felony, as well as its ability to cut immigrants off from almost all forms of legal relief from deportation, and to force them to fight their removal cases in conditions of little to no due process. Above, I have explained how the aggravated felony intertwines with the criminal justice system to reproduce existing inequalities. The harsh and unequal effects of the aggravated felony category are upheld
and rationalized by a “good immigrant, bad immigrant” binary that paints immigrants with criminal records as a monolithic group undeserving of U.S. residence, citizenship, or even basic rights. This binary is supported by the moral panic described in Chapter Four—centered on a racialized and idealized “criminal alien” folk devil—as well as the neoliberal ethos of personal responsibility that undergirds it. The aggravated felony upholds the “good immigrant, bad immigrant” binary by making it so that non-citizens with convictions that fall within the category are not tried as unique cases with a variety of individual and structural factors that should be taken into account, but rather, as “aggravated felons”—serious criminals who must be detained and removed with as little chance for legal relief as is allowable by international law. In my research, the “good immigrant, bad immigrant” binary was evident in the criminalizing treatment of detained immigrants fighting their aggravated felony cases, participants’ descriptions of the development of the aggravated felony and related policies, and the erasure of structural considerations in aggravated felony cases.

In contrast to NYC’s larger immigration court at Federal Plaza, where immigrants attend their hearings in their own clothes and arrive—at least somewhat—on their own free will, the atmosphere at the Varick Street detained court clearly denotes the criminalized status of its respondents. While ICE was still physically bringing detained immigrants to the court,¹⁰ they were transported by ICE directly from their “detention centers”—county jails in New Jersey and Upstate New York—early on the morning of their hearings. While at Varick Street, detainees were held in unseen holding cells throughout the day, except for during their hearings, when they were brought into the courtrooms in their orange prison jumpsuits, shackled at the wrists, waist,

¹⁰ In June 2019—part of the way through my research—ICE announced that they would no longer be physically bringing detainees to Varick Street for their court appearances, and they will therefore have to appear from the detention center, using video-conferencing technology (Robbins 2018). At the time of writing, ICE is still refusing to bring detainees to Varick Street for their hearings (Goldbaum 2019).
and sometimes ankles, and accompanied by privately-contracted security. In my interviews, lawyers referred to this environment as criminalizing and harmful to the cases of their clients. May described how on the non-detained docket at Federal Plaza, respondents “have the chance to show that [they’re] a normal person.” She went on to say, “It’s very hard at the detained court for judges to look at you and see you in your orange jumpsuit and your shackles to your waist and to your hands, and see you as someone who is fully human, as sad and fucked up as that is.” This problem was intensified by the switch to tele-video appearances by detainees at Varick Street in June 2018—with respondents forced to testify from the jails themselves, their humanity reduced to the grainy image of a jumpsuited prisoner on a television screen.

The criminalization of detained respondents at Varick Street is also seen in the racialized “other”-ing of immigrants and their families. In the courtroom, the difference between respondents and other actors is denoted not only by their orange jumpsuits, but also by the language barriers described in the previous chapter. Respondents are prohibited from talking to each other or anyone else while in the courtroom—except when questions are directed at them through their translator—and they often sit blankly due to incomplete translation throughout most of the proceedings. On one occasion, when two detainees from Latin America were seated on the side bench of the courtroom, one whispered to the other—apparently asking a question about translation—only to be immediately silenced and separated by security. Guards acted just as swiftly in another hearing, when the two young daughters of a shackled respondent from Guatemala attempted to approach him during one of the (oft-occurring) breaks in proceedings. This was not the only time I observed the dehumanizing treatment directed at immigrants facing deportation extend to their families. As a white woman and a graduate student, I was mostly treated with respect by court staffers. While family members—almost exclusively Latino—were
rushed into and out of the court and scolded for knocking on the door separating the waiting rooms and the courtrooms, I was often asked if I was a lawyer and was ushered in to observe court with very few questions. One morning, while going through security in the lobby of the government building that the Varick Street court is housed in, the guard made a point of having me pass through as an “employee,” while a line of Latino families—also there for immigration court—were afforded no special treatment. In the courtroom, I was likely to be moved to the front row when family was placed in the back, and one judge who had previously ejected the young child of a respondent for playing with a phone, excused me with a friendly smile when the DHS attorney accused me of having looked at my phone myself—an act that was forbidden of visitors but commonly done by lawyers, clerks, and security.

The criminalizing environment at Varick Street was underscored by the treatment of respondents and their cases by DHS lawyers and immigration court judges. DHS trial attorneys were sure to inject references to and questions about respondents’ criminal records throughout proceedings, even when not relevant, despite these records already being well-documented in case materials. While defense attorneys usually object to this practice, they are often overruled. In one case, after asking about the respondent’s criminal history during questioning related to a fear-based Convention against Torture (CAT) claim, the DHS attorney posited that the respondent’s testimony was not credible and that his documents may be fabricated, because of his own criminal history and corruption in the Dominican Republic, his home country.

The view that respondents with aggravated felony convictions were innately criminal—“bad immigrants” who could not be trusted—was made explicit in bond hearings, when judges had to determine if detainees were “flight risks” and/or “dangers to the community.” Criminal history is often the most important factor in this determination—with the aggravated felony
designation lending an instant seriousness to one’s crimes. Jon explained that this was especially the case “if the crime involved violence of any kind, or actual drug sales.” In these instances, he said, “you’re going to have a tough time convincing a judge to let you out.” Despite it being the government’s burden to prove that a detainee is a danger to the community, Jon explained, “a lot of judges sort of say, ‘Well, I consider drug dealing to be a dangerous offense.’” In my own observations, I saw decade-old low-level drug crimes cited as “serious criminal records” that made respondents too likely to flee or cause danger to be offered bail—despite obvious rehabilitation. Raina found these cases particularly incongruous, saying, “if you’ve already released them into the community, and there’s been nothing happening, then you can’t actually prove risk of flight or danger.”

Although relief hearings in cases with aggravated felony convictions were most likely concerned with fear-based relief under CAT—not a discretionary form of relief—lawyers felt that judges’ personal feelings about respondents still came into play in their decisions. Seth explained how immigrants with aggravated felony convictions often face a double-bias in these situations. He said that because of the limited nature of CAT relief (described in the Chapter Five), creative claims that do not neatly fit are met with “skeptical” judges, who “think that you’re just trying to bootstrap yourself into a form of relief.” In addition, he explained that non-citizens with aggravated felony convictions were less likely to be “sympathetic characters,” a view expressed by a few other participants as well. Seth said, “judges don’t generally like people with aggravated felonies, and particularly if they’re very unpleasant violent crimes, or serious drug crimes, the judge is—many judges are probably not going to want to have you around in the country.” Although not the only factor that comes into play, the aggravated felony category
works as a marker clearly delineating “bad immigrants” who are dangerous and deserving of deportation.

A few lawyers and advocates also pointed out the “good immigrant, bad immigrant” binary’s role in the aggravated felony category’s development (detailed in Chapter Four). Lisa explained how advocates who had been part of the negotiation process for the IIRIRA of 1996—the law that expanded and harshened the aggravated felony category more than any other—had since admitted “giving away certain things to get other things,” i.e. throwing immigrants with criminal records under the bus to negotiate benefits for “good immigrants.” George, a lawyer and advocate with 30 years of experience in immigration law, characterized the “good immigrant, bad immigrant” binary as “that false dichotomy which ignored the role of racial bias in the criminal justice system,” and described the harsh consequences it has had for non-citizen criminal offenders—a group who “from an advocacy point of view” has “historically always [been] sold out.” In describing the development of the aggravated felony, George said, “when legislation would come around, there were very few organizations that, as the bill went through its process, would advocate for this constituency.”

While more organizations have arisen to defend immigrants with criminal records since the reforms of 1996 (as will be discussed in Chapter Seven), there is still a fight for services and advocacy to include all immigrants—not just those deemed deserving based on the convictions of a patently unequal criminal justice system. In the “sanctuary city” of NYC, controversy struck in May 2017, when Mayor Bill DeBlasio—widely touted as a progressive—announced that city money would no longer pay for the legal representation of immigrants with convictions on an expansive list of 170 “serious” crimes. This is the same list of 170 crimes for which ICE detainers may be honored by the city, as described above, and it is a list that includes many
aggravated felonies. City Council members and advocates strongly refuted the Mayor’s plan, which would effectively have ended NYIFUP’s mission of providing universal representation to the city’s detained immigrants—a mission they have been successful with since 2014 (Stave et al. 2017). Eventually private money was sourced to pay for the representation of immigrants with convictions on the Mayor’s list of crimes (Robbins 2017b), yet advocates and lawyers still saw the incident as indicative of the continued salience of the “good immigrant/bad immigrant” binary.

Jackie called the Mayor’s actions “heartbreaking,” and said, “I’m glad there was a compromise, but it just to me signaled that even the people who want to shout from the rooftops that they’re the head of a progressive city, and they’re doing sanctuary, still believe that some people should somehow be thrown away.” Cecy called the list of crimes “a very unsophisticated list of offenses,” and referenced former clients with convictions on the list who ended up winning relief from removal. She explained,

Like robbery in the second degree, two kids steal a bag, or they get in a fight and at the end of the fight one of them takes off with a cell phone, robbery in the second degree because two kids are involved. So you’re telling me that a lawful permanent resident who has been in NYC for many years, and whose family is here shouldn’t get a lawyer because that’s what he was convicted of, you know?

Cecy went on to describe one particular case of a young man who was convicted of robbery in the second degree—an aggravated felony also on the Mayor’s list of crimes—who “pled guilty, got two years, was upstate, got ordered removed.” Because she was assigned as his immigration lawyer, Cecy helped the young man get out of immigration detention, appeal his original robbery case with an appellate criminal lawyer, and eventually become not removable. She said now, “The kid is doing really well, not in trouble, and is applying to become a United States citizen. He had an original conviction which is on the Mayor’s list, you know what I’m saying?”
Lawyers found the indiscriminate grouping of immigrants based on criminal convictions—whether those on DeBlasio’s list, or those that comprise the aggravated felony—especially problematic in a context of growing acknowledgement of injustice in the criminal justice system. Pia said, while there has been more recognition in recent years of “racial disparities in policing,” she does not see that recognition extended to immigration law, despite the fact that, “most immigrants I’m representing who are indigent, are immigrants of color, and they’re in these same communities, or being policed in a way that we sort of acknowledge from the criminal side, how disproportionately it affects people of color.” Pia went on to say,

I don’t think the immigration system has come to as sophisticated of a conversation around understanding that policing in the immigration context. You know I think very often the rhetoric goes to…good versus bad immigrant, and there’s a real lack of significant understanding of the policing that goes on, the communities that people are embarking from, that people may in fact have criminal convictions, but what is that about? And where is it coming from? Versus good versus bad.

Marco agreed, saying that “the U.S. has in many ways understood the flaws that our criminal justice systems have, but it’s interesting how the public opinion is still not able to translate that understanding of the criminal justice system as not fair to the immigration arena.” He explained how the same politicians who say that we need criminal justice reform go on to talk about immigrants and say “we’re only going to take the ones who haven’t committed a crime” even though the crimes arose in that same flawed criminal justice system.

Structural considerations that contextualize an immigrant’s criminal conviction are largely unwelcome in immigration court—especially in aggravated felony cases, where limits on relief make home-country conditions more relevant than individual-level factors about someone’s history in the U.S., as detailed in the previous chapter. Cori explained that there is room for such structural considerations in immigration court “if you’re not dealing with an aggravated felony,” but because of the lack of discretion in aggravated felony cases, “it’s so
black and white, that like it doesn’t really matter what the circumstances were surrounding that individual’s conviction.” Cori described a recent non-aggravated felony case where a client had been “caught up in the crack epidemic,” so she,

“presented his story in the context of what was happening to communities of color in Brooklyn in that time period in the late-'80s and the early-'90s, and how it wasn’t just his life, but his entire community was being destroyed by this. And I think we were able to put together a compelling narrative and we ultimately won in that case, but that’s because he didn’t have an aggravated felony.”

