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Shani Mahiri King

Nicole Silvestri Hall

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TRACING THE ROOTS OF A POISONOUS TREE: ON THE ORIGINS AND IMPACT OF CRIMINAL TERMINOLOGY IN A CIVIL APPREHENSION SCHEME

Shani Mahiri King* and Nicole Silvestri Hall†

ABSTRACT

Language is powerful. It can affect how we think about and treat groups of people. Poor language choices have a massive impact on immigration law, an area of the law that determines how groups of perceived “outsiders” are classified and regulated. Language and bias in judicial opinions have been studied, but less research has been done on poor language choices in immigration statutes.

This Comment focuses on the harmful effects of poor language choices in immigration statutes, including the criminal terminology “arrest” and “warrant” in civil immigration apprehension statutes 8 U.S.C. Sections 1226 and 1357. Two fundamental problems arise when criminal language is inserted into a civil statute. First, significant constitutional concerns arise when criminal procedures are ignored in the “civil” immigration arrest context. Second, the use of criminal language in civil statutes contributes to negative stereotypes and cognitive distortions linking immigrants with criminality. The public calls for harsh enforcement practices as the natural and only obvious solution for controlling “illegal immigration”—a term that is often misconstrued. Being unlawfully present in the United States is not a crime, yet non-citizens are frequently arrested and

* Professor of Law and Emeritus Director, Center on Children and Families, University of Florida Levin College of Law, J.D. Harvard Law School, B.A. Brown University, Mst. University of Oxford. I would like to thank Ingrid Eagly, Elissa Steglich, Andrew Hammond, Jeffrey Harrison, David Thronson, Greg Chen, Lindsay Nash, Leti Volpp, and Jayashri Srikantiah for agreeing to read various drafts of this article. I would also like to thank the faculties at the University of Texas School of Law, Rutgers Law School, Texas A&M University School of Law, and Santa Clara School of Law for being sounding boards for various ideas contained herein. I would also like to thank Victoria A. Redd and the library staff at the University of Florida, Levin College of Law for outstanding research assistance. As always, I continue to be grateful to Martha Minow for her kindness and unwavering support.

† Legal Research and Writing Associate, J.D. University of Pennsylvania School of Law, B.A., Brown University. I would like to thank my family for always supporting and loving me as I navigate the realities of being a single working mother. I would also like to thank Shani King for providing me with support and the continued opportunity to explore meaningful topics in immigration law, hopefully inspiring people to think creatively about justice-oriented solutions to the many challenges immigration presents.

detained for this “act” of mere presence.

*We trace the use of the criminal terms “arrest” and “warrant” over time to understand when and how they became enshrined in the apprehension statutory machinery. We demonstrate legislative resistance to the executive branch’s encroaching power on Fourth Amendment rights, rebutting the Supreme Court’s contention in *Abel v. United States* that the practice of administrative arrest by executive officers was historically uncontested and, therefore, presumptively constitutional. The standard for immigration administrative arrest must meet the standard for a criminal arrest to withstand constitutional scrutiny, ensure doctrinal uniformity in the lower courts, and maintain the consistent application of Fourth Amendment protections for all. Reliance on dicta in *Abel* suggesting that administrative arrests for non-criminal immigration violations have been “uncontested” since the Nation’s founding is an incomplete and misleading historical account; reliance on this false narrative to garner support for administrative arrests, particularly warrantless ones, is no longer appropriate in light of the statutory history we expose, and the constitutionality of this practice should be revisited.*

INTRODUCTION

Language has immense power to shape our beliefs. The potential impact of language is particularly evident in the legal world, where word choices can control the type of treatment certain groups receive under the law.¹ These impacts are devastating in immigration law, where bias against the non-dominant group is pervasive.² While the effects of language choice in judicial opinions have been studied,³ less research has been devoted to studying word choice in statutes and the biases that result from those choices. This Comment supplements the lack of research in this area by focusing on the harmful effects of poor language choices in immigration statutes.

1. See Douglas Rice, Jesse H. Rhodes & Tatishe Nteta, *Racial Bias in Legal Language*, RSCH. & POL., 1–2 Apr.–June 2019, at 1–2 (“An especially powerful set of elites is judges, whose decisions influence not only the lives of the parties to the case but also the path of legal development and the instantiation of legal interpretations by other political actors.”).

2. See D. Carolina Núñez, *War of the Words: Aliens, Immigrants, Citizens, and the Language of Exclusion*, 2013 BYU L. REV. 1517, 1561–62 (2013) (discussing the flawed narrative created when the terms “citizen,” “immigrant” and “alien” are used and how these terms impact ideas of membership theory); Keith Cunningham-Parmeter, *Alien Language: Immigration Metaphors and the Jurisprudence of Otherness*, 79 FORDHAM L. REV. 1545, 1556–59 (2011) (contrasting the use of immigration metaphors in federal cases with the use of doctrinal metaphors, and describing the reasons for a heightened risk of distortion for immigration metaphors, reasons including the personal nature of immigration metaphors and the tendencies when using immigration metaphors to conflate source and target domains and to accept the veracity of the metaphors without challenge).

3. See, e.g., Joshua Boston, *Strategic Opinion Language on the US Courts of Appeals*, 8 J. L. & CTS. 1 (2020); Michael A. Livermore, Allen B. Riddell & Daniel N. Rockmore, *The Supreme Court and the Judicial Genre*, 59 ARIZ. L. REV. 837 (2017); Mary Pat Gunderson, *Gender and the Language of Judicial Opinion Writing*, 21 GEO. J. GENDER & L. 1 (2019).

In this Comment, our research focuses on the criminal terms “arrest” and “warrant” that are found in two federal civil immigration apprehension⁴ statutes, 8 U.S.C. Sections 1226 and 1357. Two fundamental problems arise when criminal language is inserted into a civil statute. First, terms such as “arrest” and “warrant” import distinct legal meanings usually reserved for the criminal context into the civil context—meanings that serve to restrict individual liberty in ways that are constitutionally impermissible in the civil context. To begin our consideration of this problem, we trace the use of terms founded in criminal law in historical immigration apprehension statutes to illustrate how they became embedded within the apprehension machinery of the immigration system. Then, we expose the constitutional problems that arise when criminal apprehension techniques are enshrined in a civil statute to be enforced by non-judicial officers, who are supposed to be neutral and detached but are often incentivized by immigration agency regulations which compromise true impartiality.⁵ The legislatively created standards for executing immigration arrests fall short of the constitutionally mandated standard for criminal arrests, which in turn creates doctrinal uncertainty in applying jurisprudential principles to both civil and criminal arrests, and results in an inconsistent application of Fourth Amendment principles governing immigration apprehension in federal courts.⁶ These inconsistencies have profound practical effects, including diminished enforcement of constitutional rights for certain populations.

Second, the use of criminal terminology in a civil statute negatively impacts public perception of immigrant groups by furthering stereotypes and cognitive distortions that link immigrants with criminality. Describing immigration apprehension in criminal language, Immigration and Customs Enforcement (“ICE”) officers “arrest” undocumented non-citizens⁷ sometimes with, but often without,

4. Throughout this paper, we use the phrases “immigration apprehension,” “immigration arrest,” or “administrative arrest” to refer to situations in which someone is taken into custody pursuant to 8 U.S.C. Sections 1226 or 1357. In contrast, we use the phrase “criminal arrest” when referring to detention pursuant to criminal action.

5. See, e.g., NAT’L ASS’N OF IMMIGRATION JUDGES, *NAIJ HAS GRAVE CONCERNS REGARDING IMPLEMENTATION OF QUOTAS ON IMMIGRATION JUDGE PERFORMANCE REVIEWS 3–5* (2017) (criticizing the Executive Office for Immigration Review’s plan to evaluate immigration judge judicial performance based on the quantity of cases they adjudicate since it threatens judicial fairness and impartiality, thus jeopardizing litigant access to due process).

6. See Michael Kagan, *Immigration Law’s Looming Fourth Amendment Problem*, 104 GEO. L.J. 125, 158–61 (2015) (discussing ambiguities in standards applied to justify an immigration arrest, including whether “reason to believe” language is equivalent to a probable cause standard, and explaining that courts have interpreted this statutory language in ways that lead to disparate outcomes for litigants).

7. The Biden administration, acknowledging the power inherent in terminology, has stopped using the term “illegal alien” in official documents and instead has shifted to “undocumented non-citizen.” See Joel Rose, *Immigration Agencies Ordered Not to Use Term “Illegal Alien” Under New Biden Policy*, NPR (Apr. 19, 2021, 2:51 PM), <https://www.npr.org/2021/04/19/988789487/immigration-agencies-ordered-not-to-use-term-illegal-alien-under-new-biden-policy> [<https://perma.cc/C8FF-WAPL>]. We similarly have decided to use the term “undocumented non-citizen” throughout this Comment to identify the group of immigrants living within the United States suspected of residing in the U.S. without proper documentation. This group has often been referred to as “illegal immigrants” or “illegals,” which can be misleading and can result in the unjust treatment of individuals within that group. For further discussion of the Biden administration’s efforts to reform immigration policy, see Memorandum from Tae D.

“warrants” and later release them on “parole” or “bond”—even though the undocumented non-citizen being “arrested” has not been charged with a crime. These terms from the criminal law provide legal, ethical, and moral justifications for treating undocumented non-citizens as criminals by promoting the false notion that an individual’s unlawful presence in the United States (because of lack of documentation, for example) is a criminal act. Conceptualizing non-citizens as criminals puts the American public in a constant state of heightened anxiety toward perceived “outsiders.” This persistent state of fear in turn legitimizes the government’s use of immigration arrests, which can be effectuated without agents obeying constitutionally mandated criminal procedure and diminishes any potential public outcry against potentially unconstitutional state action.⁸ These harsh enforcement mechanisms seem essential to protecting the safety of a public primed with false ideas about what it means to be an “illegal immigrant.”⁹

Today, the persistent use of criminal language in immigration statutes has harmful effects. The use of this language creates doctrinal confusion for the judiciary, and in turn the media spins this confusion into a distorted narrative for consumption by a polarized public. This misleading narrative has resulted in a misinformed citizenry that is primed to believe that all immigrants are criminals and thus a direct threat to public safety. Harsh immigration apprehension tactics appear to offer the best protection for thwarting these perceived threats to personal security. This negative feedback cycle justifies overreliance on crimmigration¹⁰ tactics, the substitution of criminal justice bureaucracy for federal immigration enforcement, and the ossification of biases against immigrant groups.

At the root of this negative feedback cycle is doctrinal confusion that results from the judiciary’s attempts to parse the meaning of criminal language in a civil statute. In 1960, the United States Supreme Court had the opportunity to dispel some of this doctrinal confusion by reviewing the constitutionality of administrative “warrants” for use in immigration “arrests,” but the Court declined to address the issue head-on.¹¹ Instead, the Court in *Abel v. United States* endorsed the use of criminal apprehension tactics for the civil offense of unlawful presence, declaring

Johnson, Acting Dir., U.S. Immigr. & Customs Enf’t, to All ICE Employees (Feb. 18, 2021) (discussing Interim Guidance: Civil Immigration and Enforcement and Removal Priorities).

8. See David Cole, *The New McCarthyism: Repeating History in the War on Terrorism*, 38 HARV. CR.–C.L. L. REV. 1, 3, 15 (2003) (describing two methods that the government uses in times of heightened fears: first, the substantive method where the government increases the terms of responsibility, targeting individuals by using predictions about what that a person *might* do, often relying on skin color, nationality, political associations, etc. to make those predictions, and second, the procedural method to derive control, where the government invokes administrative processes to avoid the guarantees of criminal process).

9. See Cecilia Menjivar, *Immigrant Criminalization in Law and the Media: Effects on Latino Immigrant Workers’ Identities in Arizona*, 60 AM. BEHAV. SCIENTIST 597, 598 (2016) (“The symbolic meanings of law and their potential effects on immigrants are captured in public discourses and media coverage of immigration. In turn, these portrayals contribute to solidify and exacerbate the impact of the law and enforcement practices, as negative images of immigrants are reproduced repeatedly while at the same time, politicians and pundits discuss legal strategies to combat the alleged deleterious effects of immigration on institutions, communities, and society in general.”).

10. See *infra* Part I for further consideration of this concept.

11. See *Abel v. United States*, 362 U.S. 217 (1960) (“The claim that the administrative warrant by which petitioner was arrested was invalid, because it did not satisfy the requirements for ‘warrants’ under the Fourth Amendment, is not entitled to our consideration in the circumstances before us.”).

that “[s]tatutes authorizing administrative arrest to achieve detention pending deportation ha[d] the *sanction of time*” and were “uncontested.”¹² However, contrary to the Court’s assertion, the legislative history of statutes authorizing quasi-criminal apprehension tactics for civil offenses indicates the concept of administrative arrests was anything but “uncontested.” Instead, Congress granted immigration officials the power to “arrest” individuals within the United States and to arrest those individuals without a “warrant” in numerous legislative actions spanning decades, despite the vehement protests of some congressmen who contested any government encroachment on an individual’s constitutional rights to be secure in their personal space and to be free from unreasonable government intrusion, searches, and seizures.¹³ The Supreme Court’s failure to address the constitutionality of administrative arrests in *Abel* has allowed for the persistence of problematic criminal language in immigration statutes and has perpetuated doctrinal tension.

In Part I, we discuss the power of language generally by demonstrating how statutory language choices of the past continue to burden non-citizens today. We present the work of other scholars who have researched the impact of language on law and policy and then discuss the power of statutory language in forming and furthering harmful immigration narratives. Enshrining criminal language in a civil removal statute operates as a convenient artifact for deepening collective cognitive biases and furthering common misperceptions linking immigrants to criminality.

In Part II, we lay out the apprehension statutory framework at issue and investigate how the use of “arrest” and “warrant”¹⁴ contribute to public perceptions of immigrants. We present the problems associated with a criminal/civil statutory “hybrid” and the confusion that arises when criminal language operates to accomplish the “arrest” for an underlying civil offense. We then discuss the terms “arrest” and “warrant” to create a shared understanding of the meaning of these terms, including both the legal definitions and the more common connotations associated with these terms. We conclude with a critique of *Abel v. United States*, a Supreme Court case still relied on today for the proposition that administrative arrests conducted far from the border without well-articulated probable cause and triggered by a civil offense are constitutionally valid because of the Court’s presumption that they were traditional and customary since the inception of our Nation.

Parts III and IV are the core of our statutory research, where we explore legislative history to identify the roots of the criminal language enshrined in 8 U.S.C. Sections 1226 and 1357. The movement to enshrine criminal language in immigration law involved multiple Congresses, was both gradual and insidious, and might best be characterized as a “creeping,” yet steady, encroachment of administrative police power, over decades.

In Part III, we start with the earliest usage of criminal terms in deportation statutes, tracing the use of “arrest” and “warrant” to identify when, why, and in what

12. *Id.* at 230 (emphasis added).

13. See *infra* Part IV for in depth discussion of legislative history.

14. There are other terms in these statutes that have criminal connotations, like “parole.” See 8 U.S.C. § 1226 (a)–(c). They do not appear in both statutes, and parole considerations flow from and only occur incident to an arrest. Since we are limiting our analysis to the period *prior to* and *at* the point when an individual is physically apprehended, we have chosen to focus on only the terms “arrest” and “warrant.”

context this language was first used. We focus on the era of Chinese exclusion as a period of experimentation with the criminalization of unlawful presence to maximize the goal of racial exclusion. While statutes from this era are not precursors to Sections 1226 or 1357, they nevertheless demonstrate early attempts to use criminal language as a method to manage groups of people considered undesirable by political actors. Then, in Part IV, we use the comparative print histories associated with Sections 1226 and 1357 to trace the use of “arrest” and “warrant” in statutory precursors to Sections 1226 and 1357. As we do, we question the premise that the delegation of sweeping police power to an administrative agency—especially far from the border—was indeed “uncontested.” Tracking the use and history of this language, we unearth legislative artifacts which controvert the traditional understanding that administrative arrests for a civil offense are constitutionally permissible simply because Congress decided that it be so.

In Part V, we discuss the need to revisit *Abel* and the constitutionality of administrative arrests for a civil offense in light of the legislative history presented in Sections 1226 and 1357. We consider practical ways to create and promote positive shifts in immigration narratives. We also address the need for empirical research to study whether there is a large-scale public misconception about what it means to be an “*illegal immigrant*,” and whether, to most Americans, *illegal immigration* indicates that the individual involved must have committed a crime. We conclude by endorsing a radical shift in our conceptualizations of national identity, away from a fictional shared history and towards principles and core values rooted *only* in equal protection under the law. We suggest that this shift in national identity could drive more consensus around politically divisive topics like immigration.

I. THE IMPACTS OF POOR STATUTORY LANGUAGE CHOICES

The use of criminal statutory language in civil apprehension statutes reinforces a harmful narrative that frames immigrants as criminals—a narrative that has dominated immigration law since early in our Nation’s history. While scholars have identified the origins of crimmigration in federal legislation enacted in the 1980s and 1990s,¹⁵ this Comment adopts a broader historical lens that connects the criminal terminology in civil immigration statutes to the faulty public perceptions connecting immigrants with criminal behavior today.¹⁶ Suggesting crimmigration first arose in the 1980s overlooks the deep historical roots of such a system. By identifying the first appearance and the historical context of criminal terminology in civil deportation statutes, we demonstrate that the association between immigration

15. For example, much legislation during the 1980s and 1990s expanded criminal grounds for exclusion and deportation. See Alina Das, *Inclusive Immigrant Justice: Racial Animus and the Origins of Crime-Based Deportation*, 52 U.C. DAVIS L. REV. 171, 174 (2018) (identifying 1996 as a watershed year in connecting the concepts of criminality and immigration, and identifying use of the term “criminal alien” as arising from immigration policies created in the late 1990s); César Cuauhtémoc García Hernández, *Creating Crimmigration*, 2013 BYU L. REV. 1457, 1467–73 (discussing the expansion of crime-based removal and the criminalization of migration throughout the 1980s and 1990s); Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 384–85 (2006) (discussing the increase in immigration-related acts that carry criminal consequences particularly in the 1980s and 1990s, and also after 9/11).

