THE CRIMMIGRATION CRISIS: IMMIGRANTS, CRIME, AND SOVEREIGN POWER

JULIET STUMPF*

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* Associate Professor of Law, *Lewis & Clark Law School*. I am indebted to Doug Beloof, Jerome Bruner, Nora Demleitner, Mary Holland, Daniel Kanstroom, Anil Kalhan, Steve Legomsky, Susan Mandiberg, Teresa Miller, Jan Neuman, Huyen Pham, Jenny Roberts, and Brian Slocum. I am also grateful for the many insightful comments from participants at the Lewis & Clark Faculty Colloquium, the Immigration Law Teachers Works-in-Progress Workshop, the Baldy Center for Law and Social Policy's Interdisciplinary Workshop on Merging Immigration and Crime Control, and the NYU Young Scholars Workshop. Jenny Anne Gifford and Matthew Ellis provided excellent research assistance. Special thanks to Eric Miller.

PROLOGUE: CONFIDENTIAL MASTER STRATEGY MEMO

To: The President-Elect
From: Campaign HQ
Date: January 1, 2017
Re: The Crimmigration Crisis

On the eve of your taking office, let us seize this moment to look back at the events that propelled you to this height. The citizenry of this country swept you into office with a vote count rivaling Ronald Reagan's. But those without the franchise, who nevertheless co-inhabit this country—aliens and criminals—will likely determine whether you return to office four years from tomorrow. The "Crimmigration Crisis" will be the defining issue of your first term.

The International Prison Riots of 2015, like the terrorist attacks in 2001, took the previous Administration by surprise. The riots generated fears that the destruction in France and Australia in the 2000s[1] could be repeated in the United States. The international reaction curtailed the freedom to travel and transact business globally that Americans have taken for granted. For the first time, the United States was the target of economic sanctions as a consequence of its conduct toward noncitizens.

The riots and the world's reaction brought impassioned calls for protecting the nation's security by completely banning immigration,[2] or by detaining all noncitizens who seek to cross our borders until they have shown they are harmless.[3] Equally passionate have been calls for a massive overhaul of our immigration policies. Some have suggested establishing a "compassionate capitalist America" in which immigrants convicted of minor crimes might avoid deportation through community service in meatpacking plants and agricultural

1. *See* Anthony Faiola, *Riots in Australia Spur Introspection; Ethnic Tensions Seen as Linked to War on Terror*, WASH. POST, Dec. 20, 2005, at A23 (reporting on riots involving Anglo-Australians and Australians of Lebanese and Middle Eastern descent, which community leaders and sociologists viewed in part as a result of broader ethnic troubles tied to the global fight against terrorism); Molly Moore, *Riots Spread Across France and into Paris; Police Arrest Hundreds in Worst Unrest in Decades*, WASH. POST, Nov. 6, 2005, at A20 (detailing violence stemming from riots which began after two teenagers died evading a French police checkpoint).

2. *See* Securing America's Future through Enforcement Reform Act ("SAFER"), H.R. 5013, 107th Cong. (2002) (proposing a reduction in legal immigration levels by approximately twenty percent).

3. *See* Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005, H.R. 4437, 109th Cong. § 401 (2006) (proposing to detain all undocumented immigrants unless they show they are not a security risk and post a bond).

fields.[4] A growing minority, however, are calling for a new day for immigration policy: a wholesale retreat from the present-day merger of criminal and immigration law.

As your campaign manager, optimism about the future of this country has been my mantra. As your friend, this moment compels me to speak plainly about the challenges we face. Key to the success of your candidacy was your talent for empathizing with the passion fueling those conflicting calls without actually endorsing any of them. We are now at a crossroads where you need to stake a position.

To plan for tomorrow, we must revisit the past. The 1980s saw the beginning of a dramatic increase in criminal consequences of immigration law violations and deportations of even legal immigrants convicted of crimes. As Congress swept more immigration-related conduct into the criminal realm, the executive branch stepped up criminal enforcement of immigration violations.[5] By 2005, immigration-related matters represented the single largest group of federal prosecutions, outstripping drug and weapon prosecutions.[6] At the same time, the grounds for deportation based on state and federal convictions vastly expanded.[7]

By 2005, the population of unauthorized immigrants residing in the United States had reached an all-time high.[8] Political support for a legalization program was controversial.[9] Federal financial support

4. *Goldwater Vows to Crack Down on Illegal Immigration* (Jan. 12, 2006), http://www.goldwater4governor.org/ArchivesMoreInfo.html (last visited Nov. 3, 2006); Jennifer Talhelm, *Lawmakers Rebuke Idea of Forced Labor for Illegals*, COLUMBIAN, June 24, 2006 (reporting Arizona gubernatorial candidate's proposal to create forced labor camps for undocumented immigrants).

5. Teresa Miller, *Citizenship & Severity: Recent Immigration Reforms and the New Penology*, 17 GEO. IMMIGR. L.J. 611, 613 (2003) [hereinafter *Citizenship & Severity*]; *see, e.g.*, Immigration Reform and Control Act of 1986 ("IRCA"), Pub. L. No. 99-603, § 101, 100 Stat. 3359, 3360 (1986) (codified as amended in scattered sections of 8 U.S.C.) (declaring the act of employing unauthorized aliens illegal).

6. *See* TRAC REPORTS, TRAC/DHS, IMMIGRATION ENFORCEMENT, NEW FINDINGS (2005), http://trac.syr.edu/tracins/latest/current (establishing that immigration matters represent about one third (thirty-two percent) of the total number of federal prosecutions and comparing the total to drug and weapons prosecutions).

7. *See infra* Parts I.A.1 and I.A.2.

8. *See* JEFFREY S. PASSEL, PEW HISPANIC CENTER, THE SIZE AND CHARACTERISTICS OF THE UNAUTHORIZED MIGRANT POPULATION IN THE U.S.: ESTIMATES BASED ON THE MARCH 2005 CURRENT POPULATION SURVEY (Mar. 7, 2006), *available at* http://pewhispanic.org/files/reports/61.pdf (reporting that the number of unauthorized immigrants in the United States has steadily increased for the last few years, reaching a high of 11.1 million in 2005, according to the March 2005 Current Population Survey).

9. *See* Karen C. Tumlin, Comment, *Suspect First: How Terrorism Policy Is Reshaping Immigration Policy*, 92 CAL. L. REV. 1173, 1228 (2004) (observing that after September 11th, Bush rapidly discontinued his proposed legalization program for long-term Mexican immigrants).

for state welfare programs had waned.[10] Cash-strapped states with burgeoning immigrant populations pressured the federal government to increase immigration enforcement.[11]

The year 2006 marked a turning point in the future of immigration. The national conversation polarized between legalizing the population of undocumented immigrants and using the power of the state to crack down on the "illegal" population. Our policymakers chose the latter.

In 2007, Congress made a bold statement about unlawful border crossing by criminalizing all violations of immigration laws.[12] In 2008, Congress made deportation mandatory for the commission of any felony by any noncitizen, regardless of the length of sentence or particular conduct involved, doing away with the prior categories of

10. *See* Coalition on Human Needs, *State Reports: How Budget Cuts Will Affect Your State (Jan. 2006)*, http://www.chn.org/issues/opportunityforall/statefactsheets.html(last visited Oct. 15, 2006) (noting that both the House and the Senate considered budget bills that would cut funding for student aid, health care, assistance for abused children, child care, and child support enforcement).

11. *See* Dennis Cauchon, *States Weigh Immigration Controls: Congress Moving Too Slow for Some*, USA TODAY, Jan. 26, 2006, at A1 (observing that many state legislatures, frustrated with Congressional inaction on the immigration issue, considered proposals to increase border enforcement at their own expense). Also in 2007, Congress resolved an ongoing debate between immigrant advocates and the Department of Justice over whether state and local law enforcement officers were authorized to enforce immigration law by explicitly granting the states that authority. *See, e.g.*, H.R. 4437, 109th Cong. § 220-25 (2006) (proposing to expand authority of state and local law enforcement to enforce both criminal and civil immigration violations); Prepared remarks by John Ashcroft, Attorney General, Announcement of the National Security Entry-Exit Registration System (June 5, 2002), *available at* http://www.usdoj.gov/archive/ag/speeches/2002/060502agpreparedremarks.htm (discussing the duty of federal, state, and local law enforcement in the newly proposed National Security Entry-Exit Registration System to arrest and transfer to INS custody any noncitizens who were listed on the National Crime Information Center system and had violated either criminal provisions of the Immigration and Nationality Act or civil provisions that would render the noncitizen deportable); U.S. Dep't of Justice, Office of Legal Counsel, Memorandum Opinion for the U.S. Att'y, S.D. Cal., *Assistance by State and Local Police in Apprehending Illegal Aliens* (Feb. 5, 1996), *available at* http://www.usdoj.gov/olc/immstopo1a.htm (concluding that state and local law enforcement may only enforce the criminal provisions of federal immigration law). *See generally State and Local Authority to Enforce Immigration Law: Evaluating a Unified Approach for Stopping Terrorists: Hearing Before the S. Subcomm. on Immigration, Border Security, and Citizenship of the S. Comm. on the Judiciary*, 108th Cong. 9-11 (2004) (statement of Kris W. Kobach, Assoc. Professor of Law, Univ. of Mo., Kan. City (former counsel to Att'y General Ashcroft)); *Clear Law Enforcement for Criminal Alien Removal Act of 2003: Hearing on H.R. 2671 Before the H. Subcomm. on Immigration, Border Security, and Claims of the H. Comm. on the Judiciary*, 108th Cong. 18-28 (2003) (statement of Kris W. Kobach, Assoc. Professor of Law, Univ. of Mo., Kan. City (former counsel to Att'y General Ashcroft)); Huyen Pham, *The Inherent Flaws in the Inherent Authority Position: Why Inviting Local Enforcement of Immigration Laws Violates the Constitution*, 31 FLA. ST. U. L. REV. 965, 965-66, 971-72 (2004).

12. *Cf.* H.R. 4437 § 614 (proposing to make any unlawful presence in the United States a felony).

"crimes of moral turpitude" and "aggravated felonies."[13] In 2009, Congress expanded the rule to require deportation for the commission of most misdemeanors, calling these "gateway crimes."

Deportation became the consequence of almost[14] any criminal conviction of a noncitizen, including legal permanent residents. Immigrants who had previously been subject only to civil immigration proceedings, including tourists and business travelers who had overstayed their visas and students working beyond allotted hours or in unauthorized employment, were newly subject to criminal sanctions in addition to removal.[15] The changes in the law fed a powerful vision of the immigrant as a scofflaw and a criminal that began to dominate the competing image of the benign, hard-working embodiment of the American dream.

In 2012, the Transportation Security Administration trumpeted the capture of two suicide bombers on a Toronto-JFK flight. The Department of Homeland Security ("DHS") issued an emergency regulation mandating detention for all aliens entering the United States until the DHS, the CIA and the FBI had determined they were "unlikely to become a public threat" nor a "serial border crosser."[16] Congress amended the Immigration and Nationality Act ("INA") to create a presumption in removal proceedings that a noncitizen who had been charged with a deportable crime "posed a material risk of becoming involved in or supporting further criminal activity or terrorism."[17] The statute required courts, at government request, to close to the public criminal or immigration proceedings that might reveal sensitive national security information.[18]

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13. *See* 8 U.S.C. § 1101(a)(43) (2000) (listing the offenses that qualify as aggravated felonies); *see also* H.R. 4437 § 614 (proposing to amend the INA to significantly expand criminal violations that result in removal). *See generally* Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, Div. C., § 321, 110 Stat. 3009-546, 3009-627 to -628 (1996) (amending the definition of "aggravated felony").

14. Jaywalking is still a non-deportable offense.

15. *See* H.R. 4437 § 203 (proposing criminal sanctions for those who overstay visas or violate the terms of the visa).

16. In response to protests from business interests, DHS created "Frequent Flyer" border crossing passes to exempt U.S. employees from detention. They are available upon payment of a $200 fee and certification that an individual is employed in a U.S. corporation. The passes are known as "Get Out of Jail Free" cards.

17. *Cf.* 8 U.S.C. § 1227(a)(4) (2000) (providing for several security-related grounds of deportability, including, among others, engaging in criminal activity that endangers public safety or national security and engaging in terrorist activities).

18. *See* Classified Information Procedures Act ("CIPA"), 18 U.S.C. app. 3, § 6 (2000) (explaining that the United States may request to conduct a hearing *in camera* upon certification by the Attorney General that a public proceeding would result in the disclosure of classified information).

The practical result was that both criminal trials involving noncitizens and all deportation hearings were routinely closed to the public. Opinions of immigration judges and federal courts relating to those proceedings were either not published, or a "Public Version" was issued with sensitive material omitted or redacted. These measures remained in place even after it was discovered that the alleged bombers-to-be were arrested pursuant to a false tip from an unreliable informant.[19]

These events were not without repercussions. Applications for business visas dropped. The Wall Street Journal published an article reporting that international businesses were seeking more hospitable markets where international travel was less risky. The number of foreign students attending U.S. colleges and universities dropped dramatically. Migration scholars reported that as a result of the new laws and continued uncertainty in the visa process, many students had chosen to pursue their education in the European Union, India, and China.[20]

The criminalization of immigration law has impacted a population previously protected by significant legal and cultural barriers to deportation: legal permanent residents and other long-term noncitizen residents. We are currently exporting large numbers of U.S. residents, regardless of whether they grew up in the United States or have ties to U.S. citizen spouses or children, communities, or employers.[21] The number of deportations has grown dramatically since 2004, when we expelled close to 200,000 noncitizens.[22] Media stories continue to document deportations of legal permanent residents who have lived in the United States since early childhood to

19. *Cf.* United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 544 (1950) (holding that the Due Process Clause does not prohibit the use of secret information to exclude an alien seeking entry to the United States). *See generally* ELLEN RAPHAEL KNAUFF, THE ELLEN KNAUFF STORY (W. W. Norton & Co. 1952) (revealing that the secret information was a false tip from a jilted lover of the plaintiff's husband).

20. *See* James Fallows, *Countdown to a Meltdown: America's Coming Economic Crisis. A Look Back from the Election of 2016*, ATLANTIC MONTHLY, July-Aug. 2005, at 51, 63 n.37 (citing statistics showing a decline in foreign enrollment in U.S. universities).

21. National public outcry accompanied the DHS's arrest and subsequent deportation proceedings of four undocumented high school students in Arizona who nudged out MIT to win the national college-level robot-building competition using a robot they built at their public high school. *See* Mel Melendez, *Latinos Celebrate Wilson 4 Verdict*, ARIZ. REPUBLIC, July 29, 2005, at 1 (reporting the students' success in the competition).

22. OFFICE OF IMMIGRATION STATISTICS, U.S. DEPARTMENT OF HOMELAND SECURITY, 2004 YEARBOOK OF IMMIGRATION STATISTICS 161, tbl. 42 (2006), *available at* http://www.uscis.gov/graphics/shared/statistics/yearbook/Yearbook2004.pdf.

countries where they know no one and have little or no familiarity with the language or culture.[23]

This past year, of the noncitizens DHS deported, just over 100,000 had been legal permanent residents. Those deported residents committed criminal offenses, and were sentenced to mandatory deportation. As you know from the intelligence reports, these former U.S. residents have begun to organize, calling themselves "The Exiles." Most seem to have as their mission mutual support and dissemination of information about immigration laws and developments. A few members, however, seem to harbor a deeper resentment, and their intentions may be less benign, though presently unarticulated.

The criminalization of immigration law pushed our judicial and penological institutions to the breaking point. Immigration appeals clogged federal court dockets.[24] The burgeoning population of detainees quickly overwhelmed the available cell space in federal and state jails and prisons.[25] Private prison fees spiked as a result of the unprecedented demand for prison bed contracts.

In response, the Bureau of Prisons and the military undertook a quiet effort to build prison camps on five army bases in the Mariana Islands, the Ivory Coast, Chile, Belize, and Israel to contain

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23. Peter Shinkle & Karen Branch-Brioso, *Longtime Legal Residents Face Deportation for Minor Crimes/Immigration Agency Pursues Tough Policy*, ST. LOUIS POST-DISPATCH, May 4, 2004, at A1; Lena Williams, *A Law Aimed at Terrorists Hits Legal Immigrants*, N.Y. TIMES, July 17, 1996, at 1.

24. John R.B. Palmer et al., *Why Are So Many People Challenging Board of Immigration Appeals Decisions in Federal Court? An Empirical Analysis of the Recent Surge in Petitions for Review*, 20 GEO. IMMIGR. L.J. 1 (2005); *see* Tom Brune, *Immigration in the Courts: Burdened by Appeals: A Justice Dept. Plan to Reduce Backlog of Immigration Cases Has Done So, but Also Driven Up Federal Appeals*, NEWSDAY, Dec. 15, 2004, at A7 (reporting that the majority of immigration appeals have fallen on two major judicial circuits: the Second and Ninth Circuits); *see also* Adam Liptak, *Courts Criticize Judges' Handling of Asylum Cases*, N.Y. TIMES, Dec. 26, 2005, at A1 (reporting federal judges' harsh criticism of immigration judges and administrative agencies for the large increase in immigration cases before the federal appeals courts). Immigration cases, most of which involve asylum seekers, accounted for approximately seventeen percent of all federal appeals cases in 2004, up from only three percent in 2001. Nearly forty percent of all federal appeals in New York and California courts involved immigration cases. *Id.*

25. *See Interior Immigration Enforcement Resources: Hearing Before the Subcomm. on Immigration, Border Security, and Claims of the H. Comm. on the Judiciary*, 109th Cong. 12-13 (2005) (Statement of Paul K. Martin, Deputy Inspector Gen., U.S. Dep't of Justice) (maintaining that a lack of resources, including lack of detention and bed space and limited numbers of detention officers, has inhibited the agency's ability to effectively remove noncitizens with final orders); *see also* Michael M. Hethmon, *The Chimera and the Cop: Local Enforcement of Federal Immigration Law*, 8 UDC/DCSL L. REV. 83, 133 (2004) (noting that U.S. Immigration and Customs Enforcement lacks the resources and bed space to detain all of the noncitizens who are scheduled to appear at a removal hearing but have not yet posted bail).

noncitizen detainees and U.S. citizens convicted of serious crimes.[26] It was cheaper to ship detainees to these bases and house them there than to build new prisons domestically. These prisons were also less likely to attract public notice. The extraterritorial confinement of convicts and immigrants is exempt from judicial review under the Defend America Act of 2007,[27] thereby easing the strain on federal court dockets and avoiding the cost of prolonged prison conditions litigation.[28]

At first, most cells in the camps consisted of large rectangles separated from one another by chain link fences. By the second year, most had been converted into cement-block structures.[29] The Washington Post dubbed them "Crimmigration Camps." As of the end of last year, the camps housed 300,000 inmates, considerably more than the 3,000 alleged terrorist supporters that the CIA had detained abroad by late 2005.[30]

Citing the need to prevent conflict between detainees as well as issues of cost and administrative efficiency, the DHS designated specific internment camps to contain detainees of like national origin and religion. Detainees from Latin America were placed in the Chilean camp. Muslims from the Middle East and Africa were interned in the Israeli camp. The Ivory Coast housed African and

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26. The scope of constitutional protection against extraterritorial detention is still relatively undefined. *See* Rasul v. Bush, 542 U.S. 466, 485 (2004) (holding that federal courts have jurisdiction over habeas corpus petitions filed by detainees at the U.S. naval base at Guantanamo, but not reaching the issue of whether habeas jurisdiction covers detainees at other foreign locations); Johnson v. Eisentrager, 339 U.S. 763, 790-91 (1950) (holding that courts did not have habeas jurisdiction over enemy aliens held outside of U.S. territory). *See generally* David A. Martin, *Offshore Detainees and the Role of Courts After Rasul v. Bush: The Underappreciated Virtues of Deferential Review*, 25 B.C. THIRD WORLD L.J. 125, 125 (2005) (noting that although the Supreme Court in *Rasul* found that federal courts have habeas jurisdiction over detainees at Guantanamo, the Court did not articulate the procedures and standards to be applied to the Guantanamo detainees).

27. *See* 8 U.S.C.A. § 1252 (West 2006) (providing for the situations in which noncitizens are not entitled to judicial review upon an order of removability); *see also* Hiroshi Motomura, *Immigration Law and Federal Court Jurisdiction Through the Lens of Habeas Corpus*, 91 CORNELL L. REV. 459, 486-95 (2006) (describing the REAL ID Act's constriction of habeas corpus review in immigration cases).

28. *See generally* David Zaring, *National Rulemaking Through Trial Courts: The Big Case and Institutional Reform*, 51 UCLA L. REV. 1015, 1058 (2004) (commenting on the active role that judges and courts have played in prison reform efforts, addressing such issues as medical care, jail cell size and design, and prison menus).

29. *Camp X-Ray Detainees Get Upgrade in Housing; New Cells Have Indoor Plumbing*, WASH. POST, Apr. 27, 2002, at A15; *see* Neil A. Lewis, *Guantanamo Detention Site Is Being Transformed, U.S. Says*, N.Y. TIMES, Aug. 6, 2005, at A8 (reporting that as part of an effort to counter international criticism of Guantanamo as inhumane, the United States began construction of hard-walled, more modern prisons).

30. Dana Priest, *CIA Holds Terror Suspects in Secret Prisons*, WASH. POST, Nov. 2, 2005, at A1.

Middle Eastern detainees who were not Muslim. Detainees from Europe and Asia ended up in the smallest camp in Belize. U.S. citizens convicted of felonies were housed in the Mariana Islands, along with detainees who did not fall into the other categories.

The trouble began the day after the Supreme Court reversed the Ninth Circuit's decision that the camps violated constitutional prohibitions against cruel and unusual punishment, due process, and equal protection.[31] The riots erupted first in the Israeli camp, which had been the subject of persistent rumors of human rights violations. As word of the Israeli prison riot spread across the Internet, riots flared in the Ivory Coast, then Chile, and finally the Mariana Islands. Within a week, 300 lives were lost, counting both inmates and prison guards.

The riots were an international embarrassment. The previous Administration shrugged off the condemnation from the United Nations. The European Union's formal censure and economic sanctions had a more sobering effect. A number of countries with large immigrant populations in the United States, including many of the Latin American and Asian nations, imposed visa requirements and quotas for U.S. tourists due to concern that the presence of Americans could provoke breaches of the peace.

The riots and the international reaction have brought immigration squarely into the public eye. They have triggered national conversations about the conflicting visions of the immigrant as a criminal versus the immigrant as a member of society, and about the practical consequences of the choice between those visions. The connection between the merger of criminal and immigration law and its effect internationally and domestically have become the subject of considerable national angst.

Your great challenge now is to craft for this nation a strong and stable immigration policy that will bolster our economic integrity domestically and internationally, and protect our venerable reputation from further international embarrassment. Divergent paths lie before you: greater severity in our immigration policy to quell further unrest, or greater inclusiveness for immigrants in the United States by reversing the merger of criminal and immigration law. Looking to the future, it is clear that the place of noncitizens in our society will ultimately influence the place of our citizenry in the global order.

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31. *Cf. Rasul*, 542 U.S. 466 (holding that U.S. courts may exercise jurisdiction over challenges to the legality of detaining foreign citizens at Guantanamo Bay).

INTRODUCTION

This memo to the President describes a future grounded in the present in which criminal law is poised to swallow immigration law. Immigration law today is clothed with so many attributes of criminal law that the line between them has grown indistinct. Scholars have labeled this the "criminalization of immigration law."[32] The merger of the two areas in both substance and procedure has created parallel systems in which immigration law and the criminal justice system are merely nominally separate.

The criminalization of immigration law, or "crimmigration law," has generated intense interest from legislators, immigrants, the media, and the public.[33] In 2006, the specter of legislation that would have criminalized all immigrants present in the country without authorization ignited nationwide marches and protests.[34] The intersection of criminal and immigration law has captured the attention of immigration and criminal law scholars alike.[35] Scholarship to date has detailed the existence of this merger,[36] described the parallels between deportation and criminal

32. *E.g.*, *Citizenship & Severity*, *supra* note 5, at 616.

33. *See, e.g.*, Anushka Asthana, *Immigrants Rights Groups Split over Senate Bill*, WASH. POST, July 28, 2006, at A14 (noting that most immigrants' rights advocates opposed recent immigration reform efforts because they increased the number of "aggravated felonies" under immigration law and made immigrants who had for years lived legally in the United States vulnerable to deportation for relatively minor crimes).

34. *See* Sonya Geis & Michael Powell, *Hundreds of Thousands Rally in Cities Large and Small*, WASH. POST, Apr. 11, 2006, at A8 (reporting that hundreds of thousands took to the streets in a nationwide immigrant "Day of Action" to demand that Congress not pass legislation that criminalizes illegal immigrants).

35. *See Citizenship & Severity*, *supra* note 5, at 617-18 (observing that immigration scholars see this intersection as the importation of criminal categories into immigration law, while criminal scholars view it as the imposition of the administrative and regulatory characteristics of immigration control into the criminal justice system—the "immigrationization of criminal law").

36. *See generally* Nora V. Demleitner, *Immigration Threats and Rewards: Effective Law Enforcement Tools in the "War" on Terrorism?*, 51 EMORY L.J. 1059 (2002) [hereinafter *Immigration Threats*]; Nora V. Demleitner, *Misguided Prevention: The War on Terrorism as a War on Immigrant Offenders and Immigration Violators*, 40 CRIM. L. BULL. 550 (2004) [hereinafter *Misguided Prevention*]; *Citizenship & Severity*, *supra* note 5; Teresa Miller, *Blurring the Boundaries Between Immigration and Crime Control After September 11th*, 25 B.C. THIRD WORLD L.J. 81 (2005) [hereinafter *Blurring the Boundaries*].

punishment,[37] and outlined the constitutional consequences of criminalizing immigration law.[38]

Yet little has been written about why this merger has occurred, and what are its theoretical underpinnings. Scholars of criminal and immigration law have tended to stay on their own sides of the fence, focusing on developments within their fields rather than examining the growing intersections between these two areas.[39] As the merger of the two areas intensifies, however, the need for scholarly attention becomes critical.

This Article begins to fill that void. It unearths the roots of the confluence of criminal and immigration law and maps the theoretical impulses that motivate the merger. It offers a unifying theory for this crimmigration crisis intended to illuminate how and why these two areas of law have converged, and why that convergence may be troubling. I propose here that membership theory, which limits individual rights and privileges to the members of a social contract between the government and the people,[40] is at work in the convergence of criminal and immigration law. Membership theory has the potential to include individuals in the social contract or exclude them from it.[41] It marks out the boundaries of who is an accepted member of society.[42] It operates in this new area to define an ever-expanding group of immigrants and ex-offenders who are

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37. *See* Daniel Kanstroom, *Deportation, Social Control, and Punishment: Some Thoughts About Why Hard Laws Make Bad Cases*, 113 HARV. L. REV. 1889, 1893-94 (2000) (describing the way in which deportation, as seen through criminal law theory, serves as a form of criminal punishment, incapacitating the deportee, deterring other potential offenders, and achieving retribution). *See generally* Margaret H. Taylor & Ronald F. Wright, *The Sentencing Judge as Immigration Judge*, 51 EMORY L.J. 1131 (2002).

38. *See, e.g.*, Kanstroom, *supra* note 37, at 1935 (suggesting that the deportation of lawful permanent residents, if recognized as punishment, necessitates substantive constitutional protections, especially when applied retroactively or without counsel or the right to post bail).

39. *See Citizenship & Severity*, *supra* note 5, at 617-18 (noting that the phrase "criminalization of immigration law" fails to adequately capture the creation of a new system of social control that includes both immigration and criminal justice, but which is purely neither).

40. *See generally* ALEXANDER M. BICKEL, THE MORALITY OF CONSENT 34 (1975); MICHAEL WALZER, WHAT IT MEANS TO BE AN AMERICAN 82-95 (1st ed. 1992); T. Alexander Aleinikoff, *Theories of Loss of Citizenship*, 84 MICH. L. REV. 1471, 1490 (1986) [hereinafter *Theories*]; Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1, 20 (2002).

41. *See* Juliet Stumpf, *Citizens of an Enemy Land: Enemy Combatants, Aliens, and the Constitutional Rights of the Pseudo-Citizen*, 38 U.C. DAVIS L. REV. 79, 87-96 (2004) (explaining how the Supreme Court's use of social contract theory has paved the way for the development of a class of "pseudo-citizens" who are excluded from full membership in the citizenry).

42. *Id.*

denied badges of membership in society such as voting rights or the right to remain in the United States. Membership theory manifests in this new area through two tools of the sovereign state: the power to punish and the power to express moral condemnation.

The application of membership theory places the law on the edge of a crimmigration crisis. This convergence of immigration and criminal law brings to bear only the harshest elements of each area of law, and the apparatus of the state is used to expel from society those deemed criminally alien. The undesirable result is an ever-expanding population of the excluded and alienated. Excluding and alienating a population with strong ties to family, communities, and business interests in the United States fractures our society in ways that extend well beyond the immediate deportation or state-imposed criminal penalty.[43]

The Prologue imagined a future in which the two systems have merged, in which immigration violations have become federal criminal violations and criminal law has come to dominate the development of the law of deportation. My goal in constructing such a future is to shed new light on our present. Part II of this Article addresses the past and present: it describes the many ways in which criminal law and immigration law have come to intersect. Many criminal offenses, including misdemeanors, now result in mandatory deportation.[44] Immigration violations previously handled as civil matters are increasingly addressed as criminal offenses.[45] The procedures for determining whether civil immigration laws are violated have come to resemble the criminal process. I argue that the trend toward criminalizing immigration law has set us on a path toward establishing irrevocably intertwined systems: immigration and criminal law as doppelgangers.

Part III analyzes the motivation for this development. I theorize that the merger of immigration and criminal law is rooted in notions

43. *See* Nora V. Demleitner, *The Fallacy of Social "Citizenship," or the Threat of Exclusion*, 12 GEO. IMMIGR. L.J. 35, 63-64 (1997) (suggesting that the long-term exclusion of permanent residents from the social and political benefits of society threatens to undermine the idea of the "American dream," creating a population of disenchanted individuals poised to rebel in the form of riots or civil war).

44. *See* Kati L. Griffin, *Perfecting Public Immigration Legislation: Private Immigration Bills and Deportable Lawful Permanent Residents*, 18 GEO. IMMIGR. L.J. 273, 276 (2004) (explaining that lawful permanent residents who have been in the United States since childhood could face mandatory deportation for almost any criminal conviction, even misdemeanors such as shoplifting or bar fights).

45. *See Citizenship & Severity*, *supra* note 5, at 619 (stating that one of the major changes in immigration law in the last two decades has been the increase in criminal consequences for immigration violations that were traditionally treated as civil matters).

of membership in U.S. society that emphasize distinctions between insiders and outsiders. Membership theory plays similar roles in both areas, and both areas employ similar tools to draw lines of belonging and exclusion. Both immigration and criminal law marshal the sovereign power of the state to punish and to express societal condemnation for the individual offender.[46] The use of that powerful tool in this new area of crimmigration law is troubling precisely because of the use of membership theory. Because membership theory is inherently flexible, the viewpoint of the decisionmaker as to whether an individual is part of the community often determines whether constitutional and other rights apply at all.[47]

This Part raises several questions. Does connecting immigration and criminal law result in better decisions about who to include as members of the U.S. community? Or, does it re-cast the membership lines drawn around citizenship, or guilt, or both, in unintended and undesirable ways?

I. IMMIGRATION AND CRIMINAL LAW CONVERGE

The merger of criminal and immigration law is both odd and oddly unremarkable. It is odd because criminal law seems a distant cousin to immigration law. Criminal law seeks to prevent and address harm to individuals and society from violence or fraud or evil motive.[48] Immigration law determines who may cross the border and reside here, and who must leave. Historically, courts have drawn closer connections between immigration law and foreign policy than between immigration and the criminal justice system.[49]

Yet, criminal law and immigration law are similar in the way that they differ from other areas of the law. Most areas of law center on resolving conflicts and regulating the relationships of individuals and

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46. *See* Lisa J. Bauer, Comment, *The Effect of Post-9/11 Border Security Provisions on Mexicans Working in the United States: An End to Free Trade?*, 18 EMORY INT'L L. REV. 725, 750 (2004) (providing reasons why immigration proceedings are more criminal than civil, including the element of societal condemnation, which is present in both immigration and criminal proceedings).

47. *See, e.g.*, Stumpf, *supra* note 41, at 92-94 (discussing the Supreme Court's decision in *Ex parte Milligan*, 71 U.S. 2 (1866), which focused Milligan's citizenship and granted him constitutional rights based on his membership in the constitutional community).

48. *See generally* Benjamin B. Sendor, *Restorative Retributivism*, 5 J. CONTEMP. LEGAL ISSUES 323 (1994).

49. *See* Fong Yue Ting v. United States, 149 U.S. 698, 705 (1893) (extending the foreign policy rationale to the deportation of Chinese resident aliens); Chae Chan Ping v. United States (The Chinese Exclusion Case), 130 U.S. 581, 604 (1889) (grounding the power to regulate immigration in the law of nations and the sovereign power to conduct foreign policy).

businesses. Torts, contracts, property, family law, and business-related law primarily address disputes or regulate the creation, maintenance, and dissolution of personal and business relationships.[50] Criminal law and immigration law, in contrast, primarily regulate the relationship between the state and the individual.[51]

Both criminal and immigration law are, at their core, systems of inclusion and exclusion. They are similarly designed to determine whether and how to include individuals as members of society or exclude them from it. Both create insiders and outsiders. Both are designed to create distinct categories of people—innocent versus guilty, admitted versus excluded or, as some say, "legal" versus "illegal." Viewed in that light, perhaps it is not surprising that these two areas of law have become entwined. When policymakers seek to raise the barriers for noncitizens to attain membership in this society, it is unremarkable that they would turn to an area of the law that similarly functions to exclude.

Crimes committed by immigrants have influenced the direction of immigration law since its inception.[52] The first federal statutes restricting immigration barred the entry of foreigners with criminal convictions, among others.[53] Since then, the relationship between immigration and criminal law has evolved from merely excluding foreigners who had committed past crimes[54] to the present when many immigration violations are themselves defined as criminal offenses[55] and many crimes result in deportation.[56]

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50. Disputes among individuals and businesses are relevant to criminal and immigration law and often serve as the trigger that sets these systems in motion.

51. Civil rights laws and other constitutional provisions also tend to regulate the relationship between the state and the individual. The difference is that both criminal and immigration law focus on the circumstances under which the state can exercise its powers to penalize an individual or expel that person from society.

52. GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW 21 (Princeton Univ. Press 1996); *see* 34 JS. CONTINENTAL CONG. 528 (Sept. 16, 1788) (reflecting the plea of the Congress of the Confederation to the states to "pass proper laws for preventing the transportation of convicted malefactors from foreign countries into the United States").

53. Act of Aug. 3, 1882, ch. 376, § 2, 22 Stat. 214; Act of Mar. 3, 1875, ch. 141, § 5, 18 Stat. 477.

54. NEUMAN, *supra* note 52, at 22; Kanstroom, *supra* note 37, at 1908 ("Colonial and state laws, which often focused on the exclusion of convicted criminals, seem never to have focused on the deportation of noncitizens for post-entry criminal conduct.").

55. *Blurring the Boundaries*, *supra* note 36, at 82-83; April McKenzie, *A Nation of Immigrants or a Nation of Suspects? State and Local Enforcement of Federal Immigration Laws Since 9/11*, 55 ALA. L. REV. 1149, 1150 (2004); *see* Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 8 U.S.C. § 1326 (2000) (outlining various criminal penalties for reentry following a removal order).

