The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power

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This article provides a fresh theoretical perspective on the most important development in immigration law today: the convergence of immigration and criminal law. Although the connection between immigration and criminal law, or "crimmigration law," is now the subject of national debate, scholarship in this area is in a fledgling state. This article begins to fill that void. It proposes a unifying theory – membership theory – for why these two areas of law recently have become so connected, and why that convergence is troubling. Membership theory restricts individual rights and privileges to those who are members of a social contract between the government and the people. It is at work in the convergence of criminal and immigration law in marking out the boundaries of who is an accepted member of society.

Membership theory provides decisionmakers with justification for excluding individuals from society, using immigration and criminal law as the means of exclusion. It operates in the intersection between criminal and immigration law to mark an ever-expanding group of outsiders by denying them the privileges that citizens hold, such as the right to vote or to remain in the United States. Membership theory manifests in this new area through certain powers of the sovereign state: the power to punish, and the power to express moral condemnation.

This use of membership theory places the law on the edge of a crimmigration crisis. Only the harshest elements of each area of law make their way into the criminalization of immigration law, and the apparatus of the state

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is used to expel from society those deemed criminally alien. The result is an ever-expanding population of the excluded and alienated. Excluding and alienating a population with strong ties to family, communities, and business interests in the United States fractures our society in ways that extend well beyond the immediate deportation or criminal penalty.

The article begins with a dystopia, narrating a future in which criminal and immigration law have completely merged, and membership theory has resulted in extreme divisions in our society between insiders and outsiders – between the included and the alienated. The rest of the article describes the seeds of that future in the past and present. Part II describes the present confluence of immigration and criminal law. Part III sets out the role of membership theory in those areas in excluding noncitizens and ex-offenders from society. It details the role of sovereign power in drawing and enforcing those lines of exclusion. The article concludes by describing the potential consequences of the convergence of these two areas and the use of membership theory to justify decisions to exclude.

TABLE OF CONTENTS

PROLOGUE

Confidential
Master Strategy Memo

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

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

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

The riots and the world's reaction brought impassioned calls for protecting the nation's security by completely banning immigration,[2] or by detaining all noncitizens who seek to cross our borders until they have shown themselves to be harmless.[3] Equally passionate have been calls for a massive overhaul of our immigration policies. Some have suggested establishing a "compassionate capitalist America" in which

[1] Molly Moore, *Riots Spread Across France And Into Paris; Police Arrest Hundreds In Worst Unrest in Decades*, WASH. POST, November 6, 2005, at A20. *See also* Anthony Faiola, *Riots in Australia Spur Introspection; Ethnic Tensions Seen as Linked to War on Terror,* WASH. POST, December 20, 2005, at A23.

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

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

immigrants convicted of minor crimes might avoid deportation through community service in meatpacking plants and agricultural fields.[4] A growing minority, however, are calling for a new day for immigration policy: a wholesale retreat from the present-day merger of criminal and immigration law.

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

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

By 2005, the population of unauthorized immigrants residing in the U.S. had reached an all-time high.[7] Political support for a legalization program was controversial.[8] Federal financial support for state welfare programs had waned.[9] Cash-strapped states with burgeoning immigrant populations pressured the federal government to increase immigration enforcement.[10]

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[4] Jennifer Talhelm, *GOP Candidate's Call for Labor Camp Rebuked,* Wash. Post, June 23, 2006 (reporting Arizona gubernatorial candidate's proposal to create forced labor camps for undocumented immigrants).

[5] Teresa Miller, *Citizenship & Severity: Recent Immigration Reforms and the New Penology* [hereinafter *Citizenship & Severity*], 17 Geo. Immigr. L.J. 611 (2003). *See also* Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603, 100 Stat. 3359 (1986).

[6] *Prosecution of Immigration Cases Surges in U.S.,* TRAC/DHS, http://trac.syr.edu/tracins/latest/current (last visited March 14, 2006) (establishing that immigration matters represent about one third (32%) of the total number of federal prosecutions and comparing drug and weapons prosecutions).

[7] Jeffrey S. Passel, Pew Hispanic Center, *Size and Characteristics of the Unauthorized Migrant Population in the U.S.: Estimates Based on the March 2005 Current Population Survey* (March 7, 2006), at http://pewhispanic.org/reports/report.php?ReportID=61 (last visited June 14, 2006).

[8] Karen C. Tumlin, *Suspect First: How Terrorism Policy Is Reshaping Immigration Policy*, 92 Calif. L. Rev. 1173, 1228 (2004).

[9] Coalition for Human Needs, *State Fact Sheets - How Budget Cuts Will Affect Your State* (January 13, 2006), at http://www.chn.org/issues/opportunityforall/statefactsheets.html (last visited August 4, 2006).

[10] Dennis Cauchon, *States Weigh Immigration Controls: Congress Moving Too Slow for Some*,

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

In 2007, Congress made a bold statement about unlawful border crossing by criminalizing all violations of immigration laws.[11] In 2008, Congress made deportation mandatory for the commission of any felony by any noncitizen regardless of the length of sentence or particular conduct involved, doing away with the prior categories of "crimes of moral turpitude" and "aggravated felonies."[12] In 2009, Congress expanded the rule to require deportation for the commission of most misdemeanors, calling these "gateway crimes."

Deportation became the consequence of almost[13] any criminal conviction of a noncitizen, including permanent residents. Immigrants who had previously been subject only to civil immigration proceedings, including tourists and business travelers who had overstayed their visas and students working beyond allotted hours or in unauthorized employment, were newly subject to criminal sanctions in addition to removal.[14] The changes in the law fed a powerful vision of the

USA Today, January 26, 2006, at A1. Also in 2007, Congress resolved an ongoing debate between immigrant advocates and the Justice Department over whether state and local law enforcement officers were authorized to enforce immigration law by explicitly granting the states that authority. Attorney General John Ashcroft, Announcement of the National Security Entry-Exit Registration System (June 5, 2002) (prepared remarks available at http://www.usdoj.gov/archive/ag/speeches/2002/060502agpreparedremarks.htm). *See also* U.S. Department of Justice Office of Legal Counsel, Memorandum Opinion for the U.S. Att'y, Southern Dist. of California, *Assistance by State and Local Police in Apprehending Illegal Aliens* (Feb. 5, 1996), available at www.usdoj.gov/olc/immstopo1a.htm (concluding that state and local law enforcement may only enforce the criminal provisions of federal immigration law). *See also Local Enforcement of Immigration Laws: Hearing on H.R. 2671 Before the House Subcomm. on Immigration, Border Security, and Claims, of the House Comm. on the Judiciary*, 108th Cong. (Oct. 1, 2003) (statement of Kris W. Kobach Associate Professor, Law, University of Missouri, Kansas City (former counsel to Attorney General Ashcroft)); *Coordinated Enforcement of Immigration Laws to Stop Terrorists; Hearing Before Senate Subcomm. on Immigration of the Senate Comm. on the Judiciary*, 108th Cong. (Apr. 22, 2004) (testimony of Kris W. Kobach Professor, Law, University of Missouri, Kansas City). *See also* Huyen Pham, *The Inherent Flaws In The Inherent Authority Position: Why Inviting Local Enforcement Of Immigration Laws Violates The Constitution*, 31 Fla. St. U. L. Rev. 965, 965-66, 971-72 (2004). *See also* H.R. 4437, 109th Cong. § 220-225 (2006) (proposing to expand authority of state and local law enforcement to enforce both criminal and civil immigration violations).

[11] *See* H.R. 4437, 109th Cong. § 614 (proposing to make any unlawful presence in the United States a felony).

[12] *See* Immigration and Naturalization Act (INA) § 101(a)(43); Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C., 110 Stat. 3009-546. *See also* H.R. 4437, 109th Cong. § 614 (2006) (proposing to amend the INA to significantly expand criminal violations that result in removal).

[13] Jaywalking is still a non-deportable offense.

[14] *See* H.R. 4437, 109th Cong. § 203 (2006) (proposing criminal sanctions for those who

immigrant as a scofflaw and a criminal that began to dominate the competing image of the benign, hard-working embodiment of the American dream.

In 2012, the Transportation Security Administration trumpeted the capture of two suicide bombers on a Toronto-JFK flight. The Department of Homeland Security (DHS) issued an emergency regulation mandating detention for all aliens entering the United States until DHS, the CIA and the FBI had determined they were "unlikely to become a public threat" nor a "serial border crosser."[15] Congress amended the Immigration and Nationality Act to create a presumption that a noncitizen charged with a deportable crime "posed a material risk of becoming involved in or supporting further criminal activity or terrorism."[16] The statute required courts, at government request, to close to the public criminal or immigration proceedings that might reveal sensitive national security information.[17]

The practical result was that criminal trials involving noncitizens and all deportation hearings were closed to the public as a precaution against revelation of national security information. Opinions of immigration judges and federal courts relating to those proceedings were either not published, or a "Public Version" was issued with sensitive material omitted or redacted. These measures remained in place even after it was discovered that the alleged bombers-to-be were arrested pursuant to a false tip from an unreliable informant.[18]

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

overstay visas or violate the terms of the visa).

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

[16] *Cf.* INA § 237(a)(4).

[17] *See* Classified Information and Procedure Act (CIPA), 18 U.S.C. App. 3 § 6 (2000).

[18] *See United States Ex. Rel. Knauff v. Shaughnessy,* 338 U.S. 537, 544 (1950) (holding that the Due Process Clause does not prohibit the use of secret information to exclude an alien seeking entry to the U.S.); *see generally* ELLEN KNAUFF, THE ELLEN KNAUFF STORY (1952) (revealing that the secret information was a false tip from a jilted lover of the plaintiff's husband).

China.[19]

The criminalization of immigration law has impacted a population previously protected by significant legal and cultural barriers to deportation: legal permanent residents and other long-term noncitizen residents. We are currently exporting large numbers of U.S. residents regardless of whether they grew up in the United States or have ties to U.S. citizen spouses or children, communities, or employers.[20] The number of deportations has grown dramatically since 2004 when we expelled close to 90,000 noncitizens.[21] Media stories continue to document deportations of legal permanent residents who had lived in the United States since early childhood to countries where they knew no one and had little or no familiarity with the language or culture.[22]

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

The criminalization of immigration law pushed our judicial and penological institutions to the breaking point. Immigration appeals clogged federal court dockets.[23] The burgeoning population of detainees

[19] James Fallows, *Countdown to a Meltdown: America's Economic Crisis. A Look Back from the Election of 2016,* Atlantic Monthly, at 63 n. 37 (2005) (citing statistics showing decline in foreign enrollment in U.S. universities).

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

[21] Office of Immigration Statistics, U.S. Department of Homeland Security, 2004 YEARBOOK OF IMMIGRATION STATISTICS 161, tbl. 42 (2006).

[22] Lena Williams, *A Law Aimed at Terrorists Hits Legal Immigrants*, N.Y. Times, July 17, 1996. *See also* Karen Branch-Brioso & Peter Shinkle, *Longtime Legal Residents Face Deportation for Minor Crimes*, St. Louis Post-Dispatch, May 3, 2004.

[23] John R.B. Palmer, *et al*, *Why Are So Many People Challenging Board of Immigration Appeals Decisions in Federal Court? An Empirical Analysis of the Recent Surge in Petitions for Review*, 20 Geo. Immigr. L.J. 1 (2005); Tom Brune, *Burdened by Appeals: A Justice Dept. Plan to Reduce Backlog of Immigration Cases Has Done So, But Also Driven Up Federal Appeals*, Newsday, December 15, 2004, at A07 (reporting that the majority of immigration appeals have fallen on two major judicial circuits: the Second and Ninth Circuits). *See also* Adam Liptak, *Courts Criticize Judges' Handling of Asylum Cases*, N.Y. Times, December 26, 2005, at A1 (reporting federal judges' harsh criticism of immigration judges and administrative agencies for the large increase in immigration cases before the federal appeals courts. Immigration cases, most involving

quickly overwhelmed the available cell space in federal and state jails and prisons.[24] Private prison fees spiked as a result of the unprecedented demand for prison bed contracts.

