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Fitting Punishment

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Abstract

Proportionality is conspicuously absent from the legal framework for immigration sanctions. Immigration law relies on one sanction—deportation—as the ubiquitous penalty for any immigration violation. Neither the gravity of the violation nor the harm that results bears on whether deportation is the consequence for an immigration violation. Immigration law stands alone in the legal landscape in this respect. Criminal law incorporates proportionality when imposing graduated punishment based on the gravity of the offense; contract and tort law provide for damages that are graduated based on the harm to others or to society.

This Article represents the first and fundamental step in a larger project of articulating a proposed remedial scheme that would align immigration law with the broader landscape of legal sanctions. It traces the history of immigration sanctions, offering a historical perspective on the recent arrival of deportation as the central immigration sanction. The Article takes a fresh approach to remedying violations of immigration law, proposing a system of graduated sanctions that would align immigration remedies with the overarching goals of U.S. immigration law.

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I. Introduction

Immigration law eschews proportionality. Proportionality is conspicuously absent from the legal framework for immigration sanctions. One sanction—deportation—is the ubiquitous penalty for any immigration violation.[1] Neither the gravity of the violation nor the harm that results governs whether deportation is the consequence for an immigration violation.[2] Immigration law stands alone in the legal landscape in this respect.

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1. *See* Juliet Stumpf, *Penalizing Immigrants*, 18 FED. SENT'G REP. 264, 264 (2006) (noting that immigration law uses deportation as the single indiscriminate sanction for almost any violation).

2. *Id.*

Proportionality, in contrast, is the touchstone of criminal punishment.[3] The criminalization of immigration law has remapped the geography of immigration law over the past twenty years. A wide assortment of graver and lesser crimes now trigger deportation.[4] More immigration violations now constitute crimes,[5] and prosecution of immigration-related crimes has increased greatly.[6] Immigration law has become so tightly interwoven with criminal

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3. *See, e.g.*, Solem v. Helm, 463 U.S. 277, 287 (1983) ("[I]t is a precept of justice that punishment for crime should be graduated and proportioned to offense . . . ." (quoting Weems v. United States, 217 U.S. 349, 367 (1910))).

4. *See* 18 U.S.C. § 16 (2006) (defining "crime of violence" as an offense an element of which is the use, attempted use, or threatened use of physical force against the person or property of another, or a felony offense that involves the "substantial risk" of such force); Anti-Drug Abuse Act of 1988 (Drug Kingpin Act), Pub. L. No. 100-690, § 7342, 102 Stat. 4181, 4469–70 (defining the "aggravated felony" deportability ground to include crimes of murder, drug trafficking, and firearms trafficking); Immigration Act of 1990, Pub. L. No. 101-649, § 501(a)(3), 104 Stat. 4978, 5048 (amending definition of "aggravated felony" to include "any crime of violence"); Immigration and Nationality Technical Corrections Act of 1994, Pub. L. No. 103-416, § 222, 108 Stat. 4305, 4320–22 (expanding the "aggravated felony" deportability ground to include theft, trafficking in fraudulent documents, fraud, and tax evasion); Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, sec. 440, § 242(a)(2), 110 Stat. 1214 (codified as amended at 8 U.S.C. § 1252 (2006)) (expanding "aggravated felony" deportation ground to include nonviolent crimes of forgery, counterfeiting, prostitution, certain gambling offenses, vehicle trafficking, obstruction of justice, perjury, bribery of a witness, and offenses related to skipping bail).

5. *See* Immigration Reform and Control Act (IRCA) of 1986 § 101, 8 U.S.C. § 1324a(f) (2006) (criminalizing a pattern or practice of knowingly hiring, recruiting, or referring for a fee an unauthorized alien for employment (§ 1324a(a)(1)(A)), or knowingly continuing to employ an unauthorized alien (§ 1324a(a)(2))); § 1325(c) (making it a criminal offense for persons to marry for purpose of evading immigration laws); § 1325(d) (outlining criminal penalties imposed on those who establish commercial enterprises for purpose of evading immigration laws); § 1326(b)(1) (making it a criminal offense for noncitizen misdemeanor offenders to attempt to unlawfully re-enter the United States); Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546–3009-724 (codified as amended in scattered sections of 8, 18 U.S.C.) (expanding federal immigration crimes to include driving above the speed limit while fleeing an immigration checkpoint, knowingly failing to disclose role as preparer of false immigration application, knowingly making a false claim of U.S. citizenship, and failing to cooperate in the execution of one's removal order); *see also* Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469, 477–78 (2007) (noting that "[s]ince 1986, Congress has liberally expanded the list of immigration offenses"); Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 384 (2006) (describing civil immigration violations that have been elevated to criminal offenses).

6. *See* Legomsky, *supra* note 5, at 479–80 (outlining the dramatic escalation in federal prosecutions of immigration crimes from the 1980s to the present); Teresa Miller, *Citizenship & Severity: Recent Immigration Reforms and the New Penology*, 17 GEO. IMMIGR. L.J. 611, 639 (2003) (detailing the increase, since the 1980s, in the number of noncitizens who face punishment in the criminal justice system for crimes that were once only civil violations);

justice norms as to constitute a distinct legal category,[7] dubbed "crimmigration law."[8]

Yet this transformation is incomplete in two respects. Others have deftly addressed the first aspect: While the enforcement of immigration law has imported substantive criminal law norms, it has left behind the procedural protections of criminal law.[9] Immigration proceedings do not trigger the constitutional rights due to defendants in the criminal justice system: the right to a trial by a court established under Article III of the Constitution,[10] the right to counsel at government expense,[11] the right not to incriminate oneself,[12]

Stumpf, *supra* note 5, at 388 (noting that immigration prosecutions outnumber all other types of federal criminal prosecutions).

7. *See* Nora V. Demleitner, *Immigration Threats and Rewards: Effective Law Enforcement Tools in the "War" on Terrorism?*, 51 EMORY L.J. 1059, 1061–73 (2002) (describing how immigration law has become a tool of the criminal justice system); Daniel Kanstroom, *Deportation, Social Control, and Punishment: Some Thoughts About Why Hard Laws Make Bad Cases*, 113 HARV. L. REV. 1889, 1891 (2000) (noting the convergence between immigration law and criminal justice); Legomsky, *supra* note 5, at 471–73 (detailing the points of intersection between criminal justice and immigration control); Miller, *supra* note 6, at 613 (describing the intimacy between the criminal justice system and immigration law as the "criminalization of immigration law"); Teresa A. Miller, *Blurring the Boundaries Between Immigration and Crime Control After September 11th*, 25 B.C. THIRD WORLD L.J. 81, 82 (2005) (stating that commentators have alternately described the changing relationship between criminal justice and immigration law as the "'criminalization' of immigration law" and as a "convergence between the criminal justice and deportation systems").

8. Stumpf, *supra* note 5, at 376.

9. *See* Legomsky, *supra* note 5, at 515–16 (listing constitutional procedural protections that operate in criminal proceedings but not in deportation proceedings); Robert Pauw, *A New Look at Deportation as Punishment: Why at Least Some of the Constitution's Criminal Procedure Protections Must Apply*, 52 ADMIN. L. REV. 305, 309–10 (2000) ("Courts have generally held that the constitutional safeguards that apply in criminal prosecutions do not apply in deportation proceedings."); Stumpf, *supra* note 5, at 390 (noting that immigration proceedings have fewer constitutional protections than the criminal justice system provides); Margaret Taylor & Ronald F. Wright, *The Sentencing Judge as Immigration Judge*, 51 EMORY L.J. 1131, 1137 (2002).

10. U.S. CONST. art. III, § 2; *see* Knauff v. Shaughnessy, 338 U.S. 537, 543–44 (1950) (holding that no court has the authority to review a determination of the executive branch to exclude an alien, unless expressly authorized by law); Fong Yue Ting v. United States, 149 U.S. 698, 713–14 (1893) (concluding that the executive branch may adjudicate the exclusion and expulsion of aliens).

11. U.S. CONST. amend. VI; *see* Vides-Vides v. INS, 783 F.2d 1463, 1469–70 (9th Cir. 1986) (finding that because deportation is a civil action, the Sixth Amendment right to appointed counsel does not attach); United States v. Gasca-Kraft, 522 F.2d 149, 152 (9th Cir. 1975) (observing that courts have uniformly held that deportation proceedings are non-criminal and that the subjects of such proceedings are not entitled to representation by counsel at government expense); Burquez v. INS, 513 F.2d 751, 755 (10th Cir. 1975) ("There is no right to appointed counsel in deportation proceedings.").

12. U.S. CONST. amend. V; *see* Bilokumsky v. Tod, 263 U.S. 149, 155 (1923)

protection against double jeopardy,[13] and the prohibition of cruel and unusual punishment,[14] among others. Procedurally, immigration law is a civil proceeding subject only to the protections of the Fifth Amendment's Due Process Clause.[15]

Proportionality is key to unraveling this thorny problem. The need for reform of the immigration remedial scheme has reached a critical point because of this importation of criminal law norms. While criminal law is animated by the idea that the punishment must be proportionate to the crime,[16] proportionality is scarce in immigration law.[17] Criminal law embodies proportionality in punishment schemes that impose milder sanctions such as

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(concluding that because a deportation proceeding is not criminal, an alien is compelled to answer questions regarding his status); Smith v. INS, 585 F.2d 600, 602 (3d Cir. 1978) (holding that because a deportation proceeding is civil in nature, an alien can be required to answer questions about his status as long as the answers would not subject him to criminal liability); *cf.* Chavez-Raya v. INS, 519 F.2d 397, 401 (7th Cir. 1975) (permitting an alien to invoke privilege against self-incrimination in deportation proceeding because of possibility of criminal prosecution for violation of immigration laws); Legomsky, *supra* note 5, at 515 n.225 (describing how Fifth Amendment privilege against self-incrimination may be invoked in any proceeding, criminal or civil, if the person asserting the privilege can show that his testimony would expose him to criminal culpability).

13. U.S. CONST. amend. V; *see* De La Teja v. United States, 321 F.3d 1357, 1364 (11th Cir. 2003) (noting that the Double Jeopardy Clause only applies to criminal proceedings, and that deportation is not a criminal proceeding); Urbina-Mauricio v. INS, 989 F.2d 1085, 1089 n. 7 (9th Cir. 1993) (rejecting an alien's double jeopardy claim because deportation is a "civil action, not a criminal punishment").

14. U.S. CONST. amend. VIII; *see Ting*, 149 U.S. at 730 (concluding that because deportation is not punishment for a crime, the constitutional prohibition against cruel and unusual punishment does not apply in a deportation proceeding); Elias v. Gonzales, 431 F.3d 268, 276 (6th Cir. 2005) ("[Petitioner's] claim that his deportation constitutes cruel and unusual punishment lacks merit; the Eighth Amendment is inapplicable to deportation proceedings because, as the Supreme Court has held, deportation does not constitute punishment."); Briseno v. INS, 192 F.3d 1320, 1323 (9th Cir. 1999) (concluding that an alien's Eighth Amendment rights were not violated in a deportation proceeding because deportation is not a criminal punishment); Oliver v. INS, 517 F.2d 426, 428 (2d Cir. 1975) (rejecting alien's claim that deportation is cruel and unusual punishment because, despite its severe consequences, deportation is a civil procedure, not a criminal procedure).

15. U.S. CONST. amend. V; *see* Yamataya v. Fisher, 189 U.S. 86, 100–01 (1903) (asserting that aliens cannot be deported without due process of law); Stumpf, *supra* note 5, at 392 ("[O]nly the Due Process Clause protects noncitizens in deportation proceedings.").

16. *See generally* Michael Davis, *How to Make the Punishment Fit the Crime*, 93 ETHICS 726 (1983) (advocating a method for incorporating proportionality into retributive punishment schemes); Andrew von Hirsch, *Proportionality in the Philosophy of Punishment: From "Why Punish?" to "How Much?"*, 25 ISR. L. REV. 549 (1991) (examining the theory of proportionality as it applies to criminal punishment).

17. *See* Kanstroom, *supra* note 7, at 1891 (noting the "automatic and often disproportionate nature of the deportation sanction"); Legomsky, *supra* note 5, at 473 ("[T]he present state of affairs virtually invites policymakers to abandon any sense of proportion.").

short or suspended sentences for lesser crimes, and harsher sanctions for graver crimes.[18] In contrast, the statutory sanction for every immigration violation is removal from the country.[19] While other sanctions may also result from a violation of immigration law,[20] removal is almost invariably at stake.

Immigration law is, perhaps, the only area of law that eschews proportionality. Neither the gravity of the violation of immigration law nor the harm that results bears any relationship to whether deportation is imposed as a consequence.[21] In criminal law, the rule that a punishment must fit the crime is articulated in the Eighth Amendment's prohibition on cruel and unusual punishment.[22] The federal sentencing scheme metes out punishment meant to be proportionate to the gravity of the defendant's conduct and the harm to the victim or to society.[23] In contract law, damages are graduated based on the harm to the party who suffered from the breach.[24] In tort law, relief is proportionate to the amount of harm that the plaintiff experienced, keyed to the amount required to make the plaintiff whole.[25] Comparative negligence schemes allocate damages based on the amount of fault for which the tortfeasor

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18. *See* U.S. SENTENCING GUIDELINES MANUAL § 5A (2008) [hereinafter USSG] (setting out graduated sentences depending on the nature of the offense and differing sets of facts); N.Y. PENAL LAW §§ 55-85.15 (McKinney 2007) (setting out categories of offenses, gradations of punishment, and categories of punishment such as incarceration, probation, conditional discharge, fines, and restitution); OR. REV. STAT. § 137 (2005) (same); Stumpf, *supra* note 1, at 264–65 (noting that "sanctions for criminal convictions arrange themselves along a spectrum of severity").

19. Stumpf, *supra* note 1, at 264.

20. *See id.* at 265 (noting that immigration law occasionally imposes sanctions other than deportation, including fines, incarceration, and restrictions on reentry after removal).

21. *See supra* note 17 and accompanying text (describing the lack of proportionality in immigration law); *see also* Maureen Sweeney, *Fact or Fiction: The Legal Construction of Deportation for Crimes* (Mar. 16, 2009) (Univ. of Md. Legal Research Paper No. 2009-18), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1361670 (arguing that "for reasons . . . of proportionality and equity among similar offenders, automatic deportation does not appear to be an appropriate or fitting sanction" because it is applied "without reference to the true severity of the crime or the myriad factors which sentencing courts consider in tailoring punishment to a crime").

22. U.S. CONST. amend. VIII; *see* Lockyer v. Andrade, 538 U.S. 63, 72 (2003) (stating that grossly disproportionate criminal sentences violate the Eighth Amendment).

23. *See supra* note 18 and accompanying text (describing proportionality in the federal and state sentencing schemes).

24. *See* RESTATEMENT (SECOND) OF CONTRACTS § 347 (1981) (setting the measure of damages for breach of contract as the lost value of the other party's performance, plus incidental or consequential losses caused by the breach, minus costs avoided by not having to perform).

25. *See* RESTATEMENT (SECOND) OF TORTS § 901 (1979) (establishing the general principle that one purpose of damages in tort law is to "give compensation, indemnity or restitution for harms").

is responsible.[26] The law governing punitive damages reins in the passions of juries by requiring that the amount of the sanction be proportionate to the violation and its effect on the victim.[27]

This Article proposes to realign immigration law with other areas of law by introducing proportionality norms. Particularly in light of the criminalization of immigration law, the need is compelling for immigration law to have a system of graduated sanctions like that in criminal law. Minor violations, especially when committed by those with significant value and strong ties to this country, would result in lesser penalties. More serious violations, especially when committed by those with few ties and who contribute less to this country, would result in harsher penalties and potentially removal from the United States.

Part II describes the ubiquity of deportation as an immigration sanction. Part III traces the history of immigration law sanctions and explains that deportation was traditionally only one of a variety of immigration remedies. Part III also describes the rise of modern deportation and its central role in the interplay between immigration law and criminal law, or crimmigration law. Part IV offers the proposal that immigration law incorporate a graduated system of sanctions for immigration violations. Part V concludes by offering thoughts on questions left unanswered.

II. Deportation as the Central Immigration Sanction

Deportation[28] resists categorization as a legal construct. From one perspective, deportation serves the function of remedying an unlawful situation by removing from the United States an individual who is not entitled to remain. For this reason, deportation is not, as a formal matter, criminal punishment.[29] There is no real dispute, however, that deportation operates as a sanction, acting

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26. *See* RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 26 (2000) (providing that liability for damages can be apportioned among individuals based on percentage of responsibility in causing the harm).

27. *See* State Farm Mutual Auto. Ins. Co. v. Campbell, 538 U.S. 408, 426 (2003) ("[C]ourts must ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered.").

28. This Article uses "deportation" to mean any involuntary removal of a noncitizen from the country. Thus, the term deportation encompasses the removal of noncitizens with legal status in the United States as well as those present without government authorization.

29. *See* Harisiades v. Shaughnessy, 342 U.S. 580, 594–95 (1952) (explaining that "deportation, while it may be burdensome and severe for the alien, is not a punishment" (quoting Mahler v. Eby, 264 U.S. 32, 39 (1924))).

as a penalty for an immigration violation.[30] Given that role, it is critical to evaluate whether the sanction of deportation is meted out in a way that is consistent with the sanctions schemes of other related areas of law, especially criminal law.

A. Deportation as an On-Off Switch

The distinction is stark between the principles of criminal penology and the current immigration sanctions scheme. Criminal punishment reflects the principle of proportionality, such that less serious crimes result in milder punishment and vice versa.[31] Although commitment to the constitutional mandate of proportionality in criminal punishment has been shaken in recent years,[32] the Federal Sentencing Guidelines[33] and state sentencing schemes[34] tend to follow this rule.

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30. *See* Gastelum-Quinones v. Kennedy, 374 U.S. 469, 479 (1963) (stating that "deportation is a drastic sanction, one which can destroy lives and disrupt families"); Helvering v. Mitchell, 303 U.S. 391, 399 n.2 (1938) (noting that the deportation of aliens is a typical example of the class of remedial sanctions that are free of a punitive criminal element and involve the revocation of a privilege); Restrepo v. McElroy, 369 F.3d 627, 635 n.16 (2d Cir. 2004) (cautioning that "deportation, like some other kinds of civil sanctions, combines an unmistakable punitive aspect with non-punitive aspects"); San Pedro v. United States, 79 F.3d 1065, 1074 (11th Cir. 1996) (explaining that "deportation involves the imposition of a specific sanction—expulsion from the country").

31. *See generally* von Hirsch, *supra* note 16 (examining penal theories to explain how and why punishments should be proportionate to the gravity of offense); Stumpf, *supra* note 1 (describing the way in which criminal law calibrates punishments based on the seriousness of the crime).

32. *See, e.g.*, Lockyer v. Andrade, 538 U.S. 63, 77 (2003) (concluding that a sentence of two consecutive terms of twenty-five years to life for two felony counts of petty theft under California's three-strikes law was not disproportionate punishment); Ewing v. California, 538 U.S. 11, 29–30 (2003) (upholding California's "three strikes" law against challenge based on the Eighth Amendment's proportionality requirement, reasoning that the State had a "legitimate penological goal" of punishing those who commit repeated criminal acts rather than punishing the specific offense or conviction).

33. *See* USSG § 1A1 (2008) (establishing a policy that sentences should be proportional to the severity of the criminal conduct).

34. *See* OREGON SENTENCING GUIDELINES § 213.002.0001 (2005) (declaring that the punishment for a felony conviction should be relative to the seriousness of the crime and the offender's criminal history); N.Y. PENAL LAW § 1.05 (McKinney 2007) (describing proportionate penalties based on seriousness of the offense as the purpose of penal laws). *But see* CAL. PENAL CODE § 667(e)(2)(A) (West 2007) (subjecting an offender with two prior felony convictions who is convicted of a third felony to three times the term of imprisonment provided as punishment for each felony conviction or twenty-five years imprisonment, whichever is greater, regardless of the seriousness of the crime).

In contrast, the Immigration and Nationality Act[35] (INA) employs removal as an on-off switch, rather than reflecting a graduated sanctions scheme. The INA almost invariably prescribes deportation as the sanction for an immigration violation.[36] Regardless of whether the violation of immigration law is grave or slight, removal from the country is the statutory consequence. A college student with a student visa who works an hour over the maximum mandated by law is removable from the United States for violating the terms of her visa to the same extent that a serial killer on a tourist visa is removable as an "aggravated felon."[37] As a practical matter, the enforcement priorities of the Immigration and Customs Enforcement agency place the felon in greater danger of deportation than the over-employed student.[38] Nevertheless, under the INA, the formal consequence for violating immigration law paints both with the same brush.

