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Creating Crimmigration

*César Cuauhtémoc García Hernández**

The story of the United States has been one of welcoming foreigners. It has also been a story of excluding foreigners.¹ Some prospective immigrants have been deemed worthy of admission into the country, while others have been turned back.² Some entered without asking the government's permission and were deported after coming to the federal government's attention,³ while others were given reprieve.⁴ Still others have been allowed permission to enter only to have that permission rescinded.⁵ The bases of inclusion and exclusion have shifted over time, but they have always turned on markers of desirability or undesirability.⁶

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1. See KEVIN R. JOHNSON, THE "HUDDLED MASSES" MYTH: IMMIGRATION AND CIVIL RIGHTS 2 (2004) [hereinafter JOHNSON, HUDDLED MASSES].

2. See generally Immigration and Nationality Act of 1952 § 203(a)–(c), 8 U.S.C. § 1153(a)–(c) (2012) [hereinafter INA] (explaining the categories of noncitizens who may be admitted as lawful permanent residents); § 204(a), 8 U.S.C. § 1154(a) (detailing the process for admitting noncitizens as lawful permanent residents); § 214(a), 8 U.S.C. § 1184 (authorizing admission of noncitizens as nonimmigrant visitors); § 212(a), 8 U.S.C. § 1182(a) (providing grounds of inadmissibility).

3. See generally INA § 237(a)(1)(A), (B), 8 U.S.C. § 1227(a)(1)(A), (B) (providing grounds of deportation for noncitizens who were inadmissible at the time of entry or are presently in violation of immigration law).

4. See *State and Local Regulation of Unauthorized Immigrant Employment, Developments in the Law: Immigrant Rights & Immigration Enforcement*, 126 HARV. L. REV. 1565, 1613 (2013) (explaining that "[a]lmost 3 million undocumented immigrants received lawful permanent resident status through IRCA's amnesty program"); see also INA § 245(i), 8 U.S.C. § 1255(i) (authorizing adjustment of status for certain noncitizens who entered without inspection).

5. See generally INA § 237(a), 8 U.S.C. § 1227(a) (authorizing deportation of any noncitizen who was admitted into the United States and then violated the conditions of their stay through one of many enumerated actions).

6. See Pooja Gehi, *Struggles from the Margins: Anti-Immigrant Legislation and the Impact on Low-Income Transgender People of Color*, 30 WOMEN'S RTS. L. REP. 315, 316–17 (2009) (explaining that immigration law in the United States has been constructed "as a way to keep in desirables and keep out undesirables," then listing multiple categories of people who

Beginning in the 1980s, however, the dominant distinguishing characteristic between prospective immigrants who have been welcomed and those who have been shunned has turned on criminal activity. Convictions for a growing list of offenses result in removal—the technical umbrella term for exclusion and deportation.⁷ Sometimes commission—rather than conviction—of such an offense is sufficient.⁸ At the same time, immigration law enforcement has increasingly adopted the securitized approach of criminal law enforcement.⁹ And criminal investigations involving certain crimes related to immigration activity have borrowed many of the more lax procedures traditionally used in the civil immigration law system.¹⁰

These are the emblems of crimmigration law.¹¹ Together they abandon framing noncitizens as contributing members of society on the path to full political membership as citizens—“Americans in waiting,” as Hiroshi Motomura termed the experience of earlier generations of immigrants to the United States.¹² Instead, the procedural and substantive law that comprises crimmigration law has reimagined noncitizens as criminal deviants and security risks.¹³ They are people to be feared,¹⁴ their risk assessed,¹⁵ and the threat they

have been negatively impacted by immigration law); Mary Holper, *Deportation for a Sin: Why Moral Turpitude is Void for Vagueness*, 90 NEB. L. REV. 647, 650 (2012) (quoting DANIEL KANSTROOM, *DEPORTATION NATION* 115 (2007) (explaining that a congressional panel in 1891 “recommended new immigration laws to ‘separate the desirable from the undesirable immigrants’”)); Gerald L. Neuman, *Administrative Law: Immigration, Amnesty, and the Rule of Law*, 36 HOFSTRA L. REV. 1335, 1335 (2008) (noting that in the aftermath of the Civil War, Congress enacted legislation to exclude immigrants considered “undesirable”); see also Eric A. Posner, *The Institutional Structure of Immigration Law*, 80 U. CHI. L. REV. 289, 295 (2013) (noting that “immigration law . . . can be understood . . . as a *screening device* for distinguishing desirable migrants and undesirable migrants”).

7. See INA § 212(a)(2), 8 U.S.C. § 1182(a)(2); INA § 237(a)(2), 8 U.S.C. § 1227(a)(2). “Removal” proceedings encompass deportation and inadmissibility. INA § 240(a)(1), 8 U.S.C. § 1229a(a).

8. See INA § 212(a)(2)(A)(i), 8 U.S.C. § 1182(a)(2)(A)(i).

9. See *infra* Part II.A–B.

10. See *infra* Part II.C–D.

11. See Juliet P. Stumpf, *Introduction to SOCIAL CONTROL AND JUSTICE: CRIMMIGRATION IN THE AGE OF FEAR* 7, 7 (Maria João Guia et al. eds., 2013).

12. See generally HIROSHI MOTOMURA, *AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES* 132 (2006).

13. See Stumpf, *supra* note 11, at 10.

14. See *id.* at 11.

15. See Robert Koulish, *Entering the Risk Society: A Contested Terrain for Immigration*

pose managed.¹⁶ Crime control and migration control have become so intertwined that they have ceased to be distinct processes or to target distinct acts, for both noncitizens and individuals suspected of being noncitizens.¹⁷

Scholars from a variety of disciplines have recently begun to identify crimmigration law's core features and map its contours.¹⁸ None, however, have attempted to discern why crimmigration law developed when it did. Animosity toward noncitizens has been a feature of the United States' conflicted view of newcomers since long before the colonies split from Britain.¹⁹ Why, then, did crimmigration law not develop earlier? This Article sets out to answer that question.

Crimmigration law, this Article explains, developed in the closing decades of the twentieth century due to a shift in the perception of criminal law's proper place in society combined with a reinvigorated fear of noncitizens that occurred in the aftermath of the civil rights movement. Specifically, in the aftermath of the civil rights movement, overt racism became culturally disdained and facially racist laws impermissible. Derision of people of color, however, did not cease. Instead, it found a new outlet in facially neutral rhetoric and laws penalizing criminal activity. When immigration became a national political concern for the first time since the civil rights era, policymakers turned to criminal law and procedure to do what race had done in earlier generations: sort the desirable newcomers from the undesirable.

Enforcement, in SOCIAL CONTROL AND JUSTICE: CRIMMIGRATION IN THE AGE OF FEAR, *supra* note 11, at 61, 83.

16. *See id.*; *see also* Jennifer M. Chacón, *Managing Migration Through Crime*, 109 COLUM. L. REV. SIDEBAR 135, 137 (2009) ("In recent years . . . the U.S. government has increasingly handled migration control through the criminal justice system.").

17. *See* Joanne van der Leun & Maartje van der Woude, *A Reflection on Crimmigration in the Netherlands: On the Cultural Security Complex and the Impact of Framing*, in SOCIAL CONTROL AND JUSTICE: CRIMMIGRATION IN THE AGE OF FEAR, *supra* note 11, at 41, 43.

18. *See generally* SOCIAL CONTROL AND JUSTICE: CRIMMIGRATION IN THE AGE OF FEAR, *supra* note 11 (presenting scholarly work on crimmigration from a variety of disciplines).

19. *See generally* KANSTROOM, *supra* note 6, at 21–90 (describing various forms of exclusion and deportation during the colonial era); *see also* ELIZABETH HULL, WITHOUT JUSTICE FOR ALL: THE CONSTITUTIONAL RIGHTS OF ALIENS 9 (1985) (discussing nativism during the founding era).

To unravel this proposition, this Article proceeds in three parts. Part I reviews the long historical derision of noncitizens, which indicates that immigrants have been subjected to stigma, discrimination, and violence throughout the nation's history. Yet it was only at the end of the twentieth century that immigration law became so enmeshed with criminal law that the "penalty of deportation" became "most difficult" to divorce . . . from the conviction," as the Supreme Court concluded in 2010.²⁰ What changed, Part II explains, is the willingness with which United States law and society turned to penal norms to address social phenomena deemed problematic. The "war on crime" and, in particular, its sharp-edged progeny, the "war on drugs," created the societal perception that crime lurks everywhere. In response, police officers became an omnipresent feature of community life, especially in urban areas. Concomitantly, imprisonment became a characteristic of late twentieth century United States law, culture, and social organization. Legislators at the federal, state, and local level enacted innumerable statutes expanding the scope of confinement. As a result, the United States experienced an imprisonment boom unlike any seen in its history. Jail and prison populations skyrocketed; so too did the number of people under other types of correctional supervision, such as probation and parole. For many people, encounters with the police and imprisonment became expected—almost inevitable—stages of life.

Criminal law and procedure trends in the 1980s might have remained largely irrelevant to noncitizens had it not been for a simultaneously reignited concern about immigration that developed in the 1970s and 1980s. As Part III explains, unauthorized immigration began to grow steadily after passage of the Hart-Celler Act of 1965, which imposed a cap on the number of visas available per country, including even countries with deep ties to the United States.²¹ Almost from the beginning, demand for visas from Mexican citizens greatly exceeded supply. Within a few years, the large numbers of Haitians, Cubans, and Central Americans who flocked to the United States compounded the concern about the federal government's regulation of

20. *Padilla v. Kentucky*, 559 U.S. 356, 366 (2010).

21. Immigration Act of 1965 (Hart-Celler Act), Pub. L. No. 89-236, § 2, 79 Stat. 911, 911.

immigration. By the mid-1980s, immigration reentered the political arena where prominent policymakers associated the new round of arriving noncitizens, racialized as not white, with lawbreaking that endangered the nation's security.

Unlike earlier episodes of widespread concern about immigration, legislators operating in the aftermath of the previous decades' civil rights movements could not resort to the simple vilifications that motivated so much of immigration law's history. Instead, as Part IV illustrates, the national government began to turn to the criminal policing practices that had taken hold at the state and federal levels with devastating consequences for people of color—in particular a reduction in judicial discretion and a newfound willingness to tap its authority to imprison. Though Congress and President Reagan famously enacted a broad amnesty provision regularizing the status of millions of people already present in the United States,²² the federal government also began its long march toward interweaving criminal law and immigration law. It began, in other words, to create crimmigration law.

I. A HISTORY OF ANIMUS

Animus towards immigrants has long run through the United States' cultural and political institutions.²³ Although both cultural animus and legal sanctions have often focused on particular ethnic groups, immigrants with criminal histories have long been targeted for especially harsh treatment. Nonetheless, history demonstrates that animus towards immigrants in general, and immigrants with criminal records in particular, was alone insufficient to cause immigration, criminal laws, and law enforcement to comeingle in pursuit of common goals. Rather, the crimmigration regime is a recent phenomenon.

Ethnicity-based animus long pre-dates the country's founding. Benjamin Franklin famously asked why Germans should “be suffered to swarm into our Settlements, and by herding together establish their Language and Manners to the Exclusion of ours. Why

22. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, §§ 201–03, 100 Stat. 3359, 3394, 3405.

23. See JUAN F. PEREA, *Introduction* to IMMIGRANTS OUT!: THE NEW NATIVISM AND THE ANTI-IMMIGRANT IMPULSE IN THE UNITED STATES 1, 1–2 (Juan F. Perea ed., 1997).

should Pennsylvania, founded by the English, become a Colony of Aliens, who will shortly be so numerous as to Germanize us, instead of our Anglifying them [sic].”²⁴ Franklin, of course, was not alone among the members of his generation in his antipathy towards foreigners. The “first major deportation of European settlers in the New World,” writes Daniel Kanstroom, began in 1755 when officials in Nova Scotia loyal to the British drove French colonists known as Acadians out of the territory and ordered their buildings burned.²⁵

Distaste for newcomers based on ethnicity, of course, did not subside with time. Rather, foreigners have been derided in almost every period of the nation’s history.²⁶ The Chinese were explicitly excluded by statute in 1882, while in 1907 Henry James described a “swarming . . . Jewry that had burst all bounds” in New York.²⁷ Italians were later described as similar to Chinese or, more commonly, to blacks—neither comparison meant as flattery—and subjected to an array of discrimination.²⁸ Years later, Mexicans, including United States citizens of Mexican descent, were welcomed as temporary laborers during a labor shortage, only to experience mass deportation when they were no longer wanted.²⁹

The anti-immigrant strain that stretches across the nation’s history is not solely focused on immigrants’ ethnicity. Instead, there is also a long tradition of directing special antagonism toward foreigners who violate criminal laws either domestically or abroad. For instance, in the 1750s, Franklin lodged special opprobrium against convicts sent to the colonies’ shores by European nations, a common alternative to a death sentence for hundreds of crimes:³⁰ “In what can Britain show a more Sovereign Contempt for us, than by emptying their Jails into our Settlements; unless they would

24. John B. Frantz, *Franklin and the Pennsylvania Germans*, 65 PA. HIST. J. MID-ATLANTIC STUD. 21, 23 (1998) (citing THE PAPERS OF BENJAMIN FRANKLIN 234 (Leonard W. Labaree et al. eds., 1969)).

25. KANSTROOM, *supra* note 6, at 44.

26. See HULL, *supra* note 19, at 9; JOHNSON, HUDDLED MASSES, *supra* note 1, at 7.

27. HENRY JAMES, THE AMERICAN SCENE 127 (1907).

28. DAVID R. ROEDIGER, WORKING TOWARD WHITENESS: HOW AMERICA’S IMMIGRANTS BECAME WHITE 46–47 (2005).

29. IAN HANEY LÓPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE 27–28 (2006).

30. See KANSTROOM, *supra* note 6, at 39–41.

likewise empty their Jakes [privies] on our Tables?”³¹ Convicted foreigners, Franklin thought, were little better than feces. A resolution enacted by the Continental Congress some thirty years later suggests that the prevailing opinion had not changed. In 1788, the Continental Congress “unanimously adopted a resolution, recommending to the several states to pass proper laws for preventing the transportation of convicted malefactors from foreign countries into the United States.”³² By 1791, at least six states had done so.³³ Eventually Britain turned its attention to Australia as a destination for its convicts, but rumors persisted as late as 1874 that Britain continued its old practice of sending lawbreakers to the United States.³⁴

During the late nineteenth century, Congress began enacting legislation that excluded individuals who had been convicted of specified types of crimes from entering the United States. In 1875, the federal government’s first modern foray into regulating immigration—the same act that launched the now-dominant view that immigration regulation is the exclusive province of the federal government—included a prohibition against the entry of convicted felons.³⁵ The infamous Chinese Exclusion Act of 1882 criminalized helping Chinese enter without authorization and fraudulently obtaining the certificates of residence required for Chinese to live here.³⁶ Less than a decade later, in 1891, Congress enacted a provision that remains a central part of immigration law today and is a constant source of headaches for immigration attorneys—the basis of exclusion for having committed a crime involving moral

31. DAVID WALDSTREICHER, RUNAWAY AMERICA: BENJAMIN FRANKLIN, SLAVERY, AND THE AMERICAN REVOLUTION 140 (2004). The *Virginia Gazette* displayed similar sentiments in a 1751 article: “When we see our Papers fill’d continually with accounts of the most audacious Robberies, the most Cruel Murders, and infinite other Villanies perpetrated by Convicts transported from Europe, what melancholy, what terrible Reflections must it occasion!” KANSTROOM, *supra* note 6, at 41.

32. *New York v. Miln*, 36 U.S. 102, 112 (1837).

33. *Id.* at 112–13.

34. Gerald L. Neuman, *The Lost Century of American Immigration Law, (1776–1875)*, 93 COLUM. L. REV. 1833, 1842, 1842 n.41 (1993).

35. Act of March 3, 1875 (Page Act), ch. 141, § 5, 18 Stat. 477.

36. Act of May 6, 1882 (Chinese Exclusion Act), ch. 126, §§ 7, 11, 22 Stat. 58, 60–61, *repealed by* Chinese Exclusion Repeal Act of 1943, ch. 344, 57 Stat. 600.

turpitude.³⁷ That same public law authorized the deportation of anyone who entered the country in violation of immigration law—but, importantly, limited this authority to the year after the noncitizen’s arrival in the United States—creating what Kanstroom refers to as the “first general deportation law since the Alien and Sedition Acts” of 1798.³⁸ It was not until the Immigration Act of 1917 was enacted, however, that commission of a crime involving moral turpitude would explicitly become a basis for deportation.³⁹ Five years later, Congress added narcotics offenses to the list of reasons justifying deportation.⁴⁰

As criminal histories became an increasingly common method of distinguishing between excludable and admissible noncitizens, criminal law also began to be used as a method of regulating immigration. Aside from banning entry of most Chinese citizens and descendants, the Chinese Exclusion Act of 1892 imposed a year of hard labor on any Chinese person found to be unlawfully present in the United States.⁴¹ No judicial process was required before imprisonment; a determination by an immigration official, an officer of the Executive Branch, sufficed.⁴² However, four years later the Supreme Court in *Wong Wing v. United States* concluded that Congress, in enacting this provision, overstepped its authority. While Congress could ban the Chinese, the Court explained, it could not turn to criminal punishments without “provid[ing] for a judicial trial to establish the guilt of the accused.”⁴³ Importantly, *Wong Wing* recognized the government’s power to impose criminal penalties so long as it abided by constitutional limitations on its power to criminalize. “[W]e think it would be plainly competent for

37. See Immigration Act of March 3, 1891, ch. 551, § 1, 26 Stat. 1084, 1084.

38. KANSTROOM, *supra* note 6, at 115.

39. Holper, *supra* note 6, at 650. The 1917 Act authorized deportation for having committed a crime involving moral turpitude within five years of entry into the United States if the sentence received was for a year or more, or for having committed two crimes involving moral turpitude at any time after entry. Act of Feb. 5, 1917, ch. 29, §§ 3, 19, 39 Stat. 874.