Emily said that immigration judges, at Varick Street in particular, “are super resistant to having, maybe you could call it sociological context to our clients’ criminal history.” She said while judges are willing to consider certain individual-level factors, “if you try to put evidence like, ‘Oh, they live in this community in the Bronx, this precinct that has incredibly high levels of police brutality and over-policing,’ that no one will even look at or consider as valid evidence.”

Although judges are more willing to consider mental health—an individual-level characteristic—immigration law processes offer even fewer protections to respondents with mental health issues than the criminal justice system. As mentioned above, it has been estimated that 15% of immigrants in ICE detention have mental health problems (Mehta 2010)—similar to the rates seen in the criminally incarcerated population. Yet evaluations of “competency to stand trial,” which have been called “the most significant mental health inquiry pursued in the system of criminal law,” have not been the norm in immigration court, despite their institutionalization in the criminal system (Korngold et al. 2015). A precedential decision issued by the Board of Immigration Appeals (BIA) in the 2011 Matter of M-A-M created guidelines to be used by immigration judges when hearing cases with mental competency issues, and made it so judges could administratively close cases “where no procedural safeguards would ensure a fair hearing” (Legal Action Center 2011:5). However, former Trump Administration Attorney General Jeff
Sessions’ ending of administrative closure in the 2018 *Matter of Castro Tum* (described in the previous chapter) effectively ended this practice—reopening the deportation cases of many non-citizens with mental health issues.

In my interviews, several participants spoke to the difficulties of such immigrants facing deportation for aggravated felonies. Marco felt that for people with mental health issues who “slip through cracks in the criminal justice system,”

“Our laws in the immigration system are…incredibly harsh towards people in that condition, offer very little protection for people who are mentally ill in immigration court. And the amount of things an immigration judge can do when they have somebody who is mentally incompetent are so few, so little, that people who are mentally ill end up being deported for the same aggravated felony convictions, even though they may not be competent to proceed in immigration court.”

Laura expressed disappointment at Sessions having “taken aim at” M-A-M hearings, which she described as “competency hearings so you can get safeguards for your clients.” She lamented, “But that’s like gone, and I don’t think those people should be—it’s just such a huge waste of resources that we’re detaining them or having deportation proceedings for them.” Seth explained the difficulty of arguing for CAT relief (the only form of relief available for many with aggravated felonies) based on mental health, despite the obvious difficulties faced by people with mental health issues deported to countries that often lack adequate mental health services, and where deportees are already stigmatized. However, to win a CAT claim, one must prove that a deportee would be subjected to torture, either at the instigation of, or with the acquiescence of government authorities acting within their official capacity, as detailed in the previous chapter. Therefore, Seth said,

So you have to show that somehow either sort of mobs of enraged people are going to know that they have state protection if they attack mentally ill people, or that state-sponsored doctors or nurses in state-run facilities are going to subject your client to treatment or lack of treatment that meets the definition of torture, and so you’re kind of
out at the far edges of what’s likely to be defined as torture with the acquiescence or at the instigation of the government.

Marco elaborated on his above-mentioned case—where a client with mental health problems was apprehended by immigration enforcement for an old aggravated felony after he was caught stealing cheddar cheese and salami from a bodega. He explained how he had applied for CAT relief, while also arguing that his client was incompetent to proceed, “because he couldn’t even completely make any sort of assistance for us, his immigration attorneys.” Marco went on, “We were not able to find out anything about his past…because he was incompetent, and the immigration judge ended up finding that he was eligible for CAT because he did not meet the really really high burden of proof, and he’s in the Dominican Republic now.” Therefore, we see how the aggravated felony becomes a master status—demarcating the line between “good immigrant” and “bad,” while erasing the complex inequalities that affect criminal justice system convictions.

Conclusion

In previous chapters, I illustrated the role of a racialized moral panic linking immigrants with drugs and crime in the enactment, development, and sustenance of the aggravated felony category—despite its expansive reach, severe outcomes, and limits on due process. Above, I outlined the key role of criminal justice policies and processes in aggravated felony-related immigration enforcement and deportation, with an emphasis on the War on Drugs, and described the aggravated felony’s role in the reproduction of existing criminal justice system inequities related to race, class, gender, immigration status, and mental health. I argue that the aggravated felony is key example of the growing “crimmigration nexus,” and an important mechanism
through which the immigration system enforces a “good immigrant, bad immigrant” binary—
ignoring the structural realities of the criminal justice system and amplifying inequality.

Immigration court processes further serve to “other”, dehumanize, and re-criminalize
non-citizens previously convicted of aggravated felonies, reinforcing a racialized image of the
undeserving “bad immigrant,” and rationalizing the harsh and unequal outcomes of the category.
These processes are supported by the enduring folk devil of the “criminal alien,” as well as a
neoliberal ethos of choice and personal responsibility. By taking the aggravated felony
designation at face value and disallowing further interrogation of the unequal circumstances that
produce criminal convictions, immigration courts uphold existing inequalities in the criminal
justice system and intensify unequal punishment—adding mandatory detention and lifetime
banishment onto criminal sentences that have often already been served. Therefore, just as
disparities in the criminal justice system serve to uphold white supremacy, class hierarchies, and
a demonized image of Black and Latino young men (Alexander 2010, Chavez 2008, Spitzer
1975, Wacquant 2001), the aggravated felony targets already criminalized populations and
further excludes them through forced removal from the U.S. In the following chapter, I will
discuss forms of legal resistance that have emerged to contest the aggravated felony, before
concluding with implications for policy and future research.
7. Legal Resistance to the Aggravated Felony

Previous chapters have discussed the punitive development of the aggravated felony, as well as its wide-ranging, severe, and unequal effects, as observed in my case study of New York City’s detained immigration court. My qualitative findings confirm and expand upon existing legal critiques of the aggravated felony, while contextualizing these critiques in broader discussions of criminal justice system inequality. Still, while many of the outcomes related to the aggravated felony are as harsh and expansive as its “on-the-books” explication would suggest, my study of the law “in action” also revealed unexpected strategies of resistance that have emerged since the law’s extreme expansion in the immigration reforms of 1996. In this chapter, I conclude the examination of my second research question, (how does the aggravated felony legal category affect everyday immigration court processes and outcomes for non-citizens with criminal records?), with an exploration of strategies of “legal resistance” that have emerged in response to the evolution of the aggravated felony.

In addition to interviews with lawyers and other relevant actors, this chapter draws from my ethnographic observation of legal conferences, legal workshops, and immigration court removal proceedings, as well as my analysis of court decisions and organizational resources. I begin by defining my concept of “legal resistance,” and demonstrating its applicability to observed responses to the aggravated felony. Next, I describe resistance to the aggravated felony that works through immigration law, through the injection of sociological considerations into claims for relief from deportation under the Convention Against Torture (CAT) and the use of the “categorical approach” to contest aggravated-felony-based deportability. This is followed by a discussion of strategies of resistance to the aggravated felony that work through criminal law, such as pre-conviction advisement on immigration-safe pleas and post-conviction appeals to
expunge existing aggravated felonies. Lastly, I discuss the key role of advocacy in creating the conditions through which these legal tactics materialize, facilitating their implementation, and continuously pushing for progressive reform. Findings contribute to law and society debates on the role of law as a tool of resistance, and expand the concept of “crimmigration”—mostly used to describe the punitive results of the intertwining of criminal and immigration law—by demonstrating ways that this intertwining also creates opportunities for resistance. Furthermore, strategies of legal resistance observed in the unique policy and organizational conditions of NYC have important implications for legislators and advocates concerned with protecting the rights of immigrants nationwide.

Conceptualizing Legal Resistance

As discussed in Chapter Two, scholars of law and society have debated the potency of law as a tool of resistance. Drawing on Gramsci (1971), the field has been mindful of the hegemonic power of law—its ability to shape our lives while simultaneously naturalizing its own effects (Calavita 2010). While this distinct power often works to uphold social hierarchies (like those discussed in the previous chapter), researchers have also documented the harnessing of law’s hegemonic power by groups resisting oppression and stratification (Abel 1995, de Sousa Santos and Rodriguez-Garavito 2005, Hirsch and Lazarus-Black 1994). Furthermore, while some have argued that the legal focus on individuals and “rights talk” can distract from broader movements for social change (Gordon 1998, Tushnet 1994), others have refuted these criticisms and contended that law and the invoking of legal rights are tools that—in the right context—can be successfully used toward an end of social change (Delgado 2009, McCann 2006, Williams 1991).
Beginning this research having reviewed the foreboding legal scholarship on the aggravated felony—in the context of a presidential administration committed to the further harshening of immigration policy—I did not expect to hear much optimism from interview participants with regard to immigration court outcomes for non-citizens convicted of aggravated felonies. Yet, despite references to the “immigration law death penalty” and “mandatory deportation,” my participants were quick to describe creative strategies that have developed in response to the aggravated felony’s punitive development. I use the concept of “legal resistance” to describe such tactics, which work to upset the breadth and definitiveness of the aggravated felony category in ways that are distinctly legal—executed in the cases of individual immigrants through processes of both immigration and criminal law. While such strategies were often framed by lawyers in terms of their professional duty to represent individual clients, protect broader legal rights, and advance the law in the public interest, participants also spoke of them as responses to perceived injustice in the law and its application, and framed them in a broader context of advocacy.

The American Immigration Lawyers Association (AILA), a national organization of over 15,000 immigration lawyers and professors, cites the American Bar Association (ABA) in their in-depth practice manual to describe the multilayered role of every lawyer, as a “representative of clients, a public citizen having special responsibility for the quality of justice, and a member of a learned profession” (Vyas 2018:16). Therefore, lawyers are expected to be capable and conscientious in their representation and advisement of individual clients, while also seeking to improve law and justice, and working to advance legal knowledge and the legal profession in the public interest. All of these motivations were evident in my participants description of the legal strategies described in this chapter.
While observed legal responses to the aggravated felony may lead to outcomes with important implications for future cases (as will be discussed in subsequent sections), lawyers were clear in their responsibility to individual clients. Speaking of one recent precedential case, Raina, a public defender and immigration lawyer with six years of experience, maintained that the goal was to make sure the client got relief, with future implications an added bonus. She said, “I mean often there is a convergence of interests, right? Where it’s like, if we can get [this person] relief, then we can get so many people who are convicted of the same offense relief as well. But most of the time it’s just making sure that the client can get access to relief that they want to get.” Other lawyers confirmed the prioritization of representing individual clients over broader considerations. Seth, a public immigration lawyer with almost 25 years of experience, explained the emergence of innovative legal arguments in aggravated felony proceedings as necessity entailed by “the job of lawyers” to fit the facts of a particular client’s case to legal options for relief. With relation to aggravated felony cases in particular, Jon, a private criminal and immigration lawyer for six years, described a feeling of responsibility to provide quality representation to individual clients, even those who are otherwise maligned for their criminal convictions. Referencing a client who was convicted of “attempted possession of child pornography,” he explained how upon hearing about the case, his wife responded, “I understand you have to do what you have to do, but who cares about this guy?” Jon said, “well, I care. I care about his daughter. I care about his wife. I care about his niece and his nephew. I care about the people who fall on the ground when we leave the court, because the person they know is a loving, beautiful father and uncle. They haven’t been able to see him, and he’s gonna get deported.”
Participants also described emergent legal responses to the aggravated felony category as contextualized by a responsibility to improve the law and ensure the proper administration of justice. Naomi, a public immigration lawyer for ten years, explained that while legal responses to the aggravated felony may be seen as resistance against deportation more broadly, they should also be understood in the context of lawyers’ commitment to justice, saying,

“Even if you’re kind of like, ‘we don’t want to get involved in what those decisions are, those are for immigration judges,’ it’s also just sort of a statement about basic due process rights and basic fairness. Even if you’re not actively trying to stop the deportation machine, you’re just trying to make sure things are fair for people.”

