The U.S. Criminal-Immigration Convergence and its Possible Undoing

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The intensifying convergence of U.S. criminal law and immigration law poses fundamental structural problems. This convergence—which manifests in the criminal prosecution of immigration law violators, in deportation of criminal law violators, and in a growing immigration enforcement and detention apparatus—distorts criminal law incentives and drains enforcement resources, misguides immigration regulation, and undermines efforts to implement alternative immigration regulatory frameworks. This Article offers an account, informed by social psychological and literary theory, of why this convergence persists notwithstanding these problems, as well as how the convergence (and inherently associated problems) might be undone. The U.S. criminal-immigration convergence holds powerful sway, despite the fact that it does much harm and relatively little good, because it serves to relieve pervasive cognitive dissonance in the United States regarding immigration, specifically in relation to economic and racial concerns. Drawing on previously unexamined Immigration and Customs Enforcement memoranda, legislative history, and empirical studies of criminal-immigration enforcement, this Article critically engages the primary justifications of the convergence in immigration scholarship and policy discourse. Finally, it assesses two approaches to undoing the convergence.

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Jose Angel Carachuri-Rosendo, a lawful permanent resident who has lived in the United States since he was five years old, faced deportation under federal law after he committed two misdemeanor drug possession offenses in Texas. For the first, possession of less than two ounces of marijuana, he received 20 days in jail. For the second, possession without a prescription of one tablet of a common antianxiety medication, he received 10 days in jail. After this second offense, the Federal Government initiated removal proceedings against him.1

Jose Padilla, a native of Honduras, has been a lawful permanent resident of the United States for more than 40 years. Padilla served this nation with honor as a member of the U.S. Armed Forces during the Vietnam War. He now faces deportation after pleading guilty to the transportation of a large amount of marijuana in his tractor-trailer in the Commonwealth of Kentucky.

It is hard to think of any public policy that is less controversial than the removal of criminal aliens.

In courtrooms, jails, and police stations across the United States, criminal law and immigration law converge with unprecedented intensity. Between 1990 and 2010, immigration offenses became the most common federally prosecuted crimes in the United States. In a separate manifestation of the convergence of criminal and immigration law, since 1997, when the executive branch began to enforce major new criminal-immigration legislation, approximately one million immigrants have been deported or removed from the United States as a consequence of a criminal conviction. Approximately twenty percent of those deported due to a

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8. See HUMAN RIGHTS WATCH, FORCED APART (BY THE NUMBERS) 2–3 (2009) [hereinafter FORCED APART (BY THE NUMBERS)] (reporting 897,099 noncitizens were deported from the United States on criminal grounds between 1997 and 2007). This is the best available data on deportations from the United States on criminal grounds during this period, though it is incomplete. See id. at 2. Different government sources provide conflicting data, and the government’s own records lack accurate data on the criminal bases for removal and immigration statuses for a considerable portion of cases. See id. at 3; see also U.S. IMMIGRATION & CUSTOMS ENFORCEMENT (ICE), ICE FISCAL YEAR 2008 ANNUAL REPORT 3 (2008) (reporting 221,085 charging documents were issued to noncitizens in criminal custody in FY 2008); Memorandum from James M. Chaparro, ICE-DRO Dir., to Field Office Dir. & Deputy Field Office Dir. (Feb. 22, 2010) [hereinafter Chaparro Memorandum] (on file with author) (reporting that from October 2009 to February 2010, ICE removed 56,853 "criminal aliens").
criminal offense were in the country lawfully, many having lived in the United States for decades; most of the relevant violations involved only minor, non-violent crimes.\(^9\) Noting this increasing integration of U.S. criminal and immigration law, the U.S. Supreme Court in *Padilla v. Kentucky*\(^{10}\) remarked that:

The landscape of federal immigration law has changed dramatically . . . . While once there was only a narrow class of deportable [criminal] offenses and judges wielded broad discretionary authority to prevent deportation, immigration reforms over time have expanded the class of deportable offenses and limited the authority of judges to alleviate the harsh consequences of deportation. The "drastic measure" of deportation . . . is now virtually inevitable for a vast number of noncitizens convicted of crimes.\(^{11}\)

This far-reaching interpretation of criminal and immigration law—the de facto use of criminal law as an immigration regulatory proxy—raises a set of fundamental questions: Does this convergence embody a desirable framework for immigration regulation? How well does criminal law capture relevant characteristics signaling un-belonging or undesirability? Moreover, what does criminal-immigration enforcement portend for criminal law administration? And why has immigration enforcement come to rely so heavily on criminal law as a proxy enforcement regime?\(^{12}\)

Although at first blush, immigration enforcement focused on "criminal aliens"\(^{13}\) may seem eminently reasonable—after all, criminal law presumably identifies relatively undesirable noncitizens engaged in bad (i.e. criminal) behavior—this Article challenges that assumption through an account of the failings, persistence

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9. See *Forced Apart (By the Numbers)*, supra note 8, at 2–3. Of those lawfully present who faced removal due to criminal conviction, seventy-seven percent were convicted of nonviolent crimes. See id. Of the total population of noncitizens removed on criminal grounds, seventy-two percent faced immigration consequences due to nonviolent offenses. See id.

10. See *Padilla v. Kentucky*, 130 S. Ct. 1473, 1478 (2010) (holding that a noncitizen has a constitutional right to be advised by criminal defense counsel about potential immigration consequences of a plea).

11. See id. at 1478. The Court also noted that deportation is "intimately related to the criminal process." See id. at 481–82.


and possible undoing of the convergence of U.S. criminal and immigration law. This Article elucidates the reasons why, contrary to what is commonly thought to be the case, criminal law serves as a poor immigration regulatory proxy. It then explores the motivations for the intertwining of U.S. criminal and immigration enforcement despite profound limitations and associated harms. Finally, it examines available approaches to addressing harms generated by the convergence of U.S. criminal and immigration law.

Toward these ends, this Article engages the most significant justifications of the convergence presented in previously unexamined policy directives by U.S. Immigration and Customs Enforcement ("ICE"), as well as in a small corpus of immigration law scholarship. Dominant justifications of criminal-immigration enforcement may be classified in terms of efficient allocation of limited resources, as proposed by high-ranking ICE officials; 14 in reference to political palatability, as elaborated by Professor Peter H. Schuck; 15 or on a legal economic theory of informational advantage, as suggested by Professors Adam B. Cox and Eric A. Posner. 16 Also implicit in explanations of the wisdom of criminal-immigration enforcement, though seldom if ever expressly articulated, are a constellation of ideas about the nature of immigration as a form of trespass or privilege, or as a contractual relationship subject to retaliatory termination and possibly criminal punishment in the event a noncitizen becomes subject to criminal law enforcement. 17 A spokesperson for the immigration agency put it this way: "If you haven't become a citizen, you are here as a privilege. And, if you commit a crime, you lose that privilege." 19 In sum, these ideas—sounding alternately in the register of efficient resource allocation, political palatability, informational advantage, trespass, contract violation, and punishment—seek to justify criminal law administration as a proxy immigration regulatory regime.

14. See, e.g., Memorandum from John Morton, Dir., U.S. Immigration & Customs Enforcement, to Employees, Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens (June 30, 2010) [hereinafter Morton Memorandum] (on file with author) (explaining ICE's emphasis on criminal-immigration enforcement in terms of efficient allocation of limited resources, as proposed by high-ranking ICE officials); 14 in reference to political palatability, as elaborated by Professor Peter H. Schuck; 15 or on a legal economic theory of informational advantage, as suggested by Professors Adam B. Cox and Eric A. Posner. 16 Also implicit in explanations of the wisdom of criminal-immigration enforcement, though seldom if ever expressly articulated, are a constellation of ideas about the nature of immigration as a form of trespass or privilege, or as a contractual relationship subject to retaliatory termination and possibly criminal punishment in the event a noncitizen becomes subject to criminal law enforcement. 17 A spokesperson for the immigration agency put it this way: "If you haven't become a citizen, you are here as a privilege. And, if you commit a crime, you lose that privilege." 19 In sum, these ideas—sounding alternately in the register of efficient resource allocation, political palatability, informational advantage, trespass, contract violation, and punishment—seek to justify criminal law administration as a proxy immigration regulatory regime.

15. See generally Schuck & Williams, supra note 3, at 372. While there is significant public hesitation about deporting noncitizens integrated into U.S. communities as workers and neighbors, there is little resistance to removing criminal aliens. See infra Part II.


18. Criminal-immigration enforcement, on a trespass account, responds to an ongoing intrusion—a wrongful entry to the United States—the wrongfulness of which is exacerbated by criminal conduct. For lawful residents, the trespass account morphs into a conception of immigration as a privilege to be revoked at will. See infra Part II.

This Article challenges these justificatory accounts, demonstrating that the convergence of U.S. criminal and immigration law in action—as embodied in U.S. government practice and largely embraced in U.S. public discourse—does not represent a defensible immigration law enforcement approach. To the contrary, this convergence has brought about devastating effects: misapprehending the range of complex legal and social concerns to be managed in the immigration and criminal law contexts; harming U.S. citizens, lawful residents, refugees, and undocumented persons alike; and undermining efforts to implement alternative immigration regulatory frameworks.

So again, the question: Why has the convergence of U.S. criminal and immigration enforcement effectively captured the field of immigration law enforcement when it so poorly addresses immigration regulatory concerns and undermines criminal law enforcement? In contrast to existing explanatory accounts regarding the convergence of U.S. criminal and immigration law, this Article contends that this capture has little to do with efficient resource allocation or informational advantage—in fact, the analysis to follow will demonstrate that criminal law contact offers information often inapposite to immigration regulatory decision-making—and much to do with the ambivalent social, political, and psychological place of immigration in the U.S. national imagination. 20

In short, the core argument of the analysis to follow is that the convergence of U.S. criminal and immigration enforcement has persisted, despite the fact that it does much harm and relatively little good, because it serves to alleviate two forms of pervasive cognitive dissonance in the United States regarding immigration and immigrants—one form of dissonance involves economic unease, and the other, racial anxiety. 21 Drawing on a stock crime narrative framework developed originally in the context of imaginative literature, criminal-immigration enforcement purports to direct enforcement efforts only towards criminal wrongdoers, not implicating those good, hardworking immigrants upon whom U.S. citizens economically depend, and not targeting any particular demographic on the basis of race. This framework features prominently concepts of criminal wrongdoing, trespass, and contract violation—central implicit themes in official justifications of criminal-immigration enforcement—and it largely elides the complex regulatory concerns and competing interests at stake in the immigration context. 22


21. See LEON FESTINGER, A THEORY OF COGNITIVE DISSONANCE (1957); see also infra Part IV.

22. See infra Part IV.
A subsequent and related argument the Article pursues is that to undo or even to substantially mitigate the harms produced by criminal-immigration enforcement will require a shift in this crime-centered conceptual framework, not primarily a revolution in rights-protective procedures analogous to that which occurred in the criminal realm. The latter procedural approach is the one most widely embraced in the immigration law literature and by immigrants' rights advocates to date. This Article begins to sketch a different approach to undoing the intertwining of U.S. criminal and immigration law enforcement—an approach not necessarily at odds with procedural reform advocacy, but a critical and neglected supplement to it. Proceeding from the theoretical account the Article introduces, this approach identifies the conceptual bases of criminal-immigration enforcement and offers more humane and empirically accurate ways of imagining immigration regulation.

In so doing, this Article makes several contributions to the existing immigration law and criminal law literatures. A compelling body of immigration law scholarship has identified considerable shortcomings in the prevailing Supreme Court doctrine addressing criminal-immigration enforcement, and has examined instances of excessive harshness in specific enforcement contexts. But this body of work lacks an empirically informed normative analysis of how criminal law fails as an immigration regulatory proxy structurally, and not only as a consequence of isolated doctrinal, legislative, or enforcement errors that might be corrected through limited modifications. This Article provides such an analysis. Additionally, this Article offers an explanatory theoretical account— informs by social psychological and literary theory—that illuminates why fundamentally (notwithstanding its essential failings) U.S. criminal-immigration enforcement holds such powerful sway. Finally, in assessing approaches to undoing harms associated with criminal-immigration enforcement, this Article begins to chart the conceptual bases of alternative regulatory models that would better manage the complex concerns at stake in the immigration context.

The Article proceeds in five parts. Part I takes stock briefly of the eclipse of other immigration enforcement frameworks by a convergence of U.S. criminal and immigration law—what immigration law scholar Professor Jennifer Chacón has called in the context of federal criminal-immigration prosecutions, “Managing Migration Through Crime.” Part II considers in more depth, justifications for the convergence of U.S. criminal and immigration law enforcement. Part III explores the casualties of the convergence of U.S. criminal and immigration enforcement, in particular its foundational errors in neglecting the complicated nature of immigration regulation and of the punishment and control of crime. Synthesizing the growing body of immigration law scholarship that addresses particular harms

23. See, e.g., Chacón, Managing Migration, supra note 4; Eagly, supra note 12; Kanstroom, Criminalizing the Undocumented, supra note 4; Miller, supra note 4; Legomsky, supra note 4.

24. See Chacón, Managing Migration, supra note 4, at 135.
in specific contexts, Part III demonstrates that considered together, these harms—to lawful residents and unauthorized immigrants, green-card holders, U.S. citizens, asylees, refugees, and undocumented persons alike—thoroughly undermine the existing justifications for this enforcement model. Ultimately, Part III argues that targeted criminal-immigration enforcement is justifiable, if at all, only if concentrated on the most serious immigrant criminal law breakers and those without strong claims to U.S. membership. This would be a vastly different regime than the one currently in place.

Part IV presents a theoretical account of why criminal-immigration enforcement wields such powerful force given that, as Part III reveals, it does much harm and relatively little good. Drawing on analyses of the cathartic features of crime narrative and the theory of cognitive dissonance developed by social psychologist Leon Festinger, Part IV relates how criminal-immigration enforcement functions to alleviate simultaneously two forms of pervasive dissonance in the United States regarding immigration and immigrants. Understanding the motivational and psychological attachment to criminal-immigration enforcement is crucial to envisioning alternatives that might limit associated harms and excesses.

Part V begins to examine alternatives that seek to mitigate the harms of criminal-immigration enforcement. Part V first suggests why the procedural approach dominant in the immigration law literature on its own is unlikely to substantially curtail the convergence of criminal and immigration law enforcement, even as it promises much-needed protection to vulnerable persons. Part V then explores two attempts to re-conceptualize immigration regulation that address head-on the dissonance grounding criminal-immigration enforcement: one concentrated on development, and a second focused on human rights. Ultimately, the Article proposes, only an immigration framework centered on development and human rights will suffice to undo fully the failures of U.S. criminal-immigration enforcement, and to shape a more humane and empirically (rather than ideologically) oriented immigration regulatory regime.

I. Ascendancy of the U.S. Criminal-Immigration Convergence

As an initial matter, it is critical to identify what precisely the integration of U.S. criminal and immigration law entails, how it came into being, and how it operates. Because these themes are explored elsewhere, I address them only briefly here, emphasizing matters of particular relevance for the analysis to follow.26

25. See Festinger, supra note 21.
A. Definition

A hybrid criminal-immigration enforcement system—discussed in this Article in short-form under the rubric of the “U.S. criminal-immigration convergence”—became a dominant framework for immigration enforcement as criminal and immigration regulatory regimes merged in the following four respects.

1. Institutional Resemblance and Overlap

Immigrants are increasingly processed in civil immigration matters in institutions and by personnel that resemble, and in some instances, directly overlap with criminal law enforcement.27 Immigration enforcement is regularly delegated to local and state criminal officers.28 The federal immigration agency also cross-designates immigration officers to serve as criminal prosecutors.29 Substantive immigration law has become ever more harsh and punitive.30 And immigrants are routinely detained in re-purposed prisons and jails in what has become the largest detention system in the United States.31 In these ways, civil immigration enforcement has come to resemble and overlap with criminal law enforcement, generating a unified criminal-immigration enforcement system constituted out of shared personnel, priorities, and resources.32

2. Criminal Law as Immigration Proxy

Decisions about which immigrants to deport or remove from the United States, as well as whom to exclude from entry, are increasingly based on criminal law contact.33 Even long-term lawful permanent residents who have lived much of their lives in the United States are subject to immigration detention and deportation as a consequence of criminal arrest and conviction.34 Since major immigration reforms took effect in 1997, ICE and its predecessor agency, the Immigration and Naturalization Service (“INS”) have removed over one million criminal aliens,

27. See, e.g., Miller, supra note 4, at 614–15.
29. See, e.g., ICE Worksit Enforcement—Up to the Job?: Hearing Before the Subcomm. on Immigration Policy & Enforcement of the H. Comm. on the Judiciary, 112th Cong. 81 (2011) [hereinafter ICE Worksite Enforcement] (statement of Kumar Kibble, Deputy Director, ICE); see also Chacón, supra note 4; Eagly, supra note 12.
30. See, e.g., Miller, supra note 4, at 613.
31. During 2009, ICE held over 375,000 individuals in immigration detention (mostly in re-purposed prisons and jails), in over 300 facilities. See U.S. DEP'T OF HOMELAND SEC., IMMIGRATION DETENTION: OVERVIEW AND RECOMMENDATIONS 2, 6 (2009).
32. See, e.g., Eagly, supra note 12.
classified as such predominately for relatively minor offenses. The annual rate of deportations based on criminal law contact increased from 1978 in 1986, to over 88,000 in 2004. So criminal law enforcement has increasingly come to trigger immigration consequences, with criminal law contact serving as a proxy for un-belonging and undesirability.

3. Criminal-Immigration Prosecutions

Criminal prosecutors routinely process criminally what were previously understood as merely civil regulatory infractions. Immigration prosecutions, the most common category of federal prosecution, surpass drug and weapon prosecutions, and all violent crimes. Not only are immigration prosecutions directed at immigrants apprehended entering the United States, they also target workplace-related immigration offenses and employers who hire unauthorized immigrants. This shift in the content of federal criminal adjudication toward immigration offenses has transformed a significant portion of federal criminal litigation, such that it exhibits a more administrative, less formal, and less rights-protective character. Along with the federal government, states too have sought to criminally prosecute immigration-related offenses. Arizona Senate Bill 1070 is only the most well-known example of such provisions. Other states and municipalities have similarly passed or introduced legislation seeking to extend state criminal liability to undocumented immigrants and their associates.

35. See supra note 8 (detailing the relevant research on removal).
37. In a trend that developed over the previous twenty years, in 2009, fifty-five percent of federal criminal prosecutions involved “immigration crime,” defined as immigration-related offenses in title 8 of the U.S. Code, primarily illegal entry and illegal reentry. See Flora v. Rustad, 8 F.2d 335, 337 (8th Cir. 1925) (“It has never been the policy of this Government to punish criminally aliens who come here in contravention of our immigration laws. Deportation has been the remedy.”); Eagly, supra note 12, at 1282 n.3.
40. See, e.g., United States v. Roblero-Solis, 588 F.3d 692, 693 (9th Cir. 2009) (describing transformation in the federal district courts' criminal docket occasioned by the substantial increase in immigration prosecutions).
41. See generally Chacón, A Diversion?, supra note 5, at 1567; Miller, supra note 4, at 618; see also Amanda Bronstad, Federal Courts in Arizona Declare Judicial Emergency, Nat'l L.J. (Jan. 25, 2011).
43. See, e.g., Michael R. Boland, Jr., No Trespassing: The States, the Supremacy Clause, and the Use of Criminal Trespass Laws to Fight Illegal Immigration, 111 PENN. ST. L. REV. 481, 483–84, 486–87 (2006) (noting...
4. Immigration as Criminal Law Adjunct

Minor immigration violations increasingly serve as a basis for obtaining results in the criminal domain that would be unavailable using conventional criminal law tools. With the threat of immigration sanctions, criminal law enforcement officers obtain cooperation in federal criminal—particularly terrorism-related—investigations. Additionally, where evidence is too thin to successfully bring criminal prosecutions, law enforcement officers are able to effectuate the detention (and ultimately physical removal from the United States) of individuals who have committed minor immigration violations.

B. Context

This intertwining of U.S. criminal and immigration enforcement came about in part due to express changes in U.S. immigration law, but the convergence also involved institutional repurposing, as the federal immigration agency adopted a crime control agenda even beyond that expressly mandated by law. Also critical to the emergence of the criminal-immigration convergence was a broader conceptual shift in U.S. public discourse that increasingly came to conceive of immigration in reference to crime control, criminal wrongdoing and punishment.

