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Articles

PROSECUTING IMMIGRATION

Ingrid V. Eagly[*]

INTRODUCTION

The criminal prosecution of immigration—principally for illegal entry and reentry, alien smuggling, and document fraud—has reached an all-time high.[1] Not since Prohibition has a single category of crime been prosecuted in such record numbers by the federal government.[2] Immigration, which

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[*] Acting Professor of Law, UCLA School of Law. Many thanks to Muneer Ahmad, Sameer Ashar, David Binder, Gary Blasi, Frederic Bloom, Taimie Bryant, Devon Carbado, Ann Carlson, Davina Chen, Jack Chin, Susan Bibler Coutin, Scott Cummings, Joseph Doherty, Sharon Dolovich, Alice Eagly, Tal Grietzer, Clare Huntington, Jerry Kang, Máximo Langer, Jennifer Mnookin, Albert Moore, Hiroshi Motomura, Angela Riley, Stacy Tolchin, Eugene Volokh, Cecillia Wang, Stephen Yeazell, Jonathan Zasloff, and Noah Zatz for their helpful comments and conversation. Thanks also to Christine Green, Elly Kugler, Angélica Ochoa, and Jordan Blair Woods for their excellent research assistance, and to Amy Atchison and the expert research staff of UCLA's Hugh & Hazel Darling Law Library.

[1] *See infra* Figure 4 (charting immigration crime prosecution from 1923 to the present).

[2] *Compare* Executive Office for U.S. Attorneys, Datafile, Apr. 28, 2010 (unpublished data, acquired by author through FOIA request) (on file with author) [hereinafter EOUSA Datafile 2010] (reporting that 91,698 defendants with immigration charges had their cases

now constitutes over half of the federal criminal workload,[3] has eclipsed all other areas of federal prosecution.[4] Noncitizens have become the face of federal prisons.[5]

Along certain portions of the southwest border, virtually every person arrested while crossing into the United States is criminally prosecuted before being sent home.[6] In the interior of the country, prosecution for immigration-related offenses is increasingly linked to home and workplace raids,[7] questioning of inmates at jails,[8] and local police acting as immigration enforcers.[9] With the undocumented immigrant population in the

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terminated in fiscal year 2009), *with* 1932 ATT'Y GEN. ANN. REP. 59 (reporting a record high of 69,155 cases terminated under the National Prohibition Act in fiscal year 1932).

[3] Statistics maintained by the Executive Office for U.S. Attorneys show that, in 2009, 55% of their terminated caseload was coded as "immigration crime." EOUSA Datafile 2010, *supra* note 2. "Immigration crime," as defined in the U.S. Attorneys' database, includes immigration-related crimes found in Title 8 of the United States Code, such as illegal entry and illegal reentry. U.S. DEP'T OF JUSTICE, EXECUTIVE OFFICE FOR U.S. ATTORNEYS, LEGAL INFORMATION OFFICE NETWORK SYSTEM USER MANUAL A-53 (2010), *available at* http://www.justice.gov/usao/reading_room/data/Info/LIONS_User_Manual_5.3_Nov_2010.pdf. This Article also considers certain offenses under Title 18 for document fraud, false statements, or identity theft to be immigration crimes.

[4] *See* Solomon Moore, *Focus on Immigration Crimes Is Said to Shortchange Other Cases*, N.Y. TIMES, Jan. 12, 2009, at A1.

[5] This Article uses the terms "noncitizens" and "immigrants" to refer to persons who are not citizens or nationals of the United States—that is, persons called "aliens" by the Immigration and Nationality Act (INA), 8 U.S.C. § 1101(a)(3) (2006). The term "undocumented immigrant" is used to refer to a narrower category comprised of those persons who do not have legal permission to reside in the United States. Technically, under the INA, "immigrant" is a term of art (defined as those aliens that do not fall within certain categories), *id.* § 1101(a)(15), but this Article uses the term more broadly, and interchangeably with "noncitizen."

Currently, noncitizens represent almost 40% of defendants sentenced under the Federal Sentencing Guidelines. U.S. SENTENCING COMM'N, CHANGING FACE OF FEDERAL CRIMINAL SENTENCING 2 (2009), *available at* http://www.ussc.gov/general/20081230_Changing_Face_Fed_Sent.pdf. The color of federal crime has also shifted dramatically over the past fifteen years, with the percentage of Latinos sentenced now nearly twice that of African-Americans, and the percentage of sentenced whites down by nearly 40%. *Id.* at 4–5 & fig.8.

[6] ADMIN. OFFICE OF THE U.S. COURTS, REPORT ON THE IMPACT ON THE JUDICIARY OF LAW ENFORCEMENT ACTIVITIES ALONG THE SOUTHWEST BORDER 6 (2008) [hereinafter IMPACT REPORT] (on file with author); *see also infra* notes 273–92 and accompanying text (describing the current government program for prosecuting immigration crime on the border known as "Operation Streamline").

[7] *See* Raquel Aldana, *Of* Katz *and "Aliens": Privacy Expectations and the Immigration Raids*, 41 U.C. DAVIS L. REV. 1081, 1088–92 (2008) (chronicling the recent rise in home and workplace raids); *see also* CARDOZO IMMIGRATION JUSTICE CLINIC, CONSTITUTION ON ICE: A REPORT ON IMMIGRATION HOME RAID OPERATIONS 2 (2009).

[8] *See* Anna Gorman, *L.A. Jails to Check Immigration Status*, L.A. TIMES, Aug. 28, 2009, at 19.