16. Menjivar, *supra* note 9, at 605.

and criminality has been pervasive since the federal government began regulating immigration.¹⁷

The idea that today's immigration system is built upon hundreds of years of legitimizing majoritarian power, laws, and force to relocate groups outside of the American mainstream is certainly not new.¹⁸ However, past word choices enshrined in deportation statutes continue to perpetuate injustice. The law guides norms of behavior and social morality, which in turn legitimize negative treatment of non-dominant groups. Thus, statutory word choices, often rooted in the racial animus of the past, hold tremendous power in controlling perceptions, perpetuating inequalities, intensifying harmful narratives, and activating fear. Statutory word choices justify second-class treatment for non-citizens by implying they are criminals deserving of criminal treatment when they have not, in fact, committed any act considered a crime.

To explore the "roots" of the modern immigration system, we must identify the role that these roots play in creating "poisonous fruit"—negative downstream outcomes for non-citizens because of harmful statutory language. Supreme Court Justice Felix Frankfurter first used the analogy comparing tainted criminal evidence to the "fruit of the poisonous tree,"¹⁹ which serves as a useful metaphor for understanding how racialized policies of the past can persist in modern statutory language. When Congress imports older statutory language into newer versions of a revised statute during amendment, language artifacts can reflect and perpetuate the false stereotypes and harmful practices of the past. Tracking the origins of harmful statutory language exposes how and when those choices first arose and gives context to those choices. Additionally, statutory linguistic choices contribute to the damaging stereotypes that persist today. Harmful language choices create harmful narratives about immigrants and can allow misconceptions about immigration to spread and flourish.

A. Social Impacts of Language on Immigration Law

Proposing solutions to immigration problems and creating updated law and policy requires a heavy reliance on the use of language, metaphors, and linguistic framing to influence public perception.²⁰ Specifically:

17. See Das, *supra* note 15, at 176 ("[T]he linkage between animus against immigrants and animus against people with criminal records is not a modern phenomenon. Rather, racialized animus towards immigrants triggered the criminalization of actions that had been legal, which in turn provided the desired justification to deport immigrants from the United States. This interconnected, symbiotic relationship between racism, criminalization, and deportation pervades the earliest origins of the crime-based deportation grounds that many people take for granted as legitimate parts of our immigration system today.").

18. See DANIEL KANSTROOM, *DEPORTATION NATION: OUTSIDERS IN AMERICAN HISTORY 6–7* (2007) (discussing the connection between our current deportation system and earlier periods of "anti-Chinese hysteria," Indian removal, and fugitive slave laws).

19. "Fruit of the poisonous tree" is a criminal law doctrine which makes evidence inadmissible if it is derived from an illegal practice. If the evidential "tree" is tainted, so must be its "fruit." See, e.g., *Nardone v. United States*, 308 U.S. 338, 341 (1939).

20. See Núñez, *supra* note 2, at 1519–20 (comparing the terms "alien," "immigrant," and "citizen" and concluding that these terms carry deep cognitive associations which contribute to a hierarchical and stratified approach to membership and belonging in the United States, which justifies the denial of benefits

The metaphors floating in our minds determine our linguistic choices, which in turn affect social discourse and ultimately social action. Thus, how we *think* metaphorically affects how we *talk* about problems and the *solutions* we formulate in response to those problems. This becomes a self-fulfilling prophecy: the more we repeat, circulate, and repackage certain metaphors, the more our conceptual domains become tied to a limited set of associations.²¹

Thus, word and metaphor choices in discussions of immigration reflect broadly held beliefs about immigrants. In American English, “aliens” sit at the bottom of a stratified social hierarchy and are perceived as “non-human invaders,” or, at best, “criminals.”²² This social membership stratification serves to distance the “alien” one step further from constitutional protections than American citizens, who are seen as worthy of constitutional rights.²³ Further, the incidence of the term “criminal” near the word “alien” has been steadily increasing over the past three decades.²⁴ This data reveals and quantifies popular negative perceptions held by many Americans toward the “illegal alien.”

Connecting these concepts provides a useful linguistic framework: when repeated often enough, metaphors that connect immigrants to illegality and criminality can crystalize in the form of a cognitive association that justifies treating immigrants like criminals. However, metaphors are often incomplete, highlighting certain ideas while overlooking others. They are also often based on generalizations rather than the nuances inherent in complicated subjects such as immigration law and the diverse experiences of those classified and impacted by that body of law.²⁵ As such, these generalizations lead to cognitive distortions. These distortions have greater moral weight when stigmatizing metaphors or misleading language are used in statutes and judicial decisions since the public looks to judges and lawmakers as legal experts.

For example, the metaphor “illegal alien” is used in 69% of post-1965 federal cases using common immigration terms, yet no court or governmental body

and rights to certain groups of people). Additionally, negative connotations with the term “alien” and associations with criminality increased when usage of the term was studied over a period from 1990–2012. *See id.* at 1544–45. *See also* Cunningham-Parmeter, *supra* note 2, at 1549–50 (If immigration is seen as a “flood” of “illegal alien criminals,” the solution is a policy which would focus on their “capture and deportation.” One suggestion is to develop an “oppositional metaphoric framework” to compete with the dominant framework); Kevin R. Johnson, “*Aliens*” and the US Immigration Laws: *The Social and Legal Construction of Nonpersons*, 28 U. MIA INTER-AM. L. REV. 263, 264 (1996) (suggesting that use of the term “illegal alien” has deeply informed how we understand immigrants and how they are received and treated). For a general discussion of how biases are reflected in legal opinions, *see* Rice et al., *supra* note 1, at 1.

21. Cunningham-Parmeter, *supra* note 2, at 1548 (internal citations omitted).

22. Núñez, *supra* note 2, at 1550.

23. *See id.* at 1555 (“It is much more palatable to deny rights to an “alien” than it is to deny rights to a person.”).

24. *See id.* at 1544–45. Núñez showed that this association increased in frequency between the period 1990 and 2012 using the Corpus of Contemporary American English, the largest freely available body of English containing over 450 million words equally divided amongst the spoken word, fiction, newspaper articles, academic journals, and magazines. *Id.* at 1521–22.

25. *See* Cunningham-Parmeter, *supra* note 2, at 1557–59.

has ever explicitly defined the term.²⁶ Additionally, the use of the term “illegal alien” completely overlooks the complex array of immigration statuses by which an immigrant could be classified.²⁷ The phrase creates a presumption that the government has already met its burden of proof to show that an individual merely *suspected* of being unlawfully present is, in fact, removable. Yet a non-citizen is not judged to be *removable* before a removal hearing any more than a criminal suspect would be considered *convicted* before a trial.²⁸ The use of metaphors can be dangerous precisely because they tend to mislead the listener, who then frequently repeats them without critical evaluation. This language impacts the broader narrative surrounding immigration “[t]hrough constant, uncritical repetition, [as] the *illegal alien* metaphor has transformed immigrants into a monolithic group of criminal strangers who must be captured, convicted, and expelled.”²⁹ The use of nondescript language collapses large groups of apprehended immigrants together into one giant bucket of “illegal immigrants” while failing to capture the legal nuances between them, some of whom *have* committed a crime, but many of whom have not. It also presumes that they are, in fact, non-citizens—hundreds of U.S. citizens have been routinely, but erroneously, apprehended by immigration authorities in recent years.³⁰ Drawing a mental association between the “illegal immigrant” and the “criminal” is not only possible but highly likely in this context.

Moreover, the concept of “illegality” is incredibly ambiguous.³¹ Illegality is not an inherent condition produced by an individual’s failure to adhere to immigration laws but is instead a condition assigned to certain bodies based on social constructions.³² These constructions are created when observers and authorities use

26. *Id.* at 1573–74. It is important to note, however, recent shifts in language used by the Nation’s highest Court. In 2009, Justice Sotomayor used the term “undocumented immigrant” for the first time in a Supreme Court decision in *Mohawk*, 558 U.S. 100, 100, 103 (2009), making headlines. *See, e.g., Sotomayor, Supreme Court Use Term “Undocumented Immigrant” for First Time*, AMERICA’S VOICE, (Dec. 9, 2009), https://americasvoice.org/blog/Sotomayor_supreme_court_uses_term_undocumented_immigrant_for_first_time/ [https://perma.cc/XQ39-UAVB]. Since 2009, four other Supreme Court opinions have used this language. *See* *Torres v. Lynch*, 578 U.S. 452, 480 n.3 (2016) (Sotomayor, J., dissenting); *Trump v. New York*, 141 S. Ct. 530, 536, 544–45 (2020); *Dep’t of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1917 (2020) (Sotomayor, J., concurring in part, concurring in the judgment in part, and dissenting in part); *Ross v. Nat’l Urban League*, 141 S. Ct. 18, 19 (2020) (Sotomayor, J., dissenting).

27. *See* Cunningham-Parmeter, *supra* note 2, at 1574 (noting that many immigrants referred to as “illegal aliens” may be entitled to remain lawfully in the country due to “family connections, community ties, or legitimate fears of persecution”).

28. *See* Beth Lyon, *When More “Security” Equals Less Workplace Safety: Reconsidering U.S. Laws that Disadvantage Unauthorized Workers*, 6 UNIV. PA. J. LAB. & EMP. L. 571, 576 (2004).

29. Cunningham-Parmeter, *supra* note 2, at 1577.

30. *See* U.S. GOV’T ACCOUNTABILITY OFFICE, IMMIGRATION ENFORCEMENT: ACTIONS NEEDED TO BETTER TRACK CASES INVOLVING US CITIZENSHIP INVESTIGATIONS (2021), <https://www.gao.gov/assets/gao-21-487.pdf> [https://perma.cc/XHA6-3RBN] (“ICE arrested 674, detained 121, and removed 70 potential U.S. citizens from fiscal year 2015 through the second quarter of fiscal year 2020.”).

31. *See generally* René D. Flores & Ariela Schachter, *Who Are the “Illegals”? The Social Construction of Illegality in the United States*, 83 AM. SOCIO. REV. (2018) (discussing the social construction of “illegality” as a concept that is interpreted in various ways).

32. *See id.* at 839 (noting that “the categorization of some immigrant as ‘illegal’ is just as much a social construction as a legal one”).

shared stereotypes (instead of relying on documentation) to determine which bodies should be assigned the designation of illegality.³³ Racialized imagery serves to strengthen these biased social constructs that classify certain bodies as more likely to be “illegal” than others. Immigration court is one place where the social construct of illegality affects legal outcomes for litigants.³⁴

Accurate, specific language matters, particularly when the language impacts the legal rights of a disadvantaged group. In the following section, we illustrate how statutory word choice that results in the persistence of historical bias perpetuates and reinforces historical forms of racial discrimination.

B. How Statutory Language Choices Can Impact Perception and Bias

Even though its use furthers implicit bias and racial prejudice, criminal statutory language in the immigration context persists. This use reflects and memorializes explicit racism of the past and perpetuates negative perceptions about racial groups today.³⁵ Criminal language creates and embeds cognitive associations that perpetuate incomplete and incorrect narratives that emphasize certain aspects of immigrants and immigration but overlooks others.

The use of criminal language in civil immigration apprehension statutes creates a false association between criminality and immigrants. Despite popular belief,³⁶ being undocumented in the United States is not a criminal act.³⁷ However, the criminal statutory language found in 8 U.S.C. Sections 1357 and 1226, which govern civil apprehension before deportation proceedings, conflate immigration apprehension with criminal arrests and reinforce the misperception that immigrants who are unlawfully present in the United States are criminals.³⁸ While there is no study demonstrating a general public misunderstanding that “illegal immigrants” have *ipso facto* all committed a criminal act simply by the act of being present without proper documentation, the first few listed dictionary synonyms provide clues for what the word “illegal” can bring to mind: “unlawful, illicit, criminal, felonious,

33. See *id.* at 839–40.

34. For example, immigration courts are one setting where modern forms of racism and bias have been shown to grow and flourish. See Fatma E. Marouf, *Implicit Bias and Immigration Courts*, 45 NEW ENG. L. REV. 417, 424 (2011) (“The informality of immigration court—where the rules of evidence do not apply, forty percent of respondents are unrepresented by counsel, and overloaded, burned out judges are allowed to play an inquisitorial role—creates a setting with weak normative structures and vague guidelines for appropriate behavior, leading to discrimination.”).

35. See Emily Ryo, *On Normative Effects of Immigration Law*, 13 STAN. J. CIV. RTS. & CIV. LIBERTIES 95, 107, 109 (2017) (stating that the language used in laws that govern immigration of specific groups promotes either positive or negative sentiments).

36. See, e.g., Flores, *supra* note 31, at 840.

37. See Caroline Cincotta, *Criminalizing Immigrants: Unlawful and Harmful to the Public*, ACLU (Feb. 5, 2010), <https://www.aclu.org/news/immigrants-rights/criminalizing-immigrants-unlawful-and-harmful-public> [<https://perma.cc/5J42-N7H9>] (“In fact, mere unlawful presence in the United States has never been a crime. When considering immigration reform legislation in 2005, Congress specifically rejected a provision that would have made unlawful presence in the United States a federal crime.”).

38. See, e.g., Angie Junck, *The Dangerous Immigrant: Confronting our Implicit Bias*, HUFFPOST (Sept. 22, 2016, 12:52 PM), <https://www.huffpost.com/entry/the-dangerous-immigrant-confronting-our-implicitb57e40722e4b05d3737be56ab> [<https://perma.cc/4BNK-ZAWL>].

unauthorized.”³⁹ The use of criminal language in the apprehension and removal statutes, combined with the public’s flawed perception that the term “illegal” indeed means “criminal” reinforces a flawed narrative painting all immigrants as criminals and allows harsh enforcement practices to persist.

Finally, the gap between legal definitions and a common understanding of the criminal terms used in immigration apprehension statutes allows the media to distort perceptions of immigrants.⁴⁰ The media often pairs visual imagery of administrative “arrests” with language relating to “illegal immigration” without distinguishing between the different legal consequences of such an “arrest,” which may not have been made for deportation or a criminal charge. The media also casually pairs the term “illegal immigration” with heinous crimes, which further entrenches the flawed stereotype of the “criminal immigrant.”

For example, following an ICE operation that resulted in the administrative arrests of over one hundred immigrants, a Fox News article reported that many of the arrested “illegal immigrants” had committed criminal offenses like assault or sexual deviancy.⁴¹ However, the article failed to report that ICE had intentionally prioritized administratively arresting, and later deporting, dangerous immigrants who were unlawfully in the United States, thereby reinforcing the illusion that most immigrants are criminals and that ICE serves the public by executing criminal arrests of these dangerous individuals.⁴²

While it is true that designated ICE officials have the power to make an arrest for a criminal act without a warrant in limited instances,⁴³ many warrantless ICE arrests are administrative only, made simply for the purpose of determining whether an individual is removable.⁴⁴ The nature of these arrests are quite different—in the first instance, the individual must be informed of his *Miranda* rights; in the second, the arresting officer must only disclose his identity and the reason for the arrest.⁴⁵ However, individuals often make assumptions to settle on incorrect

39. *Synonyms of Illegal*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/thesaurus/illegal> [<https://perma.cc/2PT2-ZXNP>].

40. *See infra* Part II.

41. *See* Adam Shaw, *ICE Nabs Dozens of Illegal Immigrants, Some with Sex Crimes Convictions*, in *New York*, FOX NEWS (Jan. 29, 2019, 2:38 PM), <https://www.foxnews.com/politics/ice-nabs-illegal-immigrants-with-convictions-including-child-sex-crimes-in-ny-raid-slams-politicians-for-protecting-them> [<https://perma.cc/H5LE-387E>].

42. *See* Memorandum from John Kelly, Sec’y, U.S. Dep’t of Homeland Sec., to Kevin McAleenan, Acting Comm’r, U.S. Customs & Border Prot., Thomas D. Homan, Acting Dir., U.S. Immigr. & Customs Enf’t, Lori Scialabba, Acting Dir, U.S. Citizenship & Immigr. Serv., Joseph B. Maher, Acting Gen. Couns., U.S. Dep’t of Homeland Sec., Dimple Shah, Acting Assistant Sec. for Int’l Affairs, U.S. Dep’t of Homeland Sec., and Chip Flulghum, Acting Undersecretary for Mgmt, U.S. Dep’t of Homeland Sec. at 3, 4, 11–12 (Feb. 20, 2017), https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Implementing-the-Presidents-Border-Security-Immigration-Enforcement-Improvement-Policies.pdf [<https://perma.cc/65K6-3XZN>].

43. *See* 8 U.S.C. § 1357(a)(4)–(5).

44. *See id.* § 1357(a)(1)–(3).

45. 8 C.F.R. § 287.8 (c)(2)(A)–(B) (2023). A recent article warned that “[a] consequence of ICE being forced to make more arrests on the streets is the agency is likely to encounter other unlawfully present foreign nationals that wouldn’t have been encountered had we been allowed to take custody of a criminal target within the confines of a local jail.” *ICE ERO Boston Arrests 80 Criminal Aliens During a Targeted Enforcement Action Focused [on] Non-cooperative Jurisdictions Across 6 New England States*,

conclusions about immigration.⁴⁶ One such assumption might present like this: police only have authority to arrest if they suspect someone has committed a crime; ICE have the authority to arrest undocumented non-citizens; therefore, being undocumented in the United States must also be a criminal act. These types of mental short-cuts can lead to the conclusion that undocumented immigrants deserve to be arrested and treated as suspected criminals.

In conclusion, since the word “arrest” implies that someone has committed a crime, the public considers the harsh enforcement mechanisms for immigration apprehension, as depicted by the media, as the “just desserts” for an individual committing the assumed criminal act of “illegal immigration”—simply being present within U.S. borders.

In the next Part, we explore the specific language used in federal statutes governing apprehension, contrast the legal meaning of that language with the general public’s understanding of it, and discuss problems that arise because of the gap between public knowledge and legal meaning. Finally, we contemplate how statutory language can impact public perception even though most of the public is largely uninformed about federal immigration statutes.

II. THE PROBLEM WITH IMMIGRATION APPREHENSION STATUTORY LANGUAGE

In this Comment, we are exclusively concerned with the administrative arrests of individuals who live in the United States away from the area understood as “border territory.”⁴⁷ Administrative arrests in this “interior section” of the United States are governed by 8 U.S.C. Section 1226.⁴⁸ Section 1357 further extends these

U.S. Immigr. & Customs Enf’t, (Sept. 26, 2019), <https://www.ice.gov/news/releases/ice-ero-boston-arrests-80-criminal-aliens-during-targeted-enforcement-action-focused> [<https://perma.cc/87EN-MRQ2>].