Lisa, an immigration lawyer and educator with over 20 years of experience, exemplified this perspective, explaining, “I’m not making a judgement call about the folks or the offenses. I think more my interest in this area is more so on the due process…what’s fair.” She said, “for me, it’s not about who gets deported or not. That’s not my decision. It’s about due process.” Jackie, a public immigration lawyer and advocate for eight years, explained how a case early in her career, where a client would have been eligible for discretionary relief from deportation if it wasn’t for the aggravated felony bar, inspired further work in preventative crimmigration law (described in a subsequent section). She said, “It was a very emotional and difficult case to do, but also I had a real sense of this is what’s right and what’s fair under any kind of approximation of what law means.” Jane, a public immigration lawyer for eight years, expressed concerns with the administration of laws related to aggravated felonies and argued they need to be changed, saying, “we need legislative reform. I don’t believe that the way that the law is being applied by the current administration and by the prosecutors carrying out the administration’s policies on a daily basis is consistent with what Congress intended…”

In terms of advancing the law and regulating their profession in the public interest, some lawyers framed the emergence of creative legal strategies as part of a broader responsibility to
the communities they represent. Such concern for serving the public was particularly poignant for NYIFUP lawyers working in public defense offices. Sheria, a public immigration lawyer for four years, said,

“one of the reasons I love it here is because I guarantee if it’s an issue affecting poor immigrant New Yorkers, someone at [this organization] knows how to do it. So we’re not scared of the law not being on someone’s side, because we figure something out…When you’re a public defender at your core, then you’re like, ‘No, I’m not going to accept that this is the law and then therefore, we have to lay down and let this person be deported back to a place that they don’t even know, or where it is dangerous for them to be there.’”

Other lawyers referred to the goal of building legal knowledge through individual cases, or expressed a need to evolve legal interpretations. George, a lawyer, educator, and advocate with 30 years of immigration law experience, explained the importance of “developing theories for people, both individual and in terms of larger litigation to defeat or narrow the interpretation [of the aggravated felony]”—an approach that will be described in more detail in the following section.

Still, while focused on professional aims of representing their clients, protecting justice, and advancing their profession in the public interest, lawyers have played a key role in the development of innovative legal strategies related to the aggravated felony. I call these tactics of “resistance” not because the term was often used by my participants themselves, but because these strategies play an important role in challenging and upsetting the expansive and definitive effects of the aggravated felony, a key tool of the modern deportation regime. Observed tactics of legal resistance are often framed in response to what lawyers deem to be the overreach or overapplication of the law, as subsequent sections will show, and the development and

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11 The NYIFUP program works by funding immigration removal defense units within existing public defense organizations, namely The Legal Aid Society, Brooklyn Defender Services, and The Bronx Defenders.
implementation of such strategies are directly supported by community-based advocacy efforts, also described later in this chapter. Additionally, while many of these strategies have evolved throughout the past two decades or beyond, several participants spoke of an invigorated mission to protect their clients and broader conceptions of justice under the Trump administration. Oren, a public defender and immigration lawyer for 15 years, said,

And you know to see Jeff Sessions\textsuperscript{12} talk about return to the rule of law, what is he talking about? With this administration, like what rule of law are they following?...It’s shocking. Everyday. And the Federal Courts have been really good recently, and they have been for a while, you know, in the sense that they’re applying the law, and as much as the Trump administration doesn’t like it, because the law is whatever Donald Trump says it is. But we believe in a fair administration of laws with dutiful rules that are applied equally, you know?

Even the most recent version of the AILA practice manual refers to the administration directly in its preface, asserting that “it is more important than ever that immigration attorneys remain up to date on developments in the law and stay on top of their game to best support their clients in this challenging climate” (Klug 2018:x). In the following two sections, I describe major tactics of legal resistance to the aggravated felony that work through immigration and criminal law, before analyzing the role of advocacy in supporting observed strategies.

\textit{Legal Resistance through Immigration Law}

In Chapter Five, I described immigration court impacts of the aggravated felony, including the severity of its effects on non-citizens’ options for legal relief from deportation, as well as its expansive breadth and perceived overuse by Immigration and Customs Enforcement (ICE). The tactics of legal resistance described in this section work within immigration law to challenge and lessen these impacts, by working creatively toward relief under the Convention against Torture (CAT) and by contesting aggravated-felony-based deportability through the

\textsuperscript{12} Jeff Sessions was U.S. Attorney General under Trump from February 2017 to November 2018.
“categorical approach.” CAT-related strategies respond to aggravated felony bars on relief by working to expand one of the few forms of relief that is available, and counter the aggravated-felony-related erosion of judicial discretion—and a linked disinterest in structural factors. The categorical approach—a method of arguing that an alleged aggravated felony conviction should not actually be so-categorized—is framed as a response to the severity of the aggravated felony’s outcomes, its overuse by ICE, and its erosion of due process. While strategies of resistance in this section do not go outside of existing law, they use immigration law and its processes in creative ways to counter perceived injustices related to the aggravated felony.

As explained in Chapter Five, the major forms of relief from deportation available for immigrants convicted of aggravated felonies are withholding of removal and deferral of removal under the Convention Against Torture (CAT). In order to be granted CAT relief, an immigrant must prove that there is a higher than 50% chance that they will be tortured or otherwise injured, by the government or at government acquiescence, upon return to their home country. This is a very difficult standard to prove, especially mandatorily detained and without a lawyer, like many immigrants fighting deportation and especially those with aggravated felony convictions. Resultantly, less than 3% of applications for CAT relief from deportation are granted around the country (Executive Office for Immigration Review 2017). While study participants emphasized the difficulty of obtaining this form of relief, they did not consider it impossible, and many lawyers reported having successfully argued for it. When I asked Greg, a private immigration lawyer for eight years, “What are the common outcomes of aggravated felony cases you see? Do you see it as something that is able to be fought?,” he responded, “Oh yeah. I win a lot of these cases. I just won one last week,” before going on to explain these wins were always based on CAT relief. Nicole, a public immigration lawyer with 15 years of experience, said, “You know, I
don’t know if it’s completely correct to say that aggravated felony cases are less likely to have relief. It kind of depends on a more holistic look at the case, because there are still quite a lot of aggravated felony cases that do have relief, and have strong cases for relief, like CAT claims.”

Despite the narrow standard of relief under CAT, lawyers have developed strategies to make this form of relief fit cases that it has not traditionally been applied to—or as explained by Seth, “pushing the law in directions that perhaps it wasn’t initially intended for” because “it’s the only relief you have left for your clients.” Throughout my interviews and ethnographic observation, lawyers described arguing for CAT in cases related to mental health issues by showing that a lack of available treatment could amount to state-allowed torture, and winning CAT claims based on credible fear of drug organizations that have become “quasi-state actors” in many countries. Some described inserting discretionary factors—such as people’s ties to the U.S., demonstrated rehabilitation, or non-torture-related hardship they will face in the country of return—into CAT cases despite it not officially being a discretionary form of relief. Laura, a public immigration lawyer for three years, explained, “we will definitely put everything sympathetic in there. If the judge really likes your client, and wants to grant your client, hopefully they’ll be able to do that.” May, a public immigration lawyer for five years, agreed, saying, “even in a CAT claim, you still want the judge to like your client. You’re still going to try to get in as much information like that as you can.”

One of the most effective ways lawyers work to bring context and evidence to the likelihood of torture into CAT cases is through the use of expert witnesses. Laura said, “You need an expert witness really to prove a CAT claim,” and Greg concurred, “You always need an expert witness. You can’t do a CAT case without an expert.” Experts are most often brought in to speak to either country conditions or the mental and/or physical health of an immigrant
arguing for fear-based relief from deportation. NYIFUP providers utilize a holistic approach to legal services, which means that their attorney pools are augmented by in-house social workers and mental health professionals, in addition to other support staff (Eagly and Shafer 2015:8). Kayla, a social worker with three years of experience at NYIFUP provider, said that she worked on CAT cases, “typically when there is mental health or substance abuse worries.” She explained, “So for example, I could talk about the history of their symptoms, how they manifest, what that looks like, what that looks like as far as criminal court contact, what would most likely happen in the future…” In addition to in-house experts, lawyers spoke of hiring outside experts, enabled at the NYIFUP providers through funding specifically for this purpose. Cori, a NYIFUP lawyer with 12 years of experience, explained, “we’re fortunate that we have pretty good funding sources and we’re able to often hire expert witnesses.” Although lawyers and investigative support staff work hard to put together packets of published research on country conditions and other relevant factors, expert witnesses were seen as providing superior evidence with more impact in court. Cori said hiring experts “is often the key in these cases because there’s just not the documentary evidence that you’d gather. Like it’s not strong enough what you can find in print or through your own research.” At a workshop panel on the topic, another NYIFUP attorney explained that while lawyers often file country conditions reports of 400-500 pages, judges won’t usually look at them, nor will they give much validity to descriptions by defense lawyers or the respondents themselves, but they will listen to the accounts of expert witnesses. Along with other panelists, the NYIFUP attorney spoke of increasing success in CAT cases as judges at Varick Street progressively grew familiar with creative arguments and absorbed country conditions described by experts.
I observed hearings in several CAT cases that utilized country conditions experts, including two that successfully gleaned relief during the period of study. Neither were traditional CAT cases, but instead, were based on the expert-supported assertion that respondents would be harmed or killed with impunity by narco-cartel actors upon return to their home country, with the acquiescence of a corrupt “narco-state” government. The expert in both of these cases, a scholar who had studied the experiences of deportees in the respondents’ home country, was able to speak to conditions such as criminal impunity and police corruption, as well as the specific treatment of other criminal deportees. When asked in court how he saw his role as an expert witness, he responded, “Probably to shed light on the country conditions in relation to the case. Basically to educate the court.” He spoke of “social conditions” and their specific relevance. Although experts’ credentials and testimonies are often picked apart and fiercely fought in court by Department of Homeland Security (DHS) attorneys—as reported in my interviews and observed firsthand in court—it was clear that expert credentials and well-cited testimonies were valued by judges in making their CAT decisions, despite the general reluctance to consider structural factors in immigration court, as described in the previous chapter. In both successful cases I observed, the judge used language directly from the country conditions expert testimony in delivering her decision to grant deferral of removal under CAT.

While creative legal strategies around CAT-relief challenge the severe limits to relief and discretion activated by aggravated felonies, they only have potential to help those with a credible fear of harm upon returning to their home country—and do not confer actual legal status, just the “withholding” or “deferral” of deportation, as explained in Chapter Five. Another observed form of legal resistance is the contestation of aggravated-felony-based deportability by arguing that the underlying conviction is, in fact, not an aggravated felony. As a grounds of deportability, the
burden is on the government to prove that an immigrant has been convicted of an aggravated felony and is therefore removable. Yet aggravated-felony-based deportability usually goes uncontested, in a large part due to the fact that 86% of detained immigrants in removal proceedings go unrepresented (Eagly and Shafer 2015:8). Although legally complex to contest deportability based on an aggravated felony, if successful this strategy has the benefit of opening up forms of relief less restricted than withholding of removal and CAT-relief—like cancellation of removal and asylum—that also allow for eventual legal status.

Lawyers described their contestation of aggravated felonies as a response to the severity of the aggravated felony’s outcomes and its perceived overuse by ICE. Jess, a public immigration lawyer for 11 years, explained,

> “the first line of defense, and really the strongest line of defense, is trying to defeat the government allegation that the person committed an aggravated felony, which is absolutely a ripe area for litigation. The government frequently misconstrues things as aggravated felonies, and if you don’t have someone who is poised to articulate why this crime is not an aggravated felony, everything is going to fall apart after, because once you’re thought to have committed an aggravated felony almost every door is shut to you.