[9] *See* Julia Preston, *National Briefing: Opposing Immigration Program*, N.Y. TIMES, Aug. 27, 2009, at A16 (noting that Homeland Security Secretary Janet Napolitano has

United States holding steady at over eleven million,[10] and with the War on Terror heightening concerns over foreigners,[11] the issue of what to do about illegal immigration has catapulted to the top of the national agenda.[12] Yet even as the new Administration sets the stage for possible reform of the immigration system, criminal prosecution continues at a record pace.[13]

The consequences of this sustained focus on criminal immigration enforcement—for the criminal justice system, the civil immigration system, and the rights of noncitizen defendants themselves—have remained underexamined. Criminal law scholars have typically overlooked immigration crime in their study of federal criminal law.[14] In part, this omission reflects the tendency to treat white collar crime as the paradigmatic example of federal prosecution.[15] Immigration law scholars, in contrast, have traditionally explored civil regulatory questions of admission, exclusion, and removal, and largely ignored the criminal arm of the immigration bureaucracy.[16] A

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praised "a program of cooperation on immigration enforcement between state police and federal authorities" for being a "force multiplier").

[10] MICHAEL HOEFER, NANCY RYTINA & BRYAN C. BAKER, U.S. DEP'T OF HOMELAND SEC., OFFICE OF IMMIGRATION STATISTICS, ESTIMATES OF THE UNAUTHORIZED IMMIGRANT POPULATION RESIDING IN THE UNITED STATES: JANUARY 2008, 2–3 & fig.1 (2009), *available at* http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_ill_pe_2008.pdf.

[11] *See* Sameer M. Ashar, *Immigration Enforcement and Subordination: The Consequences of Racial Profiling After September 11*, 34 CONN. L. REV. 1185, 1196 (2002).

[12] Janet Napolitano, Sec'y, U.S. Dep't of Homeland Sec., Prepared Remarks by Secretary Napolitano on Immigration Reform at the Center for American Progress (Nov. 13, 2009), http://www.dhs.gov/ynews/speeches/sp_1258123461050.shtm (explaining why America "needs immigration reform" and proposing a "tough and fair pathway to earned legal status").

[13] *See* EOUSA Datafile 2010, *supra* note 2.

[14] For example, the leading text on federal criminal law does not discuss immigration crime. NORMAN ABRAMS & SARA SUN BEALE, FEDERAL CRIMINAL LAW AND ITS ENFORCEMENT (4th ed. 2006). Recently, some criminal law scholars have begun to examine aspects of immigration prosecution in the context of a broader critique of the federal criminal system. *See, e.g.*, Stephanos Bibas, *Regulating Local Variations in Federal Sentencing*, 58 STAN. L. REV. 137, 145–48 (2005) (critiquing immigration fast-track prosecution programs); Mary De Ming Fan, *Disciplining Criminal Justice: The Peril amid the Promise of Numbers*, 26 YALE L. & POL'Y REV. 1, 5 (2007) (criticizing the use of "numbers of people prosecuted" as a benchmark for success in immigration prosecution). Also, some practitioners have authored articles that focus on specific legal initiatives or defense strategies relating to immigration crime. *See, e.g.*, Alan D. Bersin & Judith S. Feigin, *The Rule of Law at the Margin: Reinventing Prosecution Policy in the Southern District of California*, 12 GEO. IMMIGR. L.J. 285 (1998); Robert J. McWhirter & Jon M. Sands, *Does the Punishment Fit the Crime? A Defense Perspective on Sentencing in Aggravated Felon Re-Entry Cases*, 8 FED. SENT'G REP. 275 (1996).

[15] *See, e.g.*, Panel Discussion, *The Expanding Prosecutorial Role from Trial Counsel to Investigator and Administrator*, 26 FORDHAM URB. L.J. 679 (1999) (drawing on panelists' prosecutorial experiences, largely as New York white collar prosecutors, to describe the federal criminal justice system).

[16] One notable exception is Edwin Harwood's work from the 1980s, which explored both the civil and criminal enforcement of immigration law. *See, e.g.*, Edwin Harwood, *Arrests*

nascent body of literature has begun to document the increasing merger of the immigration and criminal systems,[17] yet such analysis has focused on how the federal immigration agency imposes quasi-criminal sanctions in a setting that skirts criminal constitutional rights.[18] The existing scholarship thus has not adequately explored how immigration operates in the criminal sphere—namely, how the rights, procedures, and systems traditionally associated with the criminal system have themselves been affected by interaction with the civil system of immigration.

Immigration and criminal law scholars have offered contrasting interpretations of the criminal justice system and its relation to immigration enforcement. On the criminal law side, prominent academics increasingly have adopted an antiformalist analytic stance. Focusing on the disjuncture between the criminal system's structure and the criminal law's doctrinal principles, scholars have documented how the reality of prosecutorial power and the practice of plea bargaining often negate formal constitutional procedural protections.[19] Criminal law scholars have emphasized race and class inequality within the criminal justice system[20] yet have not given non-

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Without Warrant: The Legal and Organizational Environment of Immigration Law Enforcement, 17 U.C. DAVIS L. REV. 505 (1984).

[17] *See, e.g.*, Jennifer M. Chacón, *Unsecured Borders: Immigration Restrictions, Crime Control and National Security*, 39 CONN. L. REV. 1827 (2007); Daniel Kanstroom, *Criminalizing the Undocumented: Ironic Boundaries of the Post-September 11th "Pale of Law,"* 29 N.C. J. INT'L L. & COM. REG. 639 (2004); Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469 (2007); Teresa A. Miller, *Blurring the Boundaries Between Immigration and Crime Control After September 11th*, 25 B.C. THIRD WORLD L.J. 81 (2005); Juliet Stumpf, The *Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367 (2006).

[18] *See, e.g.*, ROBERT KOULISH, IMMIGRATION AND AMERICAN DEMOCRACY: SUBVERTING THE RULE OF LAW 6 (2009) (demonstrating how immigration enforcement abuses executive powers and frequently bypasses constitutional requirements); Aslı Ü. Bâli, *Scapegoating the Vulnerable: Preventive Detention of Immigrants in America's "War on Terror,"* 38 STUD. L. POL. & SOC'Y 25, 54 (2006) (stating that the detention system is used to evade "the constitutional checks and balances entailed by the procedural protections that attach to criminal detention"); David Cole, *The New McCarthyism: Repeating History in the War on Terrorism*, 38 HARV. C.R.-C.L. L. REV. 1, 3 (2003) (arguing that the government has invoked "administrative processes" in the War on Terror to avoid applying "the guarantees associated with the criminal process" in the immigration system); *see also infra* note 444 (collecting additional sources).