40. Act of May 26, 1922, ch. 202, Pub. L. No. 227, 42 Stat. 596; see *Matter of V-----*, 1 I. & N. Dec. 293, 295 (Bd. Immgr. Appeals 1942) (holding that such a conviction could also serve as a basis for exclusion).

41. Geary Act of 1892, ch. 60, 27 Stat. 25; see BILL ONG HING, MAKING AND REMAKING ASIAN AMERICA THROUGH IMMIGRATION POLICY 1850–1990, 23–24 (1993).

42. *Wong Wing v. United States*, 163 U.S. 228, 235–36 (1896).

43. *Id.* at 237.

[C]ongress to declare the act of an alien in remaining unlawfully within the United States to be an offense punishable by fine or imprisonment,” it explained, “if such offense were to be established by a judicial trial.”⁴⁴ Thirty-three years later Congress exploited that statement when, in 1929, it criminalized unauthorized entry into the United States with a penalty of up to a year imprisonment and a maximum fine of \$1,000.⁴⁵ This same Act imposed a maximum of two years imprisonment, a federal felony, on people who entered without authorization after having been previously deported.⁴⁶

Despite the development of a legislative scheme that relied on interactions with the criminal justice system and a parallel body of substantive criminal offenses punishing forms of immigration, criminal law and immigration law largely remained distinct bodies of law through the early 1980s. To begin, none of these punitive legislative authorizations were utilized all that much. The bulk of people who were excluded or deported suffered that fate because they lacked permission to be in the United States.⁴⁷ Perhaps they entered without permission, or perhaps they violated some condition of their authorization. In all but a small number of situations, the principal motivating factor for their removal was not involvement in criminal activity.⁴⁸ Likewise, the immigration-related federal crimes did not play a prominent role in the lives of most noncitizens or the immigration law enforcement agendas of most presidential

44. *Id.* at 235.

45. Act of March 4, 1929, ch. 690, § 2, 45 Stat. 1551, 1551.

46. *Id.* § 1.

47. According to the statistical data published by the INS, 633,918 people were excluded from the United States between 1892 and 1984. U.S. IMMIGRATION & NATURALIZATION SERV., 1996 STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE 175 tbl.60 (1997) [hereinafter INS 1996 YEARBOOK]. Of these, 192,545 were excluded because they lacked the proper documents, and 219,421 because they were deemed likely to become a public charge. *Id.* Similarly, 812,915 people were deported between 1908 and 1980. *Id.* at 183 tbl.65. Of these, 334,889 were deported because they entered without inspection or by relying on false statements; 154,896 due to having entered without the proper documents; and another 124,465 because they failed to comply with the conditions of their authorized presence. *Id.*

48. Of the 633,918 people excluded from the United States between 1892 and 1984, only 14,287 were excluded due to a criminal or narcotics violation. *Id.* at 175 tbl.60. Similarly, of the 812,915 people deported between 1908 and 1980, only 48,330 were deported due to a criminal violation and another 8,339 for a narcotics violation. *Id.* at 183 tbl.65.

administrations. Neither illegal entry nor illegal reentry was prosecuted frequently.⁴⁹

Furthermore, criminal policing norms and immigration law enforcement norms remained distinct. Use of firearms and large-scale reliance on detention, for example, were largely unheard of in the immigration law enforcement context. Employees of the Immigration and Naturalization Service (“INS”), the federal government agency charged with enforcing immigration laws for much of the twentieth century, were not even authorized to carry firearms until 1990.⁵⁰ Detention pending a decision about whether a person could remain in the United States was unquestionably the exception.⁵¹ For most of the twentieth century, few noncitizens subjected to immigration proceedings saw the inside of an immigration detention center. Indeed, the INS lacked the capacity to detain large numbers of noncitizens even if it wanted to do so.

For all the hostility toward noncitizens that has appeared throughout United States’ history, the immigration law apparatus remained distinct from the penal system. Criminal law maintained a focus on the traditional conduct associated with criminality—offenses against property and people. Immigration law, meanwhile, remained firmly encamped within civil law, sorting through the administrative matter of who was authorized to be in the country. People suspected of violating immigration law were accordingly processed through the civil immigration court system, an administrative unit first of the Department of Labor, then the Department of Justice. Within this system, they were not entitled to appointed counsel, as the Sixth Amendment requires in criminal prosecutions, and though they were protected by the Fifth Amendment Due Process Clause, it is a due

49. As late as 1993, federal prosecutors lodged only 2,487 criminal cases where the lead charge was an immigration offense. ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUS. 1997 ANNUAL REPORT 188 tbl.D-2 [hereinafter JUDICIAL BUS. 1997 REPORT].

50. Immigration Act of 1990, Pub. L. No. 101-649, § 503, 104 Stat. 4978, 5048–49.

51. In 1954, the INS abandoned its policy of detaining immigrants “except in rare cases where an alien was considered likely to ‘abscond’ or to pose a danger to the nation or community.” MARK DOW, AMERICAN GULAG: INSIDE U.S. IMMIGRATION PRISONS 6–7 (2004). The agency’s detention statistics indicate that few people were categorized as such: the INS detained only 2370 people, on average, in 1973. *Id.* at 8. That figure increased to 4062 by 1980, though the INS thought of this as too low given its newly created plans to detain hundreds of thousands of suspected unauthorized noncitizens. *Id.*

process regime mitigated by Congress and the President's power to dictate admission and the conditions of a noncitizen's stay.⁵²

II. IDENTIFYING CRIMMIGRATION

The convergence of criminal and immigration law was therefore neither obvious nor necessary. Beginning in the 1980s and blooming in the 1990s and the early years of the twenty-first century, criminal law and immigration law lost much of their separate identities. In many respects, wrote Juliet Stumpf in her foundational article examining crimmigration law, the criminalization of immigration law “has created parallel systems in which immigration law and the criminal justice system are merely nominally separate.”⁵³ This, she added, has meant that “aliens [have] become synonymous with criminals.”⁵⁴ Examining federal initiatives designed to process vast numbers of immigration-related criminal prosecutions of noncitizens, Jennifer Chacón similarly argues that “we are also witnessing the importation of the relaxed procedural norms of civil immigration proceedings into the criminal realm.”⁵⁵

As Stumpf's and Chacón's descriptions suggest, crimmigration might be defined as “the intertwinement of crime control and migration control.”⁵⁶ Starting in the 1980s, this “intertwinement” has rapidly expanded in the United States and changed the procedure and substance of criminal and immigration law such that as a person becomes entangled in one, she suffers increasingly adverse consequences in the other. First, involvement in criminal activity now frequently leads to “presumptively mandatory” removal, as the Supreme Court recognized in *Padilla v. Kentucky*.⁵⁷ Second, the

52. See *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 544 (1950) (“Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.”); *Yamataya v. Fisher*, 189 U.S. 86, 100–01 (1903) (extending Fifth Amendment Due Process Clause protections to deportation proceedings); Peter L. Markowitz, *Deportation is Different*, 13 U. PA. J. CONST. L. 1299, 1302 (2011) (“[A]s a result of the civil label currently applied to deportation proceedings, poor immigrants have no right to appointed counsel despite the notorious complexity of immigration law . . .”).

53. Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 376 (2006).

54. *Id.* at 419.

55. Chacón, *supra* note 16, at 137.

56. Van der Leun & Van der Woude, *supra* note 17, at 41, 43.

57. 559 U.S. 356, 369 (2010).

federal government and its subfederal counterparts have taken to punishing immigration-related activities through their respective penal systems. These developments have been made possible because the procedural laxity of civil immigration proceedings now appears in criminal proceedings involving immigration activity. Meanwhile, the policing norms of the criminal justice system have become emblematic of modern immigration policing, while trends long visible in immigration law policing have begun to appear in traditional criminal policing.

A. Expanding Crime-Based Removal

During the 1980s and 1990s, Congress, with the support of multiple presidential administrations, drastically increased the types of criminal conduct that could result in removal. In addition to the decades-old penalty available for conviction of a crime involving moral turpitude, Congress expanded the narcotics conviction basis of deportation to include any controlled-substances offense, whether enacted by a state, the federal government, or a foreign country.⁵⁸ Moreover, the Anti-Drug Abuse Act of 1988 added the “aggravated felony” into the immigration law lexicon and provided that a conviction for an aggravated felony would result in deportation.⁵⁹ At the time, only three crimes were considered aggravated felonies: murder, illicit trafficking in firearms, and drug trafficking.⁶⁰ Two years later, the Immigration Act of 1990 expanded the definition of “aggravated felony” by adding money laundering and crimes of violence, for which a term of imprisonment of at least five years was imposed.⁶¹ In a separate provision, the 1990 Act authorized deportation for attempting to violate a controlled-substances

58. Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, § 1751, 100 Stat. 3207 (amending INA § 212(a)(23), 8 U.S.C. § 1182(a)(23) (2012)) (replacing the provision authorizing deportation on the basis of a conviction for an “addiction-sustaining opiate” with a provision referencing any conviction involving a controlled substance under a state, federal, or foreign country’s law); *see* INA § 237(a)(2)(B)(i), 8 U.S.C. § 1227(a)(2)(B)(i). Controlled-substances offenses and crimes involving moral turpitude can also result in exclusion from the United States. *Id.* § 212(a)(2)(A)(i)(I), (II), 8 U.S.C. § 1182(a)(2)(A)(i)(I), (II).

59. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7342, 102 Stat. 4181, 4469–70 (amending INA § 101(a), 8 U.S.C. 1101(a)).

60. *Id.*

61. Immigration Act of 1990, Pub. L. No. 101-649, § 501, 104 Stat. 4978, 5048.

offense.⁶² Two well-known public laws enacted in 1996, the Antiterrorism and Effective Death Penalty Act (AEDPA) and Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), added a host of offenses to the aggravated felony definition. AEDPA added offenses such as gambling, transportation related to prostitution, human smuggling, certain passport fraud convictions, perjury, failure to appear for a judicial proceeding, and more.⁶³ Five months later, IIRIRA added the offenses of rape and sexual abuse of a minor, reduced the money-laundering threshold from \$100,000 to \$10,000, and lowered the fraud and tax evasion amount from \$200,000 to \$10,000, among other changes.⁶⁴ IIRIRA also authorized the federal government to remove a person convicted of an aggravated felony and sentenced to at least five years imprisonment, even to a country where her “life or freedom would be threatened . . . because of the alien’s race, religion, nationality, membership in a particular social group, or political opinion.”⁶⁵ Today, the aggravated felony definition spans twenty-one subsections, some of which include their own subsections.⁶⁶

Options for relief from removal are few (and diminishing over time) and eligibility is limited. In 1990, Congress repealed the judicial recommendation against deportation, a statutory power that criminal sentencing judges had wielded for almost a half century to prevent deportation on the basis of a particular conviction.⁶⁷ That same year, legislators began to narrow the eligibility criteria for an even older form of relief from removal that immigration judges had at their disposal—relief under former § 212(c) of the Immigration and Nationality Act (“INA”).⁶⁸ Six years later Congress repealed

62. *Id.* § 508.

63. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 440, 110 Stat. 1214, 1276–77.

64. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 321, 110 Stat. 3009, 3009–627 (amending INA § 101(a)(43), 8 U.S.C. § 1101(a)(43)).

65. *Id.* § 305 (amending INA § 241, 8 U.S.C. § 1251).

66. 8 U.S.C. § 1101(a)(43)(A)–(U).

67. Immigration Act of 1990, Pub. L. No. 101-649, § 505, 104 Stat. 4978, 5050.

68. *Id.* § 511; *see* *INS v. St. Cyr*, 533 U.S. 289, 294–97 (2001) (“In 1990, Congress amended § 212(c) to preclude from discretionary relief anyone convicted of an aggravated felony who had served a term of imprisonment of at least five years.”).

§ 212(c) altogether.⁶⁹ In its place, it enacted cancellation of removal.⁷⁰ Though cancellation of removal is the most charitable form of relief from removal that exists in the current version of the INA, the eligibility criteria are significantly narrower than they were under § 212(c). Meanwhile, in 1994, criminal court judges received the power to order deportation as part of the sentencing process.⁷¹

Immigration officials were quick to tap their emerging powers to target convicted noncitizens. As a point of comparison, in the decade from 1971 to 1980, the INS deported 6150 people because of a criminal or narcotics violation.⁷² Though the numbers began to increase, the pattern did not change significantly for the next several years.⁷³ In 1986, when crimmigration law was only starting to blossom, the INS reported removing 1978 people “for criminal and narcotics violations,” a mere 4% of the total number removed that year.⁷⁴ Two years later, it removed 5956 people for these reasons, a significant 23.1% of the total number of people removed that year.⁷⁵ By 1992, it reported removing 24,219 people (55.6%), and in 1996, it reported removing 36,909 (53.8%) for criminal or drug violations.⁷⁶

For most noncitizens convicted of one of these offenses, entering the U.S. Immigration and Custom Enforcement’s (“ICE”) radar is likely to result in removal. According to an analysis by Hiroshi Motomura, for example, of the roughly 600,000 deportable noncitizens arrested by ICE or the U.S. Customs and Border Protection (“CBP”) agency—the two Department of Homeland Security (“DHS”) units primarily responsible for enforcing immigration law—in fiscal year 2009, somewhere between 400,000 and 600,000 were prosecuted,

69. Illegal Immigration Reform and Immigrant Responsibility Act, § 304(b) (repealing INA § 212(c), 8 U.S.C. § 1182(c)).

70. *Id.*

71. Immigration and Nationality Technical Corrections Act of 1994, Pub. L. No. 103-416, § 224(a), 108 Stat. 4305, 4322 (amending INA § 242A, 8 U.S.C. § 1252a) (recodified at INA § 238(c)(1), 8 U.S.C. § 1228(c)(a)).

72. INS 1996 YEARBOOK, *supra* note 47, at 183 tbl.65 (1997).

73. *Id.* at 183 tbl.66.

74. *Id.* at 170–71.

75. *Id.* at 171.

76. *Id.*

adjudicated, and ordered to depart the United States.⁷⁷ Once a noncitizen who has violated immigration law comes into the hands of an immigration officer the likelihood of being allowed to remain in the country is slim.⁷⁸

B. Criminalizing Migration

While Congress was busy expanding the range of crimes that could result in removal, it also became more willing to use traditional criminal law to punish immigration law violations. In the 1980s and 1990s, Congress enacted a spate of new immigration-related crimes and increased the penalties for existing crimes. When it added the “aggravated felony” category of removable offense to immigration law in 1988, for example, it raised the maximum term of imprisonment to fifteen years if a noncitizen who entered the United States without authorization had previously been convicted of an aggravated felony.⁷⁹ Later, the maximum was again raised; this time to twenty years imprisonment, where it remains today.⁸⁰ Also during the 1980s, the Immigration Reform and Control Act of 1986, best known for its amnesty provisions, criminalized certain immigration conduct and stiffened penalties for existing immigration crimes. One section, for example, criminalized hiring unauthorized workers, with the possibility of six months imprisonment.⁸¹ Another section authorized up to five years imprisonment for bringing people into the United States clandestinely,⁸² while a third provision enhanced the penalty for possession or use of a false immigration document.⁸³ Four days later, the Immigration Marriage Fraud Amendments Act

77. Hiroshi Motomura, *The Discretion That Matters: Federal Immigration Enforcement, State and Local Arrests, and the Civil-Criminal Line*, 58 UCLA L. REV. 1819, 1841 fig.2 (2011).

78. See *id.* at 1836 (“[T]he arrest stage has been when government officers . . . exercise the discretion that matters.”); *id.* at 1842 (“[T]he immigration enforcement discretion exercised at the arrest stage has been the discretion that matters.”).

79. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7345, 102 Stat. 4181, 4469–70.

80. INA § 276(b)(2), 8 U.S.C. § 1326(b)(2) (2012).

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

82. *Id.* § 112 (amending INA § 274(a), 8 U.S.C. § 1324).

83. *Id.* § 103 (amending 18 U.S.C. § 1546).

criminalized “knowingly enter[ing] into a marriage for the purpose of evading any provision of the immigration laws,” and imposed a maximum of five years imprisonment.⁸⁴ A decade later, Congress added a criminal penalty of as much as five years for failure to disclose having falsely prepared an application for immigration benefits and added a repeat offender provision that could raise the penalty to fifteen years.⁸⁵

With time, immigration offenses began to fill a larger portion of the federal criminal docket. In 1993, for example, 2487 federal criminal prosecutions were filed in which an immigration crime was the lead charge, making these cases 5.4% of the nation’s criminal docket.⁸⁶ By 1997, the 6677 immigration law prosecutions made up 13.4% of the federal criminal docket.⁸⁷ In 2001, the first year for which the federal courts reported the number of prosecutions for illegal entry and illegal reentry, immigration offenses constituted 18.2% of the docket.⁸⁸ Illegal entry and illegal reentry prosecutions alone made up 14.9% of all criminal cases initiated by federal prosecutors that year.⁸⁹

This steady expansion sped up during the administration of President George W. Bush, and it continues under President Obama. In January 2013 alone, 7557 defendants were charged with illegal entry before federal magistrates and another 1557 with illegal reentry before district court judges.⁹⁰ More telling is the jump in illegal entry and illegal reentry prosecutions that occurred in 2008 and has yet to subside. In 2007, federal prosecutors filed 31,639 criminal cases in

84. Immigration Marriage Fraud Amendments of 1986, Pub. L. No. 99-639, § 2(d), 100 Stat. 3537, 3542.

85. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 213, 110 Stat. 3009, 3009-571 (codified at INA § 274C(e), 8 U.S.C. § 1324c(e) (2012)).