Other consequences for immigration violations are occasionally imposed, but they are in addition to deportation, not instead of it.[39] Besides deportation, an immigration violation may result in incarceration,[40] fines,[41]

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35. Immigration and Nationality Act (INA) of 1952, 8 U.S.C. §§ 1101–1537 (2006).

36. *See supra* note 1 and accompanying text (explaining that immigration law employs deportation as the central sanction).

37. *See* INA § 237(a)(1)(C)(i), 8 U.S.C. § 1227(a)(1)(C)(i) (subjecting a nonimmigrant visa holder who violates the terms of the visa to deportation); INA § 237(a)(2)(A)(iii), 8 U.S.C. § 1227(a)(2)(A)(iii) (providing for deportation of an alien who is convicted of an aggravated felony).

38. *See* U.S. Immigration and Customs Enforcement, Fact Sheet, *ICE Immigration Enforcement Initiatives* (June 23, 2006), http://web.archive.org/web/20060925233544/http://www.ice.gov/pi/news/factsheets/immigration_enforcement_initiatives.htm (last visited Sept. 30, 2009) (explaining that ICE has made it a top priority to enforce immigration violations which threaten national security or public safety) (on file with the Washington and Lee Law Review).

39. *See* Stumpf, *supra* note 1, at 265 ("[I]mmigration law provides a baseline sanction—removal—and then stacks additional sanctions on top of that, depending on the nature of the violation.").

40. *See* 8 U.S.C. § 1324a(f)(1) (2006) (providing that a criminal penalty of up to six months imprisonment and a fine of up to $3,000 may be imposed for unlawfully employing noncitizens); § 1324c(e)(1) (providing that imprisonment for up to five years is the sanction for failing to disclose a role as a document preparer for a falsely made application for immigration benefits); § 1325(a) (providing that improperly entering the United States may result in a criminal fine or imprisonment for up to six months, or both, for the first offense); § 1325(c) (providing that knowingly marrying to evade immigration laws results in imprisonment for up to five years (plus a possible $250,000 fine)).

41. *See* § 1324c (imposing civil penalties for fraudulent immigration documents); § 1325(b) (imposing a civil penalty upon a noncitizen apprehended while entering the United States at a time or place other than as designated by immigration officers); § 1325(c) (imposing a $250,000 fine for entering into a sham marriage to evade immigration laws).

or bars to re-entering the United States.[42] Criminal conduct that also constitutes an immigration violation can result in truncated review of the individual's claim to valid immigration status, and thus a swifter path to removal.[43] Yet these consequences accompany deportation. Unlike criminal sentencing schemes that erect ladders of progressively harsher sanctions, the immigration sanctions scheme relies heavily on deportation as the default sanction, imposing other sanctions as additional burdens.[44]

Deportation is the statutory consequence for entering the country without inspection by U.S. agents at the point of entry[45] or for violating the terms of a visa by working without authorization or beyond authorized limits.[46] The INA also subjects noncitizens to deportation for committing a "crime of moral turpitude"[47] or an "aggravated

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42. *See* INA § 212(a)(9)(B)(i)(I), 8 U.S.C. § 1182(a)(9)(B)(i)(I) (applying a three-year bar to reentry to a noncitizen who has accrued more than 180 days but less than one year of unlawful presence and who voluntarily departed prior to the commencement of removal proceedings); INA § 212(a)(6)(G), 8 U.S.C. § 1182(a)(6)(G) (applying a five-year bar to reentry to a noncitizen who violates the terms of a student visa); INA § 212(a)(9), 8 U.S.C. § 1182(a)(9) (creating five-year and ten-year bars for unlawful presence and reentry after a previous removal or departure under a removal order).

43. A noncitizen who has committed an aggravated felony is subject to removal without further review. 8 U.S.C. § 1228. Expedited removal, which eliminates intervention by an immigration judge, is used when an immigration officer determines that an arriving noncitizen is inadmissible because of fraud or misrepresentation, among other reasons. § 1225(b). Expedited review is not limited to noncitizens who have committed crimes. *See* § 1225(b) (permitting expedited review for noncitizens who attempt to enter without a passport or visa).

44. *See supra* note 39 and accompanying text (explaining that other remedies are available, but they are imposed in addition to deportation and not as alternatives to deportation). For example, a noncitizen who knowingly uses false documents for the purpose of obtaining an immigration benefit is both deportable and subject to fines. *See* INA § 237(a)(3)(C)(i), 8 U.S.C. § 1227(a)(3)(C)(i) (stating that "an alien who is the subject of a final order for violation of section 274C is deportable"); INA § 274C(d)(3), 8 U.S.C. § 1324c(d)(3) (describing fines for violations).

45. *See* INA § 212(a)(6)(A)(i), 8 U.S.C. § 1182(a)(6)(A)(i) (declaring inadmissible aliens who enter the United States without being properly admitted); INA § 237(a)(1)(A), 8 U.S.C. § 1227(a)(1)(A) (subjecting inadmissible aliens who entered the United States to deportation).

46. *See* INA § 237(a)(1)(C)(i), 8 U.S.C. § 1227(a)(1)(C)(i) (2006) (subjecting nonimmigrant visa holders who violate the terms of their visa to deportation).

47. INA § 237(a)(2)(A)(i), 8 U.S.C. § 1227(a)(2)(A)(i). A "crime of moral turpitude" remains undefined by the INA. Courts examine the "inherent nature of the offense" to determine whether it falls within the category. *See* Demleitner, *supra* note 7, at 1064 ("While the term has never been defined authoritatively, courts have looked at the 'inherent nature' of offenses to categorize them."); Brian C. Harms, *Redefining "Crimes of Moral Turpitude": A Proposal to Congress*, 15 GEO. IMMIGR. L.J. 259, 264–69 (2001) (noting that neither Congress nor the courts have clearly defined "crimes of moral turpitude" and describing different approaches to classifying such crimes); *see also* Nate Carter, *Shocking the Conscience of Mankind: Using International Law to Define "Crimes Involving Moral Turpitude" in*

felony,"[48] which includes major criminal offenses like murder, drug trafficking, and firearms trafficking,[49] and an array of minor crimes that includes misdemeanors.[50] Under these provisions, legal permanent residents regularly face deportation for minor crimes such as turnstile jumping,[51] minor shoplifting,[52] and passing a bad check.[53]

B. Relief from Deportation and Discretion

In theory, a substantial set of exceptions and alternatives to deportation could form the basis for a proportionate sanctions scheme. In fact, two unique characteristics of the U.S. immigration system create an appearance of proportionality. First, the statutory scheme provides for "relief" from deportation in certain circumstances.[54] Second, the immigration agency exercises discretion in setting enforcement priorities and has limited discretion to decide whether or when a noncitizen must leave the country.[55] In this subpart, I will describe how relief from removal and the existence of agency discretion create discrete islands of proportionality. Neither, however, results

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Immigration Law, 10 LEWIS & CLARK L. REV. 955, 955–58 (2006) (noting the lack of objective criteria for determining whether a crime involves moral turpitude and proposing that courts look to international law to determine the legal meaning of the term).

48. *See* INA § 237(a)(2)(A)(iii), 8 U.S.C. § 1227(a)(2)(A)(iii) (providing for deportation of an alien who is convicted of an aggravated felony).

49. INA § 101(a)(43), 8 U.S.C. § 1101(a)(43); The Anti-Drug Abuse Act of 1988 (Drug Kingpin Act), Pub. L. No. 100-690, § 7342, 102 Stat. 4181, 4469.

50. *See, e.g.*, United States v. Elizalde-Altamirano, 226 Fed. App'x 846, 848–49 (10th Cir. 2007) (declaring joyriding to be an aggravated felony); Miller, *supra* note 6, at 633–34 (observing that recent legislation has expanded the scope of "aggravated felonies" to include relatively minor offenses such as gambling, document fraud, obstruction of justice, and perjury); ELIZABETH J. HARPER & ROLAND F. CHASE, IMMIGRATION LAWS OF THE UNITED STATES 383 (3d ed. 1975) (reporting that offenses such as pandering, receiving stolen goods, and consensual sodomy have been held to involve moral turpitude).

51. *See* Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 HARV. L. REV. 1936, 1941 (2000) (explaining that turnstile jumping could constitute a crime of moral turpitude in New York and thus trigger deportation).

52. *See id.* at 1939 (noting that a conviction for shoplifting with a one-year suspended sentence can be deemed an aggravated felony and thus trigger deportation).

53. *See* Susan L. Pilcher, *Justice Without a Blindfold: Criminal Proceedings and the Alien Defendant*, 50 ARK. L. REV. 269, 312–13 (1997) (relating that under Georgia law, passing bad checks involves moral turpitude and thus constitutes a deportable offense).

54. *See infra* Part II.B.I (describing the process through which relief from deportation may be granted).

55. *See infra* Part II.B.3 (discussing the role of discretion in the deportation context).

in a remedial framework that calibrates the gravity of the immigration violation with the sanction.

1. Relief from Removal and the Binary Nature of the Deportation Determination

Relief encompasses a collection of statutory and administrative avenues for a noncitizen to avoid removal from the country even if she has violated an immigration law.[56] Removal proceedings typically pose two questions. First, the immigration judge determines whether the noncitizen has violated a provision of the INA that imposes removal from the United States as a consequence.[57] If so, the immigration judge usually finds the noncitizen deportable.[58] The burden then shifts to the noncitizen to show she is eligible for relief from deportation.[59]

On the surface, relief from removal imbues the sanctions scheme with some level of proportionality. The availability of relief means that some violations of immigration law do not result in deportation. The distinctions between the different forms of relief create variation in the likelihood of deportation.[60] Some of the criteria for these forms of relief consider the nature of the violation,[61] furthering the appearance that consequences are proportionate to the gravity of the violation. However, as I will discuss, the availability of relief falls short of instituting proportionality in immigration enforcement.

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56. *See* T. ALEXANDER ALEINIKOFF ET AL., IMMIGRATION AND CITIZENSHIP: PROCESS & POLICY 775 (6th ed. 2008) (discussing generally the various forms for relief from removal).

57. *See* DAVID WEISBRODT, IMMIGRATION LAW & PROCEDURE IN A NUTSHELL 118 (2d ed. 1989) (describing deportation as a system "designed primarily to rid the United States of statutorily defined undesirables").

58. *See, e.g.*, *In re* Vu Thang Phan, No. A076-752-061, 2009 WL 773168 (BIA 2009) ("Because we conclude that the respondent has an aggravated felony conviction that renders him removable . . . , he must be removed unless he demonstrates that he qualifies for and merits some form of relief from removal."); *see also* Alvarez-Garcia v. INS, 234 F. Supp. 2d 283, 286–87 (S.D.N.Y. 2002) (employing a two-step process in removal proceedings: first determining that the defendant is removable and then determining eligibility for relief from removal).

59. INA § 240(c)(3)(A), 8 U.S.C. § 1229a(c)(3)(A) (2006) (stating that the government has the burden to prove by clear and convincing evidence that alien is deportable); INA § 240(c)(4)(A), 8 U.S.C. § 1229a(c)(4)(A) (stating that alien has burden of proof to establish that she is eligible for relief and, if relief is discretionary, that she merits such relief).

60. *See* ALEINIKOFF ET AL., *supra* note 56, at 776–82 (discussing generally the various forms of relief from removal and the implications for an alien's status).

61. *See In re* C-V-T, 22 I. & N. Dec. 7, 11–13 (1998) (listing as a criteria for cancellation of removal the underlying circumstances of the ground of deportability).

Relief falls roughly into three categories. In the first are forms of permanent relief that excuse the underlying ground for removal and also create or sustain lawful status for the noncitizen in the United States.[62] The second category includes waivers of deportability that wipe away the deportability ground but do not establish lawful status.[63] The third is a catch-all category of forms of relief that do not endow permanent lawful status, but instead permit the noncitizen to remain in the country indefinitely or for a limited period of time.[64]

The first category of relief includes cancellation of removal, asylum, and restriction on removal (formerly known as "withholding of removal").[65] Cancellation of removal is the most generous form of relief in that it admits or restores the noncitizen to the status of a legal permanent resident and purges the underlying deportation ground.[66] Asylum and refugee status[67] and restriction on removal[68] provide those threatened with persecution in their home country a temporary lawful status with a pathway to permanent residence.[69]

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62. *See infra* notes 65–71 and accompanying text (discussing the various forms of permanent relief available for permanent resident status); *see also* ALEINIKOFF ET AL., *supra* note 56, at 785–819 (same).

63. *See infra* notes 72–77 and accompanying text (discussing forms of relief in which deportation is waived without a grant of lawful status).

64. *See infra* notes 78–85 and accompanying text (providing alternatives to formal removal and avenues for staying or delaying deportation).

65. Two other permanent forms of relief exist but their current impact is so small as to be unworthy of extended discussion. *See* INA § 249, 8 U.S.C. § 1259 (2006) (describing the process of "registry," which creates a lawful admission for noncitizens who arrived in the United States before 1972, are of good moral character, and are not inadmissible based on various enumerated grounds, including ties to terrorism or conviction of a crime of moral turpitude). Recently, only about 200 noncitizens annually have been granted this form of relief. *See* ALEINIKOFF ET AL., *supra* note 56, at 817–18 (citing statistics regarding number of aliens granted registry). The other form of relief is the passage of a private bill in Congress granting relief from deportation. *Id.* at 818–19. Few such bills gain enough support in the House and Senate to become law. *Id.* at 819.

66. *See* INA § 240A, 8 U.S.C. § 1229b (restoring or maintaining lawful permanent resident status or conferring lawful permanent resident status on nonimmigrants and those without lawful immigration status).

67. *See* INA § 208, 8 U.S.C. § 1158 (outlining qualifications for asylum and establishing the time limits for filing an application).

68. *See* INA§ 241(b)(3), 8 U.S.C. § 1231(b)(3) (establishing restrictions on the removal of aliens to foreign countries where the "alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion").

69. *See* INA § 204, 8 U.S.C. § 1159 (providing the means for aliens deemed refugees to seek permanent resident alien status).

These permanent forms of relief do not establish a graduated system of sanctions for immigration violations. Cancellation of removal arises after the determination that a removal ground applies, as its name suggests.[70] At most, cancellation is like a pardon, extracting the individual from imposition of deportation. Similarly, asylum and restriction on removal permit a noncitizen to avoid deportation by endowing a lawful status, and in the case of asylum, with an avenue to permanent residence.[71] Forms of relief such as these that confer lawful status do not instill proportionality in the immigration remedial scheme because they are, at bottom, merely part of the deportation determination. They are purely engaged with the question whether to impose the sanction of deportation, playing no part in the fundamental question of whether an alternative sanction or range of sanctions is available.

The second category of relief—waiver—does not create lawful status. A waiver of a removal ground means that the removal ground does not apply.[72] A waiver is usually a step along the way to another form of relief.[73] For example, Section 212(h) of the INA waives certain criminal grounds for removal for lawful permanent residents, individuals seeking adjustment of status to permanent residency, and victims of domestic violence seeking to remain in the United States.[74] If the waiver applies, the noncitizen may retain her current lawful status or apply for such status if she has none.[75]

The Section 212(h) waiver does not inject proportionality into the immigration sanctions scheme because, at bottom, the decision about whether the noncitizen will receive the waiver is part and parcel of the determination whether to deport her. The question of whether a waiver applies is akin to the question of liability in civil proceedings or guilt in a criminal trial: It determines whether the ground for deportation applies at all.[76] The waiver

70. *See* ALEINIKOFF ET AL., *supra* note 56, at 790–812 (discussing cancellation of removal).

71. INA §§ 208–209, 241(b)(3), 8 U.S.C. §§ 1158–1159, 1231(b)(3) (2006).

72. *See infra* notes 94–112 and accompanying text (describing various waivers).

73. *See infra* notes 94–112 and accompanying text (describing waiver criteria).

74. *See* INA § 212(h), 8 U.S.C. § 1182(h) (stating that the Attorney General may, in his discretion, waive certain crimes of moral turpitude). Section 212(h) waives grounds of removal based on crimes involving moral turpitude, 8 U.S.C. § 1182(a)(2)(A)(i)(I), a single offense of simple possession of thirty grams or less of marijuana, § 1182(a)(2)(A)(i)(II), multiple criminal convictions where the aggregate sentence was five years or more, § 1182(a)(2)(B), prostitution and commercial vice activities, § 1182(a)(2)(D), and serious criminal offenses involving a grant of immunity, § 1182(a)(2)(E). It does not waive removal grounds based on murder, torture, or drug crimes. *Id.*

75. INA § 212(h)(1), 8 U.S.C. § 1182(h)(1).

76. For a helpful review of waivers and this relationship to deportation, see ALEINIKOFF ET AL., *supra* note 56, at 812–15.

determination is a decision about whether to remove the noncitizen from the country.[77] There is no room in the statutory requisites for any alternative consequence.

The third category of relief includes alternatives to formal removal from the country and avenues for delaying deportation. Like the other two, this category of relief mainly creates variations on the likelihood of deportation. The category includes deferred enforced departure,[78] Temporary Protected Status (TPS),[79] voluntary departure,[80] parole,[81] and stays of removal.[82] Only one results in lawful status and that status is ephemeral: TPS, which provides temporary refuge for nationals of certain countries in turmoil.[83] The other forms of temporary relief also delay deportation, but without conferring even a temporary lawful status.[84] Voluntary departure is merely a gentler form of

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77. *Id.*

78. 8 C.F.R. § 1003.6 (2007) (permitting the Department of Homeland Security (DHS) to seek delay of deportation for noncitizens who would otherwise be placed in danger if deported to countries undergoing political instability or for other reasons).

79. Immigration Act of 1990, Pub. L. No. 101-649, § 302, 104 Stat. 4978, 5030; 8 U.S.C. § 1254a (2006).

80. INA § 240B(a)(1), 8 U.S.C. § 1229c(a)(1).

81. INA § 212(d)(5)(A), 8 U.S.C. § 1182(d)(5)(A).

82. 8 C.F.R. § 1003.6.

83. *See* INA § 244(c), 8 U.S.C. § 1254a(c) (granting TPS to nationals of the designated country upon proof that the national was in the United States on or before the date the DHS Secretary made the TPS designation). Moreover, the availability of TPS is limited, requiring continuous physical presence in the United States since the TPS designation, continuous residence in the United States since a date designated by the Attorney General, and compliance with the generally applicable admissibility requirements. *Id.*

84. Deferred enforced departure, a humanitarian designation for individuals who would be placed in danger if deported to countries where there is political or other instability, merely postpones deportation but does not establish a formal legal status or work authorization. *See* 8 C.F.R. § 1003.6 (2007) (describing the discretionary stay of removal designated by the President; it is requested by DHS and approved by the immigration judge). The President has made only five deferred enforced departure designations since its inception in 1990. National Immigration Forum, *Refugees and Asylum: Deferred Enforced Departure* (2007), http://www.immigrationforum.org/research/display/deferred-enforced-departure (last visited Sept. 29, 2009) (on file with the Washington and Lee Law Review). The designation is usually granted for twelve or eighteen months. *Id.* "Parole" is similarly a means of delaying removal, imbuing the government with discretionary power to permit temporary entrance into the United States for humanitarian reasons or significant public benefit or pending further investigation. *See* INA § 212(d), 8 U.S.C. § 1182(d) (authorizing the Attorney General to give special consideration when it is in the national interest). Similar to parole, "deferred action status" is usually granted when there are compelling humanitarian reasons. Memorandum from Doris Meissner, Commissioner, Immigration and Naturalization Service, to Regional Directors, District Directors, Chief Patrol Agents, and Regional and District Counsel 7–8 (Nov. 17, 2000), *available at* http://www.shusterman.com/pdf/Meissner_pros__disc_11-17-00.pdf. More limited is a stay of removal, preventing the DHS from executing a removal or exclusion order while the

deportation. Noncitizens granted voluntary departure have won the right to depart at their own expense in order to avoid a formal removal order.[85]

The variety of these forms of relief, along with those in the first category that establish permanent residency, at first appear to support the idea that relief constitutes a graduated system of sanctions. Like the others, however, these forms of relief merely contribute to the decision of whether, when, or how a noncitizen is required to leave the country.[86] They are variations on the underlying decision about whether deportation will occur, rather than operating as lesser or greater sanctions.

At bottom, relief emphasizes the binary nature of the deportation question by either permitting the noncitizen to avoid deportation altogether or delaying it. The variation in the results of immigration hearings does not create true proportionality because there is no other sanction at issue.