Jane explained how ICE “will allege that a large amount of crimes are aggravated felonies,” while she and other lawyers hold the position, “that those crimes actually don’t meet the basic requirements for an aggravated felony. And so those are cases that have to be litigated in immigration court…” Jon said, “I always look for any ability to contest the aggravated felony ground, just because it’s so devastating.” He elaborated, “that’s really at the heart of what I’m doing the most with in terms of aggravated felonies…arguing, ‘no, you’re wrong ICE, this is actually not an aggravated felony.’ And then the question is, how do we make those arguments? What are those arguments?”

An administrative body that has removed non-citizens based on criminal convictions since the-late 1800s, U.S. immigration law has long grappled with the question of how to
determine whether a given state conviction should trigger federal immigration consequences. This determination has most commonly been made through the “categorical approach,” a method of legal analysis that compares the elements of a given state offense to the elements of the offense type listed in federal law (Das 2011). To use this approach, adjudicators must consider only the legal elements of a given state conviction—not the title of the conviction or the facts of the specific case—to establish whether it triggers the federal consequence written into federal immigration law (Sharpless 2008, 2017). The use of this approach in immigration law is based on the view that administrative immigration courts should only have the power to adjudicate a conviction’s immigration law consequences, and cannot decide factual questions concerning the underlying circumstances of a conviction (Sharpless 2008). Although categorical analysis could feasibly have positive or negative effects on an immigrant’s case against deportation, legal scholars argue that by mandating a strict elements test under the categorical approach, courts address key due process concerns regarding the uniformity and predictability of immigration consequences of criminal convictions (Das 2011), and create a “bulwark against government overreach in…deportation proceedings” (Sharpless 2017: 1303).

While the tenets of the categorical approach have been applied in U.S. immigration and sentencing decisions for over a century, two key Supreme Court decisions related to sentencing enhancements—Descamps v. United States (2013) and Mathis v. United States (2016)—"cemented the categorical approach as a true elements test” (Sharpless 2017: 1303) and set precedent for a stricter interpretation in both sentencing and immigration court decisions (with some exceptions). The Supreme Court’s commitment to the categorical approach was reinforced in immigration decisions made by the Court during the same period, such as Moncrieffe v. Holder (2013) and Mellouli v. Lynch (2015). Although lawyers were mostly concerned with the
categorical approach’s potency as a tool for use in individual clients’ cases, they also described its role in gradually narrowing interpretations of the aggravated felony. Participants referred to various decisions that had precedentially restrained expansive application of aggravated felony. A list of relevant Supreme Court decisions and descriptive details can be found in Table 3 below.

Table 3. Precedential Supreme Court Decisions Affecting Interpretation of Aggravated Felony

<table>
<thead>
<tr>
<th>Year</th>
<th>Case</th>
<th>Findings</th>
</tr>
</thead>
<tbody>
<tr>
<td>2004</td>
<td>Leocal v. Ashcroft</td>
<td>State DUI offenses that do not require intent, or require only a showing of negligence in the operation of a vehicle, are not aggravated felony crimes of violence.</td>
</tr>
<tr>
<td>2009</td>
<td>Nijhawan v. Holder</td>
<td>Immigration judges can inquire into underlying facts of prior fraud conviction for purposes of determining whether the loss to the victims exceeded $10,000. (Categorical approach does not apply.)</td>
</tr>
<tr>
<td>2010</td>
<td>Carachuri-Rosendo v. Holder</td>
<td>Second or subsequent simple drug possession offenses are not aggravated felonies when the state conviction is not based on the fact of a prior conviction.</td>
</tr>
<tr>
<td>2012</td>
<td>Kawashima Et. Ux. v. Holder</td>
<td>Falsified tax returns are categorically considered fraud for the purpose of determining an aggravated felony.</td>
</tr>
<tr>
<td>2013</td>
<td>Moncrieffe v. Holder</td>
<td>State marijuana offenses that do not require remuneration or more than a small amount of marijuana are not considered aggravated felonies.</td>
</tr>
<tr>
<td>2017</td>
<td>Esquivel-Quintana v. Sessions</td>
<td>State statutory rape offenses with a threshold of older than 16 years do not fit the aggravated felony definition of “sexual abuse of a minor.”</td>
</tr>
<tr>
<td>2018</td>
<td>Sessions v. Garcia Dimaya</td>
<td>The aggravated felony definition of “crime of violence” is void for vagueness.</td>
</tr>
</tbody>
</table>

In addition to the Supreme Court cases listed in Table 3, interview participants also referred to recent precedential decisions in the Second Circuit Court of Appeals, the federal appellate court for New York, Connecticut, and Vermont, especially Harbin v. Sessions (2017) and Hylton v. Sessions (2018)—both drug related. In Harbin, the Court applied the categorical approach to find that a major NYS “sale of a controlled substance” offense is not a drug trafficking aggravated felony for immigration purposes, because the state definition includes one
substance—chorionic gonadotropin (hCG)—that is not included in the federal schedule of controlled substances. In *Hylton*, a case decided during the period of this research, the Court drew on *Moncrieffe* (2013) to find that a common NYS marijuana sale offense is categorically not an aggravated felony, because the state offense “explicitly extends to the distribution of less than an ounce of marijuana without remuneration” (*Hylton* 2018: 3).

Such decisions are often seen as collective hard-won victories by advocates and lawyers. A case litigated from immigration court through appeal by The New York Legal Aid Society (one of the three NYIFUP providers), Sheria explained that, “With *Harbin*, the goal was to change the law,” and characterized the favorable decision as the result of lawyers and advocates doing “a lot of work to try and show that New York’s definition of these offenses is broader than the federal definition.” Celia agreed that, “*Harbin* was particularly a win for the crimmimm community.” She elaborated, “It was an argument that had been being made for years, that the New York controlled substance register was overbroad… and it was the argument that we made and lost on, and then finally got a good decision.” Still, participants were clear that while broader impacts are exciting, such cases are not always fought with a goal beyond relief for one particular client. Raina explained that while appeals may be pushed with an eye toward changing the law, “sometimes it’s just happenstance.” With regard to *Hylton*, originally litigated by NYIFUP defenders before being fought on appeal by the New York University Immigrant Rights Clinic, Raina emphasized how even in the appeal stages, Mr. Hylton’s lawyers’ primary objective was to make sure he got relief—with broader impacts an added bonus.

At an observed immigration law conference panel on “crimmigration,” panelists discussed the categorical approach in detail and urged attendees to be inventive in contesting clients’ aggravated felonies, which they referred to as “the immigration law death penalty.” One
panelist explained how the current era—"post-Mathis, Moncrieffe, and Mellouli—"is a time when “only your creativity can limit you in challenging deportability.” The same speaker used the phrase “Wild West of law” to describe a contemporary legal landscape where there is space to argue that “theft is not theft, assault is not assault, burglary is not burglary.” Interview participants also identified the past several years as particularly favorable for contesting aggravated-felony-based deportability. Zara said that, “the Supreme Court has been really really strong and has made it increasingly difficult for the government to … meet its burden…when they’re arguing that someone is deportable. So that’s been a very helpful development over the last five years.” Pamela, a public immigration lawyer with three years of experience, relayed how the categorical approach has “evolved over time,” and said, “Judges are more amenable to seeing legal arguments because they realize these are prevailing in circuit courts and stuff like that, and so I think it’s maybe not as laughable to argue. Because before people would be like, ‘Of course it’s an aggravated felony, it’s drug trafficking.’ But now it’s like, ‘No, it’s not drug trafficking. It has to be a match.’ It’s more complicated than that.”

Amy, a public immigration lawyer for ten years described recent cases as a “reaction to the government overcharging people for years and years and years,” and said despite “really awful and horrible” immigration enforcement in the Trump era, currently, “once your client has an aggravated felony charge, you go, ‘Ugh. Oh my god. But what arguments can I make against it?’ And I feel like right now we have arguments against it.”

Still, while participants described increasing success with the categorical approach, they also emphasized a reticence by immigration courts and the Board of Immigration Appeals (BIA) to apply it as has been dictated by Circuit and Supreme Courts. In fact, misapplication of the categorical approach is one of most common reasons BIA decisions are appealed to higher courts (Lang 2015). Nicole said that while categorically contesting an aggravated felony can often be
successful, “it can take many levels of appeal to reach success…you might not get the results you should get until you’re at, sometimes the BIA, more likely at the Second Circuit. So the cases can go on for a long time.” Laura agreed, saying, “A lot of the immigration judges will not grant your categorical approach arguments, so even if you might eventually win at the Second Circuit, the BIA sucks, so you know.” Jon reported, “Practitioners like myself don’t feel like the immigration judges are really understanding or implementing the law, which forces us to appeal these decisions…But it’s really frustrating, because why can’t the immigration judge understand the Supreme Court case?” With more likelihood of success upon appeal, participants emphasized the importance of presenting strong categorical arguments early on in order to “preserve the record” for appellate courts that may prove more amenable. Still, despite the potential of the categorical approach, the fact that it is most often won on appeal makes it a difficult undertaking for immigrants who are likely to be detained throughout appellate proceedings—which may last several years. Laura explained, “If the person is detained, [appeals are] going to take like three years. And they’re going to be sitting in detention that entire time. And for a lot of people, that’s not worth it necessarily…”

Still, categorical-approach-based Circuit Court findings like Harbin and Hylton, as well as the Supreme Court decisions listed above in Table 3, were frequently cited by lawyers and advocates as key precedential victories, beneficial to the cases of current and future clients, beneficial to the practice of immigration law, and more generally, beneficial in moving overbroad aggravated felony application toward more just interpretations. Celia spoke to Harbin’s importance in setting precedent for clients’ cases, saying, “What was amazing was right after Harbin, we saw the DHS attorneys terminating by themselves.” She also referred to key categorical wins in the Supreme Court, like Mathis (2013), as having “really reinforced the
categorical approach, which allowed these better rulings to come down on the circuit level,” and explained how for lawyers, “Once we get those good decisions from the Circuit and the Supreme court, then we obviously have much more power with judges to agree with arguments that we’ve been making all along.” After *Hylton*, Cori said, “before this no judge was probably going to make that finding, but now there is a clear finding in the Circuit…so now [lawyers] could potentially go back and reopen something…based upon this new decision.” Amy said recent Supreme Court and Circuit Court decisions have been part of the case law on the aggravated felony “getting better and better,” and relayed that precedential cases “have allowed us to win a lot of aggravated felony arguments at the immigration judge level.” Pia explained how categorical wins, left her “inspired to bring more claims,” and emphasized the key role of lawyers in shaping the law, elaborating, “I think lawyers thinking through really creative arguments for trying to strike down some of these laws while they still exist is really important…I think preserving and making all these challenges and litigating it, and if a client is willing, to try and push and make a law.”

Interviewed on the day *Hylton* was decided, Cori referred to the specific importance of such legal resistance in the Trump era, as seen in the quote below.

And then I think it’s people just—as has been happening across the board…against the Trump administration—just like ramping up federal litigation, because immigration judges are not hearing us, the Board of Immigration Appeals is not hearing us. Jeff Sessions¹³ certainly isn’t going to be making any concessions or any better case law for us, so I feel like decisions like the one that came down today from the Second Circuit are where we can possibly get those victories that then become binding upon the Board of Immigration Appeals and immigration court.

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¹³ Jeff Sessions was U.S. Attorney General under Trump from February 2017 to November 2018.
Therefore, just as the above-discussed CAT-relief-related strategies use immigration law to challenge limits on legal relief and judicial discretion in the removal cases of non-citizens with aggravated felony convictions, the categorical approach also works within the boundaries of immigration law—and within the specific considerations of the legal profession—to resist perceived injustices related to the aggravated felony, namely its extreme bars on relief, its overbroad application, and related due process concerns.