In response, the Bureau of Prisons and the military undertook a quiet effort to build prison camps on five army bases in the Mariana Islands, the Ivory Coast, Chile, Belize, and Israel to contain noncitizen detainees and U.S. citizens convicted of serious crimes.[25] It was cheaper to ship detainees to these bases and house them there than to build new prisons domestically. These prisons were also less likely to attract public notice. The extraterritorial confinement of convicts and immigrants is exempt from judicial review under the Defend America Act of 2007,[26] thereby easing the strain on federal court dockets and avoiding the cost of prolonged prison conditions litigation.[27]

At first, most of the cells in the camps consisted of large rectangles separated from one another by chain link fence. By the second year, most had been converted into cement-block structures.[28] The Washington Post dubbed them "Crimmigration Camps." As of the end of last year, the camps housed 300,000 inmates, considerably more than the 3,000 alleged terrorist supporters that the CIA had detained abroad by late 2005.[29]

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asylum seekers, accounted for about 17% of all federal appeals cases in 2004, up from 3% in 2001. In New York and California courts, nearly 40% of federal appeals involved immigration cases).

[24] *See Interior Immigration Enforcement Resources: Hearing Before the House Judiciary Subcommittee on Immigration, Border Security, and Claims*, 109th Cong. (2005) (Statement of Paul K. Martin, Deputy Inspector General, U.S. Department of Justice). *See also* Michael M. Hethmon, *In the Aftermath of September 11: Defending Civil Liberties in the Nation's Capital: The Treatment of Immigrants: The Chimera and the Cop: Local Enforcement of Federal Immigration Law*, 8 D.C. L. Rev. 83, 133 (2004).

[25] The scope of constitutional protection against extraterritorial detention is still relatively undefined. *See Rasul v. Bush*, 542 U.S. 466 (2004) (holding that federal courts have jurisdiction over habeas corpus petitions filed by detainees at the U.S. naval base at Guantanamo, but not reaching the issue whether habeas jurisdiction covers detainees at other foreign locations); *Johnson v. Eisentrager*, 339 U.S. 763 (1950) (holding that courts did not have habeas jurisdiction over enemy aliens held outside of United States territory). *See also* David A. Martin, *Offshore Detainees and the Role of Courts After Rasul v. Bush: The Underappreciated Virtues of Deferential Review*, 25 B.C. Third World L.J. 25 (2005).

[26] *See* REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, 119 Stat. 231 (codified at 8 U.S.C.A. § 1252 (West 2006)); *see also* Hiroshi Motomura, *Immigration Law and Federal Court Jurisdiction Through the Lens of Habeas Corpus*, 91 Cornell L. Rev. 459, 486-95 (2006) (describing REAL ID Act's constriction of habeas corpus review in immigration cases).

[27] David Zaring, *National Rulemaking Through Trial Courts: The Big Case and Institutional Reform*, 51 UCLA L. Rev. 1015, 1058 (2004).

[28] *Camp X-Ray Detainees Get Upgrade In Housing; New Cells Have Indoor Plumbing*, WASH. POST, April 27, 2002, at A15. *See also* Neil A. Lewis, *Guantanamo Detention Site Is Being Transformed, U.S. Says*, N.Y. TIMES, August 6, 2005, at A1.

[29] Dana Priest, *CIA Holds Terror Suspects in Secret Prisons*, WASH. POST, November 2, 2005, at A1.

Citing the need to prevent conflict between detainees as well as issues of cost and administrative efficiency, the Department of Homeland Security designated specific internment camps to contain detainees of like national origin and religion. Detainees from Latin America were placed in the Chilean camp. Muslims from the Middle East and Africa were interned in the Israeli camp. The Ivory Coast housed African and Middle Eastern detainees who were not Muslim. Detainees from Europe and Asia ended up in the smallest camp in Belize. U.S. citizens convicted of felonies were housed in the Mariana Islands, along with detainees who did not fall into the other categories.

The trouble began the day after the Supreme Court reversed the Ninth Circuit's decision that the camps violated constitutional prohibitions against cruel and unusual punishment, due process, and equal protection.[30] The riots erupted first in Israel, which had been the subject of persistent rumors of human rights violations. As word of the Israeli prison riot spread across the internet, riots flared in the Ivory Coast, then Chile, and finally the Mariana Islands. Within a week, 300 lives were lost, counting both inmates and prison guards.

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

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

Your great challenge now is to craft for this nation a strong and stable immigration policy that will bolster our economic integrity domestically and internationally, and protect our venerable reputation from further international embarrassment. Divergent paths lie before you: greater severity in our immigration policy to quell further unrest, or greater inclusiveness for immigrants in the U.S. by reversing the merger of

[30] *Cf. Rasul v. Bush*, 542 U.S. 466 (2004).

criminal and immigration law. Looking to the future, it is clear that the place of noncitizens in our society will ultimately influence the place of our citizenry in the global order.

I. INTRODUCTION

This memo to the President describes a future grounded in the present in which criminal law is poised to swallow immigration law. Immigration law today is clothed with so many attributes of criminal law that the line between them has grown indistinct. Scholars have labeled this the "criminalization of immigration law."[31] The merger of the two areas in both substance and procedure has created parallel systems in which immigration law and the criminal justice system are merely nominally separate.

The criminalization of immigration law, or "crimmigration law," has generated intense interest from legislators, immigrants, the media, and the public. In 2006, the specter of legislation that would have criminalized all immigrants present in the country without authorization ignited nationwide marches and protests. The intersection of criminal and immigration law has captured the attention of immigration and criminal law scholars alike. Scholarship to date has detailed the existence of this merger,[32] described the parallels between deportation and criminal punishment,[33] and outlined the constitutional consequences of criminalizing immigration law.[34]

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

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[31] *E.g.,* Miller, *Citizenship & Severity*, *supra* note ___, at 616.

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

[33] *See generally* Margaret H. Taylor & Ronald F. Wright, *The Sentencing Judge as Immigration Judge*, 51 Emory L.J. 1131 (2002); Daniel Kanstroom, *Deportation, Social Control, and Punishment: Some Thoughts about Why Hard Laws Make Bad Cases,* 113 Harvard L.R. 1889, 1908 (2000).

[34] Kanstroom, *supra* note ___.

This article begins to fill that void. It unearths the roots of the confluence of criminal and immigration law and maps the theoretical impulses that motivate the merger. It offers a unifying theory for this crimmigration crisis intended to illuminate how and why these two areas of law have converged, and why that convergence may be troubling. I propose here that membership theory, which limits individual rights and privileges to the members of a social contract between the government and the people,[35] is at work in the convergence of criminal and immigration law. Membership theory has the potential to include individuals in the social contract or exclude them from it.[36] It marks out the boundaries of who is an accepted member of society.[37] It operates in this new area to define an ever-expanding group of immigrants and ex-offenders who are denied the badges of membership in society such as voting rights or the right to remain in the United States. Membership theory manifests in this new area through two tools of the sovereign state: the power to punish, and the power to express moral condemnation.

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

The previous section imagined a future in which the two systems have merged – in which immigration violations have become federal criminal violations and criminal law has taken advantage of the flexibility accorded to immigration sanctions. My goal in constructing such a future is to shed new light on our present. Part II of this article addresses the past and present: it describes the many ways in which criminal law and immigration law have come to intersect. Many criminal offenses,

[35] Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1, 20 (2002); Alexander M. Bickel, *Citizen or Person? What is not Granted Cannot Be Taken Away, in* THE MORALITY OF CONSENT 34 (1975); Michael Walzer, WHAT IT MEANS TO BE AN AMERICAN 82-95 (1992) (describing citizens as members of a political community); T. Alexander Aleinikoff, *Theories of Loss of Citizenship*, 84 MICH. L. REV. 1471, 1490 (1986) [hereinafter *Theories*].

[36] *See* Juliet Stumpf, *Citizens of an Enemy Land: Enemy Combatants, Aliens, and the Constitutional Rights of the Pseudo-Citizen*, 38 U.C. Davis Law Rev. 79 (2004).

[37] *Id.*

including misdemeanors, now result in mandatory deportation. Immigration violations previously handled as civil matters are increasingly addressed as criminal offenses. The procedures for determining whether civil immigration laws are violated have come to resemble the criminal process. I argue that the trend toward criminalizing immigration law has set us on a path towards establishing parallel systems: immigration and criminal law as doppelgangers.

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

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

II. IMMIGRATION AND CRIMINAL LAW CONVERGE

The merger of criminal and immigration law is both odd and oddly unremarkable. It is odd because criminal law seems a distant cousin to immigration law. Criminal law seeks to address harm to individuals and society from violence or fraud or evil motive. Immigration law determines who may cross the border and reside here, and who must leave. Historically, courts have drawn closer connections between immigration law and foreign policy than between immigration and the criminal justice system.[38]

Yet criminal law and immigration law are similar in the way that they differ from other areas of the law. Most areas of law center around

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

resolving conflicts and regulating the relationships of individuals and businesses. Torts, contracts, property, family law, and business-related law primarily address disputes or regulate the creation, maintenance, and dissolution of personal and business relationships. Criminal law and immigration law, in contrast, primarily regulate the relationship between the state and the individual.[39]

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

Crime committed by immigrants has influenced the direction of immigration law since its inception.[40] The first federal statutes restricting immigration barred the entry of foreigners with criminal convictions, among others.[41] Since then, the relationship between immigration and criminal law has evolved from merely excluding foreigners who had committed past crimes[42] to the present when many immigration violations are themselves defined as criminal offenses[43] and many crimes result in deportation.[44]

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[39] Disputes among individuals and businesses are relevant and often the trigger that sets the criminal or immigration system in motion. However, the focus is on the circumstances under which the state can exercise its powers to penalize an individual or expel that person from society.

[40] Gerald Neuman, STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW 21 (1996); *see also* 13 J. of Cong. 105-06 (Sept. 16, 1788) (reflecting the plea of the Congress of the Confederation to the states to "pass laws for preventing the transportation of convicted malefactors from foreign countries into the United States").

[41] Act of March 3, 1875, 43 Cong. Ch. 141, 18 Stat. 477; Act of Aug. 3, 1882, 47 Cong. Ch. 376, 22 Stat. 214.

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

[43] Miller, *Blurring the Boundaries, supra* note __, at 82-83; April McKenzie, *A Nation of Immigrants or a Nation of Suspects? State and Local Enforcement of Federal Immigration Laws Since 9/11*, 55 Ala. L. Rev. 1149, 1150 (2004). *See also* 8 U.S.C. § 1326.

[44] *See e.g.,* Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") § 441, 8 U.S.C. § 1326 (2000) (providing for deportation of criminal aliens for serious crimes including murder, drug trafficking, firearms trafficking and less serious crimes such as gambling, alien smuggling, and passport fraud); INA § 212(a)(9) (providing for the inadmissibility of noncitizens who have previously been convicted of a nonpolitical crime). *See also* Miller, *Citizenship & Severity, supra*

This increasing overlap between criminal and immigration law highlights choices about who is a member of U.S. society. Criminal and immigration law primarily serve to separate the individual from the rest of U.S. society through physical exclusion and the creation of rules that establish lesser levels of citizenship.[45] Moreover, the law often imposes both immigration and criminal sanctions for the same offense. When a noncitizen violates immigration law that has been defined as criminal, or a crime that is a deportable offense, both incarceration and deportation may result.

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

A. Overlap in the Substance of the Law

Immigration law has evolved from a primarily administrative civil process to the present day system that is intertwined with criminal law. In the beginning, immigration law intersected with criminal law only in denying entry to those with a criminal history.[46] Entering without authorization was not punished, and those who committed crimes after entering the country were not deportable.[47] Once immigrants had crossed the border, with or without government sanction, the federal government did little to expel them.[48] Only in 1917 did the government begin to deport convicted noncitizens.[49]

Over time, immigration law became infused with the substance of

note __, at 633-34.

[45] In the criminal justice system, detention is used pre-trial to ensure that a material witness remains available for investigation and trial, to ensure that a suspect appears at trial, and to prevent the commission of further crimes prior to trial. The Bail Reform Act of 1984, Pub.L. 98-473, 98 Stat. 1976 (1984) (codified 18 U.S.C. § 3142); 18 U.S.C. § 3144 (governing release or detention of a material witness).

[46] Act of Mar. 3, 1875, § 5, 18 Stat. 477 (excluding from entry those convicted of non-political felonies); *see also* Kanstroom, *supra* note __, at 1908. Earlier state laws banning entry of convicted criminals were primarily directed at those who brought the convict, rather than the convicted alien. Neuman, *supra* note __, at 21.