2. *Limited Availability of Relief*

Moreover, the limited availability of relief renders it still less effective in establishing a system of proportionate sanctions for immigration law.[87] Relief is now so circumscribed that it currently plays a role only at the margins in limiting the application of deportation as the primary immigration sanction. The broadest form of cancellation of removal applies only to lawful permanent residents with long tenures in the United States, and disqualifies those

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noncitizen's immigration case is pending final disposition, including during direct appeal to the Board of Immigration Appeals. 8 C.F.R. § 1003.6; IMMIGRATION COURT PRACTICE MANUAL 8.2 (2008), *available at* http://www.usdoj.gov/eoir/vll/OCIJPracManual/Chap%208.pdf.

85. INA § 240B(a)(1), 8 U.S.C. § 1229c(a)(1) (2006); *see* ALEINIKOFF ET AL., *supra* note 56, at 820–26 (discussing the relief of voluntary departure). In other words, it is a way for the noncitizen to avoid the entry of a removal order while saving the government the cost of a full proceeding. *Id.*

86. *See* ALEINIKOFF ET AL., *supra* note 56, at 820–26 (discussing voluntary departure and removal generally and noting that voluntary departure has changed "from an individual benefit to a docket management tool").

87. *See* Miller, *supra* note 6, at 632 (noting that relief for an alien with a criminal conviction is limited and deportations of criminal aliens continue to rise steeply); Peter H. Schuck & John Williams, *Removing Criminal Aliens: The Pitfalls and Promises of Federalism*, 22 HARV. J.L. & PUB. POL'Y 367, 393–94 (1999) (explaining that most criminal aliens have been ineligible for relief since the 1990s); Daniel Kanstroom, *Post-Deportation Human Rights Law: Aspiration, Oxymoron, or Necessity?*, 3 STAN. J. C.R. & C.L. 195, 196 (2007) (noting that the total number of cases processed by immigration courts and the percentage of those proceedings which result in removal increased from 2001 to 2005, with 282,396 proceedings in 2001 and 368,848 in 2005, and a removal rate of 78% in 2001 and 84% in 2005); *see also* INS v. St. Cyr, 533 U.S. 289, 297 & n.7 (2001) (noting that recent legislation had "reduced the size of the class of aliens eligible for . . . discretionary relief").

convicted of a plethora of crimes ranging from serious felonies to minor misdemeanors.[88] Noncitizens seeking both cancellation of removal and permanent resident status must meet stringent requirements, including ten years of continuous physical presence and proof that removal would result in "exceptional and extremely unusual hardship" to a U.S. citizen or lawful permanent resident—not to the noncitizen who is the subject of the removal proceeding.[89] Other factors disqualify a noncitizen from relief.[90] Cancellation also requires convincing the immigration court to exercise its discretion by establishing that the positive equities of permitting the noncitizen to remain outweigh the negatives.[91]

The criteria for asylum and restriction on removal are similarly stringent. Noncitizens must establish actual or threatened persecution in their home country and a nexus between that persecution and their membership in one of five protected groups.[92] Noncitizens who meet those criteria may nevertheless be ineligible for asylum or restriction on removal if an immigration judge concludes they could have found refuge in another part of their home country or a third country, among other reasons.[93]

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88. *See* INA § 240A(a), 8 U.S.C. § 1229b(a) (2006) (setting out criteria for cancellation of removal and excluding individuals convicted of aggravated felonies, as defined in § 1101(43), and offenses listed in §§ 1182(a)(2) and 1227(a)(2)).

89. *See* INA § 240A(b), 8 U.S.C. § 1229b(b) (explaining the criteria needed for cancellation of removal and adjustment of status for a nonpermanent resident); *see also In re* Gonzalez Recinas, 23 I. & N. Dec. 467, 468–73 (2002) (elucidating criteria for finding of "exceptional and extremely unusual hardship").

90. For example, it must be found that the noncitizen has not committed a crime of moral turpitude, an aggravated felony, or a drug offense, INA § 240A(b)(1)(C), 8 U.S.C. § 1229b(b)(1)(C) (2006), and that she has maintained "good moral character," INA § 240A(b)(1)(B), 8 U.S.C. § 1229b(b)(1)(B).

91. *See* INA § 240A(b), 8 U.S.C. § 1229b(b) (explaining the criteria needed for cancellation of removal and adjustment of status for a nonpermanent resident); *In re* C-V-T, 22 I. & N. Dec. 7, 11–13 (1998) (establishing that agency discretion is a requirement for cancellation of removal and listing the positive and negative equities that the agency must consider).

92. *See* INA § 208, 8 U.S.C. § 1158 (setting out asylum procedures); INA § 101(a)(42), 8 U.S.C. § 1101(a)(42) (setting out definition of "refugee"); INA § 241(b)(3), 8 U.S.C. § 1231(b)(3) (defining "restriction on removal"). Asylum and restriction on removal are available for those persecuted on account of race, religion, nationality, political opinion, or membership in a particular social group. *See* § 1158(b)(1)(A) (providing for asylum); § 1231(b)(3) (providing for restriction on removal).

93. *See* INA § 208(a)(2), 8 U.S.C. § 1158(a)(2) (listing procedural limitations on asylum claims including a one-year filing deadline); INA § 101(a)(42), 8 U.S.C. § 1101(a)(42) (making ineligible for asylum individuals who were involved in persecution); INA § 241(b)(3), 8 U.S.C. § 1231(b)(3)(B) (listing exceptions to restrictions on removal).

Waivers are also extremely cabined. They are either general, applying to a broad category of noncitizens and to more than one ground for deportation,[94] or specific, applying to one or few grounds for deportation or to a single class of noncitizens.[95] The most generous waiver, Section 212(h) of the INA,[96] is too constrained to contribute to a proportionate system of sanctions. The waiver's two avenues for relief illustrate its limited nature.[97] The first waives removal grounds based on prostitution or crimes that occurred more than fifteen years before the noncitizen's application for the immigration benefit.[98] The noncitizen must also show that she has been "rehabilitated" and that her admission would not be "contrary to the national welfare, safety, or security of the United States."[99] The second avenue requires a showing that removing the noncitizen would result in "extreme hardship" to a close relative who is a U.S. citizen or permanent resident,[100] as well as a favorable exercise of discretion from the Attorney General.[101]

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94. *See* INA § 212(h), 8 U.S.C. § 1182(h) (2006) (allowing Attorney General to waive multiple subsections for an offense of "simple possession" of marijuana and providing several reasons for which the Attorney General may waive such subsections); ALEINIKOFF ET AL., *supra* note 56, at 812–14 (discussing waivers in general).

95. *See, e.g.*, Julie E. Dinnerstein, *Options for Immigrant Victims of Domestic Violence*, 190 PRAC. L. INST. N.Y. 161, 170 (2009) (discussing the special waiver available for women who have suffered domestic violence).

96. INA § 212(h), 8 U.S.C. § 1182(h).

97. *See id.* (providing relief for aliens who committed minor criminal offenses more than fifteen years prior and have been rehabilitated or are closely related to a United States citizen or permanent resident alien to whom denial of entry would cause hardship and allowing entry would not threaten the government's interest).

98. *Id.*

99. INA § 212(h)(1)(A), 8 U.S.C. § 1182(h)(1)(A).

100. INA § 212(h)(1)(B), 8 U.S.C. § 1182(h)(1)(B).

101. *See* INA § 212(h), 8 U.S.C. § 1182(h) (stating that extreme hardship to a spouse, parent, son, or daughter must be "established to the satisfaction of the Attorney General" to qualify for waiver). For established permanent residents, the Section 212(h) waiver is further restricted. It applies only to permanent residents who have resided lawfully and continuously in the United States for seven years prior to the removal proceeding, and does not apply at all if the permanent resident has committed an "aggravated felony," a term of art in immigration law that encompasses a wide variety of crimes including misdemeanors and minor crimes. *Id.* Equal Protection challenges to Section 212(h) claiming discrimination based on distinctions between permanent residents and nonpermanent residents have been largely unsuccessful. *See* Lara-Ruiz v. INS, 241 F.3d 934, 947–48 (7th Cir. 2001) (applying rational basis review and holding that there is a reasonable justification for the distinction between permanent residents and nonpermanent residents); Jankowski-Burczyk v. INS, 291 F.3d 172, 178 (2d Cir. 2002) (rejecting Equal Protection challenge and holding that permanent residents and nonpermanent residents are not similarly situated); *cf.* Roman v. Ashcroft, 181 F. Supp. 2d 808, 812 (N.D. Ohio 2002) (upholding Equal Protection challenge), *vacated and remanded on other grounds*, 340 F.3d 314 (6th Cir. 2003).

The more specific waivers of removal grounds, applying to discrete grounds for removal, are similarly too cabined to contribute proportionality. Most are restricted to close relatives of U.S. citizens or residents and depend upon an immigration official or judge to exercise favorable discretion.[102] For example, obtaining a waiver for using false documents to procure employment is available only to permanent residents[103] and only upon proof that the

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102. *See* INA § 209(c), 8 U.S.C. § 1159(c) (2006) (providing a discretionary waiver of Section 212(a) inadmissibility grounds in order to assure family unity, except when inadmissibility is based on any of several grounds enumerated in INA § 212(a)(3)(D)(iv), 8 U.S.C. § 1182(a)(3)(D)(iv)); INA § 212(a)(3)(D)(iv), 8 U.S.C. § 1182(a)(3)(D)(iv) (waiving inadmissibility grounds for membership in a totalitarian party for close family members of United States citizens or legal permanent residents); INA § 212(a)(9)(B)(v), 8 U.S.C. § 1182(a)(9)(B)(v) (waiving inadmissibility grounds for unlawful presence in the United States for an alien seeking permanent resident status who is the spouse, son, or daughter of a United States citizen or permanent resident who would suffer extreme hardship if admission is refused); INA § 212(d)(11), 8 U.S.C. § 1182(d)(11) (providing waiver of inadmissibility ground of smuggling applicable only to permanent residents or those seeking entry as permanent residents, and only for smuggling of spouse, parent, son, or daughter); INA § 212(d)(12), 8 U.S.C. § 1182(d)(12) (waiving inadmissibility ground for document fraud under § 1324C for aliens seeking admission or adjustment of status to permanent residency based on an immediate family petition if the fraud was to assist, aid, or support the alien's spouse or child); INA § 212(e), 8 U.S.C. § 1182(e) (waiving the requirement for an alien admitted on a visitor "J" visa to return to his or her country of nationality if, *inter alia,* it would impose exceptional hardship upon a spouse or child who is a U.S. citizen or lawful permanent resident); INA § 212(g), 8 U.S.C. § 1182(g) (waiving inadmissibility grounds based on communicable diseases and physical or mental disorders for alien spouses, parents, or unmarried children of United States citizens or permanent residents); INA § 212(h)(1)(B), 8 U.S.C. § 1182(h)(1)(B) (waiving inadmissibility grounds based on certain criminal convictions if removal would cause extreme hardship to a spouse, parent, son, or daughter who is a U.S. citizen or lawful permanent resident); INA § 212(i), 8 U.S.C. § 1182(i) (waiving inadmissibility grounds based on misrepresentation in seeking admission to the United States if removal would cause extreme hardship to a spouse, parent, son, or daughter who is a U.S. citizen or lawful permanent resident); INA 216a(c)(4), 8 U.S.C. § 1186a(c)(4) (waiving inadmissibility for aliens granted conditional permanent resident status based on marriage who failed to meet the requirements to remove the conditional nature of their status if, *inter alia,* the marriage was entered in good faith and ended without the alien's fault or if the alien spouse or child was abused); INA §§ 237(a)(1)(E)(ii)–(iii), 8 U.S.C. §§ 1227(a)(1)(E)(ii)–(iii) (waiving deportability ground of smuggling available only to permanent residents (or noncitizens eligible for permanent residency) and only for smuggling of spouse, parent, son, or daughter); INA § 237(a)(1)(H), 8 U.S.C. § 1227(a)(1)(H) (providing waiver for inadmissibility based on fraud at the time of entering the United States if the alien is an immediate relative of a United States citizen or lawful permanent resident, is in possession of an immigrant visa, and is otherwise eligible for lawful permanent residency); INA § 237(a)(3)(C)(ii), 8 U.S.C. § 1227(a)(3)(C)(ii) (waiving deportability grounds for a § 1324C document fraud violation if the fraud was for the purpose of aiding the alien's spouse or child).

103. INA § 237(a)(3)(C)(ii), 8 U.S.C. § 1227(a)(3)(C)(ii). Other family-based waivers have similarly restrictive conditions. Noncitizens whose permanent residence status arises from their marriage to a U.S. citizen are subject to a two-year period of conditional residency. INA § 216(b)(1), 8 U.S.C. § 1186a(b)(1). At the end of that period, the noncitizen is removable unless she files jointly with her spouse a petition to remove the conditional aspect of her

violation was "solely to aid, assist or support" the noncitizen's spouse or child and no one else.[104]

Outside of the family context, the grounds for waivers of deportation fall into three major categories: waiver of most inadmissibility grounds for refugees seeking adjustment of status to permanent residency,[105] waivers available to battered women and children,[106] and waivers of some criminal deportability grounds in the rare event of a full executive pardon.[107] As with

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residency and successfully passes an interview with an immigration officer. INA § 216(c)(1), 8 U.S.C. § 1186a(c)(1). Waiver of that joint filing requirement and interview is discretionary, and contingent upon showing: (a) that deportation would cause extreme hardship due to factors arising only within the two-year conditional period; (b) that she entered into the marriage in good faith but it was either terminated (except by death of her spouse) or her spouse battered her or her child or subjected her or her child to extreme cruelty; and (c) she was not at fault in failing to file jointly. INA § 216(c)(4), 8 U.S.C. § 1186a(c)(4).

104. INA § 237(a)(3)(C)(ii), 8 U.S.C. § 1227(a)(3)(C)(ii). As another example, the waiver of the deportability ground for smuggling another alien applies only to permanent residents (or noncitizens eligible for permanent residency) and only if the smuggling involved a spouse, parent, son, or daughter (but not, for example, a sibling or grandparent).

105. *See* INA § 209(c), 8 U.S.C. § 1159(c) (waiving most Section 212(a) inadmissibility grounds for refugees when such waiver is for humanitarian purposes, to assure family unity, or when otherwise in the public interest); *see also* INA § 212(e), 8 U.S.C. § 1182(e) (establishing discretionary waiver of two-year foreign residency requirement for holders of student "J" visas, INA § 101(a)(15)(J), 8 U.S.C. § 1101(a)(15)(J), if alien would be subject to persecution if returned to her country of nationality or last residence).

106. *See* INA § 237(a)(1)(H)(ii), 8 U.S.C. § 1227(a)(1)(H)(ii) (waiving Section 212(a)(6)(C)(i) inadmissibility grounds based on fraud or misrepresentation at the time of entering the United States for self-petitioners under the Violence Against Women Act (VAWA)); INA § 212(h), 8 U.S.C. § 1182(h) (waiving Sections 212(a)(2)(A)(i)(I)–(II), (B), (D), and (E) inadmissibility grounds based on a criminal conviction for VAWA self-petitioners when the Attorney General agrees to the alien's application); INA § 212(i), 8 U.S.C. § 1182(i) (waiving Section 212(a)(6)(C)(i) inadmissibility grounds based on misrepresentation when seeking admission for VAWA self-petitioners who demonstrate extreme hardship to the alien or to the alien's citizen, lawful permanent resident, or qualified alien parent or child); INA § 212(g), 8 U.S.C. § 1182(g) (waiving Section 212(a)(1)(A) inadmissibility grounds based on medical or mental condition if the alien is a VAWA self-petitioner); INA § 212(a)(9)(C)(iii), 8 U.S.C. § 1182(a)(9)(C)(iii) (waiving Section 212(a)(9)(C)(i) inadmissibility grounds based on unlawful presence after previous immigration violations for a VAWA self-petitioner if there is a connection between the alien's battering or subjection to extreme cruelty and the alien's removal, departure, reentry, or attempted reentry to the United States); INA § 237(a)(7), 8 U.S.C. § 1227(a)(7) (waiving deportability grounds based on domestic violence if the alien was acting in self-defense, violated a protective order intended to protect the alien, or the domestic violence-related crime did not result in serious bodily harm and was connected to the alien's subjection to battery or extreme cruelty).

107. *See* INA § 237(a)(2)(A)(vi), 8 U.S.C. § 1227(a)(2)(A)(vi) (waiving deportability grounds based on Sections 237(a)(2)(A)(i) (crime of moral turpitude), (A)(ii) (multiple criminal convictions), (A)(iii) (aggravated felony conviction), and (A)(iv) (high speed flight) for an alien who receives a full and unconditional pardon by a state governor or the President). Waiver based on a pardon is inapplicable to drug trafficking or controlled substance offense

the family-related waivers, all three of these waiver categories have restrictions on their availability. Refugees may not obtain a waiver if their admission would create adverse foreign policy consequences or if they committed certain crimes or engaged in terrorism or Nazi persecution.[108] Some waivers based on domestic violence exclude victims if the Attorney General does not agree to the alien's seeking admission or permanent residency,[109] require proof of extreme hardship to a close family member who is a U.S. citizen or permanent resident,[110] or scrutinize the circumstances surrounding the battery or extreme cruelty.[111] An executive pardon will waive only deportability (not inadmissibility) grounds for specific crimes and only if the pardon is full and unconditional.[112]

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convictions. *See In re Yeun*, 12 I. & N. Dec. 325, 327 (1967) (stating that a "pardon [is] ineffective in the case of any alien who has been convicted of a narcotic violation").

108. *See* INA § 209, 8 U.S.C. § 1159(c) (2006) (excluding from waiver certain inadmissibility grounds based on Sections 212(a)(2)(C) (drug trafficking), (3)(A) (entering solely for illegal activity), (3)(B) (terrorist activity), (3)(C) (adverse foreign policy consequences), and (3)(E) (participant in Nazi persecution, genocide, torture, or extrajudicial killing)).

109. *See* INA § 212(h), 8 U.S.C. § 1182(h) (waiving for VAWA self-petitioners Sections 212(a)(2)(A)(i)(I), (II), (B), (D), and (E) inadmissibility grounds based on a criminal conviction when the Attorney General agrees to the alien's application).

110. *See* INA § 212(i), 8 U.S.C. § 1182(i) (waiving Section 212(a)(6)(C)(i) inadmissibility grounds based on misrepresentation for VAWA self-petitioners who demonstrate extreme hardship to the alien or to the alien's United States citizen, lawful permanent resident, or qualified alien parent or child).

111. *See* INA § 212(a)(9)(C)(iii), 8 U.S.C. § 1182(a)(9)(C)(iii) (waiving Section 212(a)(9)(C)(i) inadmissibility grounds based on unlawful presence after previous immigration violations for a VAWA self-petitioner if there is a connection between the alien's battering or subjection to extreme cruelty and the alien's removal, departure, reentry, or attempted reentry to the United States); INA § 237(a)(7), 8 U.S.C. § 1227(a)(7) (waiving deportability grounds based on domestic violence if the alien was acting in self-defense, violated a protective order intended to protect the alien, or the domestic violence-related crime did not result in serious bodily harm and was connected to the alien's subjection to battery or extreme cruelty).

112. *See* INA § 237(a)(2)(A)(vi), 8 U.S.C. § 1227(a)(2)(A)(vi) (waiving deportability grounds based on Sections 237(a)(2)(A)(i) (crime of moral turpitude), (A)(ii) (multiple criminal convictions), (A)(iii) (aggravated felony conviction), and (A)(iv) (high speed flight) for an alien who receives a full and unconditional pardon by a state governor or the President); *In re* Jung Tae Suh, 23 I. & N. Dec. 626, 626 (2003) (stating that a pardon for crimes of child abuse and domestic violence does not fall within the waiver granted in Section 237(a)(2)(E)(i)); *see also* Matthew L. Benson & Marisa N. Palmieri, *I Got a Great Plea Agreement for My Client But He Ended up Being Deported—Immigration Considerations for the Kentucky Criminal Practitioner*, 34 N. KY. L. REV. 547, 569 (2007) (describing pardon restrictions). The pardon waiver does not, therefore, cover any of the grounds not listed, such as drug-trafficking or controlled-substance convictions. *See Yeun*, 12 I. & N. Dec. at 327 (stating that a "pardon [is] ineffective in the case of any alien who has been convicted of a narcotic violation").

In sum, the existence of relief in the INA does not inject proportionality into the immigration sanctions scheme because relief merely influences the decision whether the noncitizen will be deported. Relief does not provide alternative sanctions. Rather, it merely moves the deportation decision up or down on the spectrum of ease of proof.

3. Discretion

Agency discretion pervades immigration law.[113] Discretion to decline to pursue the removal of any noncitizen or to grant relief from removal introduces a level of individualized decisionmaking about the consequences of an immigration violation.[114] However, as currently structured, it fails to create a proportionate remedial scheme for immigration law.

Agency discretion comes in several forms. First, like criminal prosecutors, immigration law enforcement officers have prosecutorial discretion to decline to initiate removal proceedings[115] and to decide which immigration law violations to charge.[116] Decisions not to prosecute are usually based on

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113. *See* Daniel Kanstroom, *The Better Part of Valor: The Real ID Act, Discretion, and the "Rule" of Immigration Law*, 51 N.Y. L. SCH. L. REV. 161, 166 (2006–2007) ("Discretion has been so deeply intertwined with statutory immigration law for more than fifty years that much of the whole enterprise could fairly be described as a fabric of discretion. This is particularly true of deportation law."). *See generally* Daniel Kanstroom, *Surrounding the Hole in the Doughnut: Discretion and Deference in U.S. Immigration Law*, 71 TUL. L. REV. 703, 709 (1997) (describing U.S. immigration law in practice as a "fabric of discretion and judicial deference"); Gerald L. Neuman, *Discretionary Deportation*, 20 GEO. IMMIGR. L.J. 611, 614 (2006) (describing deportation "as a rule-governed sanction with enforcement discretion").

114. *See* Neuman, *supra* note 113, at 621 (explaining that discretion "permits adjudicators to engage in individualized decision making, considering the full complexity of an applicant's situation rather than reducing it to a checklist of standard factors").

115. *Meissner Issues Prosecutorial Discretion Guidance on Her Last Day as INS Commissioner*, 77 INTERPRETER RELEASES 1661 (2000) [hereinafter *Meissner*]. The DHS occasionally curtails its officers' discretion through, for example, "zero-tolerance" policies such as Operation Streamline. In 2005, DHS initiated the Operation, which constituted a joint effort with the U.S. Department of Justice to detain and prosecute all unauthorized border-crossers along a defined stretch of the U.S.-Mexican border. *See* Press Release, Dep't of Homeland Sec., Remarks by Homeland Sec. Sec'y, Michael Chertoff and Attorney Gen. Mukasey at a Briefing on Immigration Enforcement and Border Sec. Efforts (Feb. 22, 2008), http://www.dhs.gov/xnews/releases/pr_1203722713615.shtm (last visited Sept. 29, 2009) (describing Operation Streamline) (on file with the Washington and Lee Law Review); *see also* Anne B. Chandler, *Why Is the Policeman Asking for My Visa? The Future of Federalism and Immigration Enforcement*, 15 TULSA J. COMP. & INT'L L. 209, 231 n.84 (2008) (summarizing Chertoff's argument).

116. *See Meissner*, *supra* note 115, at 1161 (stating that "INS officers may decline to prosecute a legally sufficient immigration case if the Federal immigration enforcement interest

humanitarian reasons.[117] In its close resemblance to the discretion granted to criminal prosecutors, prosecutorial discretion granted to immigration officials has no bearing on the proportionality of the sanction ultimately imposed.

Second, higher-level agency officials have exercised discretion to create some of the alternate avenues for delaying or staying deportation, including deferred enforced departure[118] and deferred action.[119] These avenues, as I have explained, provide variations on whether or when deportation will occur, but they do not contribute to a more proportionate remedial scheme in which deportation is one of a set of sanctions.

The same is true of the discretion that immigration courts have to confer a lawful immigration status or grant relief.[120] Immigration courts do not have discretion to override the statutory eligibility requirements for lawful status or relief from removal or to impose different sanctions or remedies.[121] Discretion is limited to granting or denying relief once a noncitizen has met the statutory requirements.[122] The noncitizen must convince the agency that relief is proper, for example, "for humanitarian purposes, to assure family unity, or when otherwise in the public interest."[123] Thus, the question of whether the immigration court will exercise discretion limits the availability of relief, rather than expanding it, because it comes into play only once the statutory requirements for deportation are met. In the end, the court's discretion remains confined within the question of whether or not to deport.

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that would be served by prosecution is not substantial").

117. Taylor & Wright, *supra* note 9, at 1173 n.153.

118. 8 C.F.R. § 1003.6 (2007); *see also supra* notes 78, 84 (describing deferred enforced departure).

119. *See supra* note 84 (describing deferred action).

120. *See* Kanstroom, *supra* note 113, at 172 (discussing discretion in relief determinations).

121. *See* Neuman, *supra* note 113, at 615 (noting that the INA "enumerates grounds of deportability, and the executive has no authority to deport foreign nationals for other, unenumerated reasons").

122. *See* Kanstroom, *supra* note 113, at 172 (discussing the role of discretion in relief determinations: The statutory standard for relief "provided a right to a ruling on an applicant's eligibility," while "'the actual granting of relief was not a matter of right under any circumstances, but rather is in all cases a matter of grace'" (quoting INS v. St. Cyr, 533 U.S. 289, 308 (2001))).

123. INA § 237(a)(1)(E)(iii), 8 U.S.C. § 1227(a)(1)(E)(iii) (2006). At least one waiver of deportability is nondiscretionary. *See* INA § 237(a)(1)(E)(ii), 8 U.S.C. § 1227(a)(1)(E)(ii) (providing that an eligible immigrant who was present in the United States prior to May 5, 1988, and has encouraged, induced, assisted, abetted, or aided *only* a spouse, parent, son, or daughter to enter the United States illegally prior to May 5, 1988, is not deportable under INA § 237(a)(1)(E)(i) for smuggling).

Viewed as elements of the decision of whether to impose deportation, these forms of discretion are not a form of proportionality. The agency's power to exercise discretion does not, for example, permit imposition of a fine rather than removal. An immigration agent's decision whether to prosecute, an agency head's institution of a policy exempting from or delaying deportation of categories of noncitizens, and an immigration court's individualized grant or denial of relief from removal each constitute a determination of whether the sanction of deportation is proper. They are not choosing from an array of alternative sanctions.

III. A Brief History of Immigration Sanctions

Evaluating the current system of immigration sanctions requires a look backward at how immigration violations have been addressed traditionally. This section traces a brief history of immigration-related sanctions. Although under current immigration law any violation renders a noncitizen removable, it was not always that way.[124] Deportation in its current form is a relative newcomer to immigration law. In an earlier era, immigration consequences had more in common with the graduated remedial scheme found in criminal law, contract law, and tort law than with the current system of immigration sanctions.[125]

A. State-Created Sanctions: Early Approaches

Before the founding of the United States, and for nearly a century afterward, the states led the way in regulating international and domestic migration.[126] Because the fledgling United States had a strong interest in encouraging immigration, there was little incentive to place restrictions on entry or expend resources on removal of immigrants.[127] Federal governance of

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124. *See infra* Part III.A (summarizing different penalties for violating immigration laws in American history).

125. *See supra* notes 24–27 and accompanying text (describing the doctrines governing damages).

126. *See* GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW 19 (1996) ("Regulation of transborder movement of persons existed, primarily at the state level . . . .").

127. *See* E.P. HUTCHINSON, LEGISLATIVE HISTORY OF AMERICAN IMMIGRATION POLICY (1798–1965) 389 (1981) (discussing incentives for noncitizens to settle in the United States); Peter L. Markowitz, *Straddling the Civil-Criminal Divide: A Bifurcated Approach to Understanding the Nature of Immigration Removal Proceedings*, 43 HARV. C.R-C. L. REV. 289,

immigration was sparse and deportation rare.[128] In 1798, Congress passed the Alien and Sedition Laws, authorizing the President to order deportation when an alien was deemed dangerous to the United States.[129] Failure to depart in a timely manner could result in three years imprisonment and a bar to citizenship.[130] Most of these laws, of questionable constitutionality at their inception, were never enforced.[131]

The Naturalization Act of 1798[132] required white aliens to register with a designated official within forty-eight hours of arrival, or for those already present in the country, within six months of the law's passage.[133] The Naturalization Act imposed a fine for failure to register and nominally required registration as a prerequisite to naturalization, but it had no provision for removal of the offender.[134] The law was ignominiously repealed in 1802 after years of noncompliance.[135]

In contrast, state laws governing migration across state borders employed three categories of sanctions: removal of the immigrant, punishment of the immigrant, and punishment of the party responsible for the immigrant's

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324 (2008) ("[T]he colonies were primarily interested in encouraging immigration and, as a result, neither the exclusion nor the expulsion of noncitizens was a significant feature of the colonies' immigration laws.").

128. *See* Markowitz, *supra* note 127, at 324 (stating that "expulsion" was not a "significant" immigration tool); HUTCHINSON, *supra* note 127, at 388 ("[I]t was the states that took the place of the colonies and inherited the problems and responsibilities related to immigration.").

129. Naturalization Act of 1798, ch. 54, 1 Stat. 566 (repealed 1802); Alien Enemies Act, ch. 66, 1 Stat. 577 (1798); Alien Act, ch. 58, 1 Stat. 570 (1798); Sedition Act, ch. 74, 1 Stat. 596 (1798); *see* Gerald L. Neuman, *The Lost Century of American Immigration Law (1776–1875)*, 93 COLUM. L. REV. 1833, 1881 (1993) (describing the "package of legislation known to history as the Alien and Sedition Acts").

130. Alien Act § 1.

131. Markowitz, *supra* note 127, at 326 (citing 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, 87–98 (2002)); Gregory Fehlings, *Storm on the Constitution: The First Deportation Law*, 10 TULSA J. COMP. & INT'L L. 63, 74 (2002). The exception is the Alien Enemy Act of 1798, Act of July 6, 1798, ch. 66, 1 Stat. 577 (current version at 50 U.S.C. §§ 21–24 (2006)). *See* Stephen J. Vladeck, *Enemy Aliens, Enemy Property, and Access to the Courts*, 11 LEWIS & CLARK L. REV. 963, 967–77 (2007) (documenting use of the act during wartimes since its enactment).

132. Naturalization Act of 1798, ch. 54, 1 Stat. 566 (repealed 1802).

133. *Id.*

134. *Id.*

135. Act of Apr. 14, 1802, ch. 28, § 2, 2 Stat. 153, 154; *see also* Neuman, *supra* note 129, at 1882 (stating that the Naturalization Act of 1798 was ignored and that it was repealed in 1802).

entry.[136] State laws restricting passage of migrants across state borders sought to bar from entry three societal ills: crime, poverty, and disease.[137] They also imposed barriers based on race and religion.[138] Although these laws tended to apply to both domestic and international travelers, the effect was that the fledgling states governed immigration for the first century of this country's existence.[139] The types of sanctions that these early state laws employed to enforce these restrictions on migration varied, but most states penalized those responsible for importing the convict into the state.[140]

Two major types of immigration violations resulted in sanctions. Sanctions were a consequence either of violating a state restriction on entry[141] or of post-entry conduct by an individual who was not a citizen of that state.[142] Although state laws often permitted physical removal of undesirable noncitizens from the territory, many states focused less on the noncitizen than on the party responsible for the noncitizen's entry into the state.[143] Laws prohibiting the entry of out-of-state felons imposed sanctions on the felon that

136. *See* Neuman, *supra* note 129, at 1883 (detailing these "three principal methods for dealing with undesired immigration").

137. *See* NEUMAN, *supra* note 126, at 20 (describing categories of state immigration laws).

138. *See* EMBERSON EDWARD PROPER, COLONIAL IMMIGRATION LAWS: A STUDY OF THE REGULATION OF IMMIGRATION BY THE ENGLISH COLONIES IN AMERICA 17–18 (1900) (explaining that many of the colonies had laws preventing Catholics from admission); *id.* at 33, 63 (describing laws passed in colonial Virginia and Connecticut barring Quakers from entering); Neuman, *supra* note 129, at 1879 (noting that prior to the Civil War Illinois enacted laws prohibiting blacks, slave or free, from entering); *id.* at 1873 (revealing that many Southern states had laws prohibiting free blacks from entering prior to the Civil War); *id.* at 1866–67 n.219 (detailing how many Northern states, including Indiana and Ohio, passed laws in the early 1800s to prevent free blacks from entering). Legislation prohibiting the immigration of free blacks arose in part from fears of revolutionaries from the West Indies and blacks from abolitionist states. *See id.* at 1866–67, 1869 (citing a Georgia act that prohibited importing slaves from the West Indies and required security from free blacks). California's attempts to bar Chinese immigrants were the precursors to the first federal immigration restrictions. *See id.* at 1872 (describing the connections between West Coast legislation excluding the Chinese and the subsequent federal Chinese Exclusion Act, Act of May 6, 1882, ch. 126, 22 Cal. Stat. 58); Kerry Abrams, *Polygamy, Prostitution, and the Federalization of Immigration Law*, 105 COLUM. L. REV. 641, 671–77 (2005) (discussing several California laws that were passed from the 1850s to the 1870s to deter the immigration of Chinese persons, including anti-prostitution laws, miners' tax laws, and Chinese labor laws).

139. NEUMAN, *supra* note 126, at 19.

140. Neuman, *supra* note 129, at 1842.

141. *See* NEUMAN, *supra* note 126, at 20–34 (describing immigration laws restricting the entry of criminals, "the poor," and "those exhibiting signs of contagious disease," and noting the penalties for violating such prohibitions).

142. *See id.* at 22–23 ("In 1917 the federal government also began deporting aliens from the United States for committing crimes of moral turpitude after their arrival.").

143. *Id.* at 21.

included removal beyond the state border[144] but often also required the party responsible for importing the felon to cover the cost of removal.[145]

Similarly, state restrictions on entry of impoverished migrants permitted removal as a sanction but were seldom employed.[146] State immigration laws were a primary means by which states sought to exclude the poor. State laws sought to prevent the settlement of those who might require public assistance by "removing" them to the place that they "legally" originated or settled.[147] Such aliens were not permitted to settle lawfully.[148] As a result, they remained indefinitely subject to deportation by local officials at public expense.[149]

Though widespread, these provisions were seldom enforced.[150] Instead, states invented alternate means of encouraging poor immigrants to leave, such as orders to depart upon threat of whipping or incarceration.[151] More commonly, they imposed bonds, fines, or criminal liability on the transporter of the indigent person.[152] As one example, New York, which became the principal port of entry for immigrants arriving by sea, discontinued in 1797 the

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144. *See, e.g.*, Act of Feb. 10, 1787, 1787 Ga. Laws 40 (requiring removal of the felon and prohibiting reentry upon pain of death).

145. *See, e.g.*, Act of Mar. 27, 1789, ch. 33., 1789 Pa. Laws 76 (mandating that the party responsible for bringing the convict into Pennsylvania cover the cost of the convict's removal); Act of Jan. 28, 1797, ch. 511, § 3, 1797 N.J. Laws 131 (requiring the party who imported the convict to pay for the convict's removal).

146. *See* NEUMAN, *supra* note 126, at 23–31 (describing state "poor laws" authorizing removal as a penalty but also stating that such penalties were "weakened in practice, if not on the books").

147. *Id.* at 23, 198 n.38. A 1794 Massachusetts law provided that an impoverished individual could be removed "by land or water, to any other State, or to any place beyond the sea, where he belongs." Act of Feb. 26, 1794, ch. 32, 1794 Mass. Acts 383.

148. *See* NEUMAN, *supra* note 126, at 26 (describing Massachusetts's poor laws in which "unnaturalized immigrants remained permanently subject to deportation under the provisions of the poor laws").

149. *See id.* (citing as examples Act of Feb. 26, 1794, § 13, 1794 Mass. Acts 375, 379, and MASS. PUB. STAT. ch. 86, § 30 (1886)).

150. *See id.* at 30 (describing a study that found that "settlement provisions went largely unenforced" (quoting James W. Ely, *"There Are Few Subjects in Political Economy of Greater Difficulty": The Poor Laws of the Antebellum South*, 1985 AM. B. FOUND. RES. J. 849, 859 (1985))).

151. *Id.* at 29 (citing R.I. REV. STAT. ch. 51, § 35 (1857)).

152. *Id.* at 25 (citing Act of Feb. 26, 1794, ch. 32, § 15, 1794 Mass. Acts 375, 379); *id.* at 27 (citing N.Y. REV. STAT. pt. 1, ch. 20, tit. 1, § 64 (1829); N.Y. REV. STAT. pt. 1, ch. 20, tit. 1, § 64 (1836)); *id.* at 29 (citing Act of June 1847, 1847 R.I. Pub. Laws 27, R.I. REV. STAT. ch. 51, §§ 5–8 (1857)); *id.* at 29–30 (citing Act of Mar. 29, 1803, §§ 21, 23, 1801–03 Pa. Laws 507, 525–26).

removal of European alien paupers in favor of a system of bonds and reporting by masters of the vessels transporting the newcomers.[153]

Sanctions for entry of persons with communicable diseases followed a similar pattern. Many state laws simply excluded immigrants with either communicable or noncommunicable diseases.[154] Others required removal of the infected individual or imposed fines or quarantine for violating prohibitions against contact with an infected community.[155]

The only means in these early years to expel a noncitizen after admission was banishment.[156] Banishment for post-entry conduct, also known as "exile" or "transportation," was reserved for out-of-state citizens and foreign immigrants.[157] It arose as a form of criminal punishment,[158] and it was a means of purging the United States of British loyalists.[159] Unlike the modern form of deportation, banishment was imposed only after the full panoply of criminal procedures and protections.[160] Thus, the Framers of the Constitution were unfamiliar with civil deportation as it exists today.

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153. Neuman, *supra* note 129, at 1854–85 (citing Act of Apr. 3, 1797, ch. 101, § 2, 1797 N.Y. Laws 134, 135).

154. NEUMAN, *supra* note 126, at 31–32.

155. *See* CONN. REV. STAT. tit. 91, § 6 (1821) (specifying a fine for willfully violating prohibition against communication with an infected town in an adjoining state); Act of Apr. 17, 1795, ch. 327, § 4, 1795 Pa. Acts 735 (providing for fines and quarantine for violating prohibition against intercourse with infected places in the United States); *see also* NEUMAN, *supra* note 126, at 31–32 (summarizing the use of quarantines in American history).

156. Markowitz, *supra* note 127, at 325; *see* Kanstroom, *supra* note 7, at 1908 (noting that early 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").

157. *See* Javier Bleichmar, *Deportation as Punishment: A Historical Analysis of the British Practice of Banishment and Its Impact on Modern Constitutional Law*, 14 GEO. IMMIGR. L.J. 115, 116–17 (1999) (explaining that at the time of the United States' founding, banishment was a form of punishment and noting that courts have either misunderstood this history or ignored it when ruling that deportation is purely a civil remedy). *See generally* Markowitz, *supra* note 127 (arguing that the history of deportation and its roots in banishment as a criminal punishment compels the application of criminal law protections in proceedings involving expulsion of lawful permanent residents).

158. *See* NEUMAN, *supra* note 126, at 21–22 (stating that transportation to America was a punishment imposed by European governments on convicts and that the U.S. government also deported aliens "for committing crimes of moral turpitude after their arrival").

159. *See id.* at 23 (describing the "first century of American independence" as a period that "began with the massive banishment of British loyalists"); *see also* Markowitz, *supra* note 127, at 327 (describing New York's removal process in which "officials . . . conducted the stranger to the town from which she had come until they reached a town where the stranger was legally settled or passed the stranger on across the border of the state").

160. Markowitz, *supra* note 127, at 325.

B. Federal Sanctions: From 1870 to the 1920s

The first federal law imposing immigration-related sanctions in the new age of federal regulation of immigration law began not with deportation, but with criminal penalties: incarceration, fines, and hard labor. The Naturalization Act of 1870,[161] which extended the privilege of naturalization "to aliens of African nativity and to persons of African descent," made use of all three of these penalties.[162] The Act threatened fines, incarceration, and hard labor for knowingly committing perjury relating to naturalization proceedings or fraudulently obtaining a certificate of citizenship.[163]

When federal regulation of immigration began in earnest in 1875, it restricted the entry of noncitizens but did not institute deportation of those who had been admitted.[164] Responding to allegations of widespread importation of "Chinese prostitutes and European criminals,"[165] Congress passed restrictions on entry based on prostitution and crimes of moral turpitude.[166] Widespread anti-Chinese sentiment led Congress to pass the Chinese Exclusion Act of 1882[167] and other statutes expanding the categories of excludable aliens.[168]

As with naturalization, criminal penalties including incarceration, fines, and hard labor were the first tools Congress chose to enforce its new immigration laws. The Chinese Exclusion Act of 1882 subjected the master of any vessel who knowingly transported a Chinese laborer to imprisonment for

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161. *See* Naturalization Act of July 14, 1870, ch. 254, 16 Stat. 254 (establishing penalties for certain crimes that could be committed during the naturalization process and extending naturalization laws to "aliens of African nativity and to persons of African descent").