86. See JUDICIAL BUS. 1997 REPORT, *supra* note 49, 198 tbl.D-2. There were 45,902 federal criminal cases filed in 1993. *Id.* at 196 tbl.D-2.

87. See *id.* at 198. There were 49,655 federal criminal cases filed in 1997. *Id.* at 196 tbl.D-2.

88. In 2001, 11,288 of 62,134 criminal cases filed featured an immigration offense as the lead charge. See ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS 2005 ANNUAL REPORT 11, 225, 227 tbl.D-2.

89. See *id.* at 227 tbl.D-2. There were 2036 illegal entry cases and 7203 illegal reentry cases filed in 2001.

90. Transactional Records Access Clearinghouse, *Immigration Prosecutions for January 2013*, TRAC IMMIGRATION (Mar. 5, 2013), <http://trac.syr.edu/tracreports/bulletins/immigration/monthlyjan13/fil/> (last visited Sept. 15, 2013).

which illegal entry (13,960) or illegal reentry (17,679) was the lead charge.⁹¹ The next year they filed 49,663 illegal entry cases and 21,320 illegal reentry cases for a total of 70,983 cases.⁹² Case filings for these two offenses continued to increase, topping off at 84,301 in 2009, but remaining well above pre-2008 levels: 79,524 in 2010 and 71,644 in 2011.⁹³ In 2004, immigration offenses for the first time became the single largest type of crime prosecuted in federal courts.⁹⁴ As recently as 2011 there were more federal criminal immigration cases lodged each year than prosecutions for violent crimes, drug offenses, or any other type of federal crime.⁹⁵

Meanwhile, the states have also attempted to penalize immigration law violations. In a well-documented trend that is unlike anything seen since at least the late 1800s when states were last heavily involved in regulating immigration, state legislators introduced well over a thousand immigration-related proposals each year between 2007 and 2011, and another 983 proposals in 2012.⁹⁶

91. Transactional Records Access Clearinghouse, *Lead Charges for Criminal Immigration Prosecutions: FY 1986-FY 2011*, TRAC IMMIGRATION, http://trac.syr.edu/immigration/reports/251/include/imm_charges.html (last visited Sept. 15, 2013).

92. *Id.*

93. *Id.* According to TRAC, there were 54,175 and 30,126 cases in which illegal entry and illegal reentry, respectively, were the lead charges in 2009; 43,688 and 35,836 for illegal entry and illegal reentry, respectively, in 2010; and a projected 34,540 and 37,104 for illegal entry and illegal reentry, respectively, in 2011. *Id.*

94. Transactional Records Access Clearinghouse, *Immigration Enforcement: New Findings*, TRAC DHS (Aug. 24, 2005), <http://trac.syr.edu/tracins/latest/current/> (“[I]n FY 2004, immigration matters now represent the single largest group of all federal prosecutions . . .”).

95. Transactional Records Access Clearinghouse, *Comparing Program Areas: Federal Judicial District: U.S., TRAC DHS*, http://trac.syr.edu/tracins/highlights/v04/dhsallprog_fil.html (last visited Sept. 15, 2013) (explaining that 32.5% of prosecutions in fiscal year 2004 were for immigration offenses while the next highest category, narcotics/drugs, came in at 26.6%). Data from federal district courts alone indicate that in 2011 there were 28,435 immigration prosecutions lodged, eclipsing drug offenses, the second most prosecuted category, which came in at 16,109 prosecutions. *Table D-2: Cases: U.S. District Courts—Criminal Cases Commenced, by Offense, During the 12-Month Periods Ending March 31, 2007 Through 2011*, U.S. COURTS, <http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/Statistics/FederalJudicialCaseloadStatistics/2011/tables/D02CMar11.pdf> (last visited Sept. 15, 2013).

96. *2012 Immigration-Related Laws and Resolutions in the States (Jan. 1-Dec. 31, 2012)*, NAT’L CONFERENCE OF STATE LEGISLATURES tbl.1 (Jan. 2013), <http://www.ncsl.org/issues-research/immig/2012-immigration-related-laws-jan-december-2012.aspx> (last visited Sept. 15, 2013). According to the NCSL report, in 2007, 1562 proposals were introduced and 240

A total of 1229 of these proposals were enacted.⁹⁷ Though the enacted laws run the gamut of immigration legislation—everything from access to education to voting—102 of the laws enacted from 2010 to 2012 address state and local law enforcement officials' involvement in regulating immigration.⁹⁸ Arizona, Alabama, and Georgia's wide-ranging laws made headlines, with Arizona's Senate Bill 1070—unflatteringly described as the “show me your papers” law by opponents—making its way to the Supreme Court.⁹⁹ Aside from these high-profile enactments, states and localities have become accustomed to using criminal prosecutions to target noncitizens. Some prosecutors have adopted policies in which they tailor criminal prosecutions to increase the likelihood that the criminal process results in removal.¹⁰⁰ Some states have restricted bail for criminal defendants thought to lack authorization to be present in the United States.¹⁰¹ In Arizona, unauthorized migrants are sometimes prosecuted for smuggling themselves under the state's human smuggling offense.¹⁰² One New Hampshire police chief even sought, ultimately without success, to use the state's criminal trespass offense to punish unauthorized individuals present in the state.¹⁰³

enacted; in 2008, 1305 introduced and 206 enacted; in 2009, 1500 introduced and 222 enacted; in 2010, 1400 enacted and 208 enacted; in 2011, 1607 introduced and 197 enacted; and in 2012, 983 introduced and 156 enacted. *Id.*

97. *See id.*

98. *Id.* at tbl.2. NCSL explains that “[t]hese laws address a wide range of law enforcement areas, from firearm possession and domestic violence to drug manufacturing and trafficking.” *Id.*

99. *Arizona v. United States*, 132 S. Ct. 2492 (2012).

100. *See* Ingrid V. Eagly, *Criminal Justice for Noncitizens: An Analysis of Variation in Local Enforcement*, 88 N.Y.U. L. REV. 1126, 1170–80 (2013).

101. *See, e.g.*, Ingrid V. Eagly, *Local Immigration Prosecution: A Study of Arizona Before SB 1070*, 58 UCLA L. REV. 1749, 1762–63 (2011) (discussing ARIZ. REV. STAT. ANN. § 13-3906 (2010) and ARIZ. CONST. art. II, § 22) [hereinafter Eagly, *Immigration Prosecution*]; TENN. CODE ANN. §§ 40-11-105(c), -118(e) (2013).

102. *See* Eagly, *Local Immigration Prosecution*, *supra* note 101, at 1752–53.

103. Pam Belluck, *Novel Tack on Illegal Immigrants: Trespass Charges*, N.Y. TIMES, July 13, 2005, at A14.

C. Bringing Civil Immigration Law Procedures to Criminal Policing and Prosecutions

A third trend emblematic of the convergence of criminal law and immigration law also appears in criminal law enforcement practices and judicial proceedings: dispensing with certain procedural protections traditionally afforded criminal defendants when immigration-related activity forms the basis for the criminal prosecution. In deviating from traditional criminal practice, these proceedings seem to “borrow” lesser procedural protections from immigration courts, which are not subject to the panoply of constitutional limitations on the government’s power to punish that are embodied in the Fourth, Fifth, and Sixth Amendments because they concern only civil immigration matters.

Modern policing practices have frequently conflated immigration and criminal law enforcement goals while relying on lax interpretations of the Fourth Amendment that are rooted in civil immigration law. For almost thirty years, the Supreme Court has limited the Fourth Amendment’s reach into civil immigration proceedings.¹⁰⁴ Relying on this precedent, the Eighth Circuit, for example, permitted the use of evidence obtained by police officers investigating traditional criminal offenses to be used against noncitizens in immigration proceedings.¹⁰⁵ In another decision, the Supreme Court held that noncitizens were not “seized” for Fourth Amendment purposes even though INS agents filled their workplace and stood in front of doors and windows as other agents moved across the factory floor speaking to each individual.¹⁰⁶ Similarly, the Fourth Circuit held that a West Virginia sheriff’s deputy did not violate the Fourth Amendment even though he took time to call ICE during a routine automobile stop for a speeding infraction.¹⁰⁷

104. See *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1045–50 (1984) (holding that the exclusionary rule generally does not apply in immigration proceedings).

105. See *Puc-Ruiz v. Holder*, 629 F.3d 771, 775–80 (8th Cir. 2010) (allowing the use of identification information obtained by police without probable cause or an applicable Fourth Amendment exception).

106. See *INS v. Delgado*, 466 U.S. 210, 217–19 (1984).

107. See *United States v. Guijon-Ortiz*, 660 F.3d 757, 770 (4th Cir. 2011).

Some ICE agents have taken this relaxed view of the Fourth Amendment to heart. The ICE officer in charge of a raid of homes on Long Island ostensibly targeting suspected gang members, for example, explained his understanding of the Fourth Amendment's warrant requirement as follows: "We didn't have warrants We don't need warrants to make the arrests. These are illegal immigrants."¹⁰⁸ In an effort to curtail such conduct—but also a tacit admission that it is widespread—ICE agreed to instruct its agents about Fourth Amendment limitations on their activities.¹⁰⁹

Likewise, the Supreme Court's relaxed interpretation of the Fifth Amendment's Due Process Clause in immigration proceedings appears to have spilled into criminal prosecutions. Perhaps the most significant example of federal prosecutions adopting less rigid protections emblematic of civil immigration proceedings is Operation Streamline, a federal response to the enormous number of immigration prosecutions filed every year.¹¹⁰ The federal criminal system was simply not equipped with the resources necessary to manage this unprecedented workload. According to the Judicial Council of the U.S. Court of Appeals for the Ninth Circuit, these cases were "crushing" district courts within its jurisdiction.¹¹¹ Started in 2005, this initiative allows courts to adjudicate criminal immigration cases en masse—as many as 100 defendants appear at the same time before a judge.¹¹² Some attorneys involved in Operation Streamline proceedings refer to this as "assembly-line justice."¹¹³ After witnessing these proceedings in Tucson, one commentator, clearly appalled, described a scene where

108. Nina Bernstein, *Raids Were a Shambles, Nassau Complains to U.S.*, N.Y. TIMES, Oct. 3, 2007, at C12.

109. See Aguilar v. ICE, No. 1:07-cv-08224-KBF, slip op. at 5–6 (S.D.N.Y. Apr. 4, 2013).

110. See Donald Kerwin & Kristen McCabe, *Arrested on Entry: Operation Streamline and the Prosecution of Immigration Crimes*, MIGRATION POLICY INST. (Apr. 29, 2010), <http://www.migrationinformation.org/USfocus/print.cfm?ID=780>.

111. *In re Approval of Jud. Emer. Decl. in Dist. of Ariz.*, 639 F.3d 970, 979 (9th Cir. 2011).

112. See Kerwin & McCabe, *supra* note 110.

113. See Ingrid V. Eagly, *Prosecuting Immigration*, 104 NW. U. L. REV. 1281, 1351 n.405 (2010) (internal quotation marks omitted) [hereinafter Eagly, *Prosecuting Immigration*]. For a compelling discussion of the procedural shortcomings Operation Streamline creates, see Chacón, *supra* note 16, at 145–47.

approximately seventy defendants were processed: “It is doubtful that most truly understand what they are agreeing to, often encountering the US court system for their first time, dealing with an interpreter, and being rushed through the system (each defendant is given one hour at most with a lawyer, shared with several other defendants, and the hearings typically last less than two hours for the entire seventy defendants).”¹¹⁴ The Chief Judge of the U.S. District Court for the District of New Mexico expressed similar concerns when he explained that judges “try very hard to conduct their hearings in a way that is understandable to the defendants,” but then noted that most defendants in these proceedings have little formal education and minimal knowledge of the U.S. legal system.¹¹⁵ Such proceedings clash with the requirement of Federal Rule of Criminal Procedure 11(b) that, prior to accepting a plea, the court address each defendant “personally” and ensure that each plea is entered voluntarily.¹¹⁶ Conversely, these en masse hearings actually resemble civil immigration proceedings where immigration judges preside over multiple cases per day with some studies indicating that they have as few as seventy-three minutes per matter.¹¹⁷ In addition, the en masse style of these proceedings treads on the attorney-client privilege by making it difficult for attorneys to consult with defendants in private.¹¹⁸ This too resembles immigration proceedings insofar as attorneys frequently lack private spaces in which to meet with clients, especially when proceedings are conducted by televideo equipment and the attorney is not in the same location as the client.¹¹⁹

114. Andrew Burrige, *Differential Criminalization Under Operation Streamline: Challenges to Freedom of Movement and Humanitarian Aid Provision in the Mexico-US Borderlands*, 26 REFUGE 78, 81 (2009).

115. ADMIN. OFFICE OF THE U.S. COURTS, REPORT ON THE IMPACT ON THE JUDICIARY OF LAW ENFORCEMENT ACTIVITIES ALONG THE SOUTHWEST BORDER 16 (2008).

116. FED. R. CRIM. P. 11(b)(2); see *United States v. Roblero-Solis*, 588 F.3d 692, 699–701 (9th Cir. 2009) (concluding that an Operation Streamline proceeding prevented the court from meeting its obligation under Rule 11, but going on to uphold the conviction because the defendant failed to satisfy the applicable standard of review). *But see* *United States v. Arqueta-Ramos*, 730 F.3d 1133, 1139, 1142 (9th Cir. 2013) (concluding that a conviction obtained through an Operation Streamline proceeding violated Rule 11 and vacating the conviction).

117. Stephen H. Legomsky, *Restructuring Immigration Adjudication*, 59 DUKE L.J. 1635, 1651–52 (2010).

118. Juan Rocha, *Operation Streamline and the Criminal Justice System*, THE CHAMPION, Nov. 2011, at 30.

119. See DORA SCHRIRO, IMMIGRATION DETENTION OVERVIEW AND

Besides incorporating civil immigration law's relaxed approach to Fourth and Fifth Amendment doctrines, criminal prosecutions of immigration-related activity now exhibit immigration law's looser approach to assistance of counsel. In the 1990s, federal prosecutors began a practice of "fast-track" plea agreements.¹²⁰ These "plea agreements offer noncitizen defendants charged with an immigration crime a reduced sentence in exchange for quickly waiving a host of rights and consenting to immediate sentencing and removal."¹²¹ Today, fast-track pleas require that defendants waive the right to suppress evidence, challenge the sufficiency of the charging document, appeal, and seek a sentencing variance.¹²² Because fast-track plea offers typically require defendants to decide whether to accept or reject a plea offer within two weeks, some criminal defense attorneys have complained that they do not have enough time to adequately investigate the law and facts pertinent to the client's predicament.¹²³ Although no court has held as much regarding fast-track pleas, criminal defense attorneys who advise their clients about the best course of action without engaging in thorough investigation of the relevant law and facts would seem to deny these defendants the right to effective assistance of counsel provided by the Sixth Amendment.¹²⁴

RECOMMENDATIONS 23 (2009); Letter from Robert D. Evans, Dir., Am. Bar Ass'n Gov't Affairs Office, to Michael J. Creppy, Chief Immigration Judge 2 (Dec. 19, 2003), *available at* <http://apps.americanbar.org/poladv/letters/108th/immig121903.pdf>; *see also* SEATTLE UNIV. SCH. OF LAW INT'L HUMAN RIGHTS CLINIC, VOICES FROM DETENTION: A REPORT ON HUMAN RIGHTS VIOLATIONS AT THE NORTHWEST DETENTION CENTER 37–39 (2008) (noting that immigration detention staff can overhear conversations between attorneys and detained clients).

120. *See* Alan D. Bersin & Judith S. Feigin, *The Rule of Law at the Border: Reinventing Prosecution Policy in the Southern District of California*, 12 GEO. IMMIGR. L.J. 285, 301 (1998).

121. César Cuauhtémoc García Hernández, *Strickland-Lite: Padilla's Two-Tiered Duty for Noncitizens*, 72 MD. L. REV. 844, 918 (2013).

122. *See* Memorandum from James M. Cole, Deputy Att'y Gen., U.S. Dep't of Justice to All U.S. Attorneys 3–4 (Jan. 31, 2012), *available at* www.justice.gov/dag/fast-track-program.pdf.

123. *See* Eagly, *Prosecuting Immigration*, *supra* note 113, at 1322; Joint Statement of Thomas W. Hillier II, Fed. Pub. Defender, W. Dist. of Wash., & Davina Chen, Assistant Fed. Pub. Defender, Cent. Dist. of Cal., *The Sentencing Reform Act of 1984: 25 Years Later: Public Hearing Before the U.S. Sentencing Comm.* 28 (May 27, 2009).

124. *See* *Strickland v. Washington*, 466 U.S. 668, 690–91 (1984); García Hernández, *supra* note 121, at 921–22.