[19] *See, e.g.*, ANGELA J. DAVIS, ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR 43–44, 166 (2007); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 536–37, 557–58 (2001) [hereinafter Stuntz, *Pathological Politics*].

[20] *See, e.g.*, DAVID COLE, NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM (1999); Devon W. Carbado, *(E)racing the Fourth Amendment*, 100 MICH. L. REV. 946 (2002).

citizen defendants any special analytical attention based on their alienage.[21] To be sure, the literature acknowledges the special disadvantages that noncitizen defendants may face—such as language and cultural barriers—make them vulnerable to abuse.[22] However, their situation is not doctrinally or structurally distinguished from that of other oppressed groups within our imperfect "administrative system" of criminal justice.[23]

On the immigration law side, the academic emphasis is, in many ways, the inverse of its criminal law counterpart: deeply concerned about the treatment of noncitizens by the immigration system but generally formalist in its examination of the criminal system.[24] This approach follows from a growing focus on the convergence between immigration and crime and the impact of this merger on the immigration system—that is, within the civil administrative agency process for determining immigrant admission that is run by the United States Department of Homeland Security (DHS).[25] It is here, scholars claim, that noncitizens experience the force of the criminal

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[21] Outside of the immigration context, some criminal law scholars have begun to explore ways in which the criminal law system may function differently in certain types of cases or for certain types of defendants. *See, e.g.*, Robert Chesney & Jack Goldsmith, *Terrorism and the Convergence of Criminal and Military Detention Models*, 60 STAN. L. REV. 1079, 1081 (2008) ("[T]he criminal justice system has diminished some traditional procedural safeguards in terrorism trials and has quietly established the capacity for convicting terrorists based on criteria that come close to associational status."); Kevin K. Washburn, *American Indians, Crime, and the Law*, 104 MICH. L. REV. 709, 713 (2006) (revealing how "federal [criminal] justice in Indian country simply may not accord with many of the basic legal principles that guide American courts, prosecutors, and law enforcement officials").

[22] *See, e.g.*, CULTURAL ISSUES IN CRIMINAL DEFENSE (Linda Friedman Ramirez ed., Juris Publ'g, 2d ed. 2007).

[23] *See generally* Peter Arenella, *Reforming the Federal Grand Jury and the State Preliminary Hearing to Prevent Conviction Without Adjudication*, 78 MICH. L. REV. 463, 467–68 (1980) (demonstrating how, in practice, plea bargaining has replaced the trial as the "primary method for determining legal guilt"); Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117, 2118 (1998) (describing a shift in the criminal justice system away from an adversarial, accusatorial system toward an "administrative," inquisitorial system).

[24] For examples of immigration scholarship that has begun to probe questions of institutional design, see Adam B. Cox & Eric A. Posner, *The Second-Order Structure of Immigration Law*, 59 STAN. L. REV. 809 (2007), and Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law*, 119 YALE L.J. 458 (2009). However, this literature has not addressed how criminal prosecution relates to immigration's broader institutional structure.

[25] DHS, which was formed after September 11, 2001, merged the Justice Department's Immigration and Naturalization Service (INS) with the Treasury Department's U.S. Customs Service. Homeland Security Act of 2002, Pub. L. 107-296, 116 Stat. 2135, (2002) (codified at 42 U.S.C. §§ 202–03 (2006)). Customs and Border Protection (CBP), the border enforcement agency within DHS, now is the largest uniformed law enforcement force in the United States. CHRISTOPHER HALL ET AL., NAT'L SEC. PROGRAM, JOHN F. KENNEDY SCH. OF GOV'T, HARVARD UNIV., SECURING THE BORDERS: CREATION OF THE BORDER PATROL AUXILIARY 6 (2007).

law on "asymmetrical" terms.[26] Immigrants are increasingly subject to the burdens of criminal law (for example, when deported as a consequence of a criminal conviction),[27] but they receive none of its benefits (because criminal procedural protections, such as *Miranda* warnings, jury trials, and the right to appointed counsel, do not apply in immigration proceedings).[28] Embedded in such descriptions is the belief that these protections do, in fact, operate in the criminal sphere.

These two literatures—one pertaining to criminal law and the other to immigration law—thus adopt divergent analytic and normative frameworks. Yet as Part I of this Article explains, they are joined by common assumptions about the operational relationship between the criminal and immigration spheres. One is an assumption of what this Article calls *doctrinal equality*: that noncitizen defendants occupy the same playing field as other defendants in the federal criminal system. The second is an assumption of what this Article calls *institutional autonomy*: that the immigration and criminal systems operate as independent institutions with distinct adjudicatory models, sanctioning regimes, and actors—reinforcing the "criminal-civil" divide.[29]

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[26] *See, e.g.*, Chacón, *supra* note 17, at 1873 (describing the relationship between the immigration system and the criminal system as "two tier[ed]," "asymmetric," and "bifurcated"); Legomsky, *supra* note 17, at 469–70, 517 (using the terms "two-tiered" and "asymmetric" to describe the criminal and immigration systems' interaction).

[27] *See* Gabriel J. Chin & Richard W. Holmes, Jr., *Effective Assistance of Counsel and the Consequences of Guilty Pleas,* 87 CORNELL L. REV. 697, 699 (2002) (arguing that the imposition of collateral consequences, including immigration consequences, "has become an increasingly central purpose of the modern criminal process"); Daniel Kanstroom, *Immigration Law as Social Control: How Many People Without Rights Does It Take to Make You Feel Secure?*, *in* CIVIL PENALTIES, SOCIAL CONSEQUENCES 161, 161 (Christopher Mele & Teresa A. Miller eds., 2005) (discussing deportation as a "collateral sanction" for criminal conduct).