*Legal Resistance through Criminal Law*

As has been discussed throughout this dissertation, research on “crimmigration”—the increased intertwining of criminal and immigration law—has been vital in bringing attention to the punitive outcomes of this intertwining (Stumpf 2006, Beckett and Evans 2015, Jiang and Erez 2017, Hernandez 2018). In Chapter Four, I demonstrated the role of increasingly punitive policy in both criminal and immigration law in the development of the aggravated felony, and in Chapter Six, I showed how the aggravated felony’s place at the crux of criminal and immigration law and enforcement results in uniquely punitive results that reproduce and exacerbate existing inequality. Still, there has been little attention paid to opportunities for resistance also created by the “crimmigration” nexus. Innovative forms of legal resistance observed in this research work through the criminal justice system to challenge the capacious, severe, and unequal effects of the aggravated felony. In this section, I will discuss two key aspects of such resistance—pre-conviction “preventative” defense, and post-conviction relief.

In the previous section, I described the categorical approach, identified by lawyers as one of the most effective strategies of avoiding deportation once placed in removal proceedings based on an alleged aggravated felony. However, a defense described by many lawyers as even
more fruitful is one that occurs long before the case reaches immigration court, prior to a non-citizen’s criminal conviction. This preventative strategy centers on immigration lawyers and other experts working with criminal lawyers, prosecutors, and judges to identify and avoid potential immigration implications of non-citizens’ criminal convictions. This is primarily done by educating criminal lawyers and judges on criminal-immigration consequences, installing in-house immigration experts in criminal defense offices, and negotiating with judges and prosecutors to procure immigration-safe convictions. As Chapter Five illustrated, there is very little room for negotiation in immigration court once a non-citizen has entered removal proceedings based on an aggravated felony conviction. The norm of bargaining in criminal law—evidenced by the astonishing 97% of federal criminal cases and 94% of state criminal cases that end in plea bargains (Eagly 2017:21)—makes this early stage the final chance for discretion in many potential aggravated felony cases, and a key opportunity for avoiding a so-classified conviction. Although practitioners have employed versions of these tactics for many years, preventative strategies against the immigration consequences of criminal convictions moved closer to institutionalization with the 2010 Supreme Court decision Padilla v. Kentucky.

In Padilla, the Supreme Court held that criminal defenders must advise non-citizen clients if a plea carries a risk of deportation, in order to satisfy the Sixth Amendment guarantee of effective counsel. In doing so, the Court recognized that rather than a mere “collateral consequence” of a conviction, “deportation is an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes” (Padilla v. Kentucky 2010:6). Due to the dominant norm of plea bargaining in criminal proceedings, study participants relayed how convictions are often more reflective of negotiations between defense lawyers and prosecutors than the actual crime committed. Raina
remarked that, “in criminal court it’s not really about guilt and innocence. It’s about bargaining power and negotiation,” and Marco explained how pre- and even post-Padilla, many of his immigration clients had pled to criminal convictions they were actually innocent of, without ever having been told that “this guilty plea that they made was going to have any sort of consequence in their immigration case.”

The Padilla decision led to the instatement of special units of immigration lawyers in public defense offices, and the institutionalization of programs to provide immigration advice to other criminal lawyers. Despite variations of such programs already existing among certain legal defense organizations and advocacy groups in NYC pre-2010, Padilla was widely recognized by participants as a key win for immigrants with potential aggravated felony convictions. Lisa said Padilla was vital in its acknowledgement of deportation as a punishment, and its “requirement that attorneys advise their clients accordingly, just like they would advise regarding sentencing issues or other legal matters”—advise she saw as fundamental to due process. Barb referred to preventative advisement on immigration implications of criminal pleas as “extremely important” and said, “there have been specialists advising criminal defense lawyers for decades, but the awareness has certainly picked up tremendously since the Padilla case.” Celia was also quick to mention the history of organizations using similar strategies pre-Padilla, yet acknowledged that the decision “has led to a much bigger role upfront for immigration advocates, a much more formalized role.”

While participants referred to inadequate levels of formalized Padilla advisement in other places around the country—despite almost a decade having passed since the ruling—most spoke positively about local implementation, including designated Padilla teams in the NYC public defender organizations and the institutionalization of “regional assistance centers” to provide
immigration-related advice to criminal practitioners around NYS. Many of my immigration lawyer participants had worked at NYC public defense organizations as “Padilla attorneys” or “criminal-immigration specialists” even before the NYIFUP program added immigration defense to these organizations’ officially-funded mission in 2014. Elena, a public immigration lawyer with eight years of experience, recounted being hired by one of the city public defender organizations post-Padilla and pre-NYIFUP “when a lot of organizations started to create small immigration units or practices.” In this job, she was “working directly with the defense attorneys in the same office, to make sure that whatever plea they’re negotiating with the DA, that doesn’t have a negative impact on the person’s immigration status.” Sheria also began as a “criminal-immigration specialist” at a future NYIFUP provider around the same time, a position where she “would work closely with defense attorneys in identifying…plea bargains…that will mitigate or lessen the immigration consequences that their client would face.” Celia described moving from removal defense to Padilla work “to try to correct what I perceived to be some of the mistakes on the front end, rather than having to deal with them on the back end.” In this preventative line of work, immigration lawyers described participating in holistic teams focused on non-citizens’ criminal cases, informally advising criminal lawyers on immigration-safe pleas to negotiate for in individual cases, contributing written details on immigration consequences to be presented to prosecutors and judges, negotiating with or testifying to judges and prosecutors directly, and running trainings or creating resources for criminal practitioners.

Participants emphasized how criminal justice system norms of negotiation and bargaining are what make these preventative strategies powerful. Raina spoke to the key combination of “criminal defense attorneys who are so wonderful…[and] have such great skill in negotiation and trial practice,” with Padilla attorneys who are experts in immigration implications of criminal
convictions. She elaborated, “All of this is about negotiation, and if the Assistant District
Attorney is willing to trade one thing for another…to preserve the ability of an individual to stay
in the United States with their family, that’s a really important process, which occurs way before
departure proceedings are even an issue.” Jackie reported, “The over prosecution that happens
in immigration court I think is partially because there is no bargaining. We are not seeing
bargaining the way we see it in criminal court, so they can charge high, and have no
consequences for that.” George also referred to the absence of negotiation in the immigration
system, and said “where charge bargaining, plea bargaining, sentence bargaining is a regular part
of the criminal justice system, then lawyers can mitigate and avoid getting an aggravated
felony.”

Nora, a public defender for eight years, described her organization’s in-house criminal-
immigration specialists as “a very necessary and vital part of our practice,” who she and other
criminal defenders “heavily rely on” to guide plea negotiations for non-citizen clients. She
explained, “Sometimes there are creative pleas that we can take, based on the specific charges
that our clients are facing.” As an immigration advisor on a criminal defense team, Jackie
described having “pled people to felonies instead of misdemeanors because the felony was safe
and the misdemeanor wasn’t,” or trading “jail time for immigration-safe consequences.” A
defense often mentioned by participants was negotiating for 364-day sentences for
misdemeanors that require a year-long sentence to become an aggravated felony, as Jackie
recounts below.

“The one common thing to do as kind of a Padilla trick, is if my client is charged with a
theft offense…and the prosecutor wants two years jail time…I would say, “well let’s
plead my client to two theft offenses, with 364 days on each. So you’re getting
everything but the two days you want, but that’s not an aggravated felony.”
Raina similarly recounted arguing for 364-day plea deals when she was a public defender, and said how in that position, “the aggravated felony ground was really important in thinking about how to negotiate pleas.” She explained how, in criminal court, “people get around things all the time,” so “if a defender is aware…they may be able to work something out with the District Attorney so as to avoid draconian immigration consequences that don’t really consider the …equities and…dynamic character traits of an individual.”

In order to persuade prosecutors to agree to immigration-safe pleas—or at least pleas not considered aggravated felonies—lawyers provide detailed information on immigration consequences, as well as discretionary details about their client that would become irrelevant in deportation proceedings once a person is convicted of an aggravated felony. In her work as a criminal-immigration specialist, Sheria recounted arguing to prosecutors that non-citizen offenders were being singled out with a “whole added penalty because of their birth-origin.” Jackie relayed writing “pre-pleading investigations” (PPIs) along with in-house social workers, to be presented to prosecutors. In these documents, she could include discretionary information, “like what are the ties, how this would devastate lots of people, what explains how we got to this point we’re at today.” Jackie would conclude with something like, “even though you’ve heard all these things, this is a real person with real family members and a chance at rehabilitation…that’s not going to matter in immigration court unless they get a plea that is like this.” Nora also reported submitting PPIs to prosecutors—“sympathetic memos, of mitigating factors about our clients”—especially in cases where “they have a really hard life story and they have a long history of addiction or abuse.” She said it is also common to have less formal conversations with prosecutors off the record, particularly when a client is undocumented, for fear that ICE could potentially gain access to court proceedings.
While there is far more discretion in criminal plea negotiations than there is in aggravated-felony-related immigration court proceedings, this discretion is largely in the hands of District Attorneys (DAs) and Assistant District Attorneys (ADAs)—who vary in their willingness to use it to protect immigrants. As a criminal lawyer, Nora remarked that these prosecutors “have a ton of power,” which can be “frustrating.” She said, “Overall, I’m not a fan of DAs…I don’t think many people on our side are…but of course there are DAs that are much more sympathetic or that you can work with, or do listen, on a case by case basis, and will listen to more sympathetic factors.” Other times, they are “just the coldest, harshest…And that’s what you’re up against.” For Sheria, the fact that prosecutors “don’t want to be known for being ‘soft on crime’” forced her to “remove emotion” from her arguments by being “more thorough with her work.” She said,

“If I’ve presented you with something that is evidence based from a clinical perspective…Like partnering with one of the social workers, what are you going to say exactly? I’m not asking you for a favor. We’re not being nice here. At this point, it’s cruel and unusual for you to insist on keeping this sentence.”

Laura, also a criminal-immigration specialist, relayed, “we push really hard on ADAs if they’re only offering things that are not safe for immigration” and explained that receptivity “totally depends borough to borough. It also depends ADA to ADA.” While some prosecutors are particularly amenable to considering immigration implications, Laura recalled others who had said, “‘Frankly, I think your client should get deported.’” In these cases, she remarked, “it sort of cuts the other way.” Still, despite variation among prosecutors, participants generally viewed these preventative negotiations as far more fruitful than later fighting an existing aggravated felony conviction in immigration court.

Among observed forms of legal resistance to the aggravated felony that work through criminal law, participants viewed pre-conviction strategies as by far the most efficacious. Yet
many interviewees also referred to “post-conviction relief” (PCR)—a method of reopening a criminal case that has already resulted in a conviction—as an option for immigrants in aggravated-felony-based deportation proceedings. Known for its utilization in overturning serious wrongful convictions—often based on new DNA evidence (The Innocence Project 2016)—PCR is won by petitioning criminal courts to vacate or renegotiate existing convictions or sentences. The Supreme Court’s decision in *Padilla v. Kentucky* (2010), as explained above, increased the viability of this option for use by immigrants facing deportation—especially those with a potential claim of ineffective assistance of counsel in their original criminal case (Marks and Slavin 2016). In my interviews, participants spoke of PCR as a key possibility for immigrants convicted of aggravated felonies, often attempted in concurrence with immigration court responses like those described in the previous section. Jane explained how, at her organization, PCR is “one of the first defenses we’ll look into, if there is an argument as to why the conviction in the first place was illegal.” Emily, a public immigration lawyer for four years, said that her organization does “a lot of post-conviction relief,” often using “Padilla to go back and reopen the case and get it re-pled to something else that’s not an aggravated felony.” Nicole described PCR as “really really important,” and referred to using it in cases when a client wrongfully took an aggravated felony plea because they were “mentally ill and incompetent” or were “not advised of the immigration consequence.” She continued, “If they’re successful and it’s re-pled, then they would be eligible in the future for relief.”