46. See Philipp Lutz & Marco Bitschnau, *Misperceptions about Immigration: Reviewing Their Nature, Motivations and Determinants*, BRITISH J. OF POL. SCI. at 4, May 2, 2022, doi:10.1017/S0007123422000084, <https://www.cambridge.org/core/journals/british-journal-of-political-science/article/misperceptions-about-immigration-reviewing-their-nature-motivations-and-determinants/875F5B45BF66FF92990410F40B2D1CA5> [<https://perma.cc/JZD6-3927>] (“[M]isperceptions about immigration are diverse in character and prevalence. The literature also suggests that, once adopted, they are often persistent and stable, driving people to go to considerable lengths to protect their beliefs.”).

47. Entrance and apprehension at the border are governed by 8 U.S.C. § 1225(a)(1), (b)(1)(B), (2)(A) and 8 C.F.R. § 235.3(b), (c) (2022). Immigrants who are apprehended at the border or within 100 miles of the border are subject to criminal arrest—it is a criminal offense to cross without inspection into the United States, subject to civil fines and up to six-months confinement. 8 U.S.C. § 1325(a). An individual caught entering without inspection more than once can face up to two years in prison. *Id.* Immigration law permits border patrol to operate within a “reasonable distance” from the U.S. border. 8 U.S.C. § 1357(a)(3). In this Comment, we do not address the power to inspect and search at border crossings where immigration authorities enjoy the power to perform routine checks, like searching bags or a vehicle, without a warrant, consent, or even a suspicion of wrongdoing. For further discussion, see *Prosecuting People for Coming to the United States*, AM. IMMGR. COUNCIL (Aug. 23, 2021) <https://www.americanimmigrationcouncil.org/research/immigration-prosecutions> [<https://perma.cc/KNS6-8J7J>].

48. Individuals may first encounter ICE officers in a few different ways—ICE officials may take a person into custody pursuant to an ICE immigration arrest warrant; an individual may be detained upon execution of an ICE-issued detainer (upon completion of a prison sentence for a prior criminal conviction); or a person can be detained after a stop by local law enforcement. 8 C.F.R. § 287 (2023). Detention can

powers of arrest over individuals believed to be in the United States unlawfully, providing immigration officials with the authority to investigate and “arrest” these individuals without a warrant.⁴⁹

When there is suspicion that an individual in the United States may be subject to removal, the Attorney General has broad power under 8 U.S.C. Section 1226(a) to “arrest” that individual after obtaining a “warrant,” and, pending the decision of removal, the Attorney General can release the individual on “bond” or “conditional parole.”⁵⁰ Despite the usage of criminal terminology peppered throughout the statute, the Supreme Court has determined that the removal process is a “purely civil” mechanism.⁵¹ The powers of immigration officers to carry out Section 1226(a) are described in Section 1357. These include the powers:

- (1) to interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States; [and]
- (2) to arrest any alien who in his presence or view is entering or attempting to enter the United States in violation of any law or regulation made in pursuance of law regulating the admission, exclusion, expulsion, or removal of aliens, or to arrest any alien in the United States, if he has reason to believe that the alien so arrested is in the United States in violation of any such law or regulation and is likely to escape before a warrant can be obtained for his arrest . . .⁵²

be mandatory or non-mandatory, depending on whether the individual has been convicted of a certain criminal offense. 8 U.S.C. § 1226(a), (c). Once in custody, the individual is entitled to a probable cause hearing within 48 hours. 8 C.F.R. § 287.3(d) (2023). The individual may seek review of the initial custody decision, first by a Department of Homeland Security official and then again by an immigration judge. However, this review is discretionary, and it can take many months to obtain, if it is granted at all. The average total length of detention, pending a final removal decision, can be over a year; some have spent nearly five years in prolonged detention. *See* Rodriguez v. Robbins, 804 F.3d 1060, 1065, 1079 (9th Cir. 2015), *rev'd sub. nom.* Jennings v. Rodriguez, 138 S. Ct. 830 (2018) (noting that one detained individual had spent 1,585 days in detention).

49. 8 U.S.C. § 1357(a)(2). To note, we are also not concerned with those subject to expedited removal, or non-citizens who recently entered the United States without inspection and who are inadmissible because they lack valid entry documents or have attempted to procure admission by fraud or misrepresentation. Expedited removal is governed by 8 U.S.C. Section 1225(b)(1)(A)(i). For a general discussion of the requirements of expedited removal under the statute, see HILLEL R. SMITH, CONG. RSCH. SERV., R45915, IMMIGRATION DETENTION: A LEGAL OVERVIEW 23 (2019).

50. 8 U.S.C. § 1226(a). Section 1226(c) addresses the detention of criminal aliens. Section 1226(a)(3) describes limitations on granting work authorization to individuals who have been apprehended.

51. *See* INS v. Lopez-Mendoza, 468 U.S. 1032, 1038 (1984) (“A deportation proceeding is a purely civil action to determine eligibility to remain in this country. . . .”). However, scholars have questioned this civil characterization of the removal process. *See, e.g.,* Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 26 (1984) (noting that deportation inevitably subjects individuals to judgements on moral blameworthiness for conduct and behavior, which is “essentially indistinguishable” from the judgements made in criminal law).

52. 8 U.S.C. § 1357(a)(1), (2). The remainder of Section 1357 qualifies the power of arrest with language stating that the alien should be “taken without unnecessary delay for examination before an officer of the Service having authority to examine aliens as to their right to enter or remain in the United States.” 8 U.S.C. § 1357(a)(2).

This procedure creates the opportunity for grave abuses of power by immigration officials, including excessive and unnecessary use of force, warrantless searches and seizures, and excessively long detention and interrogation periods.⁵³ Judicial review could mitigate the potential for abuse of the powers afforded to immigration officers, but Section 1226(e) precludes it.⁵⁴

The use of two terms in Section 1226(a) and (c) and in 1357(a) and (b)—“arrest” and “warrant”—that are typically associated with criminal apprehension tactics reinforce the widespread, but incorrect, idea that being unlawfully present in the interior of the United States is a criminal act. The use of criminal apprehension language also creates confusion for the courts.

In the next two sections, we explore, and then contrast, the legal meaning with the common understanding of the terms “arrest” and “warrant.” These words have significant ability to impact the rights and treatment of immigrants.

A. Legal Definitions of “Arrest” and “Warrant”

The use of the words “arrest”⁵⁵ and “warrant” in statutes codifying civil immigration apprehension and the powers of immigration officers when apprehending is noteworthy given their origins in criminal law. In this Comment, we limit our analysis of these terms in a few ways: first, our focus is on the terms “arrest” and “warrant” as both terms appear in Sections 1226 and 1357. Second, as our analysis of the constitutionality of civil apprehension mechanisms centers on the Fourth Amendment right to be free from unreasonable government intrusion, we focus on the unjustified targeting and physical restraint that occurs immediately at and just before an “arrest.”⁵⁶ While other criminal terms like “parole”⁵⁷ and “bond”⁵⁸ are also used in the statutes at issue, they only become relevant to the procedural process *after* an individual is arrested, and thus our analysis does not consider those terms.⁵⁹

53. For consideration of the constitutional concerns posed by ICE detainees, see CHRISTOPHER LASCH, IMMIGRATION POLICY CENTER THE FAULTY LEGAL ARGUMENTS BEHIND IMMIGRATION DETAINERS, 6–7 (2013), https://www.americanimmigrationcouncil.org/sites/default/files/research/lasch_on_detainers.pdf [<https://perma.cc/6DXZ-LZTQ>].

54. See 8 U.S.C. § 1226(e) (“No court may set aside any action or decision by the Attorney General under this Section regarding the detention or release of any alien or the grant, revocation, or denial of bond or parole.”).

55. As we investigate the origins of the term “arrest,” we also track use of the phrase “take into custody” as a “precursor” term which was often substituted for arrest and had a similar meaning until the early part of the twentieth century. See generally Thomas K. Clancy, *What Constitutes an “Arrest” Within the Meaning of the Fourth Amendment?*, 48 VILL. L. REV. 129 (2003).

56. See, e.g., Mary Holper, *The Unreasonable Seizures of Shadow Deportations*, 86 U. CIN. L. REV. 923, 946–47 (2018) (discussing what constitutes a Fourth Amendment violation and concluding that a Fourth Amendment violation is accomplished immediately at the point when a government actor unreasonably seizes an individual, irrespective of whether what occurs after that seizure is “punishment”).

57. 8 U.S.C. § 1226 (a)–(c), (e).

58. *Id.* § (a)(2)(A), (b), (e).

59. Though beyond the scope of this Comment, these terms still implicate criminality and we suggest the need for additional research to uncover the historical underpinnings of these terms as well.

To identify what the terms “arrest” and “warrant” mean in the immigration apprehension context, a strict textualist⁶⁰ would first turn to the definitions afforded by the Congress that first used them in the immigration context. Congress, however, failed to define either term.⁶¹ The Fourth Amendment, which establishes the right to be free from unreasonable government intrusion and has been the basis for judicial creation of constitutional standards for criminal restraints, such as arrests, could provide context for these terms as well. However, “arrest” does not appear in the Fourth Amendment at all, even though an arrest may be the most important for those facing criminal charges or being investigated by law enforcement. “Warrant,” on the other hand, is explicitly referenced: “no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”⁶² This reference, however, lacks any explicit definition of the term. Failing to find meaning or context for “arrest” and “warrant” in the statutory scheme or the Fourth Amendment, we can use legal scholarship grounded in case law to arrive at a common legal understanding of the terms.

First, we turn to the legal definition of “arrest.” Experts have long debated the exact meaning of “arrest,” and how to gauge whether an arrest has, in fact, taken place. However, scholars have identified guideposts for identifying a seizure as an arrest rather than a mere “stop,” or temporary detention, including whether the seizure was “lengthy and intrusive” (by contrast, a mere “stop” is “temporary and relatively non-intrusive”) and whether the seizure exceeded the “permissible bounds of a stop,” which would require the presence of probable cause that an individual had committed a crime.⁶³ Two elements are essential for a seizure to be considered a stop, in both the civil and criminal context:⁶⁴ (1) obtaining custody (by mere touching or submission by the individual) by law enforcement with (2) an intent to detain the individual.⁶⁵

By contrast, “warrant” is more easily defined by scholars. A common definition for the term is “a writ from a judge, permitting law enforcement personnel to take some action, such as make an arrest, search a location, or seize some piece of

60. Judges use two main approaches when interpreting the meaning of words in a statute: *textualism*, which maintains that a judge’s primary focus should be on the words of the statute itself, and *purposivism*, where judges try to use the purpose of the statute to evaluate the meaning of the term(s). VALERIE C. BRANNON, CONG. RSCH. SERV., R45153, STATUTORY INTERPRETATION: THEORIES TOOLS, AND TRENDS 10–15 (2023).

61. See Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 § 101 (1952) (codified at 8 U.S.C. § 1101).

62. U.S. CONST. amend. IV.

63. Clancy, *supra* note 55, at 193. See also 1 CLARENCE ALEXANDER, THE LAW OF ARREST IN CRIMINAL AND OTHER PROCEEDINGS, § 45 at 353–54 (1949) (defining arrest as “a frustration of or impediment to the free movement or locomotion of another . . . a seizure or taking possession of another against his will . . . a restraint, however slight, on another’s liberty to come and go or remain as he wills or wishes whether that will or wish is known to the restrainer or not, a manifestation of governmental authority, accompanied by apparent means of exercising it, and a communicated purpose to exercise it, so that the restraint compels one to yield involuntarily to such exercise”).

64. *Torres v. Madrid*, 141 S. Ct. 989, 999–1000 (2021) (emphasizing that the legal standard for an arrest is identical whether it operates in a civil or criminal context).

65. See Clancy, *supra* note 55, at 141.

property.”⁶⁶ Under this definition, an individual, often a judge or other magistrate, must authorize an officer to make an arrest, by issuing a warrant, and this individual needs to be detached and neutral—in fact, the validity of the warrant itself is conditioned upon that neutrality.⁶⁷ Neutrality is a key component to obtaining a valid warrant: without it, an officer could simply issue a warrant on a whim.

In contrast to the scholarly definitions of “arrest” and “warrant” used in legal analysis, the public perception of these terms may be less nuanced. Since people most commonly hear and use the terms “arrest” and “warrant” in the context of criminal apprehension, and thus associate those terms with the criminal justice system, the use of these terms in civil immigration apprehension statutes serves to strengthen the cognitive association between the act of unlawful presence and criminality.

B. Public Perception of “Arrest” and “Warrant”

It is difficult to establish what the public’s exact understanding of the terms “arrest” and “warrant” is. The dearth of research on the subject and the shift in public understanding of these terms over time makes it challenging to pinpoint. However, there is evidence that the public misunderstands concepts that have specific meanings within the scientific, political, and legal communities.⁶⁸ The terms “arrest” and “warrant” are nuanced legal terms commonly misperceived by the public at large. Widespread public failure to understand the fine distinctions within these terms results in a shortage of empathy for the constitutional troubles that arise from administrative arrests. A mental link between criminality and immigration naturally and easily can persist in such an environment. Despite the challenges associated with isolating the public’s attitudes towards these terms, there are nevertheless reasons to believe that the public perceives an “arrest” to mean that a criminal act has transpired.

First, the media can distort and confuse the public in its coverage of immigration issues, particularly when using the terms “arrest” and “warrant.”⁶⁹ This leads to a distorted perception of immigrants and crime. An internet search of images for the terms “ICE and arrest” provides a visceral understanding of how these concepts get mentally linked—the images show people handcuffed with heads

66. *Warrant*, WEX’S LAW DICTIONARY, <https://www.law.cornell.edu/wex/warrant> [<https://perma.cc/BUL8-8GM7>].

67. The Supreme Court has repeatedly insisted that warrants be issued by a “judicial officer” or a neutral magistrate. *See* *United States v. Lefkowitz*, 285 U.S. 452, 464 (1932); *Mancusi v. DeForte*, 392 U.S. 364, 371 (1968) (finding that a subpoena issued by district attorney could not qualify as a valid search warrant); *Connally v. Georgia*, 429 U.S. 245, 250–51 (1977) (finding that an unsalaried justice of the peace is not sufficiently detached when he collected a sum of money for warrants he issued, but received nothing for the denial of warrants).

68. *See, e.g.*, Stephen J. Aguilar, Morgan S. Polikoff, & Gale M. Sinatra, *When Public Opinion on Policy is Driven by Misconceptions, Refute Them*, EVIDENCE SPEAKS REP. (Brookings Inst.), Jan. 24, 2018, <https://www.brookings.edu/wp-content/uploads/2018/01/1-24-18-aguilar-polikoff-sinatra.pdf> [<https://perma.cc/ZAS3-ZR83>] (applying a technique called “refutation text” to public policy for the first time. Until this study had been published, the technique had been applied mainly to scientific misconceptions like global warming. The study found that refutation text was useful in making lasting change to widely-held misconceptions on public policy relating to controversial partisan policies.).

69. *See, e.g.*, Casey T. Harris & Jeff Gruenewald, *News Media Trends in the Framing of Immigration and Crime, 1990–2013*, 67 SOC. PROBS. 452, 455 (2020).

bowed low, jackets boldly displaying the word “police,” and guns holstered on officers’ hips. A photo of an immigration arrest looks identical to a photo of a criminal arrest to the public. News stories focusing on immigration capitalize on this imagery and do not distinguish between civil administrative arrests and criminal arrests.

Second, the media portrays warrants as having an exclusively criminal function: they operate to effectuate an arrest for a criminal matter. For example, a Google News search of the terms “ICE and immigration and warrant” includes pictures of handcuffs, badges, and guns, and reveals a selection of headlines featuring phrases related to crime like “fugitive,” “most wanted criminal,” “wanted for killing . . . police officer,” and “warrant for . . . attempted femicide and rape.”⁷⁰ By associating warrants exclusively with criminal activity, the media further entrenches an incorrect association between criminality and immigration.

Third, because of these media and social phenomena, the use of “arrest” and “warrant” becomes an easy way for people to cognitively conceptually couple unlawful presence with crime. Repeated exposure to inaccurate or incomplete storylines that link undocumented immigrants with criminality crystallizes this false narrative into a mental image that feels like a direct threat to personal safety. When criminal statutory language is combined with immigration apprehension tactics that mirror criminal arrest tactics, it is easy to justify a coupling of criminality and immigration that conceals the legal nuance behind the term “illegal immigration.” To the extent the media equates the concept of illegality with criminality, warrants and arrests can easily be deemed appropriate tools to take “illegal” immigrants into custody. The mental connection between illegality and criminality helps to keep Americans apathetic about using criminal apprehension techniques to divert a perceived steady influx of “illegal” immigrants.

Like most legal concepts, the meaning of the terms “arrest” and “warrant” are significantly more complicated, nuanced, and fact-specific than the public perceives them to be. But if most Americans fail to understand that arrests can be made for civil offenses, their default bias will automatically connect the term “arrest” with a criminal act. The contrast between the public’s one-dimensional view and the complexities inherent in the legal meaning of an arrest creates a space where disparate treatment between citizens and non-citizens can fester and intensify. If the public perceives unlawful presence as a criminal offense, they will see the arrest of such individuals as an appropriate way to apprehend and control this type of criminal behavior and are less likely to scrutinize the constitutional validity of the underlying warrant or the arrest itself. And since those arrested are not provided with a lawyer to analyze legality of the underlying arrest, challenges will be rare, and it will be difficult to quantify the frequency of officer misconduct and unlawful arrest.

C. The Constitutionality of Administrative Warrants

Forcibly taking someone into custody using an administrative warrant for a civil infraction is exceedingly rare in federal law enforcement outside of the immigration context. When not used for immigration, administrative warrants are

70. Google search was conducted on January 24, 2023. Search results are on file with author.

reserved for regulating parole violations and for certain searches on military bases.⁷¹ These alternative uses of administrative arrests are rare because they compromise an individual's basic right to move about freely in society without unnecessary government intrusion. Despite these concerns, the use of administrative arrests in the immigration context is anything but uncommon.

Both warrantless immigration arrests and arrests made pursuant to immigration warrants run contrary to the protections of the Fourth Amendment and frequently violate the due process rights of apprehended individuals. Often, immigration officials arrest non-citizens suspected of being in the United States in violation of immigration laws without warrants.⁷² However, even when an immigration official issues a warrant before an administrative arrest, a judge or neutral magistrate does not have to evaluate the sufficiency of the officer's determination of probable cause to arrest, unlike in the criminal context.⁷³ Yet, the officer's determination of probable cause is often only a bare-bones assertion stating that "other reliable evidence [has] affirmatively indicate[d] the subject . . . lacks immigration status. . . ." ⁷⁴ Without specifically stating what "other reliable evidence" supports an officer's belief that an individual lacks immigration status, the warrant lacks the supportive evidence necessary to meet the probable cause standard required under the Fourth Amendment,⁷⁵ depriving many people of the full protections of due process.