This increasing overlap between criminal and immigration law highlights choices about who is a member of U.S. society. Criminal and immigration law primarily serve to separate the individual from the rest of U.S. society through physical exclusion and the creation of rules that establish lesser levels of citizenship.[57] Moreover, the law often imposes both immigration and criminal sanctions for the same offense.[58] Whether a noncitizen violates immigration law that has been defined as criminal, or a crime that is a deportable offense, both incarceration and deportation may result.[59]

The "crimmigration" merger has taken place on three fronts: (1) the substance of immigration law and criminal law increasingly overlaps, (2) immigration enforcement has come to resemble criminal law enforcement, and (3) the procedural aspects of prosecuting immigration violations have taken on many of the earmarks of criminal procedure.[60] Some distinctions between immigration and criminal law persist and shed light on the choices our system has made about when and how individuals may be excluded from the community.

A. Overlap in the Substance of the Law

Immigration law has evolved from a primarily administrative civil process to the present day system that is intertwined with criminal law. In the beginning, immigration law intersected with criminal law only in denying entry to those with a criminal history.[61] Entering

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56. *See, e.g.*, AEDPA § 441 (providing for deportation of criminal aliens for serious crimes including murder, drug trafficking, firearms trafficking and less serious crimes such as gambling, alien smuggling, and passport fraud); 8 U.S.C. § 1182(a)(2)(A) (providing for the inadmissibility of noncitizens who have previously been convicted of a nonpolitical crime); *see also Citizenship & Severity*, *supra* note 5, at 633-34 (underscoring the severe deportation consequences facing noncitizens who are convicted of one of the many forms of aggravated felonies).

57. In the criminal justice system, detention is used pre-trial to ensure that a material witness remains available for investigation and trial, to ensure that a suspect appears at trial, and to prevent the commission of further crimes prior to trial. Bail Reform Act of 1984, 18 U.S.C. § 3142 (2000); *see* 18 U.S.C. § 3144 (governing the release or detention of a material witness).

58. *See Citizenship & Severity*, *supra* note 5, at 618 (explaining that in addition to deportation, immigrants who have unlawfully entered often face harsh criminal penalties, including incarceration, fines, or the forfeiture of property).

59. *Id.*

60. *See id.* at 619 (discussing the convergence of immigration and criminal law and noting that over twenty-five sections of the INA prohibit conduct that is also prohibited in criminal statutes). *See generally* Kanstroom, *supra* note 37 (asserting that the constitutional protections applied in criminal procedure should inform our approach to immigration and deportation).

61. *See* Act of Mar. 3, 1875, ch. 141, § 5, 18 Stat. 477 (excluding from entry those convicted of nonpolitical felonies); Kanstroom, *supra* note 37, at 1908 (noting that early colonial and state laws focused on the exclusion of convicted criminals, rather

without authorization was not punished, and those who committed crimes after entering the country were not deportable.[62] Once immigrants had crossed the border, with or without government sanction, the federal government did little to expel them.[63] Only in 1917 did the government begin to deport convicted noncitizens.[64]

Over time, immigration law became infused with the substance of criminal law itself.[65] First, there has been "unprecedented growth in the scope of criminal grounds for the exclusion and deportation of foreign-born non-U.S. citizens."[66] Second, violations of immigration law are now criminal when they were previously civil, or carry greater criminal consequences than ever before.[67] Third, recent changes in immigration law have focused on detaining and deporting those deemed likely to commit crimes that pose a threat to national security.[68]

1. Removing noncitizen offenders

Since the late 1980s, grounds for excluding and deporting aliens convicted of crimes have proliferated.[69] Until then, deportation of

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than on the deportation of noncitizens for criminal conduct after entry). Earlier state laws banning entry of convicted criminals were primarily directed at those who brought the convict, rather than the convicted alien. NEUMAN, *supra* note 52, at 21.

62. EDWARD PRINCE HUTCHINSON, LEGISLATIVE HISTORY OF AMERICAN IMMIGRATION POLICY 1798-1965 11-46 (Univ. of Pa. Press 1981).

63. *Id.*

64. NEUMAN, *supra* note 52, at 22.

65. *Blurring the Boundaries*, *supra* note 36, at 114. The turn toward criminalization of immigration law seems correlated with a downturn in public opinion toward immigrants. Some have described the 1960s, 1970s, and early 1980s as a heyday for immigrant rights due to the influence of the Civil Rights Movement. *See Citizenship & Severity*, *supra* note 5, at 615 (contrasting immigration's status as a civil rights issue in the 1960s and 1970s to its current status as an issue of national security). However, little has been written about why the solution to this newly perceived problem was to turn to increased criminalization rather than, for example, increased civil enforcement. By the 1990s, immigrants were "accused of exploiting the nation's welfare system, of committing a host of serious offenses against its population, and of being involved in terrorist activity." *Misguided Prevention*, *supra* note 36, at 553. Various rationales have been offered to explain why public opinion toward immigration took on such a negative cast. Events cited as affecting the change in public opinion include the volume of Southeast Asian refugees and those from other countries needing resettlement in the United States, Mexicans crossing the border illegally after Mexico's financial collapse in 1983, and the Mariel boatlift, in which the Cuban government encouraged disaffected Cubans and convicted criminals to take to the sea to seek asylum in the United States. *Citizenship & Severity*, *supra* note 5, at 626.

66. *Citizenship & Severity*, *supra* note 5, at 619.

67. *Id.*

68. *See Misguided Prevention*, *supra* note 36, at 552 (discussing the use of immigration enforcement as a tool in the War on Terror, targeting all "criminal aliens" as potential terrorists and threats to national security).

69. *Citizenship & Severity*, *supra* note 5, at 619; *Immigration Threats*, *supra* note 36, at 1061.

aliens with criminal backgrounds was mostly confined to past convictions for crimes of moral turpitude, drug trafficking, and some weapons offenses.[70] Deportation of permanent residents, including those who had committed crimes, was relatively rare.[71] Detention of aliens with criminal backgrounds was less common than now, and relief from detention more readily available based on a range of circumstantial considerations.[72] Criminal sanctions for purely immigration-related violations were far more limited in comparison to the present day.[73]

In 1988, Congress vastly expanded the range of crimes leading to deportation by creating a category of "aggravated felonies" that included murder, drug trafficking, and firearms trafficking.[74] Almost every immigration statute passed since then has expanded the list of crimes leading to exclusion and deportation.[75] The Immigration Act of 1990 defined an aggravated felony as any crime of violence for which the sentence was at least five years, regardless of how the statute under which the alien was actually convicted defined the crime.[76] In the mid-1990s, Congress added a plethora of offenses to the list of aggravated felonies, many of which do not involve violence.[77] The Antiterrorism and Effective Death Penalty Act of 1996 made a single crime of "moral turpitude" a deportable offense.[78]

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70. ELIZABETH J. HARPER, IMMIGRATION LAWS OF THE UNITED STATES 612-13 (3d ed. 1975); *Citizenship & Severity*, *supra* note 5, at 622.

71. *Immigration Threats*, *supra* note 36, at 1061; Brent K. Newcomb, Comment, *Immigration Law and the Criminal Alien: A Comparison of Policies for Arbitrary Deportations of Legal Permanent Residents Convicted of Aggravated Felonies*, 51 OKLA. L. REV. 697, 698-700 (1998).

72. HARPER, *supra* note 70, at 612-13; *Citizenship & Severity*, *supra* note 5, at 622-23.

73. *Citizenship & Severity*, *supra* note 5, at 622.

74. The Anti-Drug Abuse Act of 1988 (Drug Kingpin Act), Pub. L. No. 100-690, § 7342, 102 Stat. 4181, 4469 (1988); *Citizenship & Severity*, *supra* note 5, at 633.

75. *Citizenship & Severity*, *supra* note 5, at 633-34; *see Misguided Prevention*, *supra* note 36, at 554 (noting the expansion in the number of aggravated felonies that lead to mandatory deportation).

76. Immigration Act of 1990, Pub. L. No. 101-649, § 501(a)(3), 104 Stat. 4978, 5048 (1990).

77. AEDPA, Pub. L. No. 104-132, § 440, 110 Stat. 1214, 1277 (1996); Immigration and Nationality Technical Corrections Act of 1994, Pub. L. No. 103-416, § 222, 108 Stat. 4305, 4320-22 (1994). These statutes added weapons offenses; some types of theft, burglary, and fraud offenses; prostitution; acts related to gambling; transportation related to prostitution; alien smuggling; and types of document fraud. They also added obstruction of justice, serious forms of perjury or bribery, forgery, counterfeiting, vehicle trafficking, offenses committed by a previously deported alien, and offenses related to skipping bail. *Citizenship & Severity*, *supra* note 5, at 634-35.

78. AEDPA § 435 (codified at 8 U.S.C. § 1227(a)(2)(A)(i) (2000)). A "crime of moral turpitude" has never been legislatively defined. Courts look to the inherent nature of the offense to determine whether it falls within the category. *Immigration Threats*, *supra* note 36, at 1064; Brian C. Harms, *Redefining "Crimes of Moral Turpitude": A Proposal to Congress*, 15 GEO. IMMIGR. L.J. 259, 264-69 (2001).

Congress soon broadened the definition of an aggravated felony still further by reducing to one year the sentence length required to constitute a "crime of violence" or a deportable theft offense.[79]

2. Immigration-related criminal offenses

The convergence of immigration and criminal law has been a two-way street. Not only has there been an increase in the number and type of crimes that resulted in deportation, but actions by immigrants that were previously civil violations have crossed the boundary to become criminal offenses, or have come to carry harsher criminal penalties with heightened enforcement levels.[80]

Until 1929, violations of immigration laws were essentially civil matters.[81] In 1929, unlawful entry became a misdemeanor, and unlawful re-entry a felony.[82] In recent decades, the number and types of immigration-related acts that carry criminal consequences have proliferated.[83] In 1986, Congress passed legislation that for the first time sanctioned employers for knowingly hiring undocumented workers and provided for imprisonment and criminal fines for a pattern or practice of such hiring.[84] Since 1990, marrying to evade immigration laws, voting in a federal election as a noncitizen, and falsely claiming citizenship to obtain a benefit or employment have become criminal violations leading to both incarceration and deportation.[85] The criminal penalty for unlawfully re-entering the United States after deportation or exclusion increased from two years to a maximum of ten or twenty years,[86] and enforcement of these violations has increased dramatically.[87]

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79. Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, Div. C., § 321, 110 Stat. 3009-546, 3009-627 (1996) (codified as amended at 8 U.S.C. § 1101(a)(43)(F)-(G) (2000)).

80. *Citizenship & Severity*, *supra* note 5, at 639-45; *Immigration Threats*, *supra* note 36, at 1062-63.

81. Mae M. Ngai, *The Strange Career of the Illegal Alien: Immigration Restriction and Deportation Policy in the United States, 1921-1965*, 21 LAW & HIST. REV. 69, 75-76 (2003).

82. *Id.* at 76.

83. *See Citizenship & Severity*, *supra* note 5, at 639 (detailing the increase, since the 1900s, in the number of noncitizens who face punishment in the criminal justice system for crimes that were once only civil violations).

84. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (1986) (codified at 8 U.S.C. § 1324a).

85. IIRIRA, Pub. L. No. 104-208, Div. C., §§ 215-216, 110 Stat. 3009-546, 3009-627 (1996) (codified as amended at 8 U.S.C. § 1101(a)(43)(F)-(G) (2000)); Immigration Marriage Fraud Amendments of 1986, Pub. L. No. 99-639, 100 Stat. 3537 (codified as amended in scattered sections of 8 U.S.C.); *Citizenship and Severity*, *supra* note 5, at 640.

86. *See* Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 13001, 108 Stat. 1796, 2023 (codified at 8 U.S.C. § 1326 (1994)); Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7345, 102 Stat. 4181, 4471 (increasing the maximum sentence to five to fifteen years for unlawful re-entry,

3. Crimmigration and terrorism

The national focus on terrorism has also had the effect of connecting criminal and immigration law.[88] After the events of September 11, anti-terrorism efforts employed both immigration control and criminal law to reduce terrorist threats.[89] As an example, the DHS enters civil immigration warrant information into national law enforcement databases accessible to state and local police, which has in effect imposed on state and local police a role in enforcing civil immigration law.[90] Also, Operation Tarmac prosecutes and deports unauthorized airport screeners working with forged employment documents.[91]

The association between immigration and criminal law has become so strong that in some arenas immigration law has usurped the traditional role of criminal law. Immigration law is now often used in lieu of criminal law to detain or deport those alleged to be involved in terrorism.[92] Because of the lesser substantive and procedural barriers to deportation compared to a criminal conviction, federal officials have been able to undertake initiatives based on citizenship status and ethnicity that are not possible within the criminal justice system.[93]

As examples, soon after September 11, 2001 the Department of Justice initiated the National Security Entry-Exit Registration System ("NSEERS") that required noncitizen men from certain Muslim and

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depending upon whether the noncitizen's prior deportation was based on an aggravated felony offense); *Citizenship and Severity*, *supra* note 5, at 640.

87. Press Release, DHS, DHS Announces Long-Term Border and Immigration Strategy (Nov. 2, 2005), *available at* http://www.dhs.gov/dhspublic/interapp/press_release/press_release_0795.xml.

88. *Misguided Prevention*, *supra* note 36, at 560.

89. *Id.*

90. Michael J. Wishnie, *State and Local Police Enforcement of Immigration Laws*, 6 U. PA. J. CONST. L. 1084, 1088-95 (2004).

91. *See* DHS, Office Inspector General, A Review of Background Checks for Federal Passenger and Baggage Screeners at Airports 3-4, Appendix D (Jan. 2004), *available at* http://www.dhs.gov/interweb/assetlibrary/OIG-04-08_ReviewofScreenerBackgroundChecks.pdf (describing the DHS investigation of airport screeners post September 11, where the agency conducted extensive background checks designed to ensure, *inter alia*, that screeners possessed U.S. citizenship, and subjected screeners with forged citizenship documents to prosecution under 49 U.S.C. § 46306 (2000)); *see also Misguided Prevention*, *supra* note 36, at 564 (arguing that Operation Tarmac did not in fact target terrorists, but instead undocumented workers, who had used fraudulent papers to obtain employment within airport security personnel ranks).

92. *Misguided Prevention*, *supra* note 36, at 561-62.

93. *See infra* notes 139-145 and accompanying text (noting the absence of constitutional protections for immigrants); *infra* notes 149-152 and accompanying text (detailing vastly broader powers of procedural detention for immigration, as opposed to criminal, offenses).

Arab countries to register with the INS.[94] The DHS Absconder Apprehension Initiative targeted for detention and deportation noncitizen men of Muslim faith and Arab ethnicity who had criminal convictions or immigration violations, regardless of whether the crimes or violations related to terrorism.[95] The USA PATRIOT Act of 2001 has resulted in detentions of noncitizens without charge for an undefined "reasonable period of time" under extraordinary circumstances.[96] All of these examples permit the government to employ immigration rules to detain or deport noncitizens suspected of terrorist tendencies without resort to the criminal justice system.

As a result of this interlacing of criminal and immigration law, the number of deportations has risen dramatically.[97] Between 1908 and 1980, there were approximately 56,000 immigrants deported based on criminal convictions.[98] In 2004 alone, there were more than 88,000 such deportations.[99]

B. Similarities in Enforcement

Immigration enforcement has come to parallel criminal law enforcement. The authority of federal agencies to regulate immigration as a law enforcement matter, however, has not always been clear. In 1930, members of the House Committee on Immigration and Naturalization expressed concern that the Border Patrol was overreaching its authority when they discovered that the

94. 8 C.F.R. § 264.1(f) (2006); *see* Registration of Certain Nonimmigrant Aliens from Designated Countries, 67 Fed. Reg. 77, 642 (Dec. 18, 2002) (modifying and clarifying registration requirements and specifying which countries are "designated countries").

95. U.S. Dep't of Justice, Memorandum from the Deputy Attorney General, Guidance for Absconder Apprehension Initiative (Jan. 25, 2002), *available at* http://fl.findlaw.com/news.findlaw.com/hdocs/docs/doj/abscndr012502mem.pdf; *see* Misguided Prevention, *supra* note 36, at 561 (stating that the Absconder Initiative, designed to increase public security in the wake of September 11, targeted individuals from these predominantly Muslim countries for criminal or immigration violations).

96. 8 C.F.R. § 287.3(d) (2006); *see* Susan M. Akram & Maritza Karmely, *Immigration and Constitutional Consequences of Post-9/11 Policies Involving Arabs and Muslims in the United States: Is Alienage a Distinction Without a Difference?*, 38 U.C. DAVIS L. REV. 609, 634-35 (2005) (affirming that, despite broad powers of detention authorized under the USA PATRIOT Act, a report issued six months after the Act's passage indicated that the government relied instead on the provision in 8 C.F.R. § 287, which exceeds the limits set in the Act, to hold individuals indefinitely).

97. *Immigration Threats*, *supra* note 36, at 1063.

98. 2004 YEARBOOK OF IMMIGRATION STATISTICS tbl.45, *available at* http://www.uscis.gov/graphics/shared/statistics/yearbook/2004/Table45.xls (click "open" when prompted to open file) (last visited Oct. 1, 2006).

99. 2004 DHS ANN. REP. 1, *available at* http://www.uscis.gov/graphics/shared/statistics/publications/AnnualReportEnforcement2004.pdf (last visited Oct. 1, 2006).

agency operated as far as 100 miles inside the border and considered itself authorized to make arrests without a warrant.[100] Because the Border Patrol was not a criminal law enforcement agency, Congress was uneasy about the agency's lack of statutory authority to make warrantless arrests and its claim to jurisdiction well within the nation's edge.[101]

The contrast between the doubts expressed by that earlier Congress and the current authority of the immigration agency could not be more marked. Between 1875, when Congress passed the first federal immigration exclusion law,[102] and 1917, when it appropriated funds for deporting those unlawfully in the country,[103] there was no federal mechanism for enforcing the deportation sanction.[104] Yet, today the appearance and powers of the two immigration enforcement agencies—Immigration and Customs Enforcement[105] and U.S. Customs and Border Protection[106]—are almost indistinguishable from those of a criminal law enforcement organization.[107] Representative of the shift from a civil administrative agency to law enforcement is the transfer of responsibility for immigration control from the Department of Commerce and Labor

100. Ngai, *supra* note 81, at 70 & n.2.

101. *Id.* at 70.

102. *See* Kerry Abrams, *Polygamy, Prostitution, and the Federalization of Immigration Law*, 105 COLUM. L. REV. 641, 643 (2005) (describing how the Page Law, repealed in 1974, which banned women from immigrating to engage in prostitution or for other lewd or immoral purposes, in effect led to the exclusion of almost all immigrant Chinese women).

103. Act of May 6, 1882 (Chinese Exclusion Act), ch. 126, 22 Stat. 58 (repealed 1943); Act of Aug. 3, 1992 (Immigration Act of 1882), ch. 376, 22 Stat. 214 (amended 1940); Act of Feb. 26, 1885 (Alien Contract Labor Law), ch. 164, 23 Stat. 332 (repealed 1952).

104. Ngai, *supra* note 81, at 73.

105. *See* U.S. Immigration and Customs Enforcement ("ICE") Webpage, About Us, http://www.ice.gov/about/index.htm (last visited Oct. 15, 2006) (stating that the mission of the ICE (created after September 11) is to more efficiently enforce immigration and customs laws in order to protect the nation against future terrorist attacks).

106. *See* U.S. Customs and Border Protection (CBP) Webpage, About CBP, http://www.cbp.gov/xp/cgov/toolbox/about/mission/guardians.xml (last visited Oct. 15, 2006) (describing the CBP as the "guardians of our Nation's borders" and protecting the American public "against terrorists and the instruments of terror").

107. *See, e.g.*, CBP Report, Securing America's Borders, *available at* http://www.cbp.gov/xp/cgov/toolbox/about/mission (click on title "CBP: Securing America's Borders") (describing CBP as the "largest uniformed law enforcement agency" in the country and boasting that the agency's typical daily duties include executing arrests, seizing drugs and other illegal items, and intercepting and refusing entry of smuggled and criminal aliens).

to the Department of Justice in 1940 and ultimately to the DHS in 2002.[108]

The Border Patrol is perhaps the most apparent example of the way immigration enforcement has evolved to parallel criminal law enforcement. The Border Patrol has transformed from its original embodiment as a collection of 450 ranchers, military men, railway mail clerks, and local marshals and sheriffs[109] to a trained and uniformed enforcement body whose activities resemble those of any police force.[110] Border Patrol agents are empowered to conduct surveillance, pursue suspected undocumented aliens, make stops, and effectuate arrests.[111] In 1986, Congress legislated the first of a series of significant increases in appropriations for the Border Patrol.[112] Today, the immigration enforcement arms of DHS constitute the largest armed federal law enforcement body.[113] For the first time, immigration prosecutions outnumber all other types of federal criminal prosecutions, including prosecutions for drugs and weapons violations.[114]

Immigration enforcement has also begun to break down the traditional divide between federal control over immigration and state

108. Ngai, *supra* note 81, at 70 n.1; Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (codified as amended in various sections of 5, 6, 18, 44, and 49 U.S.C.)

109. BILL ONG HING, DEFINING AMERICA THROUGH IMMIGRATION POLICY 135 (Temple Univ. Press 2004); *see* Ngai, *supra* note 81, at 86-87 (describing the Border Patrol's early years when its ranks contained former cowboys, ranchers and others who were young and inexperienced but typically had some form of military training).

110. *See supra* note 107 and accompanying text (highlighting the similarities between CBP activities, the agency which controls and overseas the Border Patrol, to a criminal law enforcement agency).

111. HING, *supra* note 109, at 137-38.

112. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, § 111(b), 100 Stat. 3359, 3381 (1986) (codified at 8 U.S.C. § 1101(b) (2000)); *see* Michael D. Hoefer, *Background of U.S. Immigration Policy Reform*, *in* U.S. IMMIGRATION POLICY REFORM IN THE 1980S: A PRELIMINARY ASSESSMENT 17, 20 (Francisco L. Rivera-Batiz, Selig L. Sechzer & Ira N. Gay eds., 1991) (noting a four billion dollar earmark for the bill even before its formal passage); *Citizenship & Severity*, *supra* note 5, at 629-31 (reviewing the four major provisions of the Act: sanctions on employers who employ illegal aliens; increased immigration enforcement; privileges of amnesty for certain undocumented aliens; and special provisions for agricultural workers).

113. News Release, ICE, ICE Detention and Removal Sets Record for Fiscal Year 2004 (Nov. 16, 2004), http://www.ice.gov/pi/news/newsreleases/articles/drofy04.htm. The former Immigration and Naturalization Service has been reconstituted into three sections of the DHS. U.S. Dep't of Homeland Security, DHS Organization, July 26, 2006, http://www.dhs.gov/dhspublic/interapp/editorial/editorial_0515.xml. The U.S. Citizenship and Immigration Services provides immigration benefits. *Id.* The Bureau of Customs and Border Protection ("CBP") is responsible for border protection, while the ICE investigates and enforces violations of immigration and customs laws. *Id.*

114. Transactional Records Access Clearinghouse ("TRAC"), *New Findings about DHS-Immigration* (2005), http://www.trac.syr.edu/tracins/latest/131.

dominance of criminal law.[115] Congress has taken steps to encourage state and local law enforcement officers to enforce pure immigration violations.[116] Nonfederal law enforcement agencies may enter into agreements with the federal government under which they are deputized to enforce immigration laws.[117] Proposed legislation would declare that state and local law enforcement officers have inherent power to enforce immigration laws and would provide training and funding for agencies that participated.[118]

This blurring of federal and state authority to enforce immigration law is apparent at the agency level as well. In 2001, the INS began to enter civil immigration information into the FBI's criminal database, which state and local police widely consult during everyday stops and encounters.[119] As a result, police officers who consult the database arrest individuals suspected of civil immigration violations.[120] The Department of Justice also has put pressure on state and local police to make immigration arrests and enforce immigration laws as part of

115. Because the Tenth Amendment prevents the federal government from requiring state law enforcement agencies to enforce federal law, Congress must instead entice state and local assistance. *See* Huyen Pham, *The Constitutional Right Not To Cooperate? Local Sovereignty And TheFederal Immigration Power*, 74 U. CIN. L. REV. 1373, 1379 (2006); *see also* Printz v. United States, 521 U.S. 898 (1997) (striking down a federal law that required state officers to conduct background checks on potential gun buyers).

116. *See* Immigration and Nationality Act ("INA"), 8 U.S.C. § 1103(a)(8) (2000) (permitting the Attorney General to authorize state or local law enforcement to enforce immigration law when an "actual or imminent mass influx of aliens . . . presents urgent circumstances requiring an immediate Federal response"); *see also* Huyen Pham, *The Inherent Flaws in the Inherent Authority Position: Why Inviting Local Enforcement of Immigration Laws Violates the Constitution*, 31 FLA. ST. U. L. REV. 965, 980 & n.76 (2004) (noting the troubling effect the 10th Circuit Court of Appeal's holding in the case of *United States v. Vasquez-Alvarez*, 176 F.3d 1294 (10th Cir. 1999), may have on federal authority under § 1103(a), where the court allowed broad application of state power to make immigration arrests).

117. *See* INA, 8 U.S.C. § 1357(g) (2000) (authorizing the Attorney General to enter into agreements with states to deputize state officers and employees to perform the functions of immigration officers).

118. *See, e.g.*, Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005, H.R. 4437, 109th Cong. § 103(c) (2005) (referred to the S. Comm. on the Judiciary, Jan. 27, 2006) (proposing to amend the INA of 1986 in order to increase border protection and security against illegal immigration); Homeland Security Enhancement Act of 2003, S. 1906, 108th Cong. § 101 (2003) (referred to S. Comm. on the Judiciary, Nov. 20, 2003) (providing enhanced enforcement of federal, state, and local immigration laws). Based on controversial legal grounds, the Office of Legal Counsel in the U.S. Department of Justice recently reversed its earlier constitutional interpretation that only federal actors have authority to enforce immigration law. John Ashcroft, Attorney General, Announcement of the National Security Entry-Exit Registration System (June 5, 2002), *available at* http://www.usdoj.gov/archive/ag/speeches/2002/060502agpreparedremarks.htm.

119. Wishnie, *supra* note 90, at 1095-96.

120. *Id.* at 1096.

their duties.[121] These policies are "a sea change in the traditional understanding that federal immigration laws are enforced exclusively by federal agents."[122]

C. Procedural Parallels

The parallels between criminal procedure and the rules governing immigration law and proceedings are legion. The two areas have vastly different constitutional procedural protections. Criminal process rights are embodied in the Fourth, Fifth, and Sixth Amendments,[123] while immigration proceedings are generally governed by the Fifth Amendment's Due Process Clause.[124] Nevertheless, immigration proceedings have come to bear a striking resemblance to criminal processes. As in criminal law, an immigration judge's decision in an exclusion or deportation case concerns the physical liberty of the individual.[125] Immigration law enforcement officers execute warrants, make arrests, and detain suspected violators.[126] The violation is adjudicated in a hearing where the individual has the opportunity to present evidence and examine witnesses.[127] The functions of prosecutor and adjudicator are

121. *Id.* at 1087.
122. *Id.*
123. *See* U.S. CONST. amend. IV (affording suspected criminals the right to be free from unreasonable searches and seizures of their persons or property); *id.* amend. V (providing the procedural protections of grand jury hearings and the double jeopardy shield, as well as the right to protect against self-incrimination); *id.* amend. VI (granting defendants the rights to speedy and neutral trials, during which the defendant may confront witnesses against him, call witnesses to support him, and be ensured the assistance of counsel). *See generally*, CARL J. FRANKLIN, CONSTITUTIONAL LAW FOR THE CRIMINAL JUSTICE PROFESSIONAL 99-246 (Becky McEldowney ed., CPC Press 1999) (presenting a detailed analysis of the constitutional protections of the Fourth, Fifth, and Sixth Amendments of the U.S. Constitution and references therein to relevant Supreme Court interpretations of these criminal constitutional rights).
124. *See* Yamataya v. Fisher, 189 U.S. 86, 100-02 (1902) (declaring that deported aliens are protected only by the Fifth Amendment's constitutional guarantee of due process); *see also* Galvan v. Press, 347 U.S. 522, 530-31 (1954) (holding that deportation of noncitizens is not criminal punishment, but rather a civil penalty, and therefore, procedural protections of criminal trial do not attach to deportation proceedings); Taylor & White, *supra* note 37, at 1137 (describing the removal of traditional criminal procedure protections as one consequence of the separation of criminal and immigration enforcement).
125. *See* INA, 8 U.S.C. § 1229a (2000) (governing removal proceedings); *id.* § 1229a(e)(2) (defining the term "removable" and providing that, upon a finding that a noncitizen is in fact removable, the noncitzen is either barred entry to the United States or deported). Accordingly, because one result of a removal proceeding is to physically restrain an individual with respect to his or her ability to reside in the United States lawfully, these proceedings implicate individuals' physical liberties.
126. *See id.* § 1226.
127. *See* Taylor & Wright, *supra* note 37, at 1137-38.

generally separated,[128] and the immigrant has a right to counsel, though not at government expense.[129]

Hand in hand with the greater overlap between criminal and immigration law and the creation of a police-like enforcement agency has been the increased use of an immigration sanction—detention—that parallels the criminal sanction of incarceration.[130] Congress has recently narrowed the circumstances under which noncitizens convicted of crimes can avoid administrative detention after completing their criminal sentences.[131] DHS has expanded the categories of immigrants subject to detention that it had formerly released and now detains permanent residents, women, and children.[132] The USA PATRIOT Act of 2001 authorized the Attorney General to detain noncitizens for seven days without criminal charges.[133] Much longer detentions became prevalent, however, based on expanded administrative rules that permitted detention without charge for a "reasonable period of time" under extraordinary circumstances.[134] In April 2003, citing national security concerns, the Attorney General expanded the grounds for detention of asylum-

128. Recent amendments to the INA have created two exceptions to this rule: "INS officers can summarily deport aggravated felons who are not lawful permanent residents and individuals who have reentered illegally after having previously been removed." *Id.* at 1138.

129. INA, 8 U.S.C. § 1362 (2000); *e.g.*, Vides-Vides v. INS, 783 F.2d 1463, 1469-70 (9th Cir. 1986); United States v. Gasca-Kraft, 522 F.2d 149, 152 (9th Cir. 1975); Burquez v. INS, 513 F.2d 751, 755 (10th Cir. 1975) (holding that there is no Sixth Amendment right to counsel at government expense in deportation proceedings); *cf.* Aguilera-Enriquez v. INS, 516 F.2d 565, 568 (6th Cir. 1975) (articulating that the due process test for requiring appointed counsel asks whether assistance of counsel is necessary as a matter of fundamental fairness, but holding that counsel was not necessary in the case at bar).

130. *Citizenship & Severity*, *supra* note 5, at 635-37. There are certainly distinctions between immigration-related detention and criminal detention. The Supreme Court has repeatedly held that immigration-related detention is not punishment in the criminal sense. *E.g.*, Demore v. Kim, 538 U.S. 510, 531 (2003). The purpose of detention in the immigration context is to ensure that a noncitizen attends administrative hearings, and to guarantee ease of removal from the country. But even when the deprivation of liberty is not associated with a criminal sentence, it resembles criminal punishment. Kanstroom, *supra* note 37, at 1895. Noncitizens awaiting immigration proceedings or removal are often held in the same detention system under the same conditions as convicted criminals. *Id.* Perhaps the relevant parallel with incarceration is deportation, because both are the remedies for a determination that an individual violated the immigration or criminal law.

131. *Citizenship & Severity*, *supra* note 5, at 630.

132. *Id.* at 637.

133. USA PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 272, 350-51 § 412(a) (2001) (to be codified at 8 U.S.C. § 1226(a)); see Akram & Karmely, supra note 96 (listing the numerous provisions of the USA PATRIOT Act which target specifically Arab and Muslim citizens).

134. 8 C.F.R. § 287.3(d) (2006); Akram & Karmely, *supra* note 96.

seekers from Haiti based on his belief that "Pakistanis, Palestinians, etc." might use Haiti as a "staging point" for terrorism.[135]

D. Distinctions between Immigration and Criminal Law

Convergence of the immigration and criminal justice systems appears inevitable. Yet, significant distinctions remain. First, the constitutional rights of noncitizens in immigration proceedings are far more limited than those of criminal defendants, whose Fourth, Fifth, Sixth, and Fourteenth Amendment rights lattice the structure of the criminal trial.[136]

Courts have offered two justifications for this distinction. Unlike criminal law, courts have historically connected immigration law with foreign policy.[137] Immigration law is governed primarily by the plenary power doctrine, which grants vast power to Congress and the President over foreign policy, including immigration, and limits the reach of the Constitution and the scope of judicial review.[138] The second justification is that courts have historically treated immigration-related exclusion, deportation, and detention as civil remedies, not as punishment comparable to criminal sanctions.[139]

As a result, only the Due Process Clause protects noncitizens in deportation proceedings,[140] and those seeking to enter the country

135. *In re* D-J, 23 I. & N. Dec. 572, 579 (2003); *see Misguided Prevention*, *supra* note 36, at 571 (criticizing the Attorney General's unsupported opinion that Haiti could be a "staging point" for terrorist immigration into the United States).

136. *See supra* notes 123-124 and accompanying text (comparing the constitutional protections afforded to criminals and immigrants).

137. *See* Zadvydas v. Davis, 533 U.S. 678, 689 (2001) (holding that the government may not indefinitely detain a removable (deportable) alien in order to secure his deportation to another country); Chae Chan Ping v. United States, 130 U.S. 581, 591-602 (1889) (contextualizing the detention of a Chinese laborer seeking release by describing, at length, various United States-China treaties and theories of foreign policy relationships between the two nations).

138. *See, e.g.*, *Zadvydas*, 533 U.S. at 687-88 (discussing the Court's limited role in reviewing immigration proceedings and acknowledging the broad powers of both Congress and the executive branch instead).

139. *See* INS v. Lopez-Mendoza, 468 U.S. 1032, 1050 (1984) (refusing to extend the benefit of the exclusionary rule, derived from the Fourth Amendment's criminal protection, to a civil deportation proceeding); Mahler v. Eby, 264 U.S. 32, 39 (1924) (finding it "well settled" that deportation is not punishment); *see also* Kanstroom, *supra* note 37, at 1894-95 (referencing Justice Scalia's assertion in the majority opinion of *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 491 (1999), that while the consequences of deportation are grave, they are still not punishment by society's definition). Kanstroom contends that this argument is circular—deportation is not punishment because society does not view deportation as punishment—and emphasizes the ways in which immigration and criminal proceedings and detentions are, in fact, indistinguishable. *Id.*

140. Yamataya v. Fisher, 189 U.S. 86, 100-02 (1902).

have essentially no constitutional protections at all.[141] Fifth and Sixth Amendment rights, prominent features of criminal trials, do not apply in deportation proceedings except to the limited extent that "fundamental fairness" requires them.[142] The Fourth Amendment's exclusionary rule does not apply in removal cases.[143] Noncitizens in immigration proceedings do not enjoy the protections of the Eighth Amendment against cruel and unusual punishment.[144] They generally do not have the right to appointed counsel at government expense[145] or the protection of the privilege against self-incrimination.[146] Nor does the Ex Post Facto Clause prohibit retroactive application of laws to immigrants in the deportation context.[147]

Second, the circumstances under which noncitizens may find themselves detained are much broader than in the criminal context. In the criminal justice system, detention occurs primarily in three situations: (1) pre-conviction, when a criminal defendant is detained prior to and during trial;[148] (2) post-conviction, in connection with a sentence mandating incarceration; or (3) when a material witness is detained to ensure his presence at trial.[149]

In contrast, government power to detain noncitizens in the immigration context is vast. Noncitizens are detained if they are not clearly entitled to entry, are awaiting removal proceedings, or have a

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141. *See* Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206, 213-14 (1953) (affirming that an alien may not be deprived of the constitutional right of due process, but extending no further protection to the noncitizen); Knauff v. Shaughnessy, 338 U.S. 537, 544 (1950) (refusing to extend constitutional protection other than due process to an alien seeking admission into the United States).