In NYC, this strategy is bolstered by the existence of various forums that provide no-cost post-conviction legal representation in selected cases. The city’s Office of the Appellate Defender (OAD) has a program specifically intended to provide assigned counsel for PCR claims. Established in 2007 with a mission of identifying and remedying cases of wrongful
conviction, the OAD Reinvestigation Project chooses cases based on elements such as, “possible false confessions, the use of informants, unreliable or improperly presented forensic science, police, and/or prosecutorial misconduct, and ineffective assistance of counsel” (NYC Office of the Appellate Defender 2018). Zara spoke to the uniqueness of this program and said while most places “do have public defender systems,” many “don’t have assigned council for the purpose of a post-conviction claim.” She explained that while the Reinvestigation Project does not take every case, “they have a screening system and there is funding for Padilla post-conviction.” Other lawyers referred to the in-house Criminal Appeals Bureau at The Legal Aid Society of New York—the largest of the three NYIFUP providers—who also work to vacate convictions based on mis-advisement, especially post-Padilla. Working at a smaller legal service provider, Jane described “pursuing post-conviction relief in partnership with other New York City nonprofits.” Sky, a criminal attorney for four years, described her experience at a private NYC law firm that has traditionally done pro bono PCR work on cases related to serious wrongful convictions, but now has “one category of our docket…reserved for immigrants facing removal and/or who are being considered statutorily ineligible to seek relief in immigration court because of their convictions.” She went on to remark, “We’ve been having success.”

In New York, a motions for PCR must be filed with the criminal court where the original conviction occurred, under Article 440 of the N.Y. Criminal Procedure Law, which outlines the bases and processes for challenging the legality of a conviction or sentence. Out of various possible grounds for making such a claim, Padilla-related PCR motions are usually based on a violation of either state or federal constitutional rights in attaining the original conviction—most often a violation of the Sixth Amendment right to effective counsel. Although immigration courts may extend deportation proceedings to allow time for an open post-conviction claim to be
decided in criminal court (Marks and Slavin 2016), they will not recognize the vacatur of an aggravated felony plea if it is vacated only for immigration purposes—such as hardship upon deportation—so such claims must include strong evidence of procedural defects in the original plea.\(^{14}\) In her post-conviction work on aggravated felony cases, Sky described examining court minutes to discover breaches of justice, while also partnering with immigration lawyers in order to ensure any new plea is immigration-safe. In a recent case, she recounted re-pleading a client from “criminal possession of a controlled substance in the third degree, which is a drug trafficking aggravated felony because the subsection that he pled to was intent to sell” to “criminal possession of a controlled substance in the second degree. Simple possession offense. No longer an aggravated felony.” In another case, she was trying to re-plead a client’s theft offense with a one-year sentence to the same offense with a one-day sentence reduction, based “on a theory that his plea was not knowing and voluntary because he wasn’t advised of his Fifth and Sixth Amendment rights...which was something I realized when I got his plea minutes.”

While several lawyers reported successful outcomes with post-conviction re-pleaders of aggravated felonies, it is not an easy route, especially with no real guarantee of legal representation. In PCR cases, the burden of proof shifts to the convicted individual, and as Sky explained, “You have no right to anything on 440. So a judge can dismiss it outright without ever scheduling a hearing or anything.” She also described the administrative difficulties of getting criminal courts to consider motions for PCR in a timely manner, especially with the ticking clock of concurrent removal proceedings, saying, “You have to find the legal error. You have to draft and file the motion. And then when you file the motion you have to babysit the shit out of it to

\(^{14}\) In *Matter of Pickering* (2003:621), the BIA ruled that “If a court vacates an alien’s conviction for reasons solely related to rehabilitation or immigration hardships, rather than on the basis of a procedural or substantive defect in the underlying criminal proceedings, the conviction is not eliminated for immigration purposes.” This decision does not apply to post-conviction resentencing.
actually make sure someone pays attention.” In some cases, she recounted not being able to sleep at night, knowing that non-citizen clients are detained “while criminal court dicks around.” Sky said this difficulty was exacerbated by the fact that immigration-related PCR claims are often based on misdemeanor convictions—including many of those related to aggravated felonies. She explained,

“People treat misdemeanors in criminal court as if it’s nothing…Clerks’ offices don’t know what to do with misdemeanor 440s. Because 440s are usually filed for murder convictions of people who are innocent…and clerks like to ignore those too…And then we’re coming in on these dinky misdemeanors, making like federal cases out of them, because they’re grounds for deportability, and…clerks aren’t calendaring our motions or docketing them, until they’ve requested the court file, but the court file is like 20-years-old and sitting in some warehouse in Rochester, and we’re like, ‘No, but this guy has a check-in in two weeks. He needs access to the courts!’”

When a judge does reopen a conviction based on a post-conviction claim, there is no guarantee that the prosecutor will agree to an immigration-safe plea. For example, with regard to her above-mentioned theft case, Sky said, “The ADA’s fighting like crazy, even though the only relief we’ve requested is a one-day sentence reduction.” While Seth saw PCR as an important option, he described it as difficult, “because the law likes things to be settled and they don’t like people coming back.” Still, for some immigrants, the reopening of aggravated felony cases in criminal court is a key final opportunity to negotiate a conviction that will not ensure their deportation.

Just as creative strategies around CAT relief and the contestation of deportability through the categorical approach work through immigration law frameworks to resist the harsh and expansive effects of the aggravated felony, the tactics described in this section use criminal legal structures toward the same ends. Through pre-conviction preventative efforts and attempts at post-conviction relief, immigration and criminal lawyers work with non-citizen clients to avoid and vacate aggravated felony convictions. In these strategies, lawyers challenge the aggravated
felony’s elimination of immigration court discretion through the criminal justice system norm of plea negotiation, and resist its erosion of due process by ensuring non-citizens are notified of immigration consequences of potential criminal convictions. Furthermore, institutional successes achieved through these methods, like The Supreme Court’s recognition of deportation as punishment in *Padilla v. Kentucky* (2010), as well as fruitful outcomes in individual cases, have been vital in helping immigrants avoid aggravated-felony-based deportation. While lawyers utilize above-described strategies of legal resistance in order to best represent their clients and uphold the just administration of law, these tactics also intertwine with a broader landscape of advocacy, as will be discussed in the following section.

*Community Advocates and Legal Resistance*

Despite my focus on lawyers and their obvious role in above-described responses to the aggravated felony, study participants frequently pointed out the vital work of community-based organizations and advocates undergirding such legal resistance. From the instatement and expansion of the NYIFUP program and institutionalized criminal-immigration-advisement, to practical support in immigration and criminal cases and broader efforts toward legislative reform, advocacy has been key in creating, sustaining, and continually building upon the innovative strategies of legal resistance observed in this study—a fact that was not lost on my participants. Raina referred to the main role of lawyers as “harm reduction,” and pointed to community support as “essential” for any real progress. George said that while it is important that lawyers “try to be very good at technical things,” there must also be a “community organizing aspect” and emphasized “communities in struggle as the motive force of social change, not lawyers winning things in court rooms.” Jackie framed legal strategies as part of a broader resistance to the aggravated felony and the harsh laws that expanded it, saying, “I think
what we’re trying to do, is that if we can't change the law, how can we make this law into
something we can live with, or start to live with, we have to.”

Observed strategies of legal resistance to the aggravated felony are facilitated in NYC
through the existence of the NYIFUP program, which provides universal legal representation for
detained immigrants facing deportation. As described in Chapter Five, lack of guaranteed legal
representation is a key due process concern in immigration law, compounded by the mandatory
detention triggered by aggravated felonies—with only 14% of detained immigrants nationwide
represented in their deportation proceedings (Eagly and Shafer 2015:8). The difficulty of
securing CAT relief without a lawyer was elucidated in that chapter, and as this chapter has
demonstrated, such cases are most successful with not only a lawyer, but also an expert witness.
The legal complexities and lengthy appeals process required to contest an aggravated felony
designation through the categorical approach have also been established. Interview participants
explained that to present such legal challenges, mere representation is not enough, but rather,
immigrants need knowledgeable and well-trained legal representation. As Marco explained,

“The categorical approach is…incredibly complicated, so if you’re not represented by
just any immigration attorney, but an immigration attorney that has a lot of experience
dealing with the immigration consequences of criminal convictions, it’s almost
impossible that the person will be able to actually…apply the categorical approach
correctly. So the government ends up deporting tons and tons of people who didn’t even
have aggravated felonies, and immigration judges are so busy that they also do not apply
the analysis correctly, and the government just gets away with it. Because one, they are
fighting against people who are unrepresented or people who are not being represented
by attorneys who have experience in the field.

In most of the country, where legal representation is not guaranteed to immigrants, organizations
that work to fill the need largely operate on a “triage” model, where cases are selected with the
aim of winning as many as possible. Combined with “good immigrant, bad immigrant” issues
that influence some providers to refuse representation to immigrants with certain criminal
convictions, the “triage” model serves to disqualify aggravated felony cases—time consuming with a low margin of success. As Jess explained, universal representation under NYIFUP, “where you’re required to represent the person, so you're going to find an argument to make,” has contributed to the development of creative legal responses like those detailed above.

In addition to the existence of the NYIFUP program, NYC is unique in its institutionalization of criminal-immigration experts providing advice to criminal defenders. As explained in the previous section, units of immigration lawyers are embedded in each of the city’s public defense organizations, in addition to designated providers throughout the state who aid other criminal defenders in complying with the notice of immigration consequences required by Padilla v. Kentucky (2010). Zara remarked, “New York City is one extreme where not only are there systematic Padilla advisals, but you have immigration representation. And in many cities, many states you still don’t have the first piece. You still don’t have the Padilla advising.” Jackie referred to NYC as “one of the pioneers in…the aftermath of Padilla and what you do once this right has been established,” and Pia said, “In New York we have a really good system in place at this point, in terms of the public defender offices having pretty robust immigration teams. But I think throughout the country it’s pretty abysmal.” Victor, a criminal defender, immigration lawyer, and advocate on crimmigration issues for almost thirty years, explained that, “California and New York, I would say, are where the most has been done, but there are other parts of the country, including some high immigrant states where very little has been done.” Participants agreed that in addition to the expansion of legal representation in immigration court, the expansion of preventative criminal justice system work is an important

15 In 2015, New York State awarded $8.1 million in grants to legal service providers to ensure compliance with Padilla v. Kentucky through the operation of “regional centers of immigration legal support, assistance, training and education for the attorneys providing mandated representation to immigrant clients in Criminal and Family Court” (Stashenko 2015).
way cities and states can resist harsh and expansive outcomes related to the aggravated felony. Celia spoke of a need for “more formalized immigration roles in public defender offices across the country,” Victor said that that even after Padilla, “there’s still a lot of work to be done,” and Pia concurred, “I think there’s absolutely so much more to do on the criminal side.”

Participants emphasized the role of advocacy in NYC’s universal representation for detained immigrants and institutionalization of criminal-immigration specialists in public defense offices—structures fundamental to the strategies of legal resistance described in this chapter. Spearheaded by a coalition of organizations including the Immigration Justice Clinic at the Benjamin N. Cardozo School of Law, the Northern Manhattan Coalition for Immigrant Rights, the Center for Popular Democracy, Make the Road New York, and the Vera Institute of Justice, NYIFUP was founded as a pilot program in 2013, before being funded more extensively by the New York City Council the following year (Stave et al. 2017). Participants explained how NYIFUP was the result of widespread on-the-ground advocacy, even before larger organizations took up the cause. Pia said, “NYIFUP was created due to community groups being like, ‘This is crazy. Our community members are being torn away.’” Similarly, while NYC and NYS institutionalized criminal-immigration advisals in response to Padilla, they drew on the existing work of advocates in doing so. For example, interviewees explained how Bronx Defenders and other defender offices had begun using a team-based model of holistic defense—including immigration advisement—in their criminal defense practices long before Padilla. Similarly, Immigrant Defense Project (IDP)—selected to become a state-funded Padilla legal assistance center in 201516—was founded in 1997 by Manny Vargas, a former Legal Aid criminal defender.