71. These military arrests are not premised on a warrant, but on an "authorization." See MANUAL ON COURTS MARTIAL, R.C.M. 302 (Joint Serv. Comm'n on Mil. Just. 2019). However, parole violators and criminal defendants in the military have a reduced expectation of privacy under the Fourth Amendment—parole violators are still within the legal custody of the state, *Sherman v. U.S. Parole Comm'n*, 502 F.3d 869, 884 (9th Cir. 2007), even though they are serving out the remainder of their sentence outside of prison walls, and the Supreme Court permits the military to restrict constitutional rights of service members in ways that it would not allow for ordinary citizens, given the unique nature of military life as well as the discipline and duty that the institution requires of servicemembers. Considering the status of parolees, Congress may not have intended that parole warrants be evaluated under the Fourth Amendment at all. See, e.g., *Sherman*, 502 F.3d at 883–85 (holding that Congress did not intend to incorporate the requirements of the Fourth Amendment into the federal parole statute).

72. See, e.g., *Settlement Agreement and Release at 1–2, Castañón Nava v. Dep't of Homeland Sec.*, 435 F.Supp.3d 880 (N.D. Ill. 2020), (No. 18-cv-03757), https://www.aclu-il.org/sites/default/files/field_documents/proposed_settlement.pdf [<https://perma.cc/97ZD-EDH3>] (identifying plaintiffs as members of a class apprehended on warrantless arrests or vehicle stops conducted without reasonable suspicion that they were in violation of immigration laws during an ICE raid).

73. See, e.g., *Roy v. County of Los Angeles*, No. CV-12-09012, 2018 WL 914773, at *9 (S.D. Cal. 2018), (referencing the court's earlier holding that "the Fourth Amendment does not require judicial review of ICE officers' probable cause determinations"). The court appears to make no distinction between whether an individual is apprehended at the border (or within 100 miles thereof) or within the interior of the United States. See *id.* This distinction is significant, however, since apprehension at or near the border is indeed considered a criminal offense, while unlawful presence is not. See 8 U.S.C. § 1325.

74. See U.S. DEP'T OF HOMELAND SEC., FORM I-200 WARRANT FOR ARREST OF ALIEN (2016), https://www.ice.gov/sites/default/files/documents/Document/2017/I-200_SAMPLE.PDF [<https://perma.cc/RKM9-MC8G>].

75. See, e.g., *Jones v. United States*, 362 U.S. 257, 270–71 (1960); *Dumbra v. U.S.* 268 U.S. 435, 441 (1925) ("In determining what is probable cause . . . [w]e are concerned only with the question whether the affiant had reasonable grounds at the time of his affidavit . . . for the belief that the law was being violated on the premises to be searched; and if the apparent facts set out in the affidavit are such that a reasonably discreet and prudent man would be led to believe that there was a commission of the offense charged, there is probable cause justifying the issuance of a warrant.").

The Supreme Court has never ruled directly on whether the administrative arrest warrants used for immigration “arrests” satisfy the warrant requirements of the Fourth Amendment. However, the Court has never suggested that there is any difference between the privacy interests of citizens and non-citizens, which would support disparate requirements for administrative versus criminal arrest warrants.⁷⁶ The closest the Court has come to reviewing the constitutionality of administrative arrest warrants was in *Abel v. United States*,⁷⁷ where the Court dismissed concerns about the constitutionality of administrative arrest warrants simply because administrative immigration arrests have been used for centuries.

It is important to first consider the facts underlying *Abel*. In 1957, the FBI suspected that Rudolph Abel was a spy for the Soviet Union and was in the United States illegally.⁷⁸ However, believing it did not have enough evidence to arrest him for espionage, the FBI turned over its evidence of Abel’s unlawful presence to federal immigration officials, who have a lower threshold for securing arrest warrants.⁷⁹ Then, under the authority of an administrative arrest warrant, immigration officials arrested Abel for illegally living in the United States.⁸⁰ Officials performed a search of Abel’s hotel room and person and uncovered evidence that Abel was engaging in espionage.⁸¹ They turned over this evidence to the FBI, who relied on it to charge and convict Abel of espionage.⁸²

At the Supreme Court, Abel asserted that the administrative arrest warrant was not constitutionally adequate to search and seize the evidence found in his hotel room.⁸³ Thus, the evidence should be excluded as the “fruits” of a governmental violation of Fourth Amendment rights cannot be used to support a criminal prosecution.⁸⁴ However, the Court declined to address the constitutionality of the administrative arrest warrant because Abel did not challenge the constitutionality of the warrant at the lower court.⁸⁵ Further, in legitimizing its decision to not reach the question of constitutionality, the Court proclaimed that administrative arrests for immigration violations have the “sanction of time” based on “uncontested historical legitimacy,” and the “impressive historical evidence of acceptance of the validity of statutes providing for administrative deportation arrest from almost the beginning of the Nation,” which precluded any further consideration of the constitutionality of

76. See, e.g., *United States v. Montoya de Hernandez*, 473 U.S. 531, 539–40 (1985) (stating individuals crossing the border have a reduced expectation of privacy); *Samson v. California*, 547 U.S. 843, 853 (2006) (upholding suspicionless search of a parolee based in part on the reduced individual privacy interests of parolees who were already subject to supervision by the state); *New York v. Burger*, 482 U.S. 691, 707 (holding that those working at a vehicle dismantling junkyard business, which was pervasively regulated, had a reduced expectation of privacy); *Bd. of Ed. v. Earls*, 536 U.S. 822, 830 (2002) (holding that students have a diminished expectation of privacy in public school environment and could be drug tested due to the school’s interest in maintaining safety and discipline).

77. 362 U.S. 217, 233–34 (1960).

78. *Id.* at 221.

79. *Id.* at 221–22.

80. *Id.* at 222–23.

81. *Id.* at 223–24.

82. *Id.* at 223–25.

83. *Id.* at 225–26.

84. *Id.* at 248 (Brennan, J., dissenting).

85. *Id.* at 230.

administrative warrants.⁸⁶ However, there are serious concerns with designating administrative warrants for deportation as presumptively constitutional due to the “sanction of time” when non-citizens should be offered the same protection under the Fourth Amendment against unreasonable searches and seizures as citizens.⁸⁷

As a result of this determination, the Court upheld Abel’s conviction for espionage, even though government agents had stripped him of the protections of the Fourth Amendment when they searched his papers and person without a judicial determination of probable cause for his arrest.⁸⁸ The government used the fruits of this illegal search against Abel, in derogation of his rights.

Even though the Supreme Court has not relied on *Abel* since 1996,⁸⁹ lower courts routinely rely on the poisonous language rooted in *Abel* to uphold the constitutionality of administrative arrest warrants issued by immigration enforcement officers, even when the warrants do not meet the requirements of the Fourth Amendment.⁹⁰ However, the *Abel* Court’s notion that administrative arrests and administrative warrants have the “sanction of time” is incorrect. Contrary to the Court’s assertion, Congress has historically regarded the constitutional validity of administrative arrests with suspicion, especially as the power to execute these arrests crept further from the border. In fact, the *Abel* Court failed to identify several predecessors to modern removal statutes that empowered immigration officials to issue and execute administrative arrest warrants but faced lengthy legislative debate about the constitutional legitimacy of immigration arrests.⁹¹ An accounting of relevant legislative history from a more complete set of statutes than the grouping considered in *Abel* demonstrates Congressional resistance to the expansion of government surveillance and law enforcement authority. Congress did take notice of the Fourth Amendment problems inherent in the extra-judicial authority granted to executive officers to issue administrative arrest warrants and to make administrative arrests. This Comment dispels the notion that administrative arrests effectuated extra-judicially without well-articulated probable cause determinations enjoyed the type of historical legitimacy the *Abel* Court claimed. We begin, however, with a

86. *Id.* at 230, 234.

87. *Id.* at 250, 255 (Brennan, J., dissenting) (“Even assuming that the power of Congress over aliens may be as great as was said in *Galvan v. Press* . . . and that deportation may be styled ‘civil,’ . . . it does not follow that Congress may strip aliens of the protections of the Fourth Amendment and authorize unreasonable searches of their premises, books and papers. . . . Like most of the Bill of Rights [the Fourth Amendment] was not designed to be a shelter for criminals, but a basic protection for everyone; to be sure, it must be upheld when asserted by criminals, in order that it may be at all effective, but it ‘reaches all alike, whether accused of crime or not.’” (citations omitted)).

88. *Id.* at 251–53 (Brennan, J., dissenting).

89. See *Whren v. U.S.*, 517 U.S. 806, 815–16 (1996).

90. See, e.g., *Perez-Ramirez v. Norwood*, 322 F. Supp. 3d 1169, 1172 (D. Kan. 2018) (relying on *Abel* to support the contention that “the legality of an arrest of an alien based upon a civil immigration violation is well-established”); *City of El Cenizo v. Texas*, 890 F.3d 164, 187 (5th Cir. 2018) (stating that the seizure of an individual using an administrative warrant of arrest based on probable cause of removability was “undisputed”).

91. Two examples, which we discuss more in *infra* Part V.B, are the Act of 1925 and the Act of 1946. *Abel* omitted both of these statutes, yet they are noted in the comparative print histories as direct precursors to Sections 1226 and 1357.

historical accounting of how criminal language first found its way into immigration apprehension statutes.

III. THE ORIGINS AND USE OF CRIMINAL TERMINOLOGY IN EARLY FEDERAL IMMIGRATION STATUTES

In this Part, we trace the roots of criminal language used in early federal immigration laws directed at apprehending immigrants by discussing two historical periods and the legislation enacted during those periods. First, we turn to early American history, starting with the Alien and Sedition Acts until the immigration legislation began racially targeting Chinese individuals. Second, we look at the period of Chinese Exclusion, starting with the passage of the first Chinese Exclusion Act through the repeal of these acts. As we analyze both of these periods, we focus only on legislation using the terms “warrant” and “arrest.”

A. Alien And Sedition Acts Until Chinese Exclusion (1798–1882)

For one hundred years after the American Revolutionary War, the federal government essentially did not regulate immigration.⁹² At this time, society viewed immigrants as important to the nation’s progress and as a potential source of future prosperity, which largely explains the federal government’s abstention from restrictive immigration regulation.⁹³ The one exception to federal inactivity in the immigration arena during this period was a series of legislation enacted in 1798—the Alien and Sedition Acts.

Included in the Alien and Sedition Acts was the Alien Friends Act, which authorized the President to arbitrarily identify and deport any non-citizen whom “he judged dangerous to the peace and safety of the country,” regardless of the individual’s physical whereabouts within the nation or proximity to the border.⁹⁴ No hearing, civil or criminal, preceded the President’s order to depart. Thus, the President could order any non-citizen removed without providing any reasoning for his decision and without any judicial determination of “dangerousness.” If the individual ordered to depart failed to leave in a reasonable amount of time, or if they did not obtain a license to lawfully reside within the United States, they would, “on conviction thereof, be imprisoned for a term not exceeding three years,” suggesting

92. See CHARLES GORDON, STANLEY MAILMAN, STEPHEN YALE-LOEHR, & RONALD Y WADA, *IMMIGRATION LAW AND PROCEDURE* § 2.02[1] (2020). Instead, most immigration regulation was done by the states who had, by 1776, begun to pass laws to limit the number of immigrants that they considered “particularly undesirable.” See Robert J. Steinfeld, *Subjectship, Citizenship, and the Long History of Immigration Regulation*, 19 L. & HIST. REV. 645, 647–48 (2001) (discussing state immigration laws and their focus on controlling populations considered undesirable); see also Gerald L. Neuman, *The Lost Century of American Immigration Law (1776–1875)*, 93 COLUM. L. REV. 1833 (1993) (providing overview of the many state-imposed immigration restrictions during this time period).

93. See GORDON ET AL., *supra* note 92.

94. FRANK JULIAN WARNE, *THE TIDE OF IMMIGRATION* 235 (D. Appleton & Company 1916).

that the individual in question would be given a criminal trial.⁹⁵ The actual scope of the Alien Friends Act is unclear, however, as the law was never directly enforced.⁹⁶

Today, to bolster the assertion in *Abel* that statutes authorizing administrative arrests have the sanction of time, federal courts tout the Alien Friends Act as an example of early federal law that authorized executive officers, rather than judicial officers, to arrest and then deport non-citizens.⁹⁷ However, the Alien Friends Act cannot accurately be characterized this way. Unlike modern statutes authorizing administrative arrests, any “arrest” made under the Alien Friends Act would be a consequence of an action that was designated as criminal—the failure to follow an order to depart. This is in stark contrast to modern statutes authorizing administrative arrests, where an arrest warrant may be issued upon suspicion of an underlying civil offense—unlawful presence.⁹⁸ Thus, under the Alien Friends Act, had any arrest actually been effectuated, it would have indeed been a criminal arrest for which a constitutionally required criminal trial would be provided.

Moreover, unlike in Sections 1226 and 1357, the power to arrest set forth in the Alien Friends Act was triggered by the failure to depart *after* the issuance of a Presidential order to depart, rather than by unlawful presence alone pursuant to Sections 1226 and 1357. This difference is meaningful—the Alien Friends Act can only appropriately be cited as a historical example of a grant of executive authority to order the deportation of non-citizens, *not* as a historical example of a grant of executive authority to arrest non-citizens before a determination of removability had been made.⁹⁹ Characterizing the Alien Friends Act as an example of an early federal law that granted executive power to administratively arrest non-citizens for a civil offense is misleading; it is better understood as a precursor to the modern-day warrant of removal, which is used to arrest an individual who has failed to obey an issued order of removability. Yet courts continue to characterize the Act as an example of the “uncontested historical legitimacy” of the administrative power to arrest.

Disapproval of the Alien Friends Act was immediate and strong among politicians and the public alike, who questioned whether Congress was invoking an explicit Constitutional power when it exercised control over the deportation of

95. An Act Concerning Aliens, ch. 58, 1 Stat. 570, § 1 (1798). Section 2 is less clear as to whether a trial would be afforded to a certain subset of aliens that, in the President’s discretion, require a “speedy removal.” Section 2 grants the President the right to “cause to be arrested and sent out of the United States such of those aliens as shall have been ordered to depart therefrom and shall not have obtained a license as aforesaid, in all cases where, in the opinion of the President, the public safety requires a speedy removal.” *Id.* at § 2.

96. See KANSTROOM, *supra* note 18, at 60. However, the law did result in the voluntary departure of many who were afraid it could be enforced. *Id.*

97. See, e.g., *Sherman v. U.S. Parole Comm’n*, 502 F.3d 869, 878 (9th Cir. 2007) (“Indeed, deportation statutes going back to 1798 ‘have ordinarily authorized the arrest of deportable aliens by order of an executive official,’ evidencing an ‘overwhelming historical legislative recognition of the propriety of administrative arrest for deportable aliens.’”); see also *Lopez-Lopez v. Cnty. of Allegan*, 321 F. Supp. 3d 794, 799 (W.D. Mich. 2018) (“Specifically in the immigration context, federal law enforcement officers have a long history of using administrative warrants and arrests for purposes of deportation, dating back to 1798.”).

98. See 8 U.S.C. §§ 1226, 1357.

99. See Lindsay Nash, *Deportation Arrest Warrants*, 73 STAN. L. REV. 433, 501 (2021).

immigrants. Intense and fiery debates raged in Congress, and James Madison himself objected to the Act, stating Congress had used a power where no power had been delegated.¹⁰⁰ The Act was commonly thought of as being categorically unconstitutional throughout most of the next century.¹⁰¹ As a result of these concerns, Congress allowed the Act to expire after two years.

After the Alien and Sedition Acts of 1798, the federal government did not further exercise its immigration authority for most of the nineteenth century and states were predominantly responsible for regulating immigration. Many scholars characterize the borders of the United States during this period as relatively open, but states were careful to exclude those who were considered a threat to the newly established nation.¹⁰²

However, during and soon after the close of the Civil War, federal legislators made several attempts to regulate immigration. For example, in 1864 Congress enacted legislation that aimed to *encourage* immigration following an “unprecedented . . . demand for labor” due to war conditions that was unquenched by domestic labor sources.¹⁰³ Under this law, employers could contract with an immigrant worker and pay for his passage in exchange for a year’s wages—a system strongly reminiscent of indentured servitude.¹⁰⁴ While the law did stimulate immigration, labor interests rallied against it as immigrant laborers were often brought to the United States under contracts that locked laborers into wages that were well below what was being paid to domestic workers, thereby driving down wages and increasing unemployment rates for domestic laborers in the post-war period.¹⁰⁵ As a result, Congress repealed the law in 1868.¹⁰⁶

The Act to Encourage Immigration was the first and only major law in American history intended to encourage immigration.¹⁰⁷ In the years after the Civil War, and into the present day, federal immigration regulation instead focused on restriction. In 1875, Congress enacted the first restrictive federal immigration law in the United States, the Page Act, which prohibited the immigration of laborers from “China, Japan or any Oriental Country” who were not brought to the United States

100. James Madison, *Virginia Resolutions, 21 December 1798*, NAT’L ARCHIVES (Dec. 21, 1798), <https://founders.archives.gov/documents/Madison/01-17-02-0128> [<https://perma.cc/WCZ6-2RW4>].

101. See Nikolas Bowie & Norah Rast, *The Imaginary Immigration Clause*, 120 MICH. L. REV. 1419, 1422–23 (2022) (describing and accounting for the widespread lack of popularity for and quick demise of the Alien Friends Act).

102. These individuals that “threatened” the country included criminals, the poor, those with disease or perceived public health problems, and slaves. See Neuman, *supra* note 92, at 1841.

103. See An Act to Encourage Immigration, ch. 246, 13 Stat. 385 (1864), *repealed by* Act of Mar. 30, 1868, ch. 38, § 4, 15 Stat. 56, 58; see also DEMOCRATIC NATIONAL COMMITTEE, DEMOCRATIC CAMPAIGN BOOK: CONGRESSIONAL ELECTION 1894, at 12 (Hartman & Cadick, Printers 1894) (quoting Mr. E.B. Washburn).