142. Kanstroom, *supra* note 37, at 1895.

143. Lopez-Mendoza, 468 U.S. at 1038, 1050.

144. *See* Briseno v. INS, 192 F.3d 1320, 1323 (9th Cir. 1999) (rejecting the argument that the Eighth Amendment applies to immigrants and that deportation is cruel or unusual punishment). This may be an illusory distinction: it is questionable whether criminal defendants enjoy any greater level of Eighth Amendment protection. *See Ewing v. California,* 538 U.S. 11 (2003) (holding that the sentence of twenty-five years to life for theft of three golf clubs under California's three strikes law did not violate the Eighth Amendment).

145. INA, 8 U.S.C. § 1362 (2000).

146. *See* Bustos-Torres v. INS, 898 F.2d 1053, 1056-57 (5th Cir. 1990) (holding that "Miranda warnings are not required in the deportation context, for deportation proceedings are civil, not criminal in nature, and the Sixth Amendment safeguards are not applicable," yet stating in dicta that due process prohibits the admission of a noncitizen's involuntary statements); Lavoie v. INS, 418 F.2d 732, 734 (9th Cir. 1969) (reaffirming that deportation proceedings are civil; thus, criminal constitutional protections do not apply).

147. *See* Harisiades v. Shaughnessy, 342 U.S. 580, 593-96 (1952) (rejecting arguments that the Alien Registration Act of 1940 contravened the Ex Post Facto Clause); Johannessen v. United States, 225 U.S. 227, 242 (1912).

148. 18 U.S.C. § 3141 (2000).

149. *Id.* § 3144.

final order of removal.[150] Those who have committed aggravated felonies and have served their prison terms are detained pending the conclusion of deportation proceedings.[151] DHS regulations permit detention of a noncitizen pending a decision to file immigration charges for a "reasonable" period of time "in the event of an emergency or other extraordinary circumstance."[152] DHS has also singled out for detention asylum seekers from thirty-three designated countries which are primarily Muslim or Arab.[153]

Third, immigration control has traditionally been exclusively a federal responsibility, in contrast to the traditional state responsibility for crime control.[154] Because the plenary power doctrine locates the authority for immigration matters with Congress and the President, immigration law was historically a creature of the federal government, off-limits to the states.[155] Although there are signs of change in both areas toward overlapping state and federal responsibility, the pre-eminence of federal control over immigration and state responsibility for criminal law remains.[156]

Fourth, race and national origin are relevant in different ways in criminal and immigration law. This is most easily seen in the context of the Fourth Amendment, which the Supreme Court has interpreted to permit an immigration agent to rely on national origin and

150. INA, 8 U.S.C. §§ 1225(b)(2), 1226(c), 1231(a).

151. *See* Demore v. Kim, 538 U.S. 510 (2003) (upholding legislation mandating preventive detention without bond during immigration proceedings of immigrants with criminal convictions).

152. 8 C.F.R. § 287.3(d) (2006); *see* Charles D. Weisselberg, *The Detention and Treatment of Aliens Three Years After September 11: A New New World?*, 38 U.C. DAVIS L. REV. 815, 825 & n.58 (2005) (noting that prior regulations gave the INS twenty-four hours to decide whether to charge the detained alien).

153. *See* Donald Kerwin, *Counterterrorism and Immigrant Rights Two Years Later*, 80 INTERPRETER RELEASES 1401, 1402-03 (2003) (explaining that these designated countries are any countries in which Al Qaeda is present); *see also* Weisselberg, *supra* note 152, at 829 (noting that when the United States resumed refugee admissions after a two month suspension immediately following the September 11 attacks, it detained all asylum-seekers from these designated countries).

154. Pham, *supra* note 116, at 968.

155. *See* NEUMAN, *supra* note 52, at 19-43 (noting the transformation of immigration law from its early days as a state-governed matter to a purely federal issue); Abrams, *supra* note 102, at 664-68 (recounting the see-saw history of federal versus state control over immigration laws). Abrams notes that, prior to the passage of the Page Law, states were the primary sources of immigration laws. *Id.* at 665-66. In a series of cases in the late 1800s, however, the Supreme Court struck down various state regulations under Commerce Clause analysis, precipitating a shift towards increasing federal authority over immigration law which remains today. *Id.* at 667.

156. *See* Pham, *supra* note 116, at 968-69 (acknowledging the continued norm in immigration enforcement for state agents to yield to federal authority).

ethnicity as a factor in making a stop.[157] The exclusionary rule, which prohibits the use in criminal trials of evidence seized in violation of the Fourth Amendment, does not apply in deportation proceedings.[158] Nor does it apply to a noncitizen in a domestic criminal trial when the seizure took place abroad.[159]

One final distinction between the criminal and immigration contexts deserves mention. Societal perceptions of immigrants and criminal defendants differ. Public perceptions of immigrants have tended to be more positive than perceptions of criminal offenders.[160] Scholars describe the archetype of the undocumented immigrant as a hard-working individual drawn to enter the United States clandestinely with the hope of rising economic prospects and a better life for herself and her family.[161]

This vision, however, is in transition. Undocumented immigrants are increasingly perceived as criminals, likely to commit future criminal acts because of their history of entering the country unlawfully.[162] More recently, immigrants have been identified with terrorism, perceived as either complicit in the acts precipitating September 11 or prone to such acts in the future.[163] It is membership theory that is driving this change.

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157. *See* United States v. Brignoni-Ponce, 422 U.S. 873, 886-87 (1975) (finding that while use of a person's ancestry is a relevant factor in finding reasonable suspicion, standing alone, it would not be sufficient). *But see* United States v. Montero-Camargo, 208 F.3d 1122, 1133 (9th Cir. 2000) (holding that race is not a legitimate factor in making an immigration stop, and distinguishing *Brignoni-Ponce* as a historical relic).

158. INS v. Lopez-Mendoza, 468 U.S. 1032, 1050 (1984).

159. United States v. Verdugo-Urquidez, 494 U.S. 259, 272 (1990).

160. *See, e.g.*, Melinda Smith, *Criminal Defense Attorneys and Noncitizen Clients: Understanding Immigrants, Basic Immigration Law & How Recent Changes in Those Laws May Affect Your Criminal Cases*, 33 AKRON L. REV. 163, 169-71 (1999) (describing the general public perception of immigrants as hard workers who contribute to the nation's diversity by enriching its culture).

161. Bill Ong Hing, *The Immigrant as Criminal: Punishing Dreamers*, 9 HASTINGS WOMEN'S L.J. 79, 79-80, 85-87 (1998).

162. *Id.* An immigrant's status as undocumented or illegal is a key factor also affecting the public perception of specific immigrant individuals. *See* Smith, *supra* note 160, at 170 (reciting perceptively more negative impressions of immigrants when polled participants were asked specifically about legal versus illegal immigrants).

163. Kevin R. Johnson, *Legal Immigration in the 21st Century*, *in* BLUEPRINTS FOR AN IDEAL IMMIGRATION POLICY 37-41 (Richard D. Lamm & Alan Simpson eds., Center for Immigration Studies 2001); Hollis V. Pfitsch, Note, *The Executive's Scapegoat, The Court's Blind Eye? Immigrants' Rights After September 11*, 11 WASH. & LEE RACE, ETHNICS, ANCESTRY L.J. 151, 194-95 (2005); Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. REV. 1575 (2002).

II. MEMBERSHIP THEORY AND CRIMMIGRATION

Why has this merger of criminal and immigration law taken place? Using criminal law to enforce immigration law seems to take the long way around. It tends to address the problem *ex post* and on an individual basis, after unauthorized immigration has occurred or a foreigner has committed an offense.[164] Using exclusion or deportation to punish criminal offenses and prevent recidivism may be efficient,[165] but it circumvents criminal constitutional protections and fails to account for serious costs to the noncitizen, family members, employers, and the community.[166]

A. The Role of Membership Theory in Criminal and Immigration Law

The answer to this puzzle may lie in the core function that both immigration and criminal law play in our society. Both systems act as gatekeepers of membership in our society, determining whether an

164. *See* Kanstroom, *supra* note 37, at 1891-92 (portraying deportation as the automatic consequence of a noncitizen's criminal conviction). This inevitably requires *ex post* enforcement of immigration laws because the immigrant, logically, must first be convicted.

165. *Id.* at 1893.

166. Alternatives to criminalizing immigration law exist, though each has its flaws. Employment and family ties, not crime, are usually seen as the magnets for immigrants. Attempts to control immigration by focusing on these two internal magnets have created a host of problems. For employment, in 1986, Congress passed legislation that established civil penalties for employers who knowingly hire undocumented employees. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (1986) (codified in scattered sections of 8 U.S.C.). This legislation has been widely condemned as ineffective, primarily because of the difficulties in proving the employer's knowledge that the employee was undocumented. *See, e.g.*, Kitty Calavita, *Employer Sanctions Violations: Toward a Dialectical Model of White-Collar Crime*, 24 LAW & SOC'Y REV. 1041, 1041 (1990) (summarizing the results of an empirical study of the employer sanctions provisions and concluding that violators of the Act's provisions feel relatively protected from detection or punishment); Walter A. Ewing, *From Denial to Acceptance: Effectively Regulating Immigration to the United States*, 16 STAN. L. & POL'Y REV. 445, 451 (2005) (noting that the threat of employer sanctions failed to reduce undocumented immigration; instead, it created a prosperous black market for the manufacture of fraudulent identification documents, which immigrants could use to obtain employment in the United States); Maria L. Ontiveros, *Forging Our Identity: Transformative Resistance in the Areas of Work, Class, and the Law*, 33 U.C. DAVIS L. REV. 1057, 1064 (2000) (revealing that because the INA only requires employers to make a good-faith effort to check employee documents, the employer has essentially no liability for accepting documents that appear reasonably genuine). In 1997, a report to Congress on immigration reform suggested using familial ties to curb the influx of immigration. *See* U.S. Comm'n on Immigration Reform, *Becoming an American: Immigration and Immigration Policy*, 1997 Report to Congress, 60-69, *available at* http://www.utexas.edu/lbj/uscir/becoming/fr-toc.html (advocating shifting immigration priorities away from extended family and toward nuclear families); *see also* Mark Krikorian, *Legal Immigration: What is to be Done*, *in* BLUEPRINTS FOR AN IDEAL IMMIGRATION POLICY 47-51 (Richard D. Lamm & Alan Simpson eds., Center for Immigration Studies 2001); Johnson, *supra* note 163, at 37-41 (supporting proposals which limit immigration to the spouses and minor children of U.S. citizens).

individual should be included in or excluded from our society.[167] True, the outcomes of the two systems differ. A decision to exclude in criminal law results in segregation within our society through incarceration, while exclusion in immigration law results in separation from our society through expulsion from the national territory.[168] Yet at bottom, both criminal and immigration law embody choices about who should be members of society: individuals whose characteristics or actions make them worthy of inclusion in the national community.[169]

Membership theory influences immigration and criminal law in similar ways. Membership theory is based in the idea that positive rights arise from a social contract between the government and the people.[170] Those who are not parties to that agreement and yet are subject to government action have no claim to such positive rights, or rights equivalent to those held by members.[171] "Only members and beneficiaries of the social contract are able to make claims against the government and are entitled to the contract's protections, and the government may act outside of the contract's constraints against individuals who are non-members."[172]

When membership theory is at play in legal decisionmaking, whole categories of constitutional rights depend on the decisionmaker's vision of who belongs.[173] Membership theory is thus extraordinarily flexible.[174] Expansive notions of membership may broaden the scope of constitutional rights; stingier membership criteria restrict rights

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167. *See* Nora V. Demleitner, *Preventing Internal Exile: The Need For Restrictions On Collateral Sentencing Consequences*, 11 STAN. L. & POL'Y REV. 153, 158 (1999) [hereinafter *Internal Exile*] (comparing ex-offenders and permanent residents and labeling both as societal outcasts).

168. *Id.* at 153.

169. *See id.* at 159 (recognizing the expansion of social and welfare rights in the last decades to those considered members of society, but noting the switch in the mid-1990s to a "civic virtues" conception of citizenship in which "undeserving" members, such as criminals or noncitizens were increasingly excluded from receiving benefits).

170. Bickel, *supra* note 40, at 34; Cleveland, *supra* note 40, at 20; *see* NEUMAN, *supra* note 52, at 5 (noting that the Constitution's Preamble can arguably be construed as containing a social contract between the people and the government).

171. Cleveland, *supra* note 40, at 20; *see* WALZER, *supra* note 40, at 82-95 (describing citizens as members of a political community who are entitled to certain benefits from the state and who must fulfill common expectations pertaining to that membership); Aleinikoff, *supra* note 40, at 1490 (describing citizenship as a mutual membership in a state created by the consent of both a person and the state).

172. Cleveland, *supra* note 40, at 20.

173. *See supra* notes 140-146 and accompanying text (explaining how various criminal constitutional rights are not applicable to nonmember immigrants).

174. *See* Cleveland, *supra* note 40, at 21 (portraying the social contract theory as elastic, such that the contract can be narrowly or broadly defined to exclude or include groups of individuals).

and privileges.[175] In *Plyler v. Doe*,[176] the Court's reasoning that undocumented schoolchildren are potential members of the United States citizenry led to a ruling that Texas could not deny those children equal access to a public school education.[177] More often, membership theory has been used to narrow constitutional coverage by defining the scope of "the People" to exclude noncitizens at the perimeter of society.[178]

Introducing membership theory into criminal law, and especially into the uncharted territory of crimmigration law, undermines the strength of constitutional protections for those considered excludable. A decisionmaker's perspective on who is excludable can also affect the willingness to extend statutory rights and benefits, or interpret legal and other norms in ways that advantage ex-offenders and immigrants.[179] It becomes critical, therefore, to trace how membership theory plays out in both immigration and criminal law.

Immigration law defines membership in this society explicitly, by establishing a ladder of accession to permanent residence and then formal U.S. citizenship, and a set of criteria to determine whether an individual meets the requirements for these various levels of membership.[180] These criteria often reflect acceptance and invitation by established members of the nation, such as spouses, other family members, or employers.[181] However, when the immigrant violates prescribed rules, primarily criminal laws, immigration law requires

175. *Id.* at 21-22.
176. 457 U.S. 202 (1982).
177. *Id.* at 218 & n.17, 222 n.20.
178. *See* United States v. Verdugo-Urquidez, 494 U.S. 259, 260 (1990) (denying constitutional protection to a noncitizen because he had no voluntary connection to the United States that might place him among "the People" and reasoning that "those cases in which aliens have been determined to enjoy certain constitutional rights establish only that aliens receive such protections when they have come within the territory of, and have developed substantial connections with, this country").
179. *See supra* notes 169-171 and accompanying text (explaining that only members receive positive rights under membership theory). Statutorily granted positive rights are no different than constitutional positive rights in this regard.
180. *See* INA, 8 U.S.C. §§ 1401-1409, 1421-1458 (2000) (defining specific situations in which people receive United States citizenship at birth and establishing the requirements for gaining citizenship through naturalization). For example, the act requires at least five years of permanent residency for people seeking to become citizens through naturalization, *id.* § 1427, and mandates that no person can become a naturalized citizen of the United States without demonstrating a reasonable ability to speak, write, and understand the English language. *Id.* § 1423.
181. *See id.* § 1153(a)-(b) (mandating that immigration visas be extended on a preferred basis to children, spouses, and family members of United States citizens and for people who demonstrate exceptional ability in a particular field, or who are skilled in a field for which there is a shortage of qualified workers in the United States).

deportation of the offender and often bars re-entry,[182] effectively revoking the membership of the noncitizen.

Criminal law defines membership implicitly, by stripping critical elements of citizenship from individuals who commit relatively serious offenses. First, through incarceration, offenders lose the ability to associate with the rest of society. They are then often stripped of the basic political rights that are the earmarks of citizenship in the United States.[183] In many states, the commission of a felony results in loss of the right to vote, serve in public office, or serve on a jury.[184] Many offenders also lose social and welfare rights and benefits open to other citizens, including access to government assistance[185] and certain employment opportunities.[186] Like noncitizens, offenders are often required to register with a government agency.[187] The resulting status of an ex-felon strikingly resembles that of an alien.[188] Through incarceration and collateral sanctions, criminal offenders are—literally— alienated.

Immigration and criminal law approach the acquisition and loss of membership from two different directions. Criminal law presumes that the defendant has full membership in our society and places the

182. *See id.* § 1227(a)(2) (describing the types of criminal offenses for which an alien may be deported).

183. *See Internal Exile, supra* note 167, at 157 (positing that denying ex-offenders the right to vote represents an exclusion from society with the result of adversely affecting their status as citizens); *see also* HUMAN RIGHTS WATCH & THE SENTENCING PROJECT, LOSING THE VOTE: THE IMPACT OF FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES 1 (1998), *available at* http://www.soros.org/initiatives/justice/articles_publications/publications/losingthevote_19981001/losingthevote.pdf (noting that the only mentally competent segment of society that is denied the right to vote is convicted criminal offenders).

184. *See Internal Exile*, *supra* note 167, at 157 (stating that while the most common justification for denying ex-offenders political rights is the necessity of preserving the sanctity of the voting process, there is no evidence validating this justification).

185. *See id.* at 158 (describing restrictions on access to government benefits including federal welfare benefits, small business assistance, federal education grants, and state programs that receive federal funding such as food stamps).

186. *See* James W. Hunt et al., *Laws, Licenses, and the Offender's Right to Work*, 1973 NAT'L CLEARINGHOUSE ON OFFENDER EMPLOYMENT RESTRICTIONS 5 (relating state prohibitions on employment for ex-offenders, such as specific denial of professional licenses, requirements of "good moral character," and denial of licenses when ex-felon's offense involved "moral turpitude"). The Supreme Court has generally upheld restrictions on ex-offenders' access to the labor market. *See, e.g.*, DeVeau v. Braisted, 363 U.S. 144, 161 (1960) (upholding exclusion of ex-offenders from positions at waterfront union office against constitutional due process challenge); Hawker v. New York, 170 U.S. 189, 197 (1898) (stating that a felony conviction is a suitable basis for denying an ex-offender a professional license). *But see Internal Exile*, *supra* note 167, at 156-57 (describing access to employment opportunities as a basic civil right).

187. *See Internal Exile*, *supra* note 167, at 154 (explaining that statutes now require certain offenders to acquiesce to community notification of their presence).

188. *See id.* at 158 (noting the parallel between the refusal to extend membership rights to ex-offenders and the denial of membership rights to permanent residents).

burden on the government to prove otherwise.[189] This pro-membership perspective is reflected in the comparatively stronger constitutional protections that criminal defendants possess: the presumption of innocence embodied in the burden of proof,[190] and entitlement to constitutional rights under the Fourth, Fifth, and Sixth Amendments.[191] When the government seeks to exercise its power to punish, these rights provide protection to all those within the constitutional community against exclusion from society without a substantial justification.[192]

Immigration law assumes non-membership.[193] In contrast to the presumption of innocence, arriving aliens are presumed inadmissible unless they show they are "clearly and beyond a doubt entitled to be admitted."[194] The government's burden of proof in deportation cases is also lighter than in a criminal case—"clear and convincing evidence"[195] rather than "beyond a reasonable doubt."[196]

Levels of constitutional protection in immigration law depend in large part upon the individual's connection or potential for connection with the national community.[197] Citizens have the highest

189. *See* Coffin v. United States, 156 U.S. 432, 453 (1895) (establishing that all people accused of crimes shall be presumed innocent unless proven guilty beyond a reasonable doubt).

190. *See In re* Winship, 397 U.S. 358, 363 (1970) (quoting *Coffin*, 156 U.S. at 453) (declaring that the reasonable-doubt standard "provides concrete substance for the presumption of innocence—that bedrock 'axiomatic and elementary' principle whose 'enforcement lies at the foundation of the administration of our criminal law'").

191. *See* U.S. CONST. amend. IV (establishing the prohibition against unreasonable searches and seizures and the necessity for probable cause); *id.* amend. V (establishing the right to due process of law); *id.* amend. VI (establishing the right to a speedy trial, to present favorable witnesses, and to confront opposing witnesses).

192. *See Winship*, 397 U.S. at 362 (citing Davis v. United States, 160 U.S. 469, 488 (1895)) (asserting that the Fourth, Fifth, and Sixth Amendments were designed to protect citizens from improper convictions and the corresponding loss of liberty and property interests).

193. *See* Linda S. Bosniak, *Membership, Equality, & the Difference That Alienage Makes*, 69 N.Y.U. L. REV. 1047, 1055 (1994) (internal citation and quotation marks omitted) (stating that "alienage matters because citizenship matters; citizens are full members of the national community, while aliens are by definition those outside of this community").

194. INA, 8 U.S.C. § 1225(b)(2)(A) (2000).

195. *Id.* § 1229a(c)(3)(A) (2000).

196. *Winship*, 397 U.S. at 363.

197. *See* United States v. Verdugo-Urquidez, 494 U.S. 259, 272 (1990) (declining to extend the Fourth Amendment's exclusionary rule to a warrantless search of the defendant's home in Mexico because the defendant's presence in the United States was only brief and involuntary); *see also* DAVID A. MARTIN, MAJOR ISSUES IN IMMIGRATION LAW 24 (1987) [hereinafter MAJOR ISSUES] (commenting that *Landon v. Plasencia*, 459 U.S. 21 (1982), established that courts must look beyond a formal exclusion-deportation distinction to evaluate an alien's community ties); David A. Martin, *Due Process and Membership in the National Community: Political Asylum and Beyond*, 44 U. PITT. L. REV. 165, 216 (1983) [hereinafter *Due Process and Membership*]

level of constitutional protection.[198] Lawful permanent residents are next, due to their ties in this country.[199] Lawful permanent residence acts as a sort of probationary membership. Once admitted to the country and given permission to remain, the permanent resident has approximately five years of probation, after which, assuming she has complied with the criminal laws and shown herself to be of good moral fiber and likely to contribute to society, she has the opportunity to become a full member through naturalization.[200]

Unlike citizens, lawful permanent residents cannot vote or hold certain public offices.[201] They are subject to deportation, and the Supreme Court has deferred to the political branches' power over the substance of deportation grounds that affect legal permanent residents.[202] Nevertheless, legal permanent residents' rights to enter into contracts and own property are equivalent to those of citizens, and the courts have consistently upheld procedural due process protection for permanent residents.[203]

Lawfully present nonresidents have weaker, though still cognizable constitutional claims, while undocumented immigrants, regardless of the strength of their actual ties here, have more ephemeral constitutional claims.[204] At the bottom, those seeking entry for the

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(asserting that a determination based upon such an involuntary distinction as place of birth should not be the only factor that determines whether a person should receive procedural due process); David A. Martin, *Graduated Application of Constitutional Protections for Aliens: the Real Meaning of* Zadvydas v. Davis, 2001 SUP. CT. REV. 47, 48-49, 92-101 (2001) [hereinafter *Graduated Application*] (opining that although aliens enjoy some level of constitutional rights, the extent to which they may enjoy those rights is based upon their level of membership in society). *Compare* Landon v. Plasencia, 459 U.S. 21, 32-33 (1982) (using the permanent resident petitioner's ties to the United States as a measure of the procedural due process protections owed to her in exclusion proceedings), *with* Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 213 (1953) (disregarding substantial prior residency and family connections in the United States and holding that a permanent resident had no constitutional due process protections in exclusion proceedings).

198. *See Graduated Application*, *supra* note 197, at 92 (describing the strength of constitutional protections for citizens); *Due Process and Membership*, *supra* note 197, at 208-10 (maintaining that while citizens enjoy the full array of constitutional protections, lawful permanent residents also enjoy substantially the same safeguards).

199. *See Plasencia*, 459 U.S. at 32 (reasoning that aliens admitted to the United States who develop ties in the community can enjoy increased constitutional protections).

200. INA, 8 U.S.C. § 1427 (2000); *see Internal Exile*, *supra* note 167, at 159 (observing that permanent residents are extended an offer of full membership through the naturalization process).

201. *See Graduated Application, supra* note 197, at 94.

202. *See id.*

203. *See id.* at 93-94; Plasencia, 459 U.S. at 34; Rafeedie v. INS, 880 F.2d 506 (D.C. Cir. 1989).

204. *See* Plyler v. Doe, 457 U.S. 202, 223 (1982) (holding that undocumented aliens' unlawful presence in the United States was a relevant consideration in refusing to extend them classification as a suspect class).

first time without a prior stake in this country have essentially no constitutional protections, and courts have almost no power to review decisions barring their entry.[205]

As such, government plays the role of a bouncer in the crimmigration context. Upon discovering that an individual either is not a member or has broken the membership's rules, the government has enormous discretion to use persuasion or force to remove the individual from the premises.[206]

B. Sovereign Power and Penology in Criminal and Immigration Law

Delineating the major role that membership theory plays in the merger of criminal and immigration law only partially addresses the question of how this new "crimmigration" area developed. This Section describes how membership theory has channeled the evolution of criminal and immigration law in ways that have brought the two areas closer together.

Two developments inform the discussion. First, the rapid importation of criminal grounds into immigration law is consistent with a shift in criminal penology from rehabilitation to harsher motivations: retribution, deterrence, incapacitation, and the expressive power of the state.[207] Second, criminal penology began to embrace sovereign power as a basis for policymaking, a tool that immigration law has relied on since its inception.[208] This cross-pollination of legal tools and theories bridged the distant relationship between immigration and criminal law.[209] It led the way to more exclusionary definitions of who was a member of the U.S.

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205. *See* Ekiu v. United States, 142 U.S. 651, 660 (1892) (internal citations omitted) (holding that for first-time immigrants seeking entry, "the decisions of executive or administrative officers, acting within powers expressly conferred by Congress, are due process of law"); Chae Chan Ping v. United States, 130 U.S. 581, 606 (1889) (holding that immigration decisions were nonjusticiable political questions); *cf. Plasencia*, 459 U.S. at 32-34 (extending Due Process protections to an alien who was not seeking entry for the first time); MAJOR ISSUES, *supra* note 197, at 24 (concluding that courts may analyze an alien's ties to the community in determining whether to extend Due Process safeguards).

206. *See* Mathews v. Diaz, 426 U.S. 67, 79-80 (1976) (declaring that Congress, through its extensive authority over naturalization and immigration, makes rules that would be unacceptable constitutional violations if applied to citizens).

207. *See infra* Part II.B.1 (describing the shift away from a criminal penology focused on rehabilitation and asserting that this shift reflects a decision that ex-offenders should lose certain privileges of membership in society).

208. *See infra* Part II.B.2 (asserting that the sovereign state exerting its power to exclude is based upon the state's role at the forefront of controlling crime).

209. *See supra* Part II (explaining that, traditionally, criminal law's focus on addressing harms to society caused by crime, and immigration law's focus on determining who may enter the country and who must leave, were seen as only distantly related to each other).

community and to an expansion of the consequences of loss of membership to include mass deportation of noncitizens and loss of the privileges of citizenship for ex-offenders.[210]

1. Immigration law and penology

From the 1950s through the 1970s, both criminal and immigration sanctions reflected a rehabilitation model.[211] Criminal penology favored indeterminate sentences that could be shortened for good behavior, alternatives to incarceration, individualized treatment, and re-education.[212] This philosophy was consistent with the idea that the criminal act was separable from the individual actor, and that the actor could be rehabilitated, integrated into society, and given a second chance.[213] It was grounded in a social ideology that sought to redeem offenders and restore "full social citizenship with equal rights and equal opportunities."[214]

The rehabilitation model fell into disfavor after the 1970s, and criminal penology turned to retribution, incapacitation, and deterrence as motivating ideologies.[215] One consequence was higher

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210. *See infra* Part II.B.1 (describing how the shift to a retributive penological model has led to the deportation of permanent residents for relatively minor crimes, including some misdemeanors, and the loss of political participation rights for ex-offenders).

211. *See* DAVID GARLAND, THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY 34-35 (U. Chicago Press 2001) (tracking the rise of the rehabilitative policy framework in penology and its role as "the hegemonic, organizing principle, the intellectual framework and value system that bound together the whole structure . . . ."); Douglas A. Berman, *Distinguishing Offense Conduct and Offender Characteristics in Modern Sentencing Reforms*, 58 STAN. L. REV. 277, 278 (2005) (explaining that the rehabilitative model dominated criminal penology for a century before a shift to retribution); *see also* Ahmed A. White, *Capitalism, Social Marginality, and the Rule of Law's Uncertain Fate in Modern Society*, 37 ARIZ. ST. L.J. 759, 802 (2005) (comparing the decline of the pre-1970s rehabilitative approach to the decline of the modern welfare state).

212. *See* Berman, *supra* note 211, at 278 (explaining that judges and parole officers had great leniency to tailor sentences to the offender's individual capacity for rehabilitation).

213. *See id.* (observing that the rehabilitative ideal was "[b]orn of a deep belief in the possibility for personal change and improvement" and "conceived and discussed in medical terms with offenders described as 'sick' and punishments aspiring to 'cure the patient'"); GARLAND, *supra* note 211, at 34-35 (stating that the rehabilitative model emphasized re-education and support for the ex-offender upon reentering society).

214. GARLAND, *supra* note 211, at 46; *see* Williams v. New York, 337 U.S. 241, 249 (1949) (embracing rehabilitation as a penological goal, and advocating for indeterminate sentences based upon consideration of the attributes of individual offenders).

215. *See* GARLAND, *supra* note 211, at 54 (describing the mid-1970s collapse of the rehabilitation model resulting from the critique of correctionalism, including indeterminate sentencing and individualized treatment); Berman, *supra* note 211, at 279-81 (describing this shift and its embodiment in the Sentencing Reform Act of 1984); White, *supra* note 211, at 814 (describing the shift away from the pre-1970s

incidences of incarceration for lesser crimes and for longer periods, the purpose being to punish, incapacitate the offender from further crimes, and deter the offender and others from similar conduct.[216]

Government also began to rely heavily on sanctions that reached beyond the post-trial sentence. The federal and state governments began to remove certain hallmarks of citizenship as a consequence of a criminal conviction.[217] These hallmarks included loss of voting rights, exclusion from public office and jury service, ineligibility for public benefits, public housing, government support for education, and exclusion from professional license eligibility.[218] The increasing use of these "collateral consequences"[219] for crimes made clear that retribution rather than rehabilitation was driving the modern criminal justice system.[220]

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belief that criminals could be rehabilitated and returned to society as contributing members); *cf.* Kanstroom, *supra* note 37, at 1894 (noting the inconsistency of subjecting aliens to the principles of incapacitation, deterrence, and retribution during deportation proceedings, in which they do not receive the same constitutional rights afforded criminals); Lupe S. Salinas, *Deportations, Removals and the 1996 Immigration Acts: A Modern Look at the Ex Post Facto Clause*, 22 B.U. INT'L L.J. 245, 282 (2004) (characterizing the 1996 Immigration Acts as having retributive and deterrent goals); Stephen H. Legomsky, *The Detention of Aliens: Theories, Rules, and Discretion*, 30 U. MIAMI INTER-AM. L. REV. 531, 540 (1999) (theorizing that mandatory detention for certain immigrants is aimed in part at deterrence of immigration violations); *Misguided Prevention*, *supra* note 36, at 557-58 (describing the movement in immigration enforcement toward preventing illegal immigration at our southern border with Mexico through deterrence).

216. *See* GARLAND, *supra* note 211, at 60-61 (stating that the shift to a retributive model was based on dissatisfaction with the prison system's capacity to reform offenders).

217. *See Internal Exile*, *supra* note 167, at 154 (asserting that collateral sentencing consequences impinge upon rights considered to be at the core of society's notions of citizenship).

218. Velmer S. Burton, Jr. et al., *The Collateral Consequences of a Felony Conviction: A National Study of State Statutes*, 51 FED. PROBATION, Sept. 1987, at 52; *see* Symposium, *Developments in the Law—The Law of Prisons: One Person, No Vote: The Laws of Felon Disenfranchisement*, 115 HARV. L. REV. 1939, 1939-40 (2002) (noting that there are currently approximately 3.9 million disenfranchised felons and ex-felons); Gabriel J. Chin & Richard W. Holmes, Jr., *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 CORNELL L. REV. 697, 705-06 (2002) (noting that in addition to loss of voting privileges and the ability to sit on a jury, ex-offenders are also subjected to dishonorable discharge from the military and loss of business and professional licenses); *see also* 20 U.S.C. § 1091(r) (2000) (suspending eligibility for federal student loans and grants on the basis of drug convictions); Anti-Drug Abuse Act of 1988, 42 U.S.C. § 1437d(l)(4)(A)(ii) (2000) (permitting eviction from public housing upon conviction of a drug-related crime, a violent crime, or any felony conviction).

219. *See Internal Exile*, *supra* note 167, at 154 (defining collateral consequences as "encompass[ing] all civil restrictions that flow from a criminal conviction").

220. *See* Burton, *supra* note 218, at 52 (proposing that collateral consequences are a means of continuing to punish the offender after the prison sentence is completed, and therefore do not reflect a rehabilitative methodology).

The most logical motivation for the accumulation of these collateral consequences is that they constitute decisions about the membership status of the convicted individual.[221] Collateral consequences diminish the societal membership status of the individual convicted.[222] The lost privileges often bear no relation to the context of the crime.[223] Nor do they appear to be an attempt to prevent future criminal conduct in the areas declared off-limits to the convicted.[224] For example, loss of voting rights is not tied to the commission of political crimes, nor is loss of government benefits limited to those convicted of defrauding the government or crimes related to public housing, education, or welfare.[225]

Several of these collateral consequences eliminate the incidents of citizenship.[226] Voting rights are often seen as the hallmark of citizenship, perhaps because the right to vote is one of the most familiar and fundamental divisions between citizens and noncitizens.[227] In the same category are the opportunities to seek public office and serve as a juror.[228] Excluding the convicted individual from these activities translates into exclusion from full participation in the social and political structure of society.[229] The

221. *See Internal Exile*, *supra* note 167, at 158 (observing that collateral sentencing denies ex-offenders of the rights that have traditionally indicated membership in society).

222. *See id.* (asserting that collateral consequences can hamper an ex-offender's ability to reintegrate into society and can result in exclusion).

223. *See id.* at 160 (opining that for collateral consequences to be an effective tool of retributivism, the consequences imposed must be in proportion to the crime committed; therefore, they should be imposed on a case by case basis taking into account the context of the offense and the background of the offender).

224. *See id.* at 161 (asserting that collateral consequences, as they are currently imposed, are far too stigmatizing, resulting in a divide between ex-offenders and law-abiding citizens that forces an ex-offender to return to criminal activity).

225. *See* Burton, *supra* note 218, at 54 (presenting results from a study showing that forty-six states at least temporarily restrict the right of convicted felons to vote); *Internal Exile*, *supra* note 167, at 158 (noting that termination of welfare benefits is frequently imposed as a collateral consequence on drug offenders).

226. *See Internal Exile*, *supra* note 167, at 158 (explaining that denying the fruits of citizenship to ex-offenders exemplifies society's determination that they lack the morality necessary for inclusion in society).

227. *See id.* at 157 (noting that restrictions on political rights including voting "strike at the core of the traditional understanding of citizenship"); *see also* U.S. CONST. amends. XV, XIX, XXIV, XXVI (collectively prohibiting the denial to citizens of the right to vote on account of sex, race, failure to pay poll tax or other tax, or age).

228. *See* U.S. CONST. amend. XV art. I, § 3, cl. 3 (requiring citizenship to hold the office of senator); *id.* art. I, § 2, cl. 2 (requiring citizenship to become a member of Congress); *id.* art. II, § 1, cl. 4 (limiting to natural born citizens the office of presidency); *id.* art. IV, § 2, cl. 1 (granting privileges and immunities to citizens of the states); *Internal Exile*, *supra* note 167, at 157.

229. *See* Anthony C. Thompson, *Navigating the Hidden Obstacles to Ex-Offender Reentry*, 45 B.C. L. REV. 255, 258 (2004) (observing that "society has created a vast network of collateral consequences that severely inhibit an ex-offender's ability to

loss of these markings of citizenship demotes the convicted individual to the status of a noncitizen,[230] constitutionally incapable of voting in a federal election, serving on a jury, or seeking high public office.