[47] Edward Prince Hutchinson, LEGISLATIVE HISTORY OF AMERICAN IMMIGRATION POLICY 1798-1963 11-46 (1981).

[48] *Id.*

[49] Neuman, *supra* note ___ at 22.

criminal law itself.[50] First, there has been "unprecedented growth in the scope of criminal grounds for the exclusion and deportation of foreign-born non-U.S. citizens."[51] Second, violations of immigration law are now criminal when they were previously civil, or carry greater criminal consequences than previously.[52] Third, recent changes in immigration law have focused on detaining and deporting those deemed likely to commit crimes that pose a threat to the national security.[53]

1. Removing Noncitizen Offenders

Since the late 1980s, grounds for excluding and deporting aliens convicted of crimes have proliferated.[54] Until then, deportation of aliens with criminal backgrounds was mostly confined to past convictions for crimes of moral turpitude, drug trafficking, and some weapons offenses.[55] Deportation of permanent residents, including those who had committed crimes, was relatively rare.[56] Detention of aliens with criminal backgrounds was less common, and relief from detention more readily available based on a range of circumstantial considerations.[57] Criminal sanctions for purely immigration-related violations were far more limited compared to the present day.[58]

[50] Miller, *Blurring the Boundaries, supra* note ___, at 114. The turn toward criminalization of immigration law seems correlated with a downturn in public opinion toward immigrants. Some have described the 1960s, 1970s and early 1980s as a heyday for immigrant rights due to the influence of the Civil Rights Movement. *See* Miller, *Citizenship & Severity*, *supra* note __, at 616. However, little has been written about why the solution to this newly perceived problem was to turn to increased criminalization rather than, for example, increased civil enforcement. By the 1990s, immigrants were "accused of exploiting the nation's welfare system, of committing a host of serious offenses against its population, and of being involved in terrorist activity." Demleitner, *Misguided Prevention, supra* note __, at 553. Various rationales have been offered to explain why public opinion toward immigration took on such a negative cast. Events cited as affecting the change in public opinion include the volume of Southeast Asian refugees and those from other countries needing resettlement in the U.S., Mexicans crossing the border illegally after Mexico's financial collapse in 1983, and the Mariel boatlift, in which the Cuban government encouraged disaffected Cubans and convicted criminals to take to the sea to seek asylum in the United States. *See* Miller, *Citizenship & Severity, supra* note __, at 626-630.

[51] Miller, *Citizenship & Severity*, *supra* note __, at 619.

[52] *Id.* at 619.

[53] *See* Demleitner, *Misguided Prevention*, *supra* note __, at 552.

[54] Miller, *Citizenship & Severity*, *supra* note __, at 616; Demleitner, *Immigration Threats, supra* note __, at 1061.

[55] Miller, *Citizenship & Severity*, *supra* note __, at 622; Elizabeth J. Harper, THE IMMIGRATION LAWS OF THE UNITED STATES 612-13 (3d ed. 1975).

[56] Demleitner, *Immigration Threats, supra* note __, at 1061; Brent K. Newcomb, *Immigration Law and the Criminal Alien: A Comparison of Policies of Arbitrary Deportations of Legal Permanent Residents Convicted of Aggravated Felonies*, 51 Okla. L. Rev. 697, 699-700 (1998).

[57] Miller, *Citizenship & Severity*, *supra* note __, at 622-23; Harper, *supra* note __, at 612-13.

[58] Miller, *Citizenship & Severity*, *supra* note __, at 622.

In 1988, Congress vastly expanded the range of crimes leading to deportation by creating a category of "aggravated felonies" that included murder, drug trafficking, and firearms trafficking.[59] Almost every immigration statute passed since then has expanded the list of crimes leading to exclusion and deportation.[60] The Immigration Act of 1990 defined an aggravated felony as any crime of violence for which the sentence was at least five years, regardless of how the statute under which the alien was actually convicted defined the crime.[61] In the mid-1990s, Congress added a plethora of offenses to the list of aggravated felonies, many of which do not involve violence.[62] The Antiterrorism and Effective Death Penalty Act of 1996 made a single crime of "moral turpitude" a deportable offense.[63] Congress soon broadened the definition of an aggravated felony still further by reducing to one year the sentence length required to constitute a "crime of violence" or a deportable theft offense.[64]

2. Immigration-Related Criminal Offenses

The convergence of immigration and criminal law has been a two-way street. Not only has there been an increase in the number and type of crimes that resulted in deportation, but actions by immigrants that were previously civil violations crossed the boundary to become criminal offenses, or came to carry harsher criminal penalties with heightened enforcement levels.[65]

Until 1929, violations of immigration laws were essentially civil

[59] The Anti-Drug Abuse Act of 1988 (Drug Kingpin Act), Pub. L. No. 100-690, 102 Stat. 4181 (1988) (codified at 8 U.S.C. § 1228). *See also* Miller, *Citizenship & Severity*, *supra* note __, at 633.

[60] Miller, *Citizenship & Severity*, *supra* note __, at 633-34. *See also* Demleitner, *Misguided Prevention, supra* note __, at 554.

[61] Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (1990).

[62] The Immigration and Technical Corrections Act, Pub. L. No. 103-416, 108 Stat. 4305 (1994); Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified as amended in scattered sections of 28 U.S.C. and 42 U.S.C. (2000)). These statutes added weapons offenses, some types of theft, burglary, and fraud offenses, prostitution, acts related to gambling, transportation related to prostitution, alien smuggling, and types of document fraud, obstruction of justice, serious forms of perjury or bribery, forgery, counterfeiting, vehicle trafficking, offenses committed by a previously deported alien, and offenses related to skipping bail. *See* Miller, *Citizenship & Severity, supra* note __, at 634-35.

[63] AEDPA, Pub. L. No. 104-132, 435 (codified at 8 U.S.C. § 1182(a)(1)-(33)(2000)). A "crime of moral turpitude" has never been legislatively defined. Courts look to the inherent nature of the offense to determine whether it falls within the category. Demleitner, *Immigration Threats, supra* note __, at 1064; Brian C. Harms, *Redefining "Crimes of Moral Turpitude": A Proposal to Congress,* 15 Geo. Immigr. L.J. 259, 264-69 (2001).

[64] IIRIRA § __.

[65] Miller, *Citizenship & Severity*, *supra* note __, at 639-45; Demleitner, *Immigration Threats*, *supra* note __, at 1062-63.

matters.[66] In 1929, unlawful entry became a misdemeanor, and unlawful re-entry a felony.[67] In recent decades, the number and types of immigration-related acts that carry criminal consequences have proliferated. In 1986, Congress passed legislation that for the first time sanctioned employers for knowingly hiring undocumented workers and provided for imprisonment and fines for a pattern or practice of such hiring.[68] Since 1990, marrying in order to evade immigration laws, voting in a federal election as a non-citizen, and falsely claiming citizenship to obtain a benefit or employment became criminal violations leading to incarceration as well as deportation.[69] The criminal penalty for unlawfully re-entering the United States after deportation or exclusion increased from two years to a maximum of ten or twenty years.[70] And enforcement of these violations increased dramatically.[71]

3. Crimmigration and Terrorism

The national focus on terrorism has also had the effect of connecting criminal and immigration law.[72] After the events of September 11, anti-terrorism efforts employed both immigration control and criminal law to reduce terrorist threats.[73] As examples, the Department of Homeland Security enters civil immigration warrant information into national law enforcement databases accessible to state and local police, which has in effect imposed on them a role in enforcing civil immigration law.[74] Operation Tarmac prosecutes and deports unauthorized airport

[66] Mae M. Ngai, *The Strange Career of the Illegal Alien: Immigration Restriction and Deportation Policy in The United States, 1921-1965*, 21 Law & Hist. Rev. 69, 75 (Spring 2003).

[67] *Id.* at 75.

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

[69] Marriage Fraud Act of 1986, Pub L. No. 99-639, 10 Stat. 3537 (codified as amended in scattered sections of 8 U.S.C.); IIRIRA §§ 215, 216; *see* Miller, *Citizenship and Severity, supra* note __, at 640.

[70] Anti-Drug Abuse Act of 1988, Pub. Law. No. 100-690, § 7345, 102 Stat. 4181 (1988) (increasing the maximum sentence to five or ten years); Violent Crime Control Act and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (codified at 8 U.S.C. § 1326 (1994) (increasing the maximum sentence to ten to twenty years). *See* Miller, *Citizenship and Severity, supra* note __, at 640.

[71] Press Release, Department of Homeland Security, *DHS Announces Long-Term Border and Immigration Strategy* (November 2, 2005) (available online at http://www.dhs.gov/dhspublic/interapp/press_release/press_release_0795.xml).

[72] Demleitner, *Misguided Prevention, supra* note __, at 560.

[73] *Id.*

[74] Michael J. Wishnie, *Terrorism and the Constitution: Civil Liberties in a New America: State and Local Police Enforcement of Immigration Laws,* 6 U. Pa. J. Const. L. 1084, 1088-95 (2004) [hereinafter *Terrorism*].

screeners working with forged employment documents.[75]

The association between immigration and criminal law has become so strong that in some arenas immigration law has usurped the traditional role of criminal law. Immigration law is now often used in lieu of criminal law to detain or deport those alleged to be involved in terrorism.[76] Because of the lesser substantive and procedural barriers to deportation compared to a criminal conviction, federal officials have been able to undertake initiatives based on citizenship status and ethnicity that are not possible within the criminal justice system.

Soon after September 11, the Justice Department initiated the National Security Entry-Exit System ("NSEERS") that required noncitizen men from certain Muslim and Arab countries to register with the INS.[77] The Department of Homeland Security's Absconder Apprehension Initiative targeted for detention and deportation non-citizen men of Muslim faith and Arab ethnicity who had criminal convictions or immigration violations, regardless of whether the crimes or violations related to terrorism.[78] The USA PATRIOT Act of 2001 has resulted in detentions of noncitizens without charge for an undefined "reasonable period of time" under extraordinary circumstances.[79] All of these examples permit the government to employ immigration rules to detain or deport noncitizens suspected of terrorist tendencies without resort to the criminal justice system.

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In response to this interlacing of criminal and immigration law, the number of deportations has increased dramatically. Between 1908 and 1980, there were approximately 56,000 immigrants deported based on criminal convictions.[80] In 2004 alone, there were more than 88,000 such

[75] Department of Homeland Security, Office Inspector General, A Review of Background Checks for Federal Passenger and Baggage Screeners at Airports 3-4 (Jan. 2004); Demleitner, *Misguided Prevention, supra* note __, at 564.

[76] Demleitner, *Misguided Prevention, supra* note __, at 561-62.

[77] 67 Fed. Reg. 67,766 (Nov. 6, 2002); 67 Fed. Reg. 70,526 (Nov. 22, 2002). *See also* 67 Fed. Reg. 77,642 (Dec. 18, 2002) (modifying registration requirements).

[78] Memorandum from the Deputy Attorney General, U.S. Department of Justice, *Guidance for Absconder Apprehension Initiative* (Jan. 25, 2002); *see* Demleitner, *Misguided Prevention, supra* note __, at 561.

[79] USA PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 272 (2001); 8 C.F.R. § 287.3(d) (2004). *See also* Susan M. Akram & Maritza Karmely, *Immigration And Constitutional Consequences Of Post-9/11 Policies Involving Arabs And Muslims In The United States: Is Alienage A Distinction Without A Difference?*, 38 U.C. Davis L. Rev. 609 (March 2005).