104. See § 2, 13 Stat. at 386.

105. See KANSTROOM, *supra* note 18, at 99–100; see also Geoffrey Heeren, *The Immigrant Right to Work*, 31 GEO. IMMIGR. L.J. 243, 249 (discussing the impact of imported contract labor on the seemingly endless labor demands brought about by the Industrial Revolution, and how contract labor was used to break strikes which resulted in declining domestic wages).

106. § 4, 15 Stat. at 58.

107. Jason Silverman, *Lincoln’s ‘Forgotten’ Act to Encourage Immigration*, PRESIDENT LINCOLN’S COTTAGE (July 1, 2016) <https://www.lincolncottage.org/lincolns-forgotten-act-to-encourage-immigration/> [<https://perma.cc/DD97-5BSP>].

of their own will or who were brought for undesirable purposes, such as prostitution.¹⁰⁸ With the Page Act, Chinese individuals became the target of new exclusionary federal immigration legislation, and the numbers of Chinese women dwindled drastically.¹⁰⁹

In *Abel*, the Supreme Court asserted that administrative arrests for a civil offense have ostensibly been customary since the founding of our Nation. While the Alien Friends Act did use the term “arrest,” the law cannot be conceptualized as a precursor to administrative arrest for a civil offense. It authorized arrest for an action that was explicitly criminal—the failure to obey a Presidential order of deportation. The intent of the Page Act was to exclude or deport Chinese immigrants who had, in fact, committed a crime: prostitution. The Chinese Exclusion Acts, by contrast, marked the beginning of an era of federal experimentation to criminalize non-citizens’ unlawful presence in the United States via immigration regulation to control the nation’s ethnic and social fabric.¹¹⁰ The use of criminal language to achieve a *civil* administrative purpose began during this era, a time marked by exclusion and racial intolerance.

B. Early Chinese Restriction and Exclusion

The Chinese Exclusion era¹¹¹ was the first time in United States history that Congress began to experiment in earnest with the use of criminal language in immigration statutes aimed at apprehending non-citizens. Oversight of immigration arrests began to migrate to the executive branch, bypassing judicial scrutiny guaranteed by the Fourth Amendment. This section examines enacted as well as proposed legislation at the beginning of the Chinese Exclusion era and illustrates how criminal language began to be enshrined in immigration apprehension statutes, and the resistance and objections Congress lodged in response. We discuss the early part of this period, before the passage of the Chinese Exclusion Act in 1882 (when

108. Page Act, ch. 141, 18 Stat. 477 (1875).

109. Kerry Abrams, *Polygamy, Prostitution, and the Federalization of Immigration Law*, 105 COLUM. L. REV. 641, 698 (2005).

110. While the Page Act of 1875 and the Chinese Exclusion Act of 1882 marked the federal government’s first venture into immigration regulation, and many historians have identified anti-Asian racism as the foundation of American immigration control, scholars have recently revisited the origins of federal immigration regulation. Irish immigration had been restricted by state-level policies of Eastern seaboard states throughout the early and mid-nineteenth century, and Massachusetts and New York statutes were used as precedents for immigration control of the Chinese in California and later for the exclusion of Chinese by the federal government. Many scholars pinpoint the origins of federal legislation policy in animus towards the Chinese in Western states like California, but state-level policies developed in New York and Massachusetts targeting the Irish may have been at the heart of cultural nativist sentiment of the earliest federal immigration control. After news of the Gold Rush in California, the Chinese started arriving in California in greater numbers than ever before, and California looked to the laws of New York (which had been enacted as a form of class legislation against Irish immigrants) to develop a racially restrictive measure against Chinese immigrants to prevent them from participating in gold mining. *See generally* HIDETAKA HIROTA, *EXPPELLING THE POOR: ATLANTIC SEABOARD STATES AND THE NINETEENTH-CENTURY ORIGINS OF AMERICAN IMMIGRATION POLICY* 9–10 (2017).

111. The Chinese Exclusion Era arose when the first federal legislation to exclude Chinese immigrants was considered and passed (1882) and ended at the repeal of the last exclusionary law (1943).

the idea of excluding the Chinese first emerged) to 1892 when the Geary Act was passed and officially criminalized Chinese immigration.

Outside of its earliest use in the Alien and Sedition Acts, language characterizing immigration apprehension as an “arrest” was used for the first time during the Chinese exclusion period as part of broader efforts to criminalize illegal presence, specifically for Chinese immigrants. Experimentation with criminalizing the presence of the Chinese during the Chinese exclusion period eased legislators into the idea of using criminal language to accomplish a civil objective and provided legislators with a model for excluding or deporting people considered “undesirable” from our Nation’s borders. We provide a historical recounting of the legislation leading up to, and including, the Geary Act to trace the use of the terms arrest and warrant to identify when and how these terms were first used in Chinese exclusion immigration statutes and to understand how legislators responded when criminal punishment was proposed as a solution for curtailing immigration without commensurate criminal due process procedure.

In 1882, following growing anti-Chinese sentiment among the American public and incidences of anti-Chinese violence,¹¹² Congress sought to build on the Page Act of 1875 by enacting legislation to prevent all Chinese immigration. Congress considered several bills throughout 1882 to meet this end. One of these initial attempts was Senate Bill 71, which would have suspended Chinese immigration for twenty years and would have delegated the power of “arrest” to an executive agent, the Secretary of the Treasury. This delegation was significant because it allowed for arrest without judicial trial or review and, at least as first drafted, called for the arrest and removal of Chinese persons without any *mens rea* requirement, a typically essential element when criminalizing an action. Amendments added each of these elements, however, and the final bill read as follows:

[N]o Chinese shall be permitted to enter the United States by land without producing to the proper officer of customs the certificate herein required of Chinese seeking to land from a vessel; and any Chinese who shall *knowingly* come into the United States contrary to the provisions of this act shall be *guilty of a misdemeanor*, and *on conviction thereof shall be punished* by a fine not exceeding \$100, or *by imprisonment not exceeding one year*, or both said punishments . . . and any Chinese unlawfully entering within the United States . . . shall be removed therefrom. . . .¹¹³

Though Congress was largely supportive of restricting Chinese immigration, Senate Bill 71 was controversial.¹¹⁴ First, some members of Congress contested the delegation of criminal sanction powers to the executive branch.

112. See generally BETH LEW-WILLIAMS, *THE CHINESE MUST GO: VIOLENCE, EXCLUSION, AND THE MAKING OF THE ALIEN IN AMERICA* 19–52 (2018).

113. 13 Cong. Rec. 1481 (1882) (emphasis added).

114. There was debate over the distinction of whether to restrict or exclude, and for how long of a period, in light of trying to uphold diplomatic treaty obligations between the United States and China. See, e.g., Beth Lew-Williams, *Before Restriction Became Exclusion: America’s Experiment in Diplomatic Immigration Control*, 83 PAC. HIST. REV. 24, 32–33 (2014).

Speaking in opposition to this authority, one Senator admonished the execution provisions of the bill. Specifically, he took issue with the fact that an executive officer could seize someone, decide that the individual is a “Chinaman here without authority of law, deprive him of his liberty without a trial, and send him out of the country.” The Senator further questioned “giv[ing] an executive officer power to punish a man for an act, namely, coming into the country, which we declare to be a crime, without a trial by a jury or without a warrant for his arrest.”¹¹⁵ Speaking against the unconstitutional legislative attempt to delegate the exercise of judicial powers to executive officers, he stated that:

[A]ll cases at law, criminal or not, shall be tried judicially, that the judicial power extends to every person in our country. We here, day after day, pass laws, notwithstanding we are sworn that we will not attempt to exercise any judicial power, conferring ministerial and executive officers power to deprive men of their liberty. When a Chinaman is here he is as much under the protection and jurisdiction of our laws as if he were a citizen, a Senator, a President or anyone else; to the extent that he has rights whatever they are, he should be protected in them. You cannot crucify him on a cross; you cannot arrest and imprison him arbitrarily; you cannot touch him except in the exercise of constitutional power vested in the constitutional tribunals of the country; yet we have a bill by which we sat that any collector of customs can seize any Chinese, decide that he is a Chinaman just arrived, and forcibly extradite him out of the country.¹¹⁶

These concerns with due process and the unconstitutional delegation of judicial powers over criminal law remain in discussions of immigration law today.

Another Senator decried the vast powers Senate Bill 71 bestowed upon local customs officials, contrasting the law with Congress’ first attempt to expel immigrants under the Alien and Sedition Acts:

[Senate Bill 71] confers on every collector of customs the authority to seize and forcibly remove from the country, without trial or legal process, every person of Chinese race whom he shall determine to be in the United States in violation of its provisions. The [Alien and Sedition Acts], passed when war was deemed imminent, at a time of great and dangerous excitement, conferred upon the President of the United States for a period limited to two years the power to order out of the country aliens whose presence he might judge dangerous to its peace, and gave him the further authority in case of actual war to cause the removal or resident aliens, natives or citizens of the hostile nation. . . . The alien law was overthrown because it interested the highest officer of the Government . . . with the power for two years to order the removal of a single person whose presence for good cause he deemed dangerous to the public peace. But here a local officer of the

115. 13 CONG. REC. 1639 (Mar. 6, 1882).

116. *Id.* (statement of Mr. Call).

smallest customs district may, yes, must forcibly seize and expel, without trial or judicial hearing, the Chinese whom he finds within his precinct, however excellent his character, however advantageous his presence.¹¹⁷

This speech is a clear example of opposition to the delegation of extensive police powers to executive officials in Senate Bill 71. While the Alien and Sedition Acts had also delegated power to executive officers, this delegation of judicial power had some limitations built in—a two-year expiration term and concentrated powers of removal. However, Senate Bill 71 retained no such redeeming features—there were no comparable temporal restrictions (the bill authorized the suspension of Chinese immigration for 20 years), and the bill entrusted junior government officials with the power to arrest based on racial identifiers. As a result, President Arthur vetoed the bill, characterizing it as a “breach of our national faith.”¹¹⁸ Even though Senate Bill 71 failed to become law, federal legislators continued to experiment with solutions to curb the perceived influx of Chinese immigrants, snatching increasing amounts of power from the judiciary over matters of criminal law in the process.

After President Arthur vetoed Senate Bill 71, Congress introduced the bill that would become the Chinese Exclusion Act of 1882.¹¹⁹ In an act of compromise, the Act prohibited the immigration of Chinese laborers for only ten years, rather than twenty years as provided for in Senate Bill 71, under penalty of imprisonment and deportation.¹²⁰ The words “arrest” or “warrant” do not appear at all in the Chinese Exclusion Act, but three sections mention imprisonment as a consequence of certain actions aiding the entry of Chinese laborers.¹²¹

While presenting a fraudulent certificate for entry was a crime that could land a Chinese laborer in jail, Congress did not enact a criminal penalty for simply being a Chinese person found unlawfully within the United States. Instead, the consequence of being found unlawfully in the United States was removal “after being brought before some justice, judge, or commissioner of a court of the United States and found to be one not lawfully entitled to be or remain in the United States.”¹²² While Congress’ goal of exclusion was clear, the method of exclusion was quite uncertain: there was no discussion of “arrest” or “warrants” in the statute and it is unclear just what kind of procedure Congress envisioned for the apprehension of Chinese immigrants.

However, the Chinese Exclusion Act of 1882 proved to be ineffective in accomplishing its stated objective to protect American laborers from the influx of Chinese laborers who “endanger[ed] the good order of certain localities.”¹²³ Perhaps more accurately, it failed to serve the purposes of the racialized, nativist sentiment that had permeated the country. Either way, the Act was underfunded, had inadequate

117. *Id.* at 1517 (Mar. 1, 1882) (statement of Mr. Hoar).

118. *Id.* at 2551–52 (Apr. 4, 1882).

119. Chinese Exclusion Act of 1882, ch. 126, 22 Stat. 58, *repealed by* Act of Dec. 17, 1943, ch. 344, Pub. L. N. 78-199, 57 Stat. 600. In 1943, Congress repealed the acts excluding the Chinese and people of Chinese descent. *See* Act of Dec. 17, 1943, Ch. 344, Pub. L. N. 78-199, 57 Stat. 600.

120. §1, 22 Stat. at 59; *see also* 13 CONG. REC. 1480 (Feb. 28, 1882).

121. §§ 2, 7, 11, 22 Stat. at 59–60.

122. *Id.* § 12.

123. *Id.* Preamble.

enforcement mechanisms, and contained no internal registration or passport system to differentiate those who were here legally from those who were not.¹²⁴ These structural flaws left U.S. borders “intentionally propped open” for Chinese immigrant laborers.¹²⁵

The latter half of the 1880s brought more restrictions against Chinese immigrants. In September 1888, Congress passed a bill prohibiting the immigration of Chinese laborers to the United States.¹²⁶ For the first time in federal immigration law, the Act of September 13, 1888, used clear criminal language in its apprehension scheme, which included the power to apprehend—indeed, to “arrest”—Chinese laborers suspected of being present unlawfully within the United States:

That any Chinese person, or person of Chinese descent, found unlawfully in the United States, or its Territories, may be *arrested* upon a *warrant* issued upon a complaint, under oath, filed by any party on behalf of the United States, by any justice, judge, or commissioner of any United States court, returnable before any justice, judge, or commissioner of a United States court, or before any United States court, and when convicted, upon a hearing, and found and adjudged to be one not lawfully entitled to be or remain in the United States, such person shall be removed from the United States to the country whence he came.¹²⁷

Despite the use of criminal language within the apprehension scheme, the Act of September 13, 1888, was unclear about whether the offense of being “of Chinese descent” and “found unlawfully in the United States” was civil or criminal. The Act also did not state what rights an accused individual retained. Through the Act, Congress had sanctioned the use of forcible arrest simply for appearing Chinese and allowed those arrested to be deported upon less proof than required for a criminal trial. Yet, no criminal trial determined guilt, no proof of criminal intent was necessary, no criminal rules of evidence pertained, and no criminal standard of proof applied. While the Act’s warrant requirement offered a wisp of protection against government intrusion and seizure, as an arrest could not occur without first applying for and receiving a warrant of arrest from a judge, the evidence required to support an application for a warrant was only that the accused appeared Chinese. Presenting visual evidence and supporting witness testimony that an individual looked Chinese put the accused in the position of having to prove his right to remain in the United States affirmatively. Witness testimony that the accused appeared Chinese, combined with a lack of affirmative evidence produced by the accused that he had the right to remain in the United States, provided enough evidence for a judge to issue a deportation order.

Legislative efforts to restrict Chinese entry and presence (including Senate Bill 71, the Chinese Exclusion Act of 1882, and the Act of September 13, 1888) are the first time we see criminal arrest machinery operating to control the presence of a

124. Lew-Williams, *supra* note 114, at 34.

125. *Id.*

126. Act of Sept. 13, 1888, ch. 1015, 25 Stat. 476, *repealed by* Act of Dec. 17, 1943, ch. 344, Pub. L. No. 78-199, 57 Stat. 600.

127. *Id.* § 13 (emphasis added).

group of immigrants within the interior of the United States. Contrary to *Abel's* suggestion that these efforts went uncontested, legislators were actively opposed to the idea that an individual could be forcibly seized and detained upon suspicion of being in the United States unlawfully, and that extensive policing powers were being transferred to low-level executive agents with minimal knowledge and training.

Despite Congress' attempts throughout the 1880s to limit the immigration of Chinese laborers, it had not found a "fix" to eliminate the influx of Chinese immigrants quickly enough for their constituents. As anti-Chinese sentiment gained momentum, Congress commissioned a group to investigate the immigration of the Chinese to the United States and to decide what additional legislation could more expeditiously eradicate the Chinese.¹²⁸

i. Investigation on Chinese Immigration by the House Committee on Immigration and Naturalization (1890–91)

Between 1890 and 1891, a subcommittee of the House Committee on Immigration investigated "the immigration of Chinese to this country" and inquired about "what further legislation, if any, would be desirable on this question."¹²⁹ One proposed solution was emerging in response to the increase in negative public sentiment towards the Chinese—criminalization, for all Chinese in the United States, of the act of being unlawfully present within the United States. The subcommittee published its findings in January as the Report on Chinese Immigration.

The subcommittee was greatly concerned with the desire to preserve white racial superiority in the United States by prohibiting Chinese immigration. The subcommittee evidenced this concern by creating loose associations that tied the Chinese to criminality and debaucherous activity—a technique often used today against immigrant groups. Testifying witnesses abhorred the practices and customs often attributed to the Chinese and used those practices to "prove" that the Chinese were unassimilable with whites. One Senator stated, "[t]he Chinese are addicted to all vices, and their evil influence is speedily spreading to an alarming degree among our own people. They have introduced the opium habit among the white population, and this is increasing especially among the younger portion of the community."¹³⁰ Another witness complained that the Chinese were "not a desirable class of people to have in the midst of white people" because "they are not very cleanly."¹³¹ According to the Report, Chinese people were deemed responsible for the general demise of the white American by introducing things like gambling, sexual deviancy, immorality, and poor living conditions, and by driving down wages below what "the [w]hite man c[ould] afford to work for."¹³² Criminalizing unlawful presence emerged at a time when white Americans were seeking to preserve racial hegemony; today, the persistence of criminal statutory language memorializes these racialized policies.

128. H.R. REP. NO. 51-4048, at I–III (1891).

129. *Id.* at I.

130. *Id.* at III (statement of Sen. Lehlbach).

131. *Id.* at 72 (statement of Charles B. Wood).

132. *See, e.g., id.* at 3, 58, 371.

At the end of the investigation, the subcommittee solicited public opinion on how best to rid the nation of Chinese immigrants. One individual proposed the following deterrence scheme:

It appears to me that if there were a penalty attached to the infraction of this law that the Chinamen . . . would be scared. Now there is an infraction of our law and instead of a penalty we put them on board a steamer and pay their passage back home. There seems to be no great hardship attached to that . . . I would suggest they be put to work at hard labor for a time and then sent back . . . I would put them into the penitentiary and let them work a month or two. When they know something of that kind is going on they will be very cautious about coming over here.¹³³

The subcommittee's report frequently alluded to the idea of an increasingly punitive punishment scheme to include prison time for unlawful presence to deter entry.¹³⁴ The next piece of Chinese exclusion legislation, commonly referred to as the Geary Act, aimed to accomplish just that goal.

ii. The Geary Act

Desperate for a solution to control the "Chinese problem," the Geary Act of 1892 sought to supplement Chinese exclusion by designing a system that could "catch" Chinese immigrants who had crossed the border without detection or official admission. The Act proposed an administrative certificate system whereby all Chinese persons or persons of Chinese descent were forced to obtain an "internal passport" and to carry it on their person at all times to prove that they had entered the United States legally, extending the enforcement of immigration controls into the nation's interior.