Loss of access to public goods such as welfare benefits, public housing, or educational grants suggest a different kind of membership decision.[231] These limited public goods require the government to make choices about how to distribute them equitably.[232] Generally, the criteria for obtaining these public goods are based on the individual's need for the particular social resource, usually financial need.[233] Exclusion from eligibility for these public goods based on noncitizenship status or status as an ex-felon, on the other hand, is unrelated to need.[234] Instead, the basis for exclusion seems to be desert: those who have lost the social status of a full citizen through a criminal conviction, or never gained citizenship in the first place, must not deserve to share in the limited pie of public benefits.[235] The safety net of public benefits is only available to those who enjoy full citizenship.[236]

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reconnect to the social and economic structures that would lead to full participation in society").

230. *See Internal Exile*, *supra* note 167, at 158 (contending that collateral consequences force ex-offenders into the role of societal outcast); Charles L. Black, *The Unfinished Business of the Warren Court*, 46 WASH. L. REV. 3, 8-10 (1970) (enumerating critical aspects of rights-based citizenship: "citizenship is the right to be heard and counted on public affairs, the right to vote on equal terms, to speak, and to hold office when legitimately chosen").

231. *See Internal Exile*, *supra* note 167, at 158 (contending that denying social and welfare rights—which represent benefits designed to ensure that no member of society will live below a certain economic level—to ex-offenders suggests that society has made a determination that ex-offenders do not deserve the same economic well-being as non-offender citizens).

232. *See* Stephen H. Legomsky, *Immigration, Federalism, and the Welfare State*, 42 UCLA L. REV. 1453, 1455 (1995) (citing JOEL F. HANDLER & YEHESKEL HASENFELD, THE MORAL CONSTRUCTION OF POVERTY: WELFARE REFORM IN AMERICA (Sage Publications 1991)) (contending that the main role of welfare policy is to determine which individuals are deserving of benefits that do not derive from the individual's own efforts).

233. *See, e.g.*, 42 U.S.C §§ 1381-1383f (2000) (establishing that the Supplemental Security Income program will provide supplemental income only to low-income individuals who are blind, disabled, or sixty-five years of age and older); 7 U.S.C. §§ 2011-2015 (2000) (establishing the Food Stamp program to provide food purchasing assistance to households with low income and few resources).

234. *See Internal Exile*, *supra* note 167, at 159 (asserting that the denial of social assistance to ex-offenders represents a decision by society that they are morally unworthy of benefits rather than financially undeserving).

235. *See* Legomsky, *supra* note 232, at 1453-54 (describing heightened anti-immigration policies that reflected increasing hostility toward welfare recipients); *see also Internal Exile*, *supra* note 167, at 159 (stating that the mid-1990s represented a switch to a 'civic virtues' conception of citizenship in which the 'undeserving,' citizens and noncitizens alike, were increasingly excluded from the benefits of membership in society"). One justification for denying these benefits to immigrants was to encourage them to naturalize. *See* City of Chicago v. Shalala, 189 F.3d 598, 608

Immigration law seems to have followed the same path toward more exclusive membership.[237] In immigration law prior to the 1980s, most crimes did not trigger immigration sanctions for permanent residents.[238] Only the most serious crimes or crimes involving "moral turpitude" that presumably revealed an inherent moral flaw in the individual resulted in the ultimate sanction of deportation.[239] Otherwise, criminal conduct was handled as a domestic affair through the criminal justice system, not as an immigration matter.[240] In both areas of the law, this approach affirms the individual's claim to membership in the society.[241] Members obtain the club's benefits, but are also bound by the club's rules and are subject to its processes and sanctions for breaking those rules.[242]

The emphasis on retribution, deterrence, and incapacitation in immigration law is apparent from the expanded use of deportation as

(7th Cir. 1999) (relating the government's argument that the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, which restricted noncitizens' ability to receive welfare benefits, was justified as it was rationally related to the purpose of promoting naturalization).

236. *See* Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105, 2262-64 (1996) (codified as amended in scattered sections of 8 U.S.C.) (enacting as part of major welfare reform legislation provisions that excluded most noncitizens from eligibility for welfare benefits including food stamps, Supplemental Security Income, and in some instances, Temporary Assistance for Needy Families, Social Services Block Grants, and Medicaid); *see also City of Chicago*, 189 F.3d at 609 (holding that the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 does not violate the equal protection component of the Fifth Amendment's Due Process clause).

237. *See* Kanstroom, *supra* note 37, at 1894 (asserting that the deportation of permanent residents for crimes committed after entry into the United States is based on punishment rather than rehabilitation).

238. *See Immigration Threats*, *supra* note 36, at 1061 (noting that since the enactment of the 1988 Anti-Drug Abuse Act, crimes for which citizens can be deported have increased greatly); Newcomb, *supra* note 71, at 698-700 (describing a series of laws passed beginning in 1988 that severely increased the offenses for which a noncitizen could be deported); *Citizenship and Severity*, *supra* note 5, at 622-23 (concluding that the change in the scope of deportable crimes after the mid-1980s reflected a shift in the INS to prioritizing law enforcement and criminal sanctions).

239. *Citizenship and Severity*, *supra* note 5, at 622; *see* HARPER, *supra* note 70, at 612-13 (presenting immigration laws relating to deportation procedure that mandated removal of aliens found to be "member[s] of the criminal, subversive, narcotic, or immoral classes").

240. *See* Newcomb, *supra* note 71, at 698 (explaining how the enactment of the Anti-Drug Abuse Act of 1988 created the basis for deportation of an alien that committed an aggravated felony, formerly an offense which had been handled by the criminal justice system without immigration implications).

241. *See* Berman, *supra* note 211, at 279 (opining that a rehabilitative rather than punitive approach to criminal justice reflected a desire to return offenders to roles as constructive members of society).

242. *See Internal Exile*, *supra* note 167, at 158 (explaining that membership is akin to citizenship, in which members adhere to a social contract denoting the rights and obligations of membership).

a sanction for violating either immigration or criminal laws.[243] With few exceptions, immigration sanctions including deportation now result from a wide variety of even minor crimes, regardless of the noncitizen's ties to the United States.[244] Permanent residents are as easily deported for crimes defined as "aggravated felonies" as is a noncitizen without any connection to the United States or without permission to be in the country.[245]

This scheme might be characterized as merely a way of removing those who have broken the rules conditioning their presence in this country. However, the ascendance of these harsher rules concurrently with the shift in criminal penology suggests a different premise—that more exclusionary notions of membership in both areas resulted in reliance on harsher ideologies of punishment. Government could thus achieve both punishment and deterrence of crimes through imposition of any lawful retributive means available, including immigration sanctions.[246] Removing the individual from the country incapacitates her from committing future crimes in the United States, and is often imposed with the intent to punish.[247] Using removal as a sanction also makes a statement about membership: that the permanent resident belongs more readily to her country of origin, regardless of length of residency or connections to the U.S. community.[248]

There are, of course, differences between the membership claims of ex-offenders and noncitizens. Ex-offenders who are U.S. citizens

243. *See Immigration Threats*, *supra* note 36, at 1067 (contending that while deportation is not considered to be a criminal penalty, it has the effect of inflicting punishment on the deported individual).

244. *See id.* at 1066-67 (noting that deportation is now mandated for permanent residents who commit an aggravated felony regardless of whether they entered the United States as children, their familial status in the United States, or how long they have lived in the country).

245. *See* Newcomb, *supra* note 71, at 699 (describing the constriction of relief from removal for noncitizens convicted of aggravated felonies); *see also* INA, 8 U.S.C. § 1182(h) (2000) (denying to resident aliens convicted of aggravated felonies a waiver from the Attorney General that would prevent deportation).

246. *See* Kanstroom, *supra* note 37, at 1894 (asserting that deporting long-term resident aliens serves the retributive purposes of incapacitating the offender and deterring others from committing crimes).

247. *See id.* at 1894 n.20 (quoting 142 CONG. REC. S4600 (1996)) (statement of Sen. Roth) ("As Senator William Roth framed this view, 'the bill broadens the definition of aggravated felon to include more crimes punishable by deportation.'"); *id.* (citing 142 Cong. Rec. H2376-87, H2458-59 (1996) (statement of Rep. Becerra) (relating Representative Becerra's argument that although deportation is an acceptable punishment, permanent exile is too harsh)).

248. *See Immigration Threats*, *supra* note 36, at 1069 (asserting that the deportation of resident aliens to their country of origin for committing criminal acts reflects the United States' belief that it owes no obligations to the citizens of another country).

do not lose their formal status as citizens.[249] Still, by removing the incidents of citizenship—constitutional privileges such as the right to vote and participate in public life, as well as access to the social safety net woven by the government on behalf of the membership—those convicted of certain crimes ultimately have a lesser citizenship status.[250] They are more accurately seen as pseudo-citizens, technically citizens but possessing a much denuded bundle of membership-related rights and privileges.[251]

Also, noncitizens, unlike U.S. citizen ex-offenders, often have alternate membership status in their country of origin.[252] In contrast, without full membership in this society, ex-offenders have no membership at all. In this respect at least, excluding a noncitizen from membership privileges does not result in total exclusion from any membership. In theory, the noncitizen still retains full membership in her country of origin.[253]

In sum, the criminalization of immigration law has resulted in a more exclusionary membership. Just as important as defining the role of membership theory, however, is describing the means by which these notions of membership define who is excluded. In this new area of crimmigration law, specific powers of the sovereign state are the primary means of inclusion and exclusion.

2. Sovereign power to exclude

In moving toward retribution and away from rehabilitation and integration into society, the criminal justice system turned to a model

249. *See* Afroyim v. Rusk, 387 U.S. 253, 257 (1967) (holding that the government cannot expatriate a U.S. citizen without the citizen's affirmative consent).

250. *See Internal Exile*, *supra* note 167, at 158 (contending that collateral consequences effectively create a class of second-class citizens made up of ex-offenders).

251. *See id.* at 159 (concluding that the second-class citizenship bestowed upon ex-offenders permanently restricts their ability to receive the full set of rights and privileges enjoyed by non-offender citizens).

252. *See id.* at 158 (noting that the exclusion of ex-offenders from the benefits of membership is similar to the exclusion of permanent residents, except for that fact that permanent residents are able to enjoy the benefits of membership in another country, and also have to ability to naturalize and thus acquire full membership privileges in the United States).

253. *Id.* As a practical matter that may be membership only in theory. Membership in that originating country is of questionable value if the noncitizen is seeking refuge from her country of citizenship, has had little or no contact with that country, or has lived in this society for a long time. This is particularly true for noncitizens such as refugees or asylees, who face persecution in their countries of origin that render them stateless absent the grant of refuge and other privileges by another country. *See* 8 U.S.C. § 1101(a)(42) (2000) (defining a refugee as one who is unable to return to his country of origin for fear of persecution on account of race, religion, political beliefs, or membership in a particular social group).

that immigration law has relied on for centuries.[254] Criminal law embraced certain powers of the sovereign state as the primary response to crime: the power to exact extreme sanctions and the power to express society's moral condemnation.[255]

Decisions about membership are at play in the use of both powers. The state as sovereign has the authority to control the territory within its boundaries and protect it from external and internal enemies.[256] In immigration law, sovereign power is the authority that enables the government to exercise enormous discretion to decide who may be excluded from the territory and from membership in the society.[257]

In criminal law, the sovereign state strategy relies on the state as the main player in controlling crime.[258] As David Garland has observed, "[l]ike the decision to wage war, the decision to inflict harsh punishment or extend police powers exemplifies the sovereign mode of state action."[259] Garland theorizes that disillusionment with the rehabilitation model combined with persistently high crime rates led to ratcheting up punitive measures such as longer sentences and fewer opportunities for parole.[260] These changes paralleled the

254. *See* GARLAND, *supra* note 211, at 134-35 (describing the attractiveness of the power of the sovereign state in responding to crime because the sovereign response is immediate and potent); *see also* Cleveland, *supra* note 40, at 81-163 (tracing the history of the role of sovereign power in immigration law). *See generally* Stumpf, *supra* note 41 (describing the interaction between criminal rights and sovereign power in the immigration law context).

255. *See* GARLAND, *supra* note 211, at 134-35 (noting that pressures in today's society from the public and the media make it difficult for politicians to do anything but confront crime with the full power of the sovereign state). In fact, this turn to sovereignty as a source of crime control is arguably not new at all. In 1846, Justice Taney located the federal government's power to prescribe criminal law within Native American tribal territory in the inherent sovereign power to control the territory within its boundaries. *See* United States v. Rogers, 45 U.S. 567, 570-72 (1846) (holding that Congress has the power to punish any criminal act committed in tribal territory, whether committed by a white person or Native American); *see also* Cleveland, *supra* note 40, at 42-47 (narrating the history of the use of the sovereign powers doctrine in connection with Native American tribes).

256. GARLAND, *supra* note 211, at 109; *see* Cleveland, *supra* note 40, at 23 (defining the traditional concept that sovereign jurisdiction to legally regulate conduct extends everywhere within the sovereign's territory).

257. *See* Chae Chan Ping v. United States, 130 U.S. 581, 603-04 (1889) (finding that the power to exclude is a power inherent in all independent states); Bosniak, *supra* note 193, at 1090-94 (explaining how immigration law, even in the intraterritorial context, is unconstrained by the constitutional parameters of due process).

258. *See* GARLAND, *supra* note 211, at 110, 132 (asserting that more and longer prison sentences and increased police powers fail to reduce criminal behavior, and reflecting on this limitation of the sovereign state to control crime).

259. *Id.* at 135.

260. *See id.* at 60-61 (relating that the political response to concern that the prison system was failing to rehabilitate offenders was the creation of determinate sentencing and a cut-back in funding for parole treatment programs).

increase in the use of deportation in immigration law as a punitive measure.[261]

The expressive function of the state, in which the state's power to punish becomes a channel for society's moral condemnation of crime rather than a means of exacting retribution or enabling rehabilitation,[262] is also a manifestation of state sovereignty in criminal law.[263] The expressive dimension of punishment matches the harshness of a criminal penalty with the level of society's moral condemnation of the crime.[264] For example, when the state imposes a harsher punishment for a racially-motivated murder than for a mother who kills a child abuser, it expresses different levels of condemnation for each crime.[265] By imposing lesser punishment on the mother who kills her child's abuser than on the racially-motivated murderer, the state expresses a moral distinction between them and a greater degree of exclusion from society for the racist based on that moral condemnation.[266]

This turn to a sovereign state model as the central response to crime control mirrors the substantial role that federal sovereignty plays in immigration law.[267] The power of the federal government as a sovereign state is at its apex in immigration law.[268] The exercise of sovereign power is intricately connected to the power to define membership within a political community,[269] as Justice White emphasized in *Cabell v. Chavez-Salido*:[270]

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261. *See* Kanstroom, *supra* note 37, at 1891 (noting that there has been a convergence between immigration and criminal law focused around the increased use of deportation in response to an alien's criminal conviction).

262. *See* Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 597-98 (1996) (imposing punishment as a method of telling the offender that his assessment of whose interests matter is wrong).

263. *See* GARLAND, *supra* note 211, at 132 (asserting greater punitive power in criminal law by expanding and reasserting "law and order" powers through the force of sovereign command).

264. *See* Kahan, *supra* note 262, at 597-98 (equalizing the level of moral condemnation of crime with the harshness of punishment).

265. *See id.* at 598 (justifying the greater condemnation of the racist's killing because it represents a more reprehensible societal valuation).

266. *Id.*

267. *See* Cleveland, *supra* note 40, at 134 (describing the Supreme Court's view on immigration "as a core sovereign power that could not be alienated").

268. *See* Chae Chan Ping v. United States, 130 U.S. 581, 603-04 (1889) (declaring "[t]hat the government of the United States, through the action of the legislative department, can exclude aliens from its territory is a proposition which we do not think open to controversy").

269. *See* T. Alexander Aleinikoff, *The Tightening Circle of Membership*, 22 HASTINGS CONST. L.Q. 915, 923 (1995) (critiquing that power as applied wholesale to permanent residents).

270. 454 U.S. 432, 439-40 (1982).

> The exclusion of aliens from basic governmental processes is not a deficiency . . . but a necessary consequence of the community's process of political self-definition. Self-government, whether direct or through representatives, begins by defining the scope of the community of the governed and thus of the governors as well: Aliens are by definition those outside of this community.[271]

The state's expressive role is the same in immigration law as in criminal law. By imposing the sanction of deportation for crimes and by criminalizing immigration violations, the state expresses moral condemnation both for the crime through criminal punishment and for the individual's status as a noncitizen offender.[272] As such, the sovereign state strategy expresses the insider or outsider status of the offender.[273] The expressive dimension of punishment in this context communicates exclusion.[274] Unlike the rehabilitative model, which sought to protect the public by re-integrating the offender into a community, the use of sovereign power has the effect of excluding the offender and the immigrant from society.[275] Under the sovereign state model, ex-offenders and immigrants become the "outsiders" from whom citizens need protection.[276]

Several explanations have been offered for this turn to the state's expressive powers and the emphasis on harsh punishment. One theory is that a shift from smaller, more close-knit communities to the more disparate structure of modern society made community-imposed shame sanctions less effective and generated reliance on the more formal political mechanisms of the state.[277]

This change is intricately bound up with membership theory. With the move away from closer communities, punishment that relied on public humiliation (such as the stocks) became less effective when

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271. Aleinikoff, *supra* note 269, at 923 (citing Cabell v. Chavez-Salido, 454 U.S. 432, 439-40 (1982)).

272. *See* Kanstroom, *supra* note 37, at 1894 (illustrating the retributive aspects of deportation for civil immigration violations, but without constitutional protection since the offenders are noncitizens).

273. *Cf.* David Garland, *The Limits of the Sovereign State: Strategies of Crime Control in Contemporary Society*, 36 BRIT. J. OF CRIMINOLOGY 445, 461 (1996) (acknowledging that criminology of the alien other presents criminals as dangerous members of an outside racial and social group apart from "us," the insiders).

274. *See id.* (stating that the rhetoric surrounding "offenders as outsiders" recognizes that the only rational response to ex-offenders is to have them "taken out of circulation").

275. *Id.*

276. *Cf. id.* (stating that criminology of the other characterizes offenders as threatening outcasts and fearsome strangers).