162. *Id.*

163. *Id.*

164. Kanstroom, *supra* note 7, at 1909.

165. HUTCHINSON, *supra* note 127, at 66.

166. Act of Mar. 3, 1875, ch. 141, 18 Stat. 477 (repealed 1974); *see* 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, 73 (2003) ("In 1875 Congress legislated the first federal restrictions on entry when it banned persons convicted of 'crimes involving moral turpitude' and prostitutes . . . ."); *see also* Abrams, *supra* note 138, at 693–94 (positing that the Page Act was passed to stop the entry of Chinese women in order to prevent perceived disruption of accepted conceptions of marriage and family).

167. *See* Chinese Exclusion Act of May 6, 1882, ch. 126, 22 Stat. 58 (suspending the immigration of Chinese laborers to the United States and exempting those Chinese laborers who were present in the United States before November 17, 1880).

168. Immigration Act of Aug. 3, 1882, ch. 376, 22 Stat. 214; Act of Feb. 26, 1885, ch.164, 23 Stat. 332 (repealed 1952); Act of Feb. 23, 1887, ch. 220, 24 Stat. 414; *see also* Ngai, *supra* note 166, at 73 (detailing the expanding class of persons excluded under contemporary immigration restrictions); HUTCHINSON, *supra* note 127, at 83 (describing the changing circumstances in the nation that surrounded the expansion of immigration laws).

up to one year.[169] A fraudulent immigration certificate could lead to imprisonment for up to five years,[170] and aiding a Chinese person who was ineligible to lawfully enter the United States could result in a year's confinement.[171] In 1884, aiding a noncitizen's entry in violation of the labor contract laws invited a $500 fine.[172] The grounds for exclusion expanded during the 1880s, but without provisions for guarding the border, excludable noncitizens continued to enter.[173] Such noncitizens were typically imprisoned if discovered.[174]

When deportation laws finally appeared in the late 1880s, their reach was very limited in comparison to current law. The first federal deportation laws confined deportation to conditions existing at or prior to entry into the country.[175] In 1888, Congress mandated that aliens who landed in violation of contract labor laws[176] were to be deported at their own expense or at the expense of the owner of the importing vessel.[177] It was the first time since the dubious legislation of 1798[178] that Congress had authorized deportation of aliens already present in the United States. In 1891, Congress provided for removal within one year of any noncitizen who was inadmissible at the time of entry.[179] The 1891 Act also authorized deportation of "any alien who becomes

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169. Chinese Exclusion Act of 1882 § 2, 22 Stat. at 59.

170. *Id.*

171. *Id.* § 7.

172. Act of Feb. 26, 1885, ch. 164, § 4, 23 Stat. 332, 333; *see* HUTCHINSON, *supra* note 127, at 89 (stating the penalties "include[d] a fine of five hundred dollars on the master of any vessel who knowingly brings a contract laborer into the country").

173. *See* Ngai, *supra* note 166, at 73–74 (listing the expanding number of groups excluded under the immigration regulations and describing the border as "soft" and mostly "unguarded").

174. *Id.* at 74–75.

175. *See* Kanstroom, *supra* note 7, at 1909–10 (identifying the Act of Mar. 3, 1875, ch. 141, 18 Stat. 477 (repealed 1974) as the first federal immigration law to provide for deportation as an "immediate part of the exclusion process" because it allowed immigration authorities at the port of entry to deport prostitutes and persons convicted of non-political crimes); *see also* Act of Mar. 3, 1891, ch. 551, 26 Stat. 1084 (providing that any alien who unlawfully entered the United States could be deported within one year of entry).

176. Alien Contract Labor Law of 1885, ch.164, 23 Stat. 332 (repealed 1952); Act of Feb. 23, 1887, ch. 220, 24 Stat. 414.

177. Act of Oct. 19, 1888, ch. 1210, 25 Stat. 566 (repealed 1952); HUTCHINSON, *supra* note 127, at 96.

178. *See supra* notes 129–31 and accompanying text (describing the Alien and Sedition laws).

179. Act of Mar. 3, 1891, ch. 551, § 11, 26 Stat. 1084, 1086 (superseded by Act of Mar. 3, 1902, ch. 112, §§ 20, 32, 36 Stat. 1213, 1218, 1221 (repealed in 1907)) (requiring that any alien who entered the country unlawfully be removed within one year "at the expense of the person or persons, vessel, transportation company, or corporation bringing such alien . . . and if that can

a public charge within one year after his arrival," but only if the reason for deportation arose "from causes existing prior" to entering the country.[180]

By the early 1890s, Congress had constructed a patchwork of penalties for immigration violations that included deportation, incarceration, and fines.[181] In 1892, new legislation singled out Chinese citizens unlawfully present in the United States, imposing imprisonment at hard labor for up to a year.[182] All of these—with the possible exception of fines (which could be both criminal and civil)—were traditionally considered criminal sanctions.[183]

In light of these early attempts to enforce immigration law using criminal penalties,[184] it is not surprising that the first challenges to these immigration sanctions sought the constitutional protections of a criminal trial. The Supreme Court faced challenges to this sanctions scheme in two seminal cases. In 1893, the Court ruled, in *Fong Yue Ting v. United States*,[185] that noncitizens facing deportation were not entitled to the constitutional safeguards protecting criminal defendants.[186] Three years later, in *Wong Wing v. United States*,[187] the Court ruled that, although immigration authorities could use detention or temporary confinement "as part of the means necessary to give effect to . . . the

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not be done, then at the expense of the United States").

180. *Id.*; *see* Kanstroom, *supra* note 7, at 1909–11 (distinguishing pre-1907 entry control measures from the later post-entry grounds for deportation, which he argues became a form of social control).

181. Kanstroom, *supra* note 7, at 1900–03.

182. Geary Act of 1892, ch. 60, 27 Stat. 25 (repealed 1943).

183. *See* Markowitz, *supra* note 127, at 325–27 ("The only historical precedents for expelling persons from within the nation were transportation, banishment, abjuration of the realm, and conditional pardons—all of which were imposed *only* as criminal punishments."); *see also* Wong Wing v. United States, 163 U.S. 228, 237 (1896) (recognizing that imprisonment at hard labor had been considered an infamous punishment for crimes in England and the Americas since the 1700s); Overton v. Bazzetta, 539 U.S. 126, 142–43 (2003) (Thomas, J., concurring) (noting that incarceration became the "centerpiece of correctional theory" around the nineteenth century, as the use of corporal punishment fell into disrepute).

184. *See supra* notes 129–80 (discussing early attempts to criminalize immigration violations).

185. *See* Fong Yue Ting v. United States, 149 U.S. 698, 730 (1898) (holding that noncitizens facing deportation were not entitled to the constitutional safeguards protecting criminal defendants).

186. *See id.* (explaining that because deportation hearings are not criminal proceedings, certain provisions of the Constitution protecting criminal defendants do not apply); *see also* Kanstroom, *supra* note 7, at 1900–02 (discussing *Fong Yue Ting*).

187. *See* Wong Wing v. United States, 163 U.S. 228, 235 (1896) (ruling that the commissioner of immigration acted without jurisdiction in sentencing unlawfully present Chinese citizens to imprisonment at hard labor).

exclusion or expulsion of aliens," they lacked the power to impose criminal punishment.[188]

Deportation for causes arising after entry appeared only after the turn of the century. A 1907 statute mandated deportation of "any alien woman or girl [found to be a prostitute] . . . within three years after" entering the United States.[189] It was the first time that the United States had mandated deportation of lawful immigrants admitted for permanent residence based on conduct occurring after entry.[190]

In 1910, Congress struck the three-year limitation, authorizing deportation of noncitizen women found to be prostitutes at any time after their entry.[191] Helena Bugajewitz challenged the constitutionality of the statute as amended, arguing that it constituted criminal punishment because the conduct for which she was to be deported was also a crime.[192] In *Bugajewitz v. Adams*,[193] the Court held that her deportation was not a criminal punishment despite the conformity of the facts establishing deportability with facts establishing a crime under local law.[194] Rather, the Court reasoned, it was "simply a refusal by the government to harbor persons whom it does not want."[195]

Together, *Fong Yue Ting*, *Wong Wing*, and *Bugajewitz* established that deportation and criminal punishment were completely distinct sanctions, arising from unrelated legal authority and governed by different agents: federal immigration authorities and (primarily) state prosecutors.[196] That separation

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188. *See id.* at 237 ("It is not consistent with the theory of our government that the legislature should, after having defined an offense as an infamous crime, find the fact of guilt, and adjudge the punishment by one of its own agents.").

189. Act of Feb. 20, 1907, ch. 1134, § 3, 34 Stat. 898, 900, *amended by* Act of Mar. 26, 1910, ch. 128, § 2, 36 Stat. 263, 265 (repealed 1917).

190. *See* Kanstroom, *supra* note 7, at 1911 (arguing that the 1907 Act nevertheless tied the post-entry conduct to pre-entry conditions).

191. *See* Act of Mar. 26, 1910, ch. 128, § 2, 36 Stat. 263, 265 (repealed 1917) (stating that any alien found to be "practicing prostitution after such alien shall have entered the United States . . . shall be deemed to be unlawfully within the United States and shall be deported"); DANIEL KANSTROOM, DEPORTATION NATION: OUTSIDERS IN AMERICAN HISTORY 125–26 (2007).

192. *See* Argument for Appellant, Bugajewitz v. Adams, 228 U.S. 585, 587 (1913) ("The act involved here is not only attacked because it attempts to exclude aliens, but because it attempts to delegate to the executive branch of the Government the right to try aliens, and brand them as criminals, and because they are criminals, to deport them.").

193. *See* Bugajewitz v. Adams, 228 U.S. 585, 591 (1913) (holding that Congress has the power to refuse to harbor persons it does not want).

194. *See id.* (reasoning that Congress "has power to order the deportation of aliens whose presence in the country it deems hurtful" without a criminal trial, even when its determination is based on "facts that might constitute a crime under local law").

195. *Id.*

196. *See* Juliet Stumpf, *States of Confusion: The Domestication of Immigration Law*, 86

permitted legislators to shape a sanctions scheme for immigration violations without regard to the existence of criminal sanctions for the same conduct, and it allowed courts to review deportability challenges divorced from the larger picture of how deportation and criminal punishment affected the individual noncitizen.

C. The Rise of Deportation

The 1920s mark the beginning of the prominence of deportation in immigration law. Having broken the barrier to imposing deportation for post-entry conduct, deportation legislation began in earnest.[197] And it began with the early criminalization of immigration law.

Prior to the 1920s, deportation was rare.[198] Between 1892 and 1907, the United States deported a few hundred noncitizens annually.[199] The period between 1908 and 1920 saw a small jump, with 2,000 to 3,000 deported.[200] That increase resulted, in part, from post-war legislation in 1917 that authorized deportation of noncitizens who committed post-entry "crimes of moral turpitude" and eliminated the statute of limitations for deporting certain aliens determined to be anarchists.[201] The Palmer Raids of 1919 and 1920, during which the federal government arrested over 10,000 suspected alien anarchists and deported approximately 500 Eastern European noncitizens, more than doubled the previous number of annual deportations.[202]

N.C. L. REV. 1557, 1580 (2008) (explaining that, in combination, the Supreme Court's decisions on deportation "permit the two greatest powers of the government to be brought to bear on the noncitizen for the same conduct—the immigration power by the federal government, and the criminal law by the state or local government").

197. *See* KANSTROOM, *supra* note 191, at 133–34 (positing that the 1917 Immigration Act "radically changed prior law by requiring deportation after entry for a wide variety of reasons and in permitting deportation without time limitation for certain types of cases").

198. *See* WILLIAM VAN VLECK, ADMINISTRATIVE CONTROL OF ALIENS 20 (1932) (explaining that the 1920s marked "an awakening of public interest" in expulsion and the deportation process).

199. Ngai, *supra* note 166, at 74.

200. HISTORICAL STATISTICS OF THE UNITED STATES FROM COLONIAL TIMES TO 1970, at 114 (Bicentennial ed. 1975) [hereinafter HISTORICAL STATISTICS]; Ngai, *supra* note 166, at 74; 1921 INS ANN. REP. 14–15.

201. Immigration Act of 1917, ch. 29, § 19, 39 Stat. 874, 889 (repealed 1952); *see also* Neuman, *supra* note 129, at 1844 ("In 1917 the federal government also began deporting aliens from the United States for committing crimes of moral turpitude after their arrival."); Ngai, *supra* note 166, at 74 (explaining that Congress gradually extended the statute of limitation on deportation and eliminated it altogether for certain groups).

202. CHARLES H. MCCORMICK, SEEING REDS: FEDERAL SURVEILLANCE OF RADICALS IN THE

Immigration legislation passed just prior to the 1920s expanded the grounds for exclusion.[203] Nevertheless, the tenacity of the statute of limitations on deportation[204] and the conspicuous absence of entry without inspection as a ground for deportation[205] meant that deportation remained an extension of exclusion, a way of revoking the admission of excludable noncitizens. Mae Ngai suggests that at that time "it seemed unconscionable to expel immigrants after they had settled in the country and had begun to assimilate."[206]

The early 1920s saw the passage of quota laws for immigrants, ending the legacy of open immigration from Europe.[207] Legislation passed in 1924 eliminated the statute of limitations for entering the United States without authorization, opening the way for deportation on a mass scale.[208] Between 1925 and 1929, the number of deportations quadrupled.[209]

The new approach to immigration control continued to employ well-established enforcement approaches and sanctions, including placing the onus on third parties to prevent unauthorized immigration. For example, the quota legislation of the early 1920s expanded the imposition of fines on transportation companies that imported inadmissible noncitizens.[210]

In 1929, legislation that broadened the scope of criminal offenses leading to deportation solidified the role of deportation as the central

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PITTSBURGH MILL DISTRICT, 1917–1921, at 145 (1997); ROBERT K. MURRAY, RED SCARE: A STUDY IN NATIONAL HYSTERIA, 1919–1920, at 212–17 (1955); MAE NGAI, IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA 59 (2004).

203. *See* Ngai, *supra* note 166, at 74 (explaining that 1917 legislation added new "excludable categories" to existing limitations on entry).

204. NGAI, *supra* note 202, at 59.

205. Ngai, *supra* note 166, at 74.

206. *Id.*

207. Quota Law of 1921, ch. 8, 42 Stat. 5 (repealed 1952); Immigration Act of 1924, ch. 190, 43 Stat. 153 (repealed 1952); Ngai, *supra* note 166, at 74–75; *see also* James F. Smith, *A Nation That Welcomes Immigrants? An Historical Examination of United States Immigration Policy*, 1 U.C. DAVIS J. INT'L L. & POL'Y 227, 232 (1995) (explaining that quota laws passed in the early 1920s significantly decreased the number of Southern and Eastern Europeans who could enter the United States).

208. Immigration Act of 1924, ch. 190, § 14, 43 Stat. 153, 162 (repealed 1952); *see also* Ngai, *supra* note 166, at 76 (describing "a dramatic increase in the number of deportations" following the passage of the Immigration Act of 1924, 43 Stat. 153).

209. Ngai, *supra* note 166, at 77; *see also* HISTORICAL STATISTICS, *supra* note 200, at 114 (showing an increase in annual deportations from 9,465 to 38,796).

210. Act of May 11, 1922, ch. 187, § 3, 42 Stat. 540, 540; Immigration Act of 1924, ch. 190, § 16, 43 Stat. 153, 163 (repealed 1952). These Acts imposed a "reasonable diligence" requirement on the companies and increased the fines for noncompliance. § 3, 42 Stat. at 540; § 16, 43 Stat. at 163.

immigration sanction and further intertwined it with criminal sanctions.[211] The law subjected to deportation all aliens convicted of any offense and sentenced to two years or more of imprisonment.[212] It also made unlawful entry a criminal misdemeanor, punishable by up to one year in jail, a $1,000 fine, or both.[213] A second unlawful entry became a felony, with a doubling of the sanctions.[214] Deportation awaited the end of the sentence.[215]

The 1929 legislation pioneered the modern immigration sanctions scheme, employing a range of punitive criminal sanctions paired with deportation.[216] Plumbing the full implications of *Bugajewitz*'s holding that deportation was not a form of punishment,[217] the statute rendered criminal what had previously been a purely administrative immigration violation. Of the 40,000 criminal cases that the U.S. Immigration Service brought against unlawful entrants between 1929 and 1932, the government prevailed in 90% of them.[218]

The 1929 Act held up a mirror to *Bugajewitz*. Instead of a deportation statute that overlapped with a state criminal statute, the Act created a federal crime that mirrored the deportability ground.[219] Enforcement of unlawful entry violations now employed criminal sanctions, in addition to deportation and fines.[220] The criminal conviction also had the effect of barring future reentry.[221] Consistent with *Wong Wing*[222] and

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211. Act of Mar. 4, 1929, ch. 690, 45 Stat. 1551 (repealed 1952); *see also* HUTCHINSON, *supra* note 127, at 208–10 (describing bills considered by the Seventieth Congress to increase the number of criminal offenses that could lead to deportation and prevent an alien convicted of a crime from being deported before serving the sentence).

212. Act of Mar. 4, 1929, § 1, 45 Stat. at 1551.

213. *Id.* § 2.

214. *Id.* § 1.

215. *Id.* § 3, 45 Stat. at 1552.

216. *Id.*

217. *See* Bugajewitz v. Adams, 228 U.S. 585, 591 (1913) ("The determination by facts that might constitute a crime under local law is not a conviction of crime, nor is the deportation a punishment.").

218. NGAI, *supra* note 202, at 292 n.14 (citing the *INS Annual Reports* for the years 1929–1932).

219. *See* Act of Mar. 4, 1929, ch. 690, §§ 1–2, 45 Stat. 1551, 1551 (repealed 1952) (making it a felony for a deported alien to attempt to reenter the country and providing that any alien who entered the country unlawfully was guilty of a misdemeanor).

220. *See id.* § 2 (providing for imprisonment for up to a year of any alien found guilty of entering the country unlawfully).

221. Will Maslow, *Recasting Our Deportation Law: Proposals for Reform*, 56 COLUM. L. REV. 309, 314 (1956).

222. *See* Wong Wing v. United States, 163 U.S. 228, 237 (1986) (ruling that immigration authorities could use detention as part of the deportation process but that they could not impose

Bugajewitz,[223] those sanctions resulted from two separate proceedings: first in federal court to try the criminal charge and subsequently as a civil adjudication to effect removal.[224]

The 1930s through the 1960s saw further restrictions on immigration and the development of flexibility and discretion in imposing deportation and other sanctions. Depression Era legislation expanded the exclusion of persons likely to become a public charge.[225] Violations of narcotics laws and the fraudulent use of marriage to obtain legal status became grounds for removal.[226]

Legislation in the 1940s and 1950s expanded the grounds for deportation, encompassing conduct occurring prior to the date of the statutes[227] and requiring deportation of all aliens who unlawfully entered the United States, including aliens who were not admissible at the time of entry (even those who had an otherwise valid visa but were nonetheless excludable).[228] The Internal Security Act[229] expanded the Attorney General's power to detain noncitizens pending execution of a deportation order.[230]

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criminal penalties without criminal process).

223. *See* Bugajewitz v. Adams, 228 U.S. 585, 591 (1913) (ruling that deportation of an alien prostitute was not a criminal penalty but "simply a refusal by the government to harbor persons whom it does not want").

224. *See* Act of Mar. 4, 1929, § 3, 45 Stat. 1551, 1551 (repealed 1952) (deferring deportation until the end of imprisonment).

225. HUTCHINSON, *supra* note 127, at 214.

226. *See* Act of Feb. 18, 1931, ch. 224, 46 Stat. 1171, 1171 (codified at 8 U.S.C. § 156(a) (2006)) (making violation of narcotics laws grounds for deportation); Act of May 14, 1937, ch. 182, 50 Stat. 164 (repealed 1952) (authorizing the deportation of aliens who fraudulently used marriage to gain admission to the United States); *see also* HUTCHINSON, *supra* note 127, at 220, 242–43 (describing legislation that allowed an alien to be deported if it was found that he or she violated narcotics laws or used fraudulent marriage to attain entry to the country).

227. *See* Alien Registration Act of 1940, ch. 439, § 23, 54 Stat. 670, 673 (repealed 1952) (expanding the grounds for deportation to additional classes of aliens); Immigration and Nationality Act of 1952, ch. 477, §§ 208, 241, 66 Stat. 163, 204 (stating that deportation was permitted even if the deportable offense was committed or the alien entered the United States prior to the enactment of the law); *see also* Maslow, *supra* note 221, at 314 (noting that legislation during the time period "broadened the deportation powers of the Attorney General" and expanded the grounds for deportation).