A relaxed interpretation of the right to assistance of counsel fits neatly into immigration law, but less so within the law of criminal procedure. Individuals in immigration proceedings are granted a statutory right to counsel and some federal courts even recognize a constitutional right to counsel that arises from the Fifth Amendment's Due Process Clause.¹²⁵ One circuit hinted at the possibility of a constitutional right to appointed counsel in some circumstances, but no court has ever actually appointed counsel in an immigration proceeding under this reasoning.¹²⁶ Moreover, the Sixth Amendment right to counsel does not apply to immigration proceedings.¹²⁷ In contrast, criminal proceedings are subject to the extensive body of law interpreting the Sixth Amendment's counsel guarantee, including its requirement that counsel provide effective assistance.¹²⁸

The Supreme Court's decision in *Padilla v. Kentucky*¹²⁹ arguably follows this trend. Though recognizing for the first time that the Sixth Amendment's right to effective assistance of counsel requires defense attorneys to provide noncitizen clients with advice about the immigration consequences of conviction, *Padilla* adopts an approach that I have elsewhere dubbed "*Strickland*-lite" to signify its weakening of the standard for effective assistance of counsel that usually applies in criminal proceedings.¹³⁰ Rather than ensuring that criminal defendants are fully informed about the immigration risk associated with pleading guilty or nolo contendere to a criminal charge, *Padilla* requires less of criminal defense attorneys by way of

125. INA § 292, 8 U.S.C. § 1362 (2012); see *Ponce-Leiva v. Ashcroft*, 331 F.3d 369, 374 (3d Cir. 2003) (citing *Uspango v. Ashcroft*, 289 F.3d 226, 231 (3d Cir. 2002)); *United States v. Torres-Sanchez*, 68 F.3d 227, 230 (8th Cir. 1995); *Jiang v. Houseman*, 904 F. Supp. 971, 978 (D. Minn. 1995); *Nunez v. Boldin*, 537 F. Supp. 578, 582 (S.D. Tex. 1982).

126. *Aguilera-Enriquez v. INS*, 516 F.2d 565, 568 (6th Cir. 1975); see Geoffrey Heeren, *Illegal Aid: Legal Assistance to Immigrants in the United States*, 33 CARDOZO L. REV. 619, 668 (2011).

127. See *Abel v. United States*, 362 U.S. 217, 237 (1960) (holding that "deportation proceedings are not subject to the constitutional safeguards for criminal prosecutions"); *Matter of Compean*, 24 I. & N. Dec. 710, 716–17 (Op. Att'y Gen. 2009), *vacated on other grounds*, 25 I. & N. Dec. 1 (Op. Att'y Gen. 2009) (collecting cases from the federal circuits).

128. See *Strickland*, 466 U.S. at 685.

129. 559 U.S. 356 (2010).

130. See generally García Hernández, *supra* note 121.

investigating the client's circumstance, an approach which privileges efficiency over illumination.¹³¹

Combined, these developments alter the very nature of criminal proceedings. Rather than the robust—though susceptible to all manner of criticism—norms that have traditionally protected criminal defendants from the state's prosecutorial power, “we are . . . witnessing the importation of the relaxed procedural norms of civil immigration proceedings into the criminal realm.”¹³² Operation Streamline, fast-track plea agreements, and *Padilla's* relaxed effective assistance of counsel requirement are evocative not of traditional criminal proceedings, but rather of immigration proceedings where noncitizens are processed en masse, rights are limited, and legal counsel is viewed as a luxury rather than a necessity.

D. Policing Crimmigration Law

As substantive and procedural criminal law has become increasingly intertwined with substantive and procedural immigration law, the methods of policing the two bodies of law have transcended the historic boundary between the two.¹³³ Today, it is appropriate to talk of “policing immigration”¹³⁴ and immigration-izing traditional criminal policing.¹³⁵ No better lens through which to study this convergence exists than detention. The number of noncitizens confined to a secured facility—whether a county jail or a specialized immigration detention center—is at unprecedented levels.¹³⁶ Meanwhile, the explosive growth of federal criminal

131. *See id.* at 921–22.

132. Chacón, *supra* note 16, at 137.

133. *See* Adam B. Cox & Thomas J. Miles, *Policing Immigration*, 80 U. CHI. L. REV. 87, 87 (2013) (claiming that the Secure Communities program “accelerates the ongoing convergence of the immigration and criminal bureaucracies in the United States”).

134. *See generally id.*

135. *See* Chacón, *supra* note 16, at 137 (explaining “that the protective features of criminal investigation and adjudication are melting away at the edges in certain criminal cases involving migration-related offenses”).

136. WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* 46–47 (2011); *see* Heather Ann Thompson, *Why Mass Incarceration Matters: Rethinking Crisis, Decline, and Transformation in Postwar American History*, 97 J. AM. HIST. 703, 703–04 (2010).

prosecutions for immigration-related activity means “[n]oncitizens have become the face of federal prisons.”¹³⁷

Immigration detention, historically little used, has become the most salient feature of immigration law enforcement. In fiscal year 2011, DHS maintained custody of 429,247 people.¹³⁸ This figure represented its largest number of detained individuals to date and the first time the immigration detainee population topped 400,000.¹³⁹ It was, however, a continuation of a recent trend of a growing detention population.¹⁴⁰ Importantly, these detained individuals are not awaiting criminal prosecution or serving a penalty for having been convicted of a crime. DHS has no authority to impose detention for such reasons.¹⁴¹ Instead, they are detained while waiting to learn whether they will be allowed to remain in the United States.¹⁴² This is an administrative determination adjudicated through the federal government’s immigration bureaucracy—ICE, the immigration courts, the Board of Immigration Appeals, and, in some instances, reviewed by the federal courts.¹⁴³ On average, individuals spend between one and three months in immigration confinement.¹⁴⁴ Based on 2009 data, between one and three percent of individuals remained in detention longer than one year.¹⁴⁵ Applied

137. Eagly, *Prosecuting Immigration*, *supra* note 113, at 1282.

138. DEP’T OF HOMELAND SEC., IMMIGRATION ENFORCEMENT ACTIONS: 2011 ANNUAL REPORT 5 tbl.4 (2012).

139. *See* DORIS MEISSNER ET AL., IMMIGRATION ENFORCEMENT IN THE UNITED STATES: THE RISE OF A FORMIDABLE MACHINERY 126 fig.30 (2013) (graphically charting the immigration detention population since 2001).

140. *See id.*

141. *Id.* at 125.

142. *See* INA § 236(a), (c), 8 U.S.C. § 1226(a), (c) (2012); INA § 241(a)(1)–(2), 8 U.S.C. § 1231(a)(1)–(2) (2012).

143. *See* DAN KESSELBRENNER & LORY D. ROSENBERG, IMMIGRATION LAW & CRIMES § 8:20; Alina Das, *The Immigration Penalties of Criminal Convictions: Resurrecting Categorical Analysis in Immigration Law*, 86 N.Y.U. L. REV. 1669, 1684 (2011); *see also* Mark Noferi, *Cascading Constitutional Deprivation: The Right to Appointed Counsel for Mandatorily Detained Immigrants Pending Removal Proceedings*, 64 MICH. J. RACE & L. 63, 75 (2012) (graphically displaying the administrative process for detaining an individual in removal proceedings).

144. *See* Geoffrey Heeren, *Pulling Teeth: The State of Mandatory Immigration Detention*, 45 HARV. C.R.-C.L. L. REV. 601, 602 n.6 (2010) (citing competing estimates, one by ICE and another by the Migration Policy Institute, reporting that, on average, people remained in immigration detention thirty days or eighty-one days, respectively).

145. *See id.*

to DHS's 2011 population, this would mean that between 4292 and 12,877 individuals had spent more than a year waiting to learn their fate while sitting in a detention facility.

The facilities in which noncitizens are held pending immigration adjudications frequently carry all the hallmarks of penal confinement.¹⁴⁶ They are operated based on standards developed for penal incarceration.¹⁴⁷ Like prisons and jails used to detain criminal inmates, detention centers are secure environments where inmates' movements are strictly dictated and closely observed.¹⁴⁸ Segregated housing is not uncommon.¹⁴⁹ The largest facilities tend to be located in remote areas far removed from legal communities of any significant size and social support networks.¹⁵⁰ And most attesting to their penal character, many facilities—though each holds few detainees—are in fact jails from which ICE has simply rented space.¹⁵¹

Meanwhile, several policing trends that originated in immigration law enforcement have expanded into criminal law enforcement. Like many people serving sentences as a result of a criminal conviction,¹⁵² a growing number of immigration detainees are confined in privately owned or operated prisons.¹⁵³ Neither ICE

146. See SCHRIRO, *supra* note 119, at 4.

147. See MEISSNER ET AL., *supra* note 139, at 128.

148. See HUMAN RIGHTS FIRST, JAILS AND JUMPSUITS: TRANSFORMING THE U.S. IMMIGRATION DETENTION SYSTEM—A TWO-YEAR REVIEW 8, 35 (2011). Human Rights First contends that immigration detainees are permitted less freedom of movement within the facility than inmates at thirty-five Bureau of Prison facilities. *Id.* at 36.

149. See NAT'L IMMIGRANT JUSTICE CTR., INVISIBLE IN ISOLATION: THE USE OF SEGREGATION AND SOLITARY CONFINEMENT IN IMMIGRATION DETENTION 3 (2012); see also Ian Urbina & Catherine Rentz, *Immigrants Held in Solitary Cells, Often for Weeks*, N.Y. TIMES, Mar. 23, 2013, at A1.

150. See César Cuauhtémoc García Hernández, *Due Process and Immigrant Detainee Prison Transfers: Moving LPRs to Isolated Prisons Violates Their Right to Counsel*, 21 BERKELEY LA RAZA L.J. 17, 17–21 (2011).

151. HUMAN RIGHTS FIRST, *supra* note 148, at iii.

152. See E. ANN CARSON & WILLIAM J. SABOL, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2011, 32 appx. tbl.15 (2012) (indicating that 130,941 state or federal prisoners were held in private prisons). According to The Sentencing Project, over 130,000 people were incarcerated in private jails or prisons associated with a criminal prosecution or conviction in 2011, representing approximately 8% of the total criminal jail and prison population that year. See CODY MASON, INTERNATIONAL GROWTH TRENDS IN PRISON PRIVATIZATION 9 (2013).

153. See *The Influence of the Private Prison Industry in Immigration Detention*, DET.

nor its predecessor, INS, has built its own facility since the late 1990s.¹⁵⁴ Yet, its capacity has grown exponentially since then. This growth has come in part through contracts with private prison corporations, especially the Corrections Corporation of America (“CCA”) and the GEO Group, the country’s two largest such companies.¹⁵⁵ Indeed, an INS contract with CCA in 1983 launched the modern era of private imprisonment.¹⁵⁶ Since then, private prisons have come to fill approximately half of the nation’s immigration detention demand.¹⁵⁷

Other tactics associated with immigration law policing have also gained traction in the criminal realm and expanded detention. The suspicionless searches that have long characterized immigration law enforcement along the southwest border¹⁵⁸ have become a feature of policing in nearly every jurisdiction in the United States through the Obama Administration’s enthusiastic support of the Secure Communities program.¹⁵⁹ Through Secure Communities, law enforcement agencies effectively partner with ICE to identify potentially removable individuals by sharing with the federal agency identification information about every person taken into police custody.¹⁶⁰ In this way, the federal government augments its immigration law enforcement capacity by tapping the workforce of police agencies throughout the country. This expanded reach increases the detained population in two ways. First, it increases the length of time individuals are held by criminal police authorities

WATCH NETWORK, <http://www.detentionwatchnetwork.org/privateprisons> (last visited July 25, 2013); see also TOM BARRY, *BORDER WARS* 4 (2011) (describing private immigration prisons as “the new face of imprisonment in America”).

154. See Corrections Corp. of America, *Investor Presentation 20* (Mar. 2012), available at http://crimmigration.com/files/0/6/4/7/5/167292-157460/Q4_2011_Investor_Presentation.pdf.

155. See *id.* at 7.

156. BARRY, *supra* note 153, at 10.

157. See *The Influence of the Private Prison Industry in Immigration Detention*, *supra* note 153.

158. See, e.g., *United States v. Flores-Montano*, 541 U.S. 149, 155 (2004) (explaining that the federal government is authorized to conduct suspicionless searches at the border).

159. As of August 22, 2012, Secure Communities was active in 97% of jurisdictions in the United States. U.S. Immigration & Customs Enforcement, *Activated Jurisdictions*, ICE.GOV, <http://www.ice.gov/doclib/secure-communities/pdf/sc-activated2.pdf> (last visited Sept. 15, 2013).

160. U.S. Immigration & Customs Enforcement, *Secure Communities: The Secure Communities Process*, ICE.GOV, http://www.ice.gov/secure_communities/ (last visited Sept. 15, 2013).

because ICE issues a “detainer” on people who are identified as potentially removable.¹⁶¹ In the agency’s view, detainers allow it to request that the law enforcement agency maintain custody for up to forty-eight hours after the basis for criminally detaining the individual ends.¹⁶² Second, because the individuals identified through Secure Communities have already interacted with the criminal justice system (through the form of police officers, at a minimum), many have been convicted of a crime. According to ICE, approximately 1.1 million people convicted of any crime were identified through Secure Communities between fiscal year 2009 and fiscal year 2012.¹⁶³ Since ICE does not report the types of offenses that these people were convicted of committing, it is not possible to know what percentage was subject to immigration detention. Nonetheless, the INA’s mandatory detention provisions are quite broad and cover offenses as serious as rape and as minor as simple marijuana possession.¹⁶⁴ The statute’s discretionary detention provision, of course, allows an immigration judge to deny bond to any person who does not fall into a mandatory detention basis but is deemed dangerous or at risk of absconding.¹⁶⁵ As such, it is reasonable to assume that many of these 1.1 million were detained pending removal proceedings.

The end result of the expanded list of crimes that may result in removal, the growing willingness to regulate immigration through federal and subfederal penal codes, the adoption of relaxed procedural norms to prosecute immigration crimes, and the conflation of immigration and criminal policing norms has melted away a stark boundary that once existed between criminal law and immigration law. Instead, “the civil immigration system and the

161. *Id.*

162. *Id.*

163. U.S. Immigration & Customs Enforcement, *Secure Communities: Monthly Statistics Through September 30, 2012*, ICE.GOV, http://www.ice.gov/doclib/foia/sc-stats/nationwide_interop_stats-fy2012.pdf (last visited Sept. 15, 2013).

164. *See* INA § 236(c), 8 U.S.C. § 1226(c) (2012). Section 236(c) references INA § 237(a)(2)(A)(iii) which in turn references the “aggravated felony” term that is defined at INA § 101(a)(43)(A) to include rape. Section 236(c) also references INA § 237(a)(2)(B), which includes any controlled substance offense including simple possession of marijuana “other than a single offense involving possession for one’s own use of 30 grams or less.” INA § 237(a)(2)(B), 8 U.S.C. § 1227(a)(2)(B).

165. *See* INA § 236(a), 8 U.S.C. § 1226(a).

criminal justice system are a single, intertwined regulatory bureaucracy that moves between criminal and civil enforcement mechanisms.”¹⁶⁶ Remaining to be discussed, though, is why this conflation occurred when it did during the closing decades of the twentieth century. To understand that, it is important to place crimmigration law within the social and legal context in which it initially developed.

III. CONTEXTUALIZING CRIMMIGRATION

As detailed above, criminal law and immigration law have intersected to some degree since the earliest days of the nation’s history. Throughout those centuries, antagonism toward noncitizens has appeared regularly, and special vile has been heaped onto individuals with criminal records. Yet, the deep intertwining of criminal law and immigration law that has come to be known as crimmigration law did not develop until the 1980s and 1990s. What was different about the closing decades of the twentieth century that produced the development of crimmigration law? The answer lies in the evolving role that race occupies in law. Cultural and legal shifts in race relations spurred by the civil rights movements of the mid-twentieth century constrained reliance on overt racism. In place of openly racist rhetoric and *de jure* racism, policymakers adopted facially neutral legal regimes in criminal law and procedure and immigration law and procedure that proved anything but racially neutral in practice. Crucially, lawmakers concerned about the civil rights era’s elimination of cultural and legal mechanisms used to subordinate entire racial groups turned to the government’s criminal law power to stigmatize and punish. With the legitimacy of ostensibly race-neutral criminal law and procedure, lawmakers reproduced the racial hierarchies of decades past.

A. Post-Civil Rights Constraints on Overt Racism

A final verdict on the success of the civil rights struggles of the 1940s-1970s remains unwritten, if such an assessment is even possible.¹⁶⁷ What is clear, however, is that the broad-based efforts

166. Eagly, *Prosecuting Immigration*, *supra* note 113, at 1359.

167. See HARVARD SITKOFF, *THE STRUGGLE FOR BLACK EQUALITY, 1954–1992*, vii–viii

organized in those decades radically changed the way that the United States discusses race. On the whole, it is no longer culturally acceptable to speak of communities or individuals of color in blatantly derogatory language.¹⁶⁸ In large part, it is also not permissible to legally marginalize or discriminate against groups of people of color based on race alone. These mid-century accomplishments literally altered the face of immigration law.

Prior to the civil rights era, immigration discourse was explicitly focused on pejorative racialized depictions of prospective immigrants. As Frank P. Sargent, who from 1902 to 1908 served as the nation's first Commissioner of Immigration, explained while speaking about the Chinese, there were "difficulties inherent in the character of the Mongolian race to be met and surmounted," and he would do all he could to ensure that immigration law enforcement under his watch met this challenge.¹⁶⁹ Albert Johnson, a United States Senator who spearheaded passage of the National Origins Act of 1924, wrote of the perils of "Russian Poles or Polish Jews of the usual ghetto type They are filthy un-American and often dangerous in their habits."¹⁷⁰ No more influential example of this prevailing wisdom exists than the Senate commission led by Senator William Dillingham, which, relying on the theory of scientific racism that claimed that blacks, Asians, and southern and eastern Europeans were inferior to northern and western Europeans, concluded that the United States needed to slow immigration from southern and eastern Europe—the principal sources of that period's immigrants.¹⁷¹

This and similar rhetoric led to a host of restrictionist immigration laws premised on race-based exclusions. The Chinese

(1993) (describing writing a history of the civil rights era as a "hazardous task").