1. Changes in U.S. Immigration Law

Although U.S. law has "enmeshed criminal convictions and the penalty of deportation for nearly a century," it was only in the final decades of the twentieth century that criminal law came to play a central role on a widespread basis in immigration enforcement. From the late 1700s until the 1880s, individual states...
sought to restrict the entry of convicts, poor people, those with contagious
diseases, and persons of African descent as well as Asians. Early convict
exclusions aimed principally to prevent other countries from sending prisoners to
the United States, and did not serve to facilitate criminal prosecution of unauthorized
entry or deportation on account of post-entry conduct. In 1882, Congress
passed the Chinese Exclusion Act, which adopted an immigration enforcement
model that operated on explicitly racial grounds, as the Act’s name suggests. Also in 1882, Congress enacted legislation excluding from the United States convicts and persons likely to become public charges. Ultimately this list of
excludable persons expanded to encompass persons with “loathsome or dangerous contagious diseases,” prostitutes, polygamists, and anarchists, largely mirroring earlier state immigration restrictions. Subsequent immigration legislation expanded to permit the deportation of noncitizens convicted of “crime[s] or misdemeanor[s] involving moral turpitude.” For all practical purposes, however, those who managed to remain in the United States for longer than a few years were
e immune from deportation as the law contained statutes of limitations on deporta-
tions. Moreover, these early statutory interconnections of criminal and immigra-


50. See id. at 1841–46. There is debate over whether these early restrictions operated to any effect, with some scholars suggesting, as a matter of fact, that the U.S. borders were relatively open for much of the nineteenth century. See, e.g., Mae M. Ngai, Response to Joseph Carens’ The Case for Amnesty, in IMMIGRANTS AND THE RIGHT TO STAY 57 (2010) [hereinafter Ngai, Response].
52. Ngai, Response, supra note 50, at 57.
54. See Ngai, Response, supra note 50, at 58.
55. See id.; see also Neuman, supra note 49, at 1897–98.
57. See Immigration Act § 19; Mae M. Ngai, IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA 59 (2004). The 1917 Immigration Act also included a protection to prevent deportation where a noncitizen had strong ties to the United States. § 19. A sentencing judge at the time of sentence was empowered to recommend “that such alien shall not be deported.” See id.; Yolanda Vazquez, Advising Noncitizen Defendants on the Immigration Consequences of Criminal Convictions: The Ethical Answer for the Criminal Defense Lawyer,
igration enforcement were deployed largely to advance restrictive racial, economic, and ideological agendas, rather than relying upon criminal law as a foundational and independent vehicle for immigration enforcement. 58

The Immigration Act of May 26, 1924 further entrenched a racially organized model of U.S. immigration regulation by establishing a quota system to allocate the limited slots available to aspiring immigrants. 59 This system favored the immigration of white Northern Europeans, disfavored Southern Europeans, and banned Asian immigration altogether. 60 Literacy and fee requirements were used to restrict immigration from Latin America, though no national quotas were applied to the Western Hemisphere. 61

In 1929, Congress first criminalized unlawful entry to the United States, making it a misdemeanor punishable by up to a year in prison, 62 and also expanded illegal reentry provisions; 63 but, relatively few prosecutions actually occurred under these statutes. 64 Nonetheless, the introduction of criminal penalties tied to violations of immigration regulation began to bring about a conceptual shift in how unauthorized migration was treated in public discourse. 65 Whereas up until the 1930s, immigrants were understood as either “legitimate” immigrants, or “illegitimate” or “ineligible” immigrants, the application of criminal penalties to immigrants, even if seldom imposed, began to reinforce an idea of “illegal immigration.” 66

The period from 1952, when Congress passed major comprehensive immigration legislation, to the mid 1980s involved the relative liberalization of U.S. immigration law. 67 Criminal grounds for exclusion and deportation remained a part of the 1952 statutory scheme, but these grounds were not vigorously enforced

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58. See Kerry Abrams, Polygamy, Prostitution, and the Federalization of Immigration Law, 105 COLUM. L. REV. 641, 671–77, 693–94 (2005) (exploring anti-prostitution laws, among other provisions, that were passed to prohibit Chinese immigration); see also Ngai, Response, supra note 50, at 57.


61. See JOHNSON, supra note 60, at 23–25.


63. Id. at § 1.


67. See generally DEBRA L. DELAET, U.S. IMMIGRATION POLICY IN AN AGE OF RIGHTS 2 (2000) ("[T]he fundamental legislative changes to U.S. immigration policy from the 1960s through the 1980s have been comprised of largely liberal measures that have contributed to an increase in immigration to this country.”); MICHAEL C. LEMAY, FROM OPEN DOOR TO DUTCH DOOR: AN ANALYSIS OF IMMIGRATION POLICY SINCE 1820, at 103 (1987).
and were accompanied by generous exceptions and waiver provisions. Waivers were routinely extended for a wide range of convictions, even serious ones.

In 1965, Congress passed the Hart-Celler Act, imposing for the first time numerical limits on immigrants from countries in the Western Hemisphere. This led to a sharp spike in unauthorized immigration from Mexico and Central America, though the preexisting deportation waiver regime remained largely intact.

The thoroughgoing criminalization of U.S. immigration policy commenced in the 1980s as Congress began a process of revising the Immigration and Nationality Act ("INA") to more closely integrate criminal and immigration law. Legislative changes in the 1980s sought to respond to the growing numbers of unauthorized immigrants generated by the 1965 legislative reforms. Increasing numbers of authorized and unauthorized immigrants of color arriving in the United States, many of whom were among the working poor, prompted escalating economic and racial anxiety in U.S. public discourse—sentiments only exacerbated by ongoing economic and political transformations in the world at large. Immigration legislation passed in 1986 applied criminal sanctions to marriage fraud and reliance on false documents to avoid employer sanctions laws. In a change that would later prove significant in facilitating criminal-immigration enforcement, the 1986 Act provided additionally for reimbursement to states for the costs of incarcerating foreign-born noncitizens. Movement toward a criminal-immigration enforcement model accelerated over the course of the late 1980s, during which time criminal alien removals came to play a critical part in structuring U.S. immigration enforcement. In 1988, in the midst of the war on drugs and the mushrooming of U.S. prison populations, the Omnibus Anti-Drug Abuse Act of

68. Under the 1952 Act, a noncitizen could be excluded or deported based on a crime of "moral turpitude" or "drug trafficking," but a broad waiver was available provided that the noncitizen had seven years of U.S. residence, and the positive equities in the noncitizen's case (such as family ties in the United States, long period of residence, employment history, and hardship if deported) outweighed the negative factors (such as the nature and seriousness of criminal conviction). See INA, Pub. L. No. 82-414, § 212, 66 Stat. 163, 182 (1952) (codified at 8 U.S.C. § 1182(c)); see also Matter of Marin, 161 N. Dec. 581, 584-85 (B.I.A. 1978).


72. See Massey, supra note 71; Ngai, supra note 50.

73. See Immigration Reform and Control Act (IRCA) of 1986, Pub. L. 99-603, 100 Stat. 3359. IRCA effected three primary changes: (1) legalization for a significant number of undocumented immigrants, (2) an increase in border enforcement, (3) and criminal penalties for employers who hired undocumented workers. See id.

74. Immigration Marriage Fraud Amendment of 1986 § 2(d) (codified at 8 U.S.C. § 1325(c)).

75. IRCA § 103(a).

1988 directed the immigration agency to set up pilot programs to work with local law enforcement organizations in four cities, seeking to institutionalize integrated federal immigration enforcement and local crime control. The Anti-Drug Abuse Act of 1988 also introduced to immigration enforcement the category, “aggravated felony,” which was defined at the time to encompass offenses involving murder and trafficking in drugs or weapons. Some “aggravated felons” had committed serious crimes, but others had been convicted for “trafficking” offenses when they were actually fairly minor players in drug crime. Aggravated felons were rendered deportable regardless of their length of lawful permanent residence or other membership claims short of U.S. citizenship, and were prohibited from receiving a form of relief referred to as “voluntary departure.” Still, under the 1988 Act, even serious offenders remained eligible for discretionary relief from deportation when mandatory deportation seemed too harsh a consequence.

The scope of judicial discretion to prevent deportation began to contract dramatically during the final decade of the twentieth century. In 1990, Congress barred discretionary relief for anyone convicted of an aggravated felony and sentenced to at least five years imprisonment, and eliminated judicial recommendations against deportation for any conviction. The 1990 legislation also restricted and streamlined procedures for criminal-immigration enforcement, requiring all states, in order to enable deportation of individuals convicted of crimes, to create a plan to provide the INS with certified records of conviction within thirty days of any state conviction. In 1994, Congress further tightened the connections between criminal and immigration enforcement, expanding grounds for deporta-
tion and exclusion for many crimes to include attempts and conspiracies to commit those crimes;\(^9^9\) and expanding the definition of “aggravated felony” to include sixteen different crimes.\(^9^0\) Congress gave federal judges authority to issue an order of deportation based on a criminal conviction directly at sentencing, instead of through the previously separate civil immigration process.\(^9^1\) In 1989, only 7338 criminal removals occurred, but by 1995 that number had increased to 32,285.\(^9^2\)

The federal legislative integration of criminal and immigration enforcement culminated in 1996 with two pieces of legislation that crafted a far harsher criminal-immigration enforcement system: the Anti-Terrorism and Effective Death Penalty Act (“AEDPA”)\(^9^3\) and the Illegal Immigration Reform and Immigrant Responsibility Act (“IIRIRA”).\(^9^4\) AEDPA and IIRIRA dramatically expanded the list of crimes for which a person could be deported from the United States, including by expanding the definition of “aggravated felony” to include, among a “stunning range” of offenses,\(^9^5\) any crime of theft for which a sentence (even suspended) of more than a year was imposed, and virtually eliminating discretion of immigration adjudicators to waive deportation for any crime included within that definition.\(^9^6\) AEDPA contained special removal procedures for “terrorist aliens”\(^9^7\) and abrogated federal habeas review in a manner that applied not just to alleged terrorists but to all “criminal aliens.”\(^9^8\) IIRIRA also increased criminal penalties for a broad range of immigration-related offenses,\(^9^9\) increased bars to reentry,\(^1^0^0\) and mandated detention for certain immigrants in removal proceedings.\(^1^0^1\) The jurisdiction of federal courts in criminal sentencing to issue removal orders directly was expanded from aggravated felony cases to any deportable

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90. Id.
91. Id. at § 224. Congress authorized bypassing immigration proceedings altogether for any non-lawful permanent resident convicted of an aggravated felony and deemed ineligible for relief from deportation. This deprived persons so identified of a right to an administrative hearing before an immigration judge to determine whether they were, in fact, not a lawful permanent resident, ineligible for any relief, and actually convicted of an aggravated felony. See VCCA § 130004.
92. Schuck & Williams, supra note 3, at 384.
95. See Legomsky, supra note 4, at 520 (explaining that the definition of “aggravated felony” now includes a stunning range of crimes).
96. Nancy Morawetz, Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms, 113 HARV. L. REV. 1936, 1939 (2000) [hereinafter Morawetz, Understanding] (“[A] conviction for simple battery or for shoplifting—either of which would be a misdemeanor or violation in most states—can be deemed an aggravated felony.”) (internal citations omitted); see IIRIRA § 321(a)(3) (amending the aggravated felony definition to include theft sentences of at least one year instead of at least five years).
97. AEDPA § 401.
98. Id. at § 440.
100. Id. at §§ 301–08.
101. Id. at § 305(a)(3).
criminal offense, even offenses carrying only a sentence of probation.\textsuperscript{102} Congress ordered immigration officials to develop a “criminal alien identification system” to track noncitizens with convictions and to assist local, state and federal law enforcement to locate such individuals for deportation.\textsuperscript{103} Another significant feature of IIRIRA is that it added a provision to section 287(g) of the INA, which permits cross-deputization of local law enforcement officers to police immigration violations.\textsuperscript{104} In 1998, over 56,000 criminal removals took place.\textsuperscript{105}

It is worth noting that these significant changes in U.S. criminal-immigration law occurred during the 1990s, well before September 11, 2001. In the aftermath of that day, however, criminal-immigration enforcement became an increasingly central component of the U.S. immigration regulatory regime, even though the pivotal moment of expansion of criminal-immigration enforcement powers happened several years earlier.\textsuperscript{106}

Although attempts at comprehensive immigration reform failed during the first decade of the twenty-first century, in legislative sessions in 2005 and 2006, both houses of Congress passed bills that would have significantly expanded criminal-immigration enforcement: In December 2005, the U.S. House of Representatives passed House Bill 4437, which contained no legalization or guest worker programs and rendered unauthorized physical presence in the United States a felony.\textsuperscript{107} In May 2006, the Senate passed a bill that expanded criminal removal provisions, though it also created a guest worker program and offered a limited path to legalization for certain noncitizens unlawfully present.\textsuperscript{108} Due to considerable divergence between the two bills and feared political fallout during an election year, Congress failed to agree on any compromise legislation.\textsuperscript{109} Despite the legislative failure of expanded criminal-immigration enforcement, Congress has consistently provided generous funding for existing criminal-immigration enforcement mandates.\textsuperscript{110}

\section*{2. Institutional Repurposing}

In addition to legislative reform, institutions involved in immigration enforcement have been reorganized and repurposed to focus on the apprehension and

\begin{thebibliography}{99}
\bibitem[102]{102} Id. at § 374.
\bibitem[104]{104} INA § 287(g), 8 U.S.C. § 1357(g) (2006).
\bibitem[105]{105} Andrew I. Schoenholtz & Thomas F. Muther, Jr., \textit{Immigration and Nationality}, 33 INT'L LAW. 517, 527 (1999).
\bibitem[106]{106} See, \textit{e.g.}, Sweeney, \textit{supra} note 69, at 66.
\bibitem[109]{109} Chacón, \textit{Unsecured Borders}, \textit{supra} note 65, at 1829.
\bibitem[110]{110} The 2009 federal budget proposal included $1.4 billion designated for ICE programs to remove criminal aliens. \textit{How the $3.6 Trillion Would Be Spent}, WASH. POST, Feb. 27, 2009, at A7.
\end{thebibliography}
removal of criminal aliens. In January 2011, Kumar Kibble, Deputy Director of ICE testified before the U.S. House of Representatives: "The Department of Homeland Security (DHS) has fundamentally reformed immigration enforcement, focusing on identifying and removing criminal aliens who pose a threat to public safety and targeting employers who knowingly break the law." According to the Deputy Director, employing this approach has resulted in "record enforcement, removing more aliens in both 2009 and 2010 than in any point in . . . history . . . ." The identification and processing of criminal aliens has become the highest priority for ICE, in particular through its 287(g) and "Secure Communities" initiatives.

Under the 287(g) program (so-called in reference to its statutory section in IIRIRA), the federal government cross-deputizes local police officers to enforce federal immigration law through formal agreements. Cross-deputized officers act to enforce immigration laws in their local jurisdictions, in accord with ICE performance measures that assess the number of criminal aliens encountered by 287(g) officers during each monitoring period.

Separately, under the Secure Communities program, fingerprints of every person arrested and booked by local law enforcement, even those not deputized through 287(g) agreements, are to be automatically entered into immigration databases. ICE is alerted when an arrestee is even suspected to be an undocumented immigrant or noncitizen legal resident. Additionally, when any state, local, or federal law enforcement officer stops an individual, the officer is able to access ICE’s Law Enforcement Support Center ("LESC"), a national enforcement operations facility that provides the officer with real-time information about the person’s last recorded immigration status, if any, twenty-four hours per day, seven days per week.

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111. See, e.g., Sweeney, supra note 69, at 72.
112. ICE Worksite Enforcement, supra note 29, at 82 (statement of Kumar Kibble, Deputy Director, ICE).
113. See id. at 85 (discussing the department’s record enforcement in 2009 and 2010).
115. See MICHELE WASLIN, IMMIGRATION POLICY CTR., ICE’S ENFORCEMENT PRIORITIES AND THE FACTORS THAT UNDERMINE THEM 7 (2010) (explaining that there are seventy-two signed agreements in twenty-six states that delegate immigration power to local police).
116. See id. (stating that the performance mechanism for the 287(g) program is the number of aliens encountered by the program officers).
117. See Sweeney, supra note 69, at 74.
118. See WASLIN, supra note 115, at 11.
119. See Sweeney, supra note 69, at 73–74. The Obama Administration announced in 2009 that it intended to expand Secure Communities to cover every local jurisdiction in the nation by late 2012 at a cost of about $1 billion per year. See, e.g., Nina Bernstein, Immigration Officials Often Detain Foreign-Born Rikers Inmates for Deportation, N.Y. TIMES, Aug. 25, 2009, at A17.
Much of this enforcement work is mediated through the use of technology—biometric databases that permit immediate computer identification of persons suspected to be foreign-born noncitizens—which depersonalizes the identification of criminal aliens and renders the process of differentiating dangerous persons from non-dangerous persons a matter of computer-matching following initial law enforcement contact. A parallel process of institutional re-purposing involves the previously noted change in criminal prosecutorial efforts emphasizing immigration law violations. This process of institutional and technological reorganization alongside a changed legislative landscape reflects a general conceptual shift toward a crime-centered immigration enforcement framework.

3. Conceptual Shift

A crime-centered conceptual framework, explored in greater depth in Part IV, characterizes immigration in reference to crime control, criminal wrongdoing, and criminal punishment, and depicts the challenge of immigration regulation primarily in terms of apprehending and removing noncitizen criminal offenders, thereby permitting a desirable type of immigration to flourish. This conceptual framework draws on a stock crime narrative formula developed originally in crime fiction and related imaginative literature. Crime fiction, which emerged as a popular cultural form in the mid-nineteenth century, during a period of industrialization, urbanization, and the institutionalization of European and U.S. detective and police forces, adheres without significant variation, to an established formula:

(1) a crime is committed;
(2) a designated person or group of persons is tasked with identifying the culprit;
(3) ultimately the criminal is identified and contained; and
(4) a sense of security is restored to the affected community.

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120. According to one ICE spokesperson: "The goal of this plan is to identify and remove all criminal aliens in jails and prisons. Although the focus will first be on those who present the greatest risk to public safety and national security, ICE will also deport other lower-level criminals as resources permit." See Daphne Eviatar, Fingerprinting Plan Will Dramatically Increase Deportations, WASH. INDEP. (May 22, 2009), http://washingtonindependent.com/44141/fingerprinting-plan-will-dramatically-increase-deportations. Another ICE spokesperson, explained: "If the person ran a light, then we need to prioritize our work, and we may not be able to send an agent to the local jail to get them. But I guarantee you, we will catch up to them later." See Kristin Collins, Five Counties Push Jail Deportations, NEWS & OBSERVER (Feb. 5, 2009), http://www.newsobserver.com/2009/02/05/5-counties-push-jail-deportations.html. Immigration law scholar Nancy Morawetz suggests that Secure Communities is "designed to sweep in people and then sort it out while they're in detention ... without access to lawyers," an approach that "threatens all foreign nationals." See Bernstein, supra note 119.

121. See supra Part I.A.3. For excellent analysis of this phenomenon, see Chacón, Managing Migration, supra note 4, and Eagles, supra note 12.

122. See generally JEROME H. DELAMATER & RUTH PRIGOZY, THEORY AND PRACTICE OF CLASSIC DETECTIVE FICTION (1997) (exploring each of these themes in classic detective story model).
This narrative formula is associated with a pleasurable experience of catharsis. In this regard, W.H. Auden wrote of crime narrative that the “magical satisfaction” it provides “is the illusion of being dissociated from the murderer.”\footnote{123} Auden explained:

For me, as for many others, the reading of detective stories is an addiction like tobacco or alcohol. The symptoms of this are: Firstly, the intensity of the craving—if I have any work to do, I must be careful not to get hold of a detective story for, once I begin one, I cannot work or sleep till I have finished it. Secondly, its specificity—the story must conform to certain formulas. . . . And thirdly, its immediacy. I forget the story as soon as I have finished it, and have no wish to read it again.\footnote{124}

Crime narrative and an associated crime-centered conceptual framework have been applied extensively to represent and make sense of social phenomena outside the realm of crime or detective fiction, including in the context of immigration regulation.\footnote{125} When applied to other social phenomena, a stock crime-narrative framework continues to adhere to the same formulaic elements, but extends these features to understanding more complex social processes. As a broader explanatory framework, stock crime narrative similarly identifies culprits responsible for a given harm as deserving of punishment, and an innocent community, which for order to be restored, requires the containment of the deviant criminal elements. The associated conceptual framework necessarily entails simplification, binary logics of good and evil, and a proposed resolution associated with confinement or banishment of the undesired elements.\footnote{126}

This conceptual framework is implicitly invoked in official justifications of the intertwining of criminal and immigration enforcement. This general shift toward understanding individual immigrants as culprits or criminal wrongdoers, criminally responsible for the complex problems posed by regulating immigration

\footnote{123. See W.H. Auden, \textit{The Guilty Vicarage: Notes on the Detective Story, by an Addict}, HARPER'S, May 1948.} \footnote{124. See id.} \footnote{125. See generally DELAMATER & PRIGOZY, \textit{supra note} 122.} \footnote{126. Sheriff Joe Arpaio of Maricopa County, Arizona, put it this way: The reality is stark—either the good guys will prevail and restore some sense of decency and honor and respect to our society, or the bad guys will come out on top and destroy everything we hold dear. . . . Win or lose. Right or wrong. Good guys versus bad guys. Sometimes life is that straightforward. See JOE ARPAIO & LEN SHERMAN, \textit{AMERICA'S TOUGHEST SHERIFF: HOW TO WIN THE WAR AGAINST CRIME} xxi–xxii (1996). In her book \textit{ILLEGAL, ALIEN, OR IMMIGRANT}, political scientist Lina Newton illuminates this conceptual shift in a changing causal story explaining unauthorized immigration to the United States. LINA NEWTON, \textit{ILLEGAL, ALIEN OR IMMIGRANT: THE POLITICS OF IMMIGRATION REFORM} 65 (2008). During the mid-1980s, before the full-fledged emergence of a criminal enforcement model in the immigration context, the problem posed by immigration was characterized in public discourse in relatively more complex terms. See \textit{id}. In the 1990s, a different causal story regarding immigration became predominant—one emphasizing the moral responsibility of unauthorized immigrants as lawbreakers. See \textit{id}.}
emerged in tandem with a host of changing socio-political and economic conditions in the post-Cold War period. These changes include the rise of neoliberalism and a retrenchment of the New Deal/Great Society model of governance; refugee crises emanating from Haiti, Cuba, Southeast Asia, and Central America that put increasing pressure on U.S. immigration enforcement; and the escalation of a war on crime in which a crime-centered conceptual framework circulated widely. Before returning to explore further the circulation of this conceptual framework in the context of U.S. immigration law enforcement, the following Part examines justifications of the U.S. criminal-immigration convergence in official government accounts and in immigration law scholarship.