228. Immigration and Nationality Act of 1952, 8 U.S.C. §§ 1101–1537; *see also* Maslow, *supra* note 221, at 314–15 (listing "[t]hose aliens who were excludable at entry but nevertheless were permitted to enter the country" as one of the general classes of persons to be deported under the new legislation).

229. Internal Security Act of 1950, ch. 1024, § 23, 64 Stat. 987, 1011 (repealed 1993).

230. *Id.*; *see* Maslow, *supra* note 221, at 314 ("The [Internal Security Act] enlarged the Attorney General's power to detain aliens and supervise their activities pending the execution of a deportation order.").

Sanctions other than deportations were also on the rise during this period. Failure to depart after removal based on grounds of subversive, criminal, or immoral conduct became a crime carrying the threat of ten years in prison.[231] Bars to reentry appeared for noncitizens who had been previously excluded and deported,[232] as well as a ten-year prohibition against naturalization of noncitizens who associated with the Communist party.[233]

This more restrictive legislation, however, was accompanied by a move to expand administrative discretion to grant relief from the harsh consequences of those laws. The Alien Registration Act allowed the Attorney General to permit voluntary departure or to suspend deportation of noncitizens of good moral character when deportation would cause an economic hardship to the noncitizen's family.[234] Although the 1950s saw a narrowing of the Attorney General's discretion to grant such relief,[235] Congress later codified suspension of deportation in 1962.[236] Nevertheless, the expansion of deportation grounds and the national focus on immigration had its effect: Deportations multiplied,

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231. Internal Security Act § 23.

232. *See* Immigration and Nationality Act of 1952, ch. 477, § 276, 66 Stat. 163, 229 (codified as amended at 8 U.S.C. § 1101(2006)) (establishing criteria for a permanent bar but providing that an alien could nonetheless apply for reentry with the consent of the Attorney General); INA § 212(a)(16)–(17), 8 U.S.C. § 1182(a)(16)–(17) (providing that aliens who have previously been deported will not be re-admitted without the consent of the Attorney General).

233. Internal Security Act, sec. 25, § 305(a)–(c), 64 Stat. at 1013–14.

234. Alien Registration Act, ch. 439, sec. 20, § 19(c), 54 Stat. 670, 672 (1940); NGAI, *supra* note 202, at 87. The current version of suspension of deportation is very narrow. *See* INA § 244, 8 U.S.C. § 1254a (listing the five situations when the Attorney General may, "in his discretion, suspend deportation [of an alien] and adjust the status to that of an alien lawfully admitted for permanent residence").

235. *See* INA §§ 241–244 (broadening deportation powers of the Attorney General, but prohibiting suspension of deportation or grants of voluntary departure to aliens who fall into certain categories, including aliens considered subversive, criminal, or immoral, or those who violated alien registration laws); Maslow, *supra* note 221, at 314 ("The [Internal Security Act of 1950] enlarged the Attorney General's power to detain aliens and supervise their activities pending the execution of a deportation order, whereas it narrowed his power to suspend deportations."); Internal Security Act, sec. 22, § 4(a)–(b), 64 Stat. at 1008 (providing that aliens deportable under the statute shall "be taken into custody and deported . . . unless the Attorney General is satisfied . . . that [the] alien did not know or have reason to believe at the time such alien became a member of or affiliated with the organization . . . that such organization was a Communist organization").

236. *See* Act of Oct. 24, 1962, Pub. L. No. 87-885, sec. 4, § 244(a)(1)–(2), 76 Stat. 1247, 1247–48 (providing for suspension of deportation for aliens who had been present in the United States for either seven or ten years); HUTCHINSON, *supra* note 127, at 356 (describing the legislative history of the Act of Oct. 24, 1962).

from under 250,000 in the twenty years between 1950 and 1969, to almost double that number between 1970 and 1989.[237]

In sum, by the 1980s, immigration sanctions had already undergone tremendous evolution. Modern immigration law rendered deportation the ubiquitous sanction, imposed either alone or accompanied by other sanctions including fines, incarceration, detention, and bars to reentry.[238]

D. Crimmigration Law

The modern era of immigration sanctions, beginning in the middle of the 1980s, is marked by a major expansion of immigration sanctions, higher levels of enforcement, and a narrowing of avenues for the government to exercise discretionary relief from removal.[239] This evolution is in no small part due to the criminalization of immigration law, or "crimmigration law."[240] The development of crimmigration law starkly highlights the lack of proportionality in immigration law.

This section will describe the legislative transformation of immigration law through which a multitude of immigration violations began to carry criminal penalties, and whole categories of crimes became grounds for removal from the United States.[241] Although immigration law has taken on criminal enforcement norms, it has not similarly incorporated criminal justice norms.[242]

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237. U.S. DEPARTMENT OF HOMELAND SECURITY, YEARBOOK OF IMMIGRATION STATISTICS: 2006, http://www.dhs.gov/files/statistics/publications/YrBk06En.shtm (follow "Table 38" hyperlink) (last visited Aug. 21, 2009) (on file with the Washington and Lee Law Review).

238. *Supra* notes 35–53 and accompanying text.

239. *See* Stumpf, *supra* note 5, at 369 ("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." (citation omitted)).

240. *See id.* at 376 ("The merger of [immigration law and criminal law] 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 . . . .").

241. Kanstroom, *supra* note 7, at 1892; Miller, *supra* note 6, at 613; Stumpf, *supra* note 5, at 369; *see generally* Demleitner, *supra* note 7 (discussing how immigration law has become a tool of the criminal justice system).

242. Legomsky, *supra* note 5, at 475. Stephen Legomsky has described the importation of criminal enforcement norms as having five "ports of entry." These are: (1) the trend toward immigration violations increasingly carrying criminal penalties, (2) the proliferation of crimes that now result in removal proceedings, (3) greater application of criminal enforcement theory to immigration law, (4) importing law enforcement strategies into immigration law, and (5) using the same actors to enforce both areas of law. *Id.* at 475–500.

In particular, criminal justice norms that underlie the framework of criminal penalties have found no foothold in immigration law. The graduated structure of criminal punishment, in which penalties tend to be proportionate to the crime,[243] has no parallel in immigration law.

1. Immigration Violations as Criminal Violations

While earlier immigration violations carried criminal penalties,[244] the 1980s saw the beginning of a vast expansion of criminal penalties in the immigration law arena.[245] Traditionally, violating an immigration law resulted in a civil proceeding to determine whether the noncitizen was subject to removal from the United States.[246] Now, many immigration violations result in removal and also carry criminal penalties, and criminal prosecution has more often become a vehicle for immigration enforcement prior to removal.[247]

In 1986, Congress provided for imprisonment and criminal fines for a pattern or practice of knowingly hiring undocumented workers[248] and then created the crime of marrying to evade immigration laws.[249] Since then, Congress has created a host of new immigration crimes, including entrepreneurship fraud,[250] driving at excessive speeds while fleeing an

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243. *See, e.g.*, Solem v. Helm, 463 U.S. 277, 287 (1983) ("'[I]t is a precept of justice that punishment for crime should be graduated and proportioned to offense . . . .'" (quoting Weems v. United States, 217 U.S. 349, 367 (1910))).

244. *See, e.g.*, Internal Security Act of 1950, ch. 1024, sec. 23, § 20(c), 64 Stat. 987, 1012 (mandating that any alien deportable as being subversive, criminal, or immoral and who failed to depart within six months after being ordered removed was subject to criminal prosecution and up to ten years in prison); Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, § 1201, 82 Stat. 197, 236 (imposing up to two years of imprisonment on unauthorized immigrants possessing a gun, on the ground that such aliens posed a threat to the President and Vice President of the United States).

245. Daniel Kanstroom, *Criminalizing the Undocumented: Ironic Boundaries of the Post-September 11th "Pale of Law"*, 29 N.C. J. INT'L L. & COM. REG. 639, 640 (2004); Legomsky, *supra* note 5, at 476–82; Miller, *supra* note 6, at 617.

246. *See* INA § 237(a), 8 U.S.C. § 1227(a) (2006) (listing categories of removable noncitizens).

247. Miller, *supra* note 6, at 639–42; Kanstroom, *supra* note 245, at 654–55; Stumpf, *supra* note 5, at 384; Legomsky, *supra* note 5, at 476–82.

248. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, sec. 101, § 274A(a)(1)–(2), 100 Stat. 3359, 3360 (codified at 8 U.S.C. § 1324a).

249. Immigration Marriage Fraud Amendments of 1986, Pub. L. No. 99-639, sec. 2(a), § 216, 100 Stat. 3537, 3537–41 (codified as amended in scattered sections of 8 U.S.C.).

250. *See* Immigration Act of 1990, Pub. L. No. 101-649, sec. 121(b)(3), § 275(c), 104 Stat. 4978, 4994 (codified at 8 U.S.C. § 1325) (defining as a criminal act the establishment of a commercial enterprise for the purpose of evading immigration laws).

immigration checkpoint,[251] voting in a federal election as a noncitizen,[252] falsely claiming citizenship to obtain a benefit or employment,[253] and failing to cooperate in the execution of one's own removal order.[254] Concurrently, the severity of criminal fines and sentence lengths for immigration-related violations increased dramatically.[255]

2. *Crimes Resulting in Removal Proceedings*

The number and nature of crimes that result in removal proceedings have proliferated,[256] which has enthroned deportation as the central penalty for immigration violations. Before the mid-1980s, removal of noncitizens for criminal offenses was largely limited to convictions for serious "crimes of moral turpitude," drug trafficking, and certain weapons offenses.[257] Now, a

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251. Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, § 108, 110 Stat. 3009-546, 3009-557 (codified at 8 U.S.C. § 758).

252. *Id.* §§ 611, 1015(f).

253. *Id.* § 1015(e).

254. *Id.* § 1253.

255. *See, e.g.*, Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, sec. 130001, § 276(b)(1)–(2), 108 Stat. 1796, 2023 (codified at 8 U.S.C. § 1326(b) (2006)) (increasing criminal penalties from two years to a maximum of ten or twenty years for unlawfully reentering the United States after deportation or exclusion); Anti-Drug Abuse (Drug Kingpin) Act of 1988, Pub. L. No. 100-690, sec. 7345(a)(2), § 276(b)(1)–(2), 102 Stat. 4181, 4471 (increasing the maximum sentence to five to fifteen years for unlawful reentry, depending upon whether the noncitizen's prior deportation was based on an aggravated felony offense); Legomsky, *supra* note 5, at 478–79 ("During the same era in which it has been busily creating new immigration-related crimes, Congress has been steadily increasing both the fines and the lengths of the prison sentences for existing immigration-related crimes."); Miller, *supra* note 6, at 640 ("The Anti-Drug Abuse Act of 1988 increased the criminal penalty for illegal reentry after deportation or exclusion from up to two years to a maximum of five or ten years . . . ." (footnote omitted)). Immigration prosecutions are now the largest single type of federal prosecutions. *See* TRAC/DHS, Immigration Enforcement, New Findings, http://trac.syr.edu/tracins/latest/current/ (follow "Figure 6" hyperlink) (last visited Aug. 22, 2009) (revealing that immigration matters represented 32% of the total number of federal prosecutions in 2004 and comparing the total to drug and weapons prosecutions) (on file with the Washington and Lee Law Review).

256. Legomsky, *supra* note 5, at 482–86.

257. *See* HARPER & CHASE, *supra* note 50, at 612 (defining deportable aliens as members of the "criminal, subversive, narcotic, or immoral classes"); Miller, *supra* note 6, at 622 ("Although immigration law could, and often did, impose hardships on excludable and deportable aliens, the regime of the 1960's, 1970's and early 1980's was arguably less punitive that it is today.").

crime of moral turpitude carrying a potential sentence of one year is a removable offense.[258]

In 1988, Congress created a category of crimes that result in removal from the United States and dubbed them "aggravated felonies."[259] Originally, this category included only murder and trafficking in drugs or firearms.[260] As a result of Congress expanding the list of aggravated felonies in almost every immigration-related piece of legislation since 1988, the category of aggravated felonies burgeons with less serious crimes, including misdemeanors.[261]

The "aggravated felony" construct is now a misnomer.[262] It is neither limited to felonies, nor descriptive of crimes that conjure the concept of "aggravated."[263] Nevertheless, conviction of any of the listed crimes almost invariably results in removal from the United States.[264] Because these statutes

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258. AEDPA § 435(a), 8 U.S.C. § 1227(a)(2)(A)(i). Congress has never defined the intriguing term "crime involving moral turpitude." There is no shortage of criticism of the use of this undefined category of crimes as a basis for deportation. *See* Carter, *supra* note 47, at 958–59 ("Criticisms of moral turpitude as an undefined concept date back nearly a century."); Harms, *supra* note 47, at 259–60 ("For more than a century, the [Immigration and Naturalization Service (INS)] has deported tens of thousands of aliens on the grounds that an alien was convicted of a 'crime involving moral turpitude.' The INS has done this without any statutory definition of what constitutes a 'crime involving moral turpitude.'" (citations omitted)).

259. Drug Kingpin Act § 101(a)(43), 102 Stat. at 4469.

260. *Id.*

261. *See* AEDPA § 241(a)(2)(A)(i)(II) (making a single crime of "moral turpitude" a deportable offense); IIRIRA, Pub. L. No. 104-208, 110 Stat. 3009-546 (reducing to one year the sentence length required for a "crime of violence"); Immigration and Nationality Technical Corrections Act of 1994, Pub. L. No. 103-416, 108 Stat. 4305 (providing that the term "aggravated felony" includes offenses such as illicit trafficking in a controlled substance and in firearms or destructive devices, money laundering, crimes involving explosive materials, theft crimes for which the penalty is at least five years, racketeering, owning a prostitution business, and tax evasion); Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (amending and expanding the list of offenses categorized as aggravated felonies). Examples include prostitution, acts related to gambling, transportation related to prostitution, alien smuggling, some forms of document fraud, offenses committed by a previously deported alien, and offenses related to skipping bail. *See* Demleitner, *supra* note 7, at 1065–67 ("So-called 'aggravated felonies' have begun to constitute an ever larger category of deportable offenses."); Miller, *supra* note 6, at 634–35 (discussing federal statutes that "expanded the definition of aggravated felonies").

262. *See* Morawetz, *supra* note 51, at 1939 ("With regard to deportability and eligibility for relief, the most publicized aspect of the new laws is their Alice-in-Wonderland-like definition of the term 'aggravated felony.'").

263. *See id.* ("As the term [aggravated felony] is defined, a crime need not be either aggravated or a felony.").

264. *See id.* at 1940 ("The importance of the aggravated felony designation for these convictions is that a single conviction triggers deportability and bars relief from deportation.").

eviscerated almost every avenue of relief from removal based on an aggravated felony,[265] the number of permanent residents deported for minor crimes has skyrocketed.[266]

Widespread application of criminal enforcement theory to immigration law also has played a part in establishing deportation as the ubiquitous immigration penalty.[267] Grounds for deportation generally fall into two categories.[268] The first category justifies deportation on the grounds that a noncitizen should not have been admitted in the first place or violated a condition of admission to the United States.[269] The second category includes deportations based on post-entry conduct, including post-entry criminal convictions.[270]

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265. *Id.* at 1939–40.

266. *See* Legomsky, *supra* note 5, at 485 & n.77 ("Cases in which long-term, lawful permanent residents have been ordered removed on the basis of seemingly minor offenses that fit the statutory aggravated felony definition have attracted the attention of commentators and journalists alike."). In 2004, 92.5% of permanent resident removals were based on criminal charges. *See* Markowitz, *supra* note 127, at 333 n.260 (citing CONG. RESEARCH SERV. REPORT FOR CONG., IMMIGRATION ENFORCEMENT WITHIN THE UNITED STATES (Apr. 6, 2006), *available at* http://www.fas.org/sgp/crs/misc/RL33351.pdf (providing statistics based on reasons for removal)). In 1988, 5,956 aliens were removed on criminal or narcotics grounds. U.S. DEP'T OF JUSTICE, 1996 STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE 171 (1997), http://www.dhs.gov/files/statistics/publications/archive.shtm (follow "1996 Statistical Yearbook" hyperlink) (last visited Aug. 29, 2009) (on file with the Washington and Lee Law Review). The number of aliens deported on criminal grounds has risen each year—62,108 in 1998; 71,188 in 1999; 73,065 in 2000; 73,545 in 2001; 72,818 in 2002; 82,822 in 2003; 91,508 in 2004; 91,725 in 2005; 97,365 in 2006—with the most recent data for 2007 showing 99,924 deportations based on criminal grounds. U.S. DEP'T OF HOMELAND SEC., 2007 YEARBOOK OF IMMIGRATION STATISTICS 96, 99, 102 (2008), *available at* http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2007/ois_2007_yearbook.pdf.

267. *See* Legomsky, *supra* note 5, at 487 (explaining that applying criminal enforcement theory to immigration law spawned legislation mandating "deporting those who had entered in violation of the immigration laws").

268. *See id.* (detailing the two categories of deportation grounds).

269. *See* INA § 237(a)(1)(A), 8 U.S.C. § 1227(a)(1)(A) (2006) (providing that any alien present in the United States who was inadmissible at the time of entry is subject to deportation); INA § 237(a)(1)(C)(i), 8 U.S.C. § 1227(a)(1)(C)(i) ("Any alien who was admitted as a nonimmigrant and who has failed to maintain the nonimmigrant status . . . or to comply with the conditions of any such status, is deportable."); 6 CHARLES GORDON ET AL., IMMIGRATION LAW AND PROCEDURE § 71.05(1)(a) (rev. ed. 2007) (providing that "a noncitizen [is] deportable if he or she [is] convicted of a crime involving moral turpitude"); Legomsky, *supra* note 5, at 487 (discussing deportation laws that "prescribe deportation for the noncitizen who was properly admitted but who subsequently violated the conditions that were imposed on him or her at the time of admission").

270. *See* INA § 237, 8 U.S.C. § 1227 (providing that an alien who is "convicted of a crime involving moral turpitude within five years . . . after the date of admission" and "is convicted of a crime for which a sentence of one year or longer may be imposed" is deportable); INA

Since 1986, there has been a sharp increase in the level of enforcement of those post-entry deportation grounds, to the extent that they reached 50% of all deportations in the 1990s.[271] Justification for deportation based on this second category of post-entry conduct, it has been argued, resembles the traditional justifications for criminal punishment, including deterrence, incapacitation, and retribution.[272]

3. Immigration Law Enforcement

The expanded use of preventive detention and the increasing contact between immigrants and law enforcement personnel have imported elements of the criminal enforcement model into the immigration sanctions scheme.[273] Preventive detention in the immigration context now outstrips its more limited use in the criminal enforcement model, which largely limits such detention to the period before trial.[274] Since 1988, detention has been mandatory pending a

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§ 237(a)(2)(A)(iii), 8 U.S.C. § 1227(a)(2)(A)(iii) ("Any alien who is convicted of an aggravated felony at any time after admission is deportable."); INA § 237(a)(2)(B)(i), 8 U.S.C. § 1227(a)(2)(B)(i) ("Any alien who at any time after admission has been convicted of a violation of . . . any law or regulation . . . relating to a controlled substance . . . , other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable."); INA § 237(a)(2)(B)(ii), 8 U.S.C. § 1227(a)(2)(B)(ii) ("Any alien who is, or at any time after admission has been, a drug abuser or addict is deportable."); INA § 237(a)(3)(A), 8 U.S.C. § 1227(a)(3)(A) (providing that an alien who fails to comply with federal provisions regarding notification of change of address is deportable); INA § 237(a)(4)(A)(ii), 8 U.S.C. § 1227(a)(4)(A)(ii) (providing that any alien "who has engaged, is engaged, or at any time after admission engages in . . . criminal activity which endangers public safety or national security" is deportable); Legomsky, *supra* note 5, at 487–88 (discussing federal statutes that "prescribe deportation for the noncitizen who was promptly admitted but who subsequently violated the conditions that were imposed on him or her at the time of admission"); Kanstroom, *supra* note 7, at 1893–94 (discussing the "increasing convergence of deportation and crime control").

271. Legomsky, *supra* note 5, at 488–89 & nn.92–93.

272. *See id.* at 514 ("Thirty years ago I argued that the theories of deportation overlapped substantially, albeit incompletely, with the theories of punishment; it follows, I suggested, that deportation can sometimes be a form of punishment."); *cf.* Jennifer M. Chacón, *Unsecured Borders: Immigration Restrictions, Crime Control, and National Security*, 39 CONN. L. REV. 1827, 1832–56 (2007) (making the case that deportation is not retributive because the punishment does not fit the crime).

273. *See* Legomsky, *supra* note 5, at 489 ("Recent years have witnessed the accelerated incorporation [into immigration law] of several specific attributes of the U.S. criminal enforcement machinery."); Stumpf, *supra* note 5, at 391 ("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.").

274. *See* 18 U.S.C. § 3141 (2006) (providing for detention of persons pending criminal trial); Morawetz, *supra* note 51, at 1946–47 (emphasizing the severity of immigration detention

removal hearing for noncitizens convicted of an aggravated felony.[275] Each expansion of the aggravated felony grounds, therefore, has increased the incidence of detention. The grounds for mandatory detention have also proliferated to include detention of most noncitizens removable on the basis of a criminal conviction or a connection to terrorism, certain arriving passengers, and noncitizens under a removal order prior to the removal itself.[276] The Department of Homeland Security (DHS) has also claimed broad discretionary power to detain noncitizens for other reasons.[277]

Moreover, often the same actors enforce both immigration and criminal law.[278] Blessed by federal legislation,[279] state and local law enforcement now

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by noting that a person convicted of simple drug possession who was not sentenced to incarceration faces mandatory detention that can last for several years until the deportation process is complete). *But see* Rodriguez-Fernandez v. Wilkinson, 654 F.2d 1382, 1387 (10th Cir. 1981) (finding that detention pending deportation is analogous to incarceration pending trial and thus is justifiable only as a temporary measure).

275. *See* Stumpf, *supra* note 5, at 394 ("Those who have committed aggravated felonies and have served their prison terms are detained pending the conclusion of deportation proceedings." (citing Demore v. Kim, 538 U.S. 510, 523 (2003) (upholding a federal statute mandating preventive detention without bond during immigration proceedings of immigrants with criminal convictions))).

276. *See* 8 U.S.C. §§ 1225(b)(1)(B)(iii)(IV), 1225(b)(2)(A), 1226(c)(1)(A)–(D) (mandating detention for asylum seekers, noncitizens not clearly admissible, and noncitizens convicted of crimes); Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001 §§ 411–412, 8 U.S.C. §§ 1182, 1189, 1226a (mandating detention for those suspected of terrorism); *see also* Stumpf, *supra* note 5, at 393–94 (discussing the vast "government power to detain noncitizens in the immigration context").

277. After the events of September 11, 2001, the Department of Homeland Security (DHS) promulgated a regulation permitting it to detain noncitizens even before filing immigration charges for a "reasonable" period of time "in the event of an emergency or other extraordinary circumstance." 8 C.F.R. § 287.3(d) (2007); *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 Immigration and Naturalization Service twenty-four hours to decide whether to charge a detained alien). DHS has detained asylum seekers from thirty-three countries with primarily Muslim or Arab populations. *See id.* at 829 (describing the detention of asylum-seekers from designated countries where al Qaeda is present); Donald Kerwin, *Counterterrorism and Immigrant Rights Two Years Later*, 80 INTERPRETER RELEASES 1401, 1402–03 (2003) (explaining that these designated countries are countries in which al Qaeda is present).

278. Legomsky, *supra* note 5, at 496–500.

279. *See* INA § 103(a)(10), 8 U.S.C. § 1103(a)(10) (empowering state or local law enforcement with immigration enforcement authority when an "actual or imminent mass influx of aliens . . . presents urgent circumstances requiring an immediate Federal response"); INA § 287(g), 8 U.S.C. § 1357(g) (authorizing the Attorney General to deputize state officers and employees with authority equivalent to immigration officers); 8 U.S.C. § 1373(a)–(b) (preempting local laws that prohibit local law enforcement from cooperating with federal immigration authorities); AEDPA, Pub. L. No. 104-132, § 439, 110 Stat. 1214, 1276 (1996)

play a substantial role in immigration enforcement,[280] joining with the Department of Justice and the DHS to enforce criminal and civil immigration laws.[281] Federal judges now have authority to order deportation during

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(authorizing state and local law enforcement to arrest aliens who are unlawfully present in the United States because they were previously deported after being convicted of a felony in the United States); *see also* Miller, *supra* note 6, at 637–38 (explaining that prior to enactment of AEDPA and IIRIRA in 1996, local law enforcement authorities had no authority to arrest aliens for civil immigration violations); 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) (commenting on precedent allowing broad application of state power to make immigration arrests).

280. Traditionally, immigration law enforcement was a federal responsibility, a duty of the sovereign state. De Canas v. Bica, 424 U.S. 351, 354 (1976) (declaring that the power to regulate immigration belongs exclusively to the federal government); Chy Lung v. Freeman, 92 U.S. 275, 280 (1875) (finding that immigration power belongs to the federal government, not to the states); Huyen Pham, *The Constitutional Right Not to Cooperate? Local Sovereignty and the Federal Immigration Power*, 74 U. CIN. L. REV. 1373, 1381 (2006) (noting that courts largely agree that the federal government has exclusive power over immigration regulation and have located that power in the Naturalization Clause, the Foreign Affairs Clauses, and the Commerce Clause of the Constitution along with the sovereign power of the nation); Stumpf, *supra* note 196, at 1571 (indicating that concurrent state and federal immigration jurisdiction "came to an abrupt end" in 1875 when the Supreme Court held that "the federal government's power of immigration was supreme"); Michael J. Wishnie, *State and Local Police Enforcement of Immigration Laws*, 6 U. PA. J. CONST. L. 1084, 1089 (2004) (stating that "Congress's extensive regulation of immigration enforcement has preempted, directly or by implication, state and local arrest authority").

281. In 2002, the Office of Legal Counsel in the U.S. Department of Justice issued a memorandum reversing a longstanding constitutional interpretation prohibiting state and local police from enforcing civil immigration laws. Attorney Gen. Prepared Remarks on the Nat'l Sec. Entry-Exit Registration Sys. (June 6, 2002), http://www.usdoj.gov/archive/ag/speeches/2002/060502agpreparedremarks.htm (last visited Aug. 29, 2009) (on file with the Washington and Lee Law Review). In 2005, a high level official of the United States Immigration and Customs Enforcement of the DHS appeared before the House Committee on Homeland Security and asserted that state enforcement programs were critical to federal efforts to deter criminal alien activity and threats to national security. Paul M. Kilcoyne, Deputy Assistant Director of Investigative Services Division, U.S. Immigration and Customs Enforcement, U.S. Dep't of Homeland Security, 287(g) Program: Ensuring the Integrity of America's Border Security System Through Federal-State Partnerships, Statement Before the House Comm. on Homeland Sec. Comm. on Mgmt., Immigration, and Oversight (July 27, 2005), *available at* http://www.ice.gov/doclib/pi/news/testimonies/050727kilcoyne.pdf. Under DHS, the Immigration and Naturalization Service Law Enforcement Support Center (LESC), which was established in 1994 to gather information from databases and provide immigration information to local police officers, obtained access to additional databases, including the Student and Exchange Visitor Information System (SEVIS), National Security Entry-Exit Registration System (NSEERS), and US Visit. Press Release, Bureau of Immigration and Customs Enforcement, Homeland Security Supporting Local Law Enforcement Support Center (LESC) (Aug. 19, 2003), http://www.aila.org/content/default.aspx?bc=10234%7C9245 (last visited Aug. 29, 2009) (on file with the Washington and Lee Law Review); *see also* Suzanne Gamboa, *New Immigration Official Supports Local, State Police Help*, ASSOCIATED PRESS, July 23, 2003,

sentencing, though they no longer have the power to prevent deportation.[282] The embrace of criminal law norms in immigration enforcement has changed the very character of the immigration sanctions scheme. The importation of criminal enforcement norms without a corresponding infusion of criminal justice norms has created a system in which immigration violations based on criminal conduct have proliferated, but the sanction—removal—has remained fixed.

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Immigration law has evolved from a historical baseline when deportation was comparatively rare and immigration law imposed a wide variety of sanctions to the present unremitting application of deportation as the central immigration sanction. History is not destiny, and this Article does not propose a return to that earlier time. The history of immigration sanctions is useful because it illustrates that the current scheme is of relatively recent nascence and therefore ripe for critique and innovation. Currently, proportionality operates, at best, at the margins of this scheme. What shape would a properly constituted immigration sanctions scheme take? The answer depends, to a large extent, on the overarching goals of immigration law and the purpose of immigration sanctions. The next section takes up these questions.

IV. A Proposal for a Proportionate Immigration Sanctions Scheme

The project of constructing a proper sanctions scheme for immigration law is substantial.[283] The proposal offered in this Article establishes a foundation

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http://www.ap.org/ (search "New Immigration Official"; then follow hyperlink for full article) (last visited Oct. 22, 2009) (explaining that Michael Garcia, then-acting director of the Bureau of Immigration and Customs Enforcement under the DHS, supported more local law enforcement involvement in immigration investigations and arrests) (on file with the Washington and Lee Law Review).

282. *See* INA § 238(c)(1), 8 U.S.C. § 1228(c)(1) (2006) ("[A] United States district court shall have jurisdiction to enter a judicial order of removal at the time of sentencing against an alien who is deportable, if such an order has been requested by the United States Attorney . . . ."); Immigration and Nationality Technical Corrections Act of 1994, Pub. L. No. 103-416, § 224, 108 Stat. 4305, 4322–24 (1994) (authorizing federal judges to order deportation). As a result, the power of judges to employ immigration sanctions is limited to imposing more onerous sanctions, but judges are powerless to lighten the immigration sanction by prohibiting deportation. *See* Legomsky, *supra* note 5, at 498 ("[S]entencing judges have no power to prohibit deportation."); Taylor & Wright, *supra* note 9, at 1143 (noting that sentencing judges seldom exercise this authority, and advocating expansion of judicial sentencing power to determine whether to deport noncitizens).

283. I am, of course, not the first to advocate an overhaul of the deportation system. *See* Kanstroom, *supra* note 87, at 209 (proposing a "legitimacy grid" to determine deportability

on which to build. As a first step, I will seek to apply the proposed sanctions scheme to noncitizens who were in lawful status at the time they violated immigration law—namely, legal permanent residents and temporary visa holders (nonimmigrants). I confine the analysis to two illustrative immigration violations: commission of a crime and violation of a condition of entry.

A. Major Elements of an Immigration Sanctions Scheme

The INA relies heavily on the inadmissibility and deportability grounds to determine whether to remove a noncitizen from the United States.[284] In theory, grounds for inadmissibility and deportability identify undesirable characteristics or conduct of noncitizens that are significant enough to impose an immigration sanction. Examples of such grounds include commission of certain crimes,[285] immigration-related fraud and improper use of documents,[286] public health concerns,[287] and violations of the conditions of a nonimmigrant visa.[288] This Article does not critique the substance of those grounds. Instead, it evaluates whether those grounds and the sanctions associated with them incorporate proportionality and sufficiently account for other factors such as the reason for admission and the value to the United States of the noncitizen's continued presence. A properly calibrated sanctions scheme should incorporate not only undesirable characteristics and conduct but also the egregiousness of the

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using immigration status and the function of the deportability ground "embellish[ed] with other factors . . . such as length of residence, legality of status, claims of hardship, potential eligibility for permanent residence or citizenship, or family ties. On the horizontal, one might measure: retroactivity, weight of the government interest to deport for a particular reason, the reason for selective enforcement, etc.").

284. *See* INA § 212(a), 8 U.S.C. § 1182(a) (listing inadmissibility grounds); INA § 237(a), 8 U.S.C. § 1227(a) (listing deportability grounds); INA § 240a, 8 U.S.C. 1229a (describing removal proceedings and reliance on inadmissibility and deportation grounds to determine removal).

285. *See* INA § 212(a)(2), 8 U.S.C. § 1182(a)(2) (listing classes of aliens ineligible for visas or admission as a result of criminal and related grounds); INA § 237(a)(2), 8 U.S.C. § 1227(a)(2) (listing classes of aliens deportable for criminal offenses).

286. *See* INA § 212(a)(6)–(a)(9), 8 U.S.C. § 1182(a)(6)–(a)(9) (listing classes of aliens ineligible for visas or admission as a result of fraud and improper use of documents); INA § 237(a)(3), 8 U.S.C. 1227(a)(3) (listing deportation grounds based on document fraud and falsification of documents).

287. *See* INA § 212(a)(1), 8 U.S.C. § 1182(a)(1) (listing classes of aliens ineligible for visas or admission on health-related grounds).

288. *See* INA § 237(a)(1)(C)(i), 8 U.S.C. § 1127(a)(1)(C)(i) (defining as deportable any alien who has failed to maintain nonimmigration status or failed to "comply with the conditions of any such status"); INA § 237(a)(1)(C), 8 U.S.C. § 1227(a)(1)(C) (listing deportability grounds for violating nonimmigrant status).

violation, the values reflected in the admissions categories, and the ties that the noncitizen has to the United States.

First, taking into account the seriousness of the violation would bring immigration law into line with the proportionality principle that underlies criminal punishment.[289] The criminalization of immigration law has highlighted the striking disparity between the proportionality norms that animate criminal punishment and the lack of such proportionality in immigration law. In criminal law, the norm that the punishment should fit the crime flows from the Eighth Amendment's prohibition against cruel and unusual punishment.[290] This has resulted in a system reflecting a range of incarceration terms, as well as suspended sentences, parole, criminal fines, and community service requirements.[291] Importing a proportionality norm into the immigration sanctions scheme would result in a spectrum of severity, imposing lighter sanctions for lesser violations and harsher sanctions for more serious violations.

Second, constructing an immigration sanctions scheme requires examining the underlying goals of immigration law and the role of sanctions in furthering those aims. The central aims of immigration admissions are usually described as twofold: facilitating family reunification and ensuring an adequate labor supply for the U.S. economy.[292] The admissions categories of the INA embody these aims.[293] Most of the admissions categories require either a relationship with a close family member[294] or a showing that the noncitizen would contribute to the U.S. economy without undermining job opportunities for American workers.[295]

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289. *See* Roozbeh (Rudy) B. Baker, *Proportionality in the Criminal Law: The Differing American Versus Canadian Approaches to Punishment*, 39 U. MIAMI INTER-AM. L. REV. 483, 487 (2008) (describing the proportionality standard required by the Eighth Amendment).

290. U.S. CONST. amend. VIII.

291. *See* USSG § 5A (2006) (setting out graduated sentences depending on the nature of the offense and differing sets of facts).

292. *See* ALEINIKOFF ET AL., *supra* note 56, at 297 (describing these categories).

293. *See* INA § 203, 8 U.S.C. § 1153 (describing the various admissions categories within the Immigration and Nationality Act).

294. *See* INA § 201(b)(2)(A)(i), 8 U.S.C. § 1151(b)(2)(A)(i) (defining admissions category of "immediate relatives" of United States citizens); INA § 203(a), 8 U.S.C. § 1153(a) (defining admissions preferences for sons, daughters, and siblings of U.S. citizens and close relatives of lawful permanent residents); INA § 101(a)(15), 8 U.S.C. § 1101(a)(15)(K) (defining nonimmigrant admissions category for fiancés of U.S. citizens); INA § 101(a)(15)(N), 8 U.S.C.§ 1101(a)(15)(N) (defining nonimmigrant admissions category for parents, siblings, and children of "special immigrant[s]").

295. *See* INA § 203(b), 8 U.S.C. § 1153(b) (establishing admissions preferences for employment-based immigrant visas); INA § 101(a)(15), 8 U.S.C. § 1101(a)(15) (defining

The admissions categories reflect complex legislative priorities about the relative value of individual noncitizens. The family reunification categories prioritize parents, spouses, and minor children of U.S. citizens over older sons and daughters, and the spouses and minor children of permanent residents over the siblings of U.S. citizens.[296] Employment-based immigrant categories prioritize aliens who demonstrate "extraordinary ability" in the sciences, the arts, business, or athletics over noncitizens with baccalaureate degrees, and baccalaureate degree holders over skilled and unskilled workers.[297]

An immigration sanctions scheme should account for the value to the nation of the noncitizen's admission that is reflected in this multilayered prioritization of the reasons for admissions. Reasonable minds could disagree as to whether these legislative priorities are the right ones, or whether they accurately reflect the relative value of any individual noncitizen or group of noncitizens, if such a valuation is ever possible. Nonetheless, the admissions categories at least provide a readily available reference point for evaluating the potential benefit to the United States of admitting a particular class of noncitizens.

The weight that an admission category should have in assessing a sanction for an immigration violation will vary based on immigration status and the reason for admission. Whether the noncitizen is a temporary visitor or legal permanent resident, or whether admission was based on a close family connection or on winning the admissions "lottery" may affect the type of sanction or its severity.[298]

Finally, inherent in the granting of admission to noncitizens is the foreseeable likelihood that they will acquire ties to U.S. residents and communities. Admitting noncitizens, even for temporary purposes, raises the possibility that they will become embedded in families, social networks, communities, and workplaces. These post-admission ties, and the disruption

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numerous nonimmigrant categories permitting temporary entry for business and employment).

296. *Compare* INA § 201(b)(2)(A)(i), 8 U.S.C. § 1151(b)(2)(A)(i) (exempting "immediate relatives" of U.S. citizens from immigration quotas), *with* INA § 203(a), 8 U.S.C. § 1153(a) (setting quotas and preferences for unmarried sons and daughters of U.S. citizens less than twenty-one years old (first preference), spouses and children of legal permanent residents (second preference), married sons and daughters of U.S. citizens (third preference), and siblings of U.S. citizens (fourth preference)).

297. *See* INA § 203(b), 8 U.S.C. § 1153(b) (setting out preference categories that privilege noncitizens with greater talents and skills and higher levels of education over other noncitizen applicants for employment-based visas).

298. One pathway to permanent immigration status is by winning a diversity visa in the world-wide lottery for U.S. immigrant visas. *See* INA § 203(c), 8 U.S.C. § 1153(c) (defining diversity immigrants).

that removal or other sanctions could visit on the noncitizen's family, employer, or community, should inform the decision of whether to remove the noncitizen or to apply an alternative sanction that conforms more closely to the purpose of immigration law.[299] The noncitizen's citizenship status, length of stay, and events occurring after entry will heavily influence this element.

The current emphasis on deportation as the consistent response to violation of any immigration provision falls short in several respects. First, as this Article has argued, assigning deportation as the ubiquitous sanction renders it impossible to calibrate the gravity of the violation with the size of the sanction.[300] Second, the current scheme ignores the values underlying the admission of the individual noncitizen. It fails to account for the prioritization evident in the admissions scheme for evaluating the benefit of admitting and retaining the noncitizen.[301] Thus, a noncitizen admitted as a permanent resident, as an alien who has demonstrated "extraordinary ability" in science through evidence of "sustained national or international acclaim," is subject largely to the same deportability grounds as a tourist visa holder.[302] Finally, except for limited forms of relief, the emphasis on deportation inadequately accounts for post-entry acquisition of family, community, and workplace ties. A well-constructed sanctions scheme should incorporate all of these elements.

B. A Proposal: Introducing Proportionality into Immigration Law

In sum, a proportionate system of sanctions for immigration violations should consider: (1) the gravity of the violation, taking into account the nature of the violation and any consequences, (2) the benefit to the United States of imposing the proposed sanction and, conversely, any harm to the United States, the noncitizen, or others resulting from its imposition, and (3) the stake that the noncitizen has in remaining in this country.

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299. This element of a properly constructed sanctions scheme dovetails with a theory of immigration law that Hiroshi Motomura has articulated as "immigration as affiliation." HIROSHI MOTOMURA, AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES 89 (2006). The theory arises from modern immigration law's focus on ties to the United States as a factor in determining the strength of constitutional rights for noncitizens. *Id.* As ties and obligations to a new country increase, and with those a sense of belonging, government power over the noncitizen wanes and the power of individual rights expands. *Id.*

300. *See supra* Part II.A (discussing the lack of proportionality in immigration sanctions).

301. *Id.*

302. *See* INA § 203(b)(1)(A), 8 U.S.C. § 1153(b)(1)(A) (describing the first-preference employment-based permanent admissions category). The permanent resident would have greater access to relief from deportation. *See supra* notes 62–86 and accompanying text (discussing forms of relief, including those that apply to lawful permanent residents).

This multi-factor analysis results in a spectrum of sanctions. When the immigration violation is relatively minor, the reason for admitting the noncitizen is still compelling, and the noncitizen has strong ties to the country such that her stake in remaining is great, the sanction should be lighter. When the immigration violation is egregious, the rationale for admission is weak (either because of the violation or due to other circumstances) and the individual has few ties to the United States (and thus little stake in remaining) the sanction should be heavier. I analyze below how this framework plays out at two points along the spectrum of immigration violations: commission of crimes and violation of a term or condition of entry to the United States.