168. The reaction to revelations that celebrity chef Paula Deen made racist comments exemplifies the cultural disapproval of explicitly expressing such attitudes. See Tom Dart, *Paula Deen Let Go by Food Network Over Use of Racially-Charged Language*, THE GUARDIAN (U.K.) (June 22, 2013), <http://www.theguardian.com/world/2013/jun/22/paula-deen-food-network-racial-language>.

169. ERIKA LEE, *AT AMERICA'S GATES: CHINESE IMMIGRATION DURING THE EXCLUSION ERA, 1882–1943*, at 67 (2003).

170. PETER SCHRAG, *NOT FIT FOR OUR SOCIETY: IMMIGRATION AND NATIVISM IN AMERICA* 115 (2010).

171. See HULL, *supra* note 19, at 14; see also DANIEL J. TICHENOR, *DIVIDING LINES: THE POLITICS OF IMMIGRATION CONTROL IN AMERICA* 250, 250 (2002) (describing the Dillingham Commission's findings as "pseudoscientific" and nativist).

Exclusion Act famously identified its target group in the law's name. In 1917, Congress barred entry of anyone whose ancestry was traced to the "so-called Asiatic Barred Zone."¹⁷² These exclusionary laws meant that Asian populations would remain low for decades to come.¹⁷³ Later enactments were barely less overt in their discriminatory intent, though they branched beyond Asians. The National Origins Act, enacted in 1921 and part of immigration law for the next four decades, allotted visas for new immigrants not by family ties or employment, as immigration law presently does, but rather by country of origin, thereby allotting numerical quotas for ethnic backgrounds.¹⁷⁴ Worse, it expressly favored immigration by racial groups already dominant in the United States by tying future immigration to the number of citizens of particular countries that were in the United States in 1910.¹⁷⁵ Three years later, Congress pegged the new immigrant quota to the 1890 Census and capped total European immigration at 150,000 per year.¹⁷⁶ Western Hemisphere countries were not subject to the quota.¹⁷⁷ Given the origins of the population at that time, the end result of the two quota acts indisputably favored prospective immigrants from northern and western Europe: Great Britain, for example, which at the time had approximately two percent of the world's population, received forty-three percent of the allotment.¹⁷⁸ Asians, in contrast, were almost entirely excluded.¹⁷⁹

Mexicans too would suffer no shortage of overtly discriminatory measures. In 1951, President Harry Truman's Commission on Migratory Labor cautioned that "wetback traffic . . . is virtually an

172. See Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1, 14 (1998).

173. See MAE M. NGAI, IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA 18 (2004).

174. See James F. Smith, *A Nation That Welcomes Immigrants? An Historical Examination of United States Immigration Policy*, 1 U.C. DAVIS J. INT'L L. & POL'Y 227, 232 (1995); see also INA § 203(a)-(b), 8 U.S.C. § 1153(a)-(b) (2012) (providing the current family-based and employment-based immigration options).

175. See Immigration Act of 1921, ch. 8, §§ 2(a)-(c), 42 Stat. 5, 5-6.

176. Immigration Act of 1924, Pub. L. No. 68-139, ch. 190, § 11(a), (b), 43 Stat. 153, 159; see HULL, *supra* note 19, at 18.

177. Smith, *supra* note 174, at 232.

178. See HULL, *supra* note 19, at 18.

179. See *id.*

invasion,” using what Kanstroom describes as “a racial epithet with stereotypical images of law-breaking Mexican border crossers, the archetypal ‘illegal alien.’”¹⁸⁰ Meanwhile, the United States and Mexican governments implemented multiple strategies targeting unauthorized emigration from México into the United States.¹⁸¹ These initiatives famously climaxed in the summer of 1954 when the Border Patrol, acting at Attorney General Herbert Brownell’s instruction, launched Operation Wetback.¹⁸² According to Kelly Lytle Hernández, “eight hundred Border Patrol officers swept through the southwestern United States performing a series of raids, road blocks, and mass deportations. By the end of the year, Brownell was able to announce that the summer campaign had been a success by contributing to the apprehension and deportation of over one million persons, mostly Mexican nationals, during 1954.”¹⁸³

A decade later, the world, and the United States within it, was a different place. Through sustained organizing and, not uncommonly, physical injury and loss of life, civil rights activists had caught the public’s attention and propelled key legislation through Congress, including the landmark Civil Rights Act of 1964 and Voting Rights Act of 1965. In different ways, each piece of legislation sought to stem the decades of overt racial discrimination that had been heaped onto communities of color. Simultaneously, the Cold War, then at its peak, injected a dose of foreign policy realism into domestic affairs. When the INS Commissioner in the early 1950s proposed building a fence and watch towers along portions of the Arizona and California border, the State Department “envisioned photographs in the Moscow newspapers” and objected.¹⁸⁴ Likewise, President Truman, in vetoing the Immigration Act of 1952 (which was subsequently enacted after Congress overrode his veto), described the national origins quotas that the bill maintained as “a slur on the patriotism . . . of our citizenry” and

180. KANSTROOM, *supra* note 6, at 221, 223. A year after Operation Wetback, the INS proclaimed that it sought to curtail the “wetback invasion.” HULL, *supra* note 19, at 84.

181. See Kelly Lytle Hernández, *The Crimes and Consequences of Illegal Immigration: A Cross-Border Examination of Operation Wetback, 1943 to 1954*, 37 W. HIST. Q. 421, 422 (2006).

182. See *id.*

183. *Id.* at 421.

184. NGAI, *supra* note 173, at 156.

argued that, instead, the United States needed “a fitting instrument for our foreign policy and a true reflection of the ideals we stand for, at home and abroad.”¹⁸⁵ That instrument, according to liberals of the era, was an immigration policy that subjected everyone to a regime of formal equality—where prospective immigrants from every country were treated identically and qualifying criteria for new immigrant visas were not tied to markers of race.¹⁸⁶

Buoyed by the civil rights movement’s successes, Congress followed that liberal vision of formal equality the next time it enacted immigration legislation.¹⁸⁷ Over four decades after they were initially adopted, the Immigration Act of 1965 (commonly referred to as the Hart-Celler Act) finally repealed the national origins quotas, ending an overtly racist form of restrictionist immigration policies.¹⁸⁸ The 1965 Act’s most striking alteration of immigration law was to impose uniform immigration rules on large sets of countries.¹⁸⁹ Among other changes, the Act allotted each country of the Eastern Hemisphere 20,000 visas per year with a maximum of 170,000.¹⁹⁰ Unlike previous enactments, however, the Act imposed a cap of 120,000 to be divided according to demand by Western Hemisphere countries.¹⁹¹ Eleven years later, in 1976, Congress extended the per-country limit to the Western Hemisphere.¹⁹² With the exception of parents, spouses, and unmarried minor children of United States citizens, only 20,000 people from any given country could receive permission to enter the United States each year.¹⁹³

185. *Id.* at 239.

186. *See id.* at 245.

187. *See* KEVIN R. JOHNSON, OPENING THE FLOODGATES: WHY AMERICA NEEDS TO RETHINK ITS BORDERS AND IMMIGRATION LAWS 51, 103 (2007) (linking the civil rights movement to enactment of the 1965 act); MOTOMURA, *supra* note 12, at 132 (“[T]he [1965] amendments were part of a basic movement toward civil rights in American public law that included the Civil Rights Act of 1964 and the Voting Rights Act of 1965.”); NGAI, *supra* note 173, at 13 (explaining that the “conventional view” was that the 1965 act was a “liberal reform”).

188. *See* NGAI, *supra* note 173, at 227.

189. *See* MOTOMURA, *supra* note 12, at 131.

190. *See* NGAI, *supra* note 173, at 258.

191. *See id.*; *see also id.* at 254 (“The Immigration Acts of 1924 and 1952 did not impose numerical restrictions on immigration from countries of the Western Hemisphere.”).

192. *See id.* at 261.

193. *See id.* at 258.

Citizens of countries that had long been under tight immigration controls made quick use of the Hart-Celler Act's liberalization. Asians, in particular, experienced newfound immigration opportunities in light of the 1965 Act.¹⁹⁴ Most immigration by Asians was prohibited from the closing decades of the nineteenth century through the bulk of the twentieth century's first half.¹⁹⁵ The 1952 Act eliminated the last of the Asian exclusion laws—applied until then against Japanese and Koreans—but imposed restrictive quotas on all immigration from the “Asia Pacific Triangle.”¹⁹⁶ The Hart-Celler Act's equal allotment of visas to each country suddenly opened new paths to the United States.¹⁹⁷ By 1971, four of the top six countries outside the Western Hemisphere from which new immigrants arrived were in Asia.¹⁹⁸

At the same time, the Hart-Celler Act propagated a more subtle set of policies that converted immigration from particular countries with significant and long-standing ties to the United States, especially México, into the picture of illegality¹⁹⁹ by inaugurating an era of immigration controls from Latin America unlike anything previously imposed. The hemisphere-wide cap and the country-specific limit as applied to Mexican immigration proved woefully lower than demand.²⁰⁰ Indeed, a commission created by the Hart-Celler Act to study its implementation urged a repeal of the hemispheric maximum and, if per-country ceilings were to exist,

194. LEE, *supra* note 169, at 246.

195. *See id.* As an illustration of this regional exclusion, the Immigration Act of 1917 referenced the “Asiatic Barred Zone” that “effectively excluded all immigrants from India, Burma, Siam, the Malay States, Arabia, Afghanistan, part of Russia, and most of the Polynesian Islands.” *Id.* at 39. With the exception of Filipinos, Asian exclusion was “perfected,” Lee writes, by immigration statutes enacted in 1921 and 1924; Filipinos were excluded in 1934. *Id.*

196. *See* NGAI, *supra* note 173, at 238.

197. *See* MOTOMURA, *supra* note 12, at 133.

198. *See* NGAI, *supra* note 173, at 262 & n.120 (noting that the top sending countries to the USA in 1971 were, in order, the Philippines, Italy, Greece, China, India, and Korea).

199. *See* NGAI, *supra* note 173, at 227 (positing that the 1965 Act “reproduce[d] the problem of illegal immigration, especially from Mexico, to the present day”); *see also* DOROTHEE SCHNEIDER, CROSSING BORDERS: MIGRATION AND CITIZENSHIP IN THE TWENTIETH-CENTURY UNITED STATES 238–39 (2011) (noting the 1965 Act's adverse impact on Mexican immigration).

200. *See* KELLY LYTLE HERNÁNDEZ, MIGRA!: A HISTORY OF THE U.S. BORDER PATROL 214 (2010) [hereinafter HERNÁNDEZ, MIGRA!].

proposed that each Western Hemisphere country be allotted 40,000 slots.²⁰¹ Even 40,000 would have been substantially lower than the number of Mexicans entering the United States with some form of authorization to work in the early 1960s, which was upwards of 200,000 per year.²⁰²

When Hart-Celler's limitations went into effect, the result was as immediate as it was long lasting. Mexicans kept coming to the United States—indeed, Mexican migration appears to have increased after 1965 because an established Mexican community existed in the United States by then and the Mexican economy soured—only now they lacked permission to do so.²⁰³ Net unauthorized migration—that is, the difference between the number of unauthorized individuals who entered the country and those who left—jumped from zero before the 1965 Act was enacted to approximately 300,000 per year by the close of the 1980s.²⁰⁴ The Border Patrol responded by “return[ing] to aggressive migration control tactics” targeting unauthorized Mexicans.²⁰⁵ Not surprisingly, deportations skyrocketed.²⁰⁶ In 1976, for example, the INS deported 781,000 Mexicans.²⁰⁷ That same year it deported fewer than 100,000 people from the rest of the world combined.²⁰⁸ The imposition of quotas on Western Hemisphere immigration and per-country ceilings fanned unauthorized Mexican immigration like nothing else in the history of the two nations and “recast Mexican migration as ‘illegal.’”²⁰⁹

Without question, the Hart-Celler Act had the effect of diversifying the racial composition of new immigration as the last quarter of the twentieth century began.²¹⁰ But that diversity was not without significant complication.²¹¹ The Act ignored social and

201. See NGAI, *supra* note 173, at 261.

202. See *id.*

203. See MOTOMURA, *supra* note 12, at 135; SCHNEIDER, *supra* note 199, at 239.

204. Douglas S. Massey, *Epilogue to The Past and Future of Mexico-U.S. Migration*, in BEYOND LA FRONTERA: THE HISTORY OF MEXICO-U.S. MIGRATION 251, 254 (Mark Overmyer-Velázquez ed., 2011).

205. HERNÁNDEZ, MIGRA!, *supra* note 200, at 215.

206. See *id.* at 216.

207. NGAI, *supra* note 173, at 261.

208. See *id.*

209. See *id.*

210. See SCHNEIDER, *supra* note 199, at 243.

211. See KEVIN R. JOHNSON & BERNARD TRUJILLO, IMMIGRATION LAW AND THE US-

economic realities that drive immigration. It made no allowance for the unique relationship between the United States and México—the historical reliance on low-skill Mexican labor by numerous industries in the United States, a pattern of formal governmental and nongovernmental recruitment of Mexican workers, geographic proximity, personal relationships that spread across borders, and the ease with which generations of Mexicans had moved from one country to the other. Yet none of these factors changed when the lawful means of migration was suddenly capped by the 1965 Act and its 1976 amendments.²¹²

By framing its formal equality regarding the number of people from a given country who could lawfully immigrate each year as a gesture of fairness, immigration law pinned the onus of unauthorized immigration on the migrants themselves.²¹³ Rather than query the underlying motivation for Mexican immigration or the willingness to do so in contravention of United States immigration law, Mexican migrants could be blamed for causing unauthorized immigration.²¹⁴ In this way, unauthorized immigration became framed as a moral issue and unauthorized immigrants as moral scofflaws.²¹⁵ When policymakers became willing to turn to the criminal justice system to deal with all manner of perceived moral failings, as the next section explains, immigrants were caught up in this frenzy.

MEXICO BORDER: ¿SÍ SE PUEDE? 125 (2011) (explaining that the 1965 Act “coupled more generous treatment of those outside the Western Hemisphere with less generous treatment of Latin Americans”).

212. NGAI, *supra* note 173, at 257 (noting that the 1965 Act curtailed legal avenues for Mexican immigration without addressing factors motivating Mexicans to come to the United States to work).

213. *See id.* at 246–48.

214. *See* David Fitzgerald, *Mexican Migration and the Law*, in BEYOND LA FRONTERA: THE HISTORY OF MEXICO-U.S. MIGRATION, *supra* note 204, at 179, 192 (“Building on the legal fact that Mexicans are disproportionately represented among the unauthorized population, restrictionist politicians have been effective in discursively presenting illegal immigration as a ‘Mexican’ problem.”).

215. *See* Teresa A. Miller, *Citizenship & Severity: Recent Immigration Reforms and the New Penology*, 17 GEO. IMMIGR. L.J. 611, 615 (2003) [hereinafter Miller, *Citizenship*] (“The American Public now represents the primary victim of flawed immigration practices; a victim in need of protection from immigrants draining welfare coffers and failing to culturally assimilate into the white middle-class.”).

B. Crime as a Marker of Undesirability

Civil rights era legislative successes did not assure the end of deeply ingrained racial biases that dominated the United States' history. Instead, individuals who in the past had openly championed explicitly racialized methods of subjugating people of color set their sights on discrimination packaged in a race-neutral veneer.²¹⁶ They found their answer in crime.²¹⁷ A “law and order” discourse that had existed in limited fashion prior to the demise of Jim Crow quickly gained ground as the new paradigm of choice for governing social relations.²¹⁸

Understanding the cultural salience of crime that developed after the civil rights era²¹⁹ requires grappling with its political utility. To be sure, reported crime rates did increase in the years following the 1960s.²²⁰ This upswing can partly be explained by the fact that the baby boom generation reached the prime crime-committing years at this time.²²¹ Millions of young men suddenly had the physical maturity and mental wherewithal to engage in antisocial behavior, including criminal activity.²²² Crime rates did not, however, drive the newfound fear of crime. Rather, crime became more salient because it was more frequently pegged as the cause of social disarray. In her study of the war on drugs, Katherine Beckett concludes that “the extent to which political elites highlight the crime and drug problems is closely linked to subsequent levels of public concern about them and thus suggest that political initiative played a crucial

216. See MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 40, 42 (2010).

217. See Ian Haney López, *Post-Racial Racism: Racial Stratification and Mass Incarceration in the Age of Obama*, 98 CALIF. L. REV. 1023, 1033–34 (2010) (noting that “[t]he contest pitting law and order against civil rights” became increasingly tilted toward anticrime legislation after 1965).

218. See ALEXANDER, *supra* note 216, at 40.

219. See DAVID J. GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* 10 (2001) (“Since the 1970s fear of crime has come to have new salience.”).

220. See *id.* at 153; JONATHAN SIMON, *GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR* 24 (2007) [hereinafter SIMON, *GOVERNING*].