II. JUSTIFICATIONS OF THE U.S. CRIMINAL-IMMIGRATION CONVERGENCE

There are several distinct explanatory and justificatory accounts of the appropriateness, usefulness, legitimacy, and rationality of U.S. criminal-immigration enforcement. First, ICE’s own account of its enforcement emphasis on criminal aliens is laid out and defended in a series of memoranda issued by high-ranking officials. ICE most explicitly and thoroughly elaborates its criminal-immigration enforcement approach in a memorandum of June 30, 2010 from ICE Director John Morton to all ICE employees, in which Morton discusses his “Priorities for the Apprehension, Detention, and Removal of Aliens.” Though articulated with the most specificity in the 2010 Morton Memorandum, earlier policy directives, including those of the now defunct INS, similarly conceptualize the agency’s enforcement priorities.

Morton’s account rests on two premises: (1) a concern to allocate limited enforcement resources in a politically palatable manner on the assumption that the maximum affordable quantum of enforcement is required (determined based on resources allocated to ICE), and (2) a conjecture that a focus on criminal aliens will capture the “worst of the worst” of noncitizens in the United States given limited enforcement resources. In his 2010 memorandum, Morton wrote: “ICE is charged with enforcing the nation’s civil immigration laws”—an undertaking “with direct significance for our national security, public safety, and the integrity of our border

127. See, e.g., Newton, supra note 126, at 64–65.
129. See Chaparro Memorandum, supra note 8; Memorandum from Doris Meissner, Comm’r, Immigration & Naturalization Serv., to Reg’l Dirs. (Nov. 17, 2000) [hereinafter Meissner Memorandum] (on file with author); Morton Memorandum, supra note 14; Clinton A. Folsom, Supervisory Detention & Deportation Officer, to Immigration Enforcement Agents (Jan 4, 2010) (on file with author).
130. See Morton Memorandum, supra note 14, at 601–14.
131. See, e.g., Meissner Memorandum (indicating that INS officers should exercise discretion and focus resources on cases involving significant criminal conduct).
and immigration controls.”132 He explained, however, that ICE “only has resources to remove approximately 400,000 aliens per year, less than 4 percent of the estimated illegal alien population in the United States.”133 Therefore, ICE has chosen to focus its enforcement efforts on “the agency’s highest enforcement priorities, namely national security, public safety, and border security.”134 Accordingly, ICE’s first priority is: “Aliens who pose a danger to national security or a risk to public safety,” with special emphasis on terrorists and spies.135 Because it is highly unlikely that ICE will reach its enforcement goal of 400,000 noncitizen removals annually if efforts focus solely on terrorists and spies, priority one also includes immigrants convicted of crimes, members of gangs, persons who are subject to criminal warrants, or those who otherwise pose a risk to public safety.136

Within the category of criminal noncitizens—the de facto enforcement priority given that there are only limited noncitizen terrorists and spies on whom to focus ICE’s considerable resources—there are three further levels of priority: (1) aggravated felons as defined in the Immigration and Nationality Act, which may include serious violent offenders but also includes drug, shoplifting, and other more minor offenders, as well as any immigrant convicted of two or more felonies, whether or not those are aggravated felonies; (2) noncitizens convicted of any felony or three misdemeanors; and (3) noncitizens convicted of misdemeanors.137 The second overall enforcement priority is “[r]ecent illegal entrants.”138 The third priority is “aliens who are subject to a final order of removal and abscond, fail to depart, or intentionally obstruct immigration controls . . . .”139

Despite emphasis in the initial sections of the memorandum on terrorists, spies, and other immigrants who pose a serious risk to public safety, a subsequent and prominently located section plainly states: “Nothing in this memorandum should be construed to prohibit or discourage the apprehension, detention, or removal of other aliens unlawfully in the United States.”140 In this regard, the memorandum assures officers that they may “pursue the removal of any alien unlawfully in the United States, although attention to those aliens should not displace or disrupt the resources needed to remove aliens who are a higher priority.”141 Overall, then, ICE’s policy of prioritizing criminal alien removals is intended to constrain

133. See id.
134. See id.
135. See id.
136. Only a very small number of removals on national security grounds occur each year. For example, only ten of the 208,521 people removed in 2005 were removed on security grounds, a pattern repeated in other years. See Chacón, Unsecured Borders, supra note 65, at 1860 (citing U.S. DEP’T OF HOMELAND SEC., 2005 YEARBOOK OF IMMIGRATION STATISTICS 95–96 (2006)).
138. See id.
139. See id.
140. See id. at 3.
141. See id.
immigration enforcement to focus on the "worst of the worst," while accomplishing robust enforcement by removing approximately 400,000 noncitizens per year— the maximum quantum of ICE's enforcement capacity with a budget just exceeding $5 billion and 19,000 employees. ICE's primary justification for focusing on criminal aliens is thus that limited resources require it to target noncitizens who have come into contact with criminal law enforcement because targeting this group will permit ICE to weed out those individuals most threatening to national security or public safety, and will capture relevant characteristics of un-belonging and undesirability so as to focus limited resources. This is also presumed to be an efficient allocation of resources because it outsources some immigration screening to criminal law enforcement, and adds an extra layer of deterrence not otherwise achievable.

In addition, several legal scholars have offered explanatory accounts, which justify the U.S. criminal-immigration convergence as a rational policy choice. Professor Peter H. Schuck and John Williams have proposed a series of ways in which the convergence of criminal and immigration enforcement might be deepened. Specifically, Schuck and Williams contend that the removal of criminal aliens could be rendered more expeditious and thorough by devolving greater immigration regulatory authority to state and local law enforcers. In so doing, Schuck and Williams implicitly approve the criminal-immigration convergence as an enforcement model, at least in substantial part, and offer some sense of grounds on which it might be defended. Schuck and Williams note that no argument has been advanced—by policymakers, interest groups, or otherwise—as to why criminal aliens should not be removed.

142. See Chaparro Memorandum, supra note 8, at 1 ("Through your efforts, ICE has removed 56,853 criminal aliens as of February 15, 2010. With every field office maintaining this level of activity we anticipate achieving the Agency goal of 150,000 criminal alien removals in FY 2010. [Office of Detention and Removal] must now look at the other critical Agency goal of achieving 400,000 removals and returns overall without relaxing our increased efforts in criminal removals."). ICE officials have denied using "quotas" for removals when under criticism, but ICE's policy memoranda routinely refer to a target of 400,000 removals. See id.; see also Morton Memorandum, supra note 14.


144. See, e.g., id.

145. See generally Schuck & Williams, supra note 3, at 376; Peter H. Schuck, Do Not Go Directly to Jail, N.Y. Times, Dec. 6, 2010, at A33 [hereinafter Schuck, Do Not Go Directly to Jail].

146. See Schuck & Williams, supra note 3, at 462–63.

147. Shuck has also proposed that criminal aliens be removed prior to serving criminal sentences in order to reduce prison and jail overcrowding and associated costs. See Schuck, Do Not Go Directly to Jail, supra note 145. Schuck explains that as a legal matter "deportable criminals can be deported without serving their full sentences if they committed non-violent offenses (with some exceptions), and if the appropriate officials request earlier deportations." See id. So, a further advantage of criminal-immigration enforcement on this account is that it may reduce prison congestion in the United States by removing noncitizens from U.S. jails and prisons. Schuck dismisses other possible changes to reduce overcrowding, such as decriminalizing nonviolent offenses and reducing the length of sentences—as "promising reforms but hard to accomplish politically." See id. In contrast, the removal of incarcerated immigrants is politically popular. See id.
and Williams’ analysis, then, is that focusing U.S. immigration enforcement on criminal aliens is an uncontentious and sensible immigration regulatory model—an ideal and politically palatable manner of negotiating immigration enforcement demands in the complicated undertaking Schuck explores elsewhere of balancing the needs of “citizens, strangers, and in-betweens.”

Both ICE’s own policy directives and Schuck and Williams’ analysis are predicated implicitly on a further constellation of ideas about noncitizens who come into contact with criminal law enforcement. One such idea is that criminal aliens are participating in a form of trespass, the wrongfulness of which is exacerbated by criminal conduct. Criminal-immigration enforcement serves on this trespass account as an appropriate response to the trespass, justifying both removal and criminal prosecution. Another implicit idea is that noncitizens who are lawfully present have entered a contractual-type relationship with the government. On this account, when these noncitizens come into contact with criminal law enforcement, they have violated the terms of the contractual arrangement, and the appropriate remedy is criminal removal.

This violation may even justify removal as a form of criminal punishment, a parallel theory of violation suggesting deportation as a justified punitive response. These ideas remain implicit and unelaborated in ICE’s directives and in the existing legal scholarship, though they appear to inform justificatory accounts articulated in terms of efficient resource allocation (ICE) or political palatability (Schuck).

More recently, Professors Cox and Posner have introduced a theory of immigration regulation that offers, among other thought-provoking contributions, a different partial justification of the U.S. criminal-immigration convergence grounded in information economics—this justificatory theory is embraced by ICE’s own explanatory accounts in terms of the use of criminal law contact as a proxy for undesirability. Cox and Posner propose that there are two primary methods by which a state may achieve “first-order” immigration regulatory goals of obtaining the desired type and amount of immigration. These methods of achieving


149. An implicit contract violation theory presumes the noncitizen has violated a prior agreement to refrain from contact with law enforcement, and if she violates that agreement, the appropriate response is deportation and perhaps criminal punishment. This conception is applied both to those who enter without authorization and to lawful entrants. Justice Scalia, in his majority opinion in Reno v. American-Arab Anti-Discrimination Committee articulated a view along these lines:

Even when deportation is sought because of some act the alien has committed, in principle the alien is not being punished for that act (criminal charges may be available for that separate purpose) but is merely being held to the terms under which he was admitted. And in all cases, deportation is necessary in order to bring to an end an ongoing violation of the United States law.


151. See id. at 811–12.
first-order goals involve decisions as to what the authors call "second-order institutional design." 152 Second-order institutional design may rely on ex ante screening and/or ex post screening. 153 Ex ante screening entails patrolling initial entry and obtaining information about aspiring immigrants prior to their arrival into the country. 154 Ex post screening operates on the basis of information obtained after entry, permitting in principle more aspiring immigrants to enter (whether with or without official authorization), in part to enable the host state to apply post-entry screens to better ascertain immigrants' desirability. 155

On Cox and Posner's account, the United States has relied to a great extent on an ex post model that uses criminal justice system contact as a proxy for un-belonging and undesirability, or type. 156 According to Cox and Posner: "The implicit theory is that, at least for the pool of unskilled labor, authorities can better screen out undesired types by waiting for noncitizens to commit crimes and expelling them than by using some other proxy at the border ex ante." 157 Cox and Posner propose that this is a rational immigration regulatory design choice because it permits market-determined levels of immigration to supply labor, and then later sorts out those immigrants who have failed to find work and who are unable to assimilate—characteristics that are presumably accurately demonstrated by contact with criminal law enforcement. 158

Cox and Posner suggest that relying on criminal law contact may be preferable to relying ex ante on paper credentials, because "immigration goals are . . . complex, and paper credentials are not necessarily accurate proxies for a noncitizen's type." 159 Moreover, Cox and Posner assume "an ex post sanction on noncitizens who commit crimes . . . will impose lower costs on the desirable type . . . than on undesirable types." 160 On this model, "[a]n appropriately calibrated ex post sanction will discourage entry from undesirable types but not from desirable types." 161

It is also "perfectly possible that the sanction would have to be greater than deportation; a criminal punishment might be necessary." 162 Of course, Cox and Posner acknowledge there may be costs associated with ex post criminal law

152. See id.
153. First-order decision-making concerns questions about what sort of persons to permit to immigrate and in what number. Second-order issues of institutional design—the focus of Cox and Posner's article—involve "how to screen applicants for admission so that the desired types are admitted and others are excluded." See id.
154. See id. at 812.
155. See id.
156. See id. at 846.
157. See id. at 847.
158. See id. at 833.
159. See id. at 825-26.
160. See id. at 829. Cox and Posner do allow that a risk-averse noncitizen may be less inclined to immigrate if he fears he may be "falsely convicted of a crime and deported, thus losing . . . country specific investment." See id.
161. See id.
162. See id.
screening: (1) it may discourage "country-specific investment," because immigrants will not know how they will fare in ex-post screening; (2) risk will increase that citizens will be harmed when ties are severed with noncitizens through deportation; and (3) noncitizens may commit crime before being screened out.\textsuperscript{163} But on Cox and Posner's theoretical model, criminal-immigration screening serves as a rational institutional design choice.\textsuperscript{164}

The next Part illustrates how the U.S. criminal-immigration convergence—embodied in the enforcement of U.S. immigration law by ICE (and justified in reference to concepts of efficient resource allocation, as well as trespass, contract violation, and punishment), implicitly defended by Schuck (as a path of least political resistance), and supported generally by Cox and Posner's model (in terms of informational advantage)—fails as an immigration enforcement framework. This is so at least insofar as immigration regulation is intended to facilitate determinations as to membership and claims to remain (or characteristics of desirability and belonging), and insofar as criminal law administration seeks to punish or deter serious harms perpetrated against persons or property.

III. CASUALTIES OF THE U.S. CRIMINAL-IMMIGRATION CONVERGENCE

The U.S. criminal-immigration convergence fails as an immigration enforcement framework in at least the following three respects: (A) it distorts the focus of immigration regulation and enforcement from claims to membership, and to enter, or remain, instead mistakenly equating criminal law contact with un-belonging and undesirability; (B) it diverts criminal law administrative resources from more pressing crime concerns toward the regulation of a population with uniquely low rates of commission of violent crimes who are in large part already subject to removal from the United States; and (C) it perpetuates an entrenched institutional attachment in immigration regulatory settings to a crime-centered framework that is associated with unnecessary forms of incarceration and excessive harshness, and effectively returns to criminal law forms of excessive punishment such as banishment that had been previously abandoned as inconsistent with prevailing norms.

A. Concern for Membership

The various justifications of the criminal-immigration convergence each misapprehend fundamental empirical and normative dimensions of the situations and persons they purport to address—a result of the fundamental disconnect between a conventional criminal law and crime-centered conceptual framework and the more nuanced regulatory concerns core to a functional immigration regime. Relying

\textsuperscript{163} See id. at 827–28, 831.
\textsuperscript{164} My objection is not to ex post screening per se, but to the use of criminal justice system contact as a proxy within the ex post screening apparatus.
upon the criminal law for informational advantage (as an immigration regulatory proxy) assumes that criminal law contact adequately captures features of un-belonging or undesirability. This Section will demonstrate that, in large part, this assumption is false. Further, the steep costs associated with criminal-immigration enforcement cast serious doubt on any efficiency gains attributed to it. And although a trespass theory presumes there has been an unlawful entry, or an entry without invitation, and absent some form of substantial adverse possession or claim to belonging, this Section will also suggest this presumption is false in the case of many persons inextricably impacted by the U.S. criminal-immigration convergence. A contract violation or punishment theory would require some correspondence between the violation at issue, and the response contemplated. Again, this correspondence is absent in many cases at the core of U.S. criminal-immigration enforcement. Finally, political palatability as a justification for large-scale regulatory enforcement must be constrained by some form of accountability to concerns of justice. This Section will suggest that insofar as the U.S. criminal-immigration convergence substitutes a crime-centered conceptual framework for concern for membership or other immigration regulatory priorities, its legitimacy is severely compromised because in many instances it produces results that are manifestly unjust.

Ultimately, the failure of the U.S. criminal-immigration convergence lies in significant part in the mismatch between the institutional culture and concerns of criminal law enforcement, on the one hand, and the concern for membership and sorting rightful claims to belonging central to immigration law. Contact with criminal law enforcement is a poor proxy for un-belonging. Many of the persons who come into contact with criminal law enforcement officers and are identified as noncitizens cannot be subject to removal. Many are lawful permanent residents. More than an isolated few are in fact U.S. citizens. Others still may be asylees or refugees. Even undocumented residents may successfully press compelling claims for relief from removal. Among each of these groups, considerable numbers of those who are subject to removal due to criminal law contact ought not to be, irrespective of their legal status, in light of their abiding interests to remain. Consequently, criminal law fails as an immigration regulatory proxy because it relies upon an inaccurate indicator of un-belonging, criminal law contact. Justificatory frameworks grounded in a conception of trespass, or contract violation, or political expediency likewise fail with regard to many of the noncitizens targeted by criminal-immigration enforcement. Because the particularities of distinct groups of immigrants matter to the analysis, I consider separately harms to lawfully present persons first, and then to unauthorized immigrants.

165. This flaw is consistent with Motomura's critique of Cox and Posner’s theoretical model: that while the ex post (criminal law) screening approach may apply persuasively to certain unauthorized immigrants, it is inapplicable to other categories of noncitizens, such as lawful permanent residents. See generally Motomura, Choosing Immigrants, supra note 16.
1. Lawfully Present Persons

Of those immigrants who have been subject to removal from the United States as a consequence of criminal law contact, at least twenty percent were in the country lawfully, frequently after having lived and worked for decades in the United States with their family and loved ones.\textsuperscript{166} Lawfully present persons targeted in the U.S. criminal-immigration convergence include individuals with various distinct immigration statuses, among them: lawful permanent residents, U.S. citizens, and asylees and refugees.\textsuperscript{167}

**Lawful Permanent Residents:** Long-term lawful permanent residents of the United States—who often have extensive U.S. family ties—have been subject to removal \textit{en masse} from the United States following criminal law contact. Since the 1996 immigration reforms went into effect, more than 87,000 lawful permanent residents have faced deportation from the United States as a result of criminal conviction, ranging from minor public order violations to more serious criminal infractions involving harm to other persons.\textsuperscript{168}

Lawful permanent residents are legally admitted to the United States for an indefinite period of residence. The justificatory foundation of criminal-immigration enforcement in a conception of ongoing trespass plainly does not apply to lawful permanent residents. Nor can their presence in the United States properly be understood as merely a "privilege" as the immigration agency has suggested in public comment.\textsuperscript{169} Although lawful permanent residents are eligible to become U.S. citizens after (in most cases) five years of U.S. residence, the advantages of naturalization may not seem significant to many, and for persons of modest means, the associated costs are considerable.\textsuperscript{170} As a practical matter, a lawful permanent resident has permission from the U.S. government to live and work for the entirety of his or her life in the United States, and is free to travel internationally and

\textsuperscript{166} For\textit{ced Apart (By the Numbers)}, supra note 8, at 2; see Chacón, Unsecured Borders, supra note 65, at 1846 ("[M]ore than 156,000 'aggravated felons' who have been removed from the United States since 1997 had been in the country an average of fifteen years prior to being put into removal proceedings, and 25\% had been here over twenty years.").

\textsuperscript{167} In response to the wrongful arrest and deportation of U.S. citizens and lawful residents, Senator Menendez (D-NJ) introduced the Protect Citizens and Residents from Unlawful Detention Act. The proposed bill finds that ICE has "mistakenly detained and deported United States citizens and lawful permanent residents" as a result of "[m]istaken identities, bureaucratic mix-ups, and discriminatory attitudes." Protect Citizens and Residents from Unlawful Detention Act, S. 1549, 111th Cong. § 2 (1st Sess. 2009).

\textsuperscript{168} This number represents approximately ten percent of the total population of those removed from the United States on criminal grounds. For\textit{ced Apart (By the Numbers), supra note 8, at 24.}

\textsuperscript{169} Recall this justification for criminal-immigration enforcement offered by a government spokesperson: "If you haven't become a citizen, you are here as a privilege. And, if you commit a crime, you lose that privilege." See Swilley, supra note 19.