Before the Geary Act, immigration restrictions were enforced almost exclusively at the border. Thus, its passage marked an important shift in federal immigration enforcement—what had started as a policy centered around *exclusion* expanded to include the *deportation* of people who had already made their way past

133. *Id.* at 96 (statement of James G. Swan).

134. *Id.* at 68 ("The offer of a small reward that would lead to the capture of Chinese illegally in the country would do very well, and I think the idea of putting them at hard labor and then sending them back would tend more to keep them out."); *id.* at 86 ("Q—Do you think the Chinese would be as likely to come in if they were punished for their coming in? A—Punish the Chinaman? Q—Yes; suppose they were to put him at hard labor for 6 months before sending him back? A—Yes, sir; I think that would scare him."); *id.* at 96 ("It appears to me that if there was a penalty attached to the infraction of this law that the Chinamen . . . would be scared. Now there is an infraction of our law and instead of a penalty we put them on board a steamer and pay their passage back home. There seems to be no very great hardship attached to that . . . I would suggest they be put to work at hard labor for a time and then sent back. . . . I would put them into the penitentiary and let them work a month or two. When they know something of that kind is going on they will be very cautious about coming over here."); *id.* at 115 ("I should say punish them enough to pay for their trouble and then send them back to China. Put them in prison and make them work long enough to earn their fare back."); *id.* at 133 ("[A]s Judge Swan wisely said the other day, make it a penitentiary offense for him to come in instead of attempting to force them back into Canada, place them for a term of years in the penitentiary at hard labor"; and "[i]f you can make it an offense punishable by imprisonment, for the Chinese to force themselves into the country, then you have taken a step that will enable you to come nearer enforcing the exclusion act than you otherwise could.").

U.S. borders to settle.¹³⁵ The Secretary of the Treasury, who was in charge of immigration functions at the time, submitted the following letter to the Senate, drafted by a “Chinese Inspector” in support of draft legislation that would eventually become the Geary Act:

It must be evident now . . . that it is not safe to rely on guarding our border lines by officers only. With the present laws in force, the Army and Navy combined, scattered along the interior lines, could not prevent Chinamen from smuggling into the country. Under the operations of the present law any number of Chinamen on our border may, any night, by means of guides, evade the vigilant officers of the Government, pass in, on some by-way, join their countrymen in their “Chinatown,” don a different guise, and appear the next day on our streets, in defiance of law and officers; the officers may recognize them as smuggled Chinamen, yet for want of proper authority and evidence are powerless to bring them to justice. Convinced by personal experience and long observation of the imperfect operation of the present law, I hereby submit for your consideration a system of registration believing that, as a whole, it will completely prohibit the coming of unauthorized Chinamen from any quarter, and largely diminish the number already in the country.¹³⁶

After being only minimally involved in immigration matters for the first hundred years, the federal government’s power to keep people out began creeping further into the Nation’s interior.

Mimicking existing California state laws that prohibited Chinese immigration, the Geary Act crystalized the idea of criminalizing unlawful presence. The stated purpose of the California law had done just that:

An Act to prohibit the coming of Chinese persons into the State . . . and to provide for registration and certificates of residence, and determine the status of all Chinese persons now resident of this State, and fixing penalties and punishments for violation of this Act, and providing for deportation of *criminals*.¹³⁷

Under the California law, Chinese residents were required to apply for “certificates of residence” within a year after the passage of the statute, and failure to comply with these licensing regulations was deemed a criminal act.¹³⁸ The law included those who could not affirmatively establish citizenship as people who were “unlawfully in this State.” Peace officers, sheriffs, constables, and “all other persons authorized to make arrests” in the State then apprehended those individuals

135. See, e.g., KANSTROOM, *supra* note 18, at 115–23 (examining how the Geary Act led to the development of the plenary power doctrine, or the power inherent in a nation’s sovereignty to exclude and deport those individuals Congress has determined are unfit to remain within its borders).

136. S. MISC. DOC. No. 52-67, at 2 (1892).

137. Act of Mar. 20, 1891, Preamble, 1891 Cal. Stat. 185 (emphasis added).

138. *Id.* § 13.

suspected of being in the United States unlawfully.¹³⁹ If the individual could not prove citizenship to a U.S. federal judge, the penalty was deportation.¹⁴⁰

Like the California law, the Geary Act required Chinese immigrants to obtain a certificate stating they were in the United States lawfully and carry it at all times. The faults in this certificate system were well known to Congress. Just one day before the Act passed, after describing the challenges of a Chinese resident obtaining a certificate of residence required by the new law, one lawmaker stated:

If he is not granted a certificate . . . he is arrested, imprisoned six months or less, and then expelled from the country. If he obtains it he must carry it around with him or be liable instantly and always to arrest, imprisonment, and deportation like a convict. . . . Never before in a free country was there such a system of tagging a man, like a dog to be caught by the police and examined, and if his tag or collar is not all right taken to the pound or drowned or shot. . . . But here are more than 100,000 men, innocent of offense, who must obtain this certificate, this ticket of leave, and carry it around them in a free country! . . . Who rises here to propose labeling an Englishman or German when he goes through this country, or else make him liable to arrest, imprisonment, and expulsion?¹⁴¹

Criminalizing nothing more than mere presence in the United States without proper documentation was an audacious step that shocked the conscience of some lawmakers and enlarged the scope of the federal government's power in unprecedented ways.

However, the bill's sponsor minimized criticisms of the certificate system by suggesting that there was "nothing new" about this practice, analogizing it to the burden of proof required of someone who had engaged in the sale of alcohol or tobacco and had violated the license requirement:

[W]hen we arrest a man for a violation of the revenue laws, the burden of proof is on him to establish his right to deal in those articles, and is not on the people to prove him guilty. This bill is precisely similar. It simply requires another individual to produce a license in the shape of a certificate.¹⁴²

The concept of imposing an ethnicity tax as a prerequisite for constitutional freedom and likening it to a license for the sale of alcohol or tobacco provides a telling glimpse into the minds of yesterday's legislators. Certificates of residency created a class of suspect residents whose ethnicity and appearance made their access to basic constitutional freedoms conditional upon the payment of a residency tax.

While Congress repealed the Geary Act in 1943, its legacy remains. The criminal language used to operationalize apprehension without the "bundle of

139. *Id.* § 187–91 (describing procedure for questioning of Chinese people and applying for a warrant if a Chinese person is not carrying his or her certificate of residence).

140. *Id.* § 188.

141. 23 CONG. REC. 3923 (1892) (statement of Rep. Hitt).

142. 23 CONG. REC. 3924 (1892) (statement of Rep. Geary).

procedural rights recognized in criminal cases”¹⁴³ persists to justify the criminal policing of non-criminal immigrants today. The Geary Act and the Act of September 13, 1888, were intended and designed to facilitate the capture of an ethnic group deemed “unassimilable” by white American standards. The language of modern-day apprehension and unlawful presence statutes is rooted in these early experimental legislative efforts to accomplish racial exclusion by equating presence with criminality. Early textual choices first used in exclusionary legislation directed against the Chinese remain embedded in our modern-day apprehension framework, and the effects of those choices perpetuate confusion, irrational fear, and harmful narratives, and further sanctions the sub-constitutional treatment of immigrants.

Framed as a “radical” change to address the defects in prior exclusion laws, the Geary Act aimed to “stop all the leaks” and then “leave the revision of the system to some other Congress,”¹⁴⁴ foreshadowing immigration practices to come. Understanding better how the terms “arrest” and “warrant” first found their way into statutes aimed at restricting Chinese immigration, we next trace use of this language in Sections 1226 and 1357 to identify how and when this language first appeared in modern-day apprehension statutes.

IV. TRACING THE ROOTS OF THE TERMS “ARREST” AND “WARRANT” IN SECTIONS 1226 AND 1357

This Part investigates Congressional amendments to the bills that would eventually become Sections 1226 and 1357 by using comparative prints and legislative history to determine when and how the terms “arrest” and “warrant” were first used in these bills, and how the use of criminal law language evolved over various amendments.¹⁴⁵ Further, we share stories of legislators who challenged the enduring effort to expand executive policing power into the interior of the United States. Finally, we further repudiate the Court’s flawed characterization in *Abel v. United States*¹⁴⁶ that administrative arrest warrants have the “sanction of time” by exposing the historical fallacies inherent in the *Abel* Court’s logic and presenting the Court’s dicta¹⁴⁷ as incomplete, if not wholly inaccurate.

143. Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469, 472 (2007) (arguing that the immigration system has increasingly been absorbing the methods of criminal enforcement without procedural protections afforded by the adjudicative process); see also Ingrid V. Eagly, *Prosecuting Immigration*, 104 N.W. UNIV. L. REV. 1281, 1294 (2010).

144. 23 CONG. REC. 3924 (1892) (statement of Rep. Geary).

145. STAFF OF COMM. S. ON THE JUDICIARY, 82D CONG., PUBLIC LAW 414: COMPARATIVE PRINT OF THE TEXTS OF THE IMMIGRATION AND NATIONALITY ACT AND IMMIGRATION AND NATIONALITY LAWS EXISTING PRIOR TO ENACTMENT OF PUBLIC LAW 414 (Comm. Print 1952). The introduction of this document notes that in most cases, the prior language comes from the Act of 1917, the Act of 1924 and the Nationality Act of 1940. *Id.* at 3.

146. See 362 U.S. 217 (1960).

147. *Id.* at 230.

A. Section 1226 (“Apprehension and Deportation of Aliens”)

i. 1952 Comparative Print History

Today, Section 1226 bestows immigration officers, who are agents of the executive branch, with the power to arrest individuals suspected of being in the United States unlawfully.¹⁴⁸ We use the comparative print history from the Immigration and Nationality Act of 1952 (“INA”) to trace the enshrinement and the evolution of the criminal language (“arrest” and “warrant”) found in present-day 8 U.S.C. Section 1226.¹⁴⁹

The Act of 1917 is the earliest predecessor of Section 1226 identified in the INA’s print history. The current language of Section 1226 mirrors language from Sections 19 and 20 of the Act of 1917. Sections 19 and 20 authorized immigration officers to find and deport individuals who had entered or remained within the United States unlawfully. In pertinent part, the Sections stated:

[Sec. 19] . . . at any time within five years after entry . . . any alien who shall have entered or who shall be found in the United States . . . shall upon the *warrant* of the Secretary of Labor, be *taken into custody* and deported. . . . [A]ny person who shall be *arrested* under the provisions of this section, on the ground that he has entered or been found in the United States in violation of any other law thereof which imposes on such person the burden of proving his right to enter or remain, and who shall fail to establish the existence of that right claimed, shall be deported. . . .

[Sec. 20] Pending the final disposal of the case of any alien so *taken into custody*, he may be released under a bond in the penalty of not less than \$500 with security approval by the Secretary of Labor, conditioned that such alien shall be produced when required for a hearing or hearings in regard to the charge upon which he has been *taken into custody* and for deportation if he shall be found to be unlawfully within the United States.¹⁵⁰

Criminal law terms are present in both Sections: Section 19 uses the term “arrest” explicitly for the apprehension of individuals found unlawfully within the United States. On the other hand, while Section 20 does not use the term “arrest,” it instead uses the phrase “taken into custody.” Other criminal law terms are present throughout Sections 19 and 20,¹⁵¹ bolstering the idea that an individual found and

148. 8 U.S.C. § 1226 (“On a warrant issued by the Attorney General, an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States.”); *see also* 8 U.S.C. § 1357(a)(1), (2). The remainder of Section 1357 qualifies the arrest with language that the alien should be taken “without unnecessary delay for examination before an officer of the Service having authority to examine aliens as to their right to enter or remain in the United States.” 8 U.S.C. § 1357(a)(2).

149. Since the passage of the McCarran-Walter Act in 1952, the language in 8 U.S.C. Section 1226 has not changed significantly.

150. Immigration Act of 1917, Pub. L. No. 64-301, §§ 19–20, 39 Stat. 874, 889–91 (1917) (emphasis added).

151. *Id.* §§ 19–20. The individual was to be released on “bond” which shall guarantee that the individual will appear for his hearing, and he shall return to defend himself against the “charge” for which he was taken into custody.

apprehended for being unlawfully in the United States is a criminal and should be treated as such.

The only other legislative precursor to Section 1226 identified in the comparative print history is the Internal Security Act of 1950, which stated:

Pending final determination of the deportability of any alien *taken into custody* under *warrant* of the Attorney General, such alien may in the discretion of the Attorney General (1) be continued in custody; or (2) be released under bond in the amount not less than \$500, with security approved by the Attorney General; or (3) be released on conditional parole. It shall be among the conditions of any such bond . . . that the alien shall be produced, or will produce himself, when required to do so for the purpose of defending himself against the charge or charges under which he was *taken into custody* and any other charges which subsequently are lodged against him, and for deportation if an order for his deportation has been made.¹⁵²

As in the Act of 1917, “arrest” is not explicitly used, but “taken into custody” is used twice. Further, additional criminal terminology was inserted—the individual now could be released on “conditional parole” while he waits to “defend . . . himself against the . . . charges.” Despite the growing use of criminal language in immigration apprehension statutes, courts continue to insist on the civil nature of this process.

ii. *Analogous Language Pre-Act of 1917*

The comparative print history of the INA ended with the Act of 1917, but some language in Section 1226 predates the Act of 1917 and appears in the Act of 1907. The Act of 1907 broadened the categories of “defective” individuals to be excluded from entry into the United States or deported after arrival—among them, “imbeciles,” “feeble-minded persons,” those with political persuasions deemed averse to U.S. interests, and those coming for “immoral purposes.”¹⁵³ While no print history shows how language from the Act of 1907 was incorporated into the Act of 1917, there are word and phrase analogs between both Acts which make it reasonable to assume that drafters of the Act of 1917 borrowed language from the Act of 1907.

Section 20 of the Act of 1907 contained language similar to the language later found in Section 19 of the Act of 1917:

Sec. 20. That any alien who shall enter the United States in violation of law . . . shall, upon the *warrant* of the Secretary of Commerce and Labor, be *taken into custody* and deported to the country whence he came . . . provided, that pending the final disposal of the case of any alien so *taken into custody*, he may be released under a bond in the penalty of not less than five hundred dollars with security approved by the Secretary of Commerce and Labor, conditioned that such alien shall be produced when

152. Internal Security Act 1950, Pub. L. No. 81-831, § 20(a), 64 Stat. 987, 1011 (1950).

153. Immigration Act of 1907, Pub. L. No. 59-96, 34 Stat. 898, 898–99 (1907).

required for a hearing or hearings in regard to the charge upon which he has been *taken into custody*, and for deportation if he shall be found to be unlawfully present in the United States.¹⁵⁴

Further, the Act of 1907 has a comparative print history that reveals the Act made modifications to the Immigration Act of 1903.¹⁵⁵ The Act of 1903 also contained artifacts of language from modern-day Section 1226. However, the use of criminal terminology in immigration apprehension was noticeably “stepped-up” between 1903 and 1907. For example, before 1907, there was no statutory requirement for a warrant to carry out an immigration arrest.¹⁵⁶ Additionally, the term “bond” and the phrase “taken into custody” appear for the first time in the Act of 1907.

The criminal language imported by the Act of 1907 expanded immigration policing powers by re-envisioning how immigration authorities could apprehend individuals believed to be in the country unlawfully. This criminal language was retained by the Act of 1917, which also broadened the classes of deportable immigrants, including those who entered the United States without inspection or who entered anywhere other than a designated inspection point.¹⁵⁷ These immigrants were now subject to “arrest” and deportation if they could not affirmatively establish their right to remain in or to enter the United States.¹⁵⁸ In addition to broadening the applicability of the apprehension scheme, Section 19 of the Act of 1917 also added a major challenge for the apprehended immigrant—the order of the Secretary of Labor to deport was to be final without judicial review.¹⁵⁹ Delegating such absolute

154. *Id.* at 904–05.

155. WILLIAM DILLINGHAM, REGULATING THE IMMIGRATION OF ALIENS INTO THE UNITED STATES, S. DOC. NO. 59-318, at 9–10 (1907).

156. *Bosny* provides clarification on that the legislature intended the term *warrant* to mean a warrant of arrest, rather than a warrant of deportation. *United States ex rel. Bosny v. Williams*, 185 F. 598, 598 (S.D.N.Y. 1911) (“These rules prescribe[d] that upon an application to the Secretary of Commerce and Labor for a warrant of arrest a statement of the facts, supported, if practicable, by affidavits, [wa]s to be submitted, and thereupon, if it appear[ed] to the Secretary that a case [wa]s made out, a warrant of arrest [was to] be issued.”). The concept of an administrative arrest “warrant” was indeed confusing from an enforcement perspective—arrest warrants could be issued upon suspicion that an individual had violated an immigration regulation that happened prior to entry. A criminal conviction beyond a reasonable doubt was unnecessary to accomplish deportation. The standard for guilt was inconsistent and could shift depending on the inspector hearing the case but was always significantly less than the standard of proof required for a criminal trial. The individual was apprehended for a criminal offense, tried according to sub-criminal protections and methods, and deportation was the proxy for criminal punishment, rather than incarceration. The court described the entire procedure as a “method of procedure [that] disregards almost every fundamental principle established in England and this country for the protection of persons charged with an offense.” *Id.* at 599. The administrative warrant of arrest subjected, and continues to subject, individuals to the penalty of deportation on mere suspicion of a crime, using substandard criminal due process during the hearing and upending the burden of proof required in a criminal trial. Since *Bosny*, the procedural aspects of deportation have improved in some ways, adding immigration judges to improve neutrality and formalizing and strengthening the procedural protections of hearings. Nevertheless, *Bosny* remains a good example of the early line-blurring between criminal and civil aspects of the deportation process with respect to the administrative warrant of arrest.

157. Immigration Act of 1917 § 19.

158. *Id.*

159. *Id.*

authority to an executive officer was quite controversial and stirred up much debate in Congress.¹⁶⁰

However, despite the “stepped-up” criminal language in the Act of 1907, the effectiveness of the scheme remained limited for at least two reasons: (1) an individual had to be apprehended within five years of arrival, and (2) he had to be a “public charge” to be deportable. The condition for which the individual was being deported must have existed before his entry, which was difficult to prove given the length of time since entry and the complexity of ascertaining the date of entry. These statutory limits reflected public thinking at the time—that someone who had successfully crossed the United States border could only be arrested and deported if that individual would not be permitted to enter anyway.¹⁶¹ The authority to apprehend “public charges” was conditioned upon the possession of underlying exclusion criteria—some “preexisting” condition or act that had existed before entry. The power to control immigration mostly hinged on the Nation’s borders, on the timing of entrance, and on the individual’s condition when he arrived—efforts to apprehend those who had reached the interior United States were limited. Immigration authorities did not yet have the power to arrest an individual when they could not establish that person entered with a preexisting condition.

Nevertheless, now there was a method of seizing those who had violated entry criteria yet were well within the Nation’s borders, and the authority to arrest was consolidated into the hands of one executive official—the Secretary of Labor.

iii. Legislative History of Section 1226

Like the exclusionary acts of the 1800s,¹⁶² congressmen vehemently criticized the Act of 1917 for its broad delegation of immigration enforcement to executive officials. These criticisms run counter to the *Abel* majority’s assertion that immigration administrative arrests have the unchallenged historical legitimacy that was sanctioned by time. A member of the Committee on Immigration and Naturalization, for example, stated: “For a great many reasons, we seriously urge against the enactment of this measure . . . and giving to the immigration officials a greater power than has ever been vested in a public official.”¹⁶³

Major pushback came when Section 1226 was amended to give the Secretary of Labor the exclusive power to expel immigrants without judicial review. Before 1917, while executive officers had the power to deport,¹⁶⁴ the decisions were not final. Legislators debated the scope of the Act and the constitutionality of

160. See *infra* Part IV(A)(3) (discussing the legislative history of 8 U.S.C. § 1226).

161. KANSTROOM, *supra* note 18, at 124–26. Kanstroom provides a framework for how the immigration system has expanded and evolved, starting with the theory of this system as one of “extended border control” and the shift that occurred over a period of decades to a theory of “post-entry social control,” beginning in the early 1890s.

162. See *supra* Part III.

163. H.R. REP. NO. 64-95, pt. 2, at 4 (1916).

164. The Secretary of Commerce, prior to the Secretary of Labor, and the Secretary of the Treasury, prior to the Secretary of Commerce, had the power to order an individual to be deported but this power was subject to review. SAGE Publications, *The SAGE Encyclopedia of Surveillance, Security, and Privacy* 497 (Bruce A. Arrigo ed., 2016).

delegating to the Secretary of Labor the final, non-reviewable power to deport.¹⁶⁵ One Congressman questioned the fairness of an Act that could be administered by one individual who might have biased views on immigration:

There may be a prejudiced Secretary of Labor . . . who is wholly in favor of immigration or he may be bitterly opposed to it, and in such a case, the rights of an alien, if he had any under the American law, may be very much prejudiced by a Secretary who has already made his mind up on the subject. . . . You seem to be taking away from the alien the writ of habeas corpus. I think there ought to be some chance for a man who is thus seized . . . [a] man who is seized and charged by somebody . . . is at once at the mercy of an officer who may be prejudiced.¹⁶⁶

Later, he continued, questioning the constitutionality of the provision:

In giving exclusive jurisdiction to the Secretary of Labor, it conflicts with the Constitution. . . . There is no reason why Congress should make trouble for itself by passing a law . . . which is unconstitutional . . . if it provides that in a matter of human rights the Secretary of Labor shall have exclusive jurisdiction. . . . The right to go to a court . . . is denied by this provision.¹⁶⁷

Congressional concern for the eroding rights of the immigrant under an administrative system that exchanged due process for efficiency was plentiful, in contrast to the portrayal offered by the *Abel* majority framed it. We next turn to and similarly analyze 8 U.S.C. Section 1357.

B. Section 1357 (“Powers of Immigration Officers”)

i. 1952 Comparative Print History

As in our above analysis of Section 1226, in this section we use the INA’s comparative print history to trace the use of criminal language in Section 1357 and later amendments to it. The oldest statute referenced in the comparative print history for Section 1357 is the Act of 1925. The Act of 1925 contains the earliest statutory delegation of the power to arrest without a warrant to immigration officers. The print history also references the Act of August 7, 1946, which drafters of the INA used in writing Section 1357.

The Act of 1925 significantly enlarged the power of border patrol¹⁶⁸ officers operating at the United States border. The Act both funded the newly created border control and expanded immigration officials’ power by granting agents the ability to arrest individuals without a warrant. Additionally, it is the act with the earliest roots of language found in modern-day in Section 1357:

165. 64 Cong. Rec. 5165-5172 (1916).

166. 64 Cong. Rec. 5167 (1916) (statement of Mr. Moore).

167. 64 Cong. Rec. 5172 (1916) (statement of Mr. Moore).

168. One year after Border Patrol was formed, it was tasked with the power to apprehend immigrants under 8 U.S.C. 1226. H.R. 11753, 68th Cong., 43 Stat. 1049 (1925).

[A]ny employee of the Bureau of Immigration . . . *shall have power without warrant* . . . to arrest any alien who in his presence or view is *entering or attempting to enter* the United States in violation of any law or regulation made in pursuance of law regulating the admission of aliens. . . .¹⁶⁹

The power to arrest without a warrant was authorized by statute in 1925, but the practice had been common before the Act's passage and was beginning to occur deeper and deeper into the Nation's interior.¹⁷⁰

In 1946, Congress amended the Act of 1925 and expanded border patrol's power to execute a warrantless arrest beyond the border and deeper into the *interior* of the United States:

Any employee of the Immigration and Naturalization . . . shall have power *without warrant* . . . [t]o arrest any alien who in his presence or view is entering or attempting to enter the United States in violation of any law . . . , *or any alien who is in the United States in violation of any such law or regulation and is likely to escape before a warrant can be obtained for his arrest* . . . ; [and] [t]o board and search for aliens any vessel within territorial waters of the United States, railway car, aircraft, conveyance, or vehicle, *within a reasonable distance from any external boundary of the United States*.¹⁷¹

The 1946 amendments significantly broadened the power of immigration officials to execute warrantless arrests beyond the boundary of the U.S. border.

Just a few years later, Congress granted even more power to border patrol in the McCarran-Walters Act that allowed officers to question individuals believed to be in the United States unlawfully without a warrant.¹⁷² Congress also modified the statutory language adding the level of suspicion an immigration officer needs to effectuate a warrantless arrest:

Any officer . . . shall have power without warrant . . . to arrest any alien in the United States, if he has *reason to believe* that the alien so arrested is in the United States in violation of any such law or regulation and is likely to escape before a warrant can be obtained for his arrest. . . .¹⁷³

169. H.R. 11753, 68th Cong., 43 Stat. 1049 (1925) (emphasis added).

170. See Reuben Oppenheimer, *Recent Developments in the Deportation Process*, 36 MICH. L. REV. 355, 360, 363–64 (1938) (“It has been, at least formerly, a common practice for immigration officers to arrest suspected aliens without warrant.”); see also Francis Fisher Kane, *Challenge of the Wickersham Deportations Report*, AM. INST. CRIM. L. & CRIMINOLOGY, 575, 582, 599–600 n.9 (1932) (discussing the practice of arresting immigrants without warrants in Los Angeles).

171. H.R. 386, 79th Cong., 60 Stat. 865 (1946) (emphasis added).

172. 8 U.S.C. § 1357(a)(1) (1952) (as amended); COMM. ON THE JUDICIARY, 82ND CONG., COMPARATIVE PRINT OF THE TEXTS OF THE IMMIGRATION AND NATIONALITY ACT AND IMMIGRATION AND NATIONALITY LAWS EXISTING PRIOR TO ENACTMENT OF PUBLIC LAW 414 (Comm. Print 1952) (contrasting the McCarran-Walters Act with prior acts and noting the addition of new language).

173. 8 U.S.C. § 1357 (a)(2).

It is unclear if the addition of this “reason to believe” language in Section 1357(a)(2) liberalized administrative arrest authority by permitting immigration officers to arrest individuals based on suspicion, rather than constructive knowledge, of an immigration violation.¹⁷⁴ Interrogation powers, added in 1952 under 1357(a)(1), expanded Immigration and Naturalization Service (“INS”) authority to enforce immigration regulations.¹⁷⁵ The “reason to believe” language may have been added in 1952 to supplement the newly codified interrogation power, clarifying that officers might now develop a “reason to believe” that an immigrant is unlawfully present after an interrogation. Regardless of the underlying reason, immigrants present unlawfully within the United States can now be arrested, sometimes without even obtaining a warrant; unlike a criminal, however, the officer need only suspect that the individual has committed a civil offense to interrogate and arrest.

ii. Legislative History of the Act of 1925 and the Act of 1946

Next, we provide the legislative history and social context of each Act mentioned in the comparative print history for Section 1357 to demonstrate that the extensive powers being delegated to immigration officers did not have the “sanction of time” and that there was indeed Congressional discussion, and even resistance, to the delegation.

Understanding the congressional climate and culture that existed during the 1920s and through the 1940s contextualizes the era’s immigration legislation, including the Act of 1925 and the Act of 1946. Explicit racism prevailed in the early twentieth century and congressional conversation reflected a culture imbued with white supremacy. For example, one senator concluded a 1925 debate with a racist joke about “two darkies.”¹⁷⁶ After the punchline, the entire Senate erupted in laughter.¹⁷⁷ Without missing a beat, the same group of senators moved on to debate the scope of power immigration officers should have to make arrests at the border.¹⁷⁸ The senators’ ability to create unbiased legislation to protect the Fourth Amendment rights of immigrants despite their comfort with these overtly racist beliefs is dubious.

Additionally, in 1929, President Hoover initiated a mass Mexican repatriation effort to expand the job market for Americans at the dawn of the Great Depression. Mexican laborers had been entering the United States in greater numbers

174. Courts today have been fairly consistent in requiring a “reason to believe” standard to be equivalent to a probable cause standard in order to withstand constitutional scrutiny. *Au Yi Lau v. Immigr. & Naturalization Serv.*, 445 F.2d 217, 222 (D.C. Cir. 1971); *see also*, *Tejeda-Mata v. Immigr. & Naturalization Serv.*, 626 F.2d 721, 725 (9th Cir. 1980) (“The phrase ‘has reason to believe’ [in § 1357] has been equated with the constitutional requirement of probable cause.”); *United States v. Cantu*, 519 F.2d 494, 496 (7th Cir. 1975) (“The words [in § 1357] of the statute ‘reason to believe’ are properly taken to signify probable cause.”); *United States v. Quintana*, 623 F.3d 1237, 1239 (8th Cir. 2010) (“Because the Fourth Amendment applies to arrests of illegal aliens, the term ‘reason to believe’ in § 1357(a)(2) means constitutionally required probable cause.”).

175. “Between 1925 and 1952, INS officers had regularly questioned people about their citizenship. Both proponents and opponents of the 1952 bill believed that Section 1357 (a)(1) was an augmentation, not a limitation of then-existing INS powers.” *Zepeda v. U.S. Immigr. & Naturalization Serv.*, 753 F.2d 719, 726 (9th Cir. 1983).

176. 69 CONG. REC. 3178, 3201–02 (Feb. 7, 1925) (statements of Sen. Kenneth McKellar).

177. *Id.*

178. *Id.*

since the early twentieth century to fill labor gaps created by the increasing unavailability of Chinese and Japanese laborers who had been deported because of the racially motivated immigration restrictions of the late nineteenth century.¹⁷⁹ Mexican laborers, like the Chinese individuals of the prior century, were demonized and blamed for poor labor conditions and domestic employment shortages. To stem the tide of a perceived influx of immigrants at the Mexico-U.S. border, Congress went on to pass legislation that criminalized illegal entry for the first time—only four years after border control was granted the power to execute warrantless arrests.¹⁸⁰ Significant resources were deployed to expand border control and to deport Mexican laborers.¹⁸¹

Then, in January 1930, a House of Representatives committee convened to create designated points of entry along the border and to create a more unified border patrol.¹⁸² The committee revealed more Congressional resistance to the expanding powers assigned to border patrol. The committee took statements from the Commissioner of Immigration and the Assistant Commissioner of Immigration to better understand existing border patrol operations. The committee identified six areas of interest, including the acceptable patrolling standards as a function of the distance from the border and the distance a patrol agent could pursue without a warrant.¹⁸³ In response to a question about how far into the interior a patrolman could pursue someone without a warrant, the Commissioner responded that “[g]enerally speaking . . . the people do not object to border patrolmen going back if they are in pursuit of somebody, even going back 50 or 100 miles.”¹⁸⁴

On the topic of border patrol executing warrantless arrests, the Assistant Commissioner provided additional insight.¹⁸⁵ He firmly contended that border patrol had broad authority to execute a warrantless arrest if agents were in pursuit of a “hot trail” (a trail that led directly from the border), if agents had “reasonable grounds” to believe they were following a hot trail, or if agents were “following such aliens who make no trail, but who are upon information believed to be proceeding into the

179. See discussion *supra* Part III(B).

180. See S. 5094, 70th Cong., 45 Stat. 1551 (1929) (codified at 8 U.S.C. § 180 (1929 supp. III)); see Doug Keller, *Rethinking Illegal Entry and Re-Entry*, 44 LOY. U. CHI. L.J. 65, 72 (2012) (describing this move by Congress as a “shift in thinking” and one that “wedded the crime with the goal of deterrence”); Jennifer M. Chacón, *Unsecured Borders: Immigration Restrictions, Crime Control and National Security*, 39 CONN. L. REV. 1827, 1837 (2007).

181. See *Mexican Repatriation (1929-1936)*, IMMIGR. HIST. (2019), <https://immigrationhistory.org/item/%E2%80%8Bmexican-repatriation/> [<https://perma.cc/3GHR-Q8GK>].

182. See H.R. COMM. ON IMMIGR. & NATURALIZATION, IMMIGR. BORDER PATROL., 71ST CONG.

183. *Id.* (statements of H. Rep. Harry Hull & H. Rep. George Harris 1930) (One area of interest was identified as “[h]ow far into the interior of the United States may an immigration border patrolman pursue, without warrant, a violation of our immigration laws?”; the other concerned “[h]ow far can one of these officials of the United States Government go in the matter of search, seizure or pursuit without warrants?”).

184. *Id.*

185. H.R. 11753, 68th Cong., 43 Stat. 1049 (1925) (stating that immigration officials “shall have power without warrant (1) to arrest any alien who in his presence or view is *entering or attempting to enter* the United States in violation of any law or regulation made in pursuance of law regulating the admission of aliens”).

interior.”¹⁸⁶ The standard for warrantless arrests was agent-dependent, as it was both subjective and speculative—the officer need not “see the alien at the exact moment that he crosses the border.”¹⁸⁷ Rather, “entry [was] a continuing offense . . . not completed until the alien attain[ed] his objective” and was “not to be given a narrow construction.”¹⁸⁸

Even if such a “hot pursuit” was broadly interpreted, the Assistant Commissioner acknowledged that the pursuit had a definite end point—for example when the individual being pursued for unlawful entry “reache[d] his domicile . . . careful observance of the right of the alien to be safe from an unlawful invasion of his home” was required.¹⁸⁹ This testimony tethers warrantless apprehension of an individual to their criminal act of illegal entry, suggesting both a chronological and a “border proximity” limitation on the ability of agents to arrest. Certainly, once the individual reached his destination within the United States, the “hot pursuit” was over—and presumably, the need for arrest without a warrant ended as well.

As Congress negotiated the powers of the newly created Border Patrol, so too did they consider constraints on those powers. President Hoover commissioned a group (commonly known as the “Wickersham Commission”) to evaluate the criminal justice system, including police behavior and methods of law enforcement.¹⁹⁰

The Wickersham Commission published a report of fourteen volumes, a fifth of which was devoted to the “Enforcement of the Deportation Laws” and offered a substantial critique of law enforcement’s disregard for the rights of individuals entangled in the deportation system as well as the widespread abuse of power displayed by immigration officials in the process.¹⁹¹ The report addressed the blatant illegality of warrantless arrests and recommended warrants only be issued “upon probable cause” by local boards of immigration officials rather than the centralized board headed by the Secretary of Labor in Washington.¹⁹² The Commission identified the problematic nature of warrantless arrests, even in the more limited context of border arrests, while acknowledging the need to balance competing needs of government and individual interests in the immigration context.¹⁹³

As the 1930s came to a close and the United States began shifting national attention from economic depression towards world war, significant administrative restructuring resulted in the INS being transferred from the Department of Labor to the Department of Justice in 1940.¹⁹⁴ The INS had seen a full decade of reform efforts

186. H.R. COMM. ON IMMIGR. & NATURALIZATION, IMMIGR. BORDER PATROL., 71ST CONG., at 14. (statement of H. Rep. George Harris 1930).

187. *Id.* at 14.

188. *Id.*

189. *Id.*; see also, 2 NAT’L COMM’N ON LAW OBSERVANCE AND ENF’T, NO. 5 REPORT ON THE ENFORCEMENT OF THE DEPORTATION LAWS OF THE UNITED STATES, 52 (1931) [hereinafter WICKERSHAM REPORT].

190. See WICKERSHAM REPORT, *supra* note 189.

191. *Id.* at 133–37 (1931) (discussing illegal searches and seizures in immigration arrests without warrants).

192. *Id.* at 154, 163–64.

193. *Id.* at 156–57, 171.

194. Reed Abramson, *The Ideal of Administrative Justice: Reforming Deportation at the Department of Labor, 1938-1940*, 29 GEO. IMMIGR. L.J. 321, 322 (2015) (citing FRANKLIN DELANO ROOSEVELT,

aimed at improving the transparency and fairness of immigration hearings and procedures.¹⁹⁵ Transferring the Service from the Department of Labor to the Department of Justice was intended to be temporary, a move thought necessary due to national security concerns because the nation was at war; however, the administrative reorganization and the criminal law enforcement techniques used by the agency to enforce immigration laws has remained in place ever since.¹⁹⁶

In November 1944, H.R. 5464 was introduced to expand the power of immigration officials to conduct warrantless arrests. The bill was heralded by the Committee on Immigration and Naturalization as a way “to strengthen our hand in the deportation cases.”¹⁹⁷ The Attorney General wrote a letter to the Chairman of the House Committee on Immigration and Naturalization which was later incorporated into the Committee’s Report and adopted by the Committee Chairman as “quite completely” explaining the purposes of the bill. The letter stated:

Under existing law arrests of aliens may be made without warrant only if the alien is entering or attempting to enter the United States in the presence or view of the arresting officer. Aliens illegally in the United States may be arrested only pursuant to a warrant issued by the Immigration and Naturalization Service. This limitation is cumbersome and at times results in frustrating the ends of justice. The power to make arrest in such cases without a warrant should be conferred on personnel of the Immigration and Naturalization Service with a restriction that an alien so taken into custody should be accorded a hearing without unnecessary delay. . . .

It is also desirable to confer upon personnel of the Immigration and Naturalization Service the power of arrest in cases of violations of immigration laws, subject to the same limitations as those generally imposed on the right of an officer to make an arrest.¹⁹⁸

A Department of Justice representative even appeared before the Committee on Immigration to produce evidence that convinced the Committee that

MESSAGE FROM THE PRESIDENT OF THE UNITED STATES TRANSMITTING REORGANIZATION PLAN NO. V, H.R. No. 76-784, at 1 (1940); *see also* Jennifer Breen, *Labor, Law Enforcement and “Normal Times”*: *The Origins of Immigration’s Home Within the Department of Justice and the Evolution of Attorney General Control over Immigration Adjudication*, 42 UNIV. HAW. L. REV. 1, 27, 30–31 (2019).

195. *See, e.g.*, THE SECRETARY OF LABOR’S COMMITTEE ON ADMINISTRATIVE PROCEDURE, 76TH CONG., THE IMMIGRATION AND NATURALIZATION SERVICE (1940). This committee consisted of Marshall E. Dimock, Henry M. Hart, Jr., and John McIntyre and reflected a strong commitment of the Department of Labor to address civil rights violations in the area of immigration. External critics also examined a number of due process violations by Immigration Services. *See, e.g.*, WILLIAM C. VAN VLECK, *THE ADMINISTRATIVE CONTROL OF ALIENS: A STUDY OF ADMINISTRATIVE LAW AND PROCEDURE* 220–24 (1932); NAT’L COMM’N ON LAW OBSERVANCE AND ENF’T, NO. 5 REPORT ON THE ENFORCEMENT OF THE DEPORTATION LAWS OF THE UNITED STATES, 153–54 (1931).

196. Breen, *supra* note 194, at 31.

197. STAFF OF H.R. COMM. ON IMMIGR. AND NATURALIZATION, 78TH CONG., REP. ON H.R. 5464 (1944).

198. H.R. REP. NO. 79-186, at 1–2 (1945) (internal citations omitted).

the proposed changes to the arrest procedure were necessary.¹⁹⁹ Unfortunately, neither record of this testimony nor the supportive evidence can be found in the Congressional Record.

H.R. 5464 had the potential to result in severe, sustained Fourth Amendment violations, yet there are relatively few objections found in the Congressional Record. As the Wickersham Report had foreshadowed over a decade before, warrantless arrests in the interior of the United States would generate many opportunities for unreasonable searches and seizures threatening the rights of American citizens and unlawful entrants (those who entered unlawfully but were now United States “residents”) alike.²⁰⁰ Yet, a vocal minority in the House believed that the bill required careful consideration due to the privacy rights at stake: “[N]evertheless [it is] our responsibility to legislate cautiously and when you begin to waive the requirements of a warrant in the matter of arrest and search and seizure, we are dealing with serious and dangerous subjects.”²⁰¹

The objections of this vocal minority were well-founded. At the time of this Congressional debate, bills involving criminal or civil matters were under the jurisdiction of the Judiciary Committee,²⁰² which was responsible for oversight of law enforcement functions and the correctional administration of the Department of Justice.²⁰³ The Judiciary Committee acts as legal counsel to the House of Representatives and reviews legislation relating to areas such as criminal and civil proceedings, administrative bodies, and immigration.²⁰⁴ Had the Judiciary Committee taken up a review of H.R. 5464, it may have identified issues with a governmental “carte blanche” allowing for intrusion into the private lives of Americans and immigrants alike²⁰⁵ without particularized evidence of probable

199. H.R. REP. NO. 78-1929, at 2 (Nov. 24, 1944) (“A representative of the Department of Justice appeared before the committee and explained the necessity of legislation of this kind. After hearing all the evidence produced, the Committee is of the opinion that the legislation is highly desirable and, therefore, recommend that the bill do pass.”).

200. WICKERSHAM REPORT, *supra* note 185, at 135 (“It is not only aliens who are involved in deportation proceedings; the rights of United States citizens are often infringed. They themselves are often subjected to these illegal searches and seizures, which partake of the nature of the very abuses against which the fourth amendment was intended as a protection. . . . [T]he immigration statutes and rules only provide for the taking of aliens into custody upon the warrant of the Secretary of Labor, with an express statutory exception giving immigration officials the right to make an arrest without a warrant only where aliens are attempting to enter the United States unlawfully in their presence. The Circuit Court of Appeals for the Second Circuit has said that a resident alien ‘could not be taken into custody except by warrant.’”) (quoting *United States ex rel. Commissioner Fink v. Tod*, 1 F.2d 246, 256 (1924)).

201. 79 CONG. REC. 4217, 4820 (May 21, 1945) (statements of Rep. Graham Arthur Barden).

202. When the Judiciary Committee first was formed in 1813, its original function was to consider all matters touching on judicial proceedings; this jurisdiction was expanded to include civil and criminal law in 1880. The Committee on Immigration and Naturalization had had exclusive jurisdiction over immigration matters since 1906. It was formed as a standing committee in 1893 and at this time had general, but not exclusive, jurisdiction over immigration matters. A HISTORY OF THE COMMITTEE ON THE JUDICIARY 1813-2006, H.R. DOC. NO. 109-153, at 161-162, 165 (2007).

203. S. RULE XI, § 4 (Jan. 6, 1880); *see also* H.R. DOC. NO. 109-153, *supra* note 197, at 488.

204. *See About the Committee*, HOUSE OF REPRESENTATIVES JUDICIARY COMM. CHAIRMAN JIM JORDAN, <https://judiciary.house.gov/about> (listing and describing the functions of the Judiciary Committee) [<https://perma.cc/TFX7-QTRU>].

205. *See* WICKERSHAM REPORT, *supra* note 189, at 27 (“[T]hese investigations [to see whether suspected persons are subject to deportation] . . . often involve American citizens.”).

cause as required by the Fourth Amendment. Citizens then and now have routinely been swept up in immigration raids and arrests. Referral of legislation to the Committee was discretionary but would have been proper due to the civil liberties at stake.

In October 1945, debate ensued in the Senate on the bill. One senator voiced objections to the amendments which granted new authority to arrest in the interior of the United States without a warrant:

The bill would enlarge [an immigration official's] authority so that he could arrest a person even though he did not see him entering. Also it would permit him to . . . enter any automobile or railroad carriage, without a warrant, and arrest such a person. In other words, if one were driving his car along the highway, he could be stopped by an immigration officer who might say, "I want to look through your car. I believe you have an alien in there." It seems to me that is going pretty far.²⁰⁶

Government intrusion could now touch the personal lives of every individual, in every state of the Nation. If H.R. 5464 were to pass, no warrant would be needed to investigate or to arrest those suspected of being in the United States unlawfully. As a practical matter, this bill had the potential to eviscerate the right of every person residing within the United States to be free from unlawful search and seizure. Of course, immigration authorities would have to *suspect* an individual was here unlawfully. But mere suspicion alone could now entitle an immigration officer to stop, inquire, and arrest an individual so suspected. Despite the grave dangers the bill posed, the Committee on Immigration and Naturalization reported favorably on the bill.²⁰⁷ It was taken up again in July of the following year. The senator who had expressed earlier objections to the bill in October 1945 withdrew those objections, stating that:

[H.R. 5464's] purpose is to permit the enforcement of the immigration laws, so as to prevent aliens from unlawfully entering the United States. I am utterly in sympathy with the purpose of the bill.

During the previous call of the calendar objection was made because I thought the right of search provided by the bill was too broad. I am inclined to think so, today. However, I am advised that enactment of this bill is absolutely necessary for the proper enforcement of the immigration laws. For that reason—and expressing at the same time the hope that the measure may later be improved by amendment—I am withdrawing my objection to consideration of the bill.²⁰⁸

206. 79 CONG. REC. 9883 (1945).

207. H. R. Rep. No. 79-186, at 2 (1945) (The House Committee on Immigration and Naturalization was "of the opinion that the legislation is highly desirable . . ."); see also S. Rep. No. 79-632, 2 (1945) (the Senate Committee stated "there is no question but that this is a step in the right direction").

208. 79 CONG. REC. 10542 (1946).

After stalling through Congress, and despite an ongoing objection that the bill allowed for warrantless searches that infringed on Fourth Amendment rights, it passed and became law in August 1946.²⁰⁹ For the first time, federal legislation permitted immigration officers to arrest those suspected of being in the U.S. unlawfully well within the United States' borders without a warrant, thereby removing the "administrative inconvenience" for Border Patrol in obtaining a warrant.

V. CONCLUSIONS AND POSSIBLE SOLUTIONS

Administrative arrest warrants have not had the "sanction of time." Based on the historical evidence we have unearthed in this Comment, the constitutionality of administratively issued arrest warrants should be revisited. Contrary to the *Abel* Court's suggestion, Congressional debate about such warrants was common, intense, and replete with concern about potential Fourth Amendment violations, the preclusion of judicial review, the administrative nature of the arrest, and the grant of broad powers to the executive branch, especially as these practices and powers encroached further from the U.S. border. Courts should no longer rely on *Abel* to control the historical narrative suggesting administrative arrests have always been conventional and appropriate.

A. Revisiting the Constitutionality of Administratively Issued Warrants and Warrantless Arrests

Despite significant evidence to the contrary, the government continues to defend the use of administrative arrests as an "uncontested" historical practice by relying on *Abel v. United States*. *Abel* characterized the constitutionality of administrative arrests as supported by "impressive historical evidence . . . from almost the beginning of the Nation," "overwhelming historical legislative recognition," and an "uncontested historical legitimacy."²¹⁰ However, the practice of administrative arrests was not, and is not, "uncontested." Both the administrative nature of the process and the expansion of police powers into the United States' interior were called into question by legislators with some vigor and frequency, albeit over many decades.²¹¹ The nature of this debate was perhaps less intense than it may have been if the target of these acts authorizing administrative arrests were American citizens. However, our research does not support that the history of such an administrative arrest system went "uncontested."

Instead, the use of an administrative arrest to accomplish a civil objective (deportation), and the criminal language found in today's apprehension statutory model can better be characterized as a shift that occurred gradually and with congressional resistance. This language was first used in immigration statutes targeting Chinese laborers, who were broadly perceived as "unassimilable," and thus worthy of arrest and deportation. Early statutes experimented with criminal language

209. Act of Aug. 7, 1946, Pub. L. No. 79-614, 60 Stat. 865; *see supra* notes 205–08 and accompanying text.

210. *Abel v. United States*, 362 U.S. 217, 230, 233–34 (1960).

211. *See supra* Parts III–IV.

to penalize and incentivize the Chinese to exit the United States promptly and hastily. Criminal terminology which originated in the Chinese exclusion era and that was not deemed unconstitutional was imported into later civil apprehension statutes. Eventually, these statutes bestowed immigration and border patrol officials with the broad police power to arrest immigrants anywhere in the United States, with or without administratively issued warrants.

Contrary to the idea that the erosion of Fourth Amendment protections went uncontested or unnoticed as administrative arrest warrants and warrantless arrests were sanctioned for immigration detention, this devolution was met with significant congressional resistance. Many other scholars have advocated for better protection of immigrant rights by requiring neutral and detached judicial officers to issue arrest warrants to distance law enforcement officers from the first steps of the increasingly politicized removal.²¹² We add our voice to the chorus advocating for such change.

B. Misleading Statutory Language, Proposed Research on Public (Mis)perceptions, and Broader Connections to National Identity

Particularly in the field of immigration, language has the power to expose existing social, racial animus. It can also activate strong emotions rooted in our ideas of who belongs, and who does not, and how our “birthright” may bestow favored treatment on favored groups. Statutory word choices can help to reinforce ideas about immigrants which are often negative, incomplete, and untrue, like the notion that unlawful presence in the United States is a crime.

Large-scale public misunderstandings, such as equating unlawful presence with criminality, can create or deepen mental associations between immigration and crime and can lead to widespread ambivalence regarding the need for reform. Public perceptions have critical downstream consequences. Perceptions affect social norms and attitudes toward immigrant groups, and these perceptions influence the collective national identity and the dynamics of membership theory—who we consider “members” and who we consider “others.”²¹³ Governments, in turn, respond by forming policies that mollify voters. If the public misperceives unlawful presence

212. See generally Nash, *supra* note 99, at 433–34 (questioning the historical legitimacy of the administrative arrest warrant based on research on expulsion laws from the early Republic which authorized arrest pursuant to warrants, issued by magistrates or tribunals with judicial power); Kagan, *supra* note 6, at 161–64, 169–70 (suggesting that immigration judges should be entrusted with post-arrest probable cause review of ICE warrantless arrests or arrests based on administrative warrants, and discussing the constitutional concerns raised by the current system); Mary Holper, *The Fourth Amendment Implications of “U.S. Imitation Judges,”* 104 MINN. L. REV. 1275, 1279, 1306 (2020) (arguing that immigration judges do not have the requisite degree of impartiality and independence to review probable cause findings and that, post-immigration arrest, federal magistrate judges should be entrusted to make these determinations for compliance under the Fourth Amendment). Additionally, many states and localities have enacted ordinances (in California and Illinois, among others) to resist federal enforcement of detainers, and Courts have increasingly supported these efforts, with the weight of opinions firmly holding that the federal government cannot force a state or locality to comply with an ICE detainer unless there is a new arrest with a new probable cause finding to justify holding the individual. See Christopher N. Lasch et al., *Understanding “Sanctuary Cities,”* 59 B.C. L. REV. 1703, 1741–42 (2018).

213. See Victoria M. Esses, John F. Dovidio & Gordon Hodson, *Public Attitudes Toward Immigration in the United States and Canada in Response to the September 11, 2001 “Attack on America,”* ANALYSES OF SOC. ISSUES & PUB. POL’Y, at 69 (2002).

to be commensurate with criminality, all undocumented individuals can be mentally rebranded as “illegal” or “criminal,” gravely impacting the rights and treatment we believe they should deserve. However, because perceptions are elusive, nondescript, and often concealed, they can be as hard to identify as they are to change.

The good news is that negative racial attitudes and prejudicial associations can be altered. Growing evidence suggests racial bias and prejudice are malleable and susceptible to environmental conditions, cognitive strategies, and social motives. “Studies have found that implicit and explicit racial prejudice can be reduced with the use of evaluative conditioning that alters prejudicial associations.”²¹⁴ Early in President Biden’s presidency, his administration moved to do just that by shifting away from terminology engendering negative associations between criminality and immigration.²¹⁵ Immigrants previously termed “illegal aliens” are now “undocumented non-citizens.” These shifts in language may provoke deeper, more conscious consideration of how we treat undocumented immigrants living in the United States, rather than making the knee-jerk assumption that the term “*illegal immigrant*” signifies that an individual has committed a crime.

We propose performing research to identify American perceptions and misperceptions surrounding “illegal immigration” and “unlawful presence.” If Americans largely misunderstand unlawful presence to be the same as “illegal immigration,” and therefore synonymous with a criminal act, the call for fair treatment of immigrant groups, as well as support or resistance for immigration policies directed at these groups, will be affected. A refutation text study is one way to test public misperceptions to identify whether most Americans consider unlawful presence to be a crime. Refutation texts, an intervention strategy that uses targeted text written to change common misperceptions, could help to change large-scale public misperceptions.²¹⁶ At the very least, resistance or acceptance of a group or an immigration policy directed at a particular group could be based on accurate information rather than misinformation.

Finally, immigration, as a system, has historically been driven by fears rooted in false ideas about national identity. The history of immigration in the United States is tainted by xenophobia and filled with fear of foreigners. It has placed the Western identity of self as the normative center casting suspicion over anyone who falls outside of the preferred racial and ethnic parameters. Immigration policy, at its most basic level, is rooted in word choices, and these choices will both form and reflect our ideas about national identity. Past attempts to build a shared national identity based on ethnocentricity, given our vastly different paths and stories, have

214. Ryo, *supra* note 35, at 109 (citing Lauri A. Rudman, Richard D. Ashmore & Melvin L. Gary, “Unlearning” Automatic Biases: The Malleability of Implicit Prejudice and Stereotypes, 81 J. PERSONALITY & SOC. PSYCHOL. 856, 858 (2001)) (other citation omitted).

215. Memorandum from Troy A. Miller, Senior Official Performing the Duties of the Commissioner, to ICE Leadership (Apr. 19, 2021), https://drive.google.com/file/d/1sCncvyVGuC_mPb6Dx-jMjBj8yuq2OoP-/view (adopting the administration’s vision for more inclusive language in the immigration space and shifting from the use of the terms “alien” to “non-citizen” or “migrant,” from “illegal alien” to “undocumented non-citizen” or “undocumented individual,” among other language shifts) [<https://perma.cc/U6BX-PUBN>].

216. See, e.g., Aguilar et al., *supra* note 68 (using refutation texts to change common misperceptions about the Common Core curriculum in the first study of its kind to apply the research method of refutation texts to misperceptions about public policy).

failed.²¹⁷ A simpler national identity built on a vision of shared principles that prioritizes universally fair treatment, rather than one based on shared ethnicity or shared histories, for example, may result in more success and, certainly, more equal treatment for citizens and non-citizens alike.

The loose association tying modern immigrants to criminality has pervaded discourse in the field of immigration law. Interrupting the associations between immigration and criminality, even in small ways, can result in a diminished perceived threat to safety and security. Thinking more critically about language choices, particularly in statutes, is a necessary step in creating larger policy changes. Whether these steps will result in broader or systemic change is yet unknown, but we remain hopeful that it will.

217. While many groups have been thought incapable of assimilating into American culture, David Cole has rebuked this idea as largely a myth, suggesting instead that descendants of immigrants that were once seen as “anti-assimilationist” were defining American culture just one generation later. David Cole, *The New Know-Nothingism: Five Myths About Immigration*, NATION, Oct. 7, 1994, at 412.