221. STUNTZ, *supra* note 136, at 20.

222. See MARC MAUER, *RACE TO INCARCERATE* 50–51 (1999).

role in generating public concern about crime and drugs.”²²³ Indeed, in public opinion polls, United States residents did not show any growing concern for drug activity until politicians, led by President Reagan’s decision to focus so much of his domestic policy on drugs, began framing it as a public-safety threat.²²⁴

Added to this heightened awareness of crime was a belief that the new criminals were of a different variety than past lawbreakers. Unlike before, the criminals driving this new appreciation of crime were thought to be “incorrigible” repeat offenders, “young minority males, caught up in the underclass world of crime, drugs, broken families, and welfare dependency.”²²⁵ These were not individuals who could be rehabilitated. They were portrayed as lost souls—“desperate, driven, and capable of mindless violence,” as David Garland describes the rhetoric of the period²²⁶—prowling for the moment at which they could pounce on an unsuspecting, innocent victim. And they would do so time and time again unless stopped.²²⁷

In response, the “broken windows theory” of criminal policing caught the attention of influential law enforcement officials and policymakers.²²⁸ Crystallized in a short 1982 magazine article by James Q. Wilson and George L. Kelling, the theory posited that criminality built upon itself one minor incident at a time.²²⁹ As Wilson and Kelling memorably explained using a visual that encapsulates the theory’s name, “if a window in a building is broken and is left unrepaired, all the rest of the windows will soon be

223. KATHERINE BECKETT, MAKING CRIME PAY: LAW AND ORDER IN CONTEMPORARY AMERICAN POLITICS 23 (1997).

224. *See id.* at 55, 62.

225. *See* GARLAND, *supra* note 219, at 10, 136.

226. *Id.* at 154.

227. *See id.* at 180–81 (“The assumption today is that there is no such thing as an ‘ex-offender’—only offenders who have been caught before and will strike again.”).

228. *See* Bernard E. Harcourt, *Reflecting on the Subject: A Critique of the Social Influence Conception of Deterrence, the Broken Windows Theory, and Order-Maintenance Policing New York Style*, 97 MICH. L. REV. 291, 302 (1998) (noting that New York City Mayor Rudolph Giuliani and Police Commissioner William Bratton credited the broken windows theory as the basis for their crime-fighting tactics).

229. *See generally* George J. Kelling & James Q. Wilson, *Broken Windows: The Police and Neighborhood Safety*, ATLANTIC MONTHLY, Mar. 1982, at 29; *see also* Harcourt, *supra* note 228 (“The hypothesis of the broken windows theory is that minor disorder in a neighborhood, if left unchecked, will result in increased serious crime, and, therefore, that eliminating minor disorder will have a deterrent effect on major crime.”).

broken.”²³⁰ The best governmental strategy to prevent this chaotic escalation, they proposed, was “order-maintenance” policing—that is, police initiatives that identify and remove social deviants of all types from the streets, including people engaged in the most trivial of crime.²³¹ “Who in their right mind, after all, would side with people who urinate in the street, break windows, aggressively accost passers-by, or vandalize other people’s property?,” asked Bernard Harcourt in his critical explanation of the intuitive rationale that made order-maintenance policing so captivating.²³² By targeting low-level offenders, order-maintenance policing proponents suggested that people who are inclined to commit crime are dissuaded by the realization that other community members care and the government is ready to punish them, while also making the law-abiding community members feel safer.²³³

This anticrime rhetoric was ostensibly apolitical. Its purveyors did not repeat past claims that people of color were inferior because of identity characteristics or conduct necessarily tied to their race.²³⁴ Rather, the new law and order proponents “developed instead the racially sanitized rhetoric of ‘cracking down on crime.’”²³⁵ Importantly, like the formal equality that the Hart-Celler Act introduced into immigration law in 1965, criminal laws seem equally applicable to everyone.²³⁶ The elements of an offense do not favor one person over another.²³⁷ To violate the law, therefore, becomes framed as a decision; one that reveals a moral failing that ought to be sanctioned.²³⁸

230. Kelling & Wilson, *supra* note 229.

231. Harcourt, *supra* note 228, at 301.

232. *Id.* at 298.

233. *Id.* at 353.

234. See ALEXANDER, *supra* note 216, at 42.

235. See *id.*; Barry C. Feld, *Race, Politics, and Juvenile Justice: The Warren Court and the Conservative “Backlash”*, 87 MINN. L. REV. 1447, 1555–56 (2003).

236. See MOTOMURA, *supra* note 12, at 132 (describing the 1965 immigration amendments as “apparently race-neutral”); Paul Butler, *One Hundred Years of Race and Crime*, 100 J. CRIM. L. & CRIMINOLOGY 1043, 1055 (2010) (“[M]ost criminal statutes have been facially race-neutral for generations.”).

237. See Butler, *supra* note 236.

238. See GARLAND, *supra* note 219, at 185 (explaining that the criminological trends that gained hold in the 1980s “adopt[ed] an absolutist, moralizing approach to crime, and insist[ed] that criminal actions are voluntary, the bad choices of wicked individuals”); López, *supra* note 217, at 1034 (“[T]he language of lawbreaking relied on and promoted a social

But nothing is so simple. The shift from race-based marginalization to an emphasis on crime masked racialized values that were closely related to those previously expressed openly. The rhetoric concerned with criminality “allowed for the indirect expression of racially charged fears and antagonisms” by pointing to the same people as the explicitly racist language of decades past had done, only now it described them as lawbreakers.²³⁹ Indeed, prominent conservative politicians and activists in the 1960s famously wooed southern white voters by tapping their “racial fears and antagonisms,” launching what would come to be known as the “southern strategy.”²⁴⁰ After bearing the brunt of centuries of explicitly racist laws and practices, blacks in particular were again viewed as social outcasts—only now because of their supposed criminality.²⁴¹ At the same time, middle-class white suburbanites became idealized as victims—or, at least, potential victims—of crime.²⁴² Indeed, “[d]espite the fact that blacks are far more likely to be victims of crime . . . the majority of Americans believe that most criminals are black and most victims are white.”²⁴³

Meanwhile, fear of crime took on its own political significance.²⁴⁴ Apart from the desire to prevent or avoid crime itself, policymakers and the public viewed the threat of crime as a legitimate target.²⁴⁵ Law enforcement agencies fashioned strategies “that took the reduction of fear as a distinct, self-standing policy goal.”²⁴⁶ They promoted neighborhood watch programs, for example, that were known to make people feel safer more than they actually made people safer by reducing crime.²⁴⁷ But, in this new penology, mental

vision of individual failure rooted in moral depravity.”).

239. See BECKETT, *supra* note 223, at 42.

240. See *id.* at 41; López, *supra* note 217, at 1032.

241. See BECKETT, *supra* note 223, at 38 (explaining that after Richard Nixon and George Wallace trumpeted a concern about crime during the 1968 presidential campaign, public opinion polls indicated that a substantial majority of people polled “believed that law and order had broken down, and the majority blamed ‘Negroes who start riots’ and ‘communists’ for this state of affairs”).

242. See SIMON, GOVERNING, *supra* note 220, at 76.

243. BECKETT, *supra* note 223, at 84.

244. López, *supra* note 217, at 1037.

245. See GARLAND, *supra* note 219, at 10.

246. *Id.* at 122.

247. See *id.*

insecurity caused by the fear of crime was as much a threat as physical insecurity caused by the actual perpetration of crime.

C. Policing Severity

Accordingly, policymakers quickly searched for strategies to tackle crime and the possibility that it might occur. They found their answer in a panoply of measures that funneled more people into the criminal justice system and limited the off-ramps on the road to imprisonment. The most palpable of these measures were the practices that shifted the locus of discretion from judges to prosecutors, the militaristic law enforcement methods that became common among police departments, and the expanded use of imprisonment.

The criminal justice system is filled with instances in which individual actors meaningfully exercise discretion. For much of the nation's history until the 1970s, however, important aspects of that discretion rested in the hands of judges. As late as 1970, the standard sentencing practice placed significant power in judges to impose a punishment they deemed appropriate to the offense.²⁴⁸ Such "indeterminate sentencing" regimes placed enormous responsibility on judges that suggested a deep commitment to the notion that judges, as formally neutral actors in the criminal justice system, were well-positioned to assess the severity of a convicted individual's conduct and devise a fitting sanction.²⁴⁹

The criminal justice landscape, however, did not remain the same. The "war on crime" was well underway by the early 1970s and the "war on drugs" burst onto the political scene as well as the criminal justice system in the 1980s.²⁵⁰ With their stark rhetoric

248. See *id.* at 60. In Justice Sandra Day O'Connor's words, indeterminate sentencing schemes afforded judges "virtually unfettered discretion to sentence defendants to prison terms falling anywhere within the statutory range." *Blakely v. Washington*, 542 U.S. 296, 315 (O'Connor, J., dissenting). Parole boards also received considerable discretion in situations involving individuals sentenced to imprisonment. Victoria J. Palacios, *Go and Sin No More: Rationality and Release Decisions by Parole Boards*, 45 S.C. L. REV. 567, 573 (1994).

249. See Gilles R. Bissonnette, Comment, "*Consulting*" the Federal Sentencing Guidelines After Booker, 53 UCLA L. REV. 1497, 1502 (2006) (explaining that the federal indeterminate sentencing "system gave federal judges wide discretion by allowing them to determine 'the goals of sentencing, the factors to be considered, and how much weight to accord [certain] factors, as well as the ultimate punishment'" (citation omitted)).

250. See James Vorenberg, *The War on Crime: The First Five Years*, ATLANTIC MONTHLY

harkening to images of enemies and selfless warriors, the “wars” pitted the law-abiding public against the criminals. As James Vorenberg, an influential voice in criminal justice reforms in the late 1960s, explained in a 1972 essay, “self-protection has become the dominant concern of those in our cities and suburbs.”²⁵¹ Clearly, the battle lines were drawn.

In this arrangement of forces there was no room for neutrality.²⁵² The trust in neutral judges dissipated quite suddenly beginning in the 1970s.²⁵³ Rather than continue to confide in the neutral role that judges are supposed to occupy, over the next two decades policymakers began to portray judges as “betrayers of the common good.”²⁵⁴ As the hallmark of the judicial role, neutrality became the downfall of judicial discretion. Judges, it was commonly thought, failed to punish as severely as the circumstances called for.²⁵⁵ In doing so, they came to be viewed as unreliable partners in the wars being waged in defense of law abiders everywhere.²⁵⁶ Because the dominant trope of the period—the notion that the nation was engaged in a war against a dangerous underclass—left no room for ambiguity about which side anyone was on, judges’ perceived failure to vigorously fight crime meant they became associated with the criminals rather than the victims. As Jonathan Simon explained, “the judge remains a figure of suspicion, a person with a propensity to violate public safety, little different in public confidence from the figure of the criminal before them.”²⁵⁷

(May 1972), www.theatlantic.com/past/politics/crime/crimewar.htm (reviewing the successes and failures, as he saw them, of the first five years of the war on crime).

251. *Id.* Vorenberg served as executive director of a commission appointed by President Johnson to study crime in the United States. See William Glaberson, *James Vorenberg, Watergate Prosecutor’s Right-Hand Man, Dies at 72*, N.Y. TIMES, Apr. 13, 2000, at C21.

252. See SIMON, GOVERNING, *supra* note 220, at 112.

253. See *id.* at 102 (noting that states began to limit judicial discretion in the 1970s); *id.* at 128 (noting that the legislators in the 1980s viewed federal judges with “deep suspicion”).

254. See *id.* at 113.

255. See ANGELA J. DAVIS, ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR 7 (2007); SIMON, GOVERNING, *supra* note 220, at 113–14.

256. See SIMON, GOVERNING, *supra* note 220, at 116. Simon notes that judges were attacked for three reasons: Supreme Court opinions restricting arrests, interrogations, and searches, judicial abolishment of the death penalty, and judges’ use of discretion in sentencing. *Id.* at 114.

257. See *id.* at 129–30.

In response, legislators at the state and national level turned to sentencing schemes that removed discretion from judges' hands. Congress, for example, enacted the Sentencing Reform Act of 1984 that established the United States Sentencing Commission.²⁵⁸ The Commission, in turn, issued sentencing guidelines that for more than two decades were binding on federal judges.²⁵⁹ Meanwhile, Congress and state legislators enacted an array of "mandatory [minimum] sentences that did not allow for the individualization of sentences but required the imposition of a specific prison sentence following the commission of a specific offense, generally a drug or weapons crime."²⁶⁰ Eventually, Congress provided financial incentives for states to enact "truth in sentencing" laws that required convicted individuals to serve at least eighty-five percent of their sentence, rather than being let out early on parole.²⁶¹ The idea was to promote greater sentencing uniformity while also reducing the likelihood that judges would issue sentences deemed too lenient or that parole boards would release convicted individuals.²⁶²

Though judges came to be viewed as undeserving of the discretion they had long been assigned as part of criminal proceedings, discretion did not end. It remained a core feature of the criminal justice system.²⁶³ Rather than remain concentrated in judges, however, discretion was increasingly granted to

258. See DAVIS, *supra* note 255, at 103.

259. See *id.* at 103–04; see also *United States v. Booker*, 543 U.S. 220, 249–50 (2005) (holding that the Sentencing Guidelines were not binding on federal judges). Justice Stephen Breyer, then Chief Judge of the U.S. Court of Appeals for the First Circuit, wrote that the Sentencing Guidelines were promulgated in order to promote "honesty in sentencing" and "reduce unjustifiably wide sentencing disparity." Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1, 4 (1988) (internal quotation marks and citations omitted).

260. Nora V. Demleitner, *Immigration Threats and Rewards: Effective Law Enforcement Tools in the "War" on Terrorism?*, 51 EMORY L.J. 1059, 1090–91 (2002).

261. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, §§ 20101(b), 20102(a), 108 Stat. 1796, 1815; see PAULA M. DITTON & DORIS JAMES WILSON, DEP'T OF JUSTICE, TRUTH IN SENTENCING IN STATE PRISONS 3 (1999), available at <http://bjsdata.ojp.usdoj.gov/content/pub/pdf/tssp.pdf>.

262. See SIMON, GOVERNING, *supra* note 220, at 141 ("In varying degrees, virtually all the states in the United States have reoriented their penal systems toward more uniform application of prison sentences."); *id.* at 102 ("A number of states abolished parole and introduced legislatively determined sentencing ranges that limited the discretion of judges. The federal system followed in 1987.")

263. See DAVIS, *supra* note 255, at 6.

prosecutors.²⁶⁴ As decidedly biased actors in the criminal process, prosecutors were viewed as counterweights to criminals and the judges who had come to be cast as their allies.²⁶⁵ The sentencing reforms that took hold in the 1970s and 1980s, imposing mandatory minimums and truth-in-sentencing, meant that prosecutors wielded much more influence over outcomes in choosing the charges to bring.²⁶⁶ Now they could use the threat of significant prison time as leverage against defendants.²⁶⁷ That is, prosecutors could increase the likelihood that a defendant would see the inside of a prison for some amount of time simply by threatening a prosecution for one or more offenses that promised more imprisonment.²⁶⁸ In effect, prosecutors became the “clearly dominant force” in late twentieth century governmental responses to crime.²⁶⁹

Added to these changes in the roles of judges and prosecutors were new developments in policing norms. Law enforcement agencies across the country turned to severe, paramilitary policing practices.²⁷⁰ Military-style patrols became commonplace.²⁷¹ Police

264. See *id.* at 56; SIMON, GOVERNING, *supra* note 220, at 43.

265. See SIMON, GOVERNING, *supra* note 220, at 130; see also STUNTZ, *supra* note 136, at 88 (explaining that the introduction of government salaries and elections into the selection of prosecutors turned them into judgmental actors subject to political pressures).

266. See SIMON, GOVERNING, *supra* note 220, at 102.

267. See DAVIS, *supra* note 255, at 57–58. William Stuntz explains how severe federal sentences affect state prosecutions: “Defendants agree to harsher sentences in state court for fear of what might happen to them in federal court. Federal law acts as an unfunded mandate, raising state sentencing levels without paying for the increase.” STUNTZ, *supra* note 136, at 306.

268. See DAVIS, *supra* note 255, at 105; see also JOHN F. PFAFF, THE CAUSES OF GROWTH IN PRISON ADMISSIONS AND POPULATIONS 7 (2011), available at <http://ssrn.com/abstract=1884674> (“[C]hanging decisions in prosecutors’ offices about when to file charges appear to be the primary—at times, seemingly almost the sole—driver of prison growth, at least since the mid-to late-1980s.”). Angela J. Davis explains that prosecutors frequently overcharge defendants—that is, they “tack[] on’ additional charges that they know they cannot prove beyond a reasonable doubt or that they can technically prove but are inconsistent with the legislative intent or otherwise inappropriate.” DAVIS, *supra* note 255, at 31. They do this, she adds, because it provides them an advantage during plea negotiations and presents a back-up offense in the event the principal charge does not result in a conviction. *Id.*

269. SIMON, GOVERNING, *supra* note 220, at 41–42.

270. See GARLAND, *supra* note 219, at 177 (noting that law enforcement agencies incorporated technology that was advanced for the period, adopted widespread use of automobiles and communications equipment, and embraced “more reactive styles of ‘911’ policing”).

271. See Karan R. Singh, Note, *Treading the Thin Blue Line: Military Special-Operations Trained Police SWAT Teams and the Constitution*, 9 WM. & MARY BILL RTS. J. 673, 675–81

officers shifted their attention away from developing close relationships with community members to becoming an omnipresent but arms-length presence, especially in neighborhoods filled with poor people and people of color.²⁷² Meanwhile, prisons met the goal of flexing the government's power and reassuring the public that the threat of criminal victimization was being attacked at its roots: by segregating the perpetrators.²⁷³ Moreover, the prisons deal with wrongdoers the only way that is rational to deal with people who cannot be reformed—incapacitation. Prison walls are easily perceptible and prison population counts an easily reportable statistic. And in the years since the 1970s there has been no shortage of eye-catching statistics to report about the number of people removed from the streets.²⁷⁴ For some fifty years prior to 1973, there were approximately 110 state and federal prisoners per 100,000 residents.²⁷⁵ Growing at a rate of about 6.3% annually, by 1997 that number had jumped to 445 per 100,000 residents.²⁷⁶ This has been especially true of incarceration related to drug offenses. Between 1980 and 1996, the incarceration rate for drug crimes went from fewer than fifteen inmates per 100,000 adults in the nation's population to 148 inmates per 100,000.²⁷⁷ There were more people in prison for drug crimes in 1996 per 100,000 people, therefore, than there were for all crimes in the half-century prior to 1973.²⁷⁸

(2001) (describing the creation of special weapons and tactics (SWAT) and similar units in police departments in the late 1960s and 1970s); Amanda M. Yeaples-Coleman, Comment, *Reviving the Knock and Announce Rule and Constructively Abolishing No-Knock Entries by Giving the People a Ground They Can Stand On*, 37 U. DAYTON L. REV. 381, 388 (2012) (explaining that there was a 538% increase in the use of SWAT teams between 1980 and 1995).

272. See GARLAND, *supra* note 219, at 114.

273. See SIMON, GOVERNING, *supra* note 220, at 157 (explaining that prisons are intended to assuage the public's feelings of insecurity). Importantly, changes in the imprisonment rate are not closely related to changes in crime rates. David Jacobs & Aubrey L. Jackson, *On the Politics of Imprisonments: A Review of Systematic Findings*, 6 ANN. REV. SOC. SCI. 129, 131 (2010).

274. For an eye-catching graphical display of incarceration rates from 1920 to 1997, see Alfred Blumstein & Allen J. Beck, *Population Growth in U.S. Prisons, 1980–1996*, 26 CRIME & JUST. 17, 19 fig.1 (1999).

275. See *id.* at 17–18.

276. See *id.* at 18.

277. See *id.* at 21 & fig.2.

278. See *id.* at 21.

This evolution in policing norms affected communities of color most poignantly. For one thing, community relations with police officers all but collapsed in many urban areas. Black victims of crime struggled to receive police assistance while black residents were frequently, almost reflexively, perceived as perpetrators of crime.²⁷⁹ Moreover, imprisonment rates skyrocketed, especially among young black men convicted of drug crimes.²⁸⁰ By 1996 more than eight percent of black men in their late twenties were in prison.²⁸¹ There is now a greater likelihood that young black men will spend time in a jail or prison than at any other time in United States history.²⁸² As Michelle Alexander has carefully documented, incarceration has effectively removed massive numbers of black men from community life in much the same way that Jim Crow did prior to the civil rights movement.²⁸³ Imprisonment essentially became a rite of passage for many young black men.²⁸⁴

Latinos also felt the brunt of imprisonment policy. Indeed, between 1980 and 1996 there was a 554% growth in the number of Latinos in a state or federal prison who were sentenced to a year or more.²⁸⁵ Putting this another way, the number of Latino prisoners per 100,000 United States residents in 1980 was 206; in 1996, that number hit 690.²⁸⁶

In sum, the 1960s through the 1990s witnessed sea changes in acceptable modes of discourse and significant changes in the substantive law regulating immigration and crime. Instead of employing overtly racist means of subjugating entire classes of nonwhite people, policymakers embraced the formal equality of

279. See STUNTZ, *supra* note 136, at 22 (noting that “[c]rime victims in black neighborhoods have difficulty convincing local police to take their victimization seriously”).

280. See MAUER, *supra* note 222, at 143–44 & 153 tbl.8-1; see also Blumstein & Beck, *supra* note 274, at 22 (noting that “[t]he growth in incarceration has been greater for women and minorities than for men and whites” between 1980 and 1996, but that female prisoners only comprised 6.1% of the prison population in 1996). Mauer reports that the arrest rate for black men suspected of drug activity also increased significantly. MAUER, *supra* note 222, at 146 fig.8-2.

281. See Blumstein & Beck, *supra* note 274, at 23.

282. ANGELA J. HATTERY & EARL SMITH, *AFRICAN AMERICAN FAMILIES* 240 (2007).

283. See ALEXANDER, *supra* note 216, at 2–4.

284. See STUNTZ, *supra* note 136, at 34.

285. See Blumstein & Beck, *supra* note 274, at 22 tbl.1.

286. See *id.*

crime control as a depoliticized marker of undesirability. It was only a matter of time, as Part IV explains, before these trends would create crimmigration law.

IV. CRIMMIGRATION IS MADE

The moment in which events converged to produce crimmigration came in the 1980s and 1990s. Much of Latin America was unstable—México's economy had plummeted, Central America was being ravaged by civil wars, the Caribbean continued to suffer immense poverty, and South America's booming export to the United States was of the illicit variety, cocaine. Since the civil rights movement had rendered it culturally and politically infeasible to enact blatantly racist immigration policies similar to those adopted in past generations, policymakers sought a different method of regulating immigrants. The new willingness to punish that was sweeping criminal law and procedure soon reached immigration law. Instead of adopting explicitly race-based considerations to keep out entire racial groups as was frequently done prior to the civil rights movement, Congress and multiple presidential administrations enacted increasingly strict immigration laws that emphasized a noncitizen's involvement in criminal activity. Investigations of potential immigration law violations began to resemble criminal policing operations, and decisions about who to admit into or deport from the United States more and more often turned on criminal histories. Despite the facial neutrality of these enactments, however, the people most adversely affected were nonwhite newcomers just as was often the case prior to the civil rights era. In the post-civil rights period, crime effectively became a proxy for race.

A. Rekindling the Fear of Immigrants

A series of high profile and politically fraught events sparked a newfound concern about foreigners in the 1980s. Caribbean and Central American migrants were streaming into the United States without permission, and the federal government, it seemed, had no way of keeping up.²⁸⁷ It was simply outmatched. Upwards of

287. See Jonathan Simon, *Refugees in a Carceral Age: The Rebirth of Immigration Prisons in the United States*, 10 PUB. CULTURE 577, 579, 582–83 (1998); [hereinafter Simon,

125,000 Cubans who left the island's port of Mariel in 1979 and 1980 reached Miami's coast.²⁸⁸ Another 15,000 or so Haitians braved Caribbean waters to arrive in the United States.²⁸⁹ Neither group was welcomed. The Cubans—pejoratively described as “marielitos”—were depicted as common criminals, with *U.S. News & World Report* going so far as to publish a special report titled “Castro's ‘Crime Bomb’ Inside U.S.”²⁹⁰ Haitians, meanwhile, were associated with crime, in particular drug activity, and at times described as coming to take advantage of United States social welfare largess.²⁹¹ During this same time, along the land border with México, Central Americans made their way into the United States clandestinely.²⁹²

By the early 1980s the number of unauthorized immigrants living in the United States had caught the attention of federal policymakers and they began formulating potential legislative responses. In 1980, for example, Ronald Reagan, then a presidential candidate, rejected the idea of building a wall between México and

Refugees]; see also TIMOTHY J. DUNN, THE MILITARIZATION OF THE U.S.-MEXICO BORDER, 1978–1992: LOW-INTENSITY CONFLICT DOCTRINE COMES HOME 160 (1996) [hereinafter DUNN, MILITARIZATION] (discussing the Reagan Administration's punitive reaction to Central American migrants); Stephanie J. Silverman, *Immigration Detention in America: A History of its Expansion and a Study of its Significance* 9 (Univ. of Oxford, Working Paper No. 80, 2010), available at <http://ssrn.com/abstract=1867366> (discussing a “panic among the American public” caused by Cuban migration in the early 1980s).

288. JOSEPH NEVINS, OPERATION GATEKEEPER AND BEYOND: THE WAR ON “ILLEGALS,” AND THE REMAKING OF THE U.S.-MEXICO BOUNDARY 82–83 (2d ed. 2010).

289. See Simon, *Refugees*, *supra* note 287, at 579.

290. John S. Lang, *Castro's “Crime Bomb” Inside U.S.*, U.S. NEWS & WORLD REP., Jan. 16, 1984, at 27, 27; see JORGE DUANY, BLURRED BORDERS: TRANSNATIONAL MIGRATION BETWEEN THE HISPANIC CARIBBEAN AND THE UNITED STATES 45, 140 (2011). According to Duany, “[c]ontrary to media reports, less than 2 percent of the Marielitos were common criminals, though 25 percent had been imprisoned for various reasons, including ideological differences with the Cuban government and ‘antisocial’ behavior such as public displays of homosexuality.” *Id.*

291. See Simon, *Refugees*, *supra* note 287, at 593; Teresa A. Miller, *The Impact of Mass Incarceration on Immigration Policy*, in INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT 214, 226, 232 (Marc Mauer & Meda Chesney-Lind eds., 2002) [hereinafter Miller, *Impact*].

292. See Nora Hamilton & Norma Stoltz Chincilla, *Central American Migration: A Framework for Analysis*, in NEW AMERICAN DESTINIES: A READER IN CONTEMPORARY ASIAN AND LATINO IMMIGRATION 91, 109–10 (Darrell Y. Hamamoto & Rodolfo D. Torres eds., 1997); see also DUNN, MILITARIZATION, *supra* note 287, at 46, 160 (describing the U.S. government's treatment of Central Americans in the early 1980s).

the United States.²⁹³ His opponent for the Republican presidential nomination, the future president George H.W. Bush, acknowledged “the illegal alien problem” before taking a position that, much like Reagan’s, seems quaint to contemporary ears—“the problem,” he claimed, “is we are making illegal the labor that I’d like to see legal.”²⁹⁴ Four years later, in a debate against Democratic opponent Walter Mondale, President Reagan expressed his belief that “our borders are out of control” and his support for “an immigration bill that will give us, once again, control of our borders.”²⁹⁵ Clearly the pressure was on policymakers to do something about what had come to be seen as an urgent problem.²⁹⁶ Within two years, Congress would do just that, sending President Reagan a wide-ranging immigration bill that he signed into law.

As had occurred many times before, numerous policy initiatives implemented as early as 1980 took a decisively derisive position toward foreigners. Instead of simply identifying people to exclude or deport based on racial categorizations, this time immigration law turned on a noncitizen’s involvement in the nation’s alarm du jour: crime, specifically drug-related activity. Haitians were quickly racialized as African-American meaning that the concerns policy makers had with drug activity in black communities was easily imputed onto these new arrivals.²⁹⁷ Much the same happened with the Cubans who left the island from the port of Mariel.²⁹⁸ Unlike earlier Cuban emigrants, roughly half of the Mariel Cubans were black and many were low-skilled laborers.²⁹⁹ After “INS officials . . . began to notice Cuban men who were ‘more hardened and rougher

293. Robert Guest, *Foreword* to PILAR MARRERO, *KILLING THE AMERICAN DREAM: HOW ANTI-IMMIGRATION EXTREMISTS ARE DESTROYING THE NATION*, at xii–xiii (2012).

294. PILAR MARRERO, *KILLING THE AMERICAN DREAM: HOW ANTI-IMMIGRATION EXTREMISTS ARE DESTROYING THE NATION* 14–15 (2012).

295. 1984—Ronald Reagan on Amnesty, YOUTUBE.COM, <http://www.youtube.com/watch?v=JfHKIq5z80U> (last visited Sept. 16, 2013).

296. See Oscar J. Martinez, *Migration and the Border, 1965–1985*, in *BEYOND LA FRONTERA: THE HISTORY OF MEXICO-U.S. MIGRATION*, *supra* note 204, at 103, 111. William Colby, who led the Central Intelligence Agency in the 1970s, claimed that unauthorized Mexican immigrants posed a greater danger to the United States than the Soviet Union. NEVINS, *supra* note 288, at 79.

297. Miller, *Impact*, *supra* note 291, at 232; see Simon, *Refugees*, *supra* note 287 at 593–94.

298. See Silverman, *supra* note 287, at 9.

299. See MARK S. HAMM, *THE ABANDONED ONES: THE IMPRISONMENT AND UPRISING OF THE MARIEL BOAT PEOPLE* 75 (1995). Interestingly, Duany reports that only twenty percent or so self-identified as black. Duany, *supra* note 290, at 45.

in appearance' than earlier arrivals . . . the INS concluded that the Cuban government was taking advantage of the immigration accords [signed by the United States and Cuba] by emptying the nation's prison system of hard-core criminals."³⁰⁰ The White House agreed with the INS's assessment and soon news reports appeared repeating these claims.³⁰¹ It eventually would become clear that these claims were exaggerated, but by then "marielito" had become synonymous with dangerousness.³⁰²

Additionally, though cross-border smuggling has been part of border life in the Southwest as long as it has constituted an international boundary,³⁰³ the newfound concern about drug trafficking brought law enforcement attention to the southern border not seen since the days when a German invasion was thought possible. The Soviet-aligned Sandinistas, President Reagan commented in a reference to the putatively socialist government of Nicaragua, are only a two-day's drive from Texas.³⁰⁴ Meanwhile, drugs that had previously been routed through the Caribbean began making their way into the United States across the Mexican border.³⁰⁵ The México-United States border had become, as one Border Patrol officer put it, "a 'danger zone . . . a war zone, if you will.'"³⁰⁶ Clandestine entrants and drug traffickers became indistinguishable,³⁰⁷ and both were "enemies" of a sort.³⁰⁸ Some policymakers described unauthorized immigration as an "invasion."³⁰⁹ This narrative claimed that the border was "out of control" and "migrant workers from Mexico became increasingly associated with drug trafficking."³¹⁰ For the Reagan Administration, clandestine immigration and cross-border drug trafficking dovetailed

300. HAMM, *supra* note 299, at 51.

301. *See id.* at 51–52.

302. *See id.* at 58, 76.

303. TONY PAYAN, *THE THREE U.S.-MEXICO BORDER WARS: DRUGS, IMMIGRATION, AND HOMELAND SECURITY* 18 (2006).

304. DUNN, *MILITARIZATION*, *supra* note 287, at 3; *see* Eleanor Clift, *Lambastes "Liberals" as Helping to Create Deficits: Reagan Uses Tough Tone on Trail*, L.A. TIMES, July 24, 1986.

305. PAYAN, *supra* note 303, at 12; *see* NEVINS, *supra* note 288.

306. DUNN, *MILITARIZATION*, *supra* note 287, at 87; *see* PAYAN, *supra* note 303, at xii.

307. DUNN, *MILITARIZATION*, *supra* note 287, at 87.

308. *Id.* at 162–63.

309. *See* NEVINS, *supra* note 288, at 79.

310. *Id.* at 97.

to make border security a national security issue.³¹¹ By 1990, drugs had become so intertwined with concerns about cross-border movement that President George H.W. Bush described the border as “the front lines of the war on drugs.”³¹²

Just as nonwhite foreigners had been deemed a menace prior to the civil rights movement, immigrants in the closing quarter of the twentieth century were viewed derisively. Only now the blatant racial animus of a prior era gave way to facially neutral concerns about immigrants’ role in criminal activity, especially related to drugs. Combined with the newfound but profound concern about drug activity, unauthorized immigration became a security issue.³¹³ The “criminal alien,” it was thought, was a “dangerous class” present everywhere—always lurking in wait for an opportunity to wreak havoc on United States communities.³¹⁴ It was easy, then, to attack immigrants as threatening individual residents of the United States and the nation as a whole.³¹⁵

B. Activating Penal Power

The public policy response to immigration and cross-border drug trafficking was identical: flex the state’s penal power.³¹⁶ “Policing became the new way of dealing with any issues along the border.”³¹⁷ The political rhetoric along with the law enforcement strategies, tactics, personnel, and financial and hardware resources that launched and sustained the war on drugs were reemployed along the

311. DUNN, *MILITARIZATION*, *supra* note 287, at 42.

312. George H.W. Bush, Presidential Statement on Signing the Immigration Act of 1990 (Nov. 29, 1990), <http://www.presidency.ucsb.edu/ws/index.php?pid=19117#axzz1OsUYZ1gw>.

313. See Miller, *Citizenship*, *supra* note 215, at 625; see also Marc R. Rosenblum, *Immigration and U.S. National Interests: Historical Cases and the Contemporary Debate*, in *IMMIGRATION POLICY AND SECURITY: U.S., EUROPEAN, AND COMMONWEALTH PERSPECTIVES* 13, 14 (Terri E. Givens et al. eds., 2009) (“Thus, while most migratory flows are not threatening to security, migration control becomes a legitimate security concern when unwanted immigration overlaps with or reinforces other security threats.”).

314. See Miller, *Citizenship*, *supra* note 215, at 646.

315. Alex M. Saragoza, *Cultural Representation and Mexican Immigration*, in *BEYOND LA FRONTERA: THE HISTORY OF MEXICO-U.S. MIGRATION*, *supra* note 198, at 227, 235–36 (explaining that unauthorized Mexican immigrants in the 1980s were viewed as potential drug traffickers while also “tramp[ing] with impunity on the sovereignty of the United States”).

316. See DUNN, *MILITARIZATION*, *supra* note 287, at 104 (“[I]mmigration and drug enforcement efforts often overlapped.”).