277. *See* Kahan, *supra* note 262, at 642-43 (stating the theory that shaming will not work in modern society which has vitiated a citizen's stake in their community).

the offender was not a member of that community.[278] A need arose for punishment that depended less on community ties and more on loss of personal liberty.[279] In the modern social structure, it is much easier to equate the criminal offender with the alien and exclude him from society than when the offender was well known by and considered part of a smaller community.[280]

An alternative theory is that persistently high rates of crime and unauthorized immigration have led to distrust of the state's ability to control both crime and immigration.[281] It is politically infeasible to acknowledge that the state's ability to control crime is limited.[282] Politicians, therefore, employ the sovereign power of the state more heavily to reassure the public of their commitment to controlling crime.[283] As a result, the sovereign state power is used in ways that are divorced from effective control of either crime or unauthorized immigration. Imposing increasingly harsh sentences and using deportation as a means of expressing moral outrage is attractive from a political standpoint, regardless of its efficacy in controlling crime or unauthorized immigration.[284]

C. Consequences of Narrowing the Scope of Membership

The result of the application of membership theory has been to create a population, often identifiable by race and class, that is excluded physically, politically, and socially from the mainstream community.[285] This consequence raises a curious question: what is in it for the members? What is the advantage to U.S. society of creating and policing these membership lines?

In the case of a limited pie such as public benefits, it seems at least facially logical to exclude those with weaker claims to membership as

278. *See id.* at 644 (presenting the example of a corporate executive who could care less if an auto mechanic in a remote area of town knew of his crime, but would be mortified if close family and friends discovered his criminality).

279. *See id.* (acknowledging the weaknesses of a pure shame approach to punishment, implying that other more severe techniques would be needed).

280. *See Internal Exile*, *supra* note 167, at 158 (paralleling the denial of membership rights to ex-offenders to the denial of rights to permanent residents).

281. *See* GARLAND, *supra* note 211, at 110 (acknowledging the limitations of the state's ability to govern social life and control crime).

282. *Id.*

283. *See id.* (equating the denial of the state's ability to control crime with political suicide).

284. *See id.* (reflecting the tension between ineffective state sovereign power and crime).

285. *Cf.* Bosniak, *supra* note 193, at 1073-75 (describing the status of resident alien Metics in ancient Athens as individuals excluded from mainstream Athenian society and lacking political, welfare, and citizenship rights).

a way of ensuring an adequate slice for those with stronger membership claims.[286] Withholding the bundle of rights and privileges that includes voting, holding public office, and serving on a jury has a less tangible benefit for U.S. society. The purpose here is not to protect a scarce resource. Barring ex-offenders and noncitizens from these activities seems to have more value to the membership as an expressive statement.[287] It enhances the apparent value of those rights and privileges to the members by making them privileges over which the membership has control, rather than inalienable rights belonging to the individual.[288] Because those rights and privileges are susceptible to loss, they become more precious to the individual who holds them.[289] Since members decide how those rights may be lost and who loses them, the rights become more valuable to the members.[290]

Thus, the value to the members is two-fold: excluding ex-offenders and noncitizens from the activities of voting, holding public office, and jury service creates a palpable distinction between member and non-member, solidifying the line between those who deserve to be included and those who have either shown themselves to be deserving of exclusion or have not yet shown themselves worthy of inclusion.[291] In this light, withholding these privileges conceivably improves the quality of the membership by excluding those less

286. Delving beyond this facial argument, scholars have argued that excluding any individual who resides in this country from access to services addressing fundamental needs such as food, housing, and education results in a disservice to society; *see, e.g.*, Richard A. Boswell, *Restrictions on Noncitizens' Access to Public Benefits: Flawed Premise, Unnecessary Response*, 42 UCLA L. REV. 1475, 1478 (1995) (expressing a fundamental disagreement with the movement towards an exclusionary immigration policy in regard to access to public services); *see also Internal Exile*, *supra* note 167, at 158 (marginalizing ex-offenders even further by excluding them from social and welfare rights).

287. *See generally* Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349 (1997) (arguing that communities should adopt policies that make unlawful activities less attractive and lawful activities more so).

288. *See* Bosniak, *supra* note 193, at 1103 (indicating the Supreme Court's view of the United States "as a sovereign state that extends its 'bounty' to foreigners as a matter of grace and '[t]he decision to share that bounty with our guests may take into account the character of the relationship between the alien and this country'").

289. *See id.* at 1070 (stating Michael Walzer's view that national control over admissions, or immigration, is an inherent and precious value).

290. *Cf. id.* at 1069 (restating Walzer's view of a precious sovereign state right to create an admissions policy for citizenship that ensures relatedness, mutuality, and a common way of life).

291. *See Internal Exile*, *supra* note 167, at 157 (observing that "[t]he exclusion of ex-offenders from voting rights is . . . of symbolic importance since political rights have traditionally 'confer[red] a minimum of social dignity' upon their recipient. Without voting rights, an individual 'is not a member [of a democratic political community] at all.'" (quoting Heather Lardy, *Citizenship and the Right to Vote*, 17 OXFORD J. LEG. STUD. 74, 86 n.48 (1997))).

deserving of membership.[292] Perhaps withholding these privileges is meant to enhance the public trust in the integrity of the voting process and of public officeholders, and in the outcome of jury trials.[293] If the public perceives ex-offenders and noncitizens to be unworthy of the public trust, one could argue that excluding them from these fora of public participation increases confidence in the products of voting, public officeholding, and jury deliberations.[294]

All this begs the question, of course, whether the membership should have the power to create a class of outsiders without access to these rights or privileges. Excluding individuals who have a stake in public affairs and the fairness of the judicial process, such as ex-offenders and noncitizens who pay taxes or raise children, seems contrary to the democratic ideal that those governed have a say in the composition of the government.[295] Moreover, excluding ex-offenders and noncitizens from public benefits and public participation seems to conflict with the need to integrate these groups into society, especially if lack of resources and exclusion from participation results in alienation and contributes to the commission of further crimes.[296]

These significant costs seem to outweigh the uncertain benefits outlined above. The costs become greater upon examining who is most often excluded. Both immigration and criminal law tend to exclude certain people of color and members of lower socioeconomic classes.[297]

Immigration law does this explicitly. Immigration law takes socioeconomic status into account when it excludes a noncitizen likely to become a public charge because of lack of financial resources,[298] and by prioritizing entry of certain professionals,

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292. *See* Bosniak, *supra* note 193, at 1070 (asserting Walzer's theory that an admissions policy is needed to ensure communities maintain their cultural distinctiveness and protect their sense of relatedness and mutuality).

293. *See Internal Exile*, *supra* note 167, at 157 (noting that the denial of political rights is often justified using a "purity of the ballot box" argument, which assumes ex-offenders will engage in election fraud and vote in an anti-democratic, anti-rule-of-law manner).

294. *Cf. id.* (describing fears that ex-offenders may elect judges and prosecutors who would be "soft" on criminals or fail to enforce the law properly).

295. *See id.* (illustrating the denial of voting rights as a "particularly dramatic" and symbolically important denial of membership in the democratic political community).

296. *See id.* at 158 (paralleling the denial of membership rights to ex-offenders to the denial of rights to permanent residents).

297. *See id.* at 159 (emphasizing the creation of a group of second-class citizens by alienating racial minorities from the political and legal system).

298. *See* INA, 8 U.S.C. § 1182(a)(4)(B) (2000) (enumerating assets, resources, and financial status as a factor in determining whether an alien is an inadmissible alien).

managers, executives, and investors.[299] The prevalence of sovereign power in immigration law has its roots in excluding racial and cultural groups, beginning with the Chinese and other Asian Americans in the late 1880s, and including the deportation of U.S. citizens of Mexican origin in the 1930s.[300] Today, the rules governing entry tend to favor citizens from European countries.[301] The diversity visa (also known as "the Lottery")[302] grants up to 55,000 applications for permanent resident status to applicants from specific countries using a random selection process,[303] and results in disproportionate advantages to European applicants.[304] The visa waiver program allows citizens from primarily European countries to enter for ninety days without a visa.[305]

Inside the borders, immigration enforcement is unabashedly race- and ethnicity-based. A prime example is the National Security Entry-Exit Registration System's ("NSEERS") focus on deporting noncitizen men from Muslim and Arab countries.[306] The DHS's enforcement

299. *See* INA, 8 U.S.C. § 1153(b)(1) (2000) (prioritizing visas for aliens with extraordinary ability, outstanding professors and researchers, and multi-national executives and managers).

300. *See* Kevin Johnson & Bill Ong Hing, *National Identity in a Multicultural Nation: The Challenge of Immigration Law and Immigrants*, 103 MICH. L. REV. 1347, 1368-76 (2005) (reviewing SAMUEL P. HUNTINGTON, WHO ARE WE? THE CHALLENGES TO AMERICA'S NATIONAL IDENTITY (Simon & Schuster 2004) (outlining the historical focus of exclusion laws on Asians and Mexicans and describing them as efforts to "keep out groups that are perceived as not true Americans because they fail to conform to the prevailing image of the national identity")); Richard A. Boswell, *Racism and U.S. Immigration Law: Prospects for Reform After "9/11?,"* 7 J. GENDER RACE & JUST. 315, 316-32 (2003) (describing the history and lasting effects of racism in immigration law); Chae Chan Ping v. United States, 130 U.S. 581, 595 (1889) (describing Chinese immigration as "an Oriental invasion," and "a menace to our civilization"); Cleveland, *supra* note 40, at 24-34 (discussing sovereignty as it pertains to Native Americans).

301. *See* Jonathan H. Wardle, Note, *The Strategic Use Of Mexico To Restrict South American Access To The Diversity Visa Lottery*, 58 VAND. L. REV. 1963, 1985-90 (2005) (describing the disproportionate number of diversity visas being awarded to immigrants from Europe).

302. 8 U.S.C. § 1153(c) (2005).

303. INA, 8 U.S.C. § 1151(e) (2000).

304. *See* Wardle, *supra* note 301, at 1984-90 (detailing the emphasis in awarding diversity visas to immigrants from European countries and the curious categorization of Mexicans with South American nationals for purposes of allotting diversity visas).

305. *See* 8 U.S.C. § 1187(b) (imposing a large number of technical and bureaucratic requirements in order to qualify for a visa waiver which would likely be difficult to fulfill without a congenial diplomatic relationship).

306. Registration of Certain Nonimmigrant Aliens From Designated Countries, 67 Fed. Reg. 67,766 (Nov. 6, 2002); Registration of Certain Nonimmigrant Aliens From Designated Countries, 67 Fed. Reg. 70,526 (Nov. 22, 2002); *see* Registration of Certain Nonimmigrant Aliens From Designated Countries, 67 Fed. Reg. 77,642 (Dec. 18, 2002) (modifying registration requirements).

priorities have also targeted particular ethnic groups.[307] The Supreme Court has sanctioned the use of race and ethnicity as a factor in making Fourth Amendment stops relating to suspected immigration law violations.[308]

Unlike immigration law, criminal law's disparate treatment of members of certain minorities and income levels is not explicit.[309] Instead, criminal law has a disparate impact: the rules of the criminal justice system are neutral on their face, but their effect on racial and ethnic minorities is notoriously disproportionate to the number in the general population.[310]

The movement toward retributive justice in criminal law, the turn to the sovereign state as the answer to public fears about crime, and the disproportionate representation of minorities and low-income classes in the offender population contribute to the perception of

307. *See Blurring the Boundaries*, *supra* note 36, at 101-02 (noting that "immigration law enforcement relies heavily upon religious and ethnic 'profiles'" of potential terrorists that includes Muslim and Middle Eastern men and "a range of immigrant communities, particularly Mexican immigrants with brown skin and dark hair"); Wishnie, *supra* note 90, at 1112 (analyzing INS arrest data in New York from 1997-99 and concluding that INS arrests in New York were overwhelmingly and disproportionately of immigrants from Mexico, Central, and South America).

308. *See* United States v. Brignoni-Ponce, 422 U.S. 873, 885-86 (1975) (acknowledging that Mexican appearance can be a relevant factor when stopping a car); *see also* Kevin R. Johnson, *The Forgotten "Repatriation" Of Persons Of Mexican Ancestry And Lessons For The "War On Terror,"* 26 PACE L. REV. 1, 11-12 (2005) (citing *Brignoni-Ponce* for the proposition that "racial profiling has been sanctioned to a certain degree in immigration enforcement"). *See generally* Alfredo Mirandé, *Is There a "Mexican Exception" to the Fourth Amendment?*, 55 FLA. L. REV. 365 (2003) (exploring racial profiling within the context of the Fourth Amendment).

309. There are exceptions, of course: police may make enforcement decisions based on race or ethnicity when they have particularized suspicion that makes race relevant to a certain crime. A police officer may have personal racial motives for making a stop, but these will not invalidate the stop if the court finds that an objectively non-racial basis also existed. *See* Whren v. United States, 517 U.S. 806, 813 (1996) (asserting that subjective intentions do not play a role in Fourth Amendment probable cause analysis, thus allowing racial profiling without scrutiny).

310. *See* Kasey Corbit, Note, *Inadequate and Inappropriate Mental Health Treatment and Minority Overrepresentation In The Juvenile Justice System*, 3 HASTINGS RACE & POVERTY L.J. 75, 75-77 (2005) (collecting statistics on disproportionate representation of African-Americans, Latinos, and Native Americans in the criminal justice system); *see also* United States v. Armstrong, 517 U.S. 456, 469-71 (1996) (sustaining federal sentencing guidelines that set longer prison sentences for crack-related offenses despite a challenge based on evidence that black addicts and drug dealers preferred crack cocaine while white drug users and the dealers preferred powdered cocaine); Randall Kennedy, *The State, Criminal Law, and Racial Discrimination: A Comment*, 107 HARV. L. REV. 1255, 1260 (1994) (critiquing "reflexive, self-defeating resort to charges of racism when a policy, racially neutral on its face, gives rise to racial disparities when applied"); Marc Mauer, *Why Are Tough on Crime Policies So Popular?*, 11 STAN. L. & POL'Y REV. 9, 15-16 (1999) (discussing disproportionate representation of African American males in the criminal justice system).

criminal offenders as noncitizens.[311] Rather than viewing rehabilitation as a way of creating a more integrated citizenry, the view of the offender is as a profoundly anti-social being whose interests are fundamentally opposed to those of the rest of society.[312]

Within this framework, the criminal becomes "the alien other," an underclass with a separate culture and way of life that is "both alien and threatening."[313] The result has been a tendency toward publicly marking out the offender through community notification schemes, sex offender registers,[314] distinctive uniforms,[315] and the proliferation of sanctions such as deprivation of the franchise and the ability to otherwise participate in public life.[316] This new penology has transformed offenders from members of the public in need of realignment with society to deviant outsiders "deprived of their citizenship status and the rights that accompany it."[317]

CONCLUSION

The role of membership theory in shaping the convergence of immigration and criminal law seems likely to lead to a downward spiral of protections for non-members and a significant constriction of the definition of who is a member. A significant overlap between criminal law and immigration law inevitably will affect the way that decisionmakers view the consequences of exclusion from

311. GARLAND, *supra* note 211, at 135 (arguing that the criminal offender is characterized as a "wanton" and "amoral" member of "racial and cultural groups bearing little resemblance to 'us'").

312. *See id.* at 180 (perceiving society's disregard of an offender's legal rights as a choice between subjecting offenders to greater restriction or exposing the public to increased risk).

313. *Id.* at 135-36.

314. *See* Wayne A. Logan, *Horizontal Federalism in an Age of Criminal Justice Interconnectedness*, 154 U. PA. L. REV. 257, 280-81 (2005) (describing sex offender registration laws in all U.S. jurisdictions for those convicted of criminal offenses against victims who are minors and those convicted of a "sexually violent offense"); *see also* Jacob Wetterling Crimes Against Children and Sexually Violent Offenders Registration Act, 42 U.S.C. § 14071 (2000) (defining sex offender registration procedures for the states); Megan's Law, 42 U.S.C. § 14071(g)(2)(A) (2000) (withholding funds from states without such laws). States must maintain registration for at least ten years. Megan's Law, Final Guidelines for the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, 42 U.S.C. § 14072(b)(6) (2000). Lifetime registration is required for offenders with more than one conviction for registration-eligible offenses and those convicted of certain "aggravated" sex offenses. Pam Lyncher Sexual Offender Tracking and Identification Act of 1996, 42 U.S.C. § 14072(b)(6) (2000).

315. GARLAND, *supra* note 211, at 181.

316. *See Internal Exile*, *supra* note 167, at 158-59 (summarizing an ex-offender's social, political, and legal deprivations).

317. *Id.* at 181; *see id.* at 160 (analyzing the deprivation of citizenship rights as a potential violation of international human rights norms).

membership in each area. As criminal sanctions for immigration-related conduct and criminal grounds for removal from the United States continue to expand, aliens become synonymous with criminals. As collateral sanctions for criminal violations continue to target the hallmarks of citizenship and community membership, ex-offenders become synonymous with aliens.

When noncitizens are classified as criminals, expulsion presents itself as the natural solution.[318] The individual's stake in the U.S. community, such as family ties, employment, contribution to the community, and whether the noncitizen has spent a majority of his lifetime in the United States, becomes secondary to the perceived need to protect the community. Similarly, when criminals become aliens, the sovereign state becomes indispensable to police the nation against this internal enemy. In combating an internal invasion of criminal outsiders, containing them through collateral sanctions such as registration and removal from public participation appears critical.

Although criminal law and immigration law begin with opposite assumptions about the membership status of the individuals that they regulate, once the individual is deemed unworthy of membership, the consequences are very similar in both realms. The state treats the individual—literally or figuratively—as an alien, shorn of the rights and privileges of membership. This creates an ever-expanding population of outsiders with a stake in the U.S. community that may be at least as strong as those of incumbent members. The result is a society increasingly stratified by flexible conceptions of membership in which nonmembers are cast out of the community by means of borders, walls, rules, and public condemnation.

318. *See Immigration Threats*, *supra* note 36, at 1068 (arguing that aside from fulfilling the traditional purposes of punishment—incapacitation and deterrence—deportation may in some circumstances be justified as retributive).