16 See note 7 above. IDP was selected as the regional assistance center for NYC. (https://www.immigrantdefenseproject.org/what-we-do/padilla-support-center/)
Jackie explained how Vargas quickly realized the impact the 1996 laws would have for his non-citizen clients, and the importance of public defenders as a “last line of defense.” Therefore, IDP had already been engaging in multi-leveled advocacy for immigrants with criminal records for almost two decades by the time they were tapped to contribute institutionalized legal support (Immigrant Defense Project 2018).

While the responses to the aggravated felony described in this chapter are certainly facilitated by NYC’s universal representation model and institutionalized criminal-immigration advisement, participants also credited the development of these legal tactics to community-based advocacy that has worked to change perspectives around criminal deportation. George explained how community groups like NYC’s Families for Freedom have, “helped break down the good versus bad immigrant [binary]—you know, ‘These are people from our community. Our fathers and sisters and mothers.’” Sheria described the importance of advocates “working to take the local precincts to task,” offering the example of the immigrant enclave of Jackson Heights, Queens, where groups like TransLatina and the Sex Workers Project have brought attention to police targeting of Latina trans women who often end up in removal proceedings. Zara attributed creative strategies confronting aggravated felonies to “really good organizing and advocacy putting all the dots together and showing cause and effect, showing how specific families have been harmed.” Activist efforts at reframing the narrative around criminal deportation have also been key in electing and placing pressure on progressive legislators and prosecutors, like City Council Speaker Melissa Mark-Viverito who has continually fought for the NYIFUP program (Stave et al. 2017), and Brooklyn District Attorney Eric Gonzalez who has hired immigration attorneys to advise his office and instated an official policy to help non-citizens avoid deportation based on misdemeanors and non-violent crimes (Feuer 2017).
Immigration advocates also provide practical support for legal resistance to the aggravated felony, through trainings, resources, impact litigation, network building, community support for individual cases, and campaigns for broader legislative change. As a leader in the field of crimmigration, IDP’s foundational and ongoing efforts continually came up as vital to observed strategies of legal resistance to aggravated-felony-based-deportation. Alongside other groups such as the American Immigration Council (AIC), the Immigrant Legal Resource Center (ILRC), the Immigrant Rights Clinic at New York University (NYU) School of Law, the National Immigration Project of the National Lawyers Guild (NIPNLG), and the Vera Institute of Justice, IDP provides legal trainings for lawyers and the community, and generates in-depth materials on criminal and immigration law, which are made readily available on the internet. IDP is well-known among practitioners for maintaining a detailed reference that outlines the immigration consequences of every NYS criminal offense, and they and other organizations regularly post “practice advisories” about new Supreme Court and Circuit Court caselaw, as well as other relevant issues. Lawyers saw such resources as vital in the everchanging field of “crimmigration” law. In challenging the aggravated felony, Pamela saw “spreading knowledge of this body of caselaw that has been emerging” as equally important to expanding legal representation, and Jess emphasized how important it is for lawyers to “keep up with the caselaw on this issue,” as it is “continuing to develop.”

In addition to generating and distributing information that supports cutting-edge legal strategies, advocates also work with lawyers to produce “friend of the court” or “amicus” briefs on key issues, which are often signed on to by a number of organizations—sometimes to be submitted in a one specific case, but more likely relevant to several. Raina explained how, “as an organization that is interested in the issue, they file a friend-of-the-court brief saying, ‘This is..."
why you should rule on the issue this way,’” and provided the example of a recent IDP amicus brief drafted by the NYU Immigration Clinic, “about why immigration judges should suppress the evidence or terminate cases in which a respondent was arrested at a courthouse.”

Organizations also engage in “impact litigation” around legal issues affecting immigrants with aggravated felonies—such as the NYIFUP providers’ joint lawsuit on the use of tele-video at Varick Street immigration court (described in Chapter Five) 17—and work to identify cases that could have important precedential implications. Naomi explained how organizations like IDP are creative in facilitating impact litigation, “because they look at where there are going to be decisions in individual cases that are going to a Circuit, and if you win at the Circuit level, then you get good precedent, and that’s an impact strategy, even if it’s an individual case.” Advocacy organizations also nurture networks between community members and legal providers, and draw community support for specific cases—especially the high-profile cases of movement activists, increasingly targeted in the Trump era. Lastly, and perhaps most importantly, advocates continue to push for legislative reform—both in criminal and immigration law—with broader impacts related to the aggravated felony. For example, IDP and the Cardozo Immigration Justice Clinic have an ongoing “One Day for New Yorkers” campaign centered on a bill that would reduce the maximum sentence for NYS misdemeanor offenses from 365 to 364 days and ensure that such crimes are not deportable as aggravated felonies, and IDP has also worked with the Drug Policy Alliance (DPA) to draft legislation to legalize cannabis in NYS while ameliorating continued effects on immigrants (Immigrant Defense Project 2019). At the federal level, the ongoing “#Fix96” campaign launched in 2016 by the Immigration Justice Network (a collaboration

17 In response to ICE is refusing to bring detainees to Varick Street for their hearings since June 2018, a joint lawsuit has been filed by The Legal Aid Society, Brooklyn Defender Services, and The Bronx Defenders (Goldbaum 2019).
between IDP, NIPNLG, and ILRC), aims to change the 1996 immigration laws to “end mass criminalization,” “provide due process,” “narrow aggravated felonies,” “end mandatory deportation,” and “end local police & ICE collaboration” (Immigrant Justice Network 2016). Therefore, while distinctly legal in their character, challenges to the aggravated felony described in this chapter are contextualized, enabled, and pushed forward by an intricate landscape of activism.

**Conclusion**

Previous chapters demonstrated how entrenched stereotypes and inequality contributed to the evolution of the aggravated felony, and are also continually reified by its effects. Yet, while scholars of law and society have long acknowledged the role of law in the construction and reproduction of social hierarchies, researchers have also drawn attention to oppressed groups who have used law as a tool of resistance—turning its unique hegemonic power toward counterhegemonic ends (Abel 1995, de Sousa Santos and Rodriguez-Garavito 2005, Hirsch and Lazarus-Black 1994). In this chapter, I described tactics of “legal resistance” that work to challenge and defend against the aggravated felony’s harsh, expansive, and unequal effects—as documented in my case study of NYC. Distinctly legal in their substance, lawyers undertake such strategies as part of their professional commitments to their clients as well as broader ideals of justice, and employ existing processes of immigration and criminal law in such tactics’ implementation. However, practitioners also frame these strategies as responses to the aggravated felony’s severity, its limits on due process, and its overuse by ICE, as well as wider concerns about unjust immigration law—heightened under the Trump administration. Furthermore, strategies of legal resistance are directly supported by an intricate landscape of
multi-level activism fighting for the rights of immigrants with criminal records caught in the modern deportation regime. Without relying on courts to dictate social change, advocates and lawyers in NYC collaboratively and strategically harness the distinct hegemonic power of law to resist unjust structures upheld by the aggravated felony—such as the racialized criminalization of immigrants, mass detention and deportation with minimal due process, and intensely unequal systems of criminal justice.

Furthermore, while previous chapters explicated the aggravated felony as a key example of a punitive “crimmigration nexus,” this chapter has demonstrated how the increased intertwining of criminal and immigration law can also create opportunities for resistance. Observed strategies of legal resistance that work through immigration law—like the categorical approach—utilize differences in state criminal justice policy and enforcement to challenge and evolve interpretations of the aggravated felony, while those that work through criminal law draw on norms of negotiation and local control to avoid indiscriminate and unyielding immigration system outcomes. The crimmigration-based strategies of legal resistance described in this chapter highlight the necessity of criminal justice reform as part of any real challenge to the deportation regime, and build upon the efforts of social movements working to connect the dots between—and simultaneously oppose—these irrevocably entwined structures. Finally, the unique policy and organizational conditions of NYC, which support observed strategies of legal resistance, have key implications for legislators and advocates concerned with protecting the rights of immigrants nationwide. Namely, findings indicate the dual importance of universal legal representation for immigrants facing deportation and institutionalized immigration advisals in public defense offices—both buttressed by the advancement of nuanced and humanistic frameworks around criminal deportation.
8. Conclusion

Rooted in a perceived lack of sociological and criminological research on criminal deportation, this dissertation has examined the historical development and contemporary outcomes of the aggravated felony—an expansive category of crimes for which immigrants are forcibly removed from the United States. While legal scholars have outlined the “on-the-books” implications of law related to the aggravated felony, this study is the first socio-legal, qualitative analysis of the social forces that birthed it, its on-the-ground effects, and resultant strategies of resistance. Based on a case study of New York City—a long-time immigration hub, self-proclaimed “sanctuary,” and the only city in the country to provide universal legal representation for detained immigrants facing deportation—this dissertation has demonstrated the severe outcomes of the aggravated felony even in “best case scenario” conditions. Yet, despite sanctuary policies, the thousands of immigrants deported from NYC immigration courts each year, combined with the city’s long history of criminal justice targeting of communities of color, underscore its centrality for a study of criminal deportation. Furthermore, as a center of immigration enforcement under the Trump administration, NYC provides a distinct window into the workings of a quickly-changing deportation regime. Most importantly, combined with my focus on lawyers, this setting has allowed for an in-depth look into emergent strategies of legal resistance with implications for lawmakers and advocates nationwide.

Through archival analysis, ethnographic observation of NYC’s Varick Street immigration court, and 39 interviews with lawyers and other relevant actors, this dissertation has explored the social, political, and cultural forces affecting the historical evolution of the aggravated felony, as well as its effects on contemporary immigration court processes and outcomes. Chapter Four demonstrated how the symbolic power of a moral panic linking immigrants with drugs and
crime, during a period of increasing multiculturalism and neoliberal economic transformation, affected the punitive evolution of the aggravated felony. In Chapter Five, I described the aggravated felony’s severe effects on non-citizen’s chances for relief from deportation, its expansive application, and its erosion of due process. Chapter Six explained the centrality of criminal justice policies and processes for aggravated-felony-related immigration enforcement and deportation, and demonstrated the role of the immigration system in punitively reproducing criminal justice system inequalities. Finally, in Chapter Seven, I outlined unexpected strategies of “legal resistance” observed in my research—tactics that work through both immigration law and criminal law to challenge the aggravated felony’s harsh and expansive effects. I argue that punitive policy related to the aggravated felony developed from—and continues to perpetuate—racial and ethnic stereotypes and hierarchies. Yet the same intertwining of drug, crime, and immigration policy that underlies the aggravated felony’s severe and unequal outcomes also creates the basis for innovative forms of legal resistance.

While the moral panic described in Chapter Four was specifically rooted in the historical context of the 1980s and 1990s, its outcomes and many of its elements, remain relevant today. In later work, Young (2011) describes an ever present tendency toward moral panic in the post-9/11 era, based on ontological and economic insecurities very much like those of the ‘80s and ‘90s—exacerbated by the Great Recession, ongoing neoliberal economic restructuring, a perceived breakdown of community, and ethnic and subcultural “hyperdiversity.” In a context still characterized by “tough-on-crime” priorities, the War on Drugs, and extreme levels of mass incarceration, as well as an enduring neoliberal ethos of personal responsibility, the image of immigrant as criminal remains an attractive symbol for such panic. The folk devil of the “criminal alien” has continued to sustain policy and enforcement priorities throughout the
modern era, most recently in the Obama administration’s liberal rationalization of “felons not families” (Thompson and Cohen 2014), and the current administration’s neo-fascist portrayal of all immigrants as inherently criminal (Duda and Gearan 2018; Lee 2015; Medina 2017). The continuous touting of this racialized folk devil has also worked to sustain the aggravated felony and its punitive effects. Mandatory detention and permanent banishment, with little due process and almost no chance for legal relief, as described in Chapter Five, are excusable when they affect not only the immigrant “other” but the “criminal alien”—the “aggravated felon.”