317. PAYAN, *supra* note 303, at 12.

border. This new emphasis on curtailing clandestine entry by people and drugs neatly matched trends in criminal policing.³¹⁸ The goal was to “regain control” of cross-border traffic, and the government’s full array of resources was put into action.³¹⁹

As in the criminal context, police and prosecutors occupied the first line of attack. Law enforcement agencies suddenly found themselves adding new types of border-related work to their portfolios. INS officers, for example, became involved in drug-related enforcement activities in the mid-1980s, often alongside criminal law enforcement agencies.³²⁰ Importantly, the agency also had more money and officers to devote to its growing concerns—between 1980 and 1988 the INS’s congressionally appropriated funding increased 130% and staff grew by 41%.³²¹ One of its units, the Border Patrol, developed a host of antidrug initiatives to augment its traditional focus on clandestine immigration, including controversial patrols near El Paso public schools.³²² Indeed, beginning in 1989, the INS claimed “that the Border Patrol had primary responsibility among federal agencies for drug interdiction between official ports of entry along the U.S.-México border.”³²³ The agency soon obtained power to enforce federal drug laws.³²⁴ Two years later, in 1991, this became the Bush Administration’s official policy.³²⁵ To adequately complete its drug-fighting mission,

318. See *id.* at xiv (describing border security policies as containing “all the elements of a war . . . the strategy, the tactics, the personnel, the resources, the rhetoric, and the hardware, etc.”); see also NEVINS, *supra* note 288, at 5 (describing Border Patrol expansions in the early and mid-1990s as war-like strategies).

319. See PAYAN, *supra* note 303, at 114.

320. See *Criminal Aliens: INS Enforcement: Hearing Before the H. Subcomm. on Immigr., Refugees, and Int’l L., Comm. on the Judiciary*, 101st Cong. 28 (1987), available at <http://www.gao.gov/assets/150/145875.pdf>.

321. NEVINS, *supra* note 288, at 84.

322. *Id.* at 85; see TIMOTHY J. DUNN, BLOCKADING THE BORDER AND HUMAN RIGHTS: THE EL PASO OPERATION THAT REMADE IMMIGRATION ENFORCEMENT 28 (2009) [hereinafter Dunn, BLOCKADING].

323. DUNN, MILITARIZATION, *supra* note 287, at 80.

324. See Rebecca Bohrman & Naomi Murakawa, *Remaking Big Government: Immigration and Crime Control in the United States*, in GLOBAL LOCKDOWN: RACE, GENDER, AND THE PRISON-INDUSTRIAL COMPLEX 109, 116 (Julia Sudbury ed. 2005).

325. See *Southwest Border Enforcement Affected by Mission Expansion and Budget, Testimony Before the Subcomm. on Int’l L., Immig. & Refugees, H. Comm. of Judiciary*, 102d Cong. 1 (1991) (statement of Harold A. Valentine, Associate Director, Administration of Justice Issues).

the INS provided the Border Patrol with funding for new stations and checkpoints.³²⁶ These initiatives and funding priorities expanded immigration officials' focus to include anticrime policing in addition to violations of immigration law. Thus, their law enforcement concerns shifted. No longer tied to their historical concern about undesirable racial groups, they now sorted noncitizens on the basis of the facially neutral criminal label.

At the same time, the military became involved in immigration regulation. Usually justified by a concern about keeping illicit drugs out of the country, the military quickly took a role in enforcing immigration law. The 1981 Military Cooperation with Law Enforcement Officials Act, for example, authorized military involvement in drug and immigration enforcement activities.³²⁷ Separately, because Congress did not think the Border Patrol was up to the task on its own, it "forced the military to aid the Border Patrol in guarding the border" and soon provided approximately \$1 billion in funding for border-related drug activities.³²⁸ With time the military wound up playing a significant role in assisting to identify and apprehend suspected clandestine entrants.³²⁹ A secret National Guard initiative launched in 1989, Operation Border Ranger II, for example, deployed armed troops to the border to assist civilian law enforcement agencies with drug and immigration enforcement efforts by, among other things, informing INS agents about the presence of suspected clandestine entrants.³³⁰ The next year, a Marine unit working alongside the Border Patrol in Texas and Arizona utilized then-novel surveillance from an unmanned aerial vehicle (a "drone").³³¹ This helped the Border Patrol double the number of clandestine entrants it usually identified, while also confiscating marijuana shipments.³³²

326. NEVINS, *supra* note 288, at 85.

327. Candidus Dougherty, *While the Government Fiddled Around, the Big Easy Drowned: How the Posse Comitatus Act Became the Government's Alibi for the Hurricane Katrina Disaster*, 29 N. ILL. U. L. REV. 117, 131 (2008). This authority was expanded in 1988. DUNN, MILITARIZATION, *supra* note 287, at 117.

328. PAYAN, *supra* note 303, at 79.

329. See DUNN, BLOCKADING, *supra* note 322, at 181 (2009).

330. DUNN, MILITARIZATION, *supra* note 287, at 128.

331. *Id.* at 132.

332. *Id.*

That same year, the military created Joint Task Force-6 (“JTF-6”), an initiative intended to coordinate military support of civilian law enforcement agencies along the border as well as in Houston and Los Angeles, two large interior metropolitan areas with large immigrant communities.³³³ Involving at least 500 troops—including Army Rangers and Green Berets—JTF-6 primarily assisted Border Patrol agents with their drug-fighting duties.³³⁴ Importantly, though JTF-6 personnel were ostensibly deployed to support law enforcement officers and not to enforce laws themselves, they were nonetheless authorized to shoot to kill if military or civilian law enforcement personnel were endangered—a far cry from the long-standing practice of prohibiting the military from engaging in domestic law enforcement practices.³³⁵ This power proved fateful in 1997 when Marines participating in a JTF-6 operation shot and killed Ezekiel Hernández, Jr., an eighteen-year-old United States citizen who was tending his family’s livestock when the troops mistook him for a drug trafficker.³³⁶ Though JTF-6 was later disbanded, its successors continue to be deployed to the border ostensibly to assist with antidrug efforts while also engaging in immigration law enforcement. Joint Task Force-North, for example, “assisted in the apprehension of 3,865 undocumented aliens” in fiscal year 2010,³³⁷ while its manned aerial support program “[a]ssisted in the apprehension of 6,500-8,000 undocumented aliens” during fiscal year 2011.³³⁸ The military’s involvement in routine immigration law enforcement actions suggests the antidrug rationale is paperthin. It is instead a politically acceptable route by

333. *See id.* at 133–34.

334. *See id.* at 137.

335. *Id.*; *see* *United States v. Red Feather*, 392 F. Supp. 916, 925 (D.S.D. 1975) (holding that the Posse Comitatus Act, 18 U.S.C. § 1385, “makes unlawful the use of federal military troops in an active role of direct law enforcement by civil law enforcement officers”).

336. JUSTIN AKERS CHACÓN & MIKE DAVIS, *NO ONE IS ILLEGAL: FIGHTING RACISM AND STATE VIOLENCE ON THE U.S.-MEXICO BORDER* 208 (2006).

337. Memorandum from David M. D’Agostino, Dir., Def. Capabilities & Mgmt., U.S. Gov’t Accountability Office, to Senator Carl Levin, Chairman, U.S. Senate Comm. on Armed Servs., *Observations on the Costs and Benefits of an Increased Department of Defense Role in Helping to Secure the Southwest Land Border* 21 (Sept. 12, 2011).

338. *Id.* at 32. Two other recent Defense Department antidrug initiatives, Operation Jump Start and Operation Phalanx, also put military personnel in a position to assist with the apprehension of large numbers of unauthorized immigrants. *See id.* at 16–17.

which to justify heavy-handed securitization measures along the border in an era when it is not acceptable to do so on the basis of the racialized markers used in the past.

The policing build-up meant that governmental agencies were apprehending more people suspected of being in the country without permission. To accommodate this, immigration officials adopted a tactic newly en vogue in criminal policing: drastically expanding the government's detention capabilities. Prior to 1980, immigration detention was the exception.³³⁹ That twenty-five year norm suddenly changed within the span of a few years in the early 1980s—all the time that the INS needed to ramp up its bed space. The agency built its own facilities and contracted with private corporations to boost its detention capacity from approximately 1,720 beds in 1982 to roughly 7,439 in 1988, including 4,200 in private facilities.³⁴⁰ In the Lower Río Grande Valley of South Texas, the INS began to detain every asylum applicant, and prepared to run what it called a “federal reservation.”³⁴¹ Detention was so commonplace in this region that one commentator described it as “virtually a ‘detention zone’ during much of the 1980s for Central Americans.”³⁴²

In other parts of the country, Cubans and Haitians were subjected to similar treatment. The INS set up temporary detention facilities and rented space in a federal prison to house unauthorized Cubans,³⁴³ and in 1982 President Reagan ordered the mandatory detention of clandestinely arriving Haitians.³⁴⁴ A more permanent solution soon followed in the form of the Krome Avenue Detention Center, a facility that the INS quickly opened in Miami to house Cuban and Haitian noncitizens and that still exists solely to house immigration detainees.³⁴⁵ Though not described as a jail or prison, it

339. See DOW, *supra* note 51, at 7; Miller, *Impact*, *supra* note 291, at 214; Miller, *Citizenship*, *supra* note 215, at 611, 640.

340. See DUNN, *MILITARIZATION*, *supra* note 287, at 47–48.

341. See *id.* at 91–92.

342. *Id.* at 75.

343. See Silverman, *supra* note 287, at 9.

344. *Id.* at 10.

345. SIMON, *GOVERNING*, *supra* note 220, at 379; see Simon, *Refugees*, *supra* note 287, at 579; U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, MIAMI FIELD OFFICE, KROME SERVICE PROCESSING CENTER FACT SHEET, <http://www.ice.gov/doclib/dro/facilities/pdf/kro.pdf> (last visited Sept. 16, 2013).

had many features of these secure environments: fencing, armed guards, orange jumpsuits for inmates, and more.³⁴⁶ In the 1990s, Krome would gain notoriety as the site of guard-on-inmate abuse.³⁴⁷

Within a few years, the immigration detention practice would shift from its early focus on Central American and Caribbean refugees, frequently perceived to be involved in criminal activity, to an explicit emphasis on people suspected of having engaged in criminal activity, often drug-related activity.³⁴⁸ The Anti-Drug Abuse Act of 1986, for example, granted the INS the power to issue a “detainer to detain” any person arrested for having violated a controlled-substances offense.³⁴⁹ Its 1988 counterpart likewise turned the INS’s detention policy toward so-called “criminal aliens” by adding the “aggravated felony” basis of deportation to the INA, defining it narrowly to include only drug trafficking and two other crimes, murder and firearms trafficking, and requiring that the INS take into custody noncitizens convicted of an aggravated felony.³⁵⁰

Immigration policy has not shifted from this focus since then. In fact, the emphasis on crime and the use of criminal policing tactics has only increased in the intervening years. Today’s norms arise from the practices implemented in the 1980s and early 1990s when the federal government unleashed its policing authority along the border to regulate the flow of people and illicit drugs. Immigration agents were tasked with stopping drug crimes, and the military was employed to identify and apprehend immigration law violators. Doing this set the stage for crimmigration law’s creation.

346. See Dow, *supra* note 51, at 56; MICHAEL WELCH, DETAINED: IMMIGRATION LAWS AND THE EXPANDING I.N.S. JAIL COMPLEX 116–17 (2002).

347. See DOW, *supra* note 51, at 56–57; WELCH, *supra* note 346, at 123.

348. See DUNN, MILITARIZATION, *supra* note 287, at 72–73.

349. Anti-Drug Abuse Act, Pub. L. No. 99-570, § 1751(d), 100 Stat. 3207, 3207-47 (1986) (amending INA § 287, 8 U.S.C. § 1357). For a more detailed discussion of immigration detainers, see Christopher Lasch, *Enforcing the Limits of the Executive’s Authority to Issue Immigration Detainers*, 35 WM. MITCHELL L. REV. 164, 183 (2008).

350. See, e.g., Anti-Drug Abuse Act, Pub. L. No. 100-690, §§ 7342, 7343, 102 Stat. 4181, 4469-70 (1988) (amending INA § 101(a), 8 U.S.C. § 1101(a) and § 242(a), 8 U.S.C. § 1252(a) respectively).

C. Merging Criminal Law and Immigration Law

The convergence of criminal and immigration law did not occur coincidentally or accidentally. Rather, it was a logical progression of deliberate choices. The state's penal authority came to be seen in the 1980s as the law-abiding public's last hope to stem the tide of criminality taking the country by storm.

Immigration law was not immune to these trends. The rise in unauthorized immigration that occurred during the last three decades of the twentieth century was represented rhetorically as a threat to the nation's very existence. The argument held that the country's sovereignty could mean little if the government and the public to which it responded did not know who was crossing its borders.³⁵¹ Worse yet, unauthorized migrants arrived in a country struggling with the legacy of overt racism that in the post-civil rights era had nowhere to easily escape. Mostly racialized as nonwhite (Asian, black, and Latino), the new arrivals were saddled with the burden of domestic and international political tension. The Cubans were deemed criminals, the Haitians linked to African-American drug activity, the Central Americans depicted as the vanguard of a communist threat flouting the United States' sovereignty and laws regulating cross-border movement, and the Mexicans as willing accomplices to Colombian drug trafficking. No matter the particulars, in an era when overt racism was no longer tolerated, all were deemed dangerous because of their association with illegal conduct and therefore unwanted.

And as with the criminal justice system's response to drug activity, the immigration law system responded with strong-armed policing and imprisonment strategies. Immigration in violation of the law, traditionally a civil infraction, increasingly came within the province of criminal justice system actors. Even minor criminal convictions of noncitizens that previously had no immigration consequence became likely to result in removal. Immigration policing agents broadened their investigative techniques to more closely resemble criminal law enforcement officers—including sting

351. See Rosenblum, *supra* note 313, at 14.

operations reminiscent of antidrug initiatives.³⁵² They boosted their armaments and even joined forces with the military. Meanwhile, prisons simultaneously became the symbol of chaos and order. If they exist, the public discourse suggests, it is because a threat lurks.³⁵³ The government likewise uses the existence of prisons to demonstrate that it is doing something about that danger.³⁵⁴ In the immigration context of the 1980s and 1990s, the people inside the prison walls were framed as dangerous outsiders who did not deserve the nation's hospitality; their presence, quite simply, was not desired.³⁵⁵ Keeping them locked up provided those who were outside with "a fake sense of security," but a sense of security nonetheless.³⁵⁶

The merger of criminal law and immigration law allowed for a unified front against the threat ostensibly facing the law-abiding public. Police agents of all variety were sent into the streets to watch, identify, and apprehend outlaws of multiple sorts—selling drugs, working without authorization, present without permission. Unlike before, when undesirability was explicitly determined by race, in the age of metaphorical wars against crime and drugs, undesirability became pegged to criminality. In turn, criminality became tied, implicitly, to race. Law enforcement agents were given the task of physically removing from the body politic unwanted elements.³⁵⁷ Given the nation's appreciation of confinement, law enforcement authorities were thought to be successful if the lawbreakers were in the prisons, excluded from the law-abiding community and under the government's control.³⁵⁸ In the age of crimmigration, police authorities have done this with remarkable success, thereby providing

352. Miller, *Citizenship*, *supra* note 215, at 638.

353. See Stephanie J. Silverman, *Return to the Isle of Man: The Implications of Internment for Understanding Immigration Detention in the UK* 13 (Univ. of Oxford, Working Paper No. 102, 2012), available at <http://ssrn.com/abstract=2211336>.

354. See Simon, *Refugees*, *supra* note 287, at 577, 603.

355. ALEXANDRA HALL, BORDER WATCH: CULTURES OF IMMIGRATION, DETENTION AND CONTROL 2, 7 (2012) (positing that this is what occurs in the United Kingdom).

356. Inés Valdez, *Sovereignty and the City: Raiding, Detaining, and Domestic Immigration Policing* 2 (W. Political Sci. Ass'n, 2010), available at <http://ssrn.com/abstract=1580743>.

357. See Bohrman & Murakawa, *supra* note 324, at 122–23.

358. See GARLAND, *supra* note 219, at 177 (noting that today prisons are "conceived much more explicitly as a mechanism of exclusion and control").

the public with a sense of security.³⁵⁹ In the battle against danger and the fear of danger, the government, these tactics proclaim, finally has the upper hand.

CONCLUSION

Crimmigration is now a defining feature of law enforcement in the United States. To the tens of thousands of people who are prosecuted criminally because of an alleged immigration law violation (making this the largest category of offenses prosecuted in federal courts during several recent years), and to the hundreds of thousands who are imprisoned while immigration officials decide whether they will be allowed to remain in the country (making ICE the largest detention agency in the United States), criminal law is not distinct from immigration law. The two are simply different ends of a single punitive spectrum of governmental authority wielded over their lives.

To understand why crimmigration law developed and where it might head, it is necessary to understand its origins. This Article charts that history. The cultural and legislative successes of the civil rights era made it culturally, politically, and legally unacceptable or impermissible to repeat the overt racism that dominated law and law enforcement for much of the nation's history. Those successes, however, could not so easily preclude the widespread sentiment that people of color were undesirable, indeed, dangerous. Consequently, a punitive spirit took hold in the 1980s that continued the marginalization of people of color, but did so through operation of race-neutral criminal laws and practices. Immigration law soon developed a statutory scheme that categorized newcomers based on their interactions with the criminal justice system and borrowed criminal policing's ever harsher punitive bent—interactions that, it unsurprisingly turned out, continued to weigh most heavily on people of color.

359. See ANNA O. LAW, *THE IMMIGRATION BATTLE IN AMERICAN COURTS* 80 (2010) (“The apprehension numbers, exacerbated by arrest quotas, demonstrate to the public that the border enforcement strategies are working because the apprehension numbers represent illegal aliens that would have infiltrated our border defenses had the border patrol and INS not apprehended them.”).