[28] *See, e.g.*, DANIEL KANSTROOM, DEPORTATION NATION: OUTSIDERS IN AMERICAN HISTORY 4 (2007) ("Compared with criminal defendants, the rights of deportees are minimal."); Bâli, *supra* note 18, at 27–28, 33–34, 54 (juxtaposing the procedural protections afforded in immigration detention with those of the traditional criminal justice system); Chacón, *supra* note 17, at 1865, 1871 (contrasting immigration law with criminal proceedings, which are governed by constitutional guarantees); Legomsky, *supra* note 17, at 472 (comparing the criminal system's "stringent constitutional" protections with the immigration system's conscious rejection of those protections); Miller, *supra* note 17, at 95–96 (criminal and immigration law are "doctrinally distinct," with criminal law controlled by constitutional norms and immigration law by plenary power and administrative law); Stumpf, *supra* note 17, at 390–93 (detailing "vastly different constitutional procedural protections" of criminal and immigration law). For an earlier example of this view, see WILLIAM C. VAN VLECK, THE ADMINISTRATIVE CONTROL OF ALIENS: A STUDY IN ADMINISTRATIVE LAW AND PROCEDURE 223–24 (1932), which compares the checks and safeguards incorporated into the criminal law system with the "quasi-criminal" justice system of immigration.

[29] *See generally* Carol S. Steiker, *Foreword: Punishment and Procedure: Punishment Theory and the Criminal-Civil Procedural Divide*, 85 GEO L.J. 775, 777–82 (1997) (discussing causes of the "sharp procedural divide between criminal and civil cases").

This is not to suggest that scholars have been blind to the close relationship between criminal and immigration enforcement. On the contrary, they have been careful to explain that the two systems are similar in their theories, enforcement methods, and priorities.[30] They have also acknowledged the role that criminal prosecution of noncitizens plays in advancing the overarching goals of immigration policy.[31] Nonetheless, the description of the prosecution of noncitizens that emerges depicts the interaction between the federal criminal and immigration systems in conventional terms: immigration enforcement agents detain immigrants and refer them for criminal prosecution to federal prosecutors who exercise discretion about whether to pursue charges and—if they do—prosecute immigrant defendants within a criminal court system that provides enhanced procedural protections, cordoned off from ongoing interaction with DHS.

Drawing on court rulings, government documents, legislative history, statistical data,[32] and interviews,[33] Part II of this Article offers an account of the immigration prosecution system that is grounded in facts about the ac-

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[30] *See, e.g.*, Legomsky, *supra* note 17, at 471–72; Stumpf, *supra* note 17, at 386–90.

[31] *See, e.g.*, Jonathan Xavier Inda, *Border Prophylaxis: Technology, Illegality, and the Government of Immigration*, 18 CULTURAL DYNAMICS 115, 115–16 (2006) (asserting that criminal immigration prosecution is one example of how immigration is "governed through crime"); David A. Martin, *Two Cheers for Expedited Removal in the New Immigration Laws*, 40 VA. J. INT'L L. 673, 684–88 (2000) (arguing that the threat of "tougher criminal sanctions" for re-entry is important to deter illegal immigration); Teresa A. Miller, *Citizenship & Severity: Recent Immigration Reforms and the New Penology*, 17 GEO. IMMIGR. L.J. 611, 618–19 (2003) (describing the "immigrationization of criminal law"—a system in which immigrants increasingly are "governed through crime"); James F. Smith, *United States Immigration Law as We Know It:* El Clandestino*, the American Gulag, Rounding Up the Usual Suspects*, 38 U.C. DAVIS L. REV. 747, 749 (2005) (citing criminal immigration prosecution as a factor that has created a "fugitive" noncitizen class).

[32] In the absence of any published database measuring immigration prosecution over the past century, I compiled data on immigration enforcement from the individual Annual Reports of the Attorney General from 1923 to 1939 and the Annual Reports of the Director of the Administrative Office of the United States Courts from 1940 to present. Data for some years were unreliable or unavailable and therefore omitted. In addition, because no data were retained by the United States courts regarding the disposition (e.g., trials, pleas, dismissals) of immigration crime cases in federal magistrate court, I obtained these and other data through FOIA requests to the Statistics Division of the Executive Office for U.S. Attorneys. Additional data were obtained from a database maintained by the Transactional Records Access Clearinghouse, which consists of records acquired by Syracuse University using FOIA requests.

[33] All interviews for this Article were conducted with the interviewees' informed consent using a semistructured interview protocol approved by the UCLA Institutional Review Board. Pursuant to the approved protocol, I interviewed defense attorneys identified as having significant experience representing defendants in immigration prosecutions. These attorneys were selected from both Federal Public Defender's offices and the Federal Criminal Justice Act panels in the five federal judicial districts with the highest volumes of immigration crime prosecution: District of New Mexico, District of Arizona, Southern District of California, and Southern and Western Districts of Texas.

tual functioning of the system. This analysis establishes that the conventional assumptions of equality and autonomy have been replaced in practice by a collaborative relationship that undermines the criminal-civil divide. Instead of doctrinal equality, immigration laws allow criminal prosecutors to take advantage of the resources of the immigration system, which are largely unconstrained by the Constitution, to supplement their criminal prosecutions. Detention without bond, interrogation without *Miranda*, arrest without probable cause of a crime, and sentencing without probation all become available to the criminal prosecutor in varying degrees as a result of the peculiar interaction between the criminal justice system and the administrative arm of immigration. In practice, noncitizens are exposed to decidedly second-class criminal justice.

Instead of institutional autonomy of the criminal and administrative aspects of controlling immigration, the criminal justice system has been restructured to allow for agency control and promotion of immigration objectives within the criminal prosecution. Part II tracks these shifts across three major axes—adjudicatory model, function, and actors. In terms of adjudicatory model, the rise of immigration prosecution has fostered an alternative "fast track" for felony adjudication that emphasizes mass processing and speed. In addition, at least half of criminal immigration cases are adjudicated through prosecution of illegal entry as a "petty crime" in magistrate courts—a practice that places immigration crime squarely outside the confines of Article III courts, the right to jury trial, and grand jury indictment. In terms of prosecutorial function, immigration law screening—that is, decisions regarding the removal or admission of noncitizens—has become a salient function of the criminal prosecution.[34] For example, prosecutors increasingly include waivers of substantive immigration rights in criminal plea bargains. Finally, with respect to actors, role reversal is evident: as a matter of practice, the agency often decides whether criminal charges are filed, while the prosecutor's office adjudicates immigration rights.

In short, Part II's description of immigration crime prosecution tells the story of the evolving dynamic relationship between immigration and criminal enforcement. In so doing, it challenges the conventional understanding of both systems. Part III builds on this functional analysis to identify two

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[34] "Immigration screening" as used in this Article refers to the institutional decision to select a noncitizen for admission to, or exclusion or removal from, the United States. Other scholarship similarly has used the term "screening" to describe the selection function of the immigration law. *See, e.g.*, Bo Cooper, *Procedures for Expedited Removal and Asylum Screening Under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996*, 29 CONN. L. REV. 1501, 1503 (1997) (discussing "screening" of asylum applicants); Cox & Posner, *supra* note 24, at 811 (applying economic theory to the question of how the immigration system "screen[s] applicants for admission"); Stephen Lee, *Private Immigration Screening in the Workplace*, 61 STAN. L. REV. 1103, 1104–06 (2009) (highlighting the role of employers as immigration "screeners").

significant implications of the interaction. The first is about law enforcement power, and the second is about prosecutorial function.

First, the criminal-immigration interaction has emboldened the criminal prosecutor to borrow law enforcement tools from the civil immigration system in ways that distort the boundaries of the criminal state. As Part III explains, the traditional criminal-civil incentive structure has been inverted. Unlike the standard relationship of greater law enforcement powers on the *criminal* side,[35] in immigration, enforcement powers are greater on the *civil* side.[36] This reversal, in turn, has motivated law enforcement to draw on expanded civil powers rather than criminal powers. In addition, the reversal incentivizes the expansion of the civil immigration law and corresponding civil enforcement powers to avoid criminal rules meant to restrain police behavior.[37]

The second implication of the interaction is the criminal justice system's increasing role as an immigration screener. Although the criminal law is generally appreciated for its role in exacting moral blame,[38] this Article shows how, in application, it performs the work of immigration law. Through concrete terms of written plea agreements, orders of criminal courts, and mandatory criminal deportation rules, the criminal prosecution, rather than the administrative agency removal process, acts as the de facto immigration adjudicator. Part III develops the idea that the use of criminal law to function as immigration law can disrupt the substantive immigration law and truncate the procedural rules that would otherwise govern admission and removal.[39]

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[35] William J. Stuntz, *Substance, Process, and the Civil-Criminal Line*, 7 J. CONTEMP. LEGAL ISSUES 1, 9 (1996) [hereinafter Stuntz, *Civil-Criminal Line*] ("[L]aw enforcement power does not contract as one moves from civil to criminal. On the contrary, it expands.").

[36] Under the existing legal structure, immigration law and its punitive sanction of removal is defined as a civil sanction, rather than criminal punishment. *See, e.g.*, Fong Yue Ting v. United States, 149 U.S. 698, 728–30 (1893) (finding that Chinese laborers are subject to expulsion in "civil" proceedings). Elsewhere, scholars have thoughtfully debated the wisdom of this categorization. *See infra* note 386 (listing sources). This Article does not intend to enter into that important debate but instead adopts the existing "civil" categorization to refer to immigration enforcement that does not impose traditional criminal punishment, such as imprisonment.

[37] *Cf.* Stuntz, *Civil-Criminal Line*, *supra* note 35, at 7–15 (arguing that the substantive criminal law has continued to expand so that prosecutors and police can skirt strict criminal procedural protections).

[38] *See* Gerard E. Lynch, *The Role of Criminal Law in Policing Corporate Misconduct*, 60 LAW & CONTEMP. PROBS., Summer 1997, at 23, 43–44 (summarizing the "traditional viewpoint" that the "special purpose that distinguishes criminal law from its various civil and administrative analogues [i]s a moral one"); *see also infra* note 80 (citing additional sources).

[39] In 1996, the immigration law was amended to use the term "removal" to refer to both former deportation (for those apprehended inside the United States) and exclusion (for those apprehended at the border). *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 304, 110 Stat. 3009-589. This Article uses the term

This Article aims to establish a critical framework for understanding the institutional design of criminal immigration prosecution. By examining how federal immigration prosecution actually works, it demonstrates the immigration agency's influence over core aspects of the criminal system, including constitutional procedural rights, the boundaries of police power, and the aims of the criminal law. Although the story unveiled here focuses on the federal practice of immigration prosecution, the use of the criminal law to prosecute immigration violations has begun to appear in state criminal codes as well.[40] The prosecution of noncitizens has also increased in other bread-and-butter substantive crime areas beyond the realm of immigration crime.[41] And collaboration between local criminal law enforcement agencies and federal immigration authorities is expanding rapidly.[42] The

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"removal," but it also continues to use the terms "deportation" and "exclusion" as descriptive devices.

[40] How such state criminal immigration laws function on the ground is an important topic for future study. For example, in 2005, Arizona passed a law criminalizing human smuggling. S. 1166, 47th Leg., 1st Reg. Sess. (Ariz. 2005). In 2010, Arizona passed a more comprehensive bill creating a number of state-based immigration crimes and expanding the authority of state law enforcement officers to enforce immigration law. S. 1070, 49th Leg., 2d Reg. Sess. (Ariz. 2010) (amending ARIZ. REV. STAT. ANN. § 13-2319 (2009)). *But see* United States v. Arizona, 703 F. Supp. 2d 980 (D. Ariz. 2010) (preliminarily enjoining the enforcement of several sections of Arizona's Senate Bill 1070 on federal preemption grounds). In 2002, Louisiana enacted a law punishing those who operate a vehicle without lawful presence in the United States with up to one year of hard labor and a fine of up to $1000. LA. REV. STAT. ANN. § 14:100.13 (2009). Courts are grappling with a variety of legal challenges to such laws, including whether such state laws are preempted by federal law. *See, e.g.*, State v. Flores, 188 P.3d 706, 712 (Ariz. Ct. App. 2008) (finding that the 2005 Arizona human smuggling law was not preempted), *rev. denied*, No. 08-0252 (Jan. 6, 2009); State v. Lopez, 948 So. 2d 1121, 1125 (La. Ct. App. 2006) (concluding that the 2002 Louisiana immigration law criminalizing operation of a motor vehicle without lawful presence was preempted by federal law).

[41] *See, e.g.*, CHANGING FACE OF FEDERAL CRIMINAL SENTENCING, *supra* note 5, at 2, 16, 17 (reporting that noncitizens constituted 37% of defendants sentenced under the Federal Guidelines during the fiscal year 2007, including 20% of all fraud offenders and 30% of all drug trafficking offenders); JOHN SCALIA, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SPECIAL REPORT, NONCITIZENS IN THE FEDERAL CRIMINAL JUSTICE SYSTEM, 1984–94, at 5 tbl.5 (1996) (finding that increases in the prosecution of noncitizens in the federal system occurred across crime categories and were particularly sharp with drug crimes).

[42] *See, e.g.*, HANNAH GLADSTEIN ET AL., MIGRATION POLICY INST., BLURRING THE LINES: A PROFILE OF STATE AND LOCAL POLICE ENFORCEMENT OF IMMIGRATION LAW USING THE NATIONAL CRIME INFORMATION CENTER DATABASE, 2002–2004, at 3–5 (2005), *available at* http://www.migrationpolicy.org/pubs/MPI_report_Blurring_the_Lines_120805.pdf (discussing expanded use of federal immigration databases by local law enforcement to identify persons with deportation orders); MELISSA KEANEY & JOAN FRIEDLAND, NATIONAL IMMIGRATION LAW CENTER, OVERVIEW OF THE KEY ICE ACCESS PROGRAMS: 287(G), THE CRIMINAL ALIEN PROGRAM, AND SECURE COMMUNITIES 1 (2009), *available at* http://www.nilc.org/immlawpolicy/LocalLaw/ice-access-2009-11-05.pdf (describing a variety of recently created programs that merge local crime control with federal immigration enforcement).

findings of this Article thus have implications not only for federal immigration prosecution but also for how law enforcement power and prosecutorial function is understood in the criminal system writ large.

This Article covers considerable new ground in revealing ways in which the criminal system treats noncitizens in practice. Its analysis informs important normative questions regarding the desirability of the current interaction between the immigration and criminal systems. For example, should citizenship status make a difference in criminal law outcomes? What role should the criminal system play in regulating immigration? Such normative issues are, however, beyond the scope of this Article. Normative questions cannot be properly addressed until the structure of the current prosecution regime is more fully understood. This Article fosters this understanding and thus provides a framework for future normative debate.

I. THE CONVENTIONAL VIEW OF IMMIGRATION AND CRIMINAL LAW

This Part outlines the conventional view of the relationship between immigration law and criminal law. Existing scholarship has defined the relationship between these areas around two central principles. The first—doctrinal equality—teaches that immigration status, or alienage, does not govern outcomes in the criminal law. The second—institutional autonomy—teaches that criminal prosecution occurs in an institutional structure independent from the immigration agency.

A. Doctrinal Equality

According to the core concept of doctrinal equality, criminal defendants are to be accorded the full panoply of criminal rights and protections regardless of their alienage. In other words, the treatment of noncitizens caught up in the criminal system is separate and apart from their treatment under the plenary power doctrine and decisions regarding admission or removal.[43]

The seminal case establishing the equality principle—*Wong Wing v. United States*—arose out of a criminal law passed during Chinese exclusion.[44] Under the Geary Act of 1892, Chinese workers who were "convicted and adjudged" not to be citizens or legal residents were subject to both removal and up to one year of imprisonment and hard labor.[45] The new law provided for adjudication in summary proceedings before a "justice, judge,

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[43] For a discussion of the "plenary power doctrine," see Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255, 255, which defines "plenary power" as the Court's refusal "to review federal immigration statutes for compliance with substantive constitutional restraints."

[44] 163 U.S. 228, 229 (1895).

[45] Geary Act of 1892, ch. 60, § 4, 27 Stat. 25, 25.

or commissioner," without indictment by grand jury or trial by jury.[46] The Chinese vigorously defended themselves in such investigations—retaining counsel, demanding trials, and filing habeas petitions.[47]

In 1896, the constitutionality of the law reached the Supreme Court on a habeas petition brought by four Chinese who were arrested, tried, and sentenced to sixty days of hard labor by a United States Commissioner in Michigan shortly after the Geary Act was adopted.[48] The Supreme Court reversed the summary convictions, explaining that "[i]t is not consistent with the theory of our government" to "find the fact of guilt and adjudge the punishment by one of its own agents."[49] Citing the famous case of *Yick Wo v. Hopkins*, which held that the Fourteenth Amendment applied without regard to alienage,[50] the Court ruled that the Fifth and Sixth Amendments protect "even aliens" and cannot require them to "answer for a capital or other infamous crime, unless on a presentment or indictment of a grand jury, nor be deprived of life, liberty or property without due process of law."[51]

Wong Wing received little attention at the time.[52] More recently, however, it has been heralded as a critical Supreme Court decision.[53] The legacy of *Wong Wing* is the equality principle of criminal law—that the criminal sphere cannot be governed by the exceptionalism of immigration law.[54] Instead, regardless of alienage, those who stand charged with crimes

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[46] *Id.* §§ 2–3.

[47] LUCY E. SALYER, LAWS HARSH AS TIGERS 69–93 (1995) (documenting the Chinese community's legal challenges to the Chinese Exclusion Laws, including the Geary Act).

[48] *Wong Wing*, 163 U.S. at 229.

[49] *Id.* at 237.

[50] 118 U.S. 356, 369 (1886).

[51] *Wong Wing*, 163 U.S. at 238.

[52] Gerald L. Neuman, Wong Wing v. United States*: The Bill of Rights Protects Illegal Aliens*, *in* IMMIGRATION STORIES 31, 40–41 (David A. Martin & Peter H. Schuck eds., 2005) (surveying the scant press attention given to the decision at the time).

[53] *See* LINDA BOSNIAK, THE CITIZEN AND THE ALIEN: DILEMMAS OF CONTEMPORARY MEMBERSHIP 53 (2006) (describing *Wong Wing* as a "keystone decision in the field"); Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 565 (1990) (calling *Wong Wing* a "seminal case"); Neuman, *supra* note 52, at 31 (calling *Wong Wing* a "major landmark in constitutional jurisprudence").

[54] *See* BOSNIAK, *supra* note 53, at 53 (arguing that *Wong Wing* reflects "[t]he [c]ore [s]eparation" of criminal and immigration law); Adam B. Cox, *Immigration Law's Organizing Principles*, 157 U. PA. L. REV. 341, 386 n.136 (2008) (citing *Wong Wing* for the principle that "for over a century clear Supreme Court precedent has accorded noncitizens charged with crimes the same due process protections available to citizens"); Motomura, *supra* note 53, at 564–66 (listing *Wong Wing* in a "long line of Supreme Court decisions [that] has afforded a measure of protection to aliens that much more closely resembles the substantive and procedural rights of individuals in mainstream public law"); Neuman, *supra* note 52, at 43 (noting that *Wong Wing* protects "citizens as well as immigrants" from "streamlined procedures"); Juliet P. Stumpf, *States of Confusion: The Rise of State and Local Power Over*

within the United States are protected by the Fourth, Fifth, and Sixth Amendments in proceedings overseen by Article III judges and adjudicated by grand juries and jury trials.[55] As Linda Bosniak has argued, "In effect, *Wong Wing* stands for the following proposition: Just because the object of government power is an alien does not mean that the government is exercising its immigration power."[56] When criminal punishment is at stake, "invocation of the government's plenary power in the immigration sphere . . . [is] off the mark."[57]

Almost a full century later, in *Plyler v. Doe*, the Court again championed the immigration law as occupying a separate regulatory sphere.[58] In *Plyler*, the State of Texas argued that undocumented children were not entitled to publicly funded education.[59] The Supreme Court rejected the State's argument, relying in part on *Wong Wing* to conclude that the fact of illegal entry into the United States could not deny America's "shadow population" the due process of law embodied in the Fifth and Fourteenth Amendments.[60]

Cases like *Plyler* and *Wong Wing* highlight the pivotal question: What role do laws outside the immigration domain play in distributing rights according to citizenship status? Can such laws create a subclass of noncitizens or undocumented immigrants to whom fundamental rights do not apply?[61] To answer this question, scholars have debated the contours of a variety of civil "alienage laws," including laws in areas such as voting, employment, and public benefits.[62]

Immigration, 86 N.C. L. REV. 1557, 1574 (2008) ("*Wong Wing* . . . drew a line in the sand between laws governing immigration and laws that imposed criminal punishment.").

[55] *See Wong Wing*, 163 U.S. at 238. *Wong Wing*, like this Article, is limited to a discussion of immigration charges brought within United States courts. Questions raised by the use of military courts and extraterritorial detention for noncitizens and terror suspects, although also important topics, are beyond the scope of this project. For scholarship related to those topics, see KAL RAUSTIALA, DOES THE CONSTITUTION FOLLOW THE FLAG? (2009), which explores the extraterritorial reach of the Constitution, and Muneer I. Ahmad, *Guantanamo Is Here: The Military Commissions Act and Noncitizen Vulnerability*, 2007 U. CHI. LEGAL F. 1, which discusses the use of military commissions for prosecuting enemy combatants.

[56] BOSNIAK, *supra* note 53, at 54.

[57] *Id.* at 53.

[58] 457 U.S. 202, 228–30 (1982).

[59] *Id.* at 227.

[60] *Id.* at 210, 218.

[61] *See generally* BOSNIAK, *supra* note 53, at 53–54, 75 (describing a divergence between "separation model" scholars who believe that that plenary power must be cabined "within its own domain," that is, within immigration enforcement, and "convergence model" scholars who believe that the government's broader control over immigration may be rightfully exerted in other domains).

[62] *See* T. ALEXANDER ALEINIKOFF ET AL., IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 1191–285, 1354–418 (6th ed. 2008) (discussing the concept of "alienage law," or those laws that treat individuals differently based on citizenship status).

In the criminal law context, however, *Wong Wing* is regarded as absolute. Stephen Legomsky has provided an especially detailed statement of this view. As he has explained, the criminal justice system operates under a "criminal justice model" governed by "stringent constitutional and subconstitutional constraints familiar to all who have taken courses in criminal procedure."[63] The immigration system, on the other hand, is built on a "civil regulatory model" that lacks these protections.[64] Enforcement features of the criminal justice model (such as detention and plea bargaining) have been incorporated into the civil immigration model, yet adjudicatory features (namely "the bundle of procedural rights recognized in criminal cases") have not.[65] Thus, despite points of intersection between the two systems, the criminal law distributes its bundle of rights evenly, regardless of citizenship status.

B. Institutional Autonomy

Institutional autonomy is the second key organizing principle of criminal immigration law. Although the immigration and criminal systems are described as "converging," scholars have been careful to characterize their operations as "parallel,"[66] "nominally separate,"[67] and akin to "shadow systems."[68] The criminal system is thought to be autonomous because it relies on its own institutional actors and rules to implement the aims of the criminal law.[69] The accepted wisdom regarding the criminal system's independence may be roughly divided along three axes: adjudicatory model, function, and actors.

1. Adjudicatory Model.—An important corollary to the doctrinal equality principle of criminal law is that of asymmetry across immigration and criminal law. To use Legomsky's descriptive terms, the convergence

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[63] Legomsky, *supra* note 17, at 472.

[64] *Id.* at 472–75.

[65] *Id.* at 472; *see also id.* at 515–16 (including rights such as *Miranda* warnings, trial by jury, the privilege against self-incrimination, the exclusionary rule, and proof beyond a reasonable doubt in the "bundle" of criminal procedural rights).

[66] *See* Mariano-Florentino Cuéllar, *The Tenuous Relationship Between the Fight Against Money Laundering and the Disruption of Criminal Finance,* 93 J. CRIM. L. & CRIMINOLOGY 311, 336 n.86, 352 (2003) (describing regulatory systems such as immigration as "parallel to the system of criminal statutes").

[67] Stumpf, *supra* note 17, at 376 (describing the immigration and criminal systems as "nominally separate").

[68] *See, e.g.*, Bâli, *supra* note 18, at 27 (noting that the immigration system "shadows" the criminal system).

[69] *See* Mariano-Florentino Cuéllar, *The Institutional Logic of Preventive Crime* 8–12 (Stanford Pub. Law Working Paper No. 1272235, 2008), *available at* http://ssrn.com/abstract=1272235 (arguing that the separate institutional space of the criminal justice system gives it autonomy from the conventional regulatory agencies).

of immigration and crime has been "selective" and "asymmetric."[70] Asymmetric convergence emphasizes the marked contrast between the constitutional procedural safeguards of the criminal law and the conscious rejection of such safeguards in the immigration law.[71]

This procedural imbalance has resulted in divergent adjudicatory models. Just three years before *Wong Wing*, Fong Yue Ting and two other Chinese laborers challenged the civil enforcement of the Geary Act, which mandated their deportation unless they could prove their legal residency with the testimony of "at least one credible white witness."[72] Reasoning that deportation "is not a punishment for crime,"[73] the Court relied on plenary power to find that Congress's "power to exclude or expel aliens" may proceed "without judicial trial or examination."[74] *Wong Wing* underscored this rule, clarifying that civil immigration adjudication may proceed by "summary methods."[75]

Read together, *Fong Yue Ting* and *Wong Wing* make clear that the two systems are separated by distinct models of adjudication. Criminal law is described as a system adjudicated in Article III courts, with grand jury indictments and jury trials to decide guilt.[76] Immigration law, in contrast, is built on a civil regulatory model and processed in administrative proceedings, the most formal of which are presided over by administrative law judges.[77] The adjudicatory models are thus divided into "two separate tracks": one for criminal prosecution and the other for immigration.[78]

2. Function.—The criminal system's autonomy from the immigration system is also grounded in its unique function. Criminal law scholars generally define the criminal law as the body of law that identifies substantive crimes and determines corresponding punishments.[79] It is also distinguished

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[70] Legomsky, *supra* note 17, at 472. Margaret Taylor's examination of immigration detention begins to move away from this dominant asymmetry frame, as she argues that the border between plenary power and detention law is "porous." Margaret H. Taylor, *Detained Aliens Challenging Conditions of Confinement and the Porous Border of the Plenary Power Doctrine*, 22 HASTINGS CONST. L.Q. 1087, 1095 (1995).

[71] *See* Legomsky, *supra* note 17, at 471–73.

[72] Fong Yue Ting v. United States, 149 U.S. 698, 704 (1893).

[73] *Id.* at 730.

[74] *Id.* at 728.

[75] Wong Wing v. United States, 163 U.S. 228, 237 (1896).

[76] *See, e.g.*, Juliet Stumpf, *Fitting Punishment*, 66 WASH. & LEE L. REV. 1683, 1686–87 & nn.9–15 (2009); *see also* Kanstroom, *supra* note 17, at 650–51 (contrasting "civil" immigration procedures with criminal procedures); Legomsky, *supra* note 17, at 474–75 (explaining the distinction between the civil immigration system and the criminal justice system).

[77] *See* Legomsky, *supra* note 17, at 472, 517.

[78] Margaret H. Taylor & Ronald F. Wright, *The Sentencing Judge as Immigration Judge*, 51 EMORY L.J. 1131, 1134 (2002).

[79] Richard S. Frase, *Criminalization and Decriminalization*, *in* 2 ENCYCLOPEDIA OF CRIME AND JUSTICE 438, 440 (Sanford H. Kadish ed., 1983) (defining the criminal laws as

from other areas of law by virtue of its strength in law enforcement, severity in sanctioning regime, and imposition of moral blame.[80] Immigration law scholars, on the other hand, traditionally define immigration law as the body of law that controls the admission and removal of aliens.[81] In other words, immigration law makes decisions regarding the legal entry of applicants for residence and also permanently deselects certain entrants through the removal process.[82]

The distinction between the functions of criminal law and immigration law is thus roughly drawn between punishment and screening. The punishment–screening line exists not only in scholarship on immigration and criminal law but also in judicial decisions and public policy sentiments that surround the evolution of the criminal immigration enforcement system. The Passport Act of 1918, which threatened a hefty twenty-year maximum sentence for failing to have a passport when entering the United States, provides one early example.[83] When the government continued to use the Passport Act after World War I to prosecute illegal entry at the border, the Eighth Circuit put an end to the practice, rejecting the prosecution's contention that the law had been indirectly extended beyond its initial wartime construction.[84] In so ruling, the court underscored the fundamental division

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"those that are generally labeled or regarded as criminal in a formal sense, are enforced by the police and other traditional criminal justice agencies, and are subject to constitutