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Abstract

Starting approximately twenty years ago, and accelerating today, a clear trend has come to define modern immigration law. Sometimes dubbed "criminalization," the trend has been to import criminal justice norms into a domain built upon a theory of civil regulation. An embryonic literature chronicles this process well but fails to showcase its consciously asymmetric form. This Article argues that immigration law has been absorbing the theories, methods, perceptions, and priorities associated with criminal enforcement while explicitly rejecting the procedural ingredients of criminal adjudication.

The normative thesis is that this asymmetry has skewed both discourse and outcomes by excluding the careful consideration of the many, often competing goals of a national immigration policy. At the macro level, asymmetric incorporation has deterred policymakers from balancing law enforcement against the equally vital mission of facilitating lawful immigration. At the micro level, it has produced a deportation regime so substantively harsh and inflexible that too often the penalties are cruelly disproportionate to the transgressions. Procedurally, the preoccupation with enforcement has left noncitizens in deportation proceedings exposed to large risks of error when the personal stakes are high. In short, asymmetric

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incorporation has virtually invited policymakers to abandon any sense of proportion. To permit the fullest and most productive use of our national immigration resources, this Article urges return to an immigration regime that accepts the civil regulatory model as its foundation.

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I. Introduction

There is an embryonic literature on the growing convergence of two critical regulatory regimes—criminal justice and immigration control.[1] As discussed below,[2] the two systems intersect at multiple points: Violations of the immigration laws trigger broader, harsher, and more frequent criminal consequences. Indeed, it is no longer rare for refugees seeking asylum to be criminally prosecuted for illegal entry. Conversely, Congress has steadily expanded the list of non-immigration-related crimes that trigger deportation and other adverse immigration consequences, and the sheer numbers of deportations on crime-related grounds have skyrocketed. The underlying theories of deportation increasingly resemble those of criminal punishment. Preventive detention and plea bargaining, longstanding staples of the criminal justice system, have infiltrated the deportation process. Some of the same government actors, including federal sentencing judges and state and local police, are now frequently called upon to perform both criminal and immigration functions simultaneously. Public perceptions of criminals and

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1. *See, e.g.*, Nora V. Demleitner, *Immigration Threats and Rewards: Effective Law Enforcement Tools in the "War" on Terrorism*, 51 EMORY L.J. 1059, 1059 (2002) (describing the use of immigration law as a law enforcement tool in the "war" on terrorism); 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) [hereinafter Kanstroom, *Criminalizing the Undocumented*] (concluding that the convergence of the criminal justice system and the immigration control system produces the worst features of both models); Daniel Kanstroom, *Deportation, Social Control, and Punishment: Some Thoughts about Why Hard Cases Make Bad Laws*, 113 HARV. L. REV. 1889, 1893–94 (2000) [hereinafter Kanstroom, *Deportation, Social Control, and Punishment*] (arguing that deportation of legal permanent residents should be seen as punishment, and, therefore, substantive constitutional protections should apply to deportation proceedings); Stephen H. Legomsky, *The Alien Criminal Defendant*, 15 SAN DIEGO L. REV. 105, 137 (1977) (cautioning against deportation on criminal grounds except when the noncitizen's presence after release would pose an unusually serious danger to the general public); Maria Isabel Medina, *The Criminalization of Immigration Law: Employer Sanctions and Marriage Fraud*, 5 GEO. MASON L. REV. 669, 673 (1997) (focusing on employer sanctions and marriage fraud and concluding that criminal sanctions are an inappropriate deterrent); Teresa A. Miller, *Blurring the Boundaries Between Immigration and Crime Control After September 11*, 25 B.C. THIRD WORLD L.J. 81, 85 (2005) [hereinafter Miller, *Blurring the Boundaries*] (highlighting the social control dimensions of criminalization of immigration law); Teresa A. Miller, *Citizenship and Severity: Recent Immigration Reforms and the New Penology*, 17 GEO. IMMIGR. L.J. 611, 660 (2003) [hereinafter Miller, *Citizenship and Severity*] (seeking to explain why criminal law and immigration law are converging and why now); Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367 (2006) (exposing a common link, rooted in membership theory, that has increasingly come to unite these two once discrete fields of law).

2. *See infra* Part II (discussing the increased use of criminal enforcement strategies entering immigration law and policy through five possible gates).

foreigners have become ever more intertwined. Apprehension and removal of those who violate the immigration laws command increasing priority over programs for the lawful admission of immigrants. And the transfer of immigration functions from the Department of Justice to the Department of Homeland Security has changed the politics of immigration in ways that reward officials for prioritizing criminal and other enforcement goals.

The trend to import the criminal justice model into the domain of immigration law is unmistakable; it has begun to displace what I shall call the civil regulatory model of immigration law. At first blush, one might expect these trends to be a boon to immigrants, particularly those placed in deportation (now called "removal")[3] proceedings. After all, the criminal justice system operates under stringent constitutional and sub-constitutional constraints familiar to all who have taken courses in criminal procedure.

For more than a century, however, the courts have uniformly insisted that deportation is not punishment and that, therefore, the criminal procedural safeguards do not apply in deportation proceedings.[4] Those and similar principles remain untouched by the gradual importation of criminal justice norms into immigration law. As a result, the criminal justice model has had no discernible benefits for immigrants. It has, however, had some harmful effects, not just on immigrants but on native-born Americans as well.

The new literature on convergence chronicles well some of the ways in which the criminal justice model has taken hold in immigration law. But it falls short, I would argue, in failing to showcase the *selective, asymmetric* nature of this importation process. A pattern has emerged: Those features of the criminal justice model that can roughly be classified as enforcement have indeed been imported. Those that relate to adjudication—in particular, the bundle of procedural rights recognized in criminal cases—have been consciously rejected. Rather than speak of importation of the criminal *justice* model, then, a more fitting observation would be that immigration law has been absorbing the theories, methods, perceptions, and priorities of the criminal *enforcement* model while rejecting the criminal *adjudication* model in favor of a civil regulatory regime.

To the immigrant, of course, this state of affairs is the worst of both worlds. Is it more broadly desirable nonetheless? This Article argues that it is

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3. *See* 8 U.S.C. §§ 1226, 1229 (2000) (using the term "removal" to include the deportation of noncitizens from the interior). Despite the current statutory terminology, this Article will use the word "deportation" as a shorthand to refer to the removal of non-United States citizens from the interior.

4. *See infra* Part IV.A (discussing the broad range of legal consequences flowing from the characterization of deportation as civil rather than punitive).

not. From a procedural standpoint, this asymmetry leaves policymakers with little political appetite for allowing adjudicative fairness and accuracy to temper cost and efficiency concerns. From a substantive standpoint, it leaves them little incentive to balance the government interests in deterring and incapacitating immigration offenders against either the interests of the immigrants themselves or the interests of the U.S. citizen family members, friends, employers, and communities who are left behind. In short, the present state of affairs virtually invites policymakers to abandon any sense of proportion.

This Article asserts two propositions, one descriptive and the other normative. The descriptive thesis is that the importation of the criminal justice model into immigration law has indeed been asymmetric. Immigration law has borrowed the enforcement components of criminal justice without the corresponding adjudication components.

As for the normative thesis, I begin by acknowledging that there is nothing inherently unjust or even unwise about importing only selected components of another system. It is all right to take the wheat and leave the chaff. Nor is asymmetry inherently evil. In this instance, however, the two components of the criminal justice system cannot easily be divorced. The very reason for building such stringent procedural safeguards into the criminal justice system is that the consequences of criminal convictions are potentially so severe.[5] Because the same statement can be made about deportation, especially when the individual is a lawful permanent resident of the United States, severing the enforcement norms from the corresponding adjudication norms is problematic. At the micro level, the problems are ones of both fair procedure and substantive proportion. At the macro level, their preoccupation with enforcement has dampened policymakers' incentives to weigh the full set of often competing objectives that should drive a national immigration policy—most importantly, balancing the goal of deterring illegal immigration against the goal of facilitating lawful immigration.

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5. See the elegant concurring opinion of Justice Harlan in *In Re Winship*, 397 U.S. 358, 370–72 (1970) (discussing the reasons for different standards of proof in civil and criminal litigation). For example,

> [T]he reason for different standards of proof in civil as opposed to criminal litigation [is] apparent. In a civil suit between two private parties for money damages, for example, we view it as no more serious in general for there to be an erroneous verdict in the defendant's favor than for there to be an erroneous verdict in the plaintiff's favor. . . . In a criminal case, on the other hand, we do not view the social disutility of convicting an innocent man as equivalent to the disutility of acquitting someone who is guilty.

Id. (Harlan, J., concurring).

If the terms "criminal justice model" and "civil regulatory model" are to be used to help describe these trends, precise definitions become crucial. For purposes of this Article, I shall define those terms by reference to the properties I generally associate with each. The membrane that separates the two models is not airtight, and their defining characteristics admittedly differ only in degree. But those differences are substantial, for they reflect two distinct ways of looking at the world.

Some of the distinguishing elements of the two models relate specifically to enforcement. First and most generally, the criminal justice model, as I am using the term, tends to focus principally on the bad guys. It seeks to influence and constrain human behavior by targeting would-be and actual wrongdoers. The civil regulatory model does this as well, but it assigns at least equal priority to facilitating lawful and productive conduct. Second, compared to the civil regulatory model, the criminal justice model places greater emphasis on retribution, deterrence, and incapacitation and less emphasis on rehabilitation and redemption. The third distinguishing property relates to the forms and severity of the penalties. The criminal justice system is more likely than the civil regulatory model to mete out severe penalties generally, to rely on incarceration in particular, and to prescribe lengthier durations of confinement—as distinguished from the monetary fines and other economic sanctions that more commonly characterize civil penalties. Fourth, the criminal justice model is more likely to prioritize apprehension, arrest, and preventive detention as part of the process; the civil regulatory model, as I define it for present purposes, is less inclined to compromise personal liberty.

Other distinguishing properties relate to adjudication. First, the two models allocate the risk of error in different ways. Better to acquit ten guilty persons, the criminal justice model might say, than to convict one innocent person.[6] Both are social harms, but in the criminal justice model the latter is worse. In contrast, the civil regulatory model is either agnostic on that question or at least willing to accept a higher risk of an erroneous penalty as a tradeoff for lessening the risk of a wrongdoer escaping responsibility. These differences show up most clearly in the rules that govern standard of proof.[7] Second, the

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6. That judgment is often traced to Blackstone, who said "[B]etter that ten guilty persons escape than that one innocent suffer." WILLIAM BLACKSTONE, 4 COMMENTARIES *358. The same sentiment has its roots in much older sources, including the Book of Genesis, though there is a disagreement over the acceptable ratio. Peter A. Joy, *The Relationship Between Prosecutorial Misconduct and Wrongful Convictions: Shaping Remedies for a Broken System*, 2006 WIS. L. REV. 399, 404–05; Alexander Volokh, n *Guilty Men*, 146 U. PA. L. REV. 173, 177–78 (1997).

7. *See supra* note 5 (explaining precisely how the setting of the standard of proof influences the relative distribution of opposing errors and why, therefore, the selection of the

criminal justice model generally invests greater government resources than does the civil regulatory model to minimize the risk of erroneous penalties; grand juries, full judicial trials, and government-provided counsel serve as just a few examples.

Part II gathers the evidence of the claimed importation of the criminal enforcement model into immigration law. Synthesizing seemingly disparate recent developments, it elaborates on five general ports through which criminal enforcement norms have entered the realm. Part III explores the association of immigrants and criminals in the public mind, contrasts those perceptions with the empirical realities, and speculates as to what is driving the perceptions and how they might be influencing immigration policymakers. Part IV considers the flip side. It describes the conscious refusal of Congress and the courts to import the corresponding criminal adjudication model. Together, those three sections establish the asymmetric nature of this incorporation process. Part V sketches the normative implications. It identifies the harms that flow from asymmetric incorporation and advocates a return to an immigration regime that accepts the civil regulatory model as its foundation.

II. Importing the Criminal Enforcement Model: Five Ports of Entry

A series of seemingly unrelated recent developments can now be seen to form a clear, emerging trend in U.S. immigration law—heightened use of criminal enforcement strategies, both in setting immigration priorities and in executing them. Perhaps this trend simply mirrors a more general pattern of using criminal law to regulate an ever widening range of human behavior, a strategy that Jonathan Simon once called "governing through crime."[8] Since September 11, 2001, much of that activity has occurred in the counter-terrorism sphere, prompting one commentator to coin the phrase "governing through terror."[9] I would suggest that the criminal enforcement model has entered United States immigration law through at least five gates.

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standard of proof should reflect the magnitude of the consequences of error). Justice Harlan's logic could as easily be applied to other procedural safeguards.

8. Jonathan Simon, *Governing Through Crime, in* THE CRIME CONUNDRUM: ESSAYS ON CRIMINAL JUSTICE 171, 174 (Lawrence M. Friedman & George Fisher eds., 1997).

9. Miller, *Blurring the Boundaries*, *supra* note 1, at 113–18.

A. Attaching Criminal Consequences to Immigration Violations

Violations of the immigration laws, naturally enough, have consequences. One of those consequences is removal from the United States, either from ports of entry in the case of noncitizens who seek admission[10] or from the interior in the case of those who have already entered.[11] In the past, as discussed below, those civil "removal" proceedings were the principal mechanism for enforcing the immigration laws.

But many of the same violations also constitute criminal offenses. The clearest component of the new convergence has been the increased range, severity, and frequency of those criminal prosecutions. Some have called this trend the "criminalization" of immigration law.[12] As Teresa Miller has observed, criminalization encompasses creating new immigration-related crimes, increasing the minimum and maximum sentences for existing immigration crimes, and bringing greater numbers of prosecutions.[13] Unlike some of the newer trends highlighted in this subpart, this strand of criminalization has been in vogue for approximately twenty years, starting with the Immigration Reform and Control Act of 1986 [IRCA].[14]

Among other things, IRCA prohibited employers from knowingly hiring, or continuing to employ, noncitizens who are not authorized to work.[15] In addition to imposing civil fines on violators, Congress made it a criminal offense to engage in a "pattern or practice" of such violations.[16] IRCA also

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10. *See* 8 U.S.C. § 1182(a) (2000) (setting forth the categories of noncitizens ineligible for admission).

11. *See id.* § 1227(a) (setting forth the classes of deportable noncitizens).

12. *See, e.g.*, Kanstroom, *Criminalizing the Undocumented*, *supra* note 1, at 640 (noting that a trend toward increased convergence of the criminal justice and immigration control systems has been apparent since the 1980s); Medina, *supra* note 1, at 671 ("Increasingly the United States has looked to the criminal law to address the problem of undocumented immigration."); Miller, *Citizenship and Severity*, *supra* note 1, at 617 (defining the term "criminalization of immigration law" as a general way of describing the closer relationship that has developed between the criminal justice and immigration systems); Helen Morris, *Zero Tolerance: The Increasing Criminalization of Immigration Law*, 74 INTERPRETER RELEASES 1317, 1317 (Aug. 29, 1997) ("One of the most striking aspects of immigration law in the past decade is its increased criminalization."). Juliet Stumpf has coined the term "crimmigration" to describe this and some related phenomena. Stumpf, *supra* note 1, at 368.

13. Miller, *Citizenship and Severity*, *supra* note 1, at 639–42.

14. Immigration Reform and Control Act (IRCA) of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (codified as amended in scattered sections of 8 U.S.C.).

15. *See* 8 U.S.C. § 1342a(a)(1)–(2) (2000) (prohibiting employers from knowingly hiring or continuing to employ unauthorized workers).

16. *See* IRCA § 101(a), 8 U.S.C. § 1324a(f)(1) (2000) (imposing a fine and/or imprisonment for violations of the section). *See* Medina, *supra* note 1, at 671–73 (observing

criminalized using false documents for the purpose of evading the employer sanctions laws.[17] Just months later, Congress followed with the Immigration Marriage Fraud Amendments [IMFA]; one of their provisions made it a crime to marry for the purpose of evading the immigration laws.[18]

Since 1986, Congress has liberally expanded the list of immigration offenses. The Immigration Act of 1990 created the crime of entrepreneurship fraud; it covers those who establish commercial enterprises for the purpose of evading the immigration laws.[19] The Violent Crime Control and Law Enforcement Act of 1994[20] made it a criminal offense for a noncitizen to attempt an unlawful reentry into the United States after having been convicted of three misdemeanors involving either drugs or crimes against the person.[21] The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 [IIRIRA][22] created several new federal immigration crimes, including driving above the speed limit while fleeing an immigration checkpoint,[23] knowingly failing to disclose one's role in helping to prepare a false immigration application,[24] filing an immigration application that contains no "reasonable basis in law or fact,"[25] knowingly making a false claim of U.S. citizenship for any of several designated purposes,[26] and failing to cooperate in the execution of one's removal order.[27] A controversial bill passed in 2005 by the House of

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that both the employer sanctions laws and the marriage fraud laws reach both United States citizen and noncitizen offenders).

17. *See* IRCA § 103(a), 18 U.S.C. § 1546(b) (2000) (imposing a fine and/or imprisonment for using a fraudulent document to evade employer sanction laws).

18. *See* Immigration Marriage Fraud Amendments of 1986 § 2(d), 8 U.S.C. § 1325(c) (2000) (criminalizing marriage fraud). These 1986 offenses are the subject of Medina, *supra* note 1.

19. *See* Immigration Act of 1990 § 121(b)(3), 8 U.S.C. § 1325(d) (2000) (imposing criminal penalties on those who establish commercial enterprises for the purpose of evading immigration laws).

20. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (codified as amended in scattered sections of 8, 18, 28, 42 U.S.C.).

21. *Id.* § 130001(b), 8 U.S.C. § 1326(b)(1) (2000).

22. Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996, Pub. L. No. 104-208, 110 Stat. 3009, Div. C (codified as amended in scattered sections of 8, 18 U.S.C.).

23. *Id.* § 108, 18 U.S.C. § 758 (2000).

24. *Id.* § 213, 8 U.S.C. § 1324c(e) (2000).

25. *Id.* § 214, 18 U.S.C. § 1546(a) (2000).

26. *Id.* § 215, 18 U.S.C. § 1015(e)–(f) (2000).

27. IIRIRA § 307, 8 U.S.C. § 1253 (2000).

Representatives would have created several additional new immigration crimes.[28]

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. Examples abound. In 1988, Congress increased the criminal sentences for the offenses of unlawful reentry after deportation, if deportation resulted from a felony (more if the underlying crime was an "aggravated felony")[29] and for aiding certain classes of inadmissible noncitizens to enter unlawfully.[30] The Immigration Act of 1990 prescribed higher sentences for such crimes as overstaying one's crew member permit, concealing unlawfully present noncitizens, unlawful entry, and aiding the unlawful entry of noncitizens who are inadmissible on national security grounds.[31] The Violent Crime Control and Law Enforcement Act of 1994 again raised the prison sentences for unlawful reentry after deportations that followed criminal convictions, for immigration-related employment fraud, for various forms of passport or visa fraud, and for assisting noncitizens to enter unlawfully.[32] In 1996, IIRIRA yet again increased the sentences for assisting noncitizens to enter unlawfully, both by lengthening the prison terms directly and by making the offense a possible RICO violation.[33] The immigration reform bill that passed the House of

28. *See* Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005, H.R. 4437, 109th Cong. (1st Sess. 2005); *see, e.g.*, IIRIRA § 201(a)(1) (knowingly hiring ten or more unauthorized workers in a year); *id.* § 202(a) (expanding the range of activities that would constitute illegal assistance to undocumented immigrants); *id.* § 203(2) (being unlawfully present in the United States); *id.* § 203(3) (knowingly misrepresenting the existence or circumstances of a marriage); *id.* § 213 (engaging in a wide range of passport and visa fraud crimes). The subsequently enacted Senate bill, the Comprehensive Immigration Reform Act of 2006, S. 2611, 100th Cong. (2d Sess. 2006), differed so markedly from the House bill that the legislation ultimately failed.

29. Anti-Drug Abuse Act of 1988 § 7345, 8 U.S.C. § 1326 (2000).

30. *Id.* § 7346, 8 U.S.C. § 1327 (2000).

31. *See* Immigration Act of 1990, § 543(b), 8 U.S.C. §§ 1282, 1325–28 (increasing criminal fines for certain immigration related crimes).

32. *See* Violent Crime Control and Law Enforcement Act of 1994 § 60024, 8 U.S.C. § 1324 (2000) (enhancing penalties for smuggling noncitizens); *id.* § 130001(b), 8 U.S.C. § 1326(b)(1) (2000) (establishing criminal penalties for noncitizens who attempt to reenter the United States unlawfully after having been convicted of three misdemeanors involving either drugs or crimes against the person); *id.* 30009, 18 U.S.C. §§ 1541–47 (2000) (increasing penalties for passport and visa fraud).

33. *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009, Div. C, §§ 202, 203 (Sept. 30, 1996).

Representatives in 2005 similarly would have increased the criminal sentences for a range of immigration crimes.[34]

Apart from the creation of new immigration crimes and the statutory increases in the permissible sentences, the sheer numbers tell a similar story. Federal criminal prosecutions of immigration violators began to escalate sharply in the 1980s. For immigration felonies and class A misdemeanors (which generally do not include simple entry without inspection), Justice Department statistics show almost a tripling of prosecutions from 1984 to 1994.[35] Following Congress's enactment of IIRIRA in 1996, another jump occurred. From fiscal year 1997 to fiscal year 1998, prosecutions for all immigration offenses leaped from 17,807 to 22,857 before leveling off through 2003.[36] In fiscal year 2004, DHS referrals of immigration cases for criminal cases suddenly rose by 65% from the prior year; prosecutions of these crimes rose by 82% and actual convictions by 70%.[37] Immigration cases are now the

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34. *See* H.R. 4437, 109th Cong., 1st Sess., §§ 202(a) (2005) (assisting noncitizens who are unlawfully present); *id.* § 203(3) (criminalizing immigration marriage fraud); *id.* § 203(4) (criminalizing immigration entrepreneurship fraud); *id.* § 204 (criminalizing certain forms of illegal entry); *id.* § 205 (criminalizing assisting illegal entry); *id.* § 603 (criminalizing failing to cooperate with arrangements for one's own removal); *id.* § 618 (criminalizing document fraud and, for persons unlawfully present, drug trafficking and crimes of violence); *id.* § 706(4) (dramatically increasing both the fines and the prison sentences for a pattern and practice of hiring unauthorized workers).

35. *See* Morris, *supra* note 12, at 1318 (showing an increase of immigration felonies and Class A misdemeanors prosecuted in federal court from 1,186 in 1984 to 3,377 in 1994); *see also* Kanstroom, *Criminalizing the Undocumented*, *supra* note 1, at 655 (stating that "[t]he total number of prosecutions for immigration offenses has risen dramatically in the past decade from 14,845 in 1994 to 23,852 in 2002.").

36. U.S. DEPARTMENT OF HOMELAND SECURITY: OFFICE OF IMMIGRATION STATISTICS, 2003 YEARBOOK OF IMMIGRATION STATISTICS 180 tbl.49 (2004). For actual convictions, the corresponding figures were 15,219 and 20,768. *Id.* at 181 tbl.50. In 2003, approximately two-thirds of the immigration convictions were for simple entry without inspection (14,199), followed by unlawful reentry of those who had previously been deported (4938), and then by assisting others to enter unlawfully (1612). *Id.*

37. Department of Homeland Security: Transactional Records Access Clearinghouse, *Immigration Enforcement: New Findings*, fig. 1, http://trac.syr.edu/tracins/latest/current (2005) [hereinafter *Immigration Enforcement*] (last visited Nov. 16, 2006) (on file with the Washington and Lee Law Review). Oddly, the vast bulk of that year's increase was attributable to one judicial district—the Southern District of Texas. *Id.* at fig. 4. The authors of the report speculate that either the priorities of the particular U.S. Attorney or the available staffing levels explain the disproportionate share of the increase traceable to one district. *Id.* Interestingly also, the median sentence imposed for immigration crimes plummeted that year, from fifteen months to one month, presumably because the additional immigration cases consisted almost entirely of the least serious entry without inspection offenses. *Id.* at fig. 3; *see also* 8 U.S.C. § 1325(a) (providing that "any alien who . . . eludes examination or inspection by immigration officers . . . shall, for the first commission of any such offense, be fined under Title 18 or imprisoned not more than 6 months").

largest single category of federal prosecutions, accounting for 32% of the annual total.[38]

Similar events have been playing out more recently in the specific realm of unlawful employment. In 1986, Congress, for the first time, prescribed civil fines and, for pattern and practice cases, criminal penalties for employers that knowingly hire anyone not authorized to work.[39] Enforcement had generally been lax, but that is now changing.[40] In June 2006, DHS published a proposed rule that lays out specific expectations of employers when either DHS or the Social Security Administration notifies them that an employee name and social security number do not match.[41] Moreover, whereas in 2002 the old Immigration and Naturalization Service (INS) initiated only 25 criminal charges under the employer sanctions laws, in 2005 its successor agency made 445 criminal arrests of employers.[42]

Finally, the government in recent years has been increasingly prone to bring criminal charges against asylum seekers for entering the United States with false documents. Most of the reports involve Haitians in south Florida. According to one newspaper account, "local attorneys report that some asylum seekers are arrested upon arrival at Miami International Airport while others have been charged after months of immigration detention."[43] The U.S. Attorney's Office in Miami obtained 75–80 indictments of asylum seekers on these charges from the fall of 2003 through April 2004.[44] Because asylum seekers frequently resort to false documents both to escape their countries of

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38. *Immigration Enforcement*, *supra* note 37, at fig. 6.

39. *See supra* notes 15–17 and accompanying text (describing the IRCA prohibitions on employers hiring noncitizens).

40. *See* Julia Preston, *U.S. Puts Onus on Employers of Immigrants*, N.Y. TIMES, July 31, 2006, at A1, A16 (indicating that "while the old immigration agency brought 25 criminal charges against employers in 2002, this year Immigration and Customs Enforcement has already made 445 criminal arrests of employers").

41. *See* Safe-Harbor Procedures for Employers Who Receive a No-Match Letter, 71 Fed. Reg. 34,281, 34,281–34,282 (June 14, 2006) (to be codified at 8 C.F.R. pt. 247(a)) (detailing a proposed rule by the Bureau of Immigration and Customs Enforcement to amend the regulations relating to the unlawful hiring or continued employment of unauthorized workers).

42. Preston, *supra* note 40, at A16. The comparison is imperfect, of course, since not all criminal arrests lead to prosecutions.

43. Tanya Weinberg, *Asylum Seekers Face U.S. Charges: Prosecutors Say Dozens Entered Country Illegally*, SUN-SENTINEL (Ft. Lauderdale), Apr. 16, 2003.

44. *See* Kathleen Sullivan, *This Year in Detention Law and Policy: Immigration Detention Developments May 2003–April 2004*, 9 BENDER'S IMMIGRATION BULLETIN 851, 861 (2004) (summarizing a report from the Florida Immigration Advocacy Center indicating that seventy-five to eighty federal indictments have taken place because of a directive from the Florida Attorney General to prosecute asylum-seekers who arrive with false documents).

persecution and to secure transportation to their intended countries of asylum, and because criminal penalties on asylum seekers for unlawful entry are questionable under international law,[45] these criminal prosecutions raise difficult issues. Appropriate or not, they are further examples of the dramatically increased reliance on the criminal enforcement model in immigration.

One of the arguments that will appear in the final part of this paper is that importing the criminal enforcement model into immigration law without the accompanying criminal adjudication model exposes the affected noncitizens to harsh consequences without the necessary procedural safeguards. One objection to that argument might be that the scenario does not occur when the government charges an immigration violator with a criminal offense, since in that proceeding all the usual criminal safeguards will apply. Anticipating that objection, I would offer three observations. First, the trend toward criminalizing and prosecuting immigration violations is highlighted here only as one example of the injection of the criminal enforcement model into immigration law; other examples make up the remainder of this section. Second, because deportation has been held not to be punishment,[46] the constitutional bar on double jeopardy[47] does not preclude the government from bringing deportation proceedings once the person has completed his or her criminal sentence. Indeed, even if the person was already deportable because of the underlying immigration violation, the criminal conviction might add prison time, strip the person of otherwise available discretionary relief from deportation, require the person to remain outside the United States for a longer period after deportation, and trigger other adverse consequences.[48] The

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45. *See* Convention Relating to the Status of Refugees art. 31, July 28, 1951, 189 U.N.T.S. 174 (providing that the parties to the agreement "shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened . . . , enter or are present in their territory without authorization, provided they . . . show good cause for their illegal entry or presence"). *But see* Guy S. Goodwin-Gill, *Article 31 of the 1951 Convention Relating to the Status of Refugees: Non-Penalization, Detention, and Protection*, *in* REFUGEE PROTECTION IN INTERNATIONAL LAW: UNHCR'S GLOBAL CONSULTATIONS ON INTERNATIONAL PROTECTION, 185, 187 (Erika Feller et al. eds., 2003) (suggesting that, despite Article 31, asylum seekers are still placed in detention facilities throughout North America, Europe, and Australia because of their illegal entry or presence).

46. *See infra* Part III.A (discussing the perceived link between legal immigration and illegal immigration).

47. *See* U.S. CONST. amend. V (establishing that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb").

48. *See infra* Part II.B (discussing aggravated felonies—one situation which may trigger adverse deportation consequences).

criminal prosecution is therefore an add-on, not a substitute, for deportation. Third, the Department of Justice authorizes federal prosecutors to enter into plea agreements with deportable criminal defendants. Under the terms of the authorized agreements, the defendant stipulates to deportation—thus waiving even the limited procedural protections otherwise available in deportation proceedings—in exchange for a reduced criminal sentence.[49]

B. Attaching Immigration Consequences to Criminal Convictions[50]

Just as more and more immigration violations are culminating in criminal convictions, so too are more and more criminal convictions culminating in deportation or other adverse immigration consequences. And just as the former trend has been dubbed the "criminalization" of immigration law, at least one commentator has called the latter trend the "immigrationization" of criminal law.[51] This subsection describes two sub-strands of the latter—the proliferation of new crime-related deportation grounds and other related legal changes, and a soaring number of actual crime-related removals.

As elaborated elsewhere,[52] a criminal conviction can damage one's immigration status in many ways. It can result in denial of a visa or denial of admission to the United States.[53] It can be a ground for deporting a person who is already in the United States.[54] It can bar otherwise available discretionary relief and can be a negative factor in the exercise of a statutory discretion.[55] It can result in mandatory preventive detention while removal

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49. *See* U.S. ATTORNEYS' MANUAL, CRIMINAL RESOURCE MANUAL, STIPULATED ADMINISTRATIVE DEPORTATION IN PLEA AGREEMENTS, § 1921, http://www.usdoj.gov/usao/eousa/foia_reading_ room/usam/title9/crm01921.htm (last visited Jan. 23, 2007) (on file with the Washington and Lee Law Review). I thank Sam Buell for this observation.

50. *See generally* DAN KESSELBRENNER & LORY D. ROSENBERG, IMMIGRATION LAW AND CRIMES (8th rel. 2006) (providing the leading treatise on the immigration consequences of criminal activity); Congressional Research Service, *Immigration Consequences of Criminal Activities*, CRS REPORT FOR CONGRESS, Oct. 23, 2006 (covering the proposals made by the 109th Congress to expand the immigration consequences of criminal activity).

51. Miller, *Citizenship and Severity*, *supra* note 1, at 618; Kanstroom, *Criminalizing the Undocumented*, *supra* note 1, at 653–54; Stumpf, *supra* note 1, at 376 n.35.

52. *See* STEPHEN H. LEGOMSKY, IMMIGRATION AND REFUGEE LAW AND POLICY 530–65 (4th ed. 2005) (discussing crime-related deportability grounds).

53. *Id.*

54. *Id.*

55. *Id.*

charges are pending.[56] It can destroy one's eligibility for naturalization.[57] Because the body of law that concerns the impact of criminal activity on noncitizens is now vast and well covered in other sources,[58] and because the most important provisions tend to revolve around deportation, this subpart will offer only a brief summary focused principally on deportation.

The Immigration and Nationality Act contains numerous crime-related grounds for "deportability,"[59] but one concept—the "aggravated felony"—has accounted for the steadiest and most expansive growth in the range of crimes that give rise to removal. This term made its debut in U.S. immigration law when Congress enacted the Anti-Drug Abuse Act of 1988.[60] Among other things, that statute renders deportable any noncitizen who is convicted of an "aggravated felony" after entry (now admission) into the United States.[61] Unlike one other major category of crime-related deportability grounds,[62] the aggravated felony ground applies regardless of either the length of the criminal sentence or the amount of time spent in the United States. Moreover, aggravated felonies eliminate almost all the major avenues of discretionary relief from removal, including even asylum;[63] they trigger mandatory

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56. *Id.*

57. LEGOMSKY, *supra* note 52, at 530–65.

58. *See generally* KESSELBRENNER & ROSENBERG, *supra* note 50 (providing a close look at the impact of criminal activity on the immigration status of non-citizens); 6 CHARLES GORDON ET AL., IMMIGRATION LAW AND PROCEDURE § 71.05 (2006) (analyzing the issue of deportability based on the commission of criminal offenses).

59. *See* 8 U.S.C. § 1227(a) (2000) (providing that "[a]ny alien . . . in and admitted to the United States shall, upon the order of the Attorney General, be removed if the alien is within one or more of the . . . classes of deportable aliens" as outlined in this section). Those who have not been admitted to the United States (whether they are now at ports of entry or in the interior) are said to be "inadmissible" if they fall within any of the roughly analogous grounds enumerated in 8 U.S.C. § 1182(a). *See* 8 U.S.C. § 1182(a) (providing that "aliens who are inadmissible under the following [section] are ineligible to receive visas and ineligible to be admitted to the United States"); *see also* 8 U.S.C. § 1227(a)(2) (establishing crime-related deportability grounds).

60. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181.

61. *Id.* § 7344 (codified at 8 U.S.C. § 1227(a)(2)(A)(iii) (2000)).

62. *See, e.g.*, 8 U.S.C. § 1227(a)(2)(A)(i) (2000) (providing that a non-U.S. citizen who "is convicted of a crime involving moral turpitude committed within five years . . . after the date of admission[,]" for which a sentence of one year or more may be imposed, is deportable).

63. *See* LEGOMSKY, *supra* note 52, at 573 (discussing the negative relationship between aggravated felonies and asylum); *see also* 8 U.S.C. §§ 1158(b)(2)(A)(ii), (B)(i) (providing that "an alien who has been convicted of an aggravated felony shall be considered to have been convicted of a particularly serious crime[,]" and accordingly, the "Attorney General may by regulation establish additional limitations and conditions . . . under which an alien shall be ineligible for asylum").

preventive detention;[64] and they bar return to the United States for life, absent special permission from the Secretary of Homeland Security.[65]

In its nascent 1988 form, the aggravated felony definition was defined narrowly, in keeping with the harsh consequences just described. The term included only murder, weapons trafficking, and drug trafficking.[66]

It is now a colossus. A long series of amendments have added crime after crime to the list. The Immigration Act of 1990 added "crimes of violence,"[67] a term broadly defined to take in a sweeping range of state and federal offenses that require only the use of some physical force against the person or property of another or, in the case of a felony, a "substantial risk" of such force.[68] The Immigration and Nationality Technical Corrections Act of 1994 added theft, receipt of stolen property, burglary, trafficking in fraudulent documents, RICO, certain prostitution offenses, fraud or deceit, tax evasion, and people smuggling—some of these only if a certain amount of money was involved or if the maximum possible sentence was five years.[69] The Antiterrorism and Effective Death Penalty Act of 1996 [AEDPA][70] then weakened some of the sentence requirements for qualification as an aggravated felony and added still more crimes—commercial bribery, forgery, counterfeiting, certain gambling offenses, vehicle trafficking, obstruction of justice, perjury, and bribery of a witness.[71] Just a few months later, Congress added sexual abuse of a minor and

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64. *See* 8 U.S.C. § 1226(c)(1) (2000) (allowing the Attorney General to take into custody any alien who has committed an aggravated felony).

65. *See* 8 U.S.C. § 1182(a)(9)(A)(ii)–(iii) (2000) (providing that aliens who have committed aggravated felonies are ineligible to receive visas and ineligible to be admitted to the United States except upon special permission from the Secretary of Homeland Security).

66. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7342, 102 Stat. 4181, 4496–4470 (providing that "[t]he term 'aggravated felony' means murder, any drug trafficking crime . . . , or any illicit trafficking in firearms or destructive devices . . . , committed within the United States").

67. *See* Immigration Act of 1990, Pub. L. No. 101-649, § 501(a)(3), 104 Stat. 4978, 5048 (amending the definition of "aggravated felony" to include "crimes of violence").

68. *See* 18 U.S.C. § 16 (2000) (defining the term "crime of violence") Crime of violence is:

> (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

Id. A narrowing interpretation was adopted in *Leocal v. Ashcroft*, 543 U.S. 1, 4–6 (2004).

69. Immigration and Nationality Technical Corrections Act of 1994, Pub. L. No. 103-416, § 222, 108 Stat. 4305.

70. *Id.* § 203.

71. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110

rape, while reducing most of the remaining five-year sentencing requirements to one-year requirements, thus dramatically expanding the set of aggravated felonies further.[72] The Trafficking Victims Protection Reauthorization Act of 2003 then added various crimes relating to human trafficking.[73] From its humble origins, the aggravated felony definition now has twenty-one subparts, and the new prongs are generally applied retroactively to individuals who committed the crimes before Congress made them aggravated felonies.[74] The immigration reform bill passed by the House of Representatives in 2005 would have added a prong for manslaughter (voluntary or involuntary).[75]

The expansions mean that an "aggravated felony" need no longer be either aggravated or a felony.[76] 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.[77] Given the severe consequences that

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Stat. 1214. These new crimes were made aggravated felonies as long as the maximum possible sentences were five years, even if the sentences actually imposed were shorter. *Id.* In contrast, some of the other aggravated felony categories are defined to require a certain sentence imposed. *See, e.g.*, 8 U.S.C. §§ 1101(a)(43)(F)–(G), (P), (R)–(S) (requiring a "term of imprisonment," a phrase defined in 8 U.S.C. § 1101(a)(48)(B) to mean the sentence actually imposed, whether or not suspended).

72. *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C. § 321, 110 Stat. 3009, 3636–37 (amending the definition of "aggravated felony").

73. *See* Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193 § 4(b)(5), 117 Stat. 2875, 2879 (codified at 8 U.S.C. § 1011(a)(43)(K)(iii)) (adding "peonage, slavery, involuntary servitude, and trafficking in persons" to the definition of "aggravated felony").

74. *See* 8 U.S.C. § 1101(a)(43) (stating that an aggravated felony could be found despite the fact that the conviction occurred prior to enactment of any portion of the aggravated felony provision).

75. H.R. 4437, 109th Cong. § 613(a)(1) (2005) (as passed by House, Dec. 16, 2005) (proposing to expand the definition of "aggravated felony" to include manslaughter).

76. *See, e.g.*, United States v. Christopher, 239 F.3d 1191, 1193 (11th Cir. 2001) (finding that defendant's conviction for shoplifting, a misdemeanor, and his suspended sentence of twelve months imprisonment qualified as an aggravated felony under 8 U.S.C. § 1101(a)(43) because all that is required is a conviction with a sentence of at least one year imprisonment); United States v. Graham, 169 F.3d 787, 788 (3d Cir. 1999) (concluding that defendant's misdemeanor conviction for petit larceny satisfied the statutory requirement for aggravated felony because defendant received the maximum sentence of one-year imprisonment).

77. *See, e.g.*, Joseph Justin Rollin, *Humpty Dumpty Logic: Arguing Against the "Aggravated Misdemeanor" in Immigration Law*, 6 BENDER'S IMMIGR. BULL. 445, 460 (2001) (arguing that the current definition of "aggravated felony" has the greatest negative impact on those who relied on earlier definitions and are retroactively subject to the newer interpretation); Anthony Lewis, *This Has Got Me in Some Kind of Whirlwind*, N.Y. TIMES, Jan. 8, 2000, at A13 (publicizing the case of Mary Anne Gehris, a long-term, lawful permanent resident who was

follow the labeling of a crime as an aggravated felony, these developments raise serious questions of proportionality. Those questions are taken up in Part V below.

The number of actual crime-related removals has kept pace with the proliferation of new crime-related removal grounds. From 1908, when deportation statistics were first compiled,[78] through 1986, when IRCA was passed, crime-related removals rarely, if ever, reached 2,000 per year.[79] Starting in 1987, the numbers began to rise quickly. They leaped to 4,385 that year and rose every year thereafter until 1999, when they reached 42,014,[80] a tenfold increase in twelve years.

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facing a deportation hearing after a misdemeanor battery conviction for pulling the hair of another woman); Anthony Lewis, *Measure of Justice*, N.Y. TIMES, July 15, 2000, at A13 (reporting that Ms. Gehris was saved from deportation only because she applied for and received a pardon from the Georgia Board of Pardons and Paroles); Patrick J. McDonnell, *Deportation Shatters Family*, L.A. TIMES, Mar. 14, 1998, at B1 (reporting deportation of twenty-nine-year lawful permanent resident for sale of $10 worth of marijuana and the subsequent suicide of his despondent son).

78. Except for the short-lived Alien Act of 1798, ch. 58, 1 Stat. 570, which was never invoked, see GORDON ET AL., *supra* note 58, at § 71.01[2][a], the first federal deportation statute was not enacted until 1888. *See* Act of Oct. 19, 1888, ch. 1210, 25 Stat. 565, 566 (giving the Secretary of the Treasury the power to deport unlawful immigrants).

79. By "crime-related removals," I mean cases in which criminal convictions were the actual grounds for removal. There might well be additional cases in which noncitizens who happen to have been convicted of crimes were ordered removed on other grounds. Department of Homeland Security (DHS) statistics aggregate the figures by decade from 1908 through 1970 and by year thereafter. *See* U.S. Dep't of Homeland Sec., Yearbook of Immigration Statistics: 2004, Enforcement, *Table 45: Aliens Deported by Administrative Reason for Removal: Fiscal Years 1908–80*, http://www.dhs.gov/ximgtn/statistics/publications/YrBk04En.shtm [hereinafter DHS, *Table 45*] (reporting deportations through 1980) (last visited Nov. 16, 2006) (on file with the Washington and Lee Law Review). From 1908 to 1970, the decade with by far the greatest number of crime-related removals was the 1930s, when the total was 17,705 deportations—an annual average of 1771. *See id.* (calculating the total by combining "Criminal Violations" and "Narcotics Violations," which are displayed separately). For deportation numbers for the years 1981 through 1986, see U.S. Dep't of Homeland Sec., Yearbook of Immigration Statistics: 2004, Enforcement, *Table 46: Aliens Deported by Administrative Reason for Removal: Fiscal Years 1981–90*, http://www.dhs.gov/ximgtn/statistics/publications/YrBk04En.shtm [hereinafter DHS, *Table 46*] (last visited Nov. 16, 2006) (on file with the Washington and Lee Law Review).

80. *See* DHS, *Table 46*, *supra* note 79 (reporting the data for 1987 to 1990). Data for 1987 to 1990 is compiled by adding the figures in the columns headed "Convictions for Criminal or Narcotics Violations" and "Related to Criminal or Narcotics Violations" as found on DHS, *Table 46*. It is not clear what actions would be counted under the latter column, but such violations are minimal compared to the numbers listed under the column for convictions. For the deportation data for 1991 to 1999, which is listed under the single categorical heading "Criminal," see U.S. Dep't of Homeland Sec., Yearbook of Immigration Statistics: 2004, Enforcement, *Table 42: Aliens Deported by Administrative Reason for Removal: Fiscal Years 1991–2004*, http://www.dhs.gov/ximgtn/statistics/publications/YrBk04En.shtm [hereinafter DHS, *Table 42*] (last visited Nov. 16, 2006) (on file with the Washington and Lee Law Review).

C. Prioritizing Criminal Enforcement Theory in Immigration Law

With one ultimately insignificant exception,[81] U.S. law did not authorize deportation until 1888. That year Congress prescribed the return of those who had entered the United States in violation of an existing ban on the admission of noncitizen contract laborers.[82] A more general provision for deporting those who had entered in violation of the immigration laws followed three years later.[83] Similarly, today one may be removed from the United States for entering the country while within one of the inadmissible classes or for entering without inspection or by fraud.[84]

Importantly, as other writings have observed, each of these deportation laws was in effect a check on the admissions process.[85] Each called for deporting those who were not supposed to have been admitted in the first place. As I have suggested elsewhere, a rough analogy would be the rescission of a voidable contract.[86] Only slightly different are those provisions 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.[87] Perhaps the person overstayed the allotted time; or perhaps the

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From 1999 to 2004, the number of crime-related removals has leveled off. *See id.* (reporting an average of 40,372 crime-related removals each year since 1999).

81. The one exception was the Alien Act of 1798, Act of June 25, 1798, ch. 58, 1 Stat. 570, 571, which authorized the President to deport aliens whom he deemed dangerous. This statute was not renewed when it expired two years later, and no one was ever deported under it. *See, e.g.*, FRANK F. CHUMAN, THE BAMBOO PEOPLE: THE LAW AND JAPANESE-AMERICANS 53 (1976) (stating that the Alien Act of 1798 was unpopular and was allowed to expire at the end of its two-year term); MILTON R. KONVITZ, CIVIL RIGHTS IN IMMIGRATION 95–96 (1953) (stating that during the two years the Alien Act was in effect, no immigrant was expelled); MILTON R. KONVITZ, THE ALIEN AND THE ASIATIC IN AMERICAN LAW 46 (1946) (stating that the "notorious" Alien Act of 1798 was never used to expel immigrants and expired after two years).

82. *See* Act of Oct. 19, 1888, ch. 1210, 25 Stat. 565, 566 (empowering the Secretary of the Treasury to determine which immigrants were in the United States illegally and to demand their return to their home countries).

83. Act of Mar. 3, 1891, ch. 551, § 11, 26 Stat. 1084, 1086 (permitting the deportation of illegally present immigrants within one year of arrival).

84. *See* 8 U.S.C. §§ 1182(a)(b)(A), (C), 1227 (a)(1)(A) (2006) (rendering removable those persons who enter while inadmissible, without permission, or by fraud).

85. *See* GORDON ET AL., *supra* note 58, at § 71.01[2][a] ("Barring the admission of undesirables and ejecting those who evaded the bar were regarded as different sides of the same coin."); LEGOMSKY, *supra* note 52, at 500 ("Deportation was originally conceived as a device for removing those noncitizens who should not have entered in the first place . . . .").

86. *See* LEGOMSKY, *supra* note 52, at 500 (stating that the theory of deportation based on a wrong later committed by an immigrant who properly entered is analogous to a remedy for breach of contract).

87. *See* 8 U.S.C. § 1227(a)(1)(C) (2006) (rendering deportable immigrants who fail to

person was admitted as a student, for example, but failed to enroll or remain in school. The analogy would be to breach a valid contract. The common denominator in all these removal grounds is that they are designed to remedy lapses related to the person's entry. Each is a remedy for either a flawed entry or noncompliance with the terms of a proper admission.

Different in kind are those deportation grounds that hinge on post-entry conduct unrelated to the person's entry or admission. These include all the deportation grounds that rest on post-entry criminal convictions[88] and some others as well.[89] Their common objective is simply to remove from our midst those noncitizens who are thought to be undesirable.

As discussed in Part IV below, approximately thirty years ago I questioned the courts' insistence that deportation is not punishment, stressing the resemblance that the traditional theories of criminal punishment—particularly retribution, deterrence, and incapacitation—bear to the theories of deportation.[90] Building on those observations, Professor Daniel Kanstroom has contributed an important insight. He has argued that, given the traditional purposes of criminal punishment, the case for classifying deportation as punishment becomes strongest when the particular deportation grounds are based on criminal convictions or other post-entry conduct—as distinguished from those grounds that are linked solely to the original entries.[91]

While that subject will be addressed more fully in Part IV, the critical point here is that in the past twenty years the statistics establish a marked increase in the *relative* attention that the government has paid to the post-entry, generally crime-related, deportation grounds. From 1908 through 1986 there were large fluctuations, but, for that era as a whole, approximately 7% of all deportations were on crime-related post-entry grounds.[92] Immediately after the

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maintain nonimmigrant status or who violate a condition of entry).

88. 8 U.S.C. § 1227(a)(2) (2006).

89. *See, e.g.*, 8 U.S.C. §§ 1227(a)(3), (4), (6) (2006) (rendering deportable, respectively, noncitizens who fail to register or falsify documents; threaten the national security; or unlawfully vote in federal or state elections); *cf. id.* § 1227(a)(5) (becoming a public charge within five years of entry "from causes not affirmatively shown to have arisen since entry" also makes a noncitizen deportable).

90. *See infra* notes 216–20 and accompanying text (discussing the argument in greater detail).

91. *See* Kanstroom, *Deportation, Social Control, and Punishment*, *supra* note 1, at 1893–94 ("Deportation of long-term lawful permanent residents for post-entry criminal conduct seems in most respects to be a form of punishment.").

92. From 1908 through 1980 there were 56,669 deportations on criminal grounds (48,330 "Criminal Violations" plus another 8,339 "Narcotics Violations"). DHS, *Table 45*, *supra* note 79. During that period the total number of deportations on all grounds was 812,915. *Id.* From 1981 through 1986, the figures were 6,433 deportations on criminal grounds (5,826

enactment of IRCA in 1986, that percentage rose dramatically, from 8% in 1986 to 20% the next year, remaining above 20% in every year since and exceeding 50% for three consecutive years in the early 1990s.[93]

These percentage increases in the allocation of deportation resources to crime-related cases are highly relevant. If Kanstroom is right that the crime-related deportation grounds best reflect the theory of deportation as punishment, then the government's increased attention to those grounds suggests that its deportation *priorities* similarly reflect increased reliance on the underlying theories of criminal enforcement—as distinguished from those that relate to entry or admission.

D. Importing Strategies of Criminal Law Enforcement

Recent years have witnessed the accelerated incorporation of several specific attributes of the U.S. criminal enforcement machinery. Two are considered here—preventive detention and plea-bargaining.

1. Preventive Detention

Proceedings to determine whether to remove a noncitizen from the United States can take many months or longer. As is true in criminal cases, the law authorizes preventive detention while these proceedings are pending. As discussed below, such detention is mandatory in several large categories of cases. Ordinarily, however, the DHS has the discretion to detain, release on bond, or "parole" the subject of a removal proceeding pending the removal decision.[94] Under the relevant regulations, release is permitted when the individual "would not pose a danger to property or persons, and . . . is likely to

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"Convictions for Criminal or Narcotics Violations" plus 607 "Related to Criminal or Narcotics Violations"). DHS, *Table 46*, *supra* note 79. The totals for the two periods combined were 63,102 deportations on criminal grounds out of a total of 923,664 deportations, or 7% of all deportations.

93. In 1986, there were 1,873 criminal deportations (1,708 "convictions for Criminal Narcotics Violations" plus 165 "Related to Criminal or Narcotics Violations") out of a total of 22,314 deportations, representing 8% of deportations. DHS, *Table 46*, *supra* note 79. In 1987, the corresponding figures were 4,385 criminal deportations (4,111 plus 274) out of 22,342 total deportations, or 20%. *Id.* For 1998 through 1990, see *id.* From 1991 on, see DHS, *Table 42*, *supra* note 80. The percentage of criminal deportations equaled or exceeded 50% in 1993 (53%), 1994 (54%), and 1995 (50%). *Id.*

94. *See* 8 U.S.C. § 1226(a) (2006) (granting discretionary power pursuant to a warrant from the attorney general).

appear for any future proceeding."[95] The number of individuals subjected to either mandatory or discretionary preventive detention has soared in recent years.[96]

On this score, deportation law actually does more than draw from the criminal enforcement model; it expands this criminal justice invention by making detention both mandatory and indefinite. Those two features, as well as the application of preventive detention to the contexts of asylum and national security, have been among the more significant and controversial uses of immigration detentions and are worth considering here in more detail.

Mandatory detention made its immigration debut with the enactment of the Anti-Drug Abuse Act of 1988.[97] The concept applied only to people who had been convicted of "aggravated felonies," a term then narrowly defined to cover only murder, drug trafficking, and firearms trafficking.[98] In all other cases, detention pending deportation proceedings remained discretionary. Since then, the grounds for mandatory detention have multiplied. In 1996, Congress mandated detention for individuals who are either inadmissible or deportable on almost any of the crime-related grounds (not just aggravated felonies), inadmissible or deportable on terrorism-related grounds, arriving passengers, and awaiting the execution of removal orders.[99] In 2001, the USA PATRIOT Act further expanded the terrorism ground for mandatory

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95. 8 C.F.R. § 236.1(c)(8) (2006).

96. *Accord* Stumpf, *supra* note 1, at 393–94; *see* Miller, *Citizenship and Severity*, *supra* note 1, at 649 (reporting a quadrupling in immigration detentions from an average daily population of 5500 in 1994 to 22,000 in 2001); *see also* Cheryl Little, *INS Detention in Florida*, 30 U. MIAMI INTER-AM. L. REV. 551, 551–52 (1999) (providing statistics showing a threefold increase in the number of persons in INS custody between 1994 and 1998). For some thoughtful commentary on the duration and conditions of immigration detention, see MARK DOW, AMERICAN GULAG: INSIDE U.S. IMMIGRATION PRISONS 48–67, 137–54 (2004); Margaret H. Taylor, *Detained Aliens Challenging Conditions of Confinement and the Porous Border of the Plenary Power Doctrine*, 22 HASTINGS CONST. L.Q. 1087, 1088–89, 1111–25 (1995) (describing conditions in immigrant detention facilities).

97. *See* Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7343(a), 102 Stat. 4181, 4470 (codified as amended at 8 U.S.C. § 1252 (2000)) ("The Attorney General shall take into custody any alien convicted of an aggravated felony upon completion of the alien's sentence for such conviction."). *See generally* Stephen H. Legomsky, *The Detention of Aliens: Theories, Rules, and Discretion*, 30 U. MIAMI INTER-AM. L. REV. 531 (1999).

98. *See* Anti-Drug Abuse Act of 1988 § 7342 (codified as amended at 8 U.S.C. § 1107(a) (2000)) (defining aggravated felony).

99. *See* 8 U.S.C. §§ 1225(b)(1)(B)(iii)(IV), (b)(2)(A), 1226(c)(1)(A)–(D) (requiring that asylum seekers, noncitizens not clearly admissible, and criminal noncitizens be detained or taken into custody). In *Demore v. Kim*, 538 U.S. 510, 513 (2003), the Supreme Court upheld the constitutionality of mandatory detention.

detention.[100] The immigration reform bill passed by the House of Representatives in 2005 would have required preventive detention, pending removal proceedings, for anyone attempting an illegal entry into the United States[101] or any member of a "criminal street gang."[102]

A second controversial practice has been the growing use of indefinite detention. The problem is serious. What should the United States government do if a noncitizen has been ordered removed, but the country of origin refuses to readmit the person and the U.S. government believes that the person would either abscond or endanger public safety if released? On the one hand, should the person be held in captivity indefinitely, perhaps for life, when he or she either has never been convicted of a crime or has fully served any criminal sentence? On the other hand, should the government be forced to release a noncitizen whom it regards as either dangerous or a flight risk, simply because no other country will take the person?

Even before September 11, 2001, the United States was beginning to choose the former option with greater and greater frequency.[103] As of February 2001, the former INS was detaining approximately 3000 noncitizens for indefinite durations.[104] In June of that year, the Supreme Court in *Zadvydas v. Davis*[105] interpreted the relevant statutory provision as forbidding detention of deportable[106] noncitizens once there is no longer a "significant likelihood of

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100. *See* Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, §§ 411–12 Pub. L. No. 107-56, 115 Stat. 272, 345–52 (codified at 8 U.S.C. §§ 1182, 1189, 1226(a)) (providing terrorism-related definitions and mandating detention for suspected terrorists).

101. *See* H.R. 4437, 109th Cong. § 401 (as passed by House, Dec. 16, 2005) (mandating detention for noncitizens apprehended at U.S. ports of entry or along the international land and maritime border of the United States but providing an exception for noncitizens paroled into the United States for "urgent humanitarian reasons or significant public benefit").

102. *See id.* § 608(d) (mandating detention of criminal street gang members).

103. There are, of course, modified versions of these options. The government can, and does, make use of supervised release, often after periodic review to assess the levels of risk involved. *See, e.g.*, 8 C.F.R. § 241.13(h) (2006) (providing for conditional release and supervision).

104. *See Supreme Court Hears Arguments in Indefinite Detention Cases*, 78 INTERPRETER RELEASES 397, 397 (2001) (noting that the Supreme Court's consideration of two cases involving indefinite detention in February 2001 "will affect the estimated 3,000 persons currently subject to indefinite detention").

105. *See* Zadvydas v. Davis, 533 U.S. 678, 697 (2001) ("We cannot find here . . . any clear indication of congressional intent to grant the Attorney General the power to hold indefinitely in confinement an alien ordered removed.").

106. For the Court's extension of this holding to inadmissible noncitizens, see Clark v. Martinez, 543 U.S. 371, 378 (2005).

removal in the reasonably foreseeable future."[107] The court mentioned casually that "terrorism or other special circumstances" might present a different case.[108] After the events of September 11, the government seized on that dictum, declaring that not only terrorism, but also "highly contagious disease that is a threat to public safety," "serious adverse foreign policy consequences," and classification as "specially dangerous" because of commission of a crime of violence or a behavioral disorder would justify indefinite detention, even after removal is no longer reasonably foreseeable.[109] The government also began to impose release conditions that it knew the person would be unable to meet (for example, imposing a high bond amount) and taking back into custody individuals alleged to have violated their conditions of release.[110]

Detention of noncitizens on national security grounds has become a broader part of the counter-terrorism strategy in the post-September 11 era. In the USA PATRIOT Act, Congress authorized the Attorney General to "certify" any noncitizen whom there were reasonable grounds to believe was either inadmissible or deportable on certain national security grounds.[111] Upon such a certification, detention pending removal proceedings was to be mandatory, and even indefinite detention was explicitly approved as long as the case was reviewed every six months.[112] As others have noted, that procedure has never been invoked; the government has circumvented the few limitations built into the USA PATRIOT Act by claiming the inherent authority to detain indefinitely in connection with its ordinary powers in removal proceedings.[113]

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107. *Zadvyas*, 533 U.S. at 701. The Court found the statute capable of alternative interpretations and chose the one it did in order to avoid serious constitutional problems. *See id.* at 690–99 (noting that "[a] statute permitting indefinite detention of an alien would raise a serious constitutional problem" and thus "interpreting the statute to avoid a serious constitutional threat").

108. *See id.* at 696 (noting that the Court was not "consider[ing] terrorism or other special circumstances where special arguments might be made for forms of preventive detention").

109. *See* 8 C.F.R. § 241.14(b)–(d), (f) (2006) (providing conditions that may be invoked to "continue detention," despite the absence of a "significant likelihood that the alien will be removed in the reasonably foreseeable future").

110. *See* Thomas Hutchins, *Detention of Aliens: An Overview of Current Law*, IMMIGRATION BRIEFINGS, Apr. 2003, at 1, 10 (arguing that one mechanism used by the Department of Homeland Security to "skirt" limits on the detention of noncitizens is the imposition of "conditions of release which the alien cannot meet in the first place, such as a high bond").

111. *See* Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 § 412, 8 U.S.C. 1226a(a)(3) (providing the circumstances for certification of foreign terrorist suspects by the Attorney General).

112. 8 U.S.C. §§ 1226a(a)(1)–(3), (6)–(7) (requiring the Attorney General to detain certified noncitizens and review certification every six months).

113. *See, e.g.*, LEGOMSKY, *supra* note 52, at 844–54 (noting that "[a]s of March 26, 2003,

All this is in addition to the controversial long-term detention of suspected Al Qaeda and Taliban combatants at the Guantanamo Naval Base.[114]

Finally, the government in recent years has made widespread use of detention in the context of asylum. Generally, the government has the same statutory discretion to detain asylum seekers during removal proceedings as it does to detain any other noncitizens in those proceedings. In addition, however, both Congress and the executive branch in recent years have mandated detention in certain specific asylum contexts.

One such context is "expedited removal," a special accelerated procedure applicable to certain noncitizens upon their arrival in the United States (or, in some limited instances, even in the interior).[115] When expedited removal applies, detention is mandated until an asylum seeker passes "a final determination of credible fear of persecution."[116]

A second context relates to Haitian boat people who arrive on U.S. shores and apply for asylum. In *In re D–J–*,[117] the Attorney General ruled that for national security reasons all Haitians who arrive in the United States by boat *must* be detained throughout their removal proceedings.[118] He reasoned that the release of Haitians, even on bond, would encourage other Haitians to attempt the voyage and that the Coast Guard would then have to interdict more vessels, thus diverting resources that could be devoted to countering terrorism.[119]

A third, also recent but short-lived, asylum detention program similarly invoked national security. This one, announced by Homeland Security

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the [USA PATRIOT Act] certification provision had yet to be invoked"); Margaret H. Taylor, *Dangerous by Decree: Detention Without Bond in Immigration Proceedings*, 50 LOYOLA L. REV. 149, 149–50 (2004) (stating that the PATRIOT Act provision "was not used in the post-9/11 detention effort" and that authorities instead have "relied on the detention authority in the existing immigration statute"); *see also* David Cole, *In Aid of Removal: Due Process Limits on Immigration Detention*, 51 EMORY L.J. 1003, 1003–08 (2002) (describing the government's campaigns against noncitizens as one "in which the government has aggressively used immigration authority to implement a broad strategy of preventive detention").

114. *See* Rasul v. Bush, 542 U.S. 466, 470 (2004) (recognizing the right of foreign nationals detained abroad and held at Guantanamo Bay Naval Base to seek habeas corpus).

115. *See* 8 U.S.C. § 1225(b)(1) (2000) (authorizing expedited removal).

116. *Id.* § 1225(b)(1)(B)(iii)(IV).

117. *In re* D–J–, 23 I. & N. Dec. 572 (2003).

118. *See id.* at 579 ("I conclude that releasing respondent, or similarly situated undocumented seagoing migrants, on bond would give rise to adverse consequences for national security and sound immigration policy.").

119. *See id.* (stating that the release of the respondent, a Haitian, "would come to the attention of others in Haiti and encourage future surges in illegal migration by sea," and that "surges in such illegal migration by sea injure national security by diverting valuable Coast Guard and DOD resources from counterterrorism and homeland security responsibilities").

Secretary Tom Ridge in March 2003, was dubbed "Operation Liberty Shield." It listed 34 countries thought to harbor terrorists and required that any national of a listed country be detained if he or she applied for asylum at a U.S. port of entry and lacked proper entry documents.[120] Amidst a loud uproar, the policy was quietly shelved after one month.[121]

The large-scale detention of asylum seekers is especially striking in light of generally prevailing international norms. It is widely recognized that asylum seekers not only frequently, but typically, arrive without entry documents; even if receiving countries were commonly willing to grant refugees advance permission to resettle, the chaos and urgency of the refugees' departures seldom permit advance applications.[122] For that and other reasons, the sorts of categorical asylum detention practices catalogued in this section—and particularly those that apply selectively to Haitians or to nationals of other selected countries—are most likely incompatible with U.S. treaty obligations.[123]

2. Plea-Bargaining

Criminal-style plea bargaining has seeped into at least two areas of immigration law. One of them stems from a series of steps taken by Congress to admit to the United States, at least for temporary stays, certain noncitizens likely to cooperate with the government in the criminal prosecutions of others.

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120. *See DHS to Detain Asylum Seekers Under "Operation Liberty Shield,"* REFUGEE REPORTS (U.S. Comm. for Refugees and Immigrants, Washington D.C.), Mar./Apr. 2003, at 5–6 (describing "Operation Liberty Shield" and the earlier policy regarding asylum seekers).

121. *See* DAVID COLE, ENEMY ALIENS: DOUBLE STANDARDS AND CONSTITUTIONAL FREEDOMS IN THE WAR ON TERRORISM 50–51 (2003) (recounting the announcement and subsequent termination of "Operation Liberty Shield").

122. *See, e.g.*, Tanya Weinberg, *Asylum Seekers Face U.S. Charges: Prosecutors Say Dozens Entered Country Illegally*, SUN-SENTINEL (Ft. Lauderdale), Apr. 16, 2003, at B1 (noting that refugees frequently flee without sufficient time to obtain proper documentation).

123. *See, e.g.*, United Nations High Commissioner for Refugees [UNHCR], *Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum-Seekers*, ¶¶ 1–3 (Feb. 1999), *available at* http://www.unchr.org/protect/PROTECTION/3bd036a74.pdf (arguing that asylum-seekers should be detained only when it is necessary and stating that "the use of detention is, in many instances, contrary to the norms and principles of international law"); Letter from Guenet Guebre-Christos, Regional Representative, United Nations High Commissioner for Refugees [UNHCR], to Rebecca Sharpless, Attorney, Florida Immigrant Advocacy Center (Apr. 15, 2002), *reprinted in* 79 INTERPRETER RELEASES 620 app. at 630–51 ("In cases in which asylum seekers arrive with false or no documents, detention is justified only when there is an intention to mislead or a refusal to cooperate with the authorities."); Michele R. Pistone, *Justice Delayed is Justice Denied: A Proposal for Ending the Unnecessary Detention of Asylum-Seekers*, 12 HARV. HUM. RTS. J. 197, 237 (1999) (noting that treaty obligations require protection to "genuine asylum seekers").

Beginning in 1994,[124] Congress enacted such provisions to encourage assistance in the prosecution of criminal and terrorist organizations, human traffickers, and domestic abusers.[125] As Nora Demleitner has observed, these provisions have given rise to a kind of plea bargaining. Police and prosecutors grant permission to remain at least temporarily in the United States rather than initiate removal proceedings, in exchange for the willingness of a minor player to cooperate in securing the convictions of those who played more major roles.[126]

Asylum is the other area of immigration law that has recently begun to import criminal-style plea bargaining. To receive asylum, one must meet the definition of "refugee" and receive the favorable exercise of discretion.[127] If asylum is granted, the person may eventually adjust to permanent resident status,[128] and his or her family members may be admitted as well.[129] A lesser, non-discretionary remedy known as "withholding of removal" protects the person against removal to the country of persecution but makes no provision for admitting either the applicant or his or her family members to the United States.[130]

Practitioners now report a growing practice among some immigration judges to offer applicants withholding of removal in exchange for withdrawing their applications for asylum. Those kinds of plea-bargaining offers can cause anguish. By accepting the offer, the applicant avoids being returned to his or her persecutors but does not receive permission to remain in the United States or to reunite with his or her spouse or minor children. If the applicant declines the offer, he or she runs the risk of receiving no protection at all and being returned to the country of persecution.

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124. *See* Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 130003(a), 108 Stat. 1796, 2024 (codified at 8 U.S.C. § 1107(a) (2000)) (establishing a new classification for individuals with information related to a criminal investigation or law enforcement activities).

125. *See* 8 U.S.C. § 1101(a)(15)(S)–(U) (2000) (describing certain classes of nonimmigrants).

126. *See* Demleitner, *supra* note 1, at 1078–83 (describing the various methods through which law enforcement can promise permission to stay in the United States in exchange for cooperation). She proceeds to identify some of the unintended adverse consequences of these and related discretionary inducements. *Id.* at 1084–93.

127. *See* 8 U.S.C. §§ 1101(a)(42), 1158(b) (2000) (defining the term "refugee" and describing the required conditions for granting asylum).

128. *See id.* § 1159 (2000) (describing the requirements and procedures for the adjustment of status from refugee to immigrant).

129. *See id.* § 1158(b)(3) (2000) (describing the treatment of spouse and children of a person who is granted asylum).

130. *See id.* § 1231(b)(3) (2000) (restricting the removal of a noncitizen to a country where his or her life or freedom would be threatened).

E. Using the Same Players

Increasingly, many of the government personnel who implement the criminal justice system are simultaneously charged with enforcing the nation's system of immigration control. This section offers two examples—state or local enforcement officials and sentencing judges in criminal cases.

1. State and Local Criminal Enforcement Officials

Historically, while the federal government has long recognized the authority of state police to arrest individuals for federal *crimes*, state officials were assumed to have no "inherent" authority to arrest individuals solely on suspicion of *civil* immigration violations.[131] That position, confirmed by the Justice Department's Office of Legal Counsel in a formal memorandum as recently as 1996,[132] has now changed. Shortly after the issuance of the 1996 memorandum, Congress enacted IIRIRA, three provisions of which specifically encouraged the use of state and local criminal enforcement machinery to bolster the INS civil immigration enforcement efforts. One provision authorized the Attorney General to enter into collaborative agreements with state and local law enforcement agencies; the state and local police would investigate, apprehend, and detain noncitizens suspected of being deportable, and the federal government would provide the necessary training.[133] Another provision authorized the Attorney General to dispense with the training in the case of a "mass influx" that "presents urgent circumstances requiring an immediate Federal response."[134] Still another provision prohibited states from restricting

131. *See* Kanstroom, *Criminalizing the Undocumented*, *supra* note 1, at 664 (noting that until recently state law enforcement officials lacked authority to arrest or detain noncitizens solely for the purposes of civil immigration proceedings); Miller, *Citizenship and Severity*, *supra* note 1, at 637–38 (noting that state and local law enforcement officers were authorized to enforce the criminal provisions of the Immigration and Naturalization Act).

132. *See* Miller, *Citizenship and Severity*, *supra* note 1, at 638 (noting that a formal Department of Justice memorandum in 1996 concluded that "[s]tate police lack recognized legal authority to arrest or detain aliens solely for purposes of civil immigration proceedings as opposed to criminal prosecution").

133. *See* IIRIRA § 133; 8 U.S.C. § 1357(g) (describing how state officers and employees can perform immigration officer functions).

134. *See id.* § 372(3); 8 U.S.C. § 1103(a)(10) (allowing the Attorney General to authorize state and local law enforcement officers to exercise immigration powers in case of circumstances requiring an immediate federal response).

the exchange of information with the INS about an individual's immigration status.[135]

Since 1996, that trend has gathered steam. In 2002, the Attorney General, renouncing the 1996 Justice Department memorandum, concluded that state and local criminal enforcement officials have the inherent authority to arrest those individuals whom they believe to be deportable; no affirmative federal authorization is necessary.[136] The immigration reform bill passed in 2005 by the House of Representatives would have gone further. While Attorney General Ashcroft's proclamation of inherent state and local authority spoke only to the power to *arrest* deportable noncitizens, the House bill would have recognized an inherent authority of state and local law enforcement officers to "investigate, identify, apprehend, arrest, detain, or transfer to Federal custody" any noncitizens they encounter "in the course of carrying out routine duties."[137]

The same bill would have authorized DHS to develop training manuals and courses for state and local police engaged in immigration apprehensions[138] but cautioned that nothing in the bill itself "or any other provision of law" was to be construed as making such training a prerequisite to state or local immigration enforcement assistance in the normal course of the officers' duties.[139] The bill would also have authorized grants to state and local law enforcement agencies that assist in immigration enforcement[140] and would have cut off federal funds to any state or political subdivision that prohibits law enforcement agencies from cooperating with federal immigration officials.[141]

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135. *See id.* § 642; 8 U.S.C. § 1357(g) (2000) (prohibiting state governments from restricting information from any government official or entity to the Immigration and Naturalization Service regarding the immigration status of any individual).

136. Kris W. Kobach, *The Quintessential Force Multiplier: The Inherent Authority of Local Police to Make Immigration Arrests*, 69 ALB. L. REV. 179, 181–82 (2005) (describing Attorney General Ashcroft's conclusion that states have the inherent authority to arrest noncitizens who are suspected of being deportable).

137. H.R. 4437, 109th Cong. § 220 (1st Sess. 2005).

138. *See id.* § 221(a) (requiring the Secretary of Homeland Security to establish a training manual and a pocket guide for state or local law enforcement personnel for the purpose of immigration enforcement).

139. *See id.* § 221(e)(3) ("Nothing in this Act or any other provision of law shall be construed as making any immigration-related training a requirement for, or prerequisite to, any State or local law enforcement officer to assist in the enforcement of Federal immigration laws.").

140. *See id.* § 222 ("[T]he Secretary of Homeland Security shall make grants to States and political subdivisions of States for procurement of equipment, technology, facilities, and other products that facilitate and are directly related to investigating, apprehending, arresting, detaining, or transporting immigration law violators.").

141. *See id.* § 225(a) ("[A] State (or political subdivision of a State) that . . . prohibits law enforcement officers of the State, or of a political subdivision . . . , from assisting or cooperating

The constitutional and policy arguments for and against enlisting state and local police to help enforce the immigration laws are thoughtfully expressed in other writings.[142] The point here is simply to highlight one example of the trend toward using the same players to enforce the criminal laws and the civil deportation laws.

2. *Federal Sentencing Judges*

One other set of actors in the criminal justice system has been enlisted into the immigration enforcement cause—federal sentencing judges. At one time, sentencing judges in both federal and state criminal cases had the discretion to issue binding "judicial recommendations against deportation" (JRADs) in certain criminal cases.[143] The Immigration Act of 1990 repealed JRADs.[144] Today, therefore, sentencing judges have no power to prohibit deportation.

In 1994, however, Congress gave federal judges the power to order deportation during the sentencing phase of a criminal proceeding, provided the particular crime fit within certain of the crime-related deportation grounds.[145] In 1996, Congress extended this power to all cases in which the crime fit within any of the crime-related deportation grounds.[146] As would be true in a traditional administrative deportation or removal proceeding, the judge holds a mini-hearing to decide whether the person fits within the charged deportation ground and, if so, whether the defendant is eligible for, and deserving of, any form of statutory discretionary relief.[147] The power to decide the deportation

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with Federal immigration law enforcement . . . shall not receive any of the funds that would otherwise be allocated to the State under Section 241(i) of the Immigration and Nationality Act.").

142. *Compare* Kobach, *supra* note 136 (arguing in favor, former chief advisor to former Attorney General Ashcroft), *with* Kanstroom, *Criminalizing the Undocumented*, *supra* note 1, at 663–69 (arguing against). For some thoughtful parallels to federal-state cooperation in drug enforcement, see generally Kathleen F. Brickey, *Criminal Mischief: The Federalization of American Criminal Law*, 46 HASTINGS L.J. 1135 (1995).

143. *See* 8 U.S.C. § 1251(b)(2) (1990) (allowing a federal district judge to recommend that a particular criminal conviction not be the basis for deportation).

144. *See* Pub. L. No. 101–649, § 505, 104 Stat. 4978 (Nov. 29, 1990) (amending 8 U.S.C. § 1251(b) by removing the provisions that had given federal judges the ability to recommend against deportation).

145. *See* Immigration and Nationality Technical Amendments Act of 1994, Pub. L. No. 103-416, § 224, 108 Stat. 4305, 4322–24 (Oct. 25, 1994) (amending 8 U.S.C. § 1252(a) by inserting a provision giving federal judges the power to order deportation).

146. IIRIRA § 374; 8 U.S.C. § 1228(c).

147. *See* 8 U.S.C. § 1228(c)(2)(C) (2000) (requiring the Commissioner to provide to a court a report regarding the noncitizen's eligibility for relief from deportation if the noncitizen

issue exists only if the prosecutor, with the consent of DHS, requests the sentencing judge to exercise this jurisdiction; upon such a request, the sentencing judge then has the discretion to do so.[148]

If the sentencing judge agrees to decide the removal question, either the defendant or DHS has the right to appeal the judge's ultimate decision to the court of appeals.[149] If the sentencing judge decides against ordering removal (either because the judge opts out of the decision entirely or because, on the merits, the judge finds the person either not deportable or eligible for and deserving of statutory discretionary relief), DHS gets a second shot; it may initiate removal proceedings again via the conventional administrative process.[150] There is no analogous provision giving the defendant a second shot in conventional removal proceedings.

The enforcement priorities that animate these arrangements will be evident from the asymmetry. Federal sentencing judges have been given ample power to order removal but, with the abolition of JRADs, now have almost no power to prevent it. Further, only the prosecutor and DHS may request the sentencing judge to decide the deportation issue; the defendant may not. And once the sentencing judge (or the court of appeals if there is an appeal) has decided the issue, the government, if dissatisfied with the result, may obtain a de novo redetermination in conventional administrative proceedings; the noncitizen may not.

As the Introduction suggested, this Article will bemoan the heavy use of the criminal enforcement model in immigration law without the corresponding criminal adjudication model and its strong procedural protections. At first glance the present Part might appear to provide a counter-example, because the criminal justice agent that has been brought into the immigration process is a federal court of general jurisdiction. While the forum is borrowed from the criminal adjudication system, however, the procedure is not. The mini-hearing conducted by the sentencing judge before deciding whether to order deportation bears little resemblance to the broad safeguards required in criminal proceedings. There is no provision for a full judicial trial, no requirement of

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has provided sufficient evidence to establish prima facie eligibility for such relief).

148. *See* 8 U.S.C. § 1228(c)(1) (2000) (describing the authority of a district court to enter a judicial order of removal as discretionary).

149. *See* 8 U.S.C. § 1228(c)(3)(A) (2000) ("A judicial order of removal may be appealed by either party to the court of appeals for the circuit in which the district court is located.").

150. *See id.* § 1228(c)(4) (2000) ("Denial of a request for judicial order of removal shall not preclude the Attorney General from initiating removal proceedings pursuant to section 1229a of this title upon the same ground of deportability or upon any other ground of deportability under section 1227(a) of this title.").

proof beyond reasonable doubt, no provision for appointed counsel for indigent defendants, no bar on hearsay evidence, and, as noted earlier in connection with the government's right to request a redetermination before the administrative tribunals, no prohibition on double jeopardy.[151]

III. Immigrants and Criminals in the Public Mind

Part I demonstrated the creeping influence of the criminal enforcement model in immigration law. Policymakers presumably act on the basis of both their own perceptions of reality and their perceptions of other people's perceptions. The relevant others, in turn, presumably include both the public generally and specific constituencies. It is useful, therefore, to consider what mental associations might be driving the incorporation of the criminal enforcement model into immigration law.

Much of the recent immigration enforcement-related activity at the federal, state, and local levels reflects *someone's* perceived associations of immigrants with criminals. Whether policymakers harbor this perception themselves or perceive merely that their constituents do so is not clear and at any rate most likely varies from one policymaker to another. For present purposes it does not matter. The key point, I argue, is that, at some level, perceptions of immigrants as criminals appear to influence both the tone of the public debate and the outcomes.

What accounts for these perceptions? The most obvious answer would be reality, if there were a demonstrated positive correlation between immigrants and crime. *Illegal* immigration, of course, can itself be a criminal offense. As elaborated more fully in Part II.A above, entry without inspection is a federal crime.[152] A bill passed by the House of Representatives in 2005 would have made overstaying a lawfully issued visa or other unlawful presence a criminal offense as well.[153] But those laws establish an association of illegal immigration with crime only by definitional fiat. At any rate, they tell us nothing about whether *legal* immigration correlates with crime. For policy purposes, the real issue is whether either immigrants generally or

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151. *See id.* § 1228(c)(2) (2000) (laying out the procedure for judicial removal).

152. *See id.* §§ 1325(a), 1326 (2000) (describing penalties for noncitizens who enter the United States improperly or re-enter the United States after being removed).

153. *See* H.R. 4437, 109th Cong. § 203(5) (1st Sess. 2005) (as passed by the House, Dec. 16, 2005) (amending 8 U.S.C. § 1325 by prescribing criminal penalties for any noncitizen "in the United States in violation of the immigration laws or the regulations prescribed thereunder").

undocumented immigrants in particular are disproportionately prone to independent criminal behavior.

There is no shortage of demographic reasons for *hypothesizing* a positive correlation between immigration and crime. As others have pointed out, the immigrant population as a whole is younger, more male, and less educated than the average native-born American; all these characteristics correlate positively with crime rates.[154] In addition, immigrants face greater problems of acculturation and assimilation than the native-born, and economic realities force disproportionate numbers of immigrants to settle in poor, ethnically heterogeneous neighborhoods heavily populated by young males.[155]

These crime predictors notwithstanding, it is clear that immigrants' crime rates have consistently been dramatically *lower* than those of their otherwise demographically similar native-born counterparts. One leading study focuses on males aged 18–39, the age/gender cohort with the highest crime rates. It finds that, within this cohort, the native-born are four times more likely than immigrants to be incarcerated in federal or state prisons or local jails.[156] The lower-than-average incarceration rates for these young male immigrants hold true for every ethnic group, without exception.[157]

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154. *See* Ramiro Martinez & Matthew T. Lee, *On Immigration and Crime*, 1 CRIM. JUSTICE 485, 485–86, 495 (2000), *available at* http://www.ncjrs.gov/criminal_justice2000/vol_1/02j.pdf (reviewing the reasons why researchers might hypothesize immigrant populations to be more crime-prone than native populations); Rubén G. Rumbaut et al., *Debunking the Myth of Immigrant Criminality: Imprisonment Among First- and Second-Generation Young Men*, Migration Information Source at 4 (June 1, 2006), *available at* http://www.migration information.org/Feature/display.cfm?id=403 (noting that the current era of mass immigration has coincided with an era of mass imprisonment and examining empirically the role of ethnicity, national origin, and generation in relation to crime and imprisonment) (on file with the Washington and Lee Law Review).

155. *See* Martinez & Lee, *supra* note 154, at 485–86 (finding that despite the reasons to expect immigrant populations to be more crime-prone, most empirical studies find the opposite).

156. That study was based on data drawn from the 2000 U.S. Census. In that year, 3.51% of all native-born males aged 18–39 were incarcerated; the corresponding figure for immigrants was 0.86%. Rumbaut et al., *supra* note 154, at 4–5 & tbl.1. For various reasons, the differential cannot be attributed to deportations. *Id.* at 9. Generally, the immigrant percentage of the federal prison population is much higher than the immigrant percentage of the state prison population. *See, e.g.*, U.S. Dep't of Justice, Bureau of Justice Statistics, Criminal Offender Statistics, *available at* http://www.ojp.usdoj.gov/bjs/crimoff.htm (under heading "Comparing Federal and State prison inmates") (stating that 18% of federal inmates were non-citizens as opposed to 5% of state inmates) (on file with the Washington and Lee Law Review). For a more detailed look at immigrant incarceration rates, see Rubén G. Rumbaut et al., *Immigration and Incarceration: Patterns and Predictors of Imprisonment Among First- and Second-Generation Young Adults*, *in* IMMIGRATION AND CRIME—RACE, ETHNICITY, AND VIOLENCE (Ramiro Martinez & Abel Valenzuela eds., 2006).

157. Rumbaut et al., *supra* note 154, at 5.

Still, one might legitimately say, the policy-relevant question is not how immigrants' criminal propensities compare to those of demographically similar native-born Americans, but rather how they compare to those of the native-born population as a whole. If immigrants were more prone to crime than the native-born, it would be of small consolation that the differential can be linked to age and gender. Whatever the demographic explanation, some might ask, why add a disproportionately criminal element to our population?

Remarkably, however, immigrants commit fewer crimes per capita than the native-born even *without* controlling for age, gender, educational attainment, and other relevant demographics.[158] Two researchers, after meticulously analyzing voluminous historical and contemporary studies and noting the factors that might have predicted a higher than average crime rate among immigrants, conclude: "Yet, the major finding of a century of research on immigration and crime is that immigrants . . . , contrary to public opinion, nearly always exhibit lower crime rates than native groups."[159] I must acknowledge, however, that I have been unable to find any studies that tell us whether the same is true of undocumented immigrants. On that issue, all that can be reliably said is that there is no clear evidence either way.

Given the consistent evidence that immigrants are more law-abiding than the native-born, and the absence of evidence that even undocumented immigrants are any more or less prone to crime than the native-born, the questions remain: Do either the general public or policymakers have contrary perceptions? And if so, why? This Part demonstrates that the public does indeed associate immigration with crime, and it speculates on what is driving those perceptions. I suggest there are widespread, perhaps unconscious, assumptions that connect at least four phenomena—immigration generally, illegal immigration, crime, and terrorism.[160] The obvious additional factor of

158. *See* Kristin F. Butcher & Anne Morrison Piehl, *Cross-City Evidence on the Relationship Between Immigration and Crime*, 17 J. POL'Y ANALYSIS & MGMT. 457, 483–84 (1998) ("The analysis of the NLSY clearly implies that immigrants are less likely to commit crimes than natives."). This empirical study found there was no correlation between changes in the immigrant percentages of the populations of several major cities over time and changes in those same cities' crime rates. *Id.* at 469–80. The authors also analyzed individualized data that confirmed other studies' findings of a lower crime rate among immigrants than among the native born. *Id.* at 483–84. *Accord* Martinez & Lee, *supra* note 154, at 496 (concluding that immigrants committed fewer crimes per capita than the native born).

159. Martinez & Lee, *supra* note 154, at 496.

160. Others have made thoughtful comments on some of these relationships. *See* Kanstroom, *Criminalizing the Undocumented*, *supra* note 1 (discussing immigration and the justice system after September 11); Miller, *Blurring the Boundaries*, *supra* note 1 (discussing the criminalization of immigration activities by legal immigrants).

anti-immigrant racial stereotyping is the subject of a rich literature that this Article will not attempt to amplify.[161]

All of these perceptions, of course, reflect the ways in which the human mind processes information and forms impressions. Psychologist Scott Plous identifies a number of factors that influence the degree to which a given piece of evidence will shape one's perceptions of patterns. Among the critical factors, he says, are the "availability" of evidence, its "vividness," and its "salience."[162] When media accounts and other forms of public discourse highlight illegal immigration or immigrant involvement in terrorism or other crime; when the images of these activities are made vivid; and when people view these activities as increasingly salient to their daily lives, the assumptions and decisions that are described in the paragraphs below seem unsurprising.

A. Linking Legal Immigration and Illegal Immigration

The first set of linked perceptions to consider is that between legal and illegal immigration. Here there are several sub-links. Although the vast bulk of immigration to the United States occurs through legal channels,[163] the public

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161. *See generally* IMMIGRANTS OUT! THE NEW NATIVISM AND THE ANTI-IMMIGRANT IMPULSE IN THE UNITED STATES (Juan F. Perea ed., 1997) (presenting essays that discuss American nativism and immigration); Muneer I. Ahmad, *A Rage Shared by Law: Post-September 11 Racial Violence as Crimes of Passion*, 92 CAL. L. REV. 1259 (2004) (exploring post-September 11 racial hate crimes against Arab, Muslim, and South Asian minorities); Susan Akram & Kevin R. Johnson, *Scheherezade Meets Kafka: Two Dozen Sordid Tales of Ideological Exclusion*, 14 GEO. IMMIG. L.J. 51 (1999) (discussing the use of secret evidence in deportation proceedings against Arabs and Muslims); Richard A. Boswell, *Racism and U.S. Immigration Law: Prospects for Reform after "9/11"?*, 7 J. GENDER RACE & JUST. 315 (2003) (discussing the structural problems in U.S. immigration law); Berta Esperanza Hernández-Truyol, *Natives, Newcomers and Nativism: A Human Rights Model for the Twenty-First Century*, 23 FORDHAM URB. L.J. 1075 (1996) (suggesting a human rights model to redress discrimination against noncitizens); Kevin R. Johnson, *Race, the Immigration Laws, and Domestic Race Relations: A "Magic Mirror" into the Heart of Darkness*, 73 IND. L.J. 1111 (1998) (exploring a psychological model to explain hostility towards immigrants); Victor C. Romero, *"Aren't you Latino?" Building Bridges upon Common Misperceptions*, 33 U.C. DAVIS L. REV. 837 (2000) (discussing how minorities can use common misperceptions to strengthen their community); Natsu Taylor Saito, *Alien and Non-Alien Alike: Citizenship, "Foreignness," and Racial Hierarchy in American Law*, 76 OR. L. REV. 261 (1997) (exploring the pervasive presumption that Asian Americans are foreigners).

162. SCOTT PLOUS, THE PSYCHOLOGY OF JUDGMENT AND DECISION MAKING 121–30, 178–80 (1993). I am indebted to Rebecca Hollander-Blumoff for introducing me to these concepts.

163. The most widely cited study of the undocumented population is JEFFREY S. PASSEL, PEW HISPANIC CENTER, ESTIMATES OF THE SIZE AND CHARACTERISTICS OF THE UNDOCUMENTED POPULATION (2005), http://pewhispanic.org/files/reports/44.pdf. Passel estimates that undocumented immigrants constitute approximately 20–30% of the total number of foreign-

thinks the opposite is true.[164] Whether or not that misconception fuels the public preoccupation with illegal immigration, there can be no doubt that in the past twenty years it is the latter which has attracted the bulk of the public's attention. At the federal level, four of the last five[165] major congressional immigration reform efforts have focused on illegal immigration. The Immigration and Control Act of 1986 (IRCA) had two major components—legalization of most of the then existing undocumented immigrants and employer sanctions to deter future illegal immigration.[166] The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), as its name implies, similarly targeted illegal immigration in myriad ways.[167] The REAL ID Act of 2005 dramatically increased the use of state bureaucracies—particularly Departments of Motor Vehicles—to deter illegal immigration.[168] The subject of illegal immigration similarly dominated the immigration reform bills passed by both houses of Congress in 2005 and 2006, particularly the House of Representatives version.[169]

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born residents of the United States. *Id.* at 3. On that assumption, lawfully present immigrants outnumber the undocumented by much more than two to one. The U.S. Department of Homeland Security, Office of Immigration Statistics, estimates that as of January 2005 there were 10.5 million unauthorized immigrants residing in the United States out of a total foreign born population of 27.3 million. MICHAEL HOEFER ET AL., U.S. DEP'T OF HOMELAND SEC., ESTIMATES OF THE UNAUTHORIZED IMMIGRANT POPULATION RESIDING IN THE UNITED STATES: JANUARY 2005, at 6 (2006), http://dhs.gov/xlibrary/assets/statistics/publications/ILL_PE_2005.pdf. The latter figure is surely too low, since the foreign born population had already reached 31.1 million by 2000 and has been increasing steadily. MARC J. PERRY & JASON P. SHACHTER, U.S. CENSUS BUREAU, MIGRATION OF NATIVES AND THE FOREIGN BORN: 1995 TO 2000, at 1 (2003), http://www.census.gov/prod/2003pubs/censr-11.pdf. But even the relatively high ratio reported by DHS would leave the number of lawfully present immigrants greatly in excess of the number of undocumented immigrants. The undocumented proportion of the total foreign-born population has, however, been on the rise. MICHAEL F. FIX ET AL., THE URBAN INSTITUTE, THE INTEGRATION OF IMMIGRANT FAMILIES IN THE UNITED STATES 12–13 (2001), *available at* http://www.urban.org/UploadedPDF/immig_integration.pdf.

164. *See, e.g.*, Butcher & Piehl, *supra* note 158, at 458 n.1 (stating that the public thinks most immigrants come illegally).

165. The lone exception was the Immigration Act of 1990, which liberalized the admission of employment-based immigrants and narrowed some of the older exclusion grounds. Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978.

166. *See* Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (controlling illegal immigration).

167. *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009–546 (reforming multiple aspects of immigration).

168. *See* Real ID Act of 2005, Pub. L. No. 109-13, Stat. 231 (providing guidelines to strengthen national security).

169. Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005, H.R. 4437, 109th Cong. (2005); Comprehensive Immigration Reform Act of 2006, S. 2611, 109th Cong. (2006).

The federal preoccupation with illegal immigration has also driven U.S. asylum policy.[170] Asylum policymakers admittedly must consider not only the humanitarian and human rights objectives of U.S. asylum policy but also the prevention of asylum fraud. The problem is that the obsession with deterring asylum fraud has blocked out all competing policy objectives.[171] Virtually all the recent changes to U.S. asylum law have elevated the prevention of abuse above both the compassionate relief of suffering and the promotion of international human rights.[172]

By way of example, Congress has made it easier for those who adjudicate asylum cases to deny claims on credibility grounds.[173] Like its European counterparts, Congress and the executive branch have also made it steadily harder to gain access to the U.S. asylum determination system. These measures have included filing deadlines, safe third country limitations, an accelerated procedure known as "expedited removal," pre-inspection procedures at foreign airports, interdiction of vessels on the High Seas, and a series of deterrents to seeking asylum—detention, denial of work authorization, criminal prosecution, and penalties on both applicants and their attorneys for filing asylum applications later adjudged to be frivolous.[174]

Perhaps most striking, however, has been the zeal with which state and local governments have plunged into this previously federal domain. The increased use of state and local law enforcement officials and agencies to apprehend, arrest, and detain individuals suspected of being unlawfully present has already been noted.[175]

Beyond that, state and local governments have taken a wide range of measures designed to discourage undocumented immigrants from coming and to encourage those already residing there to leave. Some of those measures parallel federal statutory directives but go well beyond what those federal laws require the states and municipalities to do. Federal law prohibits the knowing

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170. *See* Hernández-Truyol, *supra* note 161, at 1085–86 (criticizing U.S. refugee policy for inadequate attention to human rights).

171. *See* T. Alexander Aleinikoff, *The Tightening Circle of Membership, in* IMMIGRANTS OUT!, *supra* note 161, at 324, 327–30 (Juan F. Perea ed., 1997) (describing the narrowing of immigrants' rights).

172. *See* Berta Esperanza Hernandez-Truyol, *Reconciling Rights in Collision, in* IMMIGRANTS OUT!, *supra* note 161, at 254, 261–62 (Juan F. Perea ed., 1997) (arguing that U.S. immigration laws ignore human rights norms).

173. *See* Real ID Act § 101(a)(3), 119 Stat. at 303 (codified as amended at 8 U.S.C. § 1158(b)(1)(B)(iii)) (setting credibility standards for asylum cases).

174. These strategies are discussed more fully in LEGOMSKY, *supra* note 52, at 1095–1135.

175. *See supra* Part II.E.1 and accompanying text (discussing the interaction between state and federal authorities in immigration enforcement).

employment of unauthorized workers,[176] for example, but no federal law requires states to impose additional penalties on violators. Yet they have done so, as explained below. A federal law due to go into effect in 2008 will prohibit states from giving undocumented immigrants any drivers' licenses that could be used for federal identification purposes, but that law specifically allows states to issue special drivers' licenses so long as they are conspicuously marked as invalid for federal identification.[177] Federal law permits states to make undocumented immigrants eligible for welfare benefits that the 1996 federal welfare reform law does not provide, as long as the state passes the necessary legislation after the 1996 enactment date.[178] Federal law also arguably bars states from classifying undocumented students as in-state residents for purposes of tuition rates at postsecondary institutions,[179] but leading scholars have maintained that the relevant provision is ambiguous at best; nonetheless, the vast majority of states require their undocumented residents to pay the higher out-of-state tuition.[180]

Other recent state and local actions have taken their anti-illegal immigration campaigns into uncharted territory.[181] Texas (early on) and California (more recently) both attempted to bar undocumented children who lived in their states from attending public elementary and secondary schools. Both laws were promptly held unconstitutional.[182] The City of Hazleton,

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176. 8 U.S.C. § 1324a (2000).

177. *See* REAL ID Act, §§ 201(3), 202(a)(1), 202(c)(2)(B), 202(d)(11)(A), 119 Stat. at 312–15 (codified as amended at 49 U.S.C. § 30301 (2000)) (restricting state-issued identification cards).

178. *See* Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, §§ 401(a), 411, 110 Stat. 2105, 2113, 2148 (codified at 42 U.S.C. §§ 601, 611 (2000)) (presenting guidelines for state welfare programs).

179. *See* IIRIRA, Pub. L. No. 104-208, § 505, 110 Stat. 3009–672, (codified at 8 U.S.C. § 1623 (2000)) (limiting undocumented immigrants' eligibility for higher education benefits).

180. *See* Michael A. Olivas, *A Rebuttal to FAIR: States Can Enact Residency Statutes for the Undocumented*, 7 BENDER'S IMMIGR. BULL. 652–53 (2002) (suggesting that states may grant in-state tuition status for undocumented students); Thomas R. Ruge & Angela D. Iza, *Higher Education for Undocumented Students: The Case for Open Admission and In-State Tuition Rates for Students Without Lawful Immigration Status*, 15 IND. INT'L & COMP. L. Rev. 257, 266–67 (2005) ("[Undocumented immigrants] must pay the out-of-state tuition rates that are often three (or more) times the in-state tuition rates.").

181. For a summary of immigration-related state legislative activity in 2006, see National Conference of State Legislatures, 2006 State Legislation Related to Immigration: Enacted, Vetoed, and Pending Gubernatorial Action (July 3, 2006), http://www.ncsl.org/programs/immig/06ImmigEnactedLegis2.htm (on file with the Washington and Lee Law Review).

182. The Supreme Court in *Plyler v. Doe*, 457 U.S. 202, 230 (1982), struck down the Texas law on equal protection grounds. A federal district court enjoined enforcement of the California law, Proposition 187, on grounds of federal preemption. *See* League of United Latin American Citizens v. Wilson, 908 F. Supp. 755, 786–87 (C.D. Cal. 1995) ("No matter how

Pennsylvania drew more recent national attention in July 2006.[183] It passed an ordinance that prohibits the issuance or renewal of a business permit to any entity that "utilize[s] the services or hire[s] any person who is an unlawful worker."[184] Another ordinance requires proof of citizenship for every rental occupant.[185] The Hazelton ordinances have spawned a number of similar ordinances nationwide; mass evictions have begun.[186]

B. Linking Immigration and Crime

Despite clear evidence[187] that immigrants are generally less likely than the native-born to engage in criminal behavior, public opinion polls historically, and today, reveal precisely the opposite perceptions. In poll after poll, the public perceives a positive correlation between immigration and crime.[188] Statements by public figures, especially politicians, often reinforce this perception.[189]

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serious the problem may be, . . . the authority to regulate immigration belongs exclusively to the federal government . . . .").

183. *See* Hazelton, Pa., Illegal Immigration Relief Act Ordinance 2006-18 (Sept. 12, 2006) [hereinafter Hazelton Illegal Immigration Act] (denying business permits and contracts to business entities that hire undocumented immigrants and prohibiting the "harboring" of undocumented immigrants); *see also* Hazelton, Pa., Official English Ordinance 2006-19 (Sept. 12, 2006) (declaring English to be the official language in Hazelton); Hazelton, Pa., Landlord Tenant Ordinance 2006-13 (Aug. 15, 2006) [hereinafter Hazelton Landlord Tenant Act] (establishing a registration program for residential rental property to ensure legal residence).

184. *See* Hazelton Illegal Immigration Act, *supra* note 183, at § 4 (laying out the business permit, contract and grant restrictions dealing with illegal immigrants).

185. *See* Hazelton Landlord Tenant Act, *supra* note 183, at § 7 (laying out the requirements for any rental tenant).

186. *See, e.g.*, Gaiutra Bahadur, *Riverside Bolsters Its Ban on Illegal Immigrants*, PHILA. INQUIRER, Aug. 24, 2006, at B01 (describing the effects of one city's new illegal immigration ordinance); Ellen Barry, *It's 'Get These People Out of Town': As More Communities Consider Measures Aimed at Expelling Illegal Immigrants, One Group Files Suit in Hopes of Stopping Such Laws*, L.A. TIMES, Aug. 16, 2006, at A1 (noting that cities are enacting undocumented immigrant statutes).

187. *See supra* notes 154–59 and accompanying text (citing evidence that immigrants do not commit more crimes than U.S. citizens).

188. *See* Butcher & Piehl, *supra* note 158, at 458 (citing a 1993 poll in which 59% of the respondents associated recent immigrants with crime); *see also* Martinez & Lee, *supra* note 154, at 502–03 (citing a long list of public expressions); *see also* Rumbaut et al., *supra* note 154, at 3 (citing a 2000 poll in which 73% of the respondents associated immigration with crime).

189. *See* Butcher & Piehl, *supra* note 158, at 458 (citing examples of statements by public figures that reinforce the misconception).

Public statements that purport to associate *illegal* immigration with crime have also become common. It is not unusual for state and local laws aimed at reducing illegal immigration to contain language that "finds" a causal connection between illegal immigration and crime. In 1994, that language appeared in Section 1 of California Proposition 187: "The People of California find and declare . . . [t]hat they have suffered and are suffering personal injury and damage caused by the criminal conduct of criminal aliens in this state."[190] The Hazleton, Pennsylvania ordinance similarly says, "The People of the City of Hazleton find and declare . . . [that] [i]llegal immigration leads to higher crime rates . . . ."[191] Again, the statements of public officials, including President Bush, have reinforced this impression.[192] These preambles and speeches cite no evidence to support their "findings." Nor, as observed earlier, have I been able to unearth any such evidence. If the public associates immigration primarily with illegal immigration, and if it believes that the latter leads to higher crime rates, then it is not surprising that the public would associate immigration generally with crime.

C. Linking Immigration and Terrorism

Parallel to the web of perceived relationships between immigration and ordinary garden-variety crime are the perceived links between immigration and terrorism. The preceding subsection suggested that the public appears to link immigration with crime both directly and indirectly—i.e., by associating immigration generally with crime and by associating immigration generally with illegal immigration and then linking the latter to crime. Analogous perceptions have taken root with respect to immigration and terrorism.

For perceptions of direct links between immigration and terrorism, one need go no further than the creation of the Department of Homeland Security (DHS) in 2002.[193] This Department sprang from the ashes of September 11. The Homeland Security Act dissolved the Justice Department's Immigration and Naturalization Service (INS) and redistributed almost all its functions

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190. *See* League of United Latin Am. Citizens v. Wilson, 908 F. Supp. 755, 787–91 (App. A) (C.D. Cal. 1995) (citing the text of Proposition 187).

191. Hazelton Illegal Immigration Act, *supra* note 183, at § 2.

192. *See* Rumbaut et al., *supra* note 154, at 3 (noting that in a national address on May 15, 2006, President Bush declared that "[i]llegal immigration . . . brings crime to our communities").

193. *See* Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (establishing the Department of Homeland Security and laying out the department's functions).

among several new agencies set up within DHS.[194] Perhaps no single development better exemplifies the public association of immigration and terrorism than the transfer of immigration functions to a Department whose defining mission is counter-terrorism. This perceived link is a two-way street. The transfer both reflects and reinforces the public perception that immigration and terrorism are joined at the hip. Moreover, since the Secretary of DHS knows that the Department will be judged first and foremost by its success in fighting terrorism, it would be unnatural to expect its highest priorities to be anything else. The inevitable result is that its immigration work will emphasize enforcement over any competing goals, as elaborated more fully in Part V below.

Apart from re-organizing the bureaucracy, Congress and the executive branch have aimed the vast bulk of their substantive counter-terrorism initiatives at non-citizens generally and immigration in particular. The Homeland Security Act was but one of Congress's direct responses to the September 11 attacks; other anti-terrorism statutes laden with immigration-related provisions included the USA PATRIOT Act of 2001,[195] the Enhanced Border Security and Visa Entry Reform Act of 2002,[196] the Intelligence Reform and Terrorist Prevention Act of 2004,[197] and the REAL ID Act of 2005.[198] These and other congressional and executive branch actions attacked what they perceived as security vulnerabilities in the immigration laws. They did this through a combination of programs that involved detention, intelligence-gathering, expansion of the substantive grounds for removing noncitizens, narrowing the procedural safeguards in immigration proceedings, visa and other overseas policies, border fortification, and controversial profiling practices.[199] All these initiatives reflect perceptions that immigration reform represents the surest path to national security.

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194. *See id.* § 471(a) (abolishing the INS); *see also id.* § 462 (noting that the only major exception was that the former INS responsibility for unaccompanied noncitizen children was transferred to the Office of Refugee Resettlement in the Department of Health and Human Services).

195. *See* USA PATRIOT Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (enacting legislation to deter and punish terrorist acts, and to enhance law enforcement investigatory tools).

196. *See* Enhancing Border Security and Visa Reform Act of 2002, Pub. L. No. 107-173, 116 Stat. 543 (enhancing U.S. border security).

197. *See* Intelligence Reform and Terrorist Prevention Act of 2004, Pub. L. No. 108-458, 118 Stat. 3638 (reforming the intelligence community).

198. *See* REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, 119 Stat. 231 (2005) (prescribing identification document security standards and credibility standards for asylum proceedings).

199. *See* LEGOMSKY, *supra* note 52, at 843–914 (laying out the details of the programs).

Mark Krikorian, the executive director of America's most powerful anti-immigration lobbying and research organization, the Center for Immigration Studies, makes explicit his view that immigration control is "central" to U.S. counter-terrorism efforts:

> The reason is elementary: no matter the weapon or delivery system—hijacked airliners, shipping containers, suitcase nukes, anthrax spores—operatives are required to carry out the attacks. Those operatives have to enter and work in the United States . . . . Thus keeping the terrorists out or apprehending them after they get in is indispensable to victory.[200]

He adds, "[s]ince the terrorists are themselves the weapons, immigration control is to asymmetric warfare what missile defense is to strategic warfare."[201]

As with the earlier discussion of immigration and ordinary crime, there are also indirect perceived links between immigration and terrorism. These entail associating legal immigration with illegal immigration and then associating the latter with terrorism. An example of the focus on illegal immigration as a priority in fighting terrorism is the same piece by Krikorian. He argues that combating illegal immigration would go a long way toward reducing the threat of terrorism.[202]

It is hard for immigrant advocates to win. Some critics of immigration will invariably observe that most of the September 11 hijackers were in perfectly lawful immigration status, the implication being that U.S. immigration criteria are too lax. Others will observe that several had violated the immigration laws, the implication being that the chief problem is enforcement.[203] Together, those who complied with the immigration laws and those who violated them comprise the universe of all noncitizens in the United States. It seems, therefore, that *any* set of facts about the immigration status of the September 11 perpetrators will be marshaled in an attempt to demonstrate that the real culprit is immigration.[204]

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200. Mark Krikorian, *Keeping Terror Out: Immigration Policy and Asymmetric Warfare*, THE NAT'L INTEREST 77, 78 (Spring 2004).

201. *Id.* at 80.

202. *See id.* (arguing that because of the difficulties in letting in "good" immigration violators but keeping out the "bad" ones, across-the-board immigration enforcement will reduce terrorism).

203. *See id.* at 83 ("Of the 48 Al-Qaeda operatives, nearly half were either illegal aliens at the time of their crimes or had violated immigration laws at some point prior to their terrorist acts."). However, Krikorian could as easily have observed that more than half had complied with the immigration laws and that therefore the major problem lies in our legal immigration rules.

204. I recognize that the two arguments are not necessarily in conflict. Some might believe that the immigration laws are both too permissive and too loosely enforced. The point here is

IV. Rejecting the Criminal Adjudication Model

The preceding Parts establish and seek to explain the steady incorporation of the criminal enforcement model into modern immigration law. As this Part shows, adjudication has been a different story. Here the civil regulatory model has imbedded itself firmly. The discussion below will highlight the courts' unwavering depiction of deportation as "civil" and not punitive.

Subpart A will describe the courts' embrace of the civil regulatory model in immigration adjudication and evaluate the theory that underlies it. Subpart B will then explore three different arenas in which these events have had concrete consequences. In one arena, non-citizens in deportation proceedings have asserted various constitutional safeguards that hinge on the classification of a sanction as punishment. In a second setting, non-citizen criminal defendants have sought to withdraw guilty pleas on the ground that they did not know the pleas could lead to deportation. The third context, I argue, has been the erosion of the decisional independence that adjudicators in deportation cases once brought to their work.

A. Deportation is Not Punishment

If there has been any constant in U.S. immigration law, it is the insistence of the courts that deportation is not punishment. From the Supreme Court's 1893 landmark decision in *Fong Yue Ting v. United States*[205] through the modern era, no court has ever deviated from this principle.[206] As discussed

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simply that one cannot prove a link between immigration and terrorism just by observing that each of the September 11 terrorists either did or did not violate the immigration laws.

205. *See* Fong Yue Ting v. United States, 149 U.S. 698, 730 (1893) (asserting that because deportation was not criminal punishment, the due process challenge would "therefore" fail). The word "therefore," whether or not accurate in 1893, would certainly be inapt today. A consequence need not be "punishment" for due process limitations to apply. *See* Mathews v. Eldridge, 424 U.S. 319, 321 (1976) (noting that due process requirements are not limited to situations involving the deprivation of vital necessities).

206. *See, e.g.*, Reno v. American-Arab Anti-Discrimination Comm., 525 U.S. 471, 491 (1999) ("Even when deportation is sought because of some act the alien has committed, in principle the alien is not being punished for that act . . . but is merely being held to the terms under which he was admitted."); INS v. Lopez-Mendoza, 468 U.S. 1032, 1038 (1984) (concluding that deportation is not punishment but rather is a refusal by the government to harbor persons it does not want); Galvan v. Press, 347 U.S. 522, 531 (1954) (refusing to break from precedent regarding the theory of deportation); Bugajewitz v. Adams, 228 U.S. 585, 591 (1913) ("A deportation proceeding is purely a civil action to determine eligibility to remain in this country, not to punish unlawful entry."). *But see* Lieggi v. INS, 389 F. Supp. 12, 21 (N.D. Ill. 1975) (holding that deportation can sometimes be punishment), *rev'd*, 529 F.2d 530 (7th Cir. 1976).

below, a broad range of legal consequences have flowed from the characterization of deportation as civil rather than punitive.

Are the courts right? Some exceptionally weak arguments have been made on both sides of this debate. To conclude that deportation is not punishment, courts have frequently proceeded formalistically, content simply to label deportation "civil" or "not criminal."[207] By this the courts presumably mean that Congress has assigned the task of adjudicating deportation cases to civil authorities rather than to the criminal justice system. But that rationale is circular. It does not help answer whether deportation is sufficiently punitive in nature that Congress should have made it part of the criminal justice process in the first place.

Similarly, stare decisis has played a large role in the proliferating uses of the civil/criminal distinction to reject constitutional rights in deportation cases.[208] The now prolific case law dismissing deportation as civil rather than criminal or otherwise punitive is long on citation of precedent and short on independent reasoning.[209] This snowballing effect is described elsewhere.[210]

To be fair, one argument frequently invoked to classify deportation as punishment seems equally deficient. That argument rests solely on the potential severity of the consequences and generally emphasizes the broken ties and all the treasures that the deported individual leaves behind. The argument is typically

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207. *See* Tupacyupanqui-Marin v. INS, 447 F.2d 603, 606 (7th Cir. 1971) (concluding that the petitioner's reliance on cases granting a right to appointed counsel was misplaced because deportation is not a criminal proceeding); *see also* Murgia-Melendrez v. INS, 407 F.2d 207, 209 (9th Cir. 1969) (dismissing the petitioner's first assignment of error that he should have received instructions that counsel would be provided at the government's expense if necessary, because a deportation proceeding is not a criminal prosecution); Nason v. INS, 370 F.2d 865, 868 (2d Cir. 1967) ("[A] deportation proceeding has uniformly been held to be civil and not criminal in character.") (citations omitted); Ah Chiu Pang v. INS, 368 F.2d 637, 639 (3d Cir. 1966) (refusing to extend to deportation proceedings the same immunities accorded to defendants in criminal cases). *But cf.* Aguilera-Enriquez v. INS, 516 F.2d 565, 572 (6th Cir. 1975) (DeMascio, J., dissenting) (criticizing use of the "civil"/ "criminal" distinction and concluding that "deportation is punishment, plain and simple").

208. *See* STEPHEN H. LEGOMSKY, IMMIGRATION AND THE JUDICIARY: LAW AND POLITICS IN BRITAIN AND AMERICA 208 (1987) (noting that every court ruling on the question of whether deportation is a form of punishment has held that it is not).

209. *See id.* ("As with other aspects of the plenary power doctrine, that conclusion has been reached mechanically, with little reasoned analysis.").

210. *See id.* at 208–09 (citing cases and describing the effects of cases upholding deportation as non-punitive).

expressed with unusual eloquence, often by legendary national leaders[211] or judges.[212]

To be sure, the potential consequences of deportation are severe. They include not only all the obvious traumas associated with forcible separation from family, friends, and community, loss of property, and loss of a livelihood, but also a bar on returning for at least ten years and sometimes forever;[213] the loss of social security benefits for which the deportee has paid and on which he or she might depend;[214] and the emotional and financial losses for U.S. citizens and other family members who are left behind. But the severity of a consequence does not make it punishment. Any number of devastating losses can result from any number of occurrences—car accidents, ill health, even intentional homicide—without the consequence being termed punishment.

The most compelling arguments for classifying deportation as punishment, in my view, are either historical or functional. From ancient Rome to eighteenth and nineteenth century Britain, France, and Russia, common forms of criminal punishment included exile, banishment, and transportation (particularly by Britain to the American and Australian colonies).[215]

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211. *See, e.g.*, James Madison, *Madison's Report on the Virginia Resolutions*, 4 ELLIOTT'S DEBATES 546, 555 (1800), *available at* http://memory.loc.gov/ammem/amlaw/lawhome.html ("[I]f a banishment of this sort be not a punishment, . . . it will be difficult to imagine a doom to which the name can be applied.") (on file with the Washington and Lee Law Review).

212. *Accord* Lieggi v. INS, 389 F. Supp. 12, 17 (N.D. Ill. 1975) ("[S]tands to lose his residence, livelihood, and most importantly, his family . . . ."), *rev'd*, No. 75-1393 (7th Cir. Jan. 27, 1976); *see, e.g.*, Galvan v. Press, 347 U.S. 522, 533 (1954) (Black, J., dissenting) ("[L]oses his job, his friends, his home, and maybe even his children, who must choose between their father and their native country . . . ."); Ng Fung Ho v. White, 259 U.S. 276, 284 (1922) (Brandeis, J., dissenting) ("[L]oss of both property and life, or of all that makes life worth living . . . ."); Fong Yue Ting v. United States, 149 U.S. 698, 740 (1893) (Brewer, J., dissenting) ("[F]orcibly taken away from home and family and friends and business and property, and sent across the ocean to a distant land . . . ."); DiPasquale v. Karnuth, 158 F.2d 878, 879 (2d Cir. 1947) ("[N]othing can be more disingenuous than to say that deportation in these circumstances is not punishment . . . ."); *cf. Galvan*, 347 U.S. at 531 (acknowledging that the "intrinsic consequences of deportation are so close to punishment for crime" but nonetheless concluding deportation is not technically punishment).

213. *See* 8 U.S.C. § 1182(a)(9)(A)(ii) (2006) (barring deported noncitizens from readmission to the United States for a period of ten years or more, depending on the circumstances of their deportation).

214. *See* 42 U.S.C. § 402(n) (describing the termination of benefits); Flemming v. Nestor, 363 U.S. 603, 612 (1960) (holding that termination of social security benefits to deported aliens does not offend due process).

215. *See generally* 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 (1999).

A functional analysis is also possible. 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.[216] On more than one occasion, the Supreme Court has supported its conclusion that deportation is not punishment with nothing more than the mantra that the purpose of deportation is to rid the country of undesirables.[217] The Supreme Court's reasoning does not adequately distinguish criminal punishment, as one of the leading theories of most forms of criminal punishment is incapacitation—the isolation of the undesirable offender from society.[218] Other theories of criminal punishment include both specific and general deterrence—theories that, again, could as easily be invoked in defense of deportation.[219] The retribution rationale for criminal punishment admittedly has less universal application to deportation, but even retribution might well come into play when deportation is predicated upon the commission of an independent wrong, rather than the remedying of an immigration status violation.[220]

For the distinction between deportations based on immigration violations and those based on post-entry criminal conduct, we are indebted to Daniel Kanstroom, who argues that the latter deportations should be viewed as forms of punishment and treated accordingly.[221] I would add that a strong, albeit less powerful, case could be made even for those deportations that are predicated upon unlawful entry or violation of the conditions imposed at the time of entry. The elements of retribution, concededly, are less likely to be present, but the same deterrence and

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216. *Accord* Demleitner, *supra* note 1, at 1068–71 (identifying some of the subtle limitations on the benefits of deportation and some of the external and internal costs); *see* Legomsky, *supra* note 1, at 121–22 (discussing similarities between deportation and punishment in theory, justification, and practical effect); Kanstroom, *Deportation, Social Control, and Punishment*, *supra* note 1, at 1894 (same); *see also* 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, 337–44 (2000) (arguing that deportations on certain grounds should be regarded as punishment within the meaning of certain constitutional provisions).

217. *See, e.g.*, Mahler v. Eby, 264 U.S. 32, 39 (1924) ("[R]id the country of persons [whose] continued presence here would not make for the safety or welfare of society."); Bugajewitz v. Adams, 228 U.S. 585, 591 (1913) ("[R]efusal by the government to harbor persons whom it does not want.").

218. *See* Legomsky, *supra* note 1, at 125–27 (criticizing the Supreme Court's attempted distinction between deportation and punishment on the grounds that the Court fails to identify a government purpose which applies to one action and not the other).

219. *See id.* at 123–24 (applying author's criticism of the Supreme Court's reasoning, *supra* note 217–18 and accompanying text, to the theory of deterrence).

220. *See id.* at 121–23 (applying author's criticism of the Supreme Court's reasoning, *supra* note 217–18 and accompanying text, to the theory of retributive punishment).

221. *See* Kanstroom, *Deportation, Social Control, and Punishment*, *supra* note 1, at 1898 (arguing that post-conviction deportations are primarily punitive).

incapacitation arguments that surface in criminal cases might be at work here. Congress might well feel that the threat of deportation, with all its long-term effects, deters unlawful entries or violations of the terms of one's admittance. Or Congress might feel that, because the immigration admission criteria are designed to screen out those whose presence would not be beneficial, and because individuals who violate U.S. immigration laws are likely to do so because they do not meet the criteria for legal entry, the removal of immigration violators effectively isolates the American public from whatever harms the admission criteria were meant to prevent—i.e., incapacitation.

B. What's in a Name?

As courts and commentators have expended considerable energy discussing whether deportation can be a form of punishment,[222] the natural question is why it matters. This subsection identifies three contexts in which the rejection of the criminal punishment label in the adjudication of deportation cases has had profound effects on both the administration of the deportation regime and the outcomes of individual cases.

First and most directly, certain constitutional rights operate only in criminal proceedings; the courts have explicitly invoked the civil regulatory model of deportation to hold those rights inapplicable to deportation. The list of rejected rights includes double jeopardy,[223] *Miranda* warnings,[224] the privilege against self-incrimination,[225] trial by jury,[226] restrictions on bills of attainder,[227] the prohibition

222. *See supra* note 212 and accompanying text (describing the judicial controversy over whether deportation is punishment).

223. *See* Oliver v. INS, 517 F.2d 426, 428 (2d Cir. 1975) (refusing to apply double jeopardy to the civil deportation proceeding).

224. *See* Bustos-Torres v. INS, 898 F.2d 1053, 1056–57 (5th Cir. 1990) (refusing to apply the Federal Rules of Evidence to a deportation hearing).

225. The Fifth Amendment privilege against self-incrimination may be invoked in any proceeding, including a deportation hearing. The person must be able to assert, however, that the statement would tend to expose him or her to criminal culpability; it is not enough to assert that the statement would facilitate deportation, since the latter, being civil, would not constitute "incrimination." *See generally* Daniel Kanstroom, *Hello, Darkness: Involuntary Testimony and Silence as Evidence in Deportation Proceedings*, 4 GEO. IMMIGR. L.J. 599 (1990) (discussing the lack of ordinary constitutional and evidentiary protection in deportation hearings).

226. *See* Fong Yue Ting v. United States, 149 U.S. 698, 730 (1893) (concluding that the nonpunitive nature of deportation obviates the need for constitutional safeguards in the deportation process).

227. *See* Linnas v. INS, 790 F.2d 1024, 1029–30 (2d Cir. 1986) (upholding the mandatory deportation of Nazi war criminals because deportation does not fall into the category of legislative punishment, a prerequisite for finding a bill of attainder).

of ex post facto laws,[228] the Sixth Amendment right to counsel,[229] and the ban on cruel and unusual punishment.[230] Certain other constitutional safeguards, such as the exclusionary rule and the requirement of proof beyond a reasonable doubt, have been extended to a handful of civil contexts, but they too have been held inapplicable to deportation proceedings.[231]

The assumption that deportation is not punishment has influenced outcomes in a second context as well. Noncitizen criminal defendants have often moved to withdraw their guilty pleas on the ground that they were not "knowing"; the trial judge had not informed the defendant that the resulting conviction could lead to deportation.[232] Absent a statutory requirement to the contrary, the courts have consistently upheld the denials of those motions, reasoning that deportation is merely a "collateral" consequence of the plea, not a "direct" consequence such as the length of the sentence or other components of the criminal punishment.[233] The unstated assumption is that deportation—

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228. *See* Harisiades v. Shaughnessy, 342 U.S. 580, 593–96 (1952) (upholding legislation making past Communist Party members deportable because, among other reasons, the ex post facto clause forbids only retroactive criminal punishment, not deportation).

229. *See* Vides-Vides v. INS, 783 F.2d 1463, 1469–70 (9th Cir. 1986) (finding that there is no Sixth Amendment right to counsel at government expense in deportation proceedings); United States v. Gasca-Kraft, 522 F.2d 149, 152 (9th Cir. 1975) (same); Burquez v. INS, 513 F.2d 751, 755 (10th Cir. 1975) (same). *But see* Aguilera-Enriquez v. INS, 516 F.2d 565, 572–74 (6th Cir. 1975) (DeMascio, D.J., dissenting) (discussing the possibility that Fifth Amendment due process might require the appointment of counsel to an indigent noncitizen in a particular deportation case if fairness so dictates).

230. *See* Fong Yue Ting v. United States, 149 U.S. 698, 730 (1893) (holding that the Eighth Amendment does not restrict deportation because it is not punishment); Briseno v. INS, 192 F.3d 1320, 1323 (9th Cir. 1999) (same); Oliver v. INS, 517 F.2d 426, 428 (2d Cir. 1975) (same).

231. As for the exclusionary rule, see INS v. Lopez-Mendoza, 468 U.S. 1032 (1984). The Supreme Court has held that due process requires proof beyond a reasonable doubt in at least one technically civil context, *In re Winship*, 397 U.S. 358 (1970) (juvenile delinquency proceedings), but has rejected such a requirement in most other civil contexts, including specifically deportation cases, *Woodby v. INS*, 385 U.S. 276 (1966).

232. Some states have now enacted legislation requiring a trial judge to advise of the possibility of deportation before accepting a guilty plea. *See* Attila Bogdan, *Guilty Pleas by Non-Citizens in Illinois: Immigration Consequences Reconsidered*, 53 DEPAUL L. REV. 19, 49–50 (2003) (discussing how mandatory notice statutes are evolving); John J. Francis, *Failure to Advise Non-Citizens of Immigration Consequences of Criminal Convictions: Should This Be Grounds to Withdraw a Guilty Plea?*, 36 MICH. J. L. REFORM 691, 694 (2003) (discussing the general problem of "knowing" pleas and listing state statutes requiring that defendants be advised of the potential for deportation).

233. The leading case, and one of the more dramatic, is *United States v. Parrino*, 212 F.2d 919 (2d Cir. 1954). There the criminal defendant, a long-term lawful permanent resident of the United States, asked his criminal defense attorney—a former Commissioner of Immigration—whether a guilty plea could lead to deportation. *Id.* at 920–21. Although the law was clear that the particular criminal conviction was a ground for deportation, the attorney replied that

even when imposed solely because of the person's commission of a crime—is not part of the punishment.

Because the courts have uniformly rejected any nonstatutory duty of the trial judge to advise of possible deportation consequences, defendants in the more recent cases have generally argued ineffective assistance of counsel. The theory is that it was the job of the criminal defense attorney to provide the necessary advice. Absent affirmative "misadvice" by the attorney, most courts deny that claim as well, again on the ground that deportation is merely a "collateral" consequence rather than a part of the criminal sentence or other "direct" consequence.[234]

A third context in which the civil regulatory model of deportation law has had far-reaching effects is the adjudication machinery. Neither the Constitution nor any other law requires trials of deportation cases before independent Article III courts.[235] Today, the original hearing is held before an "immigration judge," under the auspices of the Justice Department's Executive Office for Immigration Review (EOIR).[236] Either the noncitizen or the government may appeal the immigration judge's decision, as of right, to the Board of Immigration Appeals (BIA), also part of EOIR.[237] Certain deportation decisions, but not all, are reviewable by the courts of appeals upon petition by the noncitizen.[238]

In the past few years this two-tiered system of administrative adjudication subject to judicial review has come under fierce attack. I have recently argued elsewhere that a series of steps taken by the Attorney General in 2002 and 2003

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deportation would not result. *Id.* at 921. On that assurance, the defendant pleaded guilty. *Id.* He was later ordered deported on the basis of the resulting conviction. *Id.* The court denied his motion to withdraw his guilty plea, reasoning that "the claimed surprise was not of the severity of the sentence directly flowing from the judgment but a collateral consequence thereof, namely deportability." *Id. Accord* Steinsvik v. Vinzant, 640 F.2d 949, 956 (9th Cir. 1981) (stating that Steinsvik "was not prejudiced even if he were not fully aware of the potential sentence prior to the entry of his plea"); United States v. Santelises, 476 F.2d 787, 789–90, 790 n.4 (2d Cir. 1973) (referencing Second Circuit precedent "refusing to allow a defendant who was unaware that a plea of guilty would subject him to deportation, to withdraw his plea even *prior* to sentencing").

234. For numerous examples and a critique of the rule, see generally Rob A. Justman, *The Effects of AEDPA and IIRIRA on Ineffective Assistance of Counsel Claims for Failure to Advise Alien Defendants of Deportation Consequences of Pleading Guilty to an "Aggravated Felony,"* 2004 UTAH L. REV. 701.

235. *See* Fong Yue Ting v. United States, 149 U.S. 698, 730 (1893) ("[T]he provisions of the constitution, securing the right to trial by jury, and prohibiting unreasonable searches and seizures and cruel and unusual punishment have no application [to deportation proceedings].").

236. 8 U.S.C. § 1229a(a)(1) (2000); 8 C.F.R. § 1001.1(l) (2006).

237. 8 C.F.R. §§ 1003.0(a), 1003.1(b)(3) (2006).

238. 8 U.S.C. § 1252 (2000).

have eroded the job security, and therefore the decisional independence, of immigration judges and BIA members alike.[239] Further, over the past ten years, Congress has steadily added more exceptions to the courts' power to review those administrative orders once they are final.[240] The whole, I argued, is greater than the sum of its parts. The combination of draining the decisional independence from the administrative phase of the deportation process and stripping the federal courts of their power to review important categories of deportation orders means there now exist broad categories of deportation cases in which the entire process is bereft of decisional independence.[241] The point to add here is that all of this would be unthinkable in criminal cases. On the assumption that this is so, then the legitimacy of dispensing with independent adjudicators in deportation cases must hinge, again, on the characterization of deportation as a civil sanction rather than a form of criminal punishment.

V. So What?

The preceding subparts expose a sharp contrast between the steady importation of the criminal enforcement model into immigration law and the equally steady rejection of the procedural safeguards that constitute the criminal adjudication model. To be clear, both halves of this dichotomy generate public benefits. Law enforcement is a vital responsibility of any government. Time-tested enforcement strategies drawn from the criminal justice system can enhance those efforts. Conversely, the civil regulatory stamp that both the courts and the political branches have imprinted on deportation proceedings serves useful functions as well. Not all the procedural safeguards required for criminal cases are necessary or even desirable in deportation cases.

But both components of what I have called asymmetric incorporation have costs as well, and the interaction of the two components exacerbates those costs. This Part starts with the particularized costs that attend some of the specific incorporated features. These costs add up to the more general, less tangible harms described next. This Part concludes with a plea for making the civil regulatory model the foundation for both the enforcement and the adjudication components of modern immigration law.

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239. *See generally* Stephen H. Legomsky, *Deportation and the War on Independence*, 91 CORNELL L. REV. 369, 371–79 (2006).

240. *See id.* at 380–84 (describing the impact of 8 U.S.C. § 1252(a)(2)).

241. *See id.* at 384–85 (discussing the demise of decisional independence in deportation proceedings).

A. The Specific Costs of Asymmetric Incorporation

Parts II.A and II.B of this Article identified two of the five ports through which modern immigration law has increasingly incorporated the criminal enforcement model. Part II.A pointed out that far more immigration violations have been made federal criminal offenses, that the sentences for the existing immigration-related offenses have steadily increased, and that the number of federal criminal prosecutions of immigration violators has skyrocketed.[242] Part II.B. described the converse—a wider range of federal and state criminal offenses that now give rise to deportation and far greater numbers of such deportation cases.[243]

There is nothing inherently wrong with imposing both criminal and civil sanctions for the same misconduct; it happens in numerous contexts.[244] The combination might well be an effective way to enhance the particular legislation's deterrence and incapacitation objectives. The question in all these contexts is whether the dual consequences are reasonably proportionate to the misconduct. In the case of deportation based on a criminal conviction, at least two arguments might suggest that they are not.

The more radical argument would be that deportation is *always* excessive once the person has served his or her criminal sentence. When the legislature prescribed a minimum or maximum sentence for a given crime, it had to make a judgment about how much retribution the misconduct warrants, how large a deterrent is necessary, and for how long the person will need to be incapacitated before the danger is likely to have subsided to an acceptable level. Because the vast majority of the offenders are bound to be U.S. citizens[245] who cannot be deported, the sentence the legislature chose should be assumed to have reflected its determination that the criminal sentence alone imposes an optimal degree of retribution, deterrence, and incapacitation for the particular offense. If that is so, then any additional sanction is by definition excessive. One might reply that deportation of criminal offenders is aimed not at any of those objectives, but only at ridding the country of those noncitizens whose presence is deemed undesirable. But that rationale is simply a version of

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242. *See supra* Part II.A (discussing the shift from civil removal proceedings to criminal sanctions).

243. *See supra* Part II.B (discussing the trend toward deportation upon a criminal conviction).

244. For example, tort liability for conduct already punished as a crime, tax fraud, securities fraud, or welfare fraud.

245. *See supra* notes 154–59 and accompanying text (discussing studies of immigration's impact on crime rates).

incapacitation—isolating the offender from society—and the level of incapacitation already reflected in the criminal sentence should, as noted, be what the legislature regarded as sufficient.

Acceptance of that argument would bar all deportations on grounds of criminal convictions—a most unlikely outcome. A more realistic argument, therefore, is that at least some of the crime-related deportations are grossly out of proportion to the underlying misconduct. Earlier discussion has already recounted the potential consequences of deportation for the noncitizen; depending on one's personal circumstances, the severity level can range from minor annoyance to the loss "of all that makes life worth living."[246] Earlier discussion has also described the stunning range of crimes to which the label "aggravated felony" has now been appended, as well as the sweeping effects of categorizing a crime as an aggravated felony.[247] In a number of troubling cases, long-term lawful permanent residents have been ordered deported because of criminal convictions that virtually all observers would regard as trivial violations.[248]

To the extent the deportation of a particular criminal offender is deserved, one cannot describe the deportation as a net social harm. But in the growing number of cases in which the severity of the deportation sanction exceeds what is appropriate for the particular misconduct, the excess represents a cost, or harm, of over-reliance on the criminal enforcement model.

Other harms have resulted from another offshoot of the criminal enforcement model, the extensive use of preventive detention in the context of deportation proceedings.[249] Detention, like deportation, has costs. They include all the obvious human costs to the detainee—the deprivation of liberty; the inability to work, attend school, or socialize with family and friends; and the obstacles to assistance of counsel and to the preparation of one's legal case.[250] Some additional costs are borne by others—one's family, financial dependents,

246. Ng Fung Ho v. White, 259 U.S. 276, 284 (1922) (Brandeis, J., dissenting); *see supra* notes 211–14 and accompanying text (describing the potential severity of deportation or banishment).

247. *See supra* Part II.B (discussing the trend toward deportation upon a criminal conviction).

248. *See supra* note 76 (citing cases of trivial violations leading to deportation proceedings); *see also* Hem v. Maurer, 458 F.3d 1185, 1185 (10th Cir. 2006) (reviewing a removal order against a paraplegic Cambodian native convicted of assaulting a police officer).

249. *See supra* Part II.D.1 (discussing the implications of preventive detention policies).

250. *See* Legomsky, *supra* note 97, at 541–42 (describing "private sector" costs of detention).

and community.[251] Still other costs are borne by the public at large, for detention is not cheap.[252]

Again, when the benefits of detention justify the costs, detention cannot be claimed as a net social harm. As noted elsewhere, however, the government has been making heavily increased use of mandatory detention—i.e., automatic preventive detention of predesignated categories of noncitizens awaiting deportation proceedings.[253] Some members of the designated classes will inevitably be dangerous or likely to abscond; others will not. Without individualized assessments of the need to detain, therefore, the latter will be detained unnecessarily. To that extent, the substantial private and public costs of preventive detention are not offset by any accompanying benefits and thus represent an additional social cost. When the detention is for an indefinite duration, as it often now is, that cost is magnified.[254] And when the detainees are asylum applicants seeking refuge from the trauma of persecution, the human cost becomes more considerable still.[255]

Part II.D.2 above described the growing use of plea-bargaining arrangements in immigration law.[256] Nora Demleitner, while acknowledging the potential benefits these arrangements can bring, has also identified a number of unintended but concrete harms[257] that need not be rehashed here. Of greater concern, given the vulnerabilities of the persons involved, is the recent use of plea-bargaining in asylum cases; the results can be highly unnerving.[258]

Previous discussion also described the rapidly growing federal reliance on state and local police to assist in enforcing immigration laws.[259] There are clearly some enforcement advantages to inter-sovereign cooperation in law enforcement, but even one of its most ardent supporters acknowledges countervailing costs. These include discouraging immigrants from cooperating with local police, diverting police resources from other enforcement functions, providing inadequate training and expertise of state and local police in

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251. *Id.*

252. *See id.* at 542 (outlining "public sector" costs of detention).

253. *See id.* at 543–48 (discussing policy implications of mandatory detention policies).

254. *See supra* Part II.D.1 (discussing the implications of preventive detention policies).

255. *Id.*

256. *See supra* Part II.D.2 (discussing a form of plea bargaining by which minor criminals may not face deportation if they assist the government in catching major criminals).

257. *See generally* Demleitner, *supra* note 1, at 1084–93.

258. *See supra* Part II.D.2 (discussing the consequences of criminal-style plea bargaining in immigration cases).

259. *See supra* Part II.E.1 (discussing the "inherent authority" doctrine).

immigration law, and increasing the likelihood of racial or other inappropriate profiling.[260]

Dangers also reside in the expanded role of federal sentencing judges in deportation determinations. While entrusting those determinations to federal judges creates no inherent disadvantages for the noncitizen criminal defendant, the procedural particulars have been unidirectional; they have left noncitizen defendants with fewer procedural advantages than their prosecutorial adversaries.[261]

This Article earlier described the massive transfer of immigration functions from the Department of Justice to the new Department of Homeland Security in 2002.[262] That transfer, it was suggested, both reflects and reinforces public perceptions of a link between immigration and terrorism. In addition, one can safely assume that the leadership of that Department will be publicly judged, above all else, by its success in combating terrorism—not by its success in facilitating the immigration process for those who qualify. It would be unnatural to expect Departmental policies and priorities not to reflect those political realities. Under those circumstances, the potential harm from relative inattention to serving immigrants is self-evident.

Apart from these potentially adverse consequences of importing specific criminal enforcement strategies into immigration law, the continuing rejection of the criminal adjudication model in deportation cases has caused problems of its own. They were explored in Part IV above and stem from three sources. The consistent refusal of the courts to classify deportation as punishment has rendered a catalog of constitutional rights inoperative in deportation cases.[263] The labeling of deportation as a merely "collateral" consequence of a guilty plea—rather than a "direct" consequence such as the criminal sentence itself—has prevented many a noncitizen defendant from withdrawing the guilty plea on which deportation eventually rested.[264] And the measures taken by the

260. *See* Kobach, *supra* note 136, at 182 n.13 (summarizing articulated concerns over states' inherent authority to make immigration arrests). As for the statutory and constitutional permissibility of using state and local police to enforce federal immigration laws, see generally Huyen Pham, *The Inherent Flaws in the Inherent Authority Position: Why Inviting Local Enforcement of the Immigration Laws Violates the Constitution*, 31 FLA. ST. UNIV. L. REV. 965 (2004). *See also* Kanstroom, *Criminalizing the Undocumented*, *supra* note 1, at 663–69 (discussing the immigration laws' implications for state and local law enforcement).

261. *See supra* Part II.E.2 (summarizing roles of federal sentencing judges in deportation cases).

262. *See supra* Part III.C (discussing links between immigration and terrorism).

263. *See supra* notes 223–31 and accompanying text (providing a list of rejected rights).

264. *See supra* notes 232–34 and accompanying text (explaining courts' treatment of this issue).

executive branch in eroding the decisional independence of the officials who adjudicate deportation cases, combined with Congress's steady narrowing of the availability of judicial review, cause analogous problems that would not have been possible under a criminal adjudication model.[265] As explained in the next subpart, it does not follow that the civil regulatory model of deportation adjudication should be jettisoned; reforms are desirable, but I argue there that those reforms are possible even within a civil regulatory construct.

B. The More General Harms

The foregoing are examples of specific harms actually or potentially arising from what I have called the asymmetric incorporation of criminal justice norms into immigration law. From these specific concerns one can distill some broader and more worrisome patterns.

First, immigration policy is about more than enforcement. At the macro level, we should be devoting as much attention to deciding whom we want to welcome and how best to facilitate their admission and their subsequent integration as we do to deciding whom we want to exclude or deport and how best to enforce their removal. And on the issues of whom to admit and how best to do it, there is no shortage of sometimes competing policy objectives. Positive goals such as family reunification, economic growth, building a younger workforce, meeting the labor needs of employers and industries, protecting refugees, fostering both cultural diversity and successful integration, and promoting healthy foreign relations sometimes compete with such other goals as protecting the jobs and wages of domestic workers, population control and environmental protection, public health and safety, national security, national sovereignty and border integrity, and adherence to the rule of law. When the national preoccupation with enforcement reaches the extreme that this Article has suggested it has, a full and robust balancing of this broad range of objectives becomes impossible. The consequence, inevitably, is an unhealthy skewing of both the thought process and the actual resource allocation on which a more balanced set of policy results and the overall national interest depend.

Second, the asymmetric importation of criminal justice norms into immigration law prevents proportionate treatment at the micro level. The problems are ones of both substantive proportion and procedural fairness. Substantively, the narrow focus on enforcement leads to penalties that are often

265. *See supra* notes 235–41 and accompanying text (reviewing this problem).

cruelly excessive in relation to the transgressions. The relentless expansions of the list of crimes that render even long-term lawfully admitted permanent residents deportable, coupled with the narrowing of the grounds on which compassionate discretionary relief can be dispensed in deserving cases, as well as the other developments described in this Article, mean that the most trivial misstep can result in devastating loss with no possibility of discretionary relief.

Procedurally, the combination of harsh penalties borrowed from the criminal enforcement model and rejection of the procedural safeguards embodied in the criminal adjudication model leaves a disturbing imbalance. When the personal stakes are high, the risk of error should be kept correspondingly low. Asymmetric incorporation has given immigration law precisely the opposite.

Finally, asymmetric incorporation is a breeding ground for inaccurate and destructive stereotypes. As elaborated more fully in Part III of this Article, the public erroneously believes both that most immigration to the United States is illegal and that immigrants generally are more prone to crime than the native-born.[266] Apart from whatever influence those stereotypes have had in the formulation of federal immigration policy in such areas as admission, expulsion, and asylum, it seems clear that the stereotypes have helped fuel an avalanche of impulsive and uninformed state and local forays into immigration policy.

C. Restoring the Civil Regulatory Model

Harms have resulted from combining the harsh criminal-like penalties and enforcement methods of the criminal justice model with the less exacting procedural safeguards of the civil regulatory model. The converse would be an immigration system that de-emphasizes criminal enforcement but embodies the procedural safeguards of criminal adjudication. Such a system would not be inherently contradictory. When the consequences of removal are severe—no matter how thoroughly deserved in a particular case—the risk of error assumes greater importance and procedural safeguards thereby become more vital. Thus, a case could certainly be made for precisely the opposite of what we have today—i.e., rejecting the criminal enforcement model while incorporating the procedures associated with criminal adjudication.

But I do not argue here for such a system. My view is that the civil regulatory model should be the guiding star of immigration law with respect to

266. *See supra* Part III (describing how the perception of immigrants as criminals influences current trends toward criminalization of illegal immigration).

both enforcement and adjudication. With respect to enforcement, the severe results of importing the criminal justice model into immigration law have been amply examined in Part II of this Article and synthesized in the present section. With respect to adjudication, the question is closer. Even there, the civil regulatory model seems preferable and should be retained.

The practical problems with importing the criminal adjudication machinery into immigration would be staggering. In 2004, more than 200,000 noncitizens were removed from the United States, the vast majority for lack of a valid immigration status.[267] To add those cases to the annual dockets of the federal Article III courts would be unimaginable. Nor, for the routine cases that involve unauthorized entry or overstay, do juries seem essential.

In rejecting the criminal adjudication model in deportation cases, however, the courts have blessed a variety of results that do not coexist easily with commonly held notions of fundamental fairness. As Part IV explains, the depiction of deportation as a purely civil penalty has rendered inoperative all the constitutional rights that are confined to the realm of criminal punishment, has prompted courts to deny requests to withdraw guilty pleas for lack of knowledge of the deportation consequences because the latter are merely "collateral," and has made possible the loss of decisional independence during the administrative phases of deportation proceedings and the loss of judicial review in selected subcategories of those cases.[268] One might ask whether the criminal adjudication model should be extended to deportation for the purpose of avoiding those sorts of results.

It is unnecessary to do that, however, because all of those problems could be fixed without jettisoning the civil regulatory model in deportation cases. While most of the constitutional rights that courts have held inapplicable to deportation have indeed been the sole province of criminal adjudication, some have not. Both the exclusionary rule[269] and the requirement of proof beyond a reasonable doubt,[270] for example, have been rejected in deportation cases even

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267. DHS, *Table 42*, *supra* note 80.

268. *See supra* Part IV (discussing the courts' understanding of deportation as civil rather than punitive).

269. *See* INS v. Lopez-Mendoza, 468 U.S. 1032, 1045–50 (1984) (explaining why deportation is among the civil contexts in which the exclusionary rule is applied).

270. The Supreme Court has held that, in a civil proceeding to adjudicate juvenile delinquency, the Constitution requires proof beyond a reasonable doubt. *See In re* Winship, 397 U.S. 358, 368 (1970) ("[T]he constitutional safeguard of proof beyond a reasonable doubt is . . . required during the adjudicatory stage of a delinquency proceeding . . . ."). Yet in *Woodby v. INS*, 385 U.S. 276 (1966), the Court had explicitly rejected the criminal standard of proof and adopted instead the less stringent "clear, unequivocal, and convincing evidence" standard for deportation proceedings. *Id.* at 286.

though applied in some other civil contexts. There is no reason in principle that deportation could not be one of the civil contexts in which at least some of those rights operate. Moreover, even when a specific constitutional right is held inoperative in deportation proceedings, a near equivalent is sometimes available. Thus, the Sixth Amendment right to counsel is limited to criminal proceedings, but the courts have said that Fifth Amendment due process would require the appointment of counsel in a deportation case if, on the facts of the case, counsel is essential to fundamental fairness.[271] If they were so inclined, the courts could seize that opening to require appointed counsel in cases where the deportees are lawful permanent residents or where the substantive individual interests at stake are otherwise compelling or where crucial questions of fact or law demand legal expertise.

Similarly, when a criminal defendant moves to withdraw a guilty plea on the ground that he or she was unaware of the deportation consequences, the courts do not *have* to hold either that plea withdrawals will be denied whenever the unknown consequences were merely "collateral" or that for this purpose deportation is collateral. Both principles are, after all, judicial inventions. Several state legislatures have passed statutes that require judges to advise defendants of possible deportation consequences before accepting their guilty pleas.[272] A court could take the similar view that, in light of the potential severity of deportation, the defendant should be permitted to withdraw a guilty plea that was entered without knowledge of that possibility. Because the withdrawal of the plea would free the prosecution from the bargain and allow it to reinstate the original higher charges, a defendant who moves to withdraw a guilty plea is taking a chance.[273] If he or she is willing to accept that higher risk, a court might wish to allow that opportunity.

The absence of decisional independence similarly is not inevitable in civil proceedings. The Constitution explicitly contemplates civil trials in federal

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271. *See* Aguilera-Enriquez v. INS, 516 F.2d 565, 568 (6th Cir. 1975) ("The test for whether due process requires the appointment of counsel for an indigent alien is whether, in a given case, the assistance of counsel would be necessary to provide fundamental fairness—the touchstone of due process.") (citations omitted).

272. *See* Bogdan, *supra* note 232, at 21 ("[T]wenty states have recognized that immigration consequences of criminal convictions have serious effects that require trial judges to advise defendants that immigration consequences may result from pleading guilty to a criminal charge."); Francis, *supra* note 232, at 693 ("Without knowing all the consequences of a guilty plea, it is difficult for a defendant to make an informed decision . . . .").

273. *See* United States v. Parrino, 212 F.2d 919, 926 (2nd Cir. 1954) (Frank, J., dissenting) (observing that the long-term lawful permanent resident defendant had already completed his prison term and, since the original charges could be reinstated if the guilty plea were withdrawn, was willing to risk the death penalty rather than accept deportation).

Article III courts.[274] In addition, a wide variety of federal administrative agency proceedings are conducted by administrative law judges (ALJs), who possess greater job security, and therefore greater decisional independence, than the immigration judges and BIA members who adjudicate deportation cases.[275] Nor is the civil nature of deportation a reason to strip the Article III courts of their jurisdiction to review designated categories of deportation orders, as the courts' jurisdiction to review other deportation orders[276] and a range of other "civil" administrative agency decisions[277] attests.

I recognize that much of this subpart has an air of unreality to it. The alternatives I have offered, while theoretically possible under a civil regulatory model, do not appear to be on the horizon. If the courts were inclined to pursue them, I suspect they would have done so by now. This must be acknowledged. But if the mild adjustments suggested here are thought unrealistic, surely it is all the more unrealistic to expect the courts to overrule a century of case law and suddenly declare deportation to be a punitive sanction that requires the entire arsenal of constitutional rights available in criminal proceedings. The recommended course, therefore, is the general use of the civil regulatory model for both the enforcement and the adjudication components of immigration law—but, with respect to adjudication, a more flexible use of the fair procedure vehicles available in other civil settings.

VI. Conclusion

Starting about twenty years ago, and accelerating more recently, a clear trend has come to define modern immigration law. The trend, noted in recent scholarship,[278] has sometimes been dubbed the "criminalization" of immigration law. The term connotes the incorporation of criminal justice principles into a domain that previously had been conceived as civil in nature. This Article argues, however, that the new path has embraced the criminal justice model only *asymmetrically*. The asymmetry, it is submitted, has

274. *See* U.S. CONST. amend. VII (requiring a jury trial in any common law suit where more than $20 is at stake).

275. *Compare* Legomsky, *supra* note 239, at 372–79 (describing the vulnerability of immigration judges and BIA members to reassignment), *with* Jeffrey Scott Wolfe, *Are You Willing to Make the Commitment in Writing? The APA, ALJs, and SSA*, 55 OKLA. L. REV. 203, 226 (2002) (describing the job protections of ALJs).

276. 8 U.S.C. § 1252 (2000).

277. 28 U.S.C. § 158 (2000).

278. *See supra* note 12 and accompanying text (discussing the term "criminalization" of immigration law).

followed a pattern: Elements aligned with criminal enforcement have steadily found their way into immigration law, while the procedural safeguards at the core of criminal adjudication have been consciously rejected. Adjudication has followed the civil regulatory model.

After establishing that asymmetric incorporation is indeed what has occurred, this Article further argues that that trend has had some disturbing effects. Some of those effects are just specific results of particular policy decisions. Those specific results, however, both illustrate and together comprise a set of broader concerns about the nature of immigration policymaking and the direction of future events.

These broader concerns relate to balance. Through their almost exclusive emphasis on policing and enforcement, immigration policymakers have denied themselves the benefits of important competing perspectives. At the macro level, they have paid far too little attention to the positive goals of substantive immigration policy or to the government machinery for facilitating lawful immigration and successful integration. At the micro level, they have been so preoccupied with enhancing penalties and closing loopholes that the penalties are too often cruelly disproportionate to the transgressions. Combined with the courts' rejection of the criminal adjudication model and its procedural safeguards, the single-minded focus on enforcement has also left noncitizens in deportation proceedings exposed to large risks of error when the personal stakes are high.

Taken as a whole, these developments skew the results in ways that impede the fullest and most productive use of our national immigration resources. This Article urges a return to the civil regulatory model of immigration law—for enforcement and adjudication alike. Only then can we hope to devise an immigration policy that is at once balanced, moderate, fair, humane, and, ultimately, faithful to all the values that together constitute the national interest.

ESSAY