[80] Office of Immigration Statistics, U.S. Department of Homeland Security, 2004 YEARBOOK OF IMMIGRATION STATISTICS, tbl. 45 (2006) (available at http://www.uscis.gov/graphics/shared/statistics/yearbook/2004/Table45.xls (last visited June 15, 2006)). *See also* Demleitner, *Immigration Threats*, *supra* note __, at 1063.

deportations.[81]

B. Similarities in Enforcement

Immigration enforcement has come to parallel criminal law enforcement. The authority of federal agencies to regulate immigration as a law enforcement agency, however, has not always been clear. In 1930, members of the House Committee on Immigration and Naturalization expressed concern that the Border Patrol was overreaching when they discovered that the agency operated as far as 100 miles inside the border and considered itself authorized to make arrests without a warrant.[82] Because the Border Patrol was not a criminal law enforcement agency, Congress was uneasy about the agency's lack of statutory authority to make warrantless arrests and its claim to jurisdiction well beyond the nation's edge.[83]

The contrast between the doubts expressed by that earlier Congress and the current authority of the immigration agency could not be more marked. Between 1875, when Congress passed the first federal immigration exclusion law[84] and 1917, when it appropriated funds for deporting those unlawfully in the country,[85] there was no federal mechanism for enforcing the deportation sanction.[86]

Today the appearance and powers of the two immigration enforcement agencies, Immigration and Customs Enforcement and U.S. Customs and Border Protection, are almost indistinguishable from those of a criminal law enforcement organization. Representative of the shift from a civil administrative agency to law enforcement is the transfer of responsibility for immigration control from the Department of Commerce and Labor to the Department of Justice and ultimately the Department of Homeland Security.[87]

The Border Patrol is perhaps the most apparent example of the way

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[81] Office of Immigration Statistics, U.S. Department of Homeland Security, 2004 ANNUAL REPORT 1, 1 (2005) (available at http://www.uscis.gov/graphics/shared/statistics/yearbook/YrBk04En.htm (last visited June 15, 2006)).

[82] Ngai, *supra* note __, at 70 & n.2.

[83] *Id*.

[84] Act of Mar. 3, 1875 (Page Law), ch. 141, 18 Stat. 477 (repealed 1974). *See also* Kerry Abrams, *Polygamy, Prostitution, And The Federalization Of Immigration Law*, 105 Colum. L. Rev. 641, 643 (April, 2005).

[85] Act of May 6, 1882 (Chinese Exclusion Act), ch. 126, 22 Stat. 58 (repealed 1943); 22 Stat. 214 (Immigration Act of 1882); 23 Stat. 332 (Alien Contract Labor Law, 1885)

[86] Ngai, *supra* note __, at 73.

[87] *Id.* at 70 n.1.

immigration enforcement has evolved to parallel criminal law enforcement. The Border Patrol has transformed from its original embodiment as a collection of 450 ranchers, military men, railway mail clerks, and local marshals and sheriffs[88] to a trained and uniformed enforcement body whose activities resemble those of any criminal law enforcement agency. Border Patrol agents are empowered to conduct surveillance, pursue suspected undocumented aliens, make stops, and effectuate arrests.[89] In 1986, Congress legislated the first of a series of significant increases in appropriations for the Border Patrol.[90] Today, the immigration enforcement arms of the Department of Homeland Security constitute the largest armed federal law enforcement body.[91] For the first time, immigration prosecutions outnumber all other types of federal criminal prosecutions, including prosecutions for drugs and weapons violations.[92]

Immigration enforcement has also begun to leap the gulf between the traditionally federal control over immigration and the traditionally state-centered substance of criminal law. Congress has taken steps to encourage state and local law enforcement officers to enforce pure immigration violations.[93] Nonfederal law enforcement departments may enter into agreements with the federal government under which they are deputized to enforce immigration laws.[94] Proposed legislation would

[88] Bill Ong Hing, DEFINING AMERICA THROUGH IMMIGRATION POLICY 135 (2004); *see also* Ngai, *supra* note __ at 86-87.

[89] Hing, *supra* note __, at 137-38.

[90] *See id.* at § 111(b), 100 Stat. 3381 (1986). *See also* Francisco L. Rivera-Batiz, U.S. Immigration Policy Reform in the 1980's: A Preliminary Assessment 21 (1991); Miller, *Citizenship & Severity, supra* note __, at 629-31.

[91] News Release, Immigrations & Customs Enforcement, U.S. Dep't of Homeland Security, *ICE Detention and Removal Sets Record for Fiscal Year 2004* (Nov. 16, 2004), at http://www.ice.gov/graphics/news/newsreleases/articles/droFY04.htm (last visited Nov. 4, 2005). The former Immigration and Naturalization Service has been reconstituted in three sections of the Department of Homeland Security. The U.S. Citizenship and Immigration Services provides immigration benefits. The Bureau of Customs and Border Protection is responsible for border protection, while the Bureau of Immigration and Customs Enforcement investigates and enforces violations of immigration and customs laws. *See* www.dhs.gov.

[92] Transactional Records Access Clearinghouse ("TRAC"), *New Findings about DHS-Immigration* (August 24, 2005), at http://www.trac.syr.edu/tracins/latest/131/ (last visited Nov. 4, 2005).

[93] *See* 8 U.S.C. § 1103(a)(10) (permitting the Secretary of Homeland Security to authorize state or local law enforcement to enforce immigration law when an "actual or imminent mass influx of aliens. . . presents urgent circumstances requiring an immediate Federal response.") *See also* Huyen Pham, *The Inherent Flaws in the Inherent Authority Position: Why Inviting Local Enforcement of Immigration Laws Violates the Constitution*, 31 Fla. St. U. L. Rev. 965, 980 & n.76 (2004).

[94] *See* 8 U.S.C. § 1357(g) (authorizing the Secretary of Homeland Security to enter into agreements with states to deputize state officers and employees to perform the functions of immigration officers).

declare that state and local law enforcement officers have inherent power to enforce immigration laws, and would provide training and funding for departments that participated.[95]

This blurring of federal and state authority to enforce immigration law is apparent at the agency level as well. In 2001, the INS began to enter civil immigration information into the FBI's criminal database, which state and local police widely consult during everyday stops and encounters.[96] As a result, police officers who consult the database arrest individuals suspected of civil immigration violations.[97] The Justice Department has also put pressure on state and local police to make immigration arrests and enforce immigration laws as part of their duties.[98] These policies are "a sea change in the traditional understanding that federal immigration laws are enforced exclusively by federal agents."[99]

C. Procedural Parallels

The parallels between criminal procedure and the rules governing immigration law and proceedings are legion. The two areas have vastly different constitutional procedural protections, in that criminal process rights are embodied in the Fourth, Fifth and Sixth Amendments and immigration proceedings are generally governed by the Fifth Amendment's Due Process Clause. Nevertheless, immigration proceedings have come to bear a striking resemblance to criminal process. As in criminal law, the immigration judge's decision in an exclusion or deportation case concerns the physical liberty of the individual. Immigration law enforcement officers execute warrants, make arrests, and detain suspected violators. The violation is adjudicated in a hearing where the individual has the opportunity to present evidence and examine witnesses.[100] The functions of prosecutor

[95] *See* Homeland Security Enhancement Act of 2003, S. 1906, 108th Cong. (2003) (introduced and referred to Senate Subcommittee on the Judiciary November 20, 2003); Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005, H.R. 4437, 109th Cong. (2005). Based on controversial legal grounds, the Office of Legal Counsel in the U.S. Department of Justice recently reversed its earlier constitutional interpretation that only federal actors have authority to enforce immigration law. Attorney General John Ashcroft, Attorney General's Remarks on the National Security Entry-Exit Registration System (June 6, 2002) (prepared remarks available at http://www.usdoj.gov/archive/ag/speeches/2002/060502agpreparedremarks.htm).

[96] *See* Wishnie, *Terrorism, supra* note __, at 1095-96.

[97] *Id.* at 1096.

[98] *Id.* at 1087.

[99] *Id.*

[100] *See* Taylor & Wright, *supra* note __, at 1137-38.

and adjudicator are generally separated,[101] and the immigrant has a right to counsel, though not at government expense.[102]

Hand in hand with the greater overlap between the substance of criminal and immigration law and the creation of a police-like enforcement agency has been the increased use of an immigration sanction – detention – that parallels the criminal sanction of incarceration.[103] Congress has recently narrowed the circumstances under which noncitizens convicted of crimes can avoid administrative detention after completing their criminal sentences.[104] DHS has expanded the categories of immigrants subject to detention that it had formerly released and now detains permanent residents, women, and children.[105] The USA PATRIOT Act of 2001 authorized the Attorney General to detain noncitizens for seven days without criminal charges.[106] Much longer detentions became prevalent, however, based on expanded administrative rules that permitted detention without charge for a "reasonable period of time" under extraordinary circumstances.[107] And in April 2003, citing national security concerns, the Attorney General expanded the grounds for detention of asylum-seekers from Haiti based on his belief that "Pakistanis, Palestinians, etc." might use Haiti as a

[101] Recent amendments to the INA have created two exceptions to this rule. "INS officers can now summarily deport aggravated felons who are not lawful permanent residents and individuals who have reentered illegally after having previously been removed." Taylor & Wright, *supra* note __, at 1137-38.

[102] Immigration and Nationality Act § 292, 8 U.S.C. § 1362. *See, e.g.*, *United States v. Gasca-Kraft*, 522 F.2d 149, 152 (9th Cir. 1975) (holding that there is no Sixth Amendment right to counsel at government expense in deportation proceedings); *Vides-Vides v. INS*, 783 F.2d 1463, 1469-70 (9th Cir. 1986) (same); *Burquez v. INS*, 513 F.2d 751, 755 (10th Cir. 1975) (same). *Cf. Aguilera-Enriquez v. INS*, 516 F.2d 565, 568 (6th Cir. 1975) (articulating due process test for requiring appointed counsel as whether assistance of counsel is necessary as a matter of "fundamental fairness," but holding that counsel was not necessary in the case at bar) (quoting *Gagnon v. Scarpelli*, 411 U.S. 778, 790 (1973)). *See also* Taylor & Wright, *supra* note___, at 1137.

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

[104] Miller, *Citizenship & Severity*, *supra* note __, at 630.

[105] *Id.* at 637.

[106] USA PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 272(2001).

[107] *See* 8 C.F.R. § 287.3(d) (2004); *see also* Akram & Karmely, *supra* note __.

"staging point" for terrorism.[108]

D. Distinctions between Immigration and Criminal Law

Despite the appearance of an inevitable convergence of the immigration and criminal justice systems, some distinctions do remain. First, the constitutional rights of noncitizens in immigration proceedings are far more limited than those of criminal defendants, whose Fourth, Fifth, and Sixth Amendment rights lattice the structure of the criminal trial.

Courts have offered two justifications for this distinction. Unlike criminal law, courts have historically connected immigration law with foreign policy.[109] Immigration law is governed primarily by the plenary power doctrine, which grants vast power to Congress and the President over foreign policy, including immigration, and limits the reach of the Constitution and the scope of judicial review. The second justification is that courts have historically treated immigration-related exclusion, deportation, and detention as civil remedies, not as punishment comparable to criminal sanctions.[110]

As a result, noncitizens in deportation proceedings are protected only by the Due Process Clause,[111] and those seeking to enter the country have essentially no constitutional protections at all.[112] Other Fifth and Sixth Amendment rights, prominent features of criminal trials, do not apply in deportation proceedings except to the limited extent that "fundamental fairness" requires them.[113] Noncitizens in immigration proceedings do not enjoy the protections of the Eighth Amendment against cruel and unusual punishment.[114] They generally do not have the right to appointed counsel at government expense[115] or the protection of the privilege against self-incrimination.[116] Nor does the Ex Post Facto Clause

[108] *Matter of D-J,* 23 I. & N. Dec. 572, 579, Interim Decision No. 3488 (Apr. 17, 2004); *see also* Demleitner, *Misguided Prevention, supra* note __, at 571.

[109] *Chae Chan Ping,* 130 U.S. 581; *Zadvydas*, 533 U.S. 678.

[110] *Mahler v. Eby*, 264 U.S. 32 (1924); *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1050 (1984). *See also* Kanstroom, *supra* note __, at 1894-95.

[111] *Yamataya v. Fisher,* 189 U.S. 86, 100-02 (1903); s*ee also* Kanstroom, *supra* note __, at 1895.

[112] *Knauff,* 338 U.S. 537 (1950); *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953).

[113] Kanstroom, *supra* note __, at 1895.

[114] *Briseno v. INS,* 192 F.3d 1320, 1323 (1999).

[115] INA § 292.

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

prohibit retroactive application of laws to immigrants in the deportation context.[117]

Second, the circumstances under which noncitizens may find themselves detained are much broader than in the criminal context. In the criminal justice system, detention occurs primarily in three situations: (1) pre-conviction, when a criminal defendant is detained prior to and during trial,[118] (2) post-conviction, in connection with a sentence mandating incarceration, or (3) when a material witness is detained to ensure his presence at trial.[119]

In contrast, government power to detain noncitizens in the immigration context is vast. Noncitizens are detained if they are not clearly entitled to entry, are awaiting removal proceedings, or have a final order of removal.[120] Those who have committed aggravated felonies and have served their prison terms are detained pending the conclusion of deportation proceedings.[121] DHS regulations permit detention of a noncitizen pending a decision to file immigration charges for a "reasonable" period of time "in the event of an emergency or other extraordinary circumstance."[122] DHS has also singled out for detention asylum seekers from 33 designated countries which are primarily Muslim or Arab.[123]

Third, immigration control has traditionally been exclusively a federal responsibility, in contrast to the traditional state responsibility for crime control. Because the plenary power doctrine locates the authority for immigration matters with Congress and the President, immigration law was historically a creature of the federal government, off-limits to the states.[124] Although there are signs of change in both areas toward

418 F.2d 732, 734 (9th Cir.1969) (same).

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

[118] 18 U.S.C. § 3141.

[119] 18 U.S.C. § 3144.

[120] INA §§ 235(b)(2), 236(c), 241(a).

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

[122] Interim Rule, 66 Fed. Reg. 48,334 (Sept. 20, 2001). *See* Charles D. Weisselberg, *The Detention And Treatment Of Aliens Three Years After September 11: A New New World?*, 38 U.C. Davis L. Rev. 815, 825, n. 58 (2005) (noting that "The prior regulation afforded the INS twenty-four hours to determine whether to continue to keep an alien in custody and whether to charge him or her.").

[123] *See* Donald Kerwin, *Counterterrorism and Immigrant Rights Two Years Later*, 80 Interpreter Releases 1401, 1402-03 (2003) (citing White House, "Fact Sheet: Operation Liberty Shield" (Mar. 17, 2003)); *see also* Weisselberg, *supra* note__, at 829.

[124] *See* Neuman, *supra* note __, at 19-43 (describing the transformation of immigration law

overlapping state and federal responsibility, the pre-eminence of federal control over immigration and state responsibility over criminal law remains.

Fourth, race and national origin are relevant in different ways in criminal and immigration law. This is most easily seen in the context of the Fourth Amendment, which the Supreme Court has interpreted to permit an immigration agent to rely on national origin and ethnicity as a factor in making a stop.[125] The exclusionary rule, which prohibits the use in criminal trials of evidence seized in violation of the Fourth Amendment, does not apply in deportation proceedings.[126] Nor does it apply to a noncitizen in a domestic criminal trial when the seizure took place abroad.[127]

One final distinction between the criminal and immigration contexts deserves mention. Societal perceptions of immigrants and criminal defendants are often different – sometimes markedly so. In many ways, public perceptions of immigrants are more positive than perceptions of criminal defendants. Scholars describe perceptions of undocumented immigrants as hard-working people drawn to enter the United States clandestinely with the hope of rising economic prospects and a better life for themselves and their families.[128] Undocumented immigrants, however, are increasingly perceived as criminals, likely to commit future criminal acts because of their history of entering the country unlawfully.[129] More recently, immigrants have been identified with terrorism, perceived as either complicit in the acts precipitating September 11 or prone to such acts in the future.[130]

III. MEMBERSHIP THEORY AND CRIMMIGRATION

Why has this merger taken place? Using criminal law to enforce

from its early days as a state-governed matter to a purely federal issue); Abrams, *supra* note __, at 664-68.

[125] *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975); *cf. United States v. Montero-Camargo*, 208 F.3d 1122 (9th Cir. 2000) (holding that race is not a legitimate factor in making an immigration stop, and distinguishing *Brignoni-Ponce* as a historical relic).

[126] *Lopez-Mendoza*, 468 U.S. at 1050.

[127] *United States v. Verdugo-Urquidez*, 494 U.S. 259, 172 (1990).

[128] Bill Ong Hing, *The Immigrant as Criminal: Punishing Dreamers,* 9 Hastings Women's L.J. 79, 79-80, 85-87 (1998).

[129] *See generally id.*

[130] Hollis V. Pfitsch, *Note: The Executive's Scapegoat, The Court's Blind Eye? Immigrants' Rights After September 11*, 11 Wash. & Lee R.E.A.L. J. 151, 194-95; Kevin R. Johnson, *Legal Immigration in the 21st Century,* in BLUEPRINTS FOR AN IDEAL IMMIGRATION POLICY 37-41 (Richard D. Lamm & Alan Simpson 2001); Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L.Rev. 1575 (2002).

immigration law seems to take the long way around. It tends to address the problem *ex post* and on an individual basis, after unauthorized immigration has occurred or a foreigner has committed an offense. Using exclusion or deportation to punish criminal offenses and prevent recidivism may be efficient,[131] but it circumvents criminal constitutional protections and fails to account for serious costs to the noncitizen, family members, employers, and the community.[132]

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

The answer to this puzzle may lie in the core function that both immigration and criminal law play in our society. Both systems act as gatekeepers of membership in our society.[133] Both serve the purpose of determining whether an individual should be included in or excluded from our society. The outcomes of the two systems differ. A decision to exclude in criminal law results in segregation within our society through incarceration, while exclusion in immigration law results in separation from our society through expulsion from the national territory.[134] Yet at bottom, both criminal and immigration law embody choices about who should be members of society: individuals whose characteristics or

[131] Kanstroom, *supra* note__, at 1893.

[132] Alternatives to criminalizing immigration law exist, though each has its flaws. Employment and family ties, not crime, are usually seen as the magnets for immigrants. Attempts to control immigration by focusing on these two internal magnets have created a host of problems. For employment: in 1986, Congress passed legislation that established civil penalties for employers who knowingly hire undocumented employees. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (1986). This legislation has been widely condemned as ineffective, primarily because of the difficulties in proving knowledge that the employee was undocumented. *See e.g.,* Kitty Calavita, *Employer Sanctions Violations: Toward a Dialectical Model of White-Collar Crime*, 24 Law Soc'y Rev. 1041 (1990) (summarizing the results of an empirical study of the employer sanctions provisions and concluding that "employer sanctions violations are numerous and that violators feel relatively protected from detection and punishment"); Maria L. Ontiveros, *Forging Our Identity: Transformative Resistance in the Areas of Work, Class, and the Law*, 33 U.C. Davis L. Rev. 1057, 1064 (2000); Walter A. Ewing, *From Denial To Acceptance: Effectively Regulating Immigration To The United States*, 16 Stan. L. & Pol'y Rev. 445, 451 (2005) (noting that "[w]hile the threat of employer sanctions did not reduce undocumented immigration, it did create a thriving black market for the manufacture of fraudulent identification documents that immigrants could present to employers as proof of their eligibility to work in the United States"). For family: *see* U.S. Comm'n on Immigration Reform, *Becoming an American: Immigration and Immigration Policy,* 1997 Report to Congress, 60-69 (1997) (advocating shifting immigration priorities away from extended family and toward nuclear families); Johnson, *supra* note __, at 37-41; Mark Krikorian, *Legal Immigration: What is to be Done?,* in BLUEPRINTS FOR AN IDEAL IMMIGRATION POLICY 47-51 (Richard D. Lamm & Alan Simpson 2001) (advocating limiting immigration to the spouses and minor children of U.S. citizens).

[133] *See* Nora V. Demleitner, *Preventing Internal Exile: The Need For Restrictions On Collateral Sentencing Consequences*, 11 Stan. L. & Pol'y Rev. 153, 158 (1999) [hereinafter *Internal Exile*].

[134] *See id.* at 153.

actions make them worthy or unworthy of inclusion in the community of citizens.[135]

Membership theory influences immigration and criminal law in similar ways. Membership theory is based in the idea that positive rights arise from a social contract between the government and the people.[136] Those who are not parties to that agreement and yet are subject to government action have no claim to such positive rights, or at least to rights equivalent to those held by members.[137] "Only members and beneficiaries of the social contract are able to make claims against the government and are entitled to the contract's protections, and the government may act outside of the contract's constraints against individuals who are non-members."[138]

When membership theory is at play in legal decisionmaking, whole categories of constitutional rights depend on the decisionmaker's vision of who belongs. Membership theory is thus extraordinarily flexible. Expansive notions of membership may broaden the scope of constitutional rights; stingier membership criteria restrict rights and privileges. In *Plyler v. Doe*,[139] the Court's reasoning that undocumented schoolchildren are potential members of the United States citizenry led to a ruling that Texas could not deny those children equal access to a public school education.[140] More often, membership theory has been used to narrow constitutional coverage by defining the scope of "the People" to exclude noncitizens at the perimeter of society.[141]

Introducing membership theory into criminal law, and especially into the uncharted territory of crimmigration law, undermines the strength of constitutional protections for those considered excludable. A decisionmaker's perspective on who is excludable can also affect the willingness to extend statutory rights and benefits, or interpret legal and

[135] *See id.* at 159.

[136] Cleveland, *supra* note __, at 20; Bickel, *supra* note __, at 34; Neuman, *supra* note __, at 5 (noting that the Constitution's Preamble "arguably speaks the language of social contract").

[137] Cleveland, *supra* note __, at 20. *See also* Walzer, *supra* note __, at 82-95 (describing citizens as members of a political community entitled to certain benefits from a state who must fulfill "common expectations" pertaining to that membership); Aleinikoff, *Theories*, *supra* note __, at 1490 (describing citizenship as "membership in a state generated by mutual consent of a person and the state").

[138] Cleveland, *supra* note __, at 20.

[139] *Plyler v. Doe,* 457 U.S. 202 (1982).

[140] *Id.* at 219 n. 17, 222 n. 20.

[141] *Verdugo-Urquidez*, 494 U.S. at 260 (denying constitutional protection to a noncitizen with "no voluntary connection with this country that might place him among 'the people'" and reasoning that "those cases in which aliens have been determined to enjoy certain constitutional rights establish only that aliens receive such protections when they have come within the territory of, and have developed substantial connections with, this country").

other norms in ways that advantage ex-offenders and immigrants. It becomes critical, therefore, to trace how membership theory plays out in both immigration and criminal law.

Immigration law defines membership in this society explicitly, by establishing a ladder of accession to permanent residence and then formal U.S. citizenship, and a set of criteria to determine whether an individual meets the requirements for these various levels of membership.[142] These criteria often reflect acceptance and invitation by established members of the nation, such as spouses, other family members, or employers.[143] When prescribed rules are violated, primarily criminal laws, immigration law requires deportation of the offender and often bars re-entry,[144] effectively revoking the membership of the noncitizen.

Criminal law defines membership implicitly, by stripping critical elements of citizenship from individuals who commit relatively serious offenses. First, through incarceration, offenders lose the ability to associate with the rest of society. They are then stripped of the basic political rights that are the earmarks of citizenship in the United States. In many states, the commission of a felony results in loss of the right to vote, serve in public office, or serve on a jury.[145] Offenders also lose social and welfare rights and benefits open to other citizens, including access to government assistance[146] and certain employment opportunities.[147] Like noncitizens, offenders are often required to register with a government agency.[148] The resulting status of an ex-felon

[142] *See* INA §§ 301-47.

[143] *See* INA §§ 203 *et seq.*

[144] *See* INA §§ 237(a)(2).

[145] *See* Demleitner, *Internal Exile*, *supra* note __, at 157 & n. 62 (positing that "[a] restriction on the right to vote, therefore, indicates exclusion from the polity and undermines an individual's dignity as a citizen"). *See also* HUMAN RIGHTS WATCH & THE SENTENCING PROJECT, LOSING THE VOTE 1 (1998).

[146] Demleitner, *Internal Exile, supra* note _, at 158 (describing restrictions on access to government benefits including federal welfare benefits, small business assistance, federal education grants, and state programs that receive federal funding, such as food stamps).

[147] *See* James W. Hunt, LAWS, LICENSES, AND THE OFFENDER'S RIGHT TO WORK 5 (American Bar Ass'n, 1974) (setting forth prohibitions on employment for ex-offenders: specific denial of professional licenses, requirements of "good moral character," and denial of licenses when ex-felon's offense involved "moral turpitude"). The Supreme Court has generally upheld restrictions on ex-offenders' access to the labor market. *DeVeau v. Braisted*, 363 U.S. 144 (1960) (upholding exclusion of ex-offenders from positions at waterfront union office against constitutional due process challenge); *Hawker v. New York*, 170 U.S. 189, 197 (1898) (stating that a felony conviction "is evidence of the unfitness" for a professional license). *See also* Demleitner, *Internal Exile, supra* note __, at 156-57 (describing access to employment opportunities as a basic civil right).

[148] *See* Demleitner, *Internal Exile, supra* note __ at 154.

strikingly resembles that of an alien.[149] Through incarceration and collateral sanctions, criminal offenders are – literally – alienated.

Immigration and criminal law approach the acquisition and loss of membership from two different directions. Criminal law presumes that the defendant has full membership in our society and places the burden on the government to prove otherwise. This pro-membership perspective is reflected in the comparatively stronger constitutional protections that criminal defendants possess: the presumption of innocence embodied in the burden of proof,[150] and entitlement to constitutional rights under the Fourth, Fifth, and Sixth Amendments.[151] When the government seeks to exercise its power to punish, these rights provide protection to all those within the constitutional community against exclusion from society without a substantial justification.

Immigration law assumes non-membership.[152] In contrast to the presumption of innocence, arriving aliens are presumed inadmissible unless they show they are "clearly and beyond a doubt entitled to be admitted."[153] The government's burden of proof in deportation cases is also lighter than in a criminal case – "clear and convincing evidence"[154] rather than "beyond a reasonable doubt."[155]

Levels of constitutional protection in immigration law depend in large part upon the individual's connection or potential for connection with the national community.[156] Citizens and those with a claim to citizenship

[149] *See id.* at 158 (noting that "[t]he denial of membership rights to ex-offenders parallels the denial of rights to permanent residents.")

[150] *In re Winship*, 397 U.S. 358, 363 (1970) (declaring that the reasonable-doubt standard "provides concrete substance for the presumption of innocence--that bedrock 'axiomatic and elementary' principle whose 'enforcement lies at the foundation of the administration of our criminal law'") (*quoting Coffin v. United States*, 156 U.S. 432, 453 (1895)).

[151] U.S. Const. amend. IV, V, VI.

[152] Linda S. Bosniak, *Membership, Equality, & the Difference That Alienage Makes*, 69 N.Y.U. L. Rev. 1047, 1055 (1994) (stating that "alienage matters because citizenship matters; citizens are full members of the national community, while aliens "are by definition those outside of this community").

[153] INA § 235(b)(2)(A).

[154] INA § 240(c)(3)(A).

[155] *Winship*, 397 U.S. at 363.

[156] *See Verdugo-Urquidez*, 494 U.S. at 172. *See also* David A. Martin, MAJOR ISSUES IN IMMIGRATION LAW 24 (1987) (commenting that *Landon v. Plasencia* established that courts must look beyond a formal exclusion-deportation distinction to evaluate an alien's community ties); David A. Martin, *Due Process and Membership in the National Community: Political Asylum and Beyond*, 44 Univ. Pittsburgh L. Rev. 165, 216 (1983) [hereinafter *Due Process and Membership*]; David A. Martin, *Graduated Application of Constitutional Protections for Aliens: The Real Meaning of Zadvydas v. Davis,* 2001 Supreme Court Rev. 47, 48-49 (2001). *Compare Landon v. Plasencia,* 459 U.S. 21 (1982) (using the permanent resident petitioner's ties to the United States as a measure of the procedural due process protections due her in exclusion proceedings) *with Mezei*, 345 U.S. 206 (1953) (disregarding substantial prior residency and family connections in the United States in

have the strongest claim to constitutional protection.[157] Lawful permanent residents are next, due to their ties in this country.[158] Lawful permanent residence acts as a sort of probationary membership. Once admitted to the country and given permission to remain, the permanent resident has approximately five years of probation after which, assuming she has complied with the criminal laws and shown herself to be of good moral fiber and likely to contribute to society, she has the opportunity to become a full member through naturalization.[159]

Lawfully present nonresidents have weaker, though still cognizable constitutional claims, while undocumented immigrants, regardless of the strength of their actual ties here, have more ephemeral constitutional claims.[160] At the bottom, those seeking entry for the first time without a prior stake in this country have essentially no constitutional protections, and courts have almost no power to review decisions barring their entry.[161]

As such, government plays the role of a bouncer in the crimmigration context. Upon discovering that an individual either is not a member or has broken the membership's rules, the government has enormous discretion to use persuasion or force to remove the individual from the premises.[162]

B. Sovereign Power and Penology in Criminal and Immigration Law

Delineating the major role that membership theory plays in the merger of criminal and immigration law only partially addresses the question of

holding that a permanent resident had no constitutional due process protections in exclusion proceedings).

[157] David A. Martin, *Due Process and Membership*, *supra* note__, at 208-210.

[158] *Plasencia*, 459 U.S. at 32 (reasoning that "once an alien gains admission to our country and begins to develop the ties that go with permanent residence his constitutional status changes accordingly").

[159] INA § 316; *Demleitner*, *Internal Exile*, supra note __, at 159 (observing that "permanent residents are provided with the opportunity to join the group of "'deserving' citizens through naturalization").

[160] *See Plyler,* 457 U.S. at 223 (reasoning that "[u]ndocumented aliens cannot be treated as a suspect class because their presence in this country in violation of federal law is not a "constitutional irrelevancy.")

[161] *Chae Chan Ping*, 130 U.S. at 606 (concluding that immigration decisions were nonjusticiable political questions, "conclusive upon the judiciary"); *Nishimura Ekiu v. United States*, 142 U.S. 651, 660 (1892) (holding that for first-time immigrants seeking entry, "the decisions of executive or administrative officers, acting within powers expressly conferred by Congress, are due process of law."); *but see Plasencia*, 459 U.S. at 32-34; *see also* Martin, MAJOR ISSUES IN IMMIGRATION LAW, *supra* note __, at 24.

[162] *See Mathews v. Diaz*, 426 U.S. 67, 79-80 (1976) (declaring that "[i]n the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens").

how this new "crimmigration" area developed. This section describes how membership theory has channeled the evolution of criminal and immigration law in ways that brought the two areas closer together.

Two developments inform the discussion. First, the rapid importation of criminal grounds into immigration law is consistent with a shift in criminal penology from rehabilitation to retribution, deterrence, incapacitation, and the expressive power of the state. Second, criminal penology began to embrace sovereign power as a basis for policymaking, a tool that immigration law has relied on since its inception. This cross-pollination of legal tools and theories bridged the distant relationship between immigration and criminal law. It also led the way to more exclusionary definitions of who was a member of the U.S. community and to an expansion of the consequences of loss of membership to include mass deportation of noncitizens and loss of the privileges of citizenship for ex-offenders.

1. Immigration Law and Penology

From the 1950s through the 1970s, both criminal and immigration sanctions reflected a rehabilitation model.[163] Criminal penology favored indeterminate sentences that could be shortened for good behavior, alternatives to incarceration, individualized treatment, and re-education. This was consistent with the idea that the criminal act was separable from the individual actor, and that the actor could be rehabilitated, integrated into society, and given a second chance.[164] This philosophy was grounded in a social ideology that sought to redeem offenders and restore "full citizenship with equal rights and opportunities."[165]

The rehabilitation model fell into disfavor after the 1970s, and criminal

[163] *See* David Garland, THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY 34-35 (U. Chicago Press 2001) (tracking the rise of the rehabilitative policy framework in penology and its role as "the hegemonic, organizing principle, the intellectual framework and organizing principle that bound together the whole structure"). *See also* Douglas A. Berman, *Distinguishing Offense Conduct And Offender Characteristics In Modern Sentencing Reforms,* 58 Stan. L. Rev. 277, 278 (Oct. 2005); Ahmed A. White, *Capitalism, Social Marginality, And The Rule Of Law's Uncertain Fate In Modern Society,* 37 Ariz. St. L.J. 759, 802 (Fall 2005) (describing the pre-1970s rehabilitative approach as having "a tendency to view crime as an episodic social pathology susceptible to reduction through social reform").

[164] Berman, *supra* note __, at 278 (observing that the rehabilitative ideal was "[b]orn of a deep belief in the possibility for personal change and improvement" and "conceived and discussed in medical terms with offenders described as 'sick' and punishments aspiring to 'cure the patient'"); *see also* Garland, supra note __, at 34-35, 178.

[165] Garland, *supra* note __, at 46. *See also Williams v. New* York, 337 U.S. 241, 249 (1949) (embracing rehabilitation as a penological goal, stating "by careful study of the lives and personalities of convicted offenders many could be less severely punished and restored sooner to complete freedom and useful citizenship.")

penology turned to retribution, incapacitation, and deterrence as motivating ideologies.[166] One consequence was higher incidences of incarceration for lesser crimes and for longer periods, the purpose being to punish, incapacitate the offender from further crimes, and deter others from similar conduct.[167]

A new type of sanction also emerged. The federal and state governments began to remove certain hallmarks of citizenship as a consequence of a criminal conviction. They included loss of voting rights, exclusion from public office and from jury service, ineligibility for public benefits, public housing, government support for education, and exclusion from professional license eligibility.[168] The appearance of these "collateral consequences"[169] for crimes made clear that retribution rather than rehabilitation was driving the modern criminal justice system.[170]

The most logical motivation for the accumulation of these collateral consequences is that they constitute decisions about the membership status of the convicted individual. Collateral consequences diminish the societal membership status of the individual convicted.[171] The lost privileges often bear no relation to the context of the crime. Nor do they appear to be an attempt to prevent future criminal conduct in the areas

[166] *See* Garland, *supra* note __, at 54 (describing the mid-1970s collapse of the rehabilitation model resulting from the critique of correctionalism, including indeterminate sentencing and individualized treatment); Berman, *supra* note __, at 279-81 (describing this shift and its embodiment in the Sentencing Reform Act of 1984); White, *supra* note __, at 814 (describing the shift away from the pre-1970s view of "'the criminal'" as a redeemable member of society susceptible to individual rehabilitation" and toward "a return to retribution and incapacitation as goals of punishment"). *See* also Kanstroom, *supra* note __, at 1894; Lupe S. Salinas, *Deportations, Removals And The 1996 Immigration Acts: A Modern Look At The Ex Post Facto Clause*, 22 B.U. Int'l L.J. 245, 282 (Fall 2004) (charactering the 1996 immigration laws as having retributive and deterrent goals); Stephen H. Legomsky, *The Detention Of Aliens: Theories, Rules, And Discretion*, 30 U. Miami Inter-Am. L. Rev. 531, 540 (1999) (theorizing that mandatory detention for certain immigrants is aimed in part at deterrence of immigration violations); Demleitner, *Misguided Prevention, supra* note __, at 537-58 (describing the movement in immigration enforcement toward "prevention-through-deterrence").

[167] Garland, *supra* note __, at 60-61.

[168] Velmer S. Burton, Jr. et al., *The Collateral Consequences of a Felony Conviction: A National Study of State Statutes*, FED. PROBATION 52, 52 Sept. 1987); *Developments in the Law--One Person. No Vote: The Laws of Felon Disenfranchisement*, 115 HARV. L. REV. 1939, 1939-40 (2002); Gabriel J. Chin & Richard W. Holmes, Jr., *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 CORNELL L. REV. 697, 705-06 (2002); see 20 U.S.C. § 1091(r) (2000) (barring eligibility for federal loans and grants on the basis of drug convictions); Anti-Drug Abuse Act of 1988 § 5101, 42 U.S.C. § 1437d(l) (2000) (permitting eviction from public housing).

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

[170] Garland, *supra* note __, at 60-61.

[171] *See* Demleitner, *Internal Exile, supra* note __, at 158 (observing that "[c]ollateral sentencing consequences deny ex-offenders the traditional rights of citizenship and indicia of societal membership").

declared off-limits to the convicted. For example, loss of voting rights is not tied to the commission of political crimes, nor is loss of government benefits limited to those convicted of defrauding the government or crimes related to public housing, education, or welfare.

Several of these collateral consequences eliminate the incidents of citizenship.[172] Voting rights are often seen as the hallmark of citizenship, perhaps because the right to vote is one of the most familiar and fundamental divisions between citizens and noncitizens.[173] In the same category is the opportunity to seek public office and serve as a juror.[174] Excluding the convicted individual from these activities translates into exclusion from full participation in the social and political structure of society.[175] The loss of these markings of citizenship demotes the convicted individual to the status of a noncitizen[176] who is constitutionally incapable of voting in a federal election,[177] serving on a jury,[178] or seeking high public office.[179]

Loss of access to public goods such as welfare benefits, public housing, or educational grants suggest a different kind of membership decision. These limited public goods require the government to make choices about how to distribute them equitably. Generally, the criteria for obtaining these public goods are based on the individual's need for the particular social resource, usually financial need.[180] Exclusion from

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[172] *See id.* at 158.

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

[174] *See* Demleitner, *Internal Exile, supra* note __, at 157.

[175] Anthony C. Thompson, *Navigating the Hidden Obstacles to Ex-Offender Reentry*, 45 Boston College L. Rev. 255, 258 (2004) (observing that "society has created a vast network of collateral consequences that severely inhibit an ex-offender's ability to reconnect to the social and economic structures that would lead to full participation in society").

[176] *See* Demleitner, *Internal Exile, supra* note __, at 158; Charles L. Black, *The Unfinished Business of the Warren Court*, 46 WASH. L. REV. 3, 8-10 (1970) (enumerating critical aspects of rights-based citizenship: "First, citizenship is the right to be heard and counted on public affairs, the right to vote on equal terms, to speak, and to hold office when legitimately chosen. . . .").

[177] U.S. CONST. amends. XIII, XV, XIX, XXIV, XXVI.

[178] *Id.* art. III, § 2, cl. 3.

[179] *Id.* art. I, § 3, cl. 3 (requiring citizenship to hold the office of senator); *id.* art. I, § 2, cl. 2 (requiring citizenship to become a member of Congress); *id.* art. II, § 1, cl. 4 (limiting to natural born citizens the office of presidency); *id.* art. IV, § 2, cl. 1 (granting privileges and immunities to "Citizens of each State").

[180] For example, the Supplemental Security Income (SSI) and Food Stamp programs are available only to low-income applicants. The SSI program provides supplemental security income to low-income individuals who are blind, disabled, or 65 or older. See 42 U.S.C § 1381 et seq. The Food Stamp program provides food purchasing assistance to households with low income and few resources. See 7 U.S.C. § 2011 et seq.

eligibility for these public goods based on noncitizenship status or status as an ex-felon, on the other hand, is unrelated to need. Instead, the basis for exclusion seems to be desert: those who have lost the social status of a full citizen through a criminal conviction, or never gained citizenship in the first place, do not deserve to share in the limited pie of public benefits.[181] The safety net of public benefits is only available to those who enjoy full citizenship.[182]

Immigration law seems to have followed the same path.[183] In immigration law prior to the 1980s, most crimes did not trigger immigration sanctions for permanent residents.[184] Only the most serious crimes or crimes involving "moral turpitude" that presumably revealed an inherent moral flaw in the individual resulted in the ultimate sanction of deportation.[185] Otherwise, criminal conduct was handled as a domestic affair through the criminal justice system, not as an immigration matter. In both areas of the law, this approach affirms the individual's claim to membership in the society. Members obtain the club's benefits, but are also bound by the club's rules and are subject to its processes and sanctions for breaking those rules.

The emphasis on retribution, deterrence, and incapacitation in immigration law is apparent from the expanded use of deportation as a sanction for violating either immigration or criminal laws. With few exceptions, immigration sanctions including deportation can now be imposed from a wide variety of even minor crimes, regardless of the noncitizen's ties to the United States.[186] Permanent residents are as easily deported for crimes defined as "aggravated felonies" as a noncitizen without any connection to the U.S. or without permission to be in the

[181] Stephen H. Legomsky, *Immigration, Federalism, and the Welfare State*, 42 UCLA L. REV. 1453, 1453-54 (1995) (describing heightened anti-immigration policies that reflected increasing hostility toward welfare recipients). *See also* Demleitner, *Internal Exile, supra* note __, at 159 (stating that "the mid-1990s represented a switch to a 'civic virtues' conception of citizenship in which the 'undeserving,' citizens and non-citizens alike, were increasingly excluded from the benefits of membership in society"). One justification for denying these benefits to immigrant was to encourage them to naturalize. *See City of Chicago v. Shalala*, 189 F.3d 598, 608 (7th Cir. 1999).

[182] In 1996, Congress enacted major welfare reform legislation that excluded most noncitizens from eligibility for welfare benefits, including food stamps, Supplemental Security Income, and in some instances, Temporary Assistance for Needy Families, Social Services Block Grants, and Medicaid. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105, 2262-64 (1996). *See also City of Chicago*, 189 F.3d 598 (setting out statutory scheme and holding that it does not violate the Fifth Amendment's Due Process clause).

[183] Kanstroom, *supra* note __, at 1894.

[184] Demleitner, *Immigration Threats, supra* note __, at 1061; Newcomb, *supra* note __, at 697-698; Miller, *Citizenship & Severity, supra* note __, at 622-23.

[185] Miller, *Citizenship & Severity*, *supra* note __, at 622; Harper, *supra* note __, at 612-13.

[186] Demleitner, *Immigration Threats, supra* note __, at 1066-67.

country.[187]

This scheme might be characterized as merely a way of removing those who have broken the rules conditioning their presence in this country. However, the ascendance of these harsher rules concurrently with the shift in criminal penology suggests a different premise – that both punishment and deterrence of crimes can be achieved through imposition of any lawful retributive means available, including immigration sanctions.[188] Removing the individual from the country incapacitates her from committing future crimes in the United States, and is often imposed with the intent to punish.[189] Using removal as a sanction also makes a statement about membership: that the permanent resident belongs more readily to her country of origin, regardless of length of residency or connections to the U.S. community.

There are, of course, differences between the membership claims of ex-offenders and noncitizens. Ex-offenders who are U.S. citizens do not lose their formal status as citizens.[190] But by removing the incidents of citizenship – constitutional privileges such as the right to vote and participate in public life, as well as access to the social safety net woven by the government on behalf of the membership – those convicted of certain crimes ultimately have a lesser citizenship status.[191] They are more accurately seen as pseudo-citizens, technically citizens but possessing a much-denuded bundle of membership-related rights and privileges.

Also, noncitizens, unlike U.S. citizen ex-offenders, often have alternate membership status in their country of origin.[192] In contrast, without full membership in this society, ex-offenders have no membership at all. In this respect at least, excluding a noncitizen from membership privileges does not result in total exclusion from any membership. In theory, the noncitizen still retains full membership in her country of origin.[193] As a

[187] Aleinikoff, et al., *supra* note __, at 605 (describing the constriction of relief from removal for noncitizens convicted of "aggravated felonies"); *see also* INA § 212(h) (excluding permanent residents convicted of "aggravated felonies" from eligibility for a waiver of inadmissibility grounds).

[188] Kanstroom, *supra* note __, at 1894.

[189] *Id.* at 1893-94 (citing comments by legislators connecting deportation to punishment: "As Senator William Roth framed this view, 'the bill broadens the definition of aggravated felon to include more crimes punishable by deportation.' 142 Cong. Rec. S4600 (statement of Sen. Roth); 142 Cong. Rec. H2376-87, H2458-59 (statement of Rep. Becerra) (arguing that although deportation is an acceptable punishment, permanent exile is too harsh)").

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

[191] *See also* Demleitner, *Internal Exile, supra* note __, at 158.

[192] *See also id.* at 158.

[193] *See also id.* This is arguably untrue for noncitizens such as refugees or asylees, who face persecution in their countries of origin that render them stateless absent the grant of refuge and other

practical matter that may be membership only in theory. Membership in that originating country is of questionable value if the noncitizen is seeking refuge from her country of citizenship, has had little or no contact with that country, or has lived in this society for a long time.

In sum, notions of membership have exerted an enormous influence on the criminalization of immigration law. Just as important as defining the role of membership theory, however, is describing the means by which these notions of membership define who is excluded. In this new area of crimmigration law, specific powers of the sovereign state are the primary means of inclusion and exclusion.

2. Sovereign Power to Exclude

In moving toward retribution and away from rehabilitation and integration into society, the criminal justice system turned to a model that immigration law has relied on for centuries.[194] Criminal law embraced certain powers of the sovereign state as the primary response to crime: the power to exact extreme sanctions and the power to express society's moral condemnation.[195]

Decisions about membership are at play in the use of both powers. The state as sovereign has the authority to control the territory within its boundaries and protect it from external and internal enemies.[196] In immigration law, sovereign power is the authority that enables the government to exercise enormous discretion to decide who may be excluded from the territory and from membership in the society.[197]

In criminal law, the "sovereign state strategy" relies on the state as the main player in controlling crime.[198] As David Garland has observed, "[l]ike the decision to wage war, the decision to inflict harsh punishment or extend police powers exemplifies the sovereign mode of state

privileges by another country.

[194] *See* Garland, *supra* note __, at 134-35 (describing the attractiveness of the power of the sovereign state in responding to crime because the sovereign response is "an immediate, authoritative intervention."); *see also* Cleveland, *supra* note __, at 81-163 (tracing the history of the role of sovereign power in immigration law); Stumpf, *supra* note __ (describing the interaction between criminal rights and sovereign power in the immigration law context).

[195] *See* Garland, *supra* note __, at 134-35. In fact, this turn to sovereignty as a source of crime control is arguably not new at all. In 1846, Justice Taney located the federal government's power to prescribe criminal law within Native American tribal territory power to the inherent sovereign power to control the territory within its boundaries. *United States v. Rogers*, 45 U.S. (4 How.) 567, 570-72 (1846). *See* Cleveland, *supra* note __, at 42-47 (narrating the history of the use of the sovereign powers doctrine in connection with Native American tribes).

[196] See Garland, supra note __, at 109; *see* Cleveland, *supra* note __, at 23 (tracing the roots of sovereign jurisdiction to legally regulate conduct within its territory).

[197] *Chae Chan Ping,* 130 U.S. at 603-04; Bosniak, *supra* note__, at 1090-94.

[198] Garland, *supra* note __, at 110, 132.

action."[199] Garland theorizes that disillusionment with the rehabilitation model combined with persistently high crime rates led to ratcheting up punitive measures such as longer sentences and fewer opportunities for parole.[200] These changes paralleled the increase in the use of deportation in immigration law as a punitive measure.[201]

The expressive function of the state, in which the state's power to punish becomes a channel for society's moral condemnation of crime rather than a means of exacting retribution or enabling rehabilitation,[202] is also a manifestation of state sovereignty in criminal law.[203] The expressive dimension of punishment matches the harshness of a criminal penalty with the level of society's moral condemnation of the crime.[204] For example, when the state imposes a harsher punishment for a racially-motivated murder than for a mother who kills a child abuser, it expresses different levels of condemnation for each crime.[205] By imposing lesser punishment for the mother who kills her child's abuser than the racially-motivated murderer, the state expresses a moral distinction between them and a greater degree of exclusion from society for the racist based on that moral condemnation.[206]

This turn to a sovereign state model as the central response to crime control mirrors the substantial role that federal sovereignty plays in immigration law. The power of the federal government as a sovereign state is at its apex in immigration law.[207] The exercise of sovereign power is intricately connected to the power to define membership within a political community,[208] as Justice White emphasized in *Cabell v. Chavez-Salido*[209]:

> The exclusion of aliens from basic governmental processes is not a deficiency . . . but a necessary consequence of the community's process of political self-

[199] *Id.* at 135.

[200] *See* Garland, *supra* note __, at 110.

[201] *See* Kanstroom, *supra* note __, at __.

[202] Dan M. Kahan, *What Do Alternative Sanctions Mean*?, 63 U. CHI. L. REV. 591, 597-98 (1996).

[203] *See* Garland, *supra* note __, at 132.

[204] Kahan, *supra* note ___, at 597-98.

[205] *Id.* at 598 (describing this example).

[206] *Id.*

[207] Cleveland, *supra* note __, at 134 (describing the Supreme Court as viewing immigration "as a core sovereign power that could not be alienated"); *Chae Chan Ping*, 130 U.S. at 603-04 (declaring "[t]hat the government of the United States, through the action of the legislative department, can exclude aliens from its territory is a proposition which we do not think open to controversy").

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

[209] 454 U.S. 432, 439-40 (1982).

> definition. Self-government, whether direct or through representatives, begins by defining the scope of the community of the governed and thus of the governors as well: Aliens are by definition those outside of this community."[210]

The state's expressive role is the same in immigration law as in criminal law. By imposing the sanction of deportation for crimes and by criminalizing immigration violations, the state expresses moral condemnation both for the crime through criminal punishment and for the individual's status as a noncitizen offender.

Several explanations have been offered for this turn to the state's expressive powers and the emphasis on harsh punishment. One theory is that the shift in the United States from smaller, more close-knit communities to the more disparate structure of modern society made community-imposed shame sanctions less effective and generated reliance on the more formal political mechanisms of the state.[211]

This change is intricately bound up with membership theory. With the move away from closer communities, punishment that relied on public humiliation (such as the stocks) became less effective when the offender was not a member of that community.[212] A need arose for punishment that depended less on membership ties and more on loss of personal liberty.[213] In the modern social structure, it is much easier to equate the criminal offender with the alien and exclude him from society than when the offender was well known by and considered part of a smaller community.

An alternative theory is that persistently high rates of crime and unauthorized immigration have led to distrust of the state's ability to control both crime and immigration.[214] Since acknowledging the state's limitations is politically infeasible, politicians employ the sovereign power of the state more heavily to reassure the public of their commitment to controlling crime.[215] As a result, the sovereign state power is used in ways that are divorced from effective control of either crime or unauthorized immigration, such as imposing increasingly harsh sentences and grounds for deportation as a means of expressing moral

[210] *Cabell*, 454 U.S. at 439-40.
[211] Kahan, *supra* note __, at __.
[212] *Id.*
[213] *Id.*
[214] Garland, *supra* note __ at 110.
[215] *Id.*

outrage.[216]

In modern criminology and immigration law, the sovereign state strategy expresses the insider or outsider status of the offender. The expressive dimension of punishment in this context communicates exclusion. Unlike the rehabilitative model which sought to protect the public by re-integrating the offender with her community, the use of sovereign power has the effect of excluding the offender and the immigrant from society. Under the sovereign state model ex-offenders and immigrants become the "outsiders" from whom citizens need protection.

C. Consequences of Narrowing the Scope of Membership

The existence of rules denying the indicia of membership to noncitizens and offenders raises a curious question: what's in it for the members? What is the advantage to U.S. society in creating and policing these membership lines? In the case of a limited pie such as public benefits, it seems at least facially logical to exclude those with weaker claims to membership as a way of ensuring an adequate slice for those with stronger membership claims.[217] Yet the result of the application of membership theory has been to create a population, often identifiable by race and class, that is excluded physically, politically, and socially from the mainstream community.

Withholding the bundle of rights and privileges that include voting, holding public office, and serving on a jury has a less tangible benefit for U.S. society. Rather than diminishing a scarce resource, barring ex-offenders and noncitizens from these activities seems to have more value to the membership as an expressive statement.[218] It enhances the apparent value of those rights and privileges to the members by making them privileges over which the membership has control, rather than inalienable rights belonging to the individual. Because those rights and privileges are susceptible to loss, they become more precious to the individual who holds them. Because the members decide how those rights may be lost and who loses them, the rights become more valuable

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[216] *Id.*

[217] Delving beyond this facial argument, scholars have argued that excluding any individual who resides in this country from access to services addressing fundamental needs such as food, housing, and education results in a disservice to society. *See, e.g.*, Richard A. Boswell, *Restrictions on Non-Citizens' Access to Public Benefits: Flawed Premise, Unnecessary Response*, 42 UCLA L. Rev. 1475, 1478 (1995). *See also* Demleitner, *Internal Exile*, *supra* note ___, at 158.

[218] *See generally* Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence,* 83 Va. L. Rev. 349 (1997).

to the members.

Thus, the value to the members is two-fold: excluding ex-offenders and noncitizens from the activities of voting, holding public office, and jury service creates a palpable distinction between member and non-member, solidifying the line between those who deserve to be included and those who have either shown themselves to be deserving of exclusion or have not yet shown themselves worthy of inclusion.[219] In this light, withholding these privileges conceivably improves the quality of the membership by excluding those less deserving of membership. Perhaps withholding these privileges is meant to enhance the public trust in the integrity of the voting process and of public officeholders, and in the outcome of jury trials. If the public perceives ex-offenders and noncitizens to be unworthy of the public trust, one could argue that excluding them from these fora of public participation increases confidence in the products of voting, public officeholding, and jury deliberations.

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

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

Immigration law does this explicitly. Immigration law takes socioeconomic status into account when it excludes a noncitizen likely to become a public charge because of lack of financial resources,[220] and by prioritizing entry of certain professionals, managers, executives, and

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

[220] INA § 212(a)(3)(B).

investors.[221] The prevalence of sovereign power in immigration law has its roots in excluding racial and cultural groups, beginning with the Chinese and other Asian Americans in the late 1880s, and including the deportation of U.S. citizens of Mexican origin in the 1930s.[222] Today, the rules governing entry tend to favor citizens from European countries. The diversity visa (also known as "the Lottery")[223] grants up to 50,000 applications for permanent resident status to applicants from specific countries using a random selection process, and results in disproportionate advantages to European applicants.[224] The visa waiver program allows citizens from primarily European countries to enter for 90 days without a visa.[225]

Inside the borders, immigration enforcement is unabashedly race- and ethnicity-based. A prime example is the National Security Entry-Exit System's ("NSEERS") focus on deporting noncitizen men from Muslim and Arab countries.[226] The Department of Homeland Security's enforcement priorities have also targeted particular ethnic groups.[227] The Supreme Court has sanctioned the use of race and ethnicity as a factor in making Fourth Amendment stops relating to suspected immigration law violations.[228]

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[221] INA § 203(b).

[222] See Kevin Johnson & Bill Ong Hing, *Huntington: Who Are We? The Challenges to America's National Identity,* 6 Mich. L.R. 1347, 1368-76 (2005) (outlining the historical focus of exclusion laws on Asians and Mexicans and describing them as efforts to "keep out groups that are perceived as not true Americans because they fail to conform to the prevailing image of the national identity"); Richard A. Boswell, *Racism and U.S. Immigration Law: Prospects for Reform After "9/11?,"* 7 J. Gender Race & Just. 315, 316-32 (2003) (describing the history and lasting effects of racism in immigration law). *See, e.g., Chae Chan Ping*, 130 U.S. at 595 (describing Chinese immigration as "an Oriental invasion," and "a menace to our civilization"); Cleveland, *supra* note __, at 124-34.

[223] 8 U.S.C. § 1153(c) (2005); Jonathan H. Wardle, Note, *The Strategic Use Of Mexico To Restrict South American Access To The Diversity Visa Lottery*, 58 Vand. L. Rev. 1963, 1964-65, 1984-90 (2005) (detailing the emphasis in awarding diversity visas on immigrants from European countries and the curious categorization of Mexicans with South American nationals for purposes of allotting diversity visas).

[224] INA § 201(e) (codified at 8 U.S.C. § 1151(e)).

[225] INA § 217 (codified at 8 USC § 1187).

[226] 67 Fed. Reg. 67,766 (Nov. 6, 2002); 67 Fed. Reg. 70,526 (Nov. 22, 2002). *See also* 67 Fed. Reg. 77,642 (Dec. 18, 2002) (modifying registration requirements).

[227] Miller, *Blurring the Boundaries, supra* note __, at 101-02 (noting that "immigration law enforcement relies heavily upon religious and ethnic "profiles" of potential terrorists that includes Muslim and Middle Eastern men and . . . a range of immigrant communities, particularly Mexican immigrants with brown skin and dark hair"); Michael J. Wishnie, *State And Local Police Enforcement Of Immigration Laws*, 6 U. Pa. J. Const. L. 1084, 1112 (May 2004) (analyzing INS arrest data in New York from 1997-99 and concluding that INS arrests in New York were overwhelmingly and disproportionately of immigrants from Mexico, Central, and South America).

[228] *United States v. Brignoni-Ponce,* 422 U.S. 873, 885-86 (1975); *see also* Kevin R. Johnson, *The Forgotten "Repatriation" Of Persons Of Mexican Ancestry And Lessons For The "War On Terror,"* 26 Pace L. Rev. 1, 11-12 (Fall 2005) (citing *Brignoni-Ponce* for the proposition that "racial

Unlike immigration law, criminal law's disparate treatment of members of certain minorities and income levels is not explicit.[229] Instead, criminal law has a disparate impact: the rules of the criminal justice system are neutral on their face, but their effect on racial and ethnic minorities is notoriously disproportionate to the number in the general population.[230]

The movement toward retributive justice in criminal law, the turn to the sovereign state as the answer to public fears about crime, and the disproportionate representation of minorities and low-income classes in the offender population contribute to the perception of criminal offenders as non-citizens.[231] Rather than viewing rehabilitation as a way of creating a more integrated citizenry, the view of the offender is as a profoundly anti-social being whose interests are fundamentally opposed to those of the rest of society.[232]

Within this framework, the criminal becomes "the alien other," an underclass with a separate culture and way of life that is "both alien and threatening."[233] The result has been a tendency toward publicly marking out the offender through community notification schemes, sex offender registers,[234] distinctive uniforms,[235] and the proliferation of sanctions such

profiling has been sanctioned to a certain degree in immigration enforcement"); *see generally* Alfredo Mirandé, *Is There a "Mexican Exception" to the Fourth Amendment?*, 55 Fla. L. Rev. 365 (2003).

[229] There are exceptions, of course: police may make enforcement decisions based on race or ethnicity when they have particularized suspicion that makes race relevant to a certain crime. *Whren v. United States*, 517 U.S. 806 (1996).

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

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

[232] *Id.* at 180-81.

[233] *Id.* at 135-36.

[234] Wayne A. Logan, *Horizontal Federalism in an Age of Criminal Justice Interconnectedness*, 154 U. Penn. L. Rev. 257, 280-81 (Dec. 2005). All U.S. jurisdictions have sex offender registration laws for those convicted of criminal offenses against victims who are minors and those convicted of a "sexually violent offense." *See id.*; Jacob Wetterling Crimes Against Children and Sexually Violent Offenders Registration Act, Pub. L. No. 103-322, § 170101, 108 Stat. 1796, 2038 (1994) (codified as amended at 42 U.S.C. § 14071 (2000)); Megan's Law, Pub. L. No. 104-145, 110 Stat. 1345 (1996) (amending 42 U.S.C. § 14071(d) (1996)) (withholding funds from states without such

as deprivation of the franchise and the ability to otherwise participate in public life. This new penology has transformed offenders from members of the public in need of realignment with society to deviant outsiders "deprived of their citizenship status and the rights that accompany it."[236]

CONCLUSION

The ascendance of membership theory in the convergence of immigration and criminal law create the conditions for each to assert a gravitational pull on the other. A significant overlap between criminal law and immigration law inevitably will affect the way that decisionmakers view the consequences of exclusion from membership in each area. The danger is that the role of membership in shaping the consequences of immigration and criminal law violations may lead to a downward spiral of protections for non-members. As criminal sanctions for immigration-related conduct and criminal grounds for removal from the United States continue to expand, aliens become synonymous with criminals. As collateral sanctions for criminal violations continue to target the hallmarks of citizenship and community membership, ex-offenders become synonymous with aliens.

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

Although criminal law and immigration law begin with opposite assumptions about the membership status of the individuals that they regulate, once the individual is deemed unworthy of membership, the consequences are very similar in both realms. The state treats the

laws). States must maintain registration for at least ten years. Megan's Law; Final Guidelines for the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, 64 Fed. Reg. 572, 579 (Jan. 5, 1999) (setting out required registration procedures). Lifetime registration is required for offenders with more than one conviction for registration-eligible offenses and those convicted of certain "aggravated" sex offenses. Pam Lyncher Sexual Offender Tracking and Identification Act of 1996, Pub. L. No. 104-236, 110 Stat. 3093 (codified as amended at 42 U.S.C. § 14072 (2000)).

[235] Garland, *supra* note __, at 180-81.

[236] *Id.* at 181; *see also* Demleitner, *Internal Exile, supra* note __, at 160.

individual – literally or figuratively – as an alien, shorn of the rights and privileges of membership. This creates an ever-expanding population of outsiders with a stake in the U.S. community that may be at least as strong as those of incumbent members. The result is a society increasingly stratified by ill-defined conceptions of membership in which nonmembers are cast out of the community by means of borders, walls, rules, and public condemnation.