1. Commission of a Crime

Consider two noncitizens, both of whom have recent convictions for possession of cocaine. Both have served six month sentences, and the government now seeks to remove them on the basis of their convictions.[303] One is a lawful permanent resident[304] and the other holds a B-1 visa authorizing temporary travel for business for a period of six months to a year.[305] The permanent resident was admitted as a spouse of a U.S. citizen, and now has a U.S. citizen child. The business traveler is in the United States to make a series of presentations on new management practices at business conferences around the nation. Under current law, both are equally removable based on the deportability ground for conviction of any drug offense, as no relief from deportation is available for drug crimes regardless of the immigration status of the noncitizen.[306]

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303. *See* INA § 237(a)(2)(B), 8 U.S.C. § 1227(a)(2)(B) ("Any alien who at any time after admission has been convicted of a violation of . . . any law or regulation . . . relating to a controlled substance . . . is deportable.").

304. Lawful permanent residents are subject to the criminal deportability grounds. *See* INA § 237(a)(2), 8 U.S.C. § 1227(a)(2) (indicating that the criminal deportability grounds make most forms of relief unavailable to noncitizens); INA § 232(h), 8 U.S.C. § 1182(h) (denying waiver of certain grounds of inadmissibility to permanent residents with aggravated felony convictions); Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 304 (prohibiting cancellation of removal for permanent residents with aggravated felony convictions, as defined by INA § 101(a)(43), 8 U.S.C. § 1101(a)(43)); INA § 240B (curtailing voluntary departure for aliens with aggravated felony convictions).

305. *See* INA § 101(15)(B), 8 U.S.C. § 1101(15)(B) (pertaining to aliens who are visiting the United States for business or travel with no intention of abandoning their foreign residences); 22 C.F.R. § 41.31(b)(1) (authorizing issuance of business visa for "conventions, conferences, consultations, and other legitimate activities of a commercial or professional nature").

306. *See* INA § 237(a)(2)(B), 8 U.S.C. § 1227(a)(2)(B) (indicating that any alien convicted

Applying the sanctions analysis proposed above, the criminal penalty imposed for the drug conviction is likely a sufficient sanction for the permanent resident. The first element addresses the gravity of the violation and the proportionality of the sanction. For both noncitizens, that determination largely duplicates the function of the criminal sentence in measuring the egregiousness of the circumstances surrounding a crime and its harm to society. In theory, the criminal sentence functions to incapacitate the offender, deter others from similar conduct, and exact retribution for society.[307] Using the criminal sentence to fulfill the same goals that underlie deportation has precedent in the use of concurrent sentences in criminal law.

The second element, the benefit or cost to the United States of imposing the sanction, favors alternatives to deportation for both noncitizens, though more strongly for the permanent resident. The benefit to the United States of deporting a noncitizen for a drug offense for which a criminal sentence has already been served is arguably twofold: deterring other noncitizens from committing drug crimes and incapacitating the noncitizen from repeating the offense in the United States. Another way to articulate this benefit is expressive: Deportation expresses the United States' approbation of the violation of its norms by noncitizens. For the permanent resident, deportation signals that U.S. citizenship is available only to those who obey the rules.

How strongly these benefits weigh in favor of the sanction of deportation depends on the strength of the proposition that noncitizens admitted to the United States should be held to a higher standard than citizens. That proposition views nonimmigrants—like our business traveler—as guests who should be on their best behavior and lawful permanent residence as a probationary period.[308] Within that view, violating criminal law evidences a

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of violating a law relating to a controlled substance is deportable). The single exception under this ground does not apply. *See id.* (excepting convictions for possession of less than thirty grams of marijuana). For a cogent critique of the drug inadmissibility grounds, see Nancy Morawetz, *Rethinking Drug Inadmissibility*, 50 WM. & MARY L. REV. 163, 163 (2008) (arguing for "changes to the immigration law that would better reflect societal standards with respect to the appropriate lifetime consequences of past drug use").

307. *See* Maria Isabel Medina, *The Criminalization of Immigration Law: Employer Sanctions and Marriage Fraud*, 5 GEO. MASON L. REV. 669, 717 (1997) (describing the traditional justifications for imposing criminal penalties as retribution, deterrence, incapacitation, and rehabilitation) (citing Sentencing Reform Act of 1984, 18 U.S.C. § 3553(a)(2)(2)); Legomsky, *supra* note 5, at 474 ("[C]ompared to the civil regulatory model, the criminal justice model places greater emphasis on retribution, deterrence, and incapacitation and less emphasis on rehabilitation and redemption."); WAYNE R. LAFAVE, CRIMINAL LAW § 7.1(c) (4th ed. 2003) (discussing the various theories of punishment including incapacitation, deterrence, and retribution).

308. *See* Harisiades v. Shaughnessy, 342 U.S. 580, 586–87 (1952) ("Under our law, the alien in several respects stands on an equal footing with citizens, but in others has never been

repudiation of our society's most strongly-held values,[309] so noncitizens who commit crimes are fundamentally unfit to continue to reside among us.

While this perspective has merit, it has weakened with the expanded reach of crimmigration law. As a larger set of minor crimes and nonviolent crimes have come to constitute violations of immigration law—including misdemeanors[310]—the argument that these crimes render a permanent resident unfit to remain in our society loses traction.

These benefits, moreover, are outweighed by considerable costs to the United States. The harm to the United States in imposing deportation on this permanent resident lies in breaking up an American family.[311] The deportation sanction reverses the family reunification goal underlying many of the admissions categories, expressed here through the grant of permanent residence based on marriage to an American spouse.[312] Although one might argue that the cocaine conviction decreases the permanent resident's value to the family, that value will vary based on the individual circumstances and calls for a more nuanced inquiry than current law permits.

The harm to the United States of deporting the business traveler is less compelling. The cost to the United States is the loss to certain business conference audiences of potentially valuable management expertise, and the potential for increased economic advantage resulting from the business opportunities that the B-1 visa holder's presence in the United States can create. The circumstances of these hypothetical noncitizens, of course, illustrate only one facet of the potential harm to the United States of imposing the deportation sanction. Deportation of other permanent residents and nonimmigrant visa holders may leave employers without an employee critical to their operations, or lead to the loss of a community member who had performed valuable services for others. At bottom, there are costs to the United States in failing to retain a member of the community who, despite the crime, has contributed to society and appears likely to continue to do so.

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conceded legal parity with the citizen . . . . [T]o protract this ambiguous status . . . is not his right but is a matter of permission and tolerance."). *But see id.* at 599 (Douglas, J., dissenting) (asserting that "[a]n alien, who is assimilated in our society, is treated as a citizen so far as his property and his liberty are concerned").

309. *Id.* at 587–88.

310. *See supra* note 51–53 (providing examples of minor crimes and misdemeanors resulting in deportation of noncitizens).

311. Similarly, deporting a permanent resident admitted as an employee deprives an employer of a member of its workforce valuable enough to successfully pursue an often expensive, intensive and time-consuming admission application.

312. *See* INA § 203(a), 8 U.S.C. § 1153(a) (describing the "preference allocation for family-sponsored immigrants").

In addition to weighing the cost of imposing deportation on the United States, the noncitizen, and other United States persons, the cost to those outside the United States is a factor. Employing alternatives to removing noncitizens, particularly permanent residents, takes seriously the role that our society may have played in creating the circumstances leading to the commission of the crime.[313] If a permanent resident's criminal conduct is in any part a result of exposure to flaws in our society, removing that individual imposes on another country the risk of recidivism. Alternatives to deportation in the case of long-term permanent residents and others who were raised in this country is a way for the United States to take responsibility for a situation that arose within its borders, rather than exporting the issue to another country.

The third element concerns the noncitizen's stake in the United States. Stake is inherent in the status of permanent residency. Lawful permanent residents occupy the highest rung in the hierarchy of alienage status, and permanent resident status is a mandatory prerequisite to naturalization.[314] As potential citizens, immigration law invests permanent residents with a status that is stable enough to encourage tie-formation, as family relationships, employment, social relationships, cultural and community integration, and other innumerable forms of investment in residing in the nation.

In contrast, the business traveler holds comparatively little stake in remaining in the United States. The length of the visa term provides much less opportunity to establish significant ties in the United States. The only real stake in remaining in the country is to complete the series of presentations, a relatively slight interest.

Considering all three elements together, the imposition of the criminal sentence should normally subsume the immigration sanction within the criminal penalty, at least for permanent residents. A particularly egregious crime with circumstances suggesting seriously reprehensible conduct may require imposing the deportation sanction, especially when the permanent resident immigrated recently and has few ties in the United States.[315] A less

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313. *See* Daniel Kaustroom, *Post-Deportation Human Rights Law: Aspiration, Oxymoron, or Necessity?*, 3 STAN. J. CIV. RTS. & CIV. LIBERTIES 195, 210 (2007) (analyzing statistics showing higher crime rates among native-born citizens than foreign-born immigrants and concluding "it is not immigrants that cause violent crime, so much as living in the United States").

314. *See* INA § 316(a), 8 U.S.C. § 1427(a) (mandating that "[n]o person . . . shall be naturalized unless such applicant, . . . immediately preceding the date of filing his application for naturalization has resided continuously, after being lawfully admitted for permanent residence, within the United States for at least five years").

315. Permanent residents who immigrate based on employment under INA § 203(b) are more likely to immigrate without ties than those who immigrate as a family member under

compelling case for an alternative to deportation can be made for the business traveler than for the permanent resident because all three elements are weaker for the business visa holder. For both, however, the deterrent, incapacitating, and retributive effect of deportation is largely accomplished through the criminal sentence, and deportation would undo the benefits that underlay the initial admissions decision.[316]

In some circumstances, complete reliance on the criminal sanction will not adequately address the particular concerns that a criminal conviction committed by a noncitizen raises. Two rationales may underlie the current practice of imposing deportation on top of the criminal sentence: (1) expressing societal disapproval of criminal conduct by noncitizens and (2) addressing a concern that the noncitizen's conduct renders questionable her fitness to join the U.S. citizenry (for the permanent resident) or remain within U.S. society (for the business traveler).[317] Sanctions proportionate to the immigration violation and which addresses these rationales, without rising to the level of deportation, are within reach. These include restricting or delaying access to immigration benefits, imposing probation-like conditions or requiring community service, higher application fees for immigration benefits, or attending remedial courses on citizenship preparedness. For example, extending the time before which a permanent resident could apply for citizenship would address the concern that the permanent resident's conduct reflects poorly on her fitness to join the citizenry and would balance that concern with the harm that deportation would impose on the permanent resident and others.[318] Implementing probation in the context of immigration enforcement would involve retaining the noncitizen in

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§ 203(a). 8 U.S.C. § 1153(b), § 1153(a). Nevertheless, employment itself can constitute a strong attachment and cannot be discounted.

316. *See* Stumpf, *supra* note 5, at 402 ("[T]he 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.").

317. Another rationale may be to incapacitate the noncitizen from committing similar crimes within the United States. As suggested above, the criminal justice system addresses the desire to incapacitate.

318. To some extent, the current system already imposes this sanction. Conviction of certain crimes renders a permanent resident unable to establish the "good moral character" required to naturalize. Aggravated felony convictions amount to a permanent bar on naturalization. *See* INA § 316(a), 8 U.S.C. § 1427(a) (defining good moral character); INA § 101(f)(8), 8 U.S.C. § 1101(f)(8) (establishing the aggravated felony bar). Crimes involving moral turpitude, on the other hand, bar a finding of good moral character until five years after the offense was committed. *See* INA §§ 1427(a), 1101(f)(3) (establishing the five-year bar). However, since the penalty for conviction of either category of crime is removal, this delay before eligibility for naturalization cannot be treated as a form of graduated immigration sanction.

the community under conditions set by the court or agency including supervision. Violation of those conditions may lead to deportation.

2. *Violation of Conditions of Entry*

In contrast to crimes, a noncitizen who violates a condition of entry (other than through criminal conduct) has transgressed pure immigration law. In this arena, there is generally no external remedial framework like criminal sentencing that takes the first crack at a sanction. Instead, the primary approach to violations of the terms and conditions of a visa is the all-or-nothing application of the deportation sanction.[319] Two examples provide fodder for the proposed analysis: first a student who works more than the hours that her visa permits,[320] and second, an employee in the United States on a temporary basis whose spouse works without employment authorization.[321]

The first element of the proposed sanctions scheme, the gravity of the violation, does not weigh in favor of a heavy sanction for either the student or the spouse. The nature of this sort of violation does not, on its face, seem so grave as to render the noncitizen unfit to remain in the United States. It is difficult to conclude that the student who works more than her allotted hours is morally reprehensible. The same is true of the working spouse of an employee on a temporary visa.

The second element provides more traction for an argument in favor of deportation. The government permitted the noncitizen to enter the United States temporarily with the understanding that she would comply with established rules.[322] The benefit to the United States of deportation is that it imposes retribution: When a visitor breaks those rules, it seems justifiable for the government to revoke permission to remain.[323] Deportation also incapacitates the noncitizen from taking jobs or work hours that authorized U.S.

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319. *See* INA § 237(a)(1)(C), 8 U.S.C. § 1227(a)(1)(C) (establishing as grounds for removal the failure to comply with any condition of nonimmigrant status).

320. *See* INA § 101(a)(15)(F)(i), 8 U.S.C. § 1101(a)(15)(F)(i) (providing that a student who works more hours than her visa allows is subject to deportation).

321. *See* INA § 237(a)(1)(C), 8 U.S.C. § 1127(a)(1)(C) (establishing as grounds for removal the failure to comply with any condition of nonimmigrant status). For example, spouses of highly skilled employees bearing H-1B visas generally do not have authorization to work. 8 C.F.R. § 214.2(h)(9)(iv).

322. *See* INA § 237(a)(1)(C), 8 U.S.C. § 1227(a)(1)(C) (establishing as grounds for removal the failure to comply with any condition of nonimmigrant status).

323. *But see* Chacón, *supra* note 272, at 1832–56 (arguing that deportation is not retributive).

employees could fill. There may also be a deterrent effect on other noncitizens considering unauthorized employment or fraudulently seeking to obtain nonimmigrant visas in order to work without authorization.[324] If such violations are difficult to enforce, perhaps a strict sanction such as deportation is necessary to provide deterrence.

That risk, however, is to be weighed against the benefits of withholding deportation, along with the retributive and deterrent potential of other sanctions. When removing the noncitizen would undermine the purpose for granting entry or impose other costs on the United States, the noncitizen, or others, these costs often will outweigh the retributive benefit of deportation. Deporting the spouse of an employee on a temporary visa will, at a minimum, impact the quality of the employee's work. It may lead the employee to depart with her spouse, leaving the U.S. employer without a valuable employee. Deporting the student deprives both student and school of the student's participation in the intellectual life of the institution.[325]

The element of stake in the United States is less compelling for a noncitizen in a temporary immigration status than for the permanent resident. Still, temporary residents often have strong interests in remaining in the United States. These might include the opportunity to complete a degree or the interest in staying with a spouse on a work visa.[326] Stake in the United States is still more compelling for those temporary visa holders, such as H-1B workers, who have a pathway to permanent residence.[327]

When, as in these examples, the violation is minor, the costs of deporting a noncitizen outweigh the benefits (especially by thwarting the reason for admission), and the noncitizen continues to have a stake in remaining, alternatives to deportation are appropriate. Imposing fines or a probationary

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324. *See, e.g.*, Jessica M. Vaughn, *Verification of Employment Authorization: Federal Basic Pilot Program is an Effective and Employer-Friendly Tool for Immigration Law Compliance*, Feb. 21, 2006, http://www.cis.org/articles/2006/jmvtestimony022106.html (last visited Sept. 29, 2009) (providing information from a study suggesting that a federal program known as "Basic Pilot" would deter illegal aliens from seeking jobs at participating employers) (on file with the Washington and Lee Law Review).

325. Not to mention the lost tuition.

326. *See* INA § 203(a), 8 U.S.C. § 1153(a) (describing the "preference allocation for family-sponsored immigrants").

327. Several temporary employment-based visas open the way to permanent resident status. *See* INA § 101(a)(15)(H)(i)(b), 8 U.S.C. § 1101(a)(15)(H)(i)(b) (establishing the H-1B visa which allows temporary employment visas for aliens in a specialty occupation); INA § 101(a)(15)(E)(i)–(ii), 8 U.S.C. § 1101(a)(15)(E)(i)–(ii) (establishing the E visa which allows temporary employment visas for aliens to enter the United States under a trade treaty); INA § 101(a)(15)(L), 8 U.S.C. § 1101(a)(15)(L) (establishing the L visa which allows temporary employment for an alien as a manager or executive).

delay before acquiring a more permanent status would satisfy retributive concerns and have a deterrent effect,[328] as would incarceration in cases where the violation is egregious but the costs of deportation outweigh its benefits. Establishing a probationary delay is not without precedent, and could follow the lines of the already-existing stay of removal[329] or deferred action on enforcement of removal.[330] A final option is a determination of deportability with a stay of removal.[331] This option is parallel to the suspended sentence in criminal sentencing,[332] but with an added level of deterrence due to the noncitizen's interest in remaining in the country.

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The remedial scheme proposed in this Article ideally would encourage development and application of sanctions beyond the binary decision of whether to impose deportation. The proposal is not without its faults. Restricting the applicability of deportation may risk undermining deterrence of some immigration violations. The ingredients of the proposed analysis call for an individualized response to the violation. That has the potential to undermine uniformity of decisionmaking about immigration violations and the ability of the government to provide notice to noncitizens about what conduct is expected of them. Nevertheless, the sanctions scheme this Article proposes would allow immigration remedies to hew more closely to the purposes for admitting noncitizens to the United States, whether temporarily or permanently.

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328. *See* Secure America and Orderly Immigration Act, S. 1033, 109th Cong. § 304 (2005) (proposing, *inter alia*, imposition of a fine for undocumented immigrants to obtain lawful status).

329. *See* 8 U.S.C § 1252(b)(3)(B) (permitting a stay of removal during deportation proceedings).

330. *See* David A. Martin, *On Counterintuitive Consequences and Choosing the Right Control Group: A Defense of* Reno v. AADC, 14 GEO. IMMIGR. L.J. 363, 368 (2000) (listing administrative measures to delay removal).

331. *See* 8 U.S.C. § 1252(b)(3)(B) (permitting a stay of removal during deportation proceedings).

332. *See* 24 C.J.S. *Criminal Law* § 2147 (2009) ("Generally, courts have the ability to suspend sentences, or to stay criminal proceedings when such a stay will accommodate the ends of justice. In addition, the jurisdiction to grant probation and deal with probation matters lies specifically with the trial court.").

V. Conclusion

Deportation is a relative newcomer to the immigration sanctions structure.[333] It has become, however, a ubiquitous presence in immigration enforcement.[334] The pressure on legislators to impose more numerous and harsher sanctions has increased.[335] The criminalization of immigration law has fostered a public perception connecting immigrants with criminal conduct.[336] These pressures make it difficult, if not impossible, to legislate thoughtfully a proportionate immigration sanctions scheme when there is a risk that the public would perceive such innovation as a failure of immigration enforcement. Nonetheless, the impracticality and inequity of the current singular reliance on deportation calls out for reform.

In outlining the skein of a remedial scheme for immigration, the underlying purposes of our immigration laws have come to the fore as a significant factor in shaping consequences for violations of those laws. However, the Article leaves unanswered important questions about how to put meat on the bones of the proposed scheme. More work is necessary to delineate which alternative sanctions should apply and under what circumstances. I also leave unaddressed who would be responsible for undertaking such a project. These are topics that I plan to explore in subsequent writings, building on the foundation laid here. At bottom, however, the proposal seeks to advance the national conversation about immigration by drawing attention to the role of sanctions in establishing a more just and more effective legal framework for immigration law.

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333. *See supra* Part III.C (describing the history of deportation in the United States).

334. *See* Stumpf, *supra* note 5, at 383 (describing Congress's expansion of crimes leading to deportation).

335. *See, e.g.*, Emily Bazar, *Strict Immigration Law Rattles Oklahoma Businesses*, USATODAY.COM, Jan. 10, 2008, http://www.usatoday.com/news/nation/2008-01-09-immig cover_N.htm (last visited Sept. 29, 2009) (noting that state legislatures "have adopted measures aimed at curbing illegal immigration," partly in response to pressure from their constituencies) (on file with the Washington and Lee Law Review).

336. *See* Miller, *supra* note 6, 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).

NOTES