Born out of drug policy, triggered by criminal offenses, and with extreme immigration consequences, the aggravated felony is a key example of the potential of the “crimmigration” nexus—increasing the punitive potential of both criminal and immigration law. Drawing from the enforcement and permanent marking capabilities of the criminal justice system, the aggravated felony enables the intense enhancement of criminal penalties in the administrative immigration system, without the due process requirements or discretionary considerations of criminal law. Furthermore, the revered officiality of criminal justice system designations of who is criminal, combined with the immigration system’s inability to examine mitigating factors in aggravated-felony-based removal cases, work to uphold a “good immigrant, bad immigrant” binary that rationalizes the aggravated felony’s punitive results. Upkeep of this binary, as described in Chapter Six, allows the immigration system to ignore, and punitively reproduce, well-documented inequalities in the criminal justice system—especially racial and ethnic, but also related to class, gender, immigration status, and mental health. Such inequities are especially pronounced with regard to drug-related-aggravated felonies—a common basis for the criminal deportation of black and brown immigrants, despite increasing legalization, decriminalization, and public health perspectives aimed at the drug use of white Americans.
These findings contribute to a long history of scholarship on the ways that law, legal processes, and legal actors create and uphold inequality, particularly that which has described the development of social control mechanisms toward the needs of global capitalism. Spitzer (1975:642) positions law and punishment as tools used by capitalist societies to control and exclude surplus “proto-revolutionary” populations that threaten the ruling economic order, including those unable to fill roles supportive to capitalism, such as individuals with mental health issues, as well as more able “youthful, alienated, and political volatile” groups. Wacquant (2001:103) theorizes the modern prison system as the latest in a series of social control apparatuses that have served to extract labor from black Americans. DeGenova (2002, 2004, 2010) explains how deportation regime notions of “illegality” and “deportability” work to shape non-citizen labor to the needs of the precarious neoliberal market, and Golash-Boza (2015a:16) argues that deportation “reinforces the limited mobility and enhanced vulnerability of black and brown labor” as part of a “neoliberal cycle” upholding a system of “global apartheid.” Aggravated-felony-based deportation combines the social control powers of the criminal and immigration systems to criminalize, incapacitate, and ultimately exclude the same “proto-revolutionary” surplus populations described by Spitzer—in this case, Black and Latino men left behind by neoliberal economic restructuring, and individuals with mental health and substance abuse issues in a context of decreased public services.

In addition to contributing to scholarship on the punitive outcomes of “crimmigration” processes, this dissertation expands the concept to include ways that the intertwining of criminal and immigration law is also strategically drawn upon in innovative tactics of legal resistance. Bolstered by broader campaigns to upset “good immigrant, bad immigrant” narratives,
lawyers and advocates draw from the aggravated felony’s unique place at the crimmigration nexus to challenge its widespread, severe, and unequal outcomes. Despite being known as the “immigration law death penalty,” many of the state-level crimes considered aggravated felonies are relatively minor in the criminal justice context, especially included misdemeanors. Coupled with the criminal law norm of negotiation, this discrepancy creates opportunities for aggravated-felony-related discretion not available in the immigration court context. Furthermore, the state and local control of many criminal justice institutions, combined with a growing acknowledgement of criminal-justice-system inequalities, can create key opportunities for reform—currently improbable in the federally-controlled immigration system. This research contributes to scholarship on the place of law in counterhegemonic movements, by identifying the law as one tool strategically harnessed as part of a much broader landscape of resistance to the modern deportation regime. However, while previous research on “cause lawyers” has largely focused on practitioners who dedicate their work to the furtherance of one particular social movement, the many immigration (and criminal) lawyers who perform the strategies of “legal resistance” documented by this research largely do so in the course of professional commitments to their clients and the just administration of the law—rather than a stated mission against the deportation regime. The fact that dutiful work toward such commitments inevitably entails pointed opposition to the aggravated felony’s severity, expansive use, and assaults on due process only serves to further underscore injustice inherent in the law itself.

Implications for Advocates and Policymakers

Even when contextualized by a long nativist history and three decades of intense criminalization of immigrants, unprecedented levels of deportation, and growing crimmigration connections, the contemporary U.S. deportation regime has reached new levels of terror and
vindictiveness. Under a president elected on a campaign based on the vilification of immigrants, who at the time of writing, has successfully declared a state of emergency at our Southern Border, ICE has become a rogue force unencumbered of enforcement priorities and supported by vast Secure Communities-era surveillance structures that cities and states are forced to participate in, while administrative immigration courts dole out increasingly harsh punishments in conditions unfettered by the rules of due process. Indeed, the prospective for deportable non-citizens—with and without criminal records—is currently bleak, and may get worse before it gets better. Still, a robust and motivated resistance continues to fight intertwined apparatuses of criminalization and deportation as they have for decades, with the support of a public newly tuned in to immigration issues. This dissertation has several implications for those who resist the expansive, harsh, and unequal outcomes the aggravated felony, as well as the more general injustice of mass deportation.

Broadly speaking, punitive and disparate outcomes of the aggravated felony are rooted in inequalities inherent in neoliberal capitalism, exclusionary border enforcement in an increasingly transnational world, and the continued salience of white supremacist racial hierarchies—complex problems not easily solved through individual policy recommendations. However, while opposing these larger structures, this research also implies a variety of other recommendations for advocates and legislators concerned with protecting the rights of immigrants nationwide. The ramped-up immigration enforcement and immigration court breaches of due process documented in this research underscore the current need for advocates to continually challenge the deportation regime at various levels and with diverse tactics. Findings also underscore the importance of movement support for issues of criminal deportation, an important source of racial inequality that is often swept aside for more sympathetic narratives, as well as a continued need
to resist the “good immigrant, bad immigrant” binary—through movements that include the stories of immigrants with criminal records, demonstrate the links between criminal justice system inequality and unjust deportation, and oppose criminalized enforcement methods of both the criminal and immigration systems.

At the federal level, this research demonstrates the need to reform or abolish the aggravated felony category and end mandatory detention—as is being demanded in the Immigration Justice Network’s #Fix96 campaign—and also the need for guaranteed legal representation throughout the immigration court system. Findings further indicate a need to eradicate Secure Communities and other crimmigration structures that serve to funnel non-citizens of color through a pipeline from racially-disparate criminal targeting to deportation. Additionally, they support ongoing campaigns to end mass incarceration, drug prohibition, and the militarized policing of poor neighborhoods of color, as well as calls for improved services for mental health and substance abuse issues beyond the criminal justice system. At the local level, there is a nationwide need for programs like those that have established with great success in New York City, to provide universal immigration court representation (at least) for detained immigrants, as well as institutionalized immigration experts in public defender offices. The effectiveness of such programs can be increased through funding for expert witnesses and post-conviction attorneys; technical support including resources, trainings, and network building; and the election and pressuring of progressive District Attorneys. Furthermore, advocates and policymakers can work to interrupt the criminalization to deportation pipeline by refusing to honor ICE detainer requests, and by banning ICE officers from local jails and courts. Lastly, local and state-wide criminal justice reform can play an important role in limiting the expansive use of the aggravated felony, by decriminalizing drugs and “broken windows” offenses,
deprioritizing misdemeanor arrests, and capping the maximum sentence for misdemeanors at 364 days.

Future Research

In the future, I plan to expand this research on the aggravated felony to include a comparative component, through ethnographic observation of immigration court and interviews with lawyers and advocates in Philadelphia, a similar setting that is different in a few key ways—especially the lack of universal representation for detained immigrants. In other planned research, I will examine the role of U.S. drug prohibition in processes of immigration and deportation, and explore the immigration implications of state-level policies around cannabis legalization.

Additionally, there remains a need for further research focused on criminal deportation and the mechanisms that support it. The literature would benefit from a quantitative Freedom of Information Act (FOIA)-request-based investigation into the numbers and characteristics of deportations based on aggravated felonies and other criminal grounds, qualitative research that speaks directly to the stories of immigrants convicted of aggravated felonies, as well as further comparative research on aggravated-felony-related outcomes in other locales around the country. Furthermore, in a quickly changing system, there is an imperative for qualitative research exposing immigration law processes, both in court and beyond. Finally, the findings of this study indicate the need for more research on the intertwining roles of advocates and lawyers in resistance to immigrant criminalization, in addition to further examination of the relationships between mental health, drug abuse, and deportation.
More broadly, this study underscores the necessity of grounding scholarship on any given phenomenon in the structural and cultural context from which it emerged, as well as the sociological obligation to interrogate categories and binaries presented as fixed. As critical scholars, it is imperative to not accept categories as a given, but rather ask, what does it mean to be an “aggravated felon,” a “bad immigrant,” a “criminal alien,” or even just a “criminal?” Only in asking such questions is our field able to expose the socially constructed nature of such bold lines that invariably serve to exclude and punish. Finally, despite growing acknowledgement, there remains a need for continued research on the punitive, vindictive, and intertwining structures of our era, as well as the law, institutions, and social conditions that uphold them, ever evolving, like the diverse resistance that they are met with.
Appendix A: Alphabetized List of Aggravated Felonies

(referenced in the Immigration and Nationality Act [8 USC § 1101(a)(43)])

• alien smuggling- smuggling, harboring, or transporting of aliens except for a first offense in which the person smuggled was the parent, spouse or child.

• attempt to commit an aggravated felony

• bribery of a witness- if the term of imprisonment is at least one year.

• burglary- if the term of imprisonment is at least one year.

• child pornography.

• commercial bribery- if the term of imprisonment is at least one year.

• conspiracy to commit an aggravated felony

• counterfeiting- if the term of imprisonment is at least one year.

• crime of violence as defined under 18 USC 16 resulting in a term of at least one-year imprisonment, if it was not a “purely political offense.”

• destructive devices- trafficking in destructive devices such as bombs or grenades.

• drug offenses- any offense generally considered to be “drug trafficking,” plus cited federal drug offenses and analogous felony state offenses.

• failure to appear- to serve a sentence if the underlying offense is punishable by a term of 5 years, or to face charges if the underlying sentence is punishable by 2 years.

• false documents- using or creating false documents, if the term of imprisonment is at least twelve months, except for the first offense which was committed for the purpose of aiding the person’s spouse, child or parent.

• firearms- trafficking in firearms, plus several federal crimes relating to firearms and state analogues.

• forgery- if the term of imprisonment is at least one year.

• fraud or deceit offense if the loss to the victim exceeds $10,000.

• illegal re-entry after deportation or removal for conviction of an aggravated felony
• money laundering- money laundering and monetary transactions from illegally derived funds if the amount of funds exceeds $10,000, and offenses such as fraud and tax evasion if the amount exceeds $10,000.

• murder.

• national defense- offenses relating to the national defense, such as gathering or transmitting national defense information or disclosure of classified information.

• obstruction of justice if the term of imprisonment is at least one year.

• perjury or subornation of perjury- if the term of imprisonment is at least one year.

• prostitution- offenses such as running a prostitution business.

• ransom demand- offense relating to the demand for or receipt of ransom.

• rape.

• receipt of stolen property if the term of imprisonment is at least one year

• revealing identity of undercover agent.

• RICO offenses- if the offense is punishable with a one-year sentence.
  • sabotage.

• sexual abuse of a minor.

• slavery- offenses relating to peonage, slavery and involuntary servitude.

• tax evasion if the loss to the government exceeds $10,000.

• theft- if the term of imprisonment is at least one year.

• trafficking in vehicles with altered identification numbers if the term of imprisonment is at least one year.

• treason- federal offenses relating to national defense, treason.
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