\textsuperscript{170} The cost for the naturalization application itself is well over $500. This application fee does not include any attorney's fees, which are often substantial. One may feel compelled to hire an attorney as the immigration legal process is complicated and difficult for a non-expert to navigate. See U.S. CITIZENSHIP & IMMIGRATION SERV. (USCIS), NATURALIZATION APPLICATION N-400 INSTRUCTIONS, available at http://www.uscis.gov.
reenter without advance permission. The most significant practical differences in terms of political rights and social entitlements between residents and citizens are that citizens, unlike residents, may vote in state and national elections and are eligible for a greater range of public assistance; and of course, primarily subject to the U.S. criminal-immigration convergence, lawful residents are vulnerable to deportation whereas in principle citizens are not. Notwithstanding their vulnerability to deportation, however, because lawful permanent residents have a lawful claim to indefinite presence in the United States, a trespass or privilege justification for criminal prosecution or criminal removal is inapplicable to them.

A contract violation or retributive punishment justification of criminal-immigration enforcement as applied to lawful residents would entail that in virtue of criminal law contact or criminal conviction, the U.S. government is entitled to revoke entirely the permission of the lawful resident to remain in the United States. This seems justifiable as a response to the relevant criminal conduct only inasmuch as the conduct is sufficiently egregious to justify such a remedy in virtue of the strength of the lawful resident’s claim to membership and in accord with the relevant agreement. This proportionality constraint would similarly be applicable to a retributive criminal punishment account of the criminal removal of lawful permanent residents. As will be explored infra in Section III.B, in the significant majority of criminal removals involving lawful residents, the criminal conduct at issue is relatively minor. This suggests that for the substantial majority of criminal removals of lawful residents, the contract violation and retributive criminal justificatory frameworks fall short. There are further reasons to reject the entry contract justification as an accurate reflection of the immigration process, not the least of which is that the functional nature of the relationship between a noncitizen and the government changes dramatically over time in ways not reflected in the initial agreement regarding entry. However, even assuming the applicability of a contract conception of criminal-immigration enforcement, the contract and punishment frameworks lack justificatory power as applied to lawful permanent residents as both seek to justify a remedy (deportation) without regard to proportionality or to the severity of the offending conduct within the overall scheme of the agreement.

In terms of a justificatory account predicated on informational advantage, a lawful permanent resident’s contact with criminal law enforcement offers little reliable data about that person’s belonging, assimilability, or desirability.


173. It is worth clarifying again that Cox and Posner’s theory of informational advantage applies on their account only to unauthorized immigrants. However, the theoretical framework in which reliance on criminal law
Lawful permanent residents identified by the use of criminal law as an immigration screen include many individuals who have resided in the United States since childhood, have completed all of their formal schooling in U.S. educational institutions, speak English as their primary language, and have extensive family ties in the United States to U.S. citizen and lawful resident children, parents, siblings and other loved ones.\textsuperscript{174} If removed from the United States, long-term lawful residents frequently arrive back in their respective countries of birth, without family ties, employment prospects, or cultural literacy, further burdening already impoverished countries mostly in the Caribbean, Mexico, and Central America.\textsuperscript{175}

Precisely because of these substantial ties on the part of lawful permanent residents, Congress has retained a discretionary waiver available to certain lawful residents facing deportation. So, in some instances, lawful permanent residents are detained for prolonged periods, but are ultimately permitted to remain in the United States. One such case involved a Mr. B: 

[A] 57-year-old lawful permanent resident of the United States for more than forty years with US citizen children and grandchildren, [who] spent four years in mandatory detention while fighting deportation. In August 2003, he pled guilty to two misdemeanors and received probation. . . . ICE officers arrested Mr. B based on the misdemeanor convictions and sought to deport him . . . . [H]e remained in detention while his case went through several government appeals. In November 2007 [four years after his initial detention], the federal court of appeals . . . ordered his immediate release.\textsuperscript{176}

Subjecting lawful permanent residents like Mr. B to deportation proceedings following criminal law contact offers little informational advantage to the state, and imposes a considerable cost due to prolonged case processing and detention. This cost is incurred with no apparent purpose in cases such as Mr. B's, where the lawful resident ultimately remains in the United States. But to do otherwise, that is to remove lawful residents like Mr. B, rupturing longstanding family and employment relationships in the United States, would be to perpetrate severe harm to those family members, employers, and the residents themselves. And the State would not have obtained any informational benefit because contact with criminal law enforcement in most instances involving lawful permanent residents would not have meaningfully identified un-belonging, inassimilability, or undesirability.

\textsuperscript{174} See Morawetz, Understanding, supra note 96, at 1952-53.
\textsuperscript{175} FORCED APART (BY THE NUMBERS), supra note 8, at 22.
Still, in many thousands of instances, lawful permanent residents have been subject to removal as a consequence of criminal conviction, where relief, such as that afforded Mr. B, was unavailable. A justification from political palatability cannot stand up to the harm perpetrated in many of these cases. Mr. Padilla, the petitioner in the case before the Supreme Court cited in the epigraph on page 107, had been a lawful permanent resident of the United States for more than forty years and had served the United States honorably in the Vietnam War. If ultimately convicted of a drug transportation crime involving marijuana, he will be ineligible for almost any relief from removal. Mr. Carachuri-Rosendo, the petitioner whose case is cited in the epigraph on page 106, if not granted relief in the practically unreviewable discretion of an immigration judge, will be deported notwithstanding the fact that he has lived in the United States since he was five years old, is the father and husband of U.S. citizens, and stands convicted only of two minor drug possession offenses. The conclusion to be drawn from this is that criminal-immigration enforcement ought to be applied to lawful permanent residents, if at all, only where the egregiousness of their conduct is such that it overcomes their claims to belonging, and where the sanction of removal is roughly proportional as a remedy to the criminal wrong at issue.

U.S. Citizens: The misguided large-scale application of U.S. criminal-immigration enforcement to long-term lawful permanent residents is but one small piece of a much broader set of problems—including the detention and removal of misidentified U.S. citizens, asylees, refugees, and other long-term U.S. residents. Criminal-immigration enforcement has resulted in the repeated apprehension, detention, and even deportation of U.S. citizens who are profiled mistakenly as foreign-born. These individuals may be U.S.-born or naturalized citizens, or they may have acquired or derived citizenship through birth abroad to a U.S. citizen parent or through the naturalization of one or both of their parents during their childhood.

The detention and deportation of U.S. citizens reflect fundamental structural problems with the U.S. criminal-immigration convergence, because the convergence’s basic processes create unmanageable risks that, even with procedural modifications, U.S. citizens will be subject to criminal-immigration enforcement and the severe harms such enforcement entails. The trespass, contract, and punishment justificatory bases for criminal-immigration enforcement are without question inapplicable to U.S. citizens; and, no legitimate account predicated on

178. See id. at 1477–78.
political palatability or informational advantage can render legitimate the confinement and deportation of U.S. citizens.

Yet, in a stunning account of the wrongful detention and removal of U.S. citizens, political theorist Professor Jacqueline Stevens has unmasked a problem far greater in scope than was previously understood to exist.182 In 2007, the Vera Institute conducted a study that found more than 300 individuals at several immigration detention facilities who had non-frivolous claims to U.S. citizenship.183 Stevens’s more recent study, in contrast, suggests that up to one percent of noncitizens detained by ICE in Southern Arizona between 2006 and 2008 had their cases terminated by an immigration judge in virtue of their U.S. citizenship—indicating a significant structural quandary, potentially impacting thousands of vulnerable persons.184

These instances are not simply isolated mistakes, but are the inevitable consequence of an immigration enforcement system that melds criminal and immigration regulatory functions, and operates on the presumption that criminal law contact serves reliably as a proxy for un-belonging or undesirability. This approach is wrong-headed because it misapprehends the legal and factual complexity of immigration-related claims that must be sorted through a criminal law screen ill-suited to assessing such matters. The broad application of Secure Communities and other related ICE programs that refer for deportation processing any person who encounters the criminal law and is suspected to be a match as deportable, results in repeated contact of persons who may appear to be noncitizens to officers, but in fact have colorable claims to U.S. citizenship. Because of the quick transfer to ICE custody of suspected noncitizens following criminal law contact, even those with valid U.S. citizenship may not be carrying documentation or even have readily available documentation to substantiate their citizenship. According to a study by the Brennan Center for Justice at New York University, seven percent of U.S. citizens do not have readily available evidence of their citizenship; twelve percent of U.S. citizens earning less than $25,000 lack access to a U.S. passport, naturalization papers, or their U.S. birth certificate. 185

The experience of U.S. citizens subjected by ICE to immigration detention and deportation—as reflected in federal court opinions and testimony before Congress—illustrates some of the concrete consequences associated with use of criminal law as a proxy for un-belonging. In one case, Rennison Castillo, a U.S. Army veteran

182. See generally Stevens, supra note 180.
184. See Stevens, supra note 180, at 622 (discussing statistics from data collected by the Florence Immigrant and Refugee Rights Project).
and naturalized U.S. citizen since 1998, was incarcerated for more than seven months at an immigration detention center in Washington before being released.\(^{186}\) Castillo had immigrated to the United States at the age of seven, became a lawful permanent resident by age fifteen, and naturalized around his twenty-first birthday.\(^{187}\) Following a minor criminal conviction, immigration officers interviewed Castillo in jail, and subsequently charged him as removable on account of "a crime of moral turpitude."\(^{188}\) Castillo repeatedly informed immigration officers that he was a U.S. citizen, that he had served in the U.S. army, and he recounted details of his naturalization ceremony.\(^{189}\) Castillo explained that documentation to establish his claim was in the locked trunk of his car, but no attempt was made to access this information, and Castillo did not have family members in the area to assist him.\(^{190}\)

Though he was without a lawyer, Castillo pleaded in court with the immigration judge, recounting the same details of his U.S. citizenship and absence of ties to Belize; the Judge responded that Castillo "can't just expect me to believe you-your claim that you're a United States citizen."\(^{191}\) Castillo was only released—following 226 days in immigration detention—after obtaining pro bono counsel and appealing to the Board of Immigration Appeals.\(^{192}\) Castillo has sued the ICE officers responsible for his detention and is seeking unspecified monetary damages and an apology.\(^{193}\)

Another U.S. citizen, Herbert Flores-Torres, spent far longer in immigration detention before his case was resolved, and his experience illustrates yet further structural flaws that threaten to impact a wide range of citizens and others with compelling membership claims. Flores-Torres was detained in ICE custody for three years as he sought to prove his U.S. citizenship, before ultimately winning his claim in a habeas action in federal district court.\(^{194}\) Flores-Torres immigrated to the United States from El Salvador when he was eight years old; he became a lawful permanent resident several years later; and his mother naturalized when he was seventeen, entitling Flores-Torres to U.S. citizenship provided he was an illegitimate child.\(^{195}\) Whether a child derives citizenship based on the naturaliza-
tion of their parent under U.S. immigration law is controlled by the version of the statute in effect at the time of the parent's naturalization and the child's minority. Cases of acquired and derivative citizenship are often complex, requiring analysis of both U.S. and foreign law, and are not amenable to depersonalized non-expert screening effectuated by ICE's computer-based instantaneous processing conducted remotely by rank and file law enforcement officers.¹⁹⁶

For Flores-Torres, whose mother naturalized in 1995, the statute then in effect, Immigration and Nationality Act section 321(a), former 8 U.S.C. § 1432(a), stated in its entirety:

(a) A child born outside of the United States of alien parents, or of an alien parent and a citizen parent who has subsequently lost citizenship of the United States, becomes a citizen of the United States upon fulfillment of the following conditions:

   (1) The naturalization of both parents; or
   (2) The naturalization of the surviving parent if one of the parents is deceased; or
   (3) The naturalization of the parent having legal custody of the child when there has been a legal separation of the parents or the naturalization of the mother if the child was born out of wedlock and the paternity of the child has not been established by legitimation; and if
   (4) Such naturalization takes place while such child is under the age of eighteen years; and
   (5) Such child is residing in the United States pursuant to lawful admission for permanent residence at the time of the naturalization of the parent last naturalized under clause (1) of this subsection, or the parent naturalized under clause (2) or (3) of this subsection, or thereafter begins to reside permanently in the United States while under the age of eighteen years.¹⁹⁷

In 2000, the former section 1432(a) was repealed and amended to permit more readily derivation of citizenship through the naturalization of a parent.¹⁹⁸ The new statute, 8 U.S.C. § 1431, permits a lawful resident noncitizen child to derive citizenship from the naturalization of either parent, so long as that parent has custody, regardless of the status of the second parent or the legitimacy of the

¹⁹⁶. The government had contested Flores-Torres's citizenship on the grounds that he was not truly illegitimate as he had lived with his father for several months during his childhood. See Flores-Torres, 680 F. Supp. 2d at 1103. The district court found that Torres was never legitimized; that when "in middle school in Los Angeles" he had "problems in school with gang members"; was sent "to stay with his father in San Antonio"; "his mother sent him money to pay for his expenses"; her "father did not introduce him to anyone including his wife and daughters as his son"; "treated him 'like a stranger' and made him sleep in the laundry room." See id.; see also Press Release, U.C. Davis L. Sch., Law School Clinics Free Client from Immigration Detention (Jan. 5, 2010), http://www.law.ucdavis.edu/news/news.aspx?id=2477.
¹⁹⁸. See id. at § 1431 (2000).
child. As a consequence of the 2000 amendment, many more persons under the age of eighteen (as of 2000) are now U.S. citizens if their parents have naturalized. This means that the widespread application of criminal-immigration enforcement measures to persons from mixed citizenship families—a large class of persons—is increasingly likely to result in the detention and deportation of persons who are in fact U.S. citizens.

Some U.S. citizens detained by ICE have actually been physically removed from the United States. Pedro Guzman, a U.S.-born citizen who suffers from a severe mental disability, was induced by U.S. immigration authorities to sign "voluntary return" documents indicating he was a Mexican citizen without legal status in the United States. In May 2007, when Guzman was twenty-nine years old, he was removed by U.S. immigration officials from Men's Central Jail in Los Angeles, where he was held on a misdemeanor trespassing charge, to Tijuana, where he spent months eating out of dumpsters as his mother looked desperately for him in morgues, hospitals, and shelters in Mexico. Guzman had been employed as a cement mixer, had only a second-grade reading ability, and spoke limited Spanish. After three months living on the streets at the California-Mexico border, he was reunited with his family in Calexico. But for Guzman, removal meant 89 days eating out of garbage cans and bathing in canals. . . . He had tried to reenter the United States at San Ysidro but had been repeatedly turned away. He then walked 100 miles east to reach the border crossing at Mexicali [and] . . . returned to the United States fearful, stuttering, and no longer able to communicate . . . .

U.S. citizens of Latin American or Caribbean ancestry who suffer from mental disability or mental illness are particularly vulnerable to immigration detention and deportation. In 2001, Deolinda Smith-Willmore, a senior citizen with schizo-

199. See id. Section 1431 states:

(a) A child born outside of the United States automatically becomes a citizen of the United States when all of the following conditions have been fulfilled:

(1) At least one parent of the child is a citizen of the United States, whether by birth or naturalization.

(2) The child is under the age of eighteen years.

(3) The child is residing in the United States in the legal and physical custody of the citizen parent pursuant to a lawful admission for permanent residence.

Id.


201. See id. at 33 (statement of James J. Broshanahan & Mark D. Rosenbaum).

202. See id. at 30.

203. See id. at 33, 78.

204. See id. at 78 (statement of Rachel E. Rosenbloom).
phrenia who was born in Ossining, New York in 1931 to a Dominican mother and African-American father, was administratively removed from the United States to the Dominican Republic. Immigration officials encountered Smith-Willmore in prison, and although she was clear that she is a U.S. citizen, no efforts were made to corroborate her claim and she never saw an immigration judge.

The cases of U.S. citizens subject to immigration detention and removal illustrate several important structural problems with the use of criminal law as an immigration screen. First, immigration law is characterized not by clear delimitations of guilt and innocence as a crime-centered conceptual framework suggests, but by complex variations of status and claims to membership. To determine whether one is a U.S. citizen or is otherwise entitled to remain in the United States may involve sophisticated statutory and factual analysis, which criminal law enforcement officers are ill equipped to perform. Further, the dragnet created by numerically targeted criminal-immigration enforcement—with a goal of 400,000 removals per year—exacerbates these problems, where the complicated membership claims of large numbers of individuals must be quickly resolved. Finally, harms associated with mistaken determinations are severe—including unlawful prolonged detention and removal to a foreign state—especially so for the mentally ill.

In a policy memorandum issued on November 19, 2009, ICE Director Morton provided guidance regarding the treatment during apprehension, detention, and

205. See id. at 74.

206. See id. Administrative removal, a fast-track removal process in which cases are adjudicated by an immigration officer rather than an immigration judge, was established by Congress in 1994 to apply to immigrants convicted of an "aggravated felony" who are not admitted for permanent residence, or are conditional permanent residents, or have not yet lifted the conditions on residency status. See 8 U.S.C. § 1228 (2006). See generally Morawetz, Understanding, supra note 96 (discussing mandatory deportation of legal permanent residents for seemingly minor crimes, which are classified as aggravated felonies).

207. For example, in addition to the complexity of acquired and derivative citizenship statutes, as noted in Part I, supra, the term "aggravated felony" under the INA includes many minor convictions, even misdemeanors under state law, and though the definitional parameters remain in flux, since 2004, the government has lost several cases in the Supreme Court concerning the reach of the term, one decided unanimously and another by a margin of 8–1. See Lopez v. Gonzales, 549 U.S. 47, 50 (2006) (holding that a drug possession offense that does not qualify as a felony under federal law is not an aggravated felony); Leocal v. Ashcroft, 543 U.S. 1, 4 (2004) (holding that a DUI is not an aggravated felony). This suggests that it is a legally complex matter to determine eligibility for administrative processing (for which aggravated felony analysis is a threshold consideration), and is therefore a difficult analysis for low-level law enforcement officers to undertake. Although a claim to U.S. citizenship is to trigger referral to an immigration judge, this safeguard has repeatedly failed in fast-track proceedings, as evidenced by the case of Smith-Willmore. See 8 U.S.C. § 1228; Problems with ICE Interrogation, supra note 200, at 70.


209. See Problems with ICE Interrogation, supra note 200, at 76.
removal proceedings of persons claiming to be U.S. citizens. Although he expressly instructed officers not to take into custody individuals who provide persuasive evidence of U.S. citizenship which “outweighs evidence to the contrary,” such individuals may still be placed into removal proceedings if there is reason to believe they are “in the United States in violation of law.” Where a person, such as Mr. Castillo, is unable to produce evidence corroborating citizenship, “the individual may be arrested and processed for removal.” Given the complex factual and legal issues at stake in an inquiry of acquired or derivative citizenship, it is not clear how a criminal law enforcement officer cross-deputized under the 287(g) program or even line ICE officers will be able to competently make a determination as to the relative probative value of the available evidence.

ICE has sought to establish additional procedural safeguards, but these are also inadequate to address the relevant structural problems. The 2009 Morton Memorandum requires that an interview with the detainee be conducted, in which probative questions about citizenship are raised; “[a]dditional steps to be taken may include vital records searches, family interviews, and other appropriate investigative measures.” There is no mandatory language applied to the steps that must be taken to attempt to corroborate claims to U.S. citizenship beyond the custodial interview. If a person does not have readily available proof of U.S. citizenship, which is not infrequently the case for low-income persons, then ICE is under no further obligation to take any specific investigative steps. No counsel is appointed (and there is no right to government-subsidized counsel in immigration proceedings)—all that is mandated in terms of representation is that ICE

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211. See id.

212. See id. at 2. Officers are advised that “any uncertainty ... should weigh against detention,” but what threshold precisely suffices to create uncertainty is left undefined. See id. at 2.

213. Field Office Directors and Special Agents in Charge should “ensure that all state and local officers with delegated immigration authority pursuant to INA § 287(g) ... understand and adhere to this policy” and ICE supervisors are “to thoroughly investigate all [U.S. Citizen] claims made by individuals encountered by [§] 287(g) designated officers.” See id. at 3.

214. Where someone self-identifies as a U.S. citizen, the procedure whereby the merits of the case are to be examined is as follows: an interview with the detainee will be conducted under oath and “must include ... probative questions designed to elicit information sufficient to allow a thorough investigation of the person’s claim of citizenship.” See id. at 2–3. The memorandum elaborates a set of internal steps of reporting up that must be taken in cases where individuals claim U.S. citizenship, including preparation of internal memoranda and database entries. See id. at 2.

215. See id. at 3 (emphasis added).

216. See Andrew Becker & Patrick J. McDonnell, U.S. Citizens Caught Up in Immigration Sweeps, L.A. Times (Apr. 9, 2009), http://articles.latimes.com/2009/apr/09/nation/la-citizen9 (discussing how detainees often do not carry proof of their citizenship which could lead to confusion about their immigration status; since official investigations fail, detainees are often unable to prove their citizenship without a lawyer’s help); 2009 Memorandum, supra note 210, at 3.
officers provide the individual with a list of pro bono legal service providers.217 Accordingly, the protective mechanisms implemented by ICE are likely to be inadequate to protect the most vulnerable U.S. citizens. The justifications of criminal-immigration enforcement discussed above—in terms of efficient resource allocation, informational advantage, political palatability, trespass, contract, and punishment—do not address adequately the harm imposed on such persons by the convergence of U.S. criminal and immigration law enforcement.218

These structural problems cannot be resolved by isolated procedural reforms. Holding constant current enforcement levels and criminal-immigration enforcement practices, meaningful inquiry into claims of status adequate to prevent frequent errors would grind the wheels of immigration “justice” to a far slower pace, if not to a halt.

Asylees and Refugees: During the period 1997–2007, over 1000 persons coded as refugees in ICE’s recorded data were removed from the United States as a consequence of a criminal conviction.219 The number of refugees in the ICE dataset almost certainly reflects only some of those persons with refugee status, and not many others who may have had a claim for asylum or refugee status, but whose status was either unrecorded or who were unable to prevail on a claim for relief from removal as an asylee or refugee.220

To deport a refugee or asylee based on criminal law contact is potentially to return that person to a situation where he or she will be persecuted, possibly tortured, or even killed.221 Persons who have been convicted of an “aggravated felony” are ineligible for asylum; some are ineligible for another form of relief entitled “withholding of removal”; and many may obtain relief only under the Convention Against Torture (“CAT”). CAT relief is available only if a noncitizen is able to prove that he or she will be tortured with the complicity of government officials upon removal—a difficult evidentiary task, especially for persons who appear in court pro se or are subject to fast-track processing.222

For other refugees or asylees, the danger in their countries of birth may have passed, but when these persons have developed strong ties to the United States, the harms to them entailed by their removal are grave and the responsibility for the circumstances that led to their criminal conduct may lie equally, if not more so,
with the country of residence than the country of origin. Professor Bill Ong Hing has powerfully argued for these reasons, that in the case of Cambodian refugees, deportation is an unjust sanction.

The same concerns about the applicability of a trespass metaphor, of the tailored or proportional nature of the remedy of deportation in terms of contract or criminal violation, and of the accuracy of criminal law contact as a proxy for un-belonging and undesirability, apply to asylees and refugees as they do to lawful permanent residents and U.S. citizens. With regard to all three of these categories of persons, the U.S. criminal-immigration convergence overlooks fundamental concerns regarding the purposes of immigration regulation and the relevance of membership status, and in so doing perpetrates severe harms. The institutional structure of the U.S. criminal-immigration convergence—which necessarily involves delegation of complex and nuanced membership determinations to line law enforcement officers—cannot but catch in its midst lawful residents, U.S. citizens, and those with claims to asylum or refugee status.

2. Unauthorized Immigrants

Another category of persons with compelling membership claims targeted for criminal-immigration enforcement is that of immigrants who are undocumented or have overstayed a temporary visa, but nonetheless have accumulated a long period of residence and substantial ties to the United States. Some of these persons have strong membership claims: they may have lived in the United States for much of their lives, attended school in this country, speak English as their primary language, and may be husbands or wives, parents, or children of U.S. citizens or legal residents. In fact, the membership claims of certain undocumented residents may be as strong if not stronger than certain lawful permanent residents or citizens.

Removal of long-term unauthorized residents on the basis of criminal law contact may result in forcible family separation. The forcible physical separation of U.S. citizen children from their parents—impacting many thousands of children since 1997—causes enormous suffering for those children, and possible economic devastation for the entire family when the deportee is the primary income-


224. See id.

225. As the political philosopher Joseph Carens has poignantly argued, “[p]eople who live and work and raise their families in a society become members, whatever their legal status.” JOSEPH H. CARENS, IMMIGRANTS AND THE RIGHT TO STAY 18 (2010) [hereinafter, CARENS, RIGHT TO STAY]. In effect, Carens proposes, “the passage of time creates a moral claim to stay.” See id. at 23.

226. Estimates based on findings by the Pew Hispanic Center and U.S. Census Bureau indicate that 196,674 unlawfully present individuals deported on criminal grounds since 1997 had a U.S. citizen or lawfully present child or spouse. See FORCED APART (BY THE NUMBERS), supra note 8, at 5. The Department of Homeland Security has reported that it deported more than 100,000 parents of U.S. citizen children in the ten years prior to 2007. See Michael Falcone, 100,000 Parents of Citizens Were Deported Over 10 Years, N.Y. TIMES, Feb. 14, 2009, at A16.
In this regard, the large-scale family separation effected by U.S. criminal-immigration enforcement runs contrary to one of the most significant motivating principles of the post-1965 framework of U.S. immigration law: family unity. Reflecting this commitment, immigration by immediate relatives of U.S. citizens—spouses, parents, and children—is not subject to the numerical limitations that govern other types of immigration.

Just as with lawful residents, U.S. citizens, asylees and refugees, criminal law contact serves as a poor proxy for un-belonging in the case of undocumented residents with strong membership claims. From the standpoint of a contract or punishment justificatory theory, for those individuals with strong membership claims, permanent banishment from the United States as a result of minor criminal law contact offends similar principles regarding proportionality as does the banishment of U.S. citizens or lawful permanent residents. Although other undocumented residents may have only recently arrived in the United States and possess weaker membership claims, to the extent the U.S. criminal-immigration regime targets these individuals for federal criminal prosecution, a crime-centered framework distorts the complicated circumstances of poverty and disadvantage that shape migration flows. A trespass justification is limited as applied even to unauthorized immigrants, because at least for many, the circumstances that drove them to immigrate render their presence somehow less than purely voluntary. The functional invitation extended to unauthorized migrants for employment, and their contribution through taxation, contradicts a conception of their presence as a forced intrusion, hence undermining a trespass theory of criminal-immigration enforcement as applied to this group.

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If the four categories of persons with strong claims to U.S. membership who are unjustifiably targeted by the convergence of U.S. criminal and immigration enforcement are removed as legitimate targets—the many thousands of lawful

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230. See Motomura, Choosing Immigrants, supra note 16.

231. See Kanstroom, Deportation, supra note 20, at 1935.

232. See Motomura, Choosing Immigrants, supra note 16; Swilley, supra note 19.

permanent residents, U.S. citizens, refugees and asylees, and long-term undocumented residents—criminal law contact on the part of noncitizens can no longer serve as a ready proxy for deportation processing. Even if the foregoing analysis only persuades as to U.S. citizens, asylees or refugees, or lawful permanent residents, and not as to unauthorized immigrants, it remains the case that criminal law contact cannot then serve, on its own, as a basis for identifying immigrant targets for removal, because the sorting of lawful and unlawful immigrants, refugees and those without claims to asylum, is itself a legally and factually complicated task. This weakens considerably the efficiency rationale for relying upon criminal law as an immigration screen as any concession regarding the unsuitability of U.S. citizens, lawful residents, asylees or refugees as legitimate targets would require substantial additional procedural protections to differentiate appropriate from inappropriate targets.234 If criminal law is to function as an immigration screen on a large scale, nothing short of universal and immediate access to counsel would suffice to protect the interests of vulnerable populations given the complexity of the provisions, defenses, and forms of relief at stake. Even that might ultimately prove inadequate as will be explored infra in Part V, but only such a dramatic procedural rights reform would potentially be adequate to identify that more limited number of cases in which criminal law contact serves as a minimally defensible proxy for un-belonging, trespass, or a trigger for proportional immigration consequences.

B. Misguiding Crime Control

Not only does criminal law function poorly as a screen for membership or belonging, but criminal-immigration enforcement is also flawed as a crime control strategy or screen for criminal threat. Accordingly, in integrating criminal and immigration enforcement, the administration of criminal law is undermined. At the outset, a critical problem with criminal-immigration enforcement is that when criminal law enforcement's function extends to immigration enforcement, it can no longer be assumed that criminal law contact is initiated due to an individual’s priority as a criminal concern rather than on the basis of (possibly misguided) immigration concerns. So, criminal law administration is refocused from an emphasis on crime control to a dual function of immigration regulation and crime control, potentially distorting both. Separately, insofar as criminal-immigration enforcement focuses on criminally prosecuting immigration offenses, it allocates crime control resources to an unnecessary prosecutorial program—one which is difficult to justify either on a deterrence or retributive approach. Further, as a broader crime control strategy, criminal-immigration enforcement is misguided because it focuses resources intensively on immigrant communities, thereby

234. See Morton Memorandum, supra note 14.
catching immigrants committing minor crimes, when serious crimes are likely being committed elsewhere.\textsuperscript{235}

1. Distorting Crime Control

The incentives and conduct of criminal law enforcement officers are shaped by knowing that the U.S. government has set out to regulate immigration in significant part by targeting immigrants who come into contact with criminal law enforcement. Criminal law enforcement officers have enormous discretion and a great span of substantive criminal law violations they may pursue.\textsuperscript{236} The criminal law is not a perfectly insulated screen that functions independently as a proxy for immigration decision-making. Rather, with immigration officers and criminal law enforcement personnel working cooperatively, and with explicit instruction to utilize criminal law as an immigration screen, an expected outcome would be that immigrants would be targeted for criminal-immigration enforcement because that is how the state has resolved to regulate migration, not because the affected immigrants are in most instances particular priorities for criminal law enforcement due to the danger they pose to the public.\textsuperscript{237} Broad discretionary criminal law enforcement authority makes it relatively easy for an officer so inclined to arrest and book a suspected immigrant for the short period required to perform an immigration screen. The availability of federal reimbursement to state governments for incarcerating foreign-born noncitizens further incentivizes state law enforcement agencies to target such persons quite apart from their priority as criminal suspects.\textsuperscript{238}

Initial empirical research on the outcomes associated with ICE’s screening in jails and prisons supports the distortion of crime control administration predicted by merging criminal and immigration enforcement activity. When law enforcement in Irving, Texas began to have 24-hour access (via telephone and video teleconference) to ICE in the local jails, discretionary arrests of Latinos for petty offenses rose immediately and substantially.\textsuperscript{239} The dramatic rise in low-level arrests of Latinos particularly impacted arrest levels for minor traffic offenses.\textsuperscript{240} This arrest data provides strong evidence that the increase in arrests was attributable not to an increase in lawless behavior among Latinos, but to police engage-

\begin{itemize}
\item \textsuperscript{235} In the aggregate, foreign-born persons are substantially less likely than U.S.-born persons to commit crimes in the United States. See Robert J. Sampson, \textit{Open Doors Don’t Invite Criminals}, N.Y. TIMES, Mar. 11, 2006, at A15.
\item \textsuperscript{236} See Waslin, supra note 115.
\item \textsuperscript{237} See id. at 13 (discussing ICE’s failure to focus on serious criminals).
\item \textsuperscript{238} See IRA § 501(a), 8 U.S.C. § 1365 (2006).
\item \textsuperscript{240} See id. at 4.
\end{itemize}
ment in immigrant profiling tied to the ICE screening program.241

All of the prevailing justifications of the U.S. criminal-immigration convergence overlook the likelihood that the government’s determination to regulate immigration through criminal law enforcement will impact the way in which criminal law administration itself functions, distracting efforts from a focus on other priorities towards immigration regulation. When criminal law acts as an immigration screen, it does not identify independently criminal wrongdoers but reshapes criminal law administration into, in part, an immigration regulatory regime. Suspected noncitizens become more likely targets of criminal law enforcement even when those noncitizens, all things considered, are not otherwise a pressing crime control concern.

2. Unnecessary Prosecutions

Insofar as criminal-immigration enforcement is directed towards criminally prosecuting undocumented persons for immigration-related offenses, it results in enormous, unnecessary financial burdens to the impacted enforcement and punishment apparatuses. These costs are unnecessary because much of the targeted population is already deportable absent the criminalization of their infractions.242 Undocumented persons are in most cases subject to removal from the United States whether or not they have committed any crime, such as illegal entry, reentry, or another offense.243

The justifications for these criminal-immigration prosecutions reference their deterrent potential or their retributive function.244 But to serve as a meaningful and widespread deterrent, the sentence must be sufficiently harsh as to dissuade persons committed to crossing the border from coming; the many persons willing to risk serious injury or death to cross the border unlawfully are unlikely to be dissuaded by the more remote possibility of a jail or prison sentence.245 Moreover, harsh sentences carry a heavy cost which diverts resources from other criminal enforcement priorities—a particularly questionable policy choice when the objective of removal may be accomplished without criminal prosecution or sentencing. Harsh sentences also raise concerns from a retributive standpoint about proportionality, given that the offense at issue is one that involves no evident victim, and for which there may be powerful excusing factors, such as flight from extreme poverty or pervasive violence.246

241. "Profiling" is defined in the study as "racially disparate exercise of police discretion in the decision to stop, investigate and arrest." Id.
243. Id.
244. See id. at 1885.
245. See id. at 1886.
In any case, the cost of deterrent (or even properly retributive) sentencing must be balanced against the diversion of resources from other prosecutorial or federal spending priorities.\textsuperscript{247} Allocating resources to immigration offenses leaves fewer resources available for other criminal law enforcement and non-law enforcement activities. Indeed, coincident with the dramatic increase in federal prosecutions of illegal entry and reentry to the United States, federal prosecutions of public corruption, gun trafficking, and white collar crime declined.\textsuperscript{248} The case for the United States’ large-scale criminal-immigration prosecution program is weak, both from a retributive standpoint where proportionality is absent, and in virtue of its relative deterrence benefit as compared to the considerable associated costs.\textsuperscript{249} While further analysis of these important matters is beyond the scope of this Article, the purpose of briefly noting the competing concerns is to underscore the impairment of other domains of criminal law enforcement produced by the U.S. criminal-immigration convergence.

3. Diverting Resources to Minor Crimes

The U.S. criminal-immigration convergence is further ill-advised because it exacerbates preexisting tendencies toward diverting public resources to minor victimless crimes. The extensive use of criminal law administration in the United States as a means of maintaining social order across numerous domains of social life leads to widespread contact with criminal law enforcement, often for relatively insignificant violations of criminal law. This is especially true for those persons with less in the way of material resources, who necessarily live out more of their lives in public places routinely subject to criminal surveillance—on public buses rather than in cars, at bars or parks rather than at gatherings in private homes or college dormitories. But across all socio-economic classes, contact with law enforcement relating to minor public order or drug infractions is not uncommon. The Supreme Court implicitly recognized this wide-reaching scope of criminal law enforcement in its opinion in \textit{Carachuri-Rosendo v. Holder}, holding that a second simple possession drug offense is not an “aggravated felony” for immigration purposes.\textsuperscript{250} Justice Stevens, writing for the majority, noted: “Like so many in this country, Carachuri-Rosendo has gotten into some trouble with our drug laws.”\textsuperscript{251}

\begin{footnotes}
\item \textsuperscript{247} See id. at 742 n.137 (2010) (estimating the cost incurred for incarcerating only those immigrants convicted of illegal reentry in 2008 to be $637,162,082.50).
\item \textsuperscript{249} There are also important procedural costs associated with criminal-immigration prosecutions. See Chacón, \textit{A Diversion?}, supra note 5, at 1622 (citing United States v. Roblero-Solís, 588 F.3d 692, 700 (9th Cir. 2009)).
\item \textsuperscript{250} 130 S. Ct. 2577 (2010).
\item \textsuperscript{251} \textit{Carachuri-Rosendo}, 130 S. Ct. at 2583.
\end{footnotes}
The available evidence on the criminal bases of deportations reflects this phenomenon of wide-reaching criminalization of minor offenses: from 1997 to 2007, seventy-two percent of those removed from the United States on criminal grounds faced immigration consequences as a result of nonviolent offenses. The most frequent criminal offense for removed noncitizens for whom offense data is available was entering the United States illegally—the recorded crime for twenty-four percent of deportees. Of those immigrants who were lawfully present and faced removal, seventy-seven percent had committed nonviolent crimes. Overall from 1997 to 2007, at least 362,192 people were removed from the United States as a consequence of a nonviolent offense.

Of those individuals who are classified as violent offenders—at most, approximately one quarter of the total population of criminal deportees—many have not committed serious violent crimes, but far less serious offenses. Crimes classified as violent offenses include in many jurisdictions statutory rape, where the age difference between the older immigrant and the younger person is minimal and the sexual activity was consensual. A bar brawl or spat, which results in shoving may end with a criminal plea. In one illustrative case, Mary Ann Gehris, convicted in Georgia of battery for pulling another woman's hair, received a one-year suspended sentence. This entailed that under governing law, she was classified as a violent aggravated felon—both deportable and ineligible for relief—even though the hair-pulling incident, while surely unpleasant for the woman whose hair was pulled, does not constitute a particularly dangerous violent act.

The conclusion to be drawn is that a criminal conviction is not necessarily a reliable indicator of undesirability or dangerousness, even assuming that criminal law enforcement officers could be perfectly insulated from the task of immigration enforcement so that their criminal arrests reflected characteristics unrelated to

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252. *Forced Apart (By the Numbers)*, supra note 8, at 2.
253. See id. at 2–3.
254. See id. at 2. Consistent with ICE and Department of Homeland Security ("DHS") data, the U.S. Department of State similarly has reported:

| The percentage deported [from the U.S.] for violent crimes is actually very low. Of those [with criminal convictions] deported in 2005, over 50 percent were convicted for drug and immigration offenses. Of those with drug convictions (37 percent of the total criminal deportees), approximately half were possession charges, not sales . . . .

Deportees in Latin America & the Caribbean: Hearing Before the Subcomm. on the W. Hemisphere of the H. Comm. on Foreign Affairs, 110th Cong. 17 (2007) (statement of Charles S. Shapiro, Principal Deputy Assistant Sec'y for W. Hemisphere Affairs).
255. *Forced Apart (By the Numbers)*, supra note 8, at 33.
256. See id. at 2.
258. See id. at 1939.
259. See id. at 1943.
260. Id.
immigration concerns—an ultimately unachievable "acoustic separation" of criminal and immigration enforcement in a practically intertwined system. 261 An immigrant may have actually possessed narcotics, trespassed, shoved someone during a verbal altercation or pulled their hair, jaywalked, jumped a subway turnstile, driven without a license, urinated in an alleyway (public indecency and a sex crime in some states), or shoplifted, and still be a valued contributor to their community and to society at large. 262 A person who committed any of the above noted criminal violations may work hard as a small business person, a landscaper, or in construction, and be a pillar of their family and community. None of these acts, even in combination over several separate arrests and convictions, reliably serves as a proxy for undesirability or dangerousness as a U.S. resident, or indicates that an individual's positive contributions are outweighed by the conduct that led to their contact with the criminal law.

4. Diverting Resources to Demographic with Low Crime Rate

A final problem for criminal law administration posed by the U.S. criminal-immigration convergence is suggested by demographic data regarding noncitizens and their rates of criminal offending relative to citizens. Popular justifications of criminal-immigration enforcement characterize immigrants, and particularly unauthorized migrants, as especially crime-prone, 263 when in fact, the available evidence demonstrates that foreign-born individuals are significantly less likely to break non-immigration related criminal laws than are U.S. citizens. 264 Historically, the incarceration rate for individuals born in the United States has been higher than the incarceration rate of foreign-born individuals in the United States. 265 Moreover, Harvard sociologist Robert J. Sampson and his colleagues have revealed that increases in immigration generally are associated with reduced crime rates. 266 Thus, directing criminal law administration toward noncitizens focuses crime


262. Noncitizens may be subject to removal based on a “crime of moral turpitude,” which was expanded in 1996 to include offenses as minor as subway turnstile jumping. See, e.g., Mojica v. Reno, 970 F. Supp. 130, 137 (E.D.N.Y. 1997).


264. See, e.g., Kristin F. Butcher & Anne Morrison Piehl, Recent Immigrants: Unexpected Implications for Crime and Incarceration, 51 Indus. & Lab. Rel. Rev. 654, 654–57, 677 (1998) (demonstrating that the crime rate for noncitizens over a ten-year period was lower than for citizens despite noncitizens’ lower education levels).

265. See Rumbaut & Ewing, supra note 263, at 6 (finding that the incarceration rate for U.S.-born persons during the period examined was 3.5%, while the incarceration rate for foreign-born U.S. residents was 0.7%).

266. See, e.g., Sampson, supra note 235.
control resources on a population that, according to the available evidence, may be less inclined to commit criminal offenses than U.S.-born citizens. Hence, the diversion of resources to criminally prosecuting undocumented immigrants may be particularly misguided from a public safety standpoint.

C. Institutional Pathologies

Beyond its limits as a framework for either immigration regulatory decision-making or criminal law enforcement, the institutional culture that accompanies criminal-immigration enforcement undermines attempts to realize alternative immigration regulatory arrangements. By "institutional culture," I mean the basic ideas shared by members of an organization that define, often unconsciously, that organization’s view of itself and of its environment. Criminal-immigration enforcement gives rise to a particular crime-centered institutional culture characterized by an emphasis on danger, solidarity, suspicion, cynicism, authority, and numerical indicators of completed crime control projects or cases closed. This institutional culture is a product of the integration of immigration enforcement with preexisting criminal law enforcement organizations—long understood to possess the aforementioned characteristics—and of the adoption of a crime-centered agenda within independent immigration enforcement institutions. In particular, the institutional culture of criminal-immigration enforcement produces two pathological effects: first, criminal-immigration enforcement institutions themselves perpetuate significant costly and unjustifiable harms; and second, the crime-centered culture entailed by such enforcement further entrenches those harms, undermining attempts to implement alternative regulatory arrangements.

A criminal law enforcement culture in the immigration context focuses attention on meeting numerical benchmarks of apprehensions, arrests, and deportations in a manner that mirrors a criminal law enforcement agenda. ICE policy defines a regime within which officers are to focus on the bottom line of numbers of deported criminal aliens. Enforcement initiatives center on hitting numerical

267. See RUMBAUT & EWING, supra note 263, at 1; Robert J. Sampson, Rethinking Crime and Immigration, 7 CONTEXTS 28, 29 (2008), http://contexts.org/articles/files/2008/01/contexts_winter08_sampson.pdf (demonstrating immigration is associated with lower crime rates and new immigrants are less likely to commit crime than their U.S.-born peers).


270. See id.

271. See id.


targets rather than a more carefully calibrated regime engaged in subtly shaping incentives and migration flows.

Also notable is the reliance on detention in the immigration context within institutions that closely resemble (and often coexist alongside) sites of criminal incarceration. As a report by ICE’s Office of Detention Policy and Planning explains, immigration and criminal detention “are typically managed in similar ways,” with both criminals and immigrants “detained in secure facilities with hardened perimeters in remote locations at considerable distances from counsel and/or their communities.” The report continues: “design, construction, staffing plans, and population management strategies are based largely upon the principles of command and control.” Consequently, immigration detention is experienced by both detainees and employees as punitive. Days in windowless cells, under constant guard, surrounded by barbed wire, with little opportunity for productive engagement of any meaningful kind exact a heavy toll on detained immigrants. Further, the profound discomfort associated with detention convinces many who might have meritorious claims to forgo those claims in order to avoid prolonged detention. If a purpose of immigration regulation is to enable individuals with meritorious claims to enter or remain in the country, then immigration detention serves this purpose poorly. Working within the onerous conditions that obtain in detention settings also has been shown to negatively impact the social and psychic well-being of guards. Cognizant of these problems, ICE has resolved to create a more humane and civil detention system, but the entrenched crime-centered institutional culture of criminal-immigration enforcement has rendered any such changes difficult to achieve, perhaps even unattainable.

Within the organizational theory literature, new organizational strategies—such as a shift from a criminal to civil regulatory framework—have been shown to be unachievable if inconsistent with an organization’s culture. A crime-centered institutional culture may operate below the surface, without the express awareness of members; and, institutional culture is largely determined and controlled by members of an organization, not primarily by its leaders’ pronouncements. Critically, criminal-immigration enforcement relies in significant part on criminal law enforcement officers to carry out its work: to apprehend immigrants, to

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276. See id.
277. See Morawetz, Understanding, supra note 96, at 1946–47.
278. Id.
281. See generally Schein, supra note 268.
transport them, and to detain them.\textsuperscript{282} These officers work in an independent institutional culture that operates on a crime-centered command and control framework.\textsuperscript{283} Even employees of civil immigration enforcement entities, especially counsel for Department of Homeland Security ("DHS") and agents employed by ICE, have been acculturated within a crime-centered institutional framework—to act in effect as prosecutors and law enforcement officers. The particular unwanted features of this institutional framework may prove impervious to change so long as the entrenched institutional culture remains in place.

ICE's attempts to reduce reliance on detention and to implement a truly civil detention system provide one telling example of this phenomenon. Despite the express commitment and explicit instructions of high-ranking ICE and DHS officials to reduce reliance on detention of vulnerable and non-dangerous immigrants, ICE agents have not complied with these instructions, continuing to perceive asylum-seekers and other non-threatening populations as a sufficient security or flight risk to justify detention.\textsuperscript{284} When the officers who determine whether to release a particular immigrant operate on the assumption that noncitizens targeted for enforcement are so targeted because as criminals (who have violated criminal-immigration provisions) they pose a risk to public safety, then it is difficult for those officers to see no risk to public safety or of flight in releasing those immigrants.

Thus, attempts to superimpose a set of civil regulatory expectations on existing crime-centered institutions runs up against a competing set of institutional mores. Even if such institutional accommodations were feasible within a regime of criminal-immigration enforcement, the resulting reduction in the number of relevant targets—to only those violent and serious offenders with minimal claims to membership—would leave the regulatory regime with too small a scope to satisfy enforcement demands or its existing levels of funding.

\textbf{D. Considering Objections}

The primary objection to the line of argument developed thus far is that criminal-immigration enforcement could be transformed in order to accommodate these concerns. If criminal law contact alone is a poor proxy for un-belonging or dangerousness, the proxy regime could focus more narrowly on serious violent offenders. If immigration detention is costly, then the government could rely more on alternatives to detention: electronic monitoring, for example. If there are compelling equities that outweigh the crimes attributed to certain immigrants, procedures could be established to weigh those equities against the offending

\textsuperscript{282} See \textit{Waslin}, supra note 114.
\textsuperscript{283} See, e.g., \textit{Reiner}, supra note 269.
conduct for the entire class of immigrants and not only the currently limited number of persons eligible for relief. If officers tasked with using criminal law contact as a proxy immigration enforcement regime make arrests that are driven more by concern with immigration than with stopping dangerous crime, then officers could be trained to do otherwise.

Each of these institutional accommodations requires a separate response, but the one point common to all such accommodations is that when immigration regulation happens through or in reference to criminal law administration—when suspected immigration law violators are conflated with criminal law violators, a set of deeply rooted assumptions and practices are set in motion. Immigration regulation literally happens through and within criminal administrative institutions. It is then quite difficult to seek to impose a distinct and separate civil regulatory culture within an existing institutional culture tasked simultaneously with carrying out criminal law enforcement work.

Let us consider each alternative in turn. First, criminal-immigration enforcement could focus only on violent offenders whose crimes are so serious as to negate any of the aforementioned concerns regarding functional membership and triviality of offense: murderers, child molesters, rapists, armed robbers, or white collar offenders guilty of massively defrauding investors. But there are few immigrant offenders in any of these categories in any given year. Well under one percent of criminal removals have involved intentional homicide of any kind. While the removal of noncitizen murderers or rapists may in most instances be unobjectionable, at least where there is no long period of U.S. residence such that the United States bears some responsibility for the conduct in question, such cases are few and far between. Although the government may justify isolated criminal removals in terms of these sorts of serious violent crimes committed by noncitizens, there is an insufficient number of such offenses for a limited approach along these lines to serve as a meaningful enforcement model, so long as some substantial level of deportations is maintained as a priority. In other words, this accommodation would fundamentally change the structure of U.S. immigration enforcement. It is not an available limited modification to the existing U.S. criminal-immigration enforcement system.

With regard to other conceivable institutional accommodations, there are further reasons for doubt that these accommodations would fundamentally correct the harms associated with criminal-immigration enforcement. As regards immigration detention, efforts of high-level management within ICE to reduce reliance on immigration incarceration under the Obama Administration have proven less than fruitful, in part, because of how entrenched norms in favor of detention are within

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285. Forced Apart (By the Numbers), supra note 8, at 3.
286. Id.
the current crime-centered institutional culture.\footnote{287. The \textit{Morton Memorandum} discourages the use of detention in a range of cases, and suggests detention is appropriate primarily only for criminal aliens and “recent entrants.” See Morton Memorandum, \textit{supra} note 14, at 1-4. Unless they are subject to mandatory detention (as are most noncitizens convicted of crimes) and barring “extraordinary circumstances,” ICE officers are not to “expend detention resources on aliens who are known to be suffering from serious physical or mental illness, or who are disabled, elderly, pregnant, or nursing, or demonstrate that they are primary caretakers of children or an infirm person, or whose detention is otherwise not in the public interest.” See id.; see also \textit{Detention Watch Network}, \textit{supra} note 284, at 9, 15.} Explicit instructions from Washington, D.C. to no longer detain asylum-seekers other than in exceptional cases posing a public safety risk, for example, have gone unheeded in many cases.\footnote{288. See generally \textit{Morton Memorandum}, \textit{supra} note 14.} The presumption of immigrant criminality and the crime-centered culture within ICE have proven resistant to such change absent a shift in the institutional culture. Relevant, too, are the deeply vested interests in maintaining immigration detention—thousands of jobs are provided by immigration prison facilities, and powerful companies, the Corrections Corporation of America among them, draw much of their revenues from detaining immigrants.\footnote{289. See \textit{Mark Dow}, \textit{American Gulag: Inside U.S. Immigration Prisons} 90, 97 (2004).} Tinkering around the edges of criminal-immigration enforcement and seeking to change its reliance on detention, while leaving the broader enforcement approach intact rather than abandoning it, will likely lead to vehement resistance from the beneficiaries of the current system. An alternative regulatory model would permit the entry of new institutional players, less wed to the old ways of doing business, and hence more open to institutional change.

As far as instituting appropriate procedural mechanisms to take adequate account of relevant equities is concerned: although this would be a great improvement over the status quo, any such reliable regime would be enormously resource-intensive, grinding the wheels of the immigration administrative apparatus to a halt. With hundreds of thousands of removals and administrative immigration determinations on criminal grounds each year, a large staff would be required to sort through all the various equity claims of immigrants potentially subject to criminal removal who are now deprived of such hearings due to fast-track processing of various kinds. Counsel would be required to assist in assembling corroborating documentation to verify claimed equities and analyze applicable law. This accommodation would thus undermine any efficiency rationale for the reliance on criminal-immigration screening. In light of the extensive cost and further entrenchment of existing criminal-immigration enforcement arrangements entailed by such a robust procedurally protective apparatus, a matter revisited \textit{infra} in Part V, a preferable outcome would be to begin to undo the U.S. criminal-immigration convergence and to embrace other ways of imagining (and managing) migration.\footnote{290. See \textit{infra} Part IV.}
Finally, it would be a profound challenge indeed to train criminal law enforcement personnel to serve as immigration screeners (their de facto role so long as criminal law contact functions as a proxy immigration regulatory mechanism), but not to attend to immigration concerns in carrying out their criminal law enforcement work. A further challenge is presented in that those persons inclined to support cross-deputization of criminal law enforcement officers as immigration law enforcers, and hence those officers inclined to aggressively carry out this work, may well be motivated by bias against immigrants. This compounds the difficulty of preventing criminal law enforcement officers from targeting immigrants on immigration rather than criminal grounds while carrying out criminal-immigration enforcement work.

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For all these reasons, the U.S. criminal-immigration convergence has far less to recommend it than its wide reach would suggest. The following Part will explore why, given these profound shortcomings, immigration enforcement nonetheless relies so heavily on criminal law administration as a proxy enforcement regime.

IV. PERSISTENCE OF THE U.S. CRIMINAL-IMMIGRATION CONVERGENCE

Although a range of complex causal influences contributed to the emergence of the U.S. criminal-immigration convergence, one factor accounting for its persistence—little examined in the existing literature, and critical to understanding its powerful sway—is its negotiation of a pervasive and profound cognitive dissonance in the United States regarding immigration and immigrants. This cognitive dissonance is addressed, however imperfectly, through reference to a conceptual framework that draws upon a stock crime-narrative formula, developed originally, as explored supra in Part I, in crime fiction and related imaginative literature. In this regard, the U.S. criminal-immigration convergence reflects a broader trend in U.S. public discourse of brokering political compromise and envisioning regulatory solutions by using a formulaic stock crime-narrative framework as a manner of conceptualizing complex social concerns.

292. See Kevin R. Johnson, Race, the Immigration Laws, and Domestic Race Relations: A "Magic Mirror" into the Heart of Darkness, 73 Ind. L.J. 1111, 1154–57 (1998) (hereinafter Johnson, "Magic Mirror") (discussing the potential applicability of a range of social psychological theories, including cognitive dissonance theory, to the connections between subordination of domestic racial minorities and discrimination against noncitizens).
293. See supra Part I.
294. See James Forman, Jr., Exporting Harshness: How the War on Crime Helped Make the War on Terror Possible, 33 N.Y.U. Rev. L. & Soc. Change 331, 346 (2009) ("As a nation, when faced with new or pressing social challenges, we increasingly turn to criminal prosecution and incarceration.").
This Part will first briefly introduce the concept of cognitive dissonance and will then consider two forms of pervasive cognitive dissonance in the United States regarding immigration and immigrants. Subsequently, I examine how a stock crime-narrative framework as applied to immigration enforcement serves to manage this dissonance, even as it mishandles the complex social concerns at stake in the immigration context.

A. Immigration Cognitive Dissonance

1. Cognitive Dissonance Theory

Social psychologist Leon Festinger introduced the concept of cognitive dissonance in his groundbreaking account of how human beings respond to the experience of cognitive inconsistency. In *A Theory of Cognitive Dissonance*, Festinger examined how contradictions between an individual’s beliefs produce an uncomfortable psychological pressure. If the magnitude of the discomfort—a sensation Festinger termed “dissonance”—is substantial, it motivates most people to seek to alleviate the tension. Festinger explained: “as soon as dissonance occurs there will be pressures to reduce it” proportionate to the “magnitude of dissonance.”

Of course, some measure of cognitive dissonance occurs routinely and in a wide variety of situations. On Festinger’s account, elements of cognition, effectively ideas or bundles of ideas, occur largely in response to one’s experience of reality; as the world is rife with contradictions, so too is human experience rife with dissonance. In specific instances, dissonance may arise in relation to newly acquired information, or in response to social relations, or as a result of purely individual-level processes. Sometimes dissonance may be fleeting or persistent but not disturbing (such as where it concerns not particularly fundamental matters); in other instances, individuals experience major persistent dissonance, and their inconsistent cognitions cannot comfortably persist.


295. FESTINGER, supra note 21.
296. See generally id.
297. See id. at 15 (explaining that “the relation between the two elements is dissonant if, disregarding the others, the one does not, or would not be expected to, follow from the other”).
298. See id. at 5.
299. See id. at 17.
300. See id.
301. See id. at 10.
303. FESTINGER, supra note 21, at 16.
Festinger has proposed three ways in which major dissonance may be accommodated: First, dissonance may be relieved by changing one’s behavior (if dissonance arose due to tension between a behavioral cognitive element and another cognitive element). Second, it is possible to relieve dissonance by changing one’s environment (if it is indeed possible to change the relevant situation). Third, dissonance may be reduced by “adding new cognitive elements” that serve to reconcile the dissonant elements. Adding new cognitive elements entails embracing new beliefs or conceptual frameworks that minimize the intensity of the inconsistency between preexisting cognitive elements.

This third approach is especially common when dissonant beliefs are culturally ingrained or are otherwise resistant to change through behavioral or environmental modifications. Under such conditions, it will be far easier to rationalize the inconsistency within a new cognitive framework than to transform the resistant cognitive elements. This is not to say that the new cognitive elements are necessarily false or disingenuous, only that their embrace is motivated (at least in part) by dissonance.

There is ample empirical support developed over several decades for the general pattern described by Festinger’s framework: where two or more cognitive elements exist in fundamental tension, and that tension is substantial, psychological pressure will arise to reconcile the relevant contradiction. If behavioral or environmental modifications are not possible, in most instances those experiencing dissonance will adopt new cognitive elements, effectively a new cognitive framework, which functions to minimize dissonance.

2. Two Forms of Immigration Cognitive Dissonance

Immigration law scholars have long noted a uniquely American ambivalence about immigration, but the precise contours of this ambivalence, its generative
effects, and associated microprocesses remain underexplored. Cognitive dissonance theory usefully illuminates this ambivalence—which occurs in relation to both economic and racial concerns—clarifying its particular contours and associated motivational effects.

Economic Dissonance: The United States, a “Nation of Immigrants,” is economically reliant on immigrants’ labor and social contributions. Yet, U.S. citizens also jealously guard the economic and other privileges assumed to be associated with restrictive immigration enforcement. The common refrain of complaints about immigration includes a fear on the part of citizens of losing jobs to noncitizens, and of social services overwhelmed by excessive numbers of immigrants. This tension between restrictiveness and permissiveness regarding immigration is embodied in what Cox and Posner incisively call the U.S. “illegal immigration system,” as well as in the periodic amnesties extended to unauthorized immigrants in federal legislation.

By the end of the twentieth century, approximately one million unauthorized immigrants were estimated to be entering the United States per year—almost the


314. See Newton, supra note 126, at 67 (analyzing survey data indicating Americans view immigration “as simultaneously injurious and beneficent”).

315. See John F. Kennedy, A Nation of Immigrants (1964).

316. More generally, among the country’s most resonant mythologies is that this is a country open to newcomers, a melting pot of different cultures from across the globe. See, e.g., Daniel Kanstroom, Deportation Nation: Outsiders in American History (2007) (“The history of the United States is often told as a parable about the virtues of open immigration for the individual and for the nation. Few, if any, national myths have ever resonated so strongly and for so long.”).

317. See, e.g., Susan F. Martin, Unauthorized Migration: US Policy Responses in Comparative Perspective 16 (2007), http://sisim.georgetown.edu/publications/20070301_Unauthorized_Migration.pdf (“Although the public expresses concerns about high levels of irregular migration, there is far greater tolerance of the specific individuals encountered working illegally—the cleaner, landscaper, nursing aide, for example, who is providing services to American families.”).


same number as were coming through authorized channels. Even as the economic downturn led to substantially reduced levels of unauthorized migration, the U.S. economy still relies fundamentally on these immigrant workers, who constitute an estimated five percent of the U.S. workforce, and a far greater percentage in low wage and low education sectors.

Still, the widespread perception, even if erroneous (as suggested by more than a few economists), is that economic security in the United States is dependent upon restrictive immigration policies. Accordingly, a set of dissonant cognitions and material conditions exist in the United States relating to the political economy of immigration.

Racial Dissonance: A second source of immigration-related cognitive dissonance involves the tension between norms of color-blindness in the United States on the one hand, and racial anxiety surrounding immigration on the other. Color-blindness dominates public discourse about race in the United States, even


323. Schuck, Political Consensus, supra note 313, at 24 ("Immigration also threatens Americans' sense of control over their economic security."). Much of the economics literature suggests liberalized migration regulation would produce net economic benefits in poor, middle-wealth, and rich states. Concern about citizens of rich states, like the United States, losing economically from immigration is predicted (though not clearly established) by other studies, which suggest unauthorized or substantially increased lawful migration may harm the economic prospects of certain working and poverty class Americans. It may also economically burden local communities with large concentrations of migrants requiring public services. See generally GEORGE J. BORJAS, FRIENDS OR STRANGERS: THE IMPACT OF IMMIGRANTS ON THE U.S. ECONOMY (1990); GEORGE J. BORJAS, HEAVEN'S DOOR: IMMIGRATION POLICY AND THE AMERICAN ECONOMY (1999); Michael J. Trebilcock & Matthew Sudak, The Political Economy of Emigration and Immigration, 81 N.Y.U. L. REV. 234 (2006); Economic Focus: Myths and Migration, Economist, Apr. 8, 2006, at 76.

324. Prior to the passage of IIRIRA, Representative Dan Lungren summed up the dissonance surrounding immigration in the United States like this:

The strange thing is, most people are against illegal aliens; most people will tell you to round them all up and send them home; but those same people will say: "By the way, Congressman Lungren, can your immigration subcommittee pass a private bill for this person I know . . . for the woman who works in my house . . . they don't happen to have papers. Will you do something for them?" That is not schizophrenia; I think it is a recognition [sic] that most of the illegal aliens . . . have come here to work, and when we know them, we in most cases like them . . . . But we know we have to do something overall about illegal immigration.


as norms of color-blindness distort the complex realities of the persistent force of race and racism. Explicit and overt consideration of race is generally strongly socially proscribed, and a color-blind conception has permeated Supreme Court doctrine on the Equal Protection Clause. At the same time, anxiety about immigration in the United States has a profoundly racial character.

The suppressed racial anxiety surrounding immigration to the United States has a long lineage. The historical construction of citizenship through racially exclusionary immigration laws made it such that the category of “alien” is inflected through and through with racial connotations. As explored in Part I, supra, U.S. immigration law sought for many decades to exclude non-white immigrants. These racially exclusionary immigration laws aimed to realize a deeply held conviction that national cohesion required a certain sort of homogeneity, envisioned in racial terms. Persons other than those from Northern Europe were feared ultimately to be “inassimilable” and hence to threaten the coherence of the

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327. See, e.g., Gonzalez-Rivera v. INS, 22 F.3d 1441, 1450–51 (9th Cir. 1994) (holding that it was an “egregious” violation of the Fourth Amendment for an officer to stop a vehicle, solely based on the occupants’ Latino appearance, suspecting they were unlawfully present in the United States).


330. All avenues to citizenship—by birth in the national territory (jus soli), birth to citizens (jus sanguinis), or naturalization—were originally restricted by race. See Thomas Alexander Aleinikoff et al., Immigration: Process and Policy 990–95 (3d ed. 1995); see also Chacón, Unsecured Borders, supra note 65, at 1829, 1839 (“The linkage between perceived alien status and illegal status is . . . cemented in the public mind in racialized terms.”); Neil Gotanda, Race, Citizenship, and the Search for Political Community Among “We the People”, 76 OR. L. REV. 233, 253 (1997) (examining the ways in which “popular understandings of ‘foreignness’ suggest that the concept is infused with a racial character”); Ngai, supra note 50, at 63–64 (“The process of defining and policing the border both encoded and generated racial ideas . . . ”); Leti Volpp, The Citizen and the Terrorist, 49 UCLA L. REV. 1575, 1595 (2002) (“[R]ace and other markers . . . patrol the borders of belonging to political communities.”).

331. See Immigration Act of 1924, ch. 190, § 11(a), 43 Stat. 153, 159 (repealed 1952). These laws were motivated by an explicit desire to maintain the racial status quo. See Staff of H. Comm. on Immigration & Naturalization, Report on Restriction of Immigration, H.R. Rep. No. 68-350, pt. 1, at 13–14, 16 (1924) (“[T]he quota system is hoped to guarantee, as best we can at this late date, racial homogeneity . . . ”). Southern and Eastern Europeans were thought to be racially distinct from Northern Europeans and hence were permitted to enter the United States only in limited numbers. See, e.g., John Higman, Strangers in the Land: Patterns in American Nativism 1860–1925, at 156–57 (2d ed. 1992). And once in the United States, many immigrants of color were subject to persistent violent and discriminatory treatment. See, e.g., Korematsu v. United States, 323 U.S. 214 (1944) (declining to intervene to prevent the internment of Japanese persons by the U.S. government during World War II); Elmer Clarence Sandmeyer, The Anti-Chinese Movement in California 48 (2d ed. 1991) (describing mob violence directed against Chinese persons in Los Angeles).

332. See supra Part I.
United States as a nation-state. 333

In the mid-twentieth century, when it became increasingly embarrassing for the United States to prohibit the naturalization of Chinese immigrants as China was a valued ally in the war effort, foreign policy concerns rather than humanitarian ones began to bring about the dismantling of facially exclusionary immigration provisions. 334 However, the concern with demographic continuity—understood in racial, ethnic, and often religious terms—continued to characterize U.S. immigration law and policy. It was not until 1965 that Congress abolished the national origins quota system altogether and prohibited racial considerations from being applied in awarding visas. 335 Since the 1965 reform, explicit racial categorizations have been absent from U.S. immigration law, though anxiety about immigration still registers in coded though profoundly racialized terms. 336

Many anticipated that the post-1965 system of family-based immigration would maintain a certain level of racial homogeneity. 337 The emphasis on family unification in the 1965 Act was expected to favor immigrants from Northern and Western Europe, from which there was already a large immigrant population, and to supply relatively few immigrants from regions with historically low levels of immigration. 338 But the 1965 Act also implemented an annual cap of 20,000 immigrants from each country, which affected immigrants from developing countries with large populations seeking to migrate differently than applicants from other countries. 339 The per-country numerical limits were extended to the Western Hemisphere in 1976, substantially impacting the ability of Mexicans to immigrate lawfully to the United States. 340 The result was a growing population of unauthorized immigrants from countries where significantly greater numbers of

333. See, e.g., SAMUEL HUNTINGTON, THE CLASH OF CIVILIZATIONS AND THE REMAKING OF WORLD ORDER 304–06 (1996) (positing that Western values are threatened by immigrants from other civilizations who reject assimilation and continue to adhere to and to propagate the values, customs and cultures of their home societies; that this sort of multiculturalism is a long-term threat to the health of Western civilization; and that “[n]o country so constituted can long endure as a coherent society”).


people wished to immigrate than the annual numerical limits allowed. The family-based system did not suffice to contain changing racial demographics, and many new immigrants of color arrived in the United States between the late 1960s and the 1980s. Because of numerical caps, large numbers of these immigrants lacked lawful immigration status. Again, in popular discourse anxiety about immigration was articulated in (now barely coded) racial terms and ultimately figured U.S. civilizational decline as a product of insufficient national homogeneity.

Contemporary anti-immigration sentiment refers consistently to the threat of changing racial demographics in the United States as a threat to U.S. national identity, and even national security. As one example, Peter Brimelow's *Alien Nation*, a rallying cry for restrictive immigration reform, seeks to make the case that one of the primary threats posed by increased immigration is a change in the proportion of white to non-white Americans—a threat, it proposes, to the fundamental integrity of the U.S. nation-state. In the era of the “War on Terror,” restrictive criminal-immigration measures are understood to be required as well due to the terrorist threat imputed to Muslim, Arab, Middle Eastern, and South Asian men, who are identified as dangerous and unwilling to assimilate, a threat again conceptualized in racial terms.

It is not only white U.S. citizens that support harsh criminal-immigration measures promoted through invocation of racial anxieties. The endorsement on

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341. See Ngai, *Response*, supra note 50, at 63 (examining how changing racial demographics in the wake of mid-century immigration reforms were invoked to spur racial anxiety toward unauthorized Latino migrants, and stating: “that inclusionary impulse has since given way to exclusionary nativism, in which anxiety over migrant illegality has been arguably a proxy for racism against Latinos”).

342. See Reimers, supra note 336, at 10, 20.

343. Id. at 22.


345. See BRIMELOW, supra note 318.

346. See Muneer I. Ahmad, *A Rage Shared by Law: Post-September 11 Racial Violence as Crimes of Passion*, 92 CALIF. L. REV. 1259, 1262 (2004); Miller, *supra* note 4, at 615; Volpp, *supra* note 329, at 1576, 1576 n.2 (examining the racialization of persons who appear “Middle Eastern, Arab, or Muslim” and the disidentification of these persons as citizens).

347. For instance, California’s Proposition 187 was promoted in strongly racially coded terms, invoking threats to social cohesion and security posed by unauthorized (primarily) Latino immigrants in terms of a propensity toward criminality. See generally Kevin R. Johnson, *An Essay on Immigration Politics, Popular Democracy, and California’s Proposition 187: The Political Relevance and Legal Irrelevance of Race*, 70 WASH. L. REV. 629 (1995). The proposition sought to cross-deputize state criminal law enforcement officers to report immigration law violators and to exclude unauthorized immigrants from accessing public health or education services. See id. Cultivating fear about the criminality of unauthorized immigrants in racially charged terms, a prominent Proposition 187 advocate claimed:

You get illegal alien children, Third World children, out of our schools, and you will reduce the violence. That is a fact . . . . You’re not dealing with a lot of shiny face, little kiddies . . . . You’re dealing with Third World cultures who come in, they shoot, they beat, they stab and they spread their drugs around in our school system.
the part of certain racially subordinated groups of policies that would appear to
disadvantage members of those groups is consistent with cognitive dissonance and
related theories in that members of subordinated groups experience heightened
pressures to reduce dissonance as they are more directly implicated in the
dissonant cognitions and associated social contexts. 348

So, alongside a pervasive economic dissonance that characterizes conceptions
of immigration to the United States, a deep-seated racial dissonance suffuses U.S.
immigration policy. The following Section examines the role of a stock crime-
narrative framework in negotiating both racial and economic dissonance concern-
ing immigration.

B. Dissonance Deferred

A stock crime-narrative framework has increasingly been applied to the immi-
gration context wherein criminal aliens are understood to threaten the security and
well-being of U.S. society—a society in fact constituted by immigrant populations—
and the identification of these criminal individuals has become the top priority for
immigration enforcement. 349 The challenge of immigration regulation within a
crime-centered framework is to screen out and remove criminal aliens so as to
enable the appropriate form of immigration. 350 This framework appeals—and even
enables a certain relief or pleasure—as it negotiates the economic and racial
dissonance that abounds in the United States in regard to immigration. 351

See id. at 657 (quoting Barbara Coe, a drafter of Proposition 187). Yet, despite this heavily racially inflected
rhetoric, Proposition 187 was supported by substantial numbers of African Americans and Asians, as well as
significant numbers of Hispanic voters. See Heading North: After Prop. 187, ECONOMIST, Nov. 19, 1994, at 64.
Approximately fifty-seven percent of Asian American voters, fifty-six percent of African American voters, and
thirty-one percent of Hispanic voters expressed support for the initiative. See id.

348. For example, system justification theory stresses that in some instances, members of disadvantaged
groups are equally, if not more likely than members of advantaged groups to support a status quo that exacerbates
the disadvantaged group’s subordinated position. See Jost, supra note 310, at 350 (“If there is indeed a motivation
to justify the system to reduce ideological dissonance . . . then it may be that those who suffer the most because of
the system are also those who would have the most to explain, justify, and rationalize.”); see also John T. Jost et
al., Social Inequality and the Reduction of Ideological Dissonance on Behalf of the System: Evidence of Enhanced
System Justification Among the Disadvantaged, 33 EUR. J. SOC. PSYCHOL. 13 (2003). This tendency to rationalize
the status quo among members of subordinated groups is by no means universal. In protests in 2006 surrounding
harsh proposed immigration legislation, for example, immigrants resisted the characterization of immigrant status
as coextensive with criminality, taking to the streets by the thousands chanting “We

349. See Bill Ong Hing, The Immigrant as Criminal: Punishing Dreamers, 9 HASTINGS WOMEN’S L.J. 79, 80 (1998).
350. See Daniel Kanstroom, Post-Deportation Human Rights Law: Aspiration, Oxymoron, or Necessity?, 3
are treated to a spectacular and revealing rogue’s gallery. One after another, the faces and tattooed bodies of
swarthy, evil-doers appear as symbols of success stories for the invigorated removal system. They are almost all
people of color, mostly Latino men (though one Serbian war criminal and a coupe of women made the cut). The
screaming headlines read like those of 1950s ‘true crime’ magazines . . . .”).
351. See generally Auden, supra note 123.
This crime-centered account isolates responsibility for what might be construed otherwise as a complex global problem—regulating migration flows and integrating immigrant populations—to a limited class of deviant individuals, criminal aliens. This conceptual framework, pervasive in U.S. immigration policy discourse, has served as a driver in the legislative history recounted in the preceding pages, where political consensus is sought through a quid pro quo, increasing harshness toward criminal aliens traded against liberalization of other areas of immigration regulation. The conceptual model is resonant in the immigration context as well as elsewhere because it coheres with a stock naturalized crime narrative. Ultimately, this approach alleviates collective responsibility for (and offers collective release from) understanding and responding to the complex factors that drive migration flows from poorer countries to richer ones, instead demonizing “illegals” as lawbreakers or criminal aliens guilty of “illegal entry” or “illegal reentry.”

There is routinely a slippage between the identification of “criminal aliens” as a class of criminally involved persons to be removed, and “illegals,” or undocumented or unauthorized immigrants. Although the two categories overlap only in part—the category of “criminal aliens” includes thousands of lawful immigrants, and only a small minority of unauthorized immigrants come into contact with criminal law enforcement—in popular discourse, the two categories are often conflated.

U.S. Secretary of Homeland Security, Janet Napolitano, in an address on the Obama Administration’s immigration enforcement program, explained the U.S. immigration predicament in terms that reflect precisely this approach to relieving immigration dissonance. For this reason, Napolitano’s address is worth quoting at length:

We all know the story: A steady influx of undocumented workers, crossing our borders illegally in search of work and a better life. A market among employers willing to flout the law in order to hire cheap labor. And as a result, some 12 million people, here illegally, living in the shadows—a source of pain and conflict. It is wrong. It’s an affront to every law-abiding citizen and every

352. See Keith Cunningham-Parmeter, Alien Language: Immigration Metaphors and the Jurisprudence of Otherness, 79 Fordham L. Rev. 1545, 1547-48 (2011) ("In attempting to comprehend new ideas, people borrow from familiar concepts. The metaphors floating in our minds . . . affect social discourse and ultimately social action. Thus, how we think metaphorically affects how we talk about problems and the solutions we formulate in response to those problems. This becomes a self-fulfilling prophesy: the more we repeat, circulate, and repackage certain metaphors, the more our conceptual domains become tied to a limited set of associations.") (internal citations omitted).

353. Also significant, as Professor Jennifer M. Chacón has pointed out, “[t]he number of noncitizens subject to detention and removal as ‘criminal aliens’ exploded after 1996 not because a flood of ‘criminal aliens’ entered the country, but because the 1996 legal changes converted many lawfully present noncitizens into criminal aliens.” See Chacón, Unsecured Borders, supra note 65, at 1846.

employer who plays by the rules. . . . Our system must be strong enough to prevent illegal entry and to get criminal aliens off our streets and out of the country. But it must also . . . reward the hard work and entrepreneurial spirit that immigrants have always brought to America. . . . [Toward this end, DHS has] revised and standardized our immigration-enforcement agreements with state and local law enforcement to make sure that these agencies are effective force multipliers in our efforts to apprehend dangerous criminal aliens. We’ve expanded the Secure Communities program . . . and . . . identified more than 111,000 criminal aliens.\textsuperscript{355}

The conflation over the course of this well-worn story of criminal aliens and illegals functions to resolve the tension between harshly enforcing immigration restrictions against those who, as Napolitano notes, come only “in search of work and a better life,” by emphasizing criminal alien removals, and the danger posed by this category of persons.\textsuperscript{356}

Perhaps the most important feature of a crime-centered framing of immigration regulation is that it posits a now familiar and relatively simple solution, which whatever its social and economic costs, promises collective security and preservation of the status quo through incarceration and removal from U.S. public life of those criminal aliens—a readily identifiable and limited group—presumed to be individually responsible for the myriad problems posed by and reflected in the limitations of the U.S. immigration regulatory regime.\textsuperscript{357} This account discharges any shared historical or contemporary responsibility that may exist for the conditions under which significant numbers of indigent migrants come to the United States without authorization seeking work in legal labor markets and support for their families left behind.\textsuperscript{358} This conceptual framework also characterizes “criminal aliens” in such a way as to disclaim any collective introspection as to why a subset of indigent immigrants, as well as U.S. citizens, find themselves in large numbers under criminal supervision, or why such persons turn to alcohol and drugs, or suffer from mental illness in substantial numbers, resulting in criminal law contact of the sort the preceding Sections explored.

This crime-centered framework is especially resonant in the context of U.S. immigration enforcement because it responds to the economic and racial dissonance discussed above.\textsuperscript{359} The emphasis of immigration enforcement on criminal aliens serves to relieve dissonance between a general openness to or at least blatant

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{355} See supra note 69, at 84 ("The removal (and subsequent bar to readmission) of noncitizens convicted of crimes is a very satisfying outcome . . . because . . . it provides a permanent separation of the wrongdoer from the community, thereby providing maximum protection to society."); see also Kanstroom, \textit{Post-Deportation}, supra note 350, at 203 ("Post-entry social control deportation, like its historical antecedent banishment, offers an alluring promise: the permanent elimination of ‘bad’ people from our communities.").
\item \textsuperscript{356} See supra note 69, at 84.
\item \textsuperscript{357} See supra Part IV.A.2.
\end{enumerate}
\end{footnotesize}
economic reliance upon immigrants, coupled with a jealous safeguarding of the economic privilege of U.S. citizens, by allowing a comforting fiction to persist: that channels to immigration may remain open to the good, hardworking immigrants upon whom the U.S. and world economies rely, while excluding only those who are undeserving, who do not belong, who are invading criminals. The exclusion of the mass of criminal aliens imperiling good immigration, the hope is, will permit a ready and easy immigration regulatory solution, one that readily allows the right sort of immigration to flourish by banishing the wrong sort of immigrants to some far-away, sealed-off, foreign land.

This interposition of tropes of immigrant criminality to appeal to economically motivated fears played an important role in the passage of the 1996 immigration legislation, IIRIRA. 360 Although IIRIRA functioned to limit access of undocumented immigrants to virtually all federal public benefits—including loans, licenses, food aid, housing assistance, and post-secondary education—an important justification for the legislation was found in unsubstantiated concerns about immigrant criminality. 361 Members of Congress offered statements in support of the economic restrictions that directly referenced the threat of criminal aliens. 362 Representative Orrin Hatch (R-UT), for instance, warned:

We can no longer afford to allow our borders to be just overrun by illegal aliens.... Frankly, a lot of our criminality in this country today happens to be coming from criminal, illegal aliens who are ripping our country apart. A lot of the drugs are coming from these people. 363

Along these lines, criminal-immigration enforcement purports to protect against criminal wrongdoing while preserving a certain measure of economic reliance on immigration and immigrants’ labor.

As to the second source of cognitive dissonance that the criminal-immigration convergence serves to relieve—the tension between norms of color-blindness, on the one hand, and racial anxiety surrounding immigration, on the other—emphasis on criminal aliens ascribes wrongdoing to largely non-white immigrants, rather than seeking their exclusion on grounds previously reinforced in national origins quotas that sought to uphold the status of the United States as a predominantly white and European-descended nation. In a variant of what Professor Ian F. Haney López calls “post-racial racism,” U.S. immigration enforcement reinforces racial hierarchies structurally without explicitly targeting individuals on racial grounds. 364

361. See Chacón, Unsecured Borders, supra note 65, at 1843.
363. Id.
Young men (and increasingly young women) of color are subject disproportionately to arrest for drug crime and other low-level offenses. The image of the arrestee in the U.S. popular imagination is of a black or brown body, even as, of course, criminal law impacts many white persons. The U.S. criminal-immigration convergence thus maintains through its structural organization a racially coded immigration enforcement approach, though one that is expressly race neutral.

Interestingly, several hypotheses suggested by this theoretical account of the connection between racial dissonance and endorsement of criminal-immigration enforcement have been initially empirically substantiated by an early study of public support for cross-deputization of police as immigration enforcers. Social psychologist Philip A. Goff and his colleagues have found that support for criminal-immigration enforcement (specifically cross-deputization of local criminal law enforcement officers as immigration agents) is predicted by unconscious racial prejudice and a perceived threat to individuals' values rather than by a principled or pragmatic stand regarding immigration.

V. Undoing the U.S. Criminal-Immigration Convergence

Given the entrenchment of the U.S. criminal-immigration convergence and the profound harms it entails, what are the contending approaches that might undo or limit this convergence? This final Part begins to consider various approaches to undoing criminal-immigration enforcement and to re-conceptualizing immigration outside a crime-centered framework.

A. A Procedural Fix?

Much of the scholarly work critically assessing the U.S. criminal-immigration convergence proposes importing procedural rights that attach in the criminal context to the immigration context. A growing number of immigration law scholars and immigrants’ rights advocates have sought to mitigate the excesses of U.S. criminal-immigration enforcement by advocating enhanced judicially enforced due process protections in immigration proceedings, in particular, rights to: court-appointed counsel, application of an exclusionary rule, and proportionality principles. These arguments generally recommend that because U.S. criminal

366. See id. at 102.
367. See Goff, supra note 291, at 1–2; see also Chief Chris Burbank et al., Policing Immigration: A Job We Do Not Want, HUFFINGTON POST (June 7, 2010), http://www.huffingtonpost.com/chief-chris-burbank/policing-immigration-a-jo_b_602439.html (reporting on study indicating support for cross-deputization is predicted by racial prejudice).
368. See Goff, supra note 291, at 1–2.
369. See, e.g., Chacón, A Diversion?, supra note 5, at 1623 (“The application of the exclusionary rule to removal proceedings is a meritorious proposal to address the procedural problems previously discussed . . . .”);
and immigration regulation have become so thoroughly entwined, courts should “strive to call things what they are” and recognize deportation as punishment, and deportation proceedings as quasi-criminal. Other scholars have proposed that removal proceedings straddle the criminal-civil divide with certain elements of immigration proceedings more akin to criminal proceedings and others more akin to civil proceedings. On this view, rights should be assigned to the two contexts accordingly. Both approaches locate the critical agents of change as courts or judges, who are urged to reinterpret the Constitution to extend more robust due process rights to immigrants in removal proceedings.

Before proceeding to consider the potential limits of a procedural rights revolution in the immigration context, it is worth noting that this is important work that seeks to address the serious needs of a vulnerable group of people. Scholars and advocates that have made the case for a procedural rights revolution in immigration law appropriately insist that the stakes for immigrants facing removal are high, and that these stakes could be more appropriately recognized as such by extending meaningful procedural protections. Mitigating any of the harms confronting noncitizens in removal proceedings, particularly by securing a right to counsel, would represent a major gain for affected immigrants and for the integrity and legitimacy of the legal system as a whole.

But insofar as advocacy for expanded procedural rights turns on judicial recognition of such rights achieved by underscoring the quasi-criminal nature of immigration enforcement, it carries underappreciated risks, and may entail consequences unintended and undesired by its proponents. In particular, extension of criminal procedural rights to the immigration context may further entrench the intertwining of criminal and immigration enforcement. If a procedural rights revolution in the immigration context is to have the desired effect of mitigating the harshness of criminal-immigration enforcement, it ought to be accompanied by efforts to resituate immigration law and policy outside the crime-control frame-
work explored above. Yet, this project of framing immigration outside a crime-centered paradigm exists in potential tension with an insistence upon the quasi-criminal nature of deportation at the heart of much procedural rights advocacy.

A separate yet related critical question immigration law scholars seldom ask is: What do we actually know about the interaction between procedural norms, substantive outcomes, and the attention to process values in criminal law? Attending to this question suggests that a procedural rights revolution in the immigration context may hold less promise than imagined. As it has in the criminal law context, an immigration procedural rights revolution may have the unintended consequence of legitimizing the increasingly harsh substantive immigration law by offering, in principle, a panoply of robust procedural protections seldom enjoyed by defendants in practice and against which harsh substantive laws can be defended. As criminal law scholars have illuminated, this limitation has been borne out in the aftermath of the revolution in criminal procedure, and there is reason to suspect a similar pattern would recur in the immigration context.

So how well do procedural protections in the criminal law context function to protect against relevant substantive law or other excesses? Despite the Eighth Amendment’s protection against cruel and unusual punishments, the Supreme Court has held that a twenty-five-year to life sentence for a nonviolent recidivist offender who stole three golf clubs passes muster under the Constitution. Not only are defendants sentenced to decades in prison for relatively minor theft or drug offenses, but the conditions in U.S. prisons and jails are widely understood to be abhorrent: more than one in ten inmates face rape while incarcerated, and beatings and humiliation are routine. The Sixth Amendment right to effective assistance of counsel in criminal cases frequently means little. As Professor David Luban has described: “the vast majority of criminal defendants receive no individualized scrutiny of their cases but instead are processed like carcasses at the meat-packing plant.”

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376. This argument is distinct from that of Professor Marc L. Miller, who has argued against a primary focus on due process; instead, he proposes constraining executive discretion and achieving just outcomes through prosecutorial charging and plea policies. See, e.g., Miller, supra note 374, at 972; Ronald Wright & Marc Miller, The Screening/Bargaining Tradeoff, 55 STAN. L. REV. 29, 30–32 (2002).


378. U.S. Const. amend VIII.


380. See, e.g., Prison Rape Elimination Act of 2003, 42 U.S.C. § 15601(2) (2006) (“[N]early 200,000 inmates now incarcerated have or will be the victims of prison rape. The total number of inmates who have been sexually assaulted in the past 20 years likely exceeds 1,000,000.”).

381. See, e.g., ALAN ELSNER, GATES OF INJUSTICE: THE CRISIS IN AMERICA’S PRISONS 2–3 (2004) (detailing a sheriff’s effort to make his prison the toughest through humiliation and intimidation).


383. Id.; see Stephen B. Bright, Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer, 103 YALE L.J. 1835, 1836–37 (1994). Rights are rendered meaningful primarily for those able to afford robust representation or lucky enough to be assigned a defender with the time and resources to devote to
Beyond the marked discontinuity between the promises of criminal procedural protections and the actual state of affairs in U.S. criminal law administration lies a further structural challenge in remedying substantive overreaching through procedural means. The combination of robust procedural protections and a political commitment to crime control have been associated not only with pervasive exceptions to procedural safeguards, but also with an excessive ratcheting up of the harshness of substantive criminal law. This one-way ratchet has come to pass because legislators and the public perceive (even if erroneously) procedural protections as interfering with the effective regulation of crime. Professor William J. Stuntz has illuminated that a significant part of this problem lies in combining judicially implemented procedural regulation with substantive law deference, because this approach creates misaligned incentives for lawmakers. In the criminal law context, with the constitutionalization of criminal procedure, the Supreme Court "has regulated policing and trial procedure" and deferred to legislatures with regard to substantive criminal law. This means that legislators have been pushed away from a realm—procedure and policing—where the implementation of moderate policies would have come at a relatively low political cost. Instead, legislators focus almost exclusively on another domain—substantive criminal law—where moderation amidst tough-on-crime sentiment has become more difficult to manage politically. Further, substantive criminal lawmaking has become a manner of circumventing unpopular procedures, because more expansive and harsher criminal law gives prosecutors greater power to negotiate around unpopular procedures by obtaining guilty pleas. As the Supreme Court constitutionalized criminal procedure, "politicians responded with a forty-year backlash of overcriminalization and overpunishment." Political discourse regarding crime has become "too punitive, racially divisive, and insufficiently attentive to the liberty and autonomy interests that constitutional law allegedly protects."

A further structural problem identified by Professor Charles D. Weisselberg, and suggested by the analysis supra in Part III, relates to the impotence of isolated procedural fixes, such as the form Miranda warning, to meaningfully improve

their case. See Luban, supra note 382, at 1763 ("[I]f there are in reality two criminal justice systems, two criminal populations, and two criminal defense bars.").

385. See id. at 792–93.
386. See id. at 782.
387. Id.
388. Id.
390. Stuntz, supra note 389, at 850.
391. Id.
fairness in criminal law enforcement absent a shift in institutional culture. 392 Weisselberg has demonstrated how the warning and waiver regime implemented by the Supreme Court in *Miranda v. Arizona* 393 ultimately failed to secure the voluntariness of criminal suspects’ participation in interrogation because it “coheres” with a sophisticated psychological approach to police interrogation, rather than operating apart from it as the *Miranda* Court intended. 394 Moreover, following the prescribed procedure—what Weisselberg concluded ultimately (and mournfully) is “*Miranda’s* hollow ritual”—diverts attention from whether the values sought to be achieved by the procedure have actually been protected in an individual case or in the aggregate. 395

It is not hard to imagine a similar series of developments in the immigration context: Courts create more robust immigration procedural protections in response to the valiant efforts of immigrants’ rights advocates. But in the face of persistent application of a crime-centered conceptual framework to immigration regulation, legislators frustrated over what they perceive to be inadequate enforcement and interfering procedural protections systematically increase the harshness of substantive law and underfund the legal services intended to safeguard the procedural protections advocates sought in the first instance. An increasing and increasingly harsh range of substantive criminal-immigration laws allocate further discretion and power to the government officers tasked with bringing immigration charges and litigating removal cases. 396 The result is that those officers are often able to circumvent procedural protections with the threat of ever-harsher substantive charges. 397 To the extent that procedural protections such as *Miranda* warnings are required to be administered in the immigration context, those warnings operate to little effect (as Weisselberg has demonstrated in the criminal context 398) because the implementing agency does not change its internal culture to embrace the values the form procedures sought to achieve. The result might well be ever-harsher substantive criminal-immigration law, further antagonism between courts and the political branches in the domain of immigration regulation, and a set of procedures that fails to operate to realize the desired effects.

The point is not that the procedural revolution in the criminal law context is the primary cause of the harshness of U.S. substantive criminal law and of other forms of dysfunctionality in U.S. criminal law administration; nor is it that a parallel rights revolution in immigration proceedings would be the primary cause of subsequent harsh immigration legislation. Indeed, the current substantive criminal-

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394. See Weisselberg, *supra* note 392, at 1522.
395. See id. at 1523.
396. See Legomsky, *supra* note 4, at 495.
397. Immigration law scholars have noted the presence of plea-bargaining equivalents in immigration proceedings. See id.
398. See Weisselberg, *supra* note 392, at 1523.
immigration law is extremely broad and punitive, and current constitutional
procedural protections in the immigration context are quite limited. But just as the
rights revolution in criminal procedure failed to turn the tide on the harshness in
substantive criminal law (and indeed co-existed with escalating harshness), so too
might a rights revolution in immigration procedure fall short in reorienting
substantive immigration law, particularly without a shift in the governing crime-
centered conceptual and enforcement framework.399

Stuntz’s proposed solution to the pathological institutional dynamics just
described in the criminal law context is to deregulate the criminal process, and
apply greater attention and more stringent rule-of-law principles to substantive
criminal law.400 I do not necessarily endorse Stuntz’s proposal as a way out of the
current criminal or immigration law morasses. Rather, my intervention here relies
on Stuntz’s critical analysis to support a more modest insight: Change to the
fundamental character of criminal-immigration enforcement will ultimately re-
quire a change in politics and political discourse, not primarily changes in
judicially enforced procedural rules.

A preferred course, which would avoid the pathologies identified by Stuntz in
the criminal procedure context, would be one that legislatively narrowed the
scope, reduced the harshness, and revised the crime-centered enforcement model
in the immigration domain. Conventional academic wisdom has held that the
politically charged nature of crime renders impossible any legislative change
favorable to criminal suspects or defendants (and perhaps by analogy to those
persons that are the subjects of the U.S. criminal-immigration convergence).401
But a range of recent developments suggest otherwise: more than a few states have
repealed harsh drug laws and mandatory minimums and sought to restore some
measure of proportion to criminal law administration.402

B. Centering Development Economics and Human Rights

If the harms of the U.S. criminal-immigration convergence are to be undone,
more critical than a rights revolution in immigration procedure or perhaps in
tandem with it, is a reorientation in the conceptual framework through which
immigration is understood and enforcement is attempted. An alternative concep-
tual framework is required to manage the cognitive dissonance and attachment to a
crime-centered framework analyzed supra in Part IV, and to respond to the
material contradictions from which that dissonance arises. In other words, undoing
the U.S. criminal-immigration convergence will necessitate another manner of

399. But see Cox & Posner, supra note 16, at 843–44 (arguing that constitutional protections may explain state
of substantive immigration law).
401. See supra Part IV.A.
402. See, e.g., JUDITH GREENE & MARC MAUER, SENTENCING PROJECT, DOWNSCALING PRISONS: LESSONS FROM
addressing economic and racial anxieties surrounding immigration—preferably by confronting the relevant tensions head-on rather than displacing them through the use of a poorly matched proxy regime. I will preliminarily address each source of dissonance and possible conceptual reorientations in turn and will further develop this analysis in future work.

1. Economic Dissonance, Immigration, and Development

A development-focused immigration regulatory model would conceptually resituate immigration in terms of the complex push and pull factors that drive it. Rather than evading economic anxieties in the United States regarding immigration through a crime-centered framework, this approach would confront them directly, addressing those anxieties within the broader political-economic context in which they exist. This project would be two-fold: first, to examine and attend to the actual economic threats entailed by reconfigured or reduced immigration enforcement; and second, to come to terms with the futility and injustice of harsh enforcement, particularly in light of staggering global economic inequality. The aim of this conceptual reorientation more broadly would be to make credible an immigration regime dedicated not to criminal-immigration enforcement, but focused instead on regulating in-flows and out-flows of migrants by grappling with the conditions that drive large-scale regionally-concentrated migration—the primary form of immigration that fuels economic anxieties.

Central to such re-conceptualization is the reality that U.S. immigration laws fail to provide for adequate levels of lawful immigrant labor; they also fail to respond to the demand to immigrate on the part of those willing to risk death to come to the United States. At the same time, migration as a development policy imposes great hardship on individual migrants who must travel great distances and live under often difficult conditions. Family separation and “brain drain” in sending states are also matters of paramount concern. Using migration as a development strategy has the further negative effect of discouraging sending state governments from addressing development needs through means other than remittances and thus infringes the freedom to stay of those who may wish not to


404. See, e.g., Kevin R. Johnson, It's the Economy, Stupid: The Hijacking of the Debate over Immigration Reform by Monsters, Ghosts, and Goblins (or the War on Drugs, War on Terros, Narcoterrorists, Etc.), 13 CHAP. L. REV. 583, 602 (2010) (discussing the demand to immigrate as a result of the absence of economic opportunity).


406. I use the term “sending state” to refer to those countries from which immigrants leave. Correspondingly, I use the term “receiving state” to refer to those countries to which immigrants arrive.

407. See Gordon, supra note 405.
migrate but are left with little other choice. In the United States—as in other primary receiving states—migration flows may increase the competition for jobs along with other social costs. Nonetheless, the status quo entails the de facto use of migration as a development policy with little forethought and little attention to limiting the economic and other harms associated with this approach. And our de facto but un-reflective use of migration as a development policy is bad for many immigrants, as well as for both sending and receiving states. An improved approach would be to cultivate a better, more informed understanding of how migration is functioning in relation to development concerns and how it could function better to address the various interests at stake.

The key challenge, then, is to address economic concerns regarding immigration in a manner that directly acknowledges those concerns and strives to generate a win-win reward structure for those in primary sending states, as well as for those in the United States. The question such a reconceived immigration regulatory approach would seek to answer generally is: How can migration flows be organized so as to minimize the associated harms in sending and receiving states, and achieve fair distribution of any associated gains?

One proposal along these lines, about which there remains considerable uncertainty and ambivalence, concerns what development economists call "cyclical flows." When immigration flows occur cyclically, migrants spend a certain time abroad, but many ultimately return to their respective cities or villages in their countries of origin, bringing with them resources and expertise cultivated abroad to be invested in local development. Receiving states obtain substantial economic benefit from flexible labor (which would pose less threat to citizens were labor protections enforced) and profit from the diversity contributed by newcomers from other places. With cyclical flows, extended families in receiving states may remain, prohibiting places of out-migration from becoming "ghost towns," and greater accrued wealth brought by cyclical migrants could be put to productive use. In sum, both sending and receiving states and their citizens may benefit from cyclical migration, particularly where it is coupled with investments of both sending and receiving states in infrastructure for health, education, and investment in sending states. In contrast, the proponents of cyclical migration propose permanent migration on a large scale can depopulate townships and entire regions in sending states, and raise more legitimate concerns about employment scarcity in

408. See id.
409. See id. at 1144.
410. See id.
412. Id.
413. Id.
414. Id.
415. Id.
primary receiving states.\footnote{416} According to development economist Alejandro Portes, immigration regulation should thus seek to encourage cyclical migration and discourage large-scale permanent migration, which is not accomplished through criminal-immigration enforcement—an approach that either discourages migration altogether or incentivizes migrants to remain so as to avoid apprehension upon reentry, and more generally incentivizes them to mistrust and evade law enforcement.\footnote{417} For both professional and manual workers, receiving and sending states could work cooperatively to incentivize cyclical flows, so that return is voluntary rather than directly coerced.\footnote{418} Further research and analysis is required to determine whether incentivizing cyclical flows would actually function as a win-win model for migration regulation, but the reconceived orientation of this model toward addressing underlying concerns regarding labor, migration, distributive justice, and socio-economic development is a step in the right direction.

Another development economist, Jagdish Bhagwati, has put forward a blueprint for a World Migration Organization ("WMO") on the model of the World Trade Organization ("WTO"), dedicated to facilitating win-win immigration regulatory regimes, such as those explored by Alejandro Portes.\footnote{419} The WMO would monitor immigration policies and pressure restrictionist states to move toward increased openness.\footnote{420} The limitation of this approach is that no one has yet managed to identify how such an institution could structure participation so that participating states would recognize their respective interests as being served by participating and abiding by the Organization's edicts.

The specific tactics and strategies to achieve this end of greater and more humane global immigration policy integration are well beyond the scope of this Article. But the underlying conceptual framework for immigration regulation and the bulk of resources on this approach would be devoted to enabling socio-economic development and improved life chances in primary sending states and primary receiving states like the United States. Such efforts would focus on creating incentives to return for immigrants in primary receiving states, and working to better and more equitably manage the complicated structural factors that lead individuals to permanently re-settle in certain states in large numbers. On this model, criminal-immigration enforcement would continue, if at all, only as a small part of the repertoire of criminal and immigration law responses in egregious

\footnote{416} See id. at 19.\footnote{417} See id.\footnote{418} Proposed guest worker programs absent accompanying changes in development-centered immigration policy are unlikely to reorient U.S. immigration regulation so as to produce cyclical flows. See id. Guest workers would seek to remain, and, as in previous historical periods, would thereby become undocumented residents. See id. The same problems that the current restrictive regime entails would be repeated in a guest worker program if overstays were policed—fear of apprehension would encourage many to remain. See id.\footnote{419} See, e.g., JAGDISH BHAGWATI, A STREAM OF WINDOWS: UNSETTLING REFLECTIONS ON TRADE, IMMIGRATION AND DEMOCRACY 317 (1998).\footnote{420} See id.
cases of harm to persons perpetrated by noncitizens.

This approach would seek to address head-on the primary cause of large-scale immigration: global inequality and political instability. As long as there are vastly greater opportunities for personal attainment in the United States—and other primary receiving states—as compared to relatively impoverished sending states, there will be powerful pressures to immigrate. Improved levels of socio-economic development will, in the long run—more than any fence, wall, or border patrol—sustainably reduce migration flows. 421

2. Racial Dissonance, Immigration, and Human Rights

A human rights immigration framework, developed by, among others, political philosopher Joseph Carens serves to disrupt the ease with which immigration cognitive dissonance is addressed through criminal-immigration enforcement. 422 Carens’s account relies on three premises: (1) all human beings are of equal moral worth; (2) the social order is not naturally given, but requires that legitimate reasons be given for the maintenance of institutions and practices; and (3) restrictions on freedom must be justified. These three premises fundamentally undermine current policy on Carens’s account for three additional reasons: (1) because they entail support for freedom of movement only subject to reasonable restrictions; (2) because freedom of movement is essential for equality of opportunity; and (3) a commitment to equal moral worth entails some commitment to keeping economic, social, and political inequalities as low as possible. 423 A moral right to freedom of movement (as distinct from a legal right) may be subject to limitations, as are many rights, by the competing rights claims of other entities: namely, sovereign states and other rights-holders, such as citizens of destination states or sending states who may fear resource drain or brain drain caused by mass migrations. 424 But the default, on this account, is a right to freedom of movement rather than the converse. Another account offered by political theorist Jaqueline Stevens proceeds from the premise that human beings are born into a state of natural freedom subject to the constraints of mortality. 425 As enslavement unjustly limits the freedom of the slave by unjustifiable force, so, too, restrictive immigration policies unjustly

421. Of course, as it is not the poorest of the poor who have access to immigration channels, but rather those with the means to immigrate, short-term development advances may increase levels of immigration from some currently deeply impoverished locations. But as the cases of Ireland, Italy, and South Korea demonstrate, once primary sending states offer a certain level of socio-economic opportunity, immigration flows markedly decrease and many nationals return home. See Martin, supra note 318, at 10; see also Bill Ong Hing, NAFTA, Globalization and Mexican Migrants, 5 Geo. Mason U. J. Econ. & Pol’y 87, 93 (2009) (“U.S. immigration policy should not revolve around a business need for workers; it should address the modern-day social, cultural, political, and economic relations between nations—particularly those in our hemisphere.”).

422. See generally Carens, Right to Stay, supra note 225; Joseph Carens, Open Borders and the Claims of Community (forthcoming) (on file with author).

423. See generally Carens, Right to Stay, supra note 225.

424. See id.

constrain free movement of individual humans.\textsuperscript{426}

The power of these accounts is not in their legal force, though some human rights litigation has successfully chastened U.S. criminal-immigration enforcement.\textsuperscript{427} Rather, human rights accounts are most productive in their potential to morally ground a reconception of immigration regulation, centering concern for fundamental racial equality and universal human dignity outside a crime-centered framework. Further, such accounts raise a fundamental challenge to the prevailing enforcement model by refusing to concede to its terms. Perhaps most importantly, a human rights framework serves to disrupt the seemingly natural presumptions that undergird the U.S. criminal-immigration convergence. If immigration is a human right, then enforcement measures cannot, by definition, be justified in terms of trespass. If immigration is a human right, then lawful presence is not a privilege to be revoked at will if a lawful resident criminally offends. If immigration is a human right, then a compelling claim of right, beyond any efficiency rational or informational benefit, is required to defeat it. Conceptually resituating immigration in terms of human rights and development is critical to reshaping the conceptual territory within which immigration enforcement occurs, and to creating space within which to imagine alternatives that might undo the U.S. criminal-immigration convergence and its associated harms.

\textbf{CONCLUSION}

When closely considered, it becomes apparent that the use of criminal law as an immigration regulatory proxy is not the easy fix some have imagined for the profound challenges inherent in immigration regulation. Instead, the U.S. criminal-immigration convergence misguides immigration regulatory decision-making, drains criminal law enforcement resources, diverts attention from serious crime, and undermines efforts to introduce preferable immigration regulatory regimes. As a consequence, sustainable comprehensive immigration reform cannot be realized, as many appear to anticipate, by treating criminal alien enforcement as the uncomplicated front for political compromise. Nor does a crime-centered conceptual framework adequately capture the harms and possible remedies for managing migration flows or the integration of immigrants into U.S. communities. Instead, immigration regulation should engage the complex factors that drive migration flows and the varied economic and social interests at stake in the immigration context. To this end, the U.S. criminal-immigration convergence must be undone—a feat that will require, in addition and perhaps prior to any immigration procedural rights revolution, a reorientation of the conceptual framework that shapes U.S. immigration law and politics.

\textsuperscript{426} See id.

\textsuperscript{427} See, e.g., Inter-Am. Comm’n H.R., Submission in Preparation for a Working Meeting (Mar. 26, 2011) (granting precautionary measures for Haitian nationals in the United States under human rights law because the Haitians' lives would be at "grave risk" were they deported to Haiti).