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

This Article represents the first and fundamental step in a larger project of articulating a proposed remedial scheme that would align immigration law with the broader landscape of legal sanctions. It breaks new ground in original scholarship, tracing for the first time the history of immigration sanctions and offering a historical perspective on alternatives to the recent arrival of deportation as the central immigration sanction. It then proposes an innovative approach to remedying violations of immigration law, constructing a system of graduated sanctions grounded in criminal law and aligning immigration remedies with the overarching goals of U.S. immigration law.

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Introduction

Immigration law eschews proportionality. Proportionality is conspicuously absent from the legal framework for immigration sanctions. Immigration law relies on one sanction – deportation – as the ubiquitous penalty for any immigration violation. Neither the gravity of the violation nor the harm that results bears on whether deportation is the consequence for an immigration violation. Immigration law stands alone in the legal landscape in this respect.

Proportionality, in contrast, is the touchstone of the criminal justice system. The criminalization of immigration law, perhaps the most important development in modern immigration law, has re-mapped the geography of immigration law over the past 20 years. A wide assortment of graver and lesser crimes now trigger deportation.[1] More immigration violations now constitute

[1] *See* Anti-Drug Abuse Act of 1988 (Drug Kingpin Act), Pub. L. 100-690, § 7342, 102 Stat. 4181, 4469-4470 (defining "aggravated felony" for which deportation is sanction to include crimes of murder, drug trafficking, and firearms trafficking); Immigration Act of 1990, Pub. L. No. 101-649, § 501(a)(3), 104 Stat. 4978, 5048 (amending definition of "aggravated felony" to include "crimes of violence"); 18 U.S.C. § 16 (2000) (defining "crime of violence" to include any crime in which the use of some physical force is used against the person or property of another or, for felonies, the "substantial risk" of such force); Immigration and Nationality Technical Corrections Act of 1994, Pub. L. No. 103-416, § 222, 108 Stat. 4305 (expanding "aggravated felony" for which deportation is a sanction to include theft, trafficking in fraudulent documents, fraud, and tax evasion);

crimes,[2] and prosecution of immigration-related crimes has greatly increased.[3] Immigration law has become so tightly interwoven with criminal justice norms as to constitute a distinct legal category, which I have elsewhere termed "crimmigration law."[4]

Yet this transformation is incomplete in two respects. Others have deftly addressed the first aspect: while the enforcement of immigration law has imported substantive criminal law norms, it has left behind the procedural protections of criminal law.[5] These protections include the constitutional rights meant to protect defendants in the criminal justice system: the right to a trial by a court constituted under Article III of the Constitution,[6] the right to counsel at

Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (expanding "aggravated felony" for which deportation is sanction to include non-violent crimes of forgery, counterfeiting, prostitution, certain gambling offenses, vehicle trafficking, obstruction of justice, perjury, bribery of a witness, and offenses related to skipping bail).

[2] Immigration Reform and Control Act ("IRCA") of 1986, Pub. L. No. 99-603, 100 Stat. 3359, 8 U.S.C. § 1342a (2000) (making it a criminal violation for noncitizens to vote in a federal election or to falsely claim citizenship to obtain a benefit or employment); Immigration Marriage Fraud Amendments of 1986 § 2(d), 8 U.S.C. § 1325(c) (2000) (making it a criminal offense for persons to marry for purpose of evading immigration laws); Immigration Act of 1990 § 121(b)(3), 8 U.S.C.§ 1325(d) (2000) (outlining criminal penalties imposed on those who establish commercial enterprises for purpose of evading immigration laws); Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 130001(b), 108 Stat. 1796, 8 U.S.C. 1326(b)(1) (2000) (making it a criminal offense for noncitizen misdemeanor offenders to attempt to unlawfully re-enter the U.S.); Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA") of 1996, Pub. L. No. 104-208, 110 Stat. 3009, Div. C (1996) (codified as amended in scattered sections of 8, 18 U.S.C.) (expanding federal immigration crimes to include driving above the speed limit while fleeing an immigration checkpoint, knowingly failing to disclose role as preparer of false immigration application, knowingly making a false claim of U.S. citizenship, and failing to cooperate in the execution of one's removal order); Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469, 477 (2007); Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 384 (2006).

[3] *See* Legomsky, *supra* note 2, at 479 (outlining the dramatic escalation in federal prosecutions of immigration crimes from the 1980s to the present); s*ee* Teresa Miller, *Citizenship & Severity: Recent Immigration Reforms and the New Penology*, 17 GEO. IMMIGR. L.J. 611, 639 (2003) [hereinafter Miller, *Citizenship & Severity*] (detailing the increase, since the 1900s, in the number of noncitizens who face punishment in the criminal justice system for crimes that were once only civil violations); *see* Stumpf, *supra* note 2, at 388 (noting that immigration prosecutions currently outnumber all other types of federal criminal prosecutions).

[4] Stumpf, *supra* note 2. *See also* Nora V. Demleitner, *Immigration Threats and Rewards: Effective Law Enforcement Tools in the "War" on Terrorism?*, 51 EMORY L.J. 1059 (2002); Daniel Kanstroom, *Deportation, Social Control, and Punishment: Some Thoughts about Why Hard Laws Make Bad Cases*, 113 HARV. L. REV. 1889 (2000) [hereinafter Kanstroom, *Social Control*]; Legomsky, supra note 2, at 469; Miller, *Citizenship & Severity*, *supra* note 3; Miller, *Blurring the Boundaries between Immigration and Crime Control after September 11th*, 25 B.C. THIRD WORLD L.J. 81 (2005) [hereinafter Miller, *Blurring the Boundaries*].

[5] Legomsky, *supra* note 2, at 515-516; Robert Pauw, *A New Look at Deportation as Punishment: Why at Least Some of the Constitution's Criminal Procedure Protections Must Apply*, 52 ADMIN. L. REV. 305, 309-310 (2000); Stumpf, *supra* note 2, at 390.

[6] U.S. Const., art. III, § 2; *see* Knauff v. Shaughnessy, 338 U.S. 537, 543-44 (1950); Fong Yue Ting v. United States, 149 U.S. 698, 705 (1893).

government expense,[7] the right not to incriminate oneself,[8] protection against double jeopardy,[9] and the prohibition of cruel and unusual punishment,[10] among others. Procedurally, immigration law is a civil proceeding subject only to the protections of the Fifth Amendment's Due Process clause.[11] The procedural protections of a criminal trial set out above do not apply in immigration proceedings.[12]

Proportionality is the key to unraveling this thorny problem. Overlooked by the scholarship is the central role of immigration sanctions in furthering effective immigration law and policy. Yet the need for reform of the immigration remedial scheme has reached a critical point because of this importation of criminal law norms. If deportation is properly considered a sanction within immigration law, and not merely a means of correcting an unlawful situation, immigration law is unique in its approach to sanctioning violations. While criminal law is animated by the idea that the punishment must be proportionate to the crime,[13] proportionality is foreign to immigration law.[14] Criminal law embodies proportionality in punishment schemes that impose milder sanctions such as short or suspended sentences for lesser crimes, and harsher sanctions for graver crimes.[15] In contrast, the statutory sanction for

[7] *Id.*, amend. VI; *see* Vides-Vides v. INS, 783 F.2d 1463, 1469-70 (9th Cir. 1986); United States v. Gasca-Kraft, 522 F.2d 149, 152 (9th Cir. 1975); Burquez v. INS, 513 F.2d 751, 755 (10th Cir. 1975).

[8] U.S. Const., amend. V; Legomsky, *supra* note 2, at 515 n. 225 (describing how Fifth Amendment privilege against self-incrimination may be invoked in any proceeding, criminal or civil, if the person asserting the privilege can show that his testimony would expose him to criminal culpability); Bilokumsky v. Tod, 263 U.S. 149, 155 (1923) (concluding that because a deportation proceeding is not criminal, alien is compelled to answer questions regarding his status); Chavez–Raya v. INS, 519 F.2d 397, 401 (7th Cir. 1975) (permitting an alien to invoke privilege against self-incrimination in deportation proceeding because of possibility of criminal prosecution for violation of immigration laws); Smith v. INS, 585 F.2d 600, 602 (3d Cir. 1978) (holding that because a deportation proceeding is civil in nature, an alien can be required to answer questions about his status as long as the answers would not subject him to criminal liability).

[9] U.S. Const., amend. V; *see* De La Teja v. U.S., 321 F.3d 1357, 1364 (11th Cir. 2003), United States v. Yacoubian, 24 F.3d 1, 10 (9th Cir. 1994); Urbina-Mauricio v. INS, 989 F.2d 1085, 1089 n. 7 (9th Cir. 1993); LeTourneur v. INS, 538 F.2d 1368, 1370 (9th Cir. 1976).

[10] U.S. Const., amend. VIII; *see* Fong Yue Ting v. United States, 149 U.S. 698, 730 (1893); Elias v. Gonzales, 431 F.3d 268, 276 (6th Cir. 2005); Briseno v. INS, 192 F.3d 1320, 1323 (9th Cir. 1999); Bassett v. INS, 581 F.2d 1385, 1387 (10th Cir. 1978); Oliver v. INS, 517 F.2d 426, 428 (2d Cir. 1975).

[11] Yamataya v. Fisher, 189 U.S. 86 (1903); *see* Stumpf, *supra* note 2, at 392.

[12] Margaret Taylor & Ronald F. Wright, *The Sentencing Judge as Immigration Judge*, 51 EMORY L.J. 1131, 1137 (2002).

[13] *See generally* Michael Davis, *How to Make the Punishment Fit the Crime*, 93 ETHICS 726 (1983); Andrew von Hirsch, *Proportionality in the Philosophy of Punishment: From "Why Punish?" to "How Much?,"* 25 ISR. L. REV. 549 (1991).

[14] *See* Kanstroom, *supra* note 4, at 1891; Legomsky, *supra* note 2, at 437.

[15] U.S. SENTENCING GUIDELINES MANUAL § 5A (2006) [hereinafter "USSG"](setting out graduated sentences depending on the nature of the offense and differing sets of facts); N.Y. PENAL LAW §§ 55-85.15 (McKinney 2007) (setting out categories of offenses, gradations of punishment, and categories of punishment such as incarceration, probation, conditional discharge, fines, and restitution); OR. REV. STAT. § 137 (2005) (same); s*ee* Juliet Stumpf, *Penalizing Immigrants*, 18 FED. SENT'G REP. 264, 264-65 (2006).

every immigration violation is removal from the country.[16] While other sanctions may also result from a violation of immigration law, removal is usually what is at stake.

Immigration law is, perhaps, the only area of law that eschews proportionality. Neither the gravity of the violation of immigration law nor the harm that results bears any relationship to whether deportation is imposed as a consequence. In criminal law, the rule that a punishment must fit the crime is embodied in the Eighth Amendment's prohibition on cruel and unusual punishment.[17] The federal sentencing scheme metes out punishment meant to be proportionate to the gravity of the defendant's conduct and the harm to the victim or to society.[18] In contract law, damages are graduated based on the harm to the party who suffered from the breach.[19] In tort law, relief is proportionate to the amount of harm that the plaintiff experienced, keyed to the amount required to make the plaintiff whole.[20] Comparative negligence schemes allocate damages based on the amount of fault for which the tortfeasor is responsible.[21] The law governing punitive damages reins in the generosity of juries by requiring that the amount of the sanction be proportionate to the violation and its effect on the victim.[22]

This article seeks to re-align immigration law with other areas of law by proposing to introduce proportionality norms. Particularly in light of the criminalization of immigration law, the need is compelling for immigration law to have a system of graduated sanctions like that in criminal law. Minor violations, especially if committed by those with significant ties to this country would result in lesser penalties. More serious violations, especially if committed by those with little stake in this country, could result in harsher penalties, and potentially removal from the United States.

In Part I, I describe the ubiquity of deportation as an immigration sanction. Part II traces the history of immigration law sanctions and explains that deportation was traditionally only one of a variety of immigration sanctions. This Part describes the rise of deportation and its central role in the interplay between immigration law and criminal law, or crimmigration law. Part III contains my proposal that immigration law incorporate a graduated system of sanctions for immigration violations. I conclude by offering thoughts on implementation of the proposal.

[16] Stumpf, *supra* note 15, at 264.
[17] U.S. Const. amend. VIII; Lockyer v. Andrade, 538 U.S. 63 (2003).
[18] *See* USSG § 5A (2006).
[19] *See* RESTATEMENT (SECOND) OF CONTRACTS § 347 (1981).
[20] *See* RESTATEMENT (SECOND) OF TORTS § 901 (1979).
[21] *See* RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 26 (2000).
[22] *See* State Farm Mutual Auto. Ins. Co. v. Campbell, 538 U.S. 408 (2003).

I. Deportation as the Central Immigration Sanction

Deportation[23] resists categorization as a legal construct. From one perspective, deportation serves the function of remedying an unlawful situation by removing from the United States an individual who is not entitled to remain. For this reason, deportation is not, as a formal matter, criminal punishment.[24] There is no real dispute, however, that deportation operates as a sanction, that is, as a penalty for an immigration violation.[25] Given that role, it is critical to evaluate whether the sanction of deportation is meted out in a way that is consistent with the sanctions schemes of other related areas of law, such as criminal law.

A. Deportation as an On-Off Switch

The distinction is stark between the foundation of criminal penology and the system of immigration sanctions. Criminal punishment reflects the principle of proportionality, such that less serious crimes result in milder punishment and vice versa.[26] Although the strength of the constitutional mandate of proportionality in criminal punishment has been shaken in recent years,[27] the Federal Sentencing Guidelines[28] and state sentencing schemes[29] tend to follow this rule.

In contrast, the Immigration and Nationality Act ("INA") employs removal as an on-off switch, rather than reflecting a graduated sanctions

[23] In this Article, I use "deportation" to mean any involuntary removal of a noncitizen from the country, including the removal of noncitizens with legal status in the United States as well as those present without government authorization.

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

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

[26] *See generally* von Hirsch, *supra* note 13; Stumpf, *supra* note 15, at 264.

[27] Lockyer v. Andrade, 538 U.S. 63 (2003) (holding that a sentence of two consecutive terms of twenty-five years to life for two felony counts of petty theft under California's three-strikes law was not disproportionate punishment).

[28] USSG § 1A1.1 (2006).

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

scheme. The Act almost invariably imposes deportation as the sanction for an immigration violation. Regardless of whether the violation of immigration law is grave or slight, removal from the country is the statutory consequence. A college student with a student visa who works an hour over the maximum mandated by law is removable from the United States for violating the terms of her visa to the same extent that a serial killer on a tourist visa is removable as an "aggravated felon."[30] As a practical matter, the enforcement priorities of the Immigration and Customs Enforcement agency place the felon in greater danger of deportation than the over-achieving student.[31] Nevertheless, under the Immigration and Nationality Act, the consequence for violating immigration law paints both with the same brush.

Other consequences for immigration violations are occasionally imposed, but they are in addition to deportation, not instead of it. Besides deportation, an immigration violation may result in incarceration,[32] fines,[33] or bars to re-entering the United States.[34] Criminal conduct that also constitutes an immigration violation can result in truncated review of the individual's claim to valid immigration status, and thus a swifter path to removal.[35] Yet these consequences accompany deportation. Unlike criminal sentencing schemes that

[30] INA § 237(a)(1)(C)(i) (subjecting a nonimmigrant visa holder who violates the terms of his visa to deportation); *id.* § 237(a)(2)(A)(iii)(providing for deportation of an alien who is convicted of an aggravated felony).

[31] *See* U.S. Immigration and Customs Enforcement, Fact Sheet, *ICE Immigration Enforcement Initiatives* (June 23, 2006) *available at* http://www.ice.gov/pi/news/factsheets/immigration_enforcement_initiatives.htm (explaining that ICE has made it a top priority to enforce immigration violations which threaten national security or public safety).

[32] A criminal penalty of up to six months imprisonment and a fine of up to $3,000 may be imposed for unlawfully employing non-citizens. 8 U.S.C. § 1324a(f)(1) (2000). Imprisonment for up to five years is the sanction for failing to disclose a role as a document preparer for a falsely made application for immigration benefits. 8 U.S.C. § 1324c(e)(1) (2000). Knowingly marrying to evade immigration laws results in imprisonment for up to five years (plus a possible $250,000 fine). 8 U.S.C. § 1325(c) (2000). Improperly entering the United States may result in a criminal fine or imprisonment for up to six months, or both, for the first offense. 8 U.S.C. § 1325(a) (2000).

[33] *See e.g.*, 8 U.S.C. § 1324c (2000) (imposing civil penalties for fraudulent immigration documents); § 1325(b) (2000) (imposing a civil penalty upon a non-citizen apprehended while entering the U.S. at a time or place other than as designated by immigration officers); § 1325(c) (2000) (imposing a $250,000 fine for entering into a sham marriage to evade immigration laws).

[34] A three-year bar to re-entry applies to a non-citizen who has accrued more than 180 days but less than one year of unlawful presence and who voluntarily departed prior to the commencement of removal proceedings. 8 U.S.C. § 1182(a)(9)(B)(i)(I) (2000). *See also* INA § 212(a)(9) (creating five-year and ten-year bars for unlawful presence and re-entry after a previous removal or departure under a removal order). A five-year bar to re-entry applies to a non-citizen who violates the terms of a student visa. 8 U.S.C. §1182(a)(6)(G) (2000).

[35] A non-citizen who has committed an aggravated felony is subject to removal without further review. 8 U.S.C. § 1228 (2000). Expedited removal, which eliminates intervention by an immigration judge, is used when an immigration officer determines that an arriving non-citizen is inadmissible because of fraud or misrepresentation, among other reasons. 8 U.S.C. § 1225(b) (2000). Expedited review is not limited to noncitizens who have committed crimes. *See* 8 U.S.C. § 1225(b) (2000) (permitting expedited review for noncitizens who attempt to enter without a passport or visa, including potential asylum applicants).

erect ladders of progressively harsher sanctions, immigration law begins with deportation as a consequence of any violation, and then piles additional sanctions on top of it.

Deportation is the statutory consequence for entering the country without inspection by U.S. agents at the point of entry[36] or for violating the terms of a visa by working without authorization or beyond authorized limits.[37] As a result, an employee that a U.S. corporation hired temporarily to fill a position that no U.S. worker was available to fill may find her spouse at risk of removal for working without authorization.[38] The INA also subjects any noncitizen to deportation for committing a "crime of moral turpitude"[39] or an "aggravated felony," which includes major criminal offenses like murder, drug trafficking, and firearms trafficking,[40] and an array of minor crimes and even some misdemeanors.[41] Under these provisions, legal permanent residents have faced deportation for turnstile jumping,[42] minor shoplifting,[43] and passing a bad check.[44]

Theoretically, significant exceptions and alternatives to deportation could inject proportionality into immigration law. Two unique characteristics of the U.S. immigration system create an appearance of proportionality. First, the statutory scheme provides for "relief" from deportation in certain circumstances. Second, the immigration agency exercises discretion in setting enforcement priorities and has limited discretion to decide whether or when a noncitizen must leave the country. Neither, however, results in a remedial framework that calibrates the seriousness of the immigration violation with the sanction.

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[36] INA §212(a)(6)(A)(i) (declaring inadmissible aliens who enter the U.S. without being properly admitted); *id.* § 237(a)(1)(A) (subjecting inadmissible aliens who entered the U.S. to deportation).

[37] INA § 237(a)(1)(C)(i) (subjecting nonimmigrant visa holders who violate the terms of their visa to deportation).

[38] *Id.* § 101(a)(15)(H); 8 C.F.R. § 214.2(h) (2007).

[39] INA § 237(a)(2)(A)(i); AEDPA § 435 (codified at 8 U.S.C. § 1227(a)(2)(A)(i) (2000)). A "crime of moral turpitude" remains undefined by the Immigration and Nationality Act. Courts examine the "inherent nature of the offense" to determine whether it falls within the category. *See* Demleitner, *supra* note 4, at 1064; Brian C. Harms, *Redefining "Crimes of Moral Turpitude": A Proposal to Congress*, 15 GEO. IMMIGR. L.J. 259, 264-69 (2001). *See also*, Nate Carter, *Shocking The Conscience Of Mankind: Using International Law To Define "Crimes Involving Moral Turpitude" In Immigration Law*, 10 LEWIS & CLARK L. REV. 955, 955-58 (2006).

[40] INA § 101(a)(43); The Anti-Drug Abuse Act of 1988 (Drug Kingpin Act), Pub. L. No. 100-690, § 7342, 102 Stat. 4181, 4469 (1988).

[41] *E.g.*, United States v. Elizalde-Altamirano, No. 66-4143 (10th Cir. 2007) (finding joyriding to be an aggravated felony); Miller, *Citizenship & Severity*, *supra* note 1, at 622; ELIZABETH J. HARPER, IMMIGRATION LAWS OF THE UNITED STATES 612-13 (3d ed. 1975).

[42] Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 HARV. L. REV. 1936, 1941 (2000).

[43] *Id.* at 1939.

[44] Susan L. Pilcher, *Justice Without a Blindfold: Criminal Proceedings and the Alien Defendant*, 50 ARK. L. REV. 269, 312-13 (1997).

B. Does Relief from Deportation Create Proportionality?

Relief from deportation is the name given to a collection of statutory and administrative avenues for a noncitizen to avoid removal from the country even if she has violated an immigration law. Removal proceedings typically pose two questions. First, the immigration judge determines whether the noncitizen has violated a statutory provision that imposes removal from the United States as a consequence. A decision that the noncitizen has violated an immigration law almost inevitably results in a finding that the noncitizen is removable.

At that point, the focus of the removal proceeding turns to the availability of relief from removal. Once the government has proven that the noncitizen is removable, the burden shifts to the noncitizen to show she is eligible for relief from deportation.[45] Relief falls roughly into two categories. In the first are types of relief that eliminate the underlying ground for removal and create lawful status for the noncitizen in the United States.[46] The second is a catch-all category of types of relief that do not endow permanent lawful status, but instead permit the noncitizen to remain in the country indefinitely or for a limited period of time.[47]

On the surface, relief imbues the sanctions scheme with some level of proportionality. The availability of relief means that some violations of immigration law do not result in deportation. The distinctions between the different forms of relief create lesser and greater consequences of an immigration law violation. Some of the criteria for these forms of relief consider the nature of the violation,[48] furthering the appearance of a regulatory structure that imposes consequences proportionate to the gravity of the violation.

While the existence of relief seems to provide some level of proportionality by establishing alternatives to deportation, these alternative avenues fall short. The variation in the results of immigration hearings does not create true proportionality because it is rarely contingent upon the magnitude of the violation. As I will show, other factors such as hardship often determine whether a noncitizen will avoid deportation. Moreover, some forms of relief merely emphasize the binary nature of the deportation question by either permitting the noncitizen to avoid deportation altogether or delaying it, rather than offering an alternative lesser or greater sanction. Finally, the availability of relief is now so circumscribed that it currently plays a role only at the margins in limiting the application of deportation as the immigration sanction.

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[45] INA § 240(c)(3) (government has burden to prove by clear and convincing evidence that alien is deportable); INA § 240(c)(4) (alien has burden of proof to establish that she is eligible for relief and, if relief is discretionary, that she merits such relief).

[46] *See* ALEINIKOFF, MARTIN, MOTOMURA, IMMIGRATION & CITIZENSHIP: PROCESS & POLICY 785-819 (6th ed. 2008).

[47] *Id.* at 820-27.

[48] *See* Matter of C-V-T, 22 I&N Dec. 7, 11-13 (BIA 1998) (listing as criteria for cancellation of removal the underlying circumstances of the ground of deportability).

1. Permanent Relief and the Binary Nature of the Deportation Determination

The first category of relief includes cancellation of removal, asylum, restriction on removal (formerly known as "withholding of removal"), and waivers of removal grounds.[49] Cancellation of removal is the most generous form of relief in that it admits or restores the noncitizen to the status of a legal permanent resident and purges the underlying deportation ground.[50] Asylum and refugee status[51] and restriction on removal[52] provide those threatened with persecution in their home country a temporary lawful status with a pathway to permanent residence.[53] A waiver of a removal ground results in a determination that the removal ground does not apply, even when the noncitizen's conduct would otherwise lead to removal.[54]

These permanent forms of relief do not establish a graduated system of sanctions for immigration violations. The consequences that flow from these forms of relief act less as sanctions than as a determination of whether the noncitizen merits lawful immigration status. Cancellation of removal arises after the determination that a removal ground applies, as its name suggests. It cancels the removal finding and also confers a benefit: either restoring lawful permanent resident status or conferring that status.[55] Similarly, asylum and restriction on removal permit a noncitizen to avoid deportation by endowing a lawful status, and in the case of asylum, with an avenue to permanent residence.[56] Whether a waiver of a removal ground applies is usually a step along the way to another form of relief, excusing a statutory ground for excluding or deporting a noncitizen.[57]

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[49] Two other types of relief exist but their current impact is so small as to be unworthy of extended discussion. *See* INA § 249 (describing the process of "registry" which creates a lawful admission for noncitizens who arrived in the United States before 1972, are of good moral character, and are not inadmissible based on participation in Nazi persecutions, conviction of a crime of moral turpitude, ties to terrorism, engaging in smuggling, trafficking in narcotics, or involvement in prostitution. Recently, only about 200 noncitizens annually have been granted this form of relief.) *See* ALEINIKOFF, et al. *supra* note 46, at 607. The other form of relief is the passage of a private bill in Congress granting relief from deportation. *Id.* at 608-09. Few such bills gain enough support in the House and Senate to become law. *Id.* at 609 (citing statistics).

[50] *See* INA § 240A, 8 U.S.C. § 1229b(a)(2000).

[51] *See* INA § 208, 8 U.S.C. §1158 (2000).

[52] *See* INA § 241(b)(3), 8 U.S.C. §1231(b)(3) (2000) (formerly known as "withholding of removal").

[53] INA § 208, 8 U.S.C. § 1158(2002), *repealed in part by* the REAL ID ACT, Pub. L. No. 109-13, Div. B, § 106(a)(1)(A)(iii), 119 Stat. 231, 310 (May 11, 2005) (codified at 8 U.S.C. § 1252(a)(2)(D)). *See* Husyev v. Mukasey, 528 F.3d 1172, 1178 (9th Cir. 2008) (noting that the REAL ID Act has overridden the jurisdictional prohibition of 8 U.S.C. § 1158(a)(3), which provided that "[n]o court shall have jurisdiction to review any determination of the Attorney General" regarding the one-year bar to application for asylum or its exceptions for changed or extraordinary circumstances); INA § 209, 8 U.S.C. § 1159 (2005).

[54] *See infra* notes 67- 81 (describing various waivers).

[55] *See* § 240A(a) (restoring or maintaining lawful permanent resident status), § 240A(b) (conferring lawful permanent resident status on nonimmigrants and those without lawful immigration status).

[56] INA §§ 208, 209, 8 U.S.C. §§ 1158, 1159 (2002); INA § 241(b)(3), 8 U.S.C. § 1231(b)(3).

[57] *See infra* notes 67- 81 (describing waiver criteria).

The conferring of a lawful status does not reflect proportionality in sanctions, because the decision about whether to grant that lawful status is a step in the decision about whether deportation should be imposed. Rather than offering an alternative sanction, these forms of relief merely replicate the on-off nature of the deportation sanction at a later stage in the proceeding. Like deciding the age of the victim in a statutory rape case, deciding whether a noncitizen should be granted lawful status is a precursor to deciding whether to impose a criminal or immigration sanction. It is not part of the sanction itself.

Similarly, the existence of waivers of deportability grounds is merely another facet of the on-off nature of the deportation sanction. The question of whether a waiver applies is akin to the question of liability in civil proceedings or guilt in a criminal trial: it determines whether the ground for deportation applies at all. The broadest of these general waivers is section 212(h) of the INA, which waives certain criminal grounds for removal only for lawful permanent residents, individuals seeking adjustment of status to permanent residency, and victims of domestic violence.[58] The section 212(h) waiver does not inject proportionality into the immigration sanctions scheme because, at bottom, the decision about whether the waiver applies or whether the immigration agency will grant it is merely another facet of the binary nature of the immigration sanctions scheme. The waiver determination is a decision about whether to remove the noncitizen from the country. There is no room in the statutory requisites for any other result.

2. Limited Availability of Permanent Relief

The limited availability of these forms of relief renders them still less effective in establishing proportionate sanctions for immigration law.[59] The broadest form of cancellation of removal is limited to lawful permanent residents with long tenures in the United States, and disqualifies those convicted of a plethora of crimes ranging from serious felonies to minor misdemeanors.[60]

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[58] *See* INA § 212(h), 8 U.S.C. § 1182(h)(2000). Section 212(h) waives grounds of removal based on crimes involving moral turpitude, INA § 212(a)(2)(A)(i)(I), a single offense of simple possession of 30 grams or less of marijuana, INA § 212(a)(1)(A)(i)(II), multiple criminal convictions where the aggregate sentence was five years or more, INA § 212(a)(2)(B), prostitution and commercial vice activities, INA § 212(a)(2)(D), and serious criminal offenses involving a grant of immunity, INA § 212(a)(2)(E). It does not waive removal grounds based on murder, torture, or drug crimes. *Id.*

[59] Miller, *Citizenship and Severity*, *supra* note 3, at 632 (noting that relief for an alien with a criminal conviction is limited and deportations of criminal aliens continue to rise steeply); Peter H. Schuck & John Williams, *Removing Criminal Aliens: The Pitfalls and Promises of Federalism*, 22 HARV. J. L. & PUB. POL'Y 367, 393-94 (1998-1999) (explaining that most criminal aliens have been ineligible for relief since the 1990s); Daniel Kanstroom, *Post-Deportation Human Rights Law: Aspiration, Oxymoron, Or Necessity?*, 3 STAN. J. CIV. RTS. & CIV. LIBERTIES 195, 196 (2007) (noting that the total number of cases processed by immigration courts and the percentage of those proceedings which result in removal increased from 2001 to 2005, with 282,396 proceedings in 2001 and 368,848 in 2005, and a removal rate of 78% in 2001 and 84 % in 2005). *See also* INS v. St. Cyr, 533 U.S. 289, 297 & n. 7 (2001) (noting that recent legislation had "reduced the size of the class of aliens eligible for … discretionary relief").

[60] § 240A(a) (setting out criteria for cancellation of removal and excluding individuals convicted of

They must also convince the immigration court to exercise its discretion by establishing that the positive equities of permitting the permanent resident to remain outweigh the negatives.[61]

For noncitizens who are not permanent residents, cancellation of removal and acquisition of permanent resident status requires meeting stringent requirements, including ten years of continuous physical presence and proof that removal would result in "exceptional and extremely unusual hardship" to a U.S. citizen or lawful permanent resident – not to the noncitizen who is the subject of the removal proceeding.[62] If those onerous requirements are met, and other disqualifying factors avoided,[63] the noncitizen must still win a favorable exercise of discretion from the immigration judge.[64]

While asylum and restriction on removal provide an indefinite lawful status and a pathway to permanent resident status, the criteria are stringent. These forms of relief are available only to those noncitizens able to establish actual or threatened persecution in their home country and a nexus between that persecution and the individual's membership in one of five protected groups.[65] Noncitizens who meet those criteria may nevertheless be ineligible for asylum or restriction on removal if an immigration judge concludes they could have found refuge in another part of their home country or a third country, among other reasons.[66]

Waivers are also extremely cabined. They are either general, applying to a broad swath of noncitizens and to more than one ground for deportation, or specific, applying to one or few grounds for deportation or to a single class of noncitizens. The most general waiver under section 212(h) is so constrained as to contribute very little as a practical matter to a proportionate system of sanctions. A section 212(h) waiver provides two limited avenues for relief. The first waives removal grounds based on prostitution or crimes that occurred more than fifteen years before the date of the noncitizen's application for the immigration benefit. The noncitizen must also show that she has been

aggravated felonies (*see* § 101(a)(43)) and offenses listed in §§ 212(a)(2) and 237(a)(2)).

[61] INA § 240A, 8 U.S.C. § 1229b(a) (2000); *see* Matter of C-V-T, 22 I&N Dec. 7, 11-13 (BIA 1998) (establishing that agency discretion is a requirement for cancellation of removal and listing the positive and negative equities that the agency must consider).

[62] *See* INA § 240A, 8 U.S.C. § 1229b(a) (2000); *see also* Matter of Gonzalez Recinas, 23 I & N Dec. 467, 468-73 (BIA 2002) (elucidating criteria for finding of "exceptional and extremely unusual hardship").

[63] *E.g.*, that the noncitizen has not committed a crime of moral turpitude, an aggravated felony, or a drug offense, *see* INA § 240A(b)(1)(C), 8 U.S.C. § 1229b(b)(1)(C), and that she has maintained "good moral character," *see* INA § 240A(b)(1)(B), 8 U.S.C. § 1229b(b)(1)(B).

[64] *See* INA § 240A, 8 U.S.C. § 1229b(a) (2000).

[65] *See* INA § 208, 8 U.S.C. §1158 (2000) (setting out asylum procedures); INA § 101(a)(42), 8 U.S.C. § 1101(a)(42) (setting out definition of "refugee"); *see* INA § 241(b)(3), 8 U.S.C. §1231(b)(3) (2000) (defining restriction on removal).

[66] *See* INA § 208, 8 U.S.C. §1158 (2000) (listing procedural limitations for asylum claims including a one-year filing deadline); INA § 101(a)(42), 8 U.S.C. § 1101(a)(42) (making ineligible for asylum individuals who were involved in persecution); INA § 241(b)(3), 8 U.S.C. §1231(b)(3)(B) (2000) (listing exceptions to restrictions on removal).

"rehabilitated" and her admission would not be "contrary to the national welfare, safety, or security of the United States."[67] The second avenue requires a showing that removing the noncitizen would result in "extreme hardship" to a close relative who is a U.S. citizen or permanent resident,[68] as well as a favorable exercise of discretion from the Attorney General.[69]

The more specific waivers of removal grounds, applying to discrete grounds for removal, are similarly so cabined that they do not constitute a form of proportionality. Most are restricted to close relatives of U.S. citizens or residents and depend upon an immigration official or judge to exercise favorable discretion.[70] For example, obtaining a waiver for using false documents to

[67] *See* INA § 212(h)(1)(A).

[68] *See* INA § 212(h)(1)(B).

[69] INA § 212(h), 8 U.S.C. § 1182(h) (2000) (limiting waiver to spouses, parents, sons, and daughters of U.S. citizens or lawful permanent residents). For established permanent residents, the section 212(h) waiver is further restricted. It applies only to permanent residents who have resided lawfully and continuously in the United States for seven years prior to the removal proceeding, and does not apply at all if the permanent resident has committed an "aggravated felony," a term of art in immigration law that encompasses a wide variety of crimes including misdemeanors and minor crimes. *Id.* Equal Protection challenges to section 212(h) claiming discrimination based on distinctions between permanent residents and non-permanent residents have been largely unsuccessful. *See* Lara-Ruiz v. INS, 241 F.3d 934, 947-48 (7th Cir. 2001) (applying rational basis review and holding that there is a reasonable justification for the distinction between permanent residents and non-permanent residents); Jankowski-Burczyk v. INS, 291 F.3d 172, 178 (2nd Cir. 2002) (rejecting Equal Protection challenge, holding that permanent residents and non-permanent residents are not similarly situated). Cf. Roman v. Ashcroft, 181 F. Supp. 2d 808, 812 (N.D. Ohio 2002) (upholding Equal Protection challenge), *vacated and remanded on other grounds*, 340 F.3d 314 (6th Cir. 2003). *See infra* notes 190-230 (outlining the development of crimmigration law).

[70] *See* INA § 209(c) (providing a discretionary waiver of § 212(a) inadmissibility grounds in order to assure family unity, except when inadmissibility is based on drug trafficking (§ 212(a)(2)(C)), entering the United States solely to engage in illegal activity (§ 212(a)(2)(3)(A)), terrorist activity (§ 212(a)(3)(B)), adverse foreign policy consequences (§ 212(a)(3)(C)), or participation in Nazi persecution, genocide, torture, or extrajudicial killing (§ 212(a)(3)(E)); INA § 212(a)(3)(D)(iv) (waiving inadmissibility grounds for membership in a totalitarian party for close family members of United States citizens or legal permanent residents); INA § 212(a)(9)(B)(v) (waiving inadmissibility grounds for unlawful presence in the United States for an alien seeking permanent resident status who is the spouse, son, or daughter of a United States citizen or permanent resident who would suffer extreme hardship if admission is refused); INA § 212(d)(11) (waiver of inadmissibility ground of smuggling applicable only to permanent residents or those seeking entry as permanent residents, and only for smuggling of spouse, parent, son or daughter); INA § 212(d)(12) (waiving inadmissibility ground for document fraud under section 274C for aliens seeking admission or adjustment of status to permanent residency based on an immediate family petition if the fraud was to assist, aid or support the alien's spouse or child); INA § 212(e) (waiving the requirement for an alien admitted on a visitor "J" visa to return to his or her country of nationality if, *inter alia*, it would impose exceptional hardship upon a spouse or child who is a U.S. citizen or lawful permanent resident); INA § 212(g) (waiving inadmissibility grounds based on communicable diseases and physical or mental disorders for alien spouses, parents, or unmarried children of United States citizens or permanent residents); INA § 212(h)(1)(B) (waiving inadmissibility grounds based on certain criminal convictions if removal would cause extreme hardship to a spouse, parent, son or daughter who is a U.S. citizen or lawful permanent resident); INA § 212(i) (waiving inadmissibility grounds based on misrepresentation in seeking admission the United States if removal would cause extreme hardship to a spouse, parent, son or daughter who is a U.S. citizen or lawful permanent resident); INA § 216(c)(4) (waiver for aliens granted conditional permanent resident status based on

procure employment is available only to permanent residents. It requires proof that the noncitizen violated the prohibition against working with false documents "solely to aid, assist or support" the noncitizen's spouse or child, and no one else.[71] The waiver of the deportability ground for smuggling another alien applies only to permanent residents (or noncitizens eligible for permanent residency) and only if the smuggling involved a spouse, parent, son, or daughter (but not, for example, a sibling or grandparent).[72] For both, the noncitizen must obtain a favorable exercise of discretion.[73]

Outside of the family context, the grounds for waivers of deportation fall into three major categories: waiver of most inadmissibility grounds for refugees seeking adjustment of status to permanent residency,[74] waivers available to battered women and children,[75] and waivers of some criminal

marriage who failed to meet the requirements to remove the conditional nature of their status if, *inter alia*, the marriage was entered in good faith and ended without the alien's fault or the alien spouse or child was abused); INA § 237(a)(1)(E)(ii), (iii) (waiver of deportability ground of smuggling available only to permanent residents (or noncitizens eligible for permanent residency) and only for smuggling of spouse, parent, son or daughter); INA § 237(a)(1)(H) (waiver for inadmissibility ground based on fraud or misrepresentation at the time of entering the United States if, among other things, the alien is the spouse, parent, son or daughter of a United States citizen or lawful permanent resident, but only if the noncitizen is in possession of an immigrant visa (or equivalent document) and otherwise eligible for lawful permanent residency and not if the fraud or misrepresentation was related to labor certification); INA § 237(a)(3)(C)(ii) (waiving deportability grounds for a section 274C document fraud violation if the fraud was for the purpose of aiding the alien's spouse or child).

[71] INA § 237(a)(3)(C)(ii).

[72] INA § 237(a)(1)(E)(iii).

[73] *See* INA § 237(a)(1)(E)(iii)(smuggling); INA § 237(a)(3)(C)(ii)(document fraud). Other family-based waivers have similarly restrictive conditions. Noncitizens whose permanent residence status arises from their marriage to a U.S. citizen are subject to a two-year period of conditional residency. At the end of that period, the noncitizen is removable unless she files jointly with her spouse a petition to remove the conditional aspect of her residency and successfully passes an interview with an immigration officer. Waiver of that joint filing requirement and interview is discretionary, and contingent upon a showing (a) that deportation would cause her extreme hardship due to factors arising only within the two-year conditional period, (b) that she entered into the marriage in good faith but it was either terminated (except by the death of her spouse) or her spouse battered her or her child or subjected her or her child to extreme cruelty, and (c) she was not at fault in failing to file jointly. INA § 216(c)(4).

[74] INA § 209(c) (waiving most section 212(a) inadmissibility grounds for refugees when such waiver is for humanitarian purposes, to assure family unity, or when otherwise in the public interest); *see also* INA § 212(e)(establishing discretionary waiver of two-year foreign residency requirement for holders of student "J" visas, INA § 101(a)(15)(1), if alien would be subject to persecution if returned to her country of nationality or last residence).

[75] *See* INA § 237(a)(1)(H)(ii) (waiving § 212(a)(6)(C)(i) inadmissibility grounds based on fraud or misrepresentation at the time of entering the United States for VAWA self-petitioners); INA § 212(h) (waiving § 212(a)(2)(A)(i)(I), (II), (B), (D), and (E) inadmissibility grounds based on a criminal conviction for VAWA self-petitioners when the Attorney General agrees to the alien's application); INA § 212(i) (waiving § 212(a)(6)(C)(i) inadmissibility grounds based on misrepresentation when seeking admission for VAWA self-petitioners who demonstrate extreme hardship to the alien or to the alien's citizen, lawful permanent resident, or qualified alien parent or child); INA § 212(g) (waiving § 212(a)(1)(A) inadmissibility grounds based on medical or mental condition if the alien is a VAWA self-petitioner); INA § 212(a)(9)(C)(iii) (waiving § 212(a)(9)(C)(i) inadmissibility grounds based on unlawful presence after previous immigration violations for a

deportability grounds in the rare event of a full executive pardon.[76] As with the family-related waivers, all three of these waiver categories carry further restrictions on their availability. Refugees may not obtain a waiver if their admission would create adverse foreign policy consequences or if they committed certain crimes or engaged in terrorism or Nazi persecution.[77] Some waivers based on domestic violence exclude victims if the Attorney General does not agree to the alien's seeking admission or permanent residency,[78] require proof of extreme hardship to a close family member who is a U.S. citizen or permanent resident,[79] or scrutinize the circumstances surrounding the battery or extreme cruelty.[80] An executive pardon will waive only deportability (not inadmissibility) grounds for specific crimes and only if the pardon is full and unconditional.[81]

In sum, the existence of statutory waivers in the Immigration and Nationality Act does not inject proportionality into the immigration sanctions

VAWA self-petitioner if there is a connection between the alien's battering or subjection to extreme cruelty and the alien's removal, departure, reentry, or attempted reentry to the United States); INA § 237(a)(7) (waiving deportability grounds based on domestic violence if the alien was acting in self-defense, violated a protective order intended to protect the alien, or the domestic violence-related crime did not result in serious bodily harm and was connected to the alien's subjection to battery or extreme cruelty).

[76] INA § 237(a)(2)(A)(vi) (waiving deportability grounds based on §§ 237(a)(2)(A)(i) (crime of moral turpitude), (A)(ii) (multiple criminal convictions), (A)(iii) (aggravated felony conviction), and (A)(iv) (high speed flight) for an alien who receives a full and unconditional pardon by a state governor or the President; waiver inapplicable to drug trafficking or controlled substance offense convictions, *see* Matter of Yeun, 12 I&N Dec. 325 (BIA 1967)).

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

[78] INA § 212(h) (waiving for VAWA self-petitioners § 212(a)(2)(A)(i)(I), (II), (B), (D), and (E) inadmissibility grounds based on a criminal conviction when the Attorney General agrees to the alien's application).

[79] INA § 212(i) (waiving § 212(a)(6)(C)(i) inadmissibility grounds based on misrepresentation when seeking admission for VAWA self-petitioners who demonstrate extreme hardship to the alien or to the alien's United States citizen, lawful permanent resident, or qualified alien parent or child).

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

[81] INA § 237(a)(2)(A)(vi) (waiving deportability grounds based on §§ 237(a)(2)(A)(i) (crime of moral turpitude), (A)(ii) (multiple criminal convictions), (A)(iii) (aggravated felony conviction), and (A)(iv) (high speed flight) for an alien who receives a full and unconditional pardon by a state governor or the President). In re Jung Tae Suh, 23 I&N Dec. 626, 626 (BIA 2003); *see* Matthew L. Benson & Marisa N. Palmieri, *I Got a Great Plea Agreement for my Client But He Ended up being Deported - Immigration Considerations for the Kentucky Criminal Practitioner*, 34 N. KY. L. REV. 547, 569 (2007) (describing pardon restrictions). The pardon waiver does not, therefore, cover any of the grounds not listed, such as drug-trafficking or controlled-substance convictions. *See Yeun*, 12 I&N Dec. at 327.

scheme because waivers merely influence the decision whether the noncitizen will be deported. They do not provide an alternative sanction, nor lessen or deepen the consequence of a decision that a violation of immigration law leads to deportation. Rather, they merely move the deportation decision up or down on the spectrum of ease of proof. Moreover, the extremely limited nature of waivers places them in the margins of the immigration sanctions scheme.

3. Non-Permanent Relief

The second category of relief is composed of alternatives to formal physical removal from the country that do not result in permanent lawful status in the United States. This category includes deferred enforced departure,[82] Temporary Protected Status (TPS),[83] voluntary departure,[84] parole,[85] and stays of removal.[86] The variety of these forms of relief, along with those in the first category that establish permanent residency, at first appear to support the idea that relief constitutes a graduated system of sanctions.

These forms of relief, however, merely contribute to the decision of whether, or when, or how a noncitizen is required to leave the country. Only one results in lawful status and that status is ephemeral: Temporary Protected Status, which provides temporary refuge for nationals of certain countries in turmoil.[87] The other forms of temporary relief also delay deportation, but without conferring even a temporary lawful status.[88] Voluntary departure is

[82] 8 C.F.R. § 1003.6 (2007) (permitting delay of deportation of non-citizens who would otherwise be placed in danger if deported to countries undergoing political instability or for other reasons).
[83] Immigration Act of Nov. 29, 1990, 104 Stat. 4978; INA § 244(c)(2) (1990).
[84] INA § 240B(a)(1), 8 U.S.C. § 1229c(a)(1) (2006).
[85] 8 U.S.C. § 1182(d)(5)(A), INA 212(d)(5).
[86] 8 C.F.R. § 1003.6 (2007).
[87] INA § 244(c)(2) (granting TPS to nationals of the designated country upon proof that the national was in the United States on or before the date the DHS Secretary made the TPS designation). Moreover, the availability of TPS is limited, requiring continuous physically presence in the United States since DHS's designation of that state, continuous residence in the United States since a date designated by the Attorney General, and compliance with the generally applicable admissibility requirements. *Id.*
[88] Deferred enforced departure, a humanitarian designation for individuals who would be placed in danger if deported to countries where there is political or other instability,[88] merely postpones deportation but does not establish a formal legal status or work authorization. 8 C.F.R. § 1003.6 (discretionary stay of removal designated by the President; it is requested by DHS and approved by the immigration judge). The President has made only five deferred enforced departure designations since its inception in 1990. *Refugees and Asylum: Deferred Enforced Departure*, National Immigration Forum, (2007) *available at* http://www.immigrationforum.org/DesktopDefault.aspx?tabid=288 (last visited Dec. 1, 2008). The designation is usually granted for twelve or eighteen months. *Id.* "Parole" is similarly a means of delaying removal, imbuing the government with discretionary power to permit temporary entrance into the United States for humanitarian reasons or significant public benefit or pending further investigation. *See* INA § 212(d); 8 U.S.C. § 1182(d) (2000). Similar to parole, "deferred action status" is usually granted when there are compelling humanitarian reasons. Standard Operating Procedures for Enforcement Officers: Arrest, Detention, Processing and Removal, Part X, Meissner, Comm, Memo, HQOPP 50/4 (Nov. 17, 2000). More limited is a stay of removal, preventing the Department of Homeland Security from executing a removal or exclusion order while the

merely a gentler form of deportation. Noncitizens granted voluntary departure have won the right to depart at their own expense in order to avoid removal proceedings or to avoid a formal removal order.[89]

In sum, these forms of relief are mere variations on the underlying decision about whether deportation will occur. They do not create a graduated system of remedies.

4. Discretion

Finally, the existence of discretion over whether to pursue the removal of any noncitizen or to grant relief from removal has the potential to create proportionality in immigration sanctions, but fails to do so within the current immigration law scheme. Agency discretion comes in several forms. First, immigration law enforcement officers have prosecutorial discretion not to pursue proceedings against a noncitizen who may be deportable when prosecution would not serve federal immigration interests. They also have discretion to decide which immigration law violation to charge.[90] Decisions not to prosecute are usually based on humanitarian reasons.[91]

Second, immigration judges and the BIA have discretion in deciding whether or not to impose deportation or confer a particular lawful immigration status. Most forms of relief from removal permit the immigration agency to deny relief even when a noncitizen has met the statutory requirements, unless the noncitizen convinces the agency that relief is proper, for example, "for humanitarian purposes, to assure family unity, or when otherwise in the public interest."[92]

However, these forms of discretion are merely elements of the larger decision of whether the noncitizen is deported, not a form of proportionality. A decision to prosecute or to deny relief from removal reflects a determination of whether the single sanction of deportation is proper. It is not a choice among a variety of alternative sanctions.

II. A Brief History of Immigration Sanctions

noncitizen's immigration case is pending final disposition, including during direct appeal to the Board of Immigration Appeals. 8 C.F.R. § 1003.6; Immigration Court Practice Manual 119-120, Office of the Chief Immigration Judge (Apr. 1, 2008) available at http://www.usdoj.gov/eoir/vll/OCIJPracManual/Chap%208.pdf (last visited Dec. 1, 2008).

[89] INA § 240B(a)(1), 8 U.S.C. §1229c (2000). *See* ALEINIKOFF, et al., *supra* note 46, at 609-10. In other words, it is a way for the noncitizen to avoid the entry of a removal order while saving the government the cost of a full proceeding. *Id.*

[90] *See* Memo from INS Commissioner Doris Meissner, Nov. 17, 2000, 77 INTERP. REL. 1673 (2000) (stating "INS officers may decline to prosecute a legally sufficient immigration case if the Federal immigration enforcement interest that would be served by prosecution is not substantial").

[91] Taylor & Wright, *supra* note 12, at 1173.

[92] At least one waiver of deportability is non-discretionary. *See* INA 237(a)(1)(E)(ii) (an eligible immigrant who was present in the United States prior to May 5, 1988, and has encouraged, induced, assisted, abetted, or aided *only* a spouse, parent, son, or daughter to enter the United States illegally prior to May 5, 1988, is not deportable under § 237(a)(1)(E)(i) for smuggling).

Evaluating the current system of immigration sanctions requires a look backward at how immigration violations have been addressed traditionally. This section traces a brief history of immigration-related sanctions. Although under current immigration law any violation renders a noncitizen removable, it was not always that way. Deportation in its current form is a relative newcomer to immigration law. In an earlier era, immigration consequences had more in common with the graduated remedial scheme found in criminal law, contract law, and tort law than with the current system of immigration sanctions.[93]

A. State-Created Sanctions: Early Approaches

Before the founding of the United States, and for nearly a century afterward, the states led the way in regulating international and domestic migration.[94] Because the fledgling United States had a strong interest in encouraging immigration, there was little incentive to place restrictions on entry or expend resources on removal of immigrants.[95] Federal governance of immigration was sparse, and deportation was rarely applied. In 1798, Congress passed the Alien and Sedition Laws, authorizing the President to order deportation when an alien was deemed dangerous to the United States.[96] Failure to depart in a timely manner could result in three years imprisonment and a bar to citizenship. These laws, of questionable constitutionality at their inception, were never enforced.[97]

The Naturalization Act of 1798 required white aliens to register with a designated official within 48 hours of arrival, or for those already present in the country, within six months of the Act's passage.[98] The Act imposed a fine for failure to register and nominally required registration as a prerequisite to naturalization, but it had no provision for removal of the offender.[99] The Act was ignominiously repealed in 1802 after years of noncompliance.[100]

In contrast, state laws governing migration across state borders employed three categories of sanctions: removal of the immigrant, punishment

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[93] *See supra*, notes 19 - 22 & accompanying text.

[94] GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW 19 (1996) [hereinafter NEUMAN, STRANGERS].

[95] E.P. HUTCHINSON, LEGISLATIVE HISTORY OF AMERICAN IMMIGRATION POLICY 389 (1981); *see* Markowitz, *Straddling the Civil-Criminal Divide: A Bifurcated Approach to Understanding the Nature of Immigration Removal Proceedings*, 43 HARV. C.R-C. L. REV. 289, 324 (2008).

[96] Act of June 18, 1798, ch. 54, 1 Stat. 566; Act of July 6, 1798, ch. 66, 1 Stat. 577; Act of June 25, 1798 ch. 58, 1 Stat. 570; Sedition Act, ch. 74, 1 Stat. 596. Gerald L. Neuman, *The Lost Century of American Immigration Law (1776-1875)*, 93 COLUM. L. REV. 1833, 1880-81 (1993) [hereinafter Neuman, *Lost Century*].

[97] Markowitz, *supra* note 95, at 326 n.225 (citing Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power Over Foreign Affairs*, 81 TEX. L. REV. 1, 87-98 (2002)); Gregory Fehlings, *Storm on the Constitution: The First Deportation Law*, 10 TULSA J. COMP. & INT'L L. 63, 71 (2002).

[98] 1 Stat. 566.

[99] *Id.*

[100] Act of Apr. 14, 1802, ch. 28, § 2, 2 Stat. 153, 154. *See also* Neuman, *Lost Century*, *supra* note 96, at 1882.

of the immigrant, and punishment of the party responsible for the immigrant's entry.[101] State laws restricting passage of migrants across state borders sought to bar from entry three societal ills: crime, poverty, and disease.[102] They also imposed barriers based on race and religion.[103] Although these laws tended to apply to both domestic and international travelers, the effect was that the fledgling states governed immigration for the first century of this country's existence.[104] The types of sanctions that these early state laws employed to enforce these restrictions on migration varied, but most states directed their sanctions against those responsible for importing the convict into the state.[105]

Two major types of immigration violations resulted in sanctions. Sanctions were a consequence either of violating a state restriction on entry, or of post-entry conduct by an individual who was not a citizen of that state. Although state laws often permitted physical removal of undesirable noncitizens from the territory, many states focused less on the noncitizen than on the party responsible for the noncitizen's entry into the state.[106] Laws prohibiting the entry of out-of-state felons imposed sanctions on the felon that included removal beyond the state border,[107] but often also required the party responsible for importing the felon to cover the cost of removal.[108]

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[101] *See* Neuman, *Lost Century*, *supra* note 96, at 1883.

[102] NEUMAN, STRANGERS, *supra* note 94, at 20.

[103] Legislation prohibiting immigration of free blacks arose in part from fears of revolutionaries from the West Indies and blacks from abolitionist states. *See* Neuman, *Lost Century*, supra note 96, at 1866-67, 1869 (citing, e.g., Act of Dec. 19, 1793, 1793 Ga. Act 24 (prohibiting importing slaves from the West Indies and requiring security from free blacks)). California's attempts to bar Chinese immigrants were the precursors to the first federal immigration restrictions. *See id* at 1872 (describing the connections between West Coast legislation excluding the Chinese and the subsequent federal Chinese Exclusion Act, Act of May 6, 1882, ch. 126, 22 Stat. 58); Kerry Abrams, *Polygamy, Prostitution, and the Federalization of Immigration Law*, 105 COLUM. L. REV. 641, 671-77 (2005) (discussing several California laws that were passed from the 1850s to the 1870s to deter the immigration of Chinese persons, including anti-prostitution laws, miners' tax laws, and Chinese laborer tax laws.); EMBERSON EDWARD PROPER, COLONIAL IMMIGRATION LAWS: A STUDY OF THE REGULATION OF IMMIGRATION BY THE ENGLISH COLONIES IN AMERICA 31 (Columbia Univ. Press 1900) (noting that in the 1700s Massachusetts and several other colonies enacted laws restricting the importation of German persons); *id.* at 35 (noting that the New England Colonies passed laws in the 1700s to prohibit the importation of black slaves); Neuman, *Lost Century*, *supra* note 96, at 1879 (noting that prior to the Civil War Illinois enacted laws prohibiting blacks, slave or free, from entering); *id.* at 1873 (revealing that many Southern states had laws prohibiting free blacks from entering prior to the Civil War); *id.* at 1866-67, n. 219 (detailing how many Northern states, including Indiana and Ohio passed laws in the early 1800s to prevent free blacks from entering). *See also* PROPER, *supra* note 103, at 17-18 (explaining how many of the colonies had laws preventing Catholics from admission); *id.* at 33, 63 (describing laws passed in colonial Virginia and Connecticut barring Quakers from entering).

[104] NEUMAN, STRANGERS, *supra* note 94, at 20.

[105] Neuman, *Lost Century*, *supra* note 96, at 1842.

[106] NEUMAN, STRANGERS, *supra* note 94, at 21.

[107] Act of Feb. 10, 1787, 1787 Ga. Acts 40 (requiring removal of the felon and prohibiting re-entry upon pain of death).

[108] *See e.g.*, Pa. Act of Mar. 27, 1789, ch. 463.; Act of Jan. 28, 1797, ch. 611 § 3, 1797 N.J. Acts 131.

Similarly, state restrictions on entry of impoverished migrants permitted removal as a sanction, but seldom employed it. State immigration laws were a primary means by which states sought to exclude the poor. State laws sought to prevent the settlement of those who might require public assistance by "removing" them to the place that they "legally" originated or settled.[109] Aliens were not permitted to settle lawfully. As a result, they remained indefinitely subject to deportation by local officials at public expense.[110]

Though widespread, these provisions were seldom enforced. Instead, states invented alternate means of encouraging poor immigrants to leave, such as orders to depart upon threat of whipping or incarceration.[111] More commonly, they imposed bonds, fines, or criminal liability on the transporter of the indigent person.[112] As one example, New York, which became the principal port of entry for immigrants arriving by sea, discontinued in 1797 the removal of alien paupers from Europe in favor of a system of bonds and reporting by masters of the vessels transporting the newcomers.[113]

Sanctions for entry of persons with communicable diseases followed a similar pattern. Many state laws simply excluded immigrants with both communicable and noncommunicable diseases.[114] Others required removal of the infected individual or imposed fines or quarantine for violating prohibitions against contact with an infected community.[115]

The only means in these early years to expel a noncitizen after admission was banishment.[116] Banishment for post-entry conduct, also known as "exile" or "transportation," was reserved for out-of-state citizens and foreign immigrants.[117] It arose as a form of criminal punishment,[118] and was a means of

[109] NEUMAN, STRANGERS, *supra* note 94, at 23 & n. 38. A 1794 Massachusetts law provided that an impoverished individual could be removed "by land or water, to any other State, or to any place beyond the sea, where he belongs." Act of Feb. 26, 1794, ch. 32 § 10, 13, 1794 Mass. Acts & Laws 375, 379, 383.

[110] NEUMAN, STRANGERS, *supra* note 94, at 26 (citing as examples the Mass. Act of Feb. 26, 1794, § 13 and Mass. Pub. Stat. ch. 86 § 30 (1886)).

[111] *Id.* at 29 (citing R.I. Rev. Stat. ch. 51 § 35 (1857)).

[112] *Id.* at 25 (citing 1794 Massachusetts's Act of Feb. 26, 1794, ch. 32 § 15), 27 (citing N.Y. Rev. Stat. pt. 1, ch. 20, tit. 1, § 64 (1829), § 69 (1836)), 29 (citing Act of June 1847, 1847 R.I. Acts 27; R.I. Rev. Stat. ch. 51, §§ 5-8 (1857)), 29-30 (citing Act of Mar. 29, 1803, §§ 21, 23, 1801-03 Pa. Laws 507, 525-26).

[113] Neuman, *Lost Century*, *supra* note 96, at 1854-85 (citing Act of Apr. 3, 1797, ch. 101, § 2, 1797 N.Y. Laws 134, 135).

[114] NEUMAN, STRANGERS, *supra* note 94, at 31-32.

[115] Conn. Rev. Stat. tit. 91 § 6 (1821) (specifying a fine for willfully violating prohibition against communication with an infected town in an adjoining state); Act of Apr. 17, 1795, ch. 327, §4, 1794-95, Pa. Acts 734 (providing for fines and quarantine for violating prohibition against intercourse with infected places in the United States). *See also* NEUMAN, STRANGERS, *supra* note 94, at 31-32.

[116] Markowitz, *supra* note 95, at 325; Kanstroom, *Social Control*, *supra* note 4, at 1908 (noting that early state laws, "which often focused on the exclusion of convicted criminals, seem never to have focused on the deportation of noncitizens for post-entry criminal conduct.").

[117] *See* Javier Bleichmar, *Deportation as Punishment: A Historical Analysis of the British Practice of Banishment and Its Impact on Modern Constitutional Law*, 14 GEO. IMMIGR. L.J. 115 (1999)

purging the United States of British loyalists.[119] Unlike the modern form of deportation, banishment was imposed only after the full panoply of criminal procedures and protections.[120] Thus, the Framers of the Constitution were unfamiliar with civil deportation as it exists today.[121]

B. Federal Sanctions: from 1870 to the 1920s

The first federal law imposing immigration-related sanctions in the new age of federal regulation of immigration law began – not with deportation – but with criminal penalties: incarceration, fines, and hard labor. The Naturalization Act of 1870, which extended the privilege of naturalization to aliens of African nativity and to persons of African descent,[122] made use of all three of these penalties. The Act threatened fines, incarceration, and hard labor for knowingly committing perjury relating to naturalization proceedings or fraudulently obtaining a certificate of citizenship.[123]

When federal regulation of immigration began in earnest in 1875, it restricted the entry of noncitizens but did not institute deportation of those who had been admitted.[124] Responding to allegations of widespread importation of Chinese prostitutes and European criminals,[125] Congress passed restrictions on entry based on prostitution and crimes of moral turpitude.[126] Widespread anti-Chinese sentiment led to the passage of the Chinese Exclusion Act and other statutes that expanded the list of excludable classes.[127]

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

(explaining that at the time of the founding of the United States, banishment was a form of punishment, and noting that courts have either misunderstood this history or ignored it when ruling that deportation is purely a civil remedy); *see generally* Markowitz, *supra* note 95 (arguing that the history of deportation and its roots in banishment as a criminal punishment compels the application of criminal law protections in expulsion proceedings involving lawful permanent residents).

[118] *See* NEUMAN, STRANGERS, *supra* note 94, at 22.

[119] *See id.* at 23.

[120] Markowitz, *supra* note 95, at 325.

[121] *Id.* at 327.

[122] Naturalization Act of July 14, 1870, ch. 254, 16 Stat. 254.

[123] *Id.*

[124] Kanstroom, *Social Control*, *supra* note 4, at 1908.

[125] HUTCHINSON, *supra* note 95, at 66.

[126] Act of Mar. 3, 1875, ch. 141, 18 Stat. 477. *See* Mae Ngai, *The Strange Career of the Illegal Alien: Immigration Restriction and Deportation Policy in The United States, 1921-1965*, 21 LAW & HIST. REV. 69, 73 (2003) [hereinafter Ngai, *Strange Career*]. *See also* Kerry Abrams, *Polygamy, Prostitution, and the Federalization of Immigration Law*, 105 COLUM. L. REV. 641, 643 (2005) (positing that the Page Act was passed to prevent the entry of Chinese women in order to prevent perceived disruption of accepted conceptions of marriage and family).

[127] Chinese Exclusion Act of May 6, 1882, ch.126, 22 Stat. 58; Immigration Act of Aug. 3, 1882, ch. 376, 22 Stat. 214; Act of Feb. 26, 1885, ch.164, 23 Stat. 332; Act of Feb. 23, 1887, ch. 220, 24 Stat. 414. *See also* Ngai, *Strange Career*, *supra* note 126, at 73; HUTCHINSON, *supra* note 95, at 83.

to one year.[128] A fraudulent immigration certificate could lead to imprisonment for up to five years, and aiding a Chinese person who was ineligible to lawfully enter the United States could result in a year's confinement.[129] In 1884, aiding a noncitizen's entry in violation of the labor contract laws invited a $500 fine.[130] The grounds for exclusion expanded during the 1880s, but without provisions made for guarding the border, excludable noncitizens continued to enter.[131] Such noncitizens were typically imprisoned if discovered.[132]

When deportation laws finally appeared in the late 1880s, their reach was considerably limited in comparison to current law. The first federal deportation laws confined deportation to conditions existing at or prior to entry into the country.[133] In 1888, Congress mandated that aliens who landed in violation of contract labor laws[134] were to be deported at their own expense or at the expense of the owner of the importing vessel.[135] It was the first time since the dubious legislation of 1798 that Congress had authorized deportation of aliens already present in the United States. In 1891, Congress provided for removal within one year of any noncitizen who was inadmissible at the time of entry.[136] The 1891 Act also authorized deportation of "any alien who becomes a public charge within one year after his arrival," but only if the reason for deportation arose "from causes existing prior" to entering the country.[137]

In light of the early attempts to enforce immigration law using criminal penalties, it is not surprising that the first challenges to these immigration sanctions were grounded on the constitutional protections of a criminal trial. By the early 1890s, Congress had constructed a patchwork of sanctions for immigration violations that included deportation, incarceration, and fines. In 1892, new legislation singled out Chinese citizens unlawfully present in the

[128] Chinese Exclusion Act of May 6, 1882, ch.126, 22 Stat. 58.
[129] *Id*.
[130] Act of Feb. 26, 1885, ch. 164, 23 Stat. 332. *See* HUTCHINSON, *supra* note 95, at 89.
[131] *See* Ngai, *Strange Career*, *supra* note 126, at 73-74.
[132] *Id*. at 74-75.
[133] *See* Kanstroom, *Social Control*, *supra* note 4, at 1909-10 (identifying the Act of Mar. 3, 1875, ch. 141, 18 Stat. 477 as the first federal immigration law to provide for deportation as an "immediate part of the exclusion process" because it allowed immigration authorities at the port of entry to deport prostitutes and persons who had committed a crime of moral turpitude). *See also* Act of Mar. 3, 1891, ch. 551, 26 Stat. 1084 (providing for deportation within one year of entry of any alien who unlawfully entered the United States).
[134] Alien Contract Labor Law of 1885, Feb. 26, 1885, ch.164, 23 Stat. 332; Act of Feb. 23, 1887, ch. 220, 24 Stat. 414.
[135] Act of Oct. 19, 1888, ch. 1210, 25 Stat. 566. See HUTCHINSON, *supra* note 95, at 96.
[136] Act of Mar. 3, 1891, ch. 551, §11, 26 Stat. 1084 (superseded by Act of Mar. 3, 1902, ch. 112, §§ 20, 36, 32 Stat. 1213, 1218, 1221 (repealed in 1907) (requiring removal of "any alien who shall come into the United States in violation of law … at any time within one year thereafter…. at the expense of the person or persons, vessel, transportation company, or corporation bringing such alien into the United States, and if that can not be done, then at the expense of the United States").
[137] 26 Stat. 1084. *See* Kanstroom, *Social Control*, *supra* note 4, at 1909-11 (distinguishing pre-1907 entry control measures from the later post-entry grounds for deportation, which he argues became a form of social control).

United States, imposing imprisonment at hard labor for up to a year.[138] All of these (with the possible exception of fines which could be both criminal and civil), were traditionally considered criminal sanctions.[139]

The Supreme Court faced challenges to this sanctions scheme in two seminal cases. In the 1893 case of *Fong Yue Ting v. United States*,[140] the Supreme Court ruled that noncitizens facing deportation were not entitled to the constitutional safeguards reserved for criminal punishment.[141] Three years later, in *Wong Wing v. United States*,[142] the Court ruled that, although immigration authorities may use detention or temporary confinement "as part of the means necessary to give effect to…the exclusion or expulsion of aliens," they lacked the power to impose criminal punishment.[143]

Deportation for causes arising after entry did not appear until 1907. A 1907 statute mandated deportation of "any alien woman or girl [found to be a prostitute]…within three years after she shall have entered the United States,"[144] establishing deportation as a sanction for conduct occurring after entry.[145] In 1910, Congress struck the three-year limitation, authorizing deportation of noncitizen women found to be prostitutes at any time after their entry.[146] This was the first time that the United States had mandated deportation of lawful immigrants admitted for permanent residence for conduct occurring after entry.

Helena Bugajewitz challenged the constitutionality of the Act as amended, arguing that it constituted criminal punishment because the conduct for which she was to be deported was also a crime. In *Bugajewitz v. Adams*,[147] the Court held that her deportation was not a criminal punishment despite the overlap of the underlying facts with facts establishing a crime under local law.

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[138] Act of May 5, 1892, ch. 60, 27 Stat. 25. *See* Kanstroom, *Social Control*, *supra* note 4, at 1902.

[139] *See* Markowitz, *supra* note 95, at 325-327. *See also* Wong Wing v. United States, 63 U.S. 228, 237 (1896) (recognizing that imprisonment at hard labor was considered an infamous punishment for crimes in England and the America since the 1700s); Overton v. Bazzetta, 539 U.S. 126, 142-143 (2003) (Thomas, J., concurring) (noting that incarceration became the "centerpiece of correctional theory" around the 19th century, as the use of corporal punishment fell into disrepute).

[140] Fong Yue Ting v. United States, 149 U.S. 698, 730 (1893).

[141] *Fong Yue Ting*, 149 U.S. at 730. *See also* Kanstroom, *Social Control*, *supra* note 4, at 1901.

[142] Wong Wing v. United States, 163 U.S. 228, 235 (1896).

[143] *Wong Wing*, 163 U.S. at 237-38 (stating that "[i]t is not consistent with the theory of our government that the legislature should, after having defined an offense as an infamous crime, find the fact of guilt, and adjudge the punishment by one of its own agents" and concluding that "the commissioner [of immigration], in sentencing the appellants to imprisonment at hard labor…, acted without jurisdiction.").

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

[145] *See* Kanstroom, *Social Control*, *supra* note 4, at 1911 (arguing that the 1907 Act nevertheless tied the post-entry conduct to pre-entry conditions).

[146] Act of Mar. 26, 1910, ch. 128, 2, 36 Stat. 263, 265 (repealed 1917). *See* DANIEL KANSTROOM, DEPORTATION NATION: OUTSIDERS IN AMERICAN HISTORY 125-26 (2007) [hereinafter KANSTROOM, DEPORTATION NATION].

[147] Bugajewitz v. Adams, 228 U.S. 585 (1913).

Rather, it was "simply a refusal by the government to harbor persons whom it does not want."[148]

Together, *Fong Yue Ting*, *Wong Wing* and *Bugajewitz* established that deportation and criminal punishment were completely distinct sanctions, arising from unrelated legal authority and governed by distinct agents: federal immigration authorities and (primarily) state prosecutors.[149] That separation permitted legislators to shape a sanctions scheme for immigration violations without regard to the existence of criminal sanctions for the same conduct, and it allowed courts to review deportability challenges divorced from the larger picture of how the deportation determination and criminal punishment affected the individual noncitizen.

C. The Rise of Deportation

The 1920s mark the beginning of the prominence of deportation in immigration law. Having broken the barrier to imposing deportation for post-entry conduct, deportation legislation began in earnest.[150] And it began with the early criminalization of immigration law.

Prior to the 1920s, deportation was rare. Between 1892 and 1907, the United States deported a few hundred noncitizens. The period between 1908 and 1920 saw a small jump, with 2000 to 3000 deported.[151] That increase resulted, in part, from post-war legislation in 1917 that authorized deportation of noncitizens who committed "crimes of moral turpitude" after their entry into the United States and eliminated the statute of limitations for deporting certain aliens determined to be anarchists.[152] The Palmer Raids of 1919 and 1920, in which the federal government arrested over 10,000 suspected alien anarchists and deported approximately 500 Eastern European noncitizens, more than doubled the previous number of annual deportations.[153]

Thus, immigration legislation passed just prior to the 1920s expanded the grounds for exclusion. Nevertheless, the tenacity of the statute of limitations on deportation[154] and the conspicuous absence of entry without inspection as a

[148] *Bugajewitz*, 228 U.S. at 592.

[149] The states were the primary enactors and enforcers of criminal law at this juncture. *See* Juliet Stumpf, *States of Confusion: the Domestication of Immigration Law*, 86 N.C. L. REV. 1557, 1580 (2008).

[150] *See* KANSTROOM, DEPORTATION NATION, *supra* note 146, at 132.

[151] HISTORICAL STATISTICS OF THE U.S. FROM COLONIAL TIMES TO 1970 114 (Washington, DC: GPO, 1975). *See also* Ngai, *Strange Career*, *supra* note 126, at 74; *INS Annual Report, 1921* 14-15; William Van Vleck, *Administrative Control of Aliens* 20 (New York: Commonwealth Fund 1932).

[152] Immigration Act of Feb. 5, 1917, ch. 29, 39 Stat. 874. *See also* NEUMAN, STRANGERS, *supra* note 94, at 1844; Ngai, *Strange Career*, *supra* note 126, at 74.

[153] CHARLES H. MCCORMICK, SEEING REDS: FEDERAL SURVEILLANCE OF RADICALS IN THE PITTSBURGH MILL DISTRICT, 1917-1921 (1997); ROBERT K. MURRAY, RED SCARE: A STUDY IN NATIONAL HYSTERIA, 1919-1920, 212-17 (1955); NGAI, IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA 59 (2004) [hereinafter NGAI, IMPOSSIBLE SUBJECTS].

[154] Ngai, IMPOSSIBLE SUBJECTS, *supra* note 153, at 59.

ground for deportation[155] meant that deportation remained an extension of exclusion, a way of revoking the admission of excludable noncitizens. As Mae Ngai has suggested, "it seemed unconscionable to expel immigrants after they had settled in the country and had begun to assimilate."[156]

The early 1920s saw the passage of quota laws for immigrants, ending the legacy of open immigration from Europe.[157] Legislation passed in 1924 eliminated the statute of limitations for entering the United States without authorization, opening the way for deportation on a mass scale.[158] Between 1925 and 1929, the number of deportations quadrupled.[159]

The new approach to immigration control continued to employ well-established enforcement approaches and sanctions, including placing the onus on third parties to prevent unauthorized immigration. For example, the quota legislation of the early 1920s expanded the imposition of fines on transportation companies that imported inadmissible noncitizens.[160]

In 1929, legislation expanding the scope of criminal offenses that led to deportation solidified the role of deportation as the central immigration sanction and further intertwined it with criminal sanctions.[161] The law subjected to deportation all aliens convicted of any offense and sentenced to two years or more of imprisonment.[162] The Act made unlawful entry a criminal misdemeanor, punishable by up to one year in jail, a $1000 fine, or both.[163] A second unlawful entry became a felony, with a doubling of the sanctions.[164] Deportation was deferred until the end of the sentence.[165] This Act pioneered the modern immigration sanctions scheme, employing a range of punitive criminal sanctions paired with deportation. Plumbing the full implications of *Bugajewitz*'s holding that deportation was not a form of punishment, the Act rendered criminal what had previously been a pure immigration violation. Of the 40,000 criminal cases that the U.S. Immigration Service brought against

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[155] Ngai, *Strange Career*, *supra* note 126, at 74.
[156] *Id.*
[157] Quota Law of May 19, 1921, ch. 8, 42 Stat. 5; Immigration Act of May 26, 1924, ch. 190, 43 Stat. 153. Ngai, *Strange Career*, supra note 126, at 74-75. *See also* James F. Smith, *A Nation that Welcomes Immigrants? An Historical Examination of United States Immigration Policy*, 1 U.C. Davis J. Int'l L. & Pol'y 227, 232 (1995).
[158] Immigration Act of May 26, 1924, ch. 190, 43 Stat. 153; *see also* Ngai, *Strange Career*, *supra* note 126, at 76.
[159] HISTORICAL STATISTICS OF THE U.S. FROM COLONIAL TIMES TO 1970 114 (Washington, DC: GPO, 1975) (showing an increase from 9,465 to 38,796); *see also* Ngai, *Strange Career*, *supra* note 126, at 77.
[160] Act of May 11, 1922, ch. 187, 42 Stat. 540; Immigration Act of May 26, 1924, ch. 190, 43 Stat. 153.
[161] Act of Mar. 4, 1929, ch. 690, 45 Stat. 1551. *See also* HUTCHINSON, *supra* note 95, at 208-10.
[162] *Id.*
[163] Act of Mar. 4, 1929, ch. 690, 45 Stat. 1551.
[164] *Id.*
[165] *Id.*

unlawful entrants between 1929 and 1932, the government prevailed in 90 percent of them.[166]

The 1929 Act held up a mirror to *Bugajewitz*. Instead of a deportation statute that overlapped with a state criminal statute, the Act created a federal crime from facts that overlapped with deportability grounds. Enforcement of unlawful entry violations now employed criminal sanctions, in addition to deportation and fines. The criminal conviction also barred future re-entry.[167] Consistent with *Wong Wing* and *Bugajewitz*, those sanctions were now governed by two proceedings: first in federal court to try the criminal charge and subsequently as a civil adjudication to effect removal.[168]

The 1930s through the 1960s saw further restrictions on immigration and the development of flexibility and discretion in imposing deportation and other sanctions. Depression Era legislation expanded the exclusion of persons likely to become a public charge.[169] Violations of narcotics laws and the fraudulent use of marriage to obtain legal status became grounds for removal.[170]

Legislation in the 1940s and 1950s expanded the grounds for deportation, including mandating deportation for conduct occurring prior to the date of the statutes,[171] and requiring deportation of all aliens who unlawfully entered the United States, including aliens who were not admissible at the time of entry (even those who have an otherwise valid visa but are nonetheless excludable).[172] The Internal Security Act expanded the Attorney General's power to detain non-citizens pending execution of a deportation order.[173]

Sanctions other than deportation also arose during this period. Failure to depart after removal based on grounds of subversive, criminal, or immoral conduct became a crime carrying the threat of ten years in prison.[174] Bars to re-entry appeared for noncitizens who had been previously excluded and deported,[175] as well as a ten-year prohibition against naturalization of noncitizens who associated with the Communist party.[176]

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[166] NGAI, IMPOSSIBLE SUBJECTS, *supra* note 153, at 292, n. 14 (citing the *INS Annual Reports for 1929-1932*).

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

[168] Act of 1929, 45 Stat. 1551 (deferring deportation until the end of imprisonment). *See also* HUTCHINSON, *supra* note 95, at 210.

[169] *See* HUTCHINSON, *supra* note 95, at 214.

[170] Act of Feb. 18, 1931, ch. 224, 46 Stat. 1171 (narcotics); Act of May 14, 1937, ch. 182, 50 Stat. 164 (fraudulent marriage). *See* HUTCHINSON, *supra* note 95, at 220, 242-43.

[171] Alien Registration Act of June 28, 1940, ch. 439, 54 Stat. 670; Immigration and Nationality Act of June 27, 1952, ch. 477, 66 Stat. 163 (deportation permitted even if the deportable offense was committed or the alien entered the U.S. prior to the enactment of the law). *See also* Maslow, *supra* note 167, at 314.

[172] Immigration and Nationality Act of June 27, 1952, ch. 477, 66 Stat. 163; *see also* Maslow, *supra* note 167, at 314.

[173] Internal Security Act of Sept. 22, 1950, ch. 1024, 64 Stat. 987. Maslow, *supra* note 167, at 314.

[174] Internal Security Act, ch. 1024, 64 Stat. 987.

[175] Immigration and Nationality Act of June 27, 1952, ch. 477, 66 Stat. 163, establishing criteria for a permanent bar but providing for consent from the Attorney General to reapply for reentry); *see* INA

This more restrictive legislation, however, was accompanied by a move toward administrative discretion to expand relief from the harsh consequences of those laws. The Alien Registration Act allowed the Attorney General to grant voluntary departure or suspend deportation of noncitizens of good moral character when deportation would work an economic hardship on the noncitizen's family.[177] Although the 1950s saw a narrowing of the Attorney General's discretion to grant such relief,[178] Congress later codified suspension of deportation in 1962.[179] Nevertheless, the expansion of deportation grounds and the national focus on immigration had its effect: the rate of deportation multiplied, from under 250,000 in the 20 years between 1950 and 1969, to almost double that rate between 1970 and 1989.[180]

In sum, by the 1980s, the evolution of immigration law embodied an expansion in the nature and availability of immigration sanctions. Modern immigration law has rendered deportation the ubiquitous sanction, imposed either alone or accompanied by other sanctions that included fines, incarceration, detention, and bars to re-entry.

D. Crimmigration Law

The modern era of immigration sanctions, beginning in the middle of the 1980s, is marked by a major expansion of immigration sanctions, higher levels of enforcement, and a narrowing of avenues for the government to exercise discretionary relief from removal. This evolution is in no small part due to the criminalization of immigration law, or "crimmigration law."[181] The development of crimmigration law starkly highlights the lack of proportionality in immigration law.

This section will describe a legislative transformation of immigration law through which a vast swath of immigration violations now carry criminal penalties, and whole categories of crimes have become grounds for removal from the United States.[182] Although immigration law has taken on criminal

§ 212(a)(16)-(17).

[176] Internal Security Act of Sept. 22, 1950, ch. 1024, 64 Stat. 987.

[177] Alien Registration Act of June 28, 1940, ch. 439, 54 Stat. 670; *see also* NGAI, IMPOSSIBLE SUBJECTS, *supra* note 153, at 87. The current version of suspension of deportation is very narrow. *See* INA § 244(a).

[178] Internal Security Act of Sept. 22, 1950, ch. 1024, 64 Stat. 987; Immigration and Nationality Act of June 27, 1952, ch. 477, 66 Stat. 163 (also known as the McCarran-Walter Act) (broadening deportation powers of Attorney General but prohibiting suspension of deportation or grants of voluntary departure to aliens who fell into any one of eleven categories, including aliens considered subversive, criminal, or immoral, or those who violated alien registration laws). *See* Maslow, *supra* note 167, at 314, 316-17.

[179] Act of Oct. 24, 1962, 76 Stat. 1247 (providing for suspension of deportation for aliens who had been present in the U.S. for either seven or ten years). *See* HUTCHINSON, *supra* note 95, at 356.

[180] *See* Office of Immigration Statistics, U.S. Dep't of Homeland Sec., Yearbook of Immigration Statistics (2006), available at http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2005/table38.xls.

[181] *See* Stumpf, *supra* note 2, at 376.

[182] *See generally* Demleitner, *supra* note 4; Kanstroom, *Social Control*, *supra* note 4, at 1892; Miller,

enforcement norms, it has not similarly incorporated criminal justice norms.[183] In particular, criminal justice norms that influence the framework of criminal penalties have found no foothold in immigration law. The graduated structure of criminal punishment, in which penalties tend to be proportionate to the crime, has no parallel in immigration law.

1. Immigration Violations as Criminal Violations

While some immigration violations carried criminal penalties before the 1980s,[184] that decade was the beginning of a vast expansion of criminal penalties in the immigration law arena.[185] Traditionally, violating immigration law resulted in a civil proceeding to determine whether the noncitizen was subject to removal from the United States.[186] Now, many immigration violations result not only in removal but also carry criminal penalties, and criminal prosecution has more often become the vehicle for enforcement of those violations prior to the removal proceeding.[187]

In 1986, Congress provided for imprisonment and criminal fines for a pattern or practice of knowingly hiring undocumented workers,[188] and then created the crime of marrying to evade immigration laws.[189] Since then Congress has created a host of new immigration crimes, including entrepreneurship fraud,[190] driving at excessive speed while fleeing an

Citizenship & Severity, *supra* note 3, at 613; Stumpf, *supra* note 2, at 369.

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

[184] *E.g.*, Internal Security Act of Sept. 22, 1950, ch. 1024, 64 Stat. 987 (mandating that any alien deportable as being subversive, criminal, or immoral and who failed to depart within six months after being ordered removed was subject to criminal prosecution and up to ten years in prison); Act of June 19, 1968, Title VII, 82 Stat. 197 (imposing up to two years of imprisonment on unauthorized immigrants possessing a gun, on the ground that such aliens posed a threat to the President and Vice President of the United States).

[185] Daniel Kanstroom, *Criminalizing the Undocumented: Ironic Boundaries of the Post-9/11 "Pale of Law,"* 29 N.C. J. INT'L & COM. REG. 639, 640 (2004) [hereinafter Kanstroom, *Criminalizing the Undocumented*]; Legomsky, *supra* note 2, at 476-82; Miller, *Citizenship & Severity*, *supra* note 3, at 617.

[186] 8 U.S.C. § 1227(a) (2000) (listing categories of removable noncitizens).

[187] Miller, *Citizenship & Severity*, *supra* note 3, at 639-42; Kanstroom, *Criminalizing the Undocumented*, *supra* note 185, at 654-55; Stumpf, *supra* note 1, at 384; Legomsky, *supra* note 1, at 476.

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

[189] Immigration Marriage Fraud Amendments of 1986, Pub. L. No. 99-639, 100 Stat. 3537 (codified as amended in scattered sections of 8 U.S.C.).

[190] Immigration Act of 1990 § 121(b)(3), 8 U.S.C. § 1325(d)(2000) (defining as a criminal act establishing a commercial enterprise for the purpose of evading immigration laws).

immigration checkpoint,[191] filing an immigration application without a reasonable basis,[192] voting in a federal election as a noncitizen, [193] falsely claiming citizenship to obtain a benefit or employment,[194] and failing to cooperate in the execution of one's own removal order.[195] Concurrently, the severity of criminal fines and sentence lengths for immigration-related violations increased dramatically.[196]

2. Crimes Resulting in Removal Proceedings

The number and nature of crimes that result in removal proceedings have proliferated,[197] which has enthroned deportation as the central penalty for immigration violations. Removal of noncitizens for criminal offenses was largely limited in the early 1980s to convictions for serious "crimes of moral turpitude," drug trafficking, and certain weapons offenses.[198] Now, a crime of moral turpitude carrying a sentence of one year is a removable offense.[199]

In 1988, Congress created a category of crimes that result in removal from the United States and dubbed them "aggravated felonies."[200] Originally this category included only murder and trafficking in drugs or firearms.[201] By expanding the list of aggravated felonies in almost every immigration-related

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[191] IIRIRA § 108, 18 U.S.C. § 758 (2000).
[192] *Id.* § 214, 110 Stat. 3009-546, 3009-627, 18 U.S.C. § 1546(a) (2000).
[193.] *Id.* §§ 215-216, 110 Stat. 3009-546, 3009-627 (codified as amended at 8 U.S.C. § 1101(a)(43)(F)-(G) (2000)).
[194.] *Id.*
[195] *Id.* § 307(a), (codified as amended at 8 U.S.C. § 1253 (2000)).
[196] Criminal penalties for unlawfully re-entering the United States after deportation or exclusion increased from two years to a maximum of ten or twenty years. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 13001, 108 Stat. 1796, 2023 (codified at 8 U.S.C. § 1326 (1994)). *See also* Anti-Drug Abuse Act of 1988 (Drug Kingpin Act), Pub. L. No. 100-690, § 7345, 102 Stat. 4181, 4471 (increasing the maximum sentence to five to fifteen years for unlawful re-entry, depending upon whether the noncitizen's prior deportation was based on an aggravated felony offense). *See* Miller, *Citizenship and Severity*, *supra* note 1, at 640; Legomsky, *supra* note 1, at 478-79. Immigration prosecutions are now the largest single type of federal prosecutions. *See* TRAC REPORTS, TRAC/DHS, IMMIGRATION ENFORCEMENT, NEW FINDINGS (2005), http://trac.syr.edu/tracins/latest/current (revealing that immigration matters represent 32% of the total number of federal prosecutions and comparing the total to drug and weapons prosecutions).
[197] Legomsky, *supra* note 2, at 482-86.
[198] ELIZABETH J. HARPER, IMMIGRATION LAWS OF THE UNITED STATES 612-13 (3d ed. 1975); Miller, *Citizenship & Severity*, *supra* note 1, at 622.
[199] Antiterrorism and Effective Death Penalty Act ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 279, § 435 (1996) (codified at 8 U.S.C. § 1227(a)(2)(A)(i) (2000)). Congress has never defined the intriguing term "crime involving moral turpitude." There is no shortage of criticism of the use of this undefined category of crimes as a basis for removal of noncitizens from the United States. Brian C. Harms, *Redefining "Crimes of Moral Turpitude": A Proposal to Congress*, 15 GEO. IMMIGR. L.J. 259, 259-60 (2001); Nate Carter, *Shocking The Conscience Of Mankind: Using International Law To Define "Crimes Involving Moral Turpitude" In Immigration Law*, 10 LEWIS & CLARK L. REV. 955, 958-59 (2006).
[200] The Anti-Drug Abuse Act of 1988 (Drug Kingpin Act), Pub. L. No. 100-690, § 7342, 102 Stat. 4181, 4469 (1988).
[201] *Id.*

piece of legislation since its creation, the category of aggravated felonies burgeons with less serious crimes, including misdemeanors.[202]

The "aggravated felony" construct is now a misnomer. It is neither limited to felonies, nor describes crimes that conjure the concept of "aggravated." Nevertheless, conviction of any of the listed crimes almost invariably results in removal from the United States. Because these statutes almost completely wiped away any avenue of relief from removal based on an aggravated felony,[203] the number of long-term permanent residents deported for minor crimes has skyrocketed.[204]

Widespread application of criminal enforcement theory to immigration law also has played a part in establishing deportation as the ubiquitous immigration penalty.[205] Grounds for deportation generally fall into two categories. The first category justifies deportation on the grounds that the individual should not have been admitted in the first place or that they violated a condition of their admission to the United States.[206] The second includes deportations based on post-entry conduct, including post-entry criminal convictions.[207]

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[202] Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (1990); Immigration and Technical Corrections Act, Pub. L. No. 103-416, 108 Stat. 4305 (1994); AEDPA, § 435 (codified at 8 U.S.C. § 1182(a) (1)-(33)(2000)) (making a single crime of "moral turpitude" a deportable offense); IIRIRA, Pub. L. No. 104-208, 110 Stat. 3009-590 (1996) (codified as amended at 9 U.S.C. § 1229a(B) (2000) (reducing to one year the sentence length required for a "crime of violence."). Examples include prostitution, acts related to gambling, transportation related to prostitution, alien smuggling, some forms of document fraud, offenses committed by a previously deported alien, and offenses related to skipping bail. *See also* Miller, *Citizenship & Severity*, *supra* note 3, at 634-35; Demleitner, *supra* note 4, at 1064.

[203] Miller, *Citizenship & Severity*, *supra* note 3, at 653. Morawetz, *supra* note 42, at 1939-40.

[204] *See* Legomsky, *supra* note 2, at 485 & n. 77. In 1995, 98% of LPR removals were based on criminal charges. In 2004, 95.5% of LPR removals were based on criminal charges. *See* Markowitz, *supra* note 95, at 333 n.260 (citing Congressional Res. Service, et. al, Immigration Enforcement within the United States (Apr. 6, 2006), available at http://www.fas.org/sgp/crs/misc/RL33351.pdf (providing statistics based on reasons for removal)). In 1988, 5,956 aliens were removed on criminal or narcotics grounds. U.S. Immigration and Naturalization Serv., Statistical Yearbook of the Immigration and Naturalization Service, 1996 171 (1997), available at http://www.dhs.gov/ximgtn/statistics/publications/archive.shtm. The number of aliens deported on criminal grounds has risen each year (62,108 in 1998; 71,188 in 1999; 73,065 in 2000; 73,545 in 2001; 72,818 in 2002; 82,822 in 2003; 91,508 in 2004; 91,725 in 2005; 97,365 in 2006) with the most recent data for 2007 showing 99,924 deportations based on criminal grounds. *See* Office of Immigration Statistics, U.S. Dep't of Homeland Sec., YEARBOOK OF IMMIGRATION STATISTICS: 2007 96, 99, 102 (2008), available at http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2007/ois_2007_yearbook.pdf.

[205] *See* Legomsky, *supra* note 2, at 487.

[206] INA § 237(a)(1)(A) (any alien present in the United States who was inadmissible at time of entry is subject to deportation); § 237(a)(1)(C)(i) ("any alien who was admitted as a nonimmigrant and who has failed to maintain the nonimmigrant status…or to comply with the conditions of any such status, is deportable"); s*ee* CHARLES GORDON, ET AL., IMMIGRATION LAW AND PROCEDURE § 71.05 (2006); Legomsky, *supra* note 2, at 487.

[207] INA § 237(a)(2)(A)(i) (alien convicted of a crime involving moral turpitude for which a sentence of one year or more may be imposed and which is committed within five years (or ten years for lawful permanent residents) after the date of admission is deportable); § 237(a)(2)(A)(iii) ("alien

Since 1986, there has been a sharp increase in the level of enforcement of those post-entry deportation grounds, to the extent that they reached 50% of all deportations in the 1990s.[208] Justification for deportation based on this second category of post-entry conduct, it has been argued, resembles the traditional justifications for criminal punishment, including deterrence, incapacitation, and retribution.[209]

3. Immigration Law Enforcement

The expanded use of preventive detention and the increasing contact between immigrants and law enforcement personnel have imported elements of the criminal enforcement model into the immigration sanctions scheme.[210] Preventive detention in the immigration context now outstrips its more limited use in the criminal enforcement model which largely limits such detention to the period before trial.[211] Since 1988, detention has been mandatory pending a removal hearing for noncitizens convicted of an aggravated felony.[212] The grounds for mandatory detention have proliferated since then to include detention of any noncitizen removable on the basis of a criminal conviction or a connection to terrorism, arriving passengers, and noncitizens under a removal order prior to the removal itself.[213] The Department of Homeland Security has also stepped up its discretionary decisions to detain noncitizens for other reasons.[214]

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who is convicted of aggravated felony at any time after admission is deportable"); § 237(a)(2)(B)(i) (alien who after admission is convicted of violation of controlled substance laws, excepting single offense involving possession of 30 grams or less of marijuana for personal use, is deportable); § 237(a)(2)(B)(ii) ("alien who is, or at any time after admission has been, a drug abuser or addict is deportable"); § 237(a)(3)(A) (alien who fails to comply with INA provisions regarding notifying immigration authorities of change of address is deportable); § 237(a)(4)(A)(ii) (alien who engages in criminal activity which endangers public safety is deportable); *see* Legomsky, *supra* note 2, at 487-88; Kanstroom, *Social Control*, *supra* note 4, at 1893-94.

[208] *See* Legomsky, *supra* note 2, at 488-89 & n. 92 &93.

[209] *See id.* at 514.

[210] *See id.* at 489-96; Stumpf, *Crimmigration Crisis*, *supra* note 2, at 391.

[211] 18 U.S.C. § 3141 (2000) (providing for detention of persons pending criminal trial). *See* Morawetz, *supra* note 42, at 1946-47 (detailing the severity of immigration detention by noting that a person convicted of simple drug possession who was not sentenced to incarceration faces mandatory detention which can last for several years until the deportation process is complete); *but see* Rodriguez-Fernandez v. Wilkinson, 654 F.2d 1382, 1387 (10th Cir. 1981) (holding detention pending deportation is analogous to incarceration pending trial and thus is justifiable only as a temporary measure).

[212] *See* 8 U.S.C. § 1107(a) (2000) (mandating detention of aggravated felons).

[213] *See* 8 U.S.C. §§ 1225(b)(1)(B)(iii)(IV), (b)(2)(A), 1226(c)(1)(A)-(D) (mandating detention for asylum seekers, noncitizens not clearly admissible, and noncitizens convicted of crimes); Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism ("PATRIOT") Act of 2001, §§ 411-12 Pub. L. No. 107-56, 115 Stat. 272, 345-52, 8 U.S.C. §§ 1182, 1189, 1226(a) (mandating detention for those suspected of terrorism). *See also* Stumpf, *supra* note 2, at 393-94.

[214] After the events of September 11, 2001, DHS promulgated a regulation permitting it to detain noncitizens even before filing immigration charges for a "reasonable" period of time "in the event of an emergency or other extraordinary circumstance." 8 C.F.R. § 287.3(d) (2007). *See* Charles D.

Moreover, the same actors enforce both immigration and criminal law.[215] State and local law enforcement now play a substantial role in immigration enforcement[216] as a result of federal legislation[217] and encouragement from the Department of Justice and the Department of Homeland Security for police to take part in enforcement of immigration violations, both criminal and civil.[218] Federal judges now have authority to

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, 829 (2005) (noting that prior regulations gave the INS twenty-four hours to decide whether to charge a detained alien). DHS has detained asylum seekers from thirty-three countries with primarily Muslim or Arab populations. *See id.* (describing the detention of asylum-seekers from designated countries where al-Qaeda is present); Donald Kerwin, *Counterterrorism and Immigrant Rights Two Years Later*, 80 INTERP. REL. 1401, 1402-03 (2003) (explaining that these designated countries are any countries in which Al Qaeda is present).

[215] Legomsky, *supra* note 2, at 496-500.

[216] Traditionally, immigration law enforcement was a federal responsibility, a duty of the sovereign state. Stumpf, *States of Confusion*, *supra* note 149; Huyen Pham, *The Constitutional Right Not to Cooperate? Local Sovereignty and the Federal Immigration Power*, 74 U. CIN. L. REV. 1373, 1381 (2005-2006) (noting that courts largely agree that the federal government has exclusive power over immigration regulation and have located that power in the Naturalization Clause, the Foreign Affairs Clauses, and the Commerce Clause of the Constitution along with the sovereign power of the nation); Wishnie, *supra* note 62, at 1089 (stating that "Congress's extensive regulation of immigration enforcement has preempted, directly or by implication, state and local arrest authority"); DeCanas v. Bica, 424 U.S. 351, 354 (1976) (declaring that the power to regulate immigration belongs exclusively to the federal government); Chy Lung v. Freeman, 92 U.S. 275, 280 (1875) (holding that immigration power belongs to the federal government, not to the States).

[217] *See* AEDPA § 439 (codified at 8 U.S.C. § 1252c (2000)) (authorizing state and local law enforcement to arrest aliens who are illegally present in the U.S. because they were previously deported after being convicted of a felony in the U.S.); IIRIRA § 103(a) (codified at 8 U.S.C. § 1103(a)(8) (2000)) (empowering state or local law enforcement with immigration enforcement authority when an "actual or imminent mass influx of aliens...presents urgent circumstances requiring an immediate Federal response"), §§ 133, 328, 553 (codified at 8 U.S.C. § 1357(g) (2000)) (authorizing the Attorney General to deputize state officers and employees with authority equivalent to immigration officers). "), § 642 (codified at 8 U.S.C. § 1373 (2000)) (preempting local laws which prohibit local law enforcement from cooperating with federal immigration authorities). *See also* Miller, *Citizenship and Severity*, *supra* note 3, at 637-38 (explaining how prior to enactment of AEDPA and IIRIRA in 1996, local law enforcement authorities had no authority to arrest aliens for civil immigration violations); Huyen Pham, *The Inherent Flaws in the Inherent Authority Position: Why Inviting Local Enforcement of Immigration Laws Violates the Constitution*, 31 FLA. ST. U. L. REV. 965, 980 & n.76 (2004) (commenting on precedent allowing broad application of state power to make immigration arrests).

[218] In 2002, the Office of Legal Counsel in the U.S. Department of Justice issued a memo reversing a longstanding constitutional interpretation prohibiting state and local law police from enforcing civil immigration laws. John Ashcroft, Attorney General, Announcement of the National Security Entry-Exit Registration System (June 5, 2002), *available at* http://www.usdoj.gov/archive/ag/speeches/2002/060502agpreparedremarks.htm. In 2005, the Deputy Assistant Director of Investigative Services Division of the U.S. Immigration and Customs Enforcement of the Department of Homeland Security ("DHS") appeared before the House Committee on Homeland Security and highlighted DHS' assistance in implementing successful state immigration enforcement programs in Florida and Alabama under INA § 287(g). Mr. Kilcoyne asserted that such state enforcement programs were critical to federal efforts to deter criminal alien activity and threats to national security. Paul M. Kilcoyne, Deputy Assistant Dir. of Investigative Serv. Div., U.S. Immigration and Customs Enforcement, U.S. Dep't of Homeland Sec., 287(g) Program: Ensuring the Integrity of America's Border Security System Through Federal-State

order deportation during sentencing, though not to bar it.[219] Jail and prison officials often alert ICE when the facility detains a noncitizen who is likely to be removable,[220] or may contract to house noncitizens pending removal proceedings or awaiting execution of a removal order.[221]

The increase in both mandatory and discretionary decisions to detain noncitizens has had a concomitant increase in the role of these officials. Also, a greater percentage of noncitizens who have committed or are suspected of committing immigration violations are experiencing the equivalent of criminal confinement in these facilities.

The embrace of criminal law norms in immigration enforcement has changed the very character of the immigration sanctions scheme. The importation of criminal enforcement norms without a corresponding infusion of criminal justice norms has created a system in which immigration violations based on criminal conduct have proliferated, but the sanction – removal – has remained fixed.

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Partnerships, Statement Before the House Committee on Homeland Security Committee on Management, Immigration, and Oversight (July 27, 2005), *available at* http://www.ice.gov/doclib/pi/news/testimonies/050727kilcoyne.pdf. Under DHS the INS Law Enforcement Support Center (LESC), which was established in 1994 to gather information from databases and provide immigration information to local police officers, obtained access to additional databases, including the Student and Exchange Visitor Information System (SEVIS), NSEERS, and US Visit. Press Release, ICE, Homeland Security Supporting Local Law Enforcement Law Enforcement Support Center (LESC) (Aug. 19, 2003), *available* at http://www.aila.org/content/default.aspx?bc=10234%7C9245; s*ee also* Suzanne Gamboa, *New Immigration Official Wants Local Help*, AP ONLINE, July 23, 2003, at 1 (explaining that Michael Garcia, then-acting director of the Bureau of Immigration and Customs Enforcement under the DHS, supported more local law enforcement involvement in immigration investigations and arrests).

[219] *See* Immigration and Nationality Technical Amendments Act of 1994, Pub. L. No. 103-416, § 224, 108 Stat. 4305, 4322-24 (Oct. 25, 1994) (authorizing federal judges to order deportation); IIRIRA, Pub. L. No. 104-208, 110 Stat. 3009, § 374 (1996); 8 U.S.C. § 1228(c) (2000). As a result, the power of judges to employ immigration sanctions is limited to imposing more onerous sanctions, but judges are powerless to lighten the immigration sanction by prohibiting deportation. *See* Legomsky, *supra* note 2, at 498-500.

[220] Congressional Res. Service et al., *Enforcing Immigration Law: The Role of State and Local Law Enforcement* (updated Oct. 13, 2005), *available at* http://www.ilw.com/immigdaily/news/2005,1026-crs.pdf.

[221] *See* BRYAN LONEGAN & THE IMMIGRATION LAW UNIT OF THE LEGAL AID SOCIETY, IMMIGRATION DETENTION AND REMOVAL: A GUIDE FOR DETAINEES AND THEIR FAMILIES 2 (Revised Feb. 2006) available at http://www.nysda.org/idp/docs/06_ImmigrationDetentionRemovalGuideDetaineesFamilies.pdf (explaining that local law enforcement will transfer potentially removable alien into federal immigration custody within forty-eight hours after the alien's completion of any jail time); *see* U.S. DEP'T OF HOMELAND SEC., DETENTION OPERATIONS MANUAL, DETAINEE HANDBOOK (2000), available at http://www.ice.gov/doclib/partners/dro/opsmanual/handbk.pdf (listing three types of detention facilities for aliens facing removal, including service processing centers (SPCs), contract detention facilities (CDFs), and intragovernmental service agreement facilities (IGSAs) (for further explanations of SPCs, CDFs, and IGSAs visit http://www.ice.gov/doclib/partners/dro/opsmanual/defin.pdf)).

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

III. A Proposal for a Proportionate Immigration Sanctions Scheme

The project of constructing a proper sanctions scheme for immigration law is ambitious. The proposal offered in this Article, therefore, establishes a foundation on which I intend to build. As a first step, I will focus here on applying the proposed sanctions scheme to noncitizens who were in lawful status at the time they violated immigration law, namely, legal permanent residents and temporary visa holders (nonimmigrants) who violated a condition of their visa or committed an immigration violation other than overstaying the term of their visa.

A. Major Elements of an Immigration Sanctions Scheme

Current law relies heavily on the inadmissibility and deportability grounds of the INA to determine whether to deport a noncitizen. Grounds for inadmissibility and deportability identify undesirable characteristics or conduct of noncitizens that are significant enough to impose an immigration sanction. Examples of such grounds include commission of certain crimes,[222] immigration-related fraud and improper use of documents,[223] public health concerns,[224] and violations of the conditions of a nonimmigrant visa.[225] A properly calibrated sanctions scheme should incorporate not only these undesirable characteristics and conduct, but also the egregiousness of the violation, the values reflected in the admissions categories, and the ties that the noncitizen has to the United States.

First, taking into account the seriousness of the violation would bring immigration law into line with the proportionality principle that underlies criminal punishment. In criminal law, the idea that the punishment should fit the crime flows from the Eighth Amendment's prohibition against cruel and

[222] *See* INA § 212(a)(2), § 237(a)(3).
[223] *See id.* § 212(a)(6)-(a)(9).
[224] *See id.* § 212(a)(1)(4)(10).
[225] *See id.* § 237(a)C) (defining as deportable any alien who has failed to maintain nonimmigration status or failed to "comply with the conditions of any such status").

unusual punishment.[226] This has resulted in a system reflecting a range of incarceration terms, including suspended sentences, parole, criminal fines, and community service requirements. The criminalization of immigration law has highlighted the stark disparity between the proportionality norms that animate criminal punishment and the lack of such proportionality in immigration law. Importing a proportionality norm into the immigration sanctions scheme would result in a spectrum of severity, imposing lighter sanctions for lesser violations and harsher sanctions for more serious violations.

Second, constructing an immigration sanctions scheme requires examining the underlying goals of immigration law and the role of sanctions in furthering those aims. The central aims of immigration admissions are usually articulated as twofold: facilitating family reunification and ensuring an adequate labor supply for the U.S. economy.[227] The admissions categories of the Immigration and Nationality Act embody these aims, defining various immigration benefits. Most of the admissions categories require either a relationship with a close family member[228] or a showing that the noncitizen contributes to the U.S. economy without undermining job opportunities for U.S. workers.[229]

The admissions categories reflect complex legislative priorities about the relative value of individual noncitizens. The family reunification categories prioritize parents, spouses, and minor children of U.S. citizens over older sons and daughters, and the spouses and minor children of permanent residents over the siblings of U.S. citizens.[230] Employment-based immigrant categories prioritize aliens who demonstrate "extraordinary ability" in the sciences, arts, business, or athletics over noncitizens with baccalaureate degrees, and baccalaureate holders over skilled and unskilled workers.[231]

An immigration sanctions scheme should also account for the value to the nation of the noncitizen's admission that is reflected in this multilayered prioritization of the admissions categories. This valuation will vary based on

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[226] U.S. Const., amend. VIII.

[227] *See* ALEINIKOFF, ET AL., *supra* note 46, at 297 (describing these categories).

[228] *See* INA § 201(b) (defining admissions category of "immediate relatives" of United States citizens), § 203(a) (defining admissions preferences for sons, daughters and siblings of U.S. citizens and close relatives of lawful permanent residents); § 101(a)(15)(K) (defining nonimmigrant admissions category for fiancés of U.S. citizens), (N) (defining nonimmigrant admissions category for parents, siblings, and children of "special immigrants").

[229] *See* INA § 203(b) (establishing admissions preferences for employment-based immigrant visas), § 101(a)(15) (defining numerous nonimmigrant categories permitting temporary entry for business and employment).

[230] *Compare* INA § 201(b) (exempting "immediate relatives" of U.S. citizens from immigration quotas) *with* § 203(a)(setting quotas and preferences for unmarried sons and daughters of U.S. citizens less than 21 years old (first preference), spouses and children of legal permanent residents (second preference), married sons and daughters of U.S. citizens (third preference), and siblings of U.S. citizens (fourth preference).

[231] *See* INA § 203(b) (setting out preference categories that privilege noncitizens with greater talents and skills and higher levels of education over other noncitizen applicants for employment-based visas).

immigration status and the reason for admission, namely, whether the noncitizen is a temporary visitor or legal permanent resident, whether admission was based on a close family connection or on winning the admissions "lottery."[232] Like tort and contract remedies, the cost-benefit analysis that this element employs evaluates the harm to the party experiencing the violation: the United States.

Finally, inherent in the granting of admission to noncitizens is the foreseeable risk and benefit that they will acquire ties to U.S. residents and communities. Admitting noncitizens, even for temporary purposes, raises the possibility that they will become embedded in families, social spaces, and workplaces. These post-admission ties, and the disruption that removal or other sanctions could visit on the noncitizen's family, employer, or community, should inform the decision of whether to remove the noncitizen or apply an alternative sanction that conforms more closely to the purpose and structure of immigration law.[233] The noncitizen's citizenship status, length of stay, and events subsequent to entry will heavily influence this element.

The current emphasis on deportation as the consistent response to violation of any immigration provision falls short in several respects. First, as this Article has previously argued, assigning deportation as the ubiquitous sanction renders it impossible to calibrate the gravity of the violation with the size of the sanction. Second, the current scheme ignores the values underlying the admission of the individual noncitizen. It fails to account for the prioritization evident in the admissions scheme for evaluating the worth of the noncitizen seeking admission. Thus, a noncitizen admitted as a permanent resident as an alien who has demonstrated "extraordinary ability" in science through evidence of "sustained national or international acclaim"[234] is governed largely by the same removal standards as a tourist visa holder. Finally, except for limited forms of relief, the emphasis on deportation inadequately accounts for post-entry acquisition of family, community, and workplace ties. The bones of a well-constructed sanctions scheme should incorporate all of these elements.

B. A Proposal: Introducing Proportionality into Immigration Law

In sum, a proportionate system of sanctions for immigration violations should consider: (1) the gravity of the violation, taking into account the nature of the violation and any consequences, (2) the benefit to the United States of

[232] One pathway to permanent immigration status is by winning a diversity visa in the world-wide lottery for U.S. immigrant visas. *See* INA § 203(c).

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

[234] *See* INA § 203(b)(1)(A) (describing the first-preference employment-based permanent admissions category).

imposing the proposed sanction and, conversely, any harm to the United States, the noncitizen, or other individuals resulting from its imposition, and (3) the stake that the noncitizen has in remaining in this country.

This multi-factor analysis results in a spectrum of sanctions. When the immigration violation is relatively minor, the reason for admitting the noncitizen still extant and the value of admission still strong, and the noncitizen has strong ties to the country such that her stake in remaining is great, the sanction should be lighter. When the immigration violation is egregious, the rationale for admission undermined either because of the violation or due to other circumstances, and the individual has few ties to the United States and so little stake in avoiding deportation, the sanction should be heavier. I analyze below how this framework plays out for lawful permanent residents and nonimmigrants who hold temporary visas.

1. Legal Permanent Residents

Imagine two noncitizens, both of whom have recent convictions for possession of cocaine. Both have served six month sentences, and the government now seeks to remove them on the basis of their convictions.[235] One is a lawful permanent resident[236] and the other holds a B-1 visa authorizing temporary travel for business for a period of six month to a year.[237] The permanent resident was admitted as a spouse of a permanent resident, and now has a U.S. citizen child. The business traveler is in the United States to make a series of presentations on new management practices at business conferences around the nation. Under current law, both are equally removable under the deportability ground for conviction of any drug offense, as no relief from deportation is available for drug crimes regardless of the immigration status of the noncitizen.[238]

Applying the sanctions analysis proposed above, the criminal penalty imposed for the drug conviction is likely a sufficient sanction for the permanent resident. The first element, addressing the gravity of the violation, is a way of determining whether the conviction rendered the individual unfit to remain in

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[235] *See* INA § 237(a)(2)(B).

[236] Lawful permanent residents are subject to the criminal deportability grounds, which under current law mandates a deportability finding. *See* INA § 237(a)(2). The criminal deportability grounds make most forms of relief unavailable to noncitizens. *See e.g.*, INA § 240A(a) (no cancellation of removal for permanent residents with aggravated felony convictions (*see also* § 101(a)(43) (setting out extensive list of crimes defined as aggravated felonies)); § 240B (no voluntary departure for aliens with aggravated felony convictions); § 212(h) (denying waiver of certain grounds of inadmissibility to permanent residents with aggravated felony convictions).

[237] *See* INA § 101(15)(B); 22 C.F.R. 41.31(b)(1) (authorizing issuance of business visa for "conventions, conferences, consultations, and other legitimate activities of a commercial or professional nature.")

[238] *See* INA § 237(a)(2)(B). The single exception under this ground does not apply. *See* INA § 237(a)(2)(B)(excepting convictions for possession of less than 30 grams of marijuana). For a cogent critique of the drug inadmissibility grounds, *see* Nancy Morawetz, *Rethinking Drug Inadmissibility*, 50 WM & MARY L. REV. 163 (2008).

U.S. society such that deportation is appropriate, or whether an alternative sanction is more effective. For both noncitizens, that determination largely duplicates the function of the criminal sentencing in measuring the egregiousness of the crime and its harm to society. Theoretically at least, the criminal sentence would function to incapacitate the offender, deter others from similar conduct, and exact retribution for society.[239]

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

How strongly these benefits weigh in favor of the sanction of deportation depends on the strength of the proposition that noncitizens admitted to the United States should be held to a higher standard than citizens. That proposition views nonimmigrants like our business traveler as guests who should be on their best behavior and lawful permanent residents as potential citizens in a probationary period.[240] In that view, violating criminal law evidences a repudiation of our society's most strongly-held values, and so noncitizens who commit crimes are fundamentally unfit for citizenship or for continued residence among us.

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

These benefits, moreover, are outweighed by considerable costs to the United States. The harm to the United States in imposing deportation on this permanent resident lies in breaking up a U.S. family. The deportation sanction reverses the family reunification goal underlying many of the admissions

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[239] *See* Maria Isabel Medina, *The Criminalization of Immigration Law: Employer Sanctions and Marriage Fraud*, 5 GEO. MASON L. REV. 669, (1997) (describing the traditional justifications for imposing criminal penalties as retribution, deterrence, incapacitation, and rehabilitation) (citing Sentencing Reform Act of 1984, 18 U.S.C. SS 3553(a)(2)(A)-(D) (1994)). *See also* Legomsky, *supra* note 2, at 474; Wayne R. LaFave, Criminal Law § 7.1(c) (4th ed. 2003).

[240] *See Harisiades*, 342 U.S. at 586-87 (opining that "Under our law, the alien in several respects stands on an equal footing with citizens, but in others has never been conceded legal parity with the citizen…. To protract this ambiguous status …is not his right but is a matter of permission and tolerance. The Government's power to terminate its hospitality has been … sustained by this Court since the question first arose…."). *Compare id.* at 599 (Douglas J., dissenting) (asserting that "[a]n alien, who is assimilated in our society, is treated as a citizen so far as his property and his liberty are concerned").

categories and expressed here through the grant of permanent residence based on marriage to the incumbent permanent resident spouse. Although the permanent resident's value to the family is arguably decreased because of the cocaine conviction, that value will vary based on the individual circumstances and calls for a more nuanced inquiry than current law permits.

The situation of this hypothetical permanent resident, of course, illustrates only one facet of the potential harm to the United States of imposing the deportation sanction. Deportation of other permanent residents and nonimmigrant visa holders may leave employers without an employee critical to its operations, or lead to the loss of a community member who had performed valuable services for others. At bottom, there are costs to the United States in failing to retain a member of the community who, despite the crime, has contributed to society and appears likely to continue to do so.

The harm to the United States of deporting the business traveler is less compelling. The cost to the United States is the loss to certain business conference audiences of potentially valuable management expertise, and the potential for increased economic advantage resulting from the business opportunities that the B-1 visa holder's presence in the United States can create. The innovation of this proposal lies in weighing these costs in light of the reason for admitting the noncitizen against the benefits of deterrence, incapacitation, and the ability to express disapproval of noncitizen. On balance, a lesser sanction than deportation is likely to be proper here.

The third element concerns the noncitizen's stake in the United States. Stake is inherent in the status of permanent residency. Lawful permanent residents occupy the highest rung in the hierarchy of alienage status, and permanent resident status is a mandatory prerequisite to naturalization.[241] As potential citizens, immigration law invests permanent residents with a status that is stable enough to encourage such tie-formation, such as family relationships or employment, social relationships, cultural and community integration, and other innumerable forms of investment in residing in the country.

Thus, for permanent residents at least, the imposition of the criminal sentence should normally subsume the immigration sanction within the criminal penalty. A particularly egregious crime with circumstances suggesting seriously reprehensible conduct may require imposing the deportation sanction, especially when the permanent resident immigrated recently and has few ties in the United States.[242]

In contrast, the business traveler holds comparatively little stake in remaining in the United States. The length of the visa term provides much less

[241] *See* INA § 316(a) (mandating that "[n]o person … shall be naturalized, unless such applicant, (1) immediately preceding the date of filing his application for naturalization has resided continuously, after being lawfully admitted for permanent residence, within the United States for at least five years….").

[242] Permanent residents who immigrate based on employment under INA § 203(b) are more likely to immigrate without ties than those who immigrate as a family member under § 203(a). Nevertheless, employment itself can constitute a strong attachment and cannot be discounted.

opportunity or expectation that significant ties with the United States will result from the B-1 visa holder's tenure in the country. The only real stake in remaining in the country is to complete the series of presentations, a relatively slight interest.

Considering all three elements together, a less compelling case for an alternative to deportation can be made for the business traveler than for the permanent resident. For both, however, the deterrent, incapacitating, and retributive effect of deportation was largely accomplished through the criminal sentence, and deportation would undo much of the benefit that underlay the initial admissions decision.

Also, employing alternatives to removing noncitizens, particularly permanent residents, takes seriously the role that our society may have played in creating the circumstances leading to the commission of the crime. If a permanent resident's turn to crime and tendency toward recidivism is in any part a result of exposure to flaws in our society, removing permanent residents imposes on another country the risk that those individuals may commit future crimes. Alternatives to deportation in the case of long-term permanent residents and others who were raised in this country is a way for the United States to take responsibility for a situation that arose within its borders, rather than exporting the issue to another country.

Thus far, this Article has analyzed only the extreme ends of the spectrum of immigration sanctions: reliance on the criminal sentence at one end, and deportation at the other. Proportionality requires a set of sanctions that fall between those ends. One potential intermediate sanction is extending the time before which a permanent resident could apply for citizenship. This delay in seeking citizenship would address the concern that the permanent resident's reflects on her fitness to join the citizenry, but balance that concern with the harm that deportation would impose on the permanent resident and others.[243] A second possible sanction is akin to probation: retaining the noncitizen in the community under the supervision of the government, under conditions set forth by the court or agency. Violation of those conditions could lead to deportation.

2. Nonimmigrants who Violate Conditions of Entry

Currently, violating the terms and conditions of a visa subjects a noncitizen to deportation.[244] A student who works more than the hours

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

[244] *See* INA § 237(a)(1)(C) (establishing as grounds for removal the failure to comply with any condition of nonimmigrant status).

permitted by her visa is one example.[245] Another is the situation of an employee in the United States on a temporary basis whose spouse works without employment authorization.[246]

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

The second element provides more traction for argument in favor of deportation. The government permitted the noncitizen to enter temporarily with the understanding that she would comply with certain rules. The benefit to the United States of deportation is that it imposes retribution: when a visitor breaks those rules, it seems justifiable for the government to revoke permission to remain. Deportation also incapacitates the noncitizen from taking jobs or work-hours that authorized U.S. employees could fill. There may also be a deterrent effect on other noncitizens considering unauthorized employment, or fraudulently seeking to obtain nonimmigrant visas in order to work without authorization. Refraining from deporting the temporary visa-holder who violates a condition of entry risks weakening deterrence of other would-be violators.

That risk, however, should be weighed against the benefits of withholding deportation, along with the retributive and deterrent potential of other sanctions. When the violation is minor and removing the noncitizen would undermine the purpose for granting entry, or another important interest, an alternative to deportation may be appropriate. Deporting the spouse of an employee on a temporary visa will, at a minimum, impact the quality of the employee's work. It may lead the employee to depart with her spouse, leaving the U.S. employer without a needed employee. Deporting the student deprives both student and school of the student's participation in the intellectual life of the institution.[247]

The element of stake in the United States is less compelling for a noncitizen in a temporary immigration status than for the permanent resident. Still, temporary residents often have strong interests in remaining in the United States. These might include the opportunity to complete a degree, or the interest in staying together with a spouse on a work visa. Another element of stake is present for those temporary visa-holders who may have a pathway to permanent residence.[248]

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[245] INA § 101(a)(15)(F)(1).

[246] INA § 237(a)(1)(C) (establishing as grounds for removal the failure to comply with any condition of nonimmigrant status). *E.g.*, spouses of high-skilled employees bearing H-1B visas generally do not have authorization to work. 8 C.F.R. § 214.2(h)(9)(iv).

[247] Not to mention the lost tuition.

[248] Several temporary employment-based visas open the way to permanent resident status. *See* INA § 101(a)(15)(H)(i)(b) (establishing the H-1B visa which allows temporary employment visas for

When the cost of deportation impacts the purpose of the immigration visa in these ways, it makes sense to consider alternatives to deportation. One alternative might include fines, which have both a deterrent and retributive function. Another is a determination of deportability with a stay of removal. This sort of stay is parallel to the suspended sentence in criminal sentencing, but with an added level of deterrence based on the noncitizen's interest in remaining in the country.

When the stake for the noncitizen in remaining in the United States is high, and there is some benefit to the United States if the noncitizen is not deported, alternatives to deportation should be considered. These might include imposing a fine,[249] incarceration in cases where the violation is egregious but the costs of deportation outweigh the benefits, or a probationary delay before acquiring a more coveted legal status, in the situation where the noncitizen has a pathway to such a legal status. Establishing a probationary delay is not without precedent, and could follow the lines of the already-existing stay of removal[250] or deferred action on enforcement of removal.[251]

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The remedial scheme proposed in this Article would result in a graduated system of immigration sanctions that would encourage development and application of sanctions beyond the current binary decision of whether to impose deportation. The proposal is not without its faults. Restricting the applicability of deportation may risk undermining deterrence of some immigration violations.[252] Relying on a valuation of ties to the country to determine the scope of government power means that immigration decisions become very discretionary. That undermines uniformity of decisionmaking about immigration violations, and the ability of the government to provide notice to noncitizens about what conduct is expected of them while they remain in the country.[253]

Nevertheless, the sanctions scheme this Article articulates would allow immigration remedies to hew more closely to the purposes for admitting noncitizens to the United States, whether temporarily or permanently.

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aliens in a specialty occupation); § 101(a)(15)(E)(i) & (ii) (establishing the E visa which allows temporary employment visas for aliens to enter the United States under a trade treaty); § 101(a)(15)(L) (establishing the L visa which allows temporary employment for an alien as a manager or executive).

[249] *See* S. 1033, 109th Cong. § 304 (2005) (proposing, *inter alia*, imposition of a fine for undocumented immigrants to obtain lawful status).

[250] 8 U.S.C § 1252(b)(3)(B) (permitting a stay of removal during deportation proceedings).

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

[252] MOTOMURA, AMERICANS IN WAITING, *supra* note 233, at 94.

[253] *Id.* at 94-95.

Conclusion

Deportation is a relative newcomer to the immigration sanctions structure. It has become, however, a ubiquitous presence in immigration law. The pressure for legislators to impose more numerous and harsher sanctions has increased with the criminalization of immigration law, which encourages public perceptions of immigrants to become intertwined with the negative associations of criminal conduct. These pressures make it difficult, if not impossible, to thoughtfully legislate the details of an immigration sanctions scheme if there is a risk that the public would perceive such innovation as a failure of immigration enforcement. Nonetheless, the impracticality and inequity of the current singular reliance on deportation calls out for reform.

In constructing the skein of a remedial scheme for immigration, this Article seeks to take a step back and consider the underlying purposes of our immigration laws when determining how to shape consequences for violations of those laws. The Article leaves unanswered important questions about how to put meat on the bones of the proposed scheme. It does not delineate which alternative sanctions should apply and under what circumstances. It also leaves unaddressed who would be responsible for undertaking such a project. These are topics that I plan to explore in subsequent writings, building on the foundation laid here. At bottom, however, the proposal seeks to advance to a higher level the national conversation about immigration by drawing attention to an area that has, to date, been much neglected – the role of sanctions in establishing a more just and more effective legal framework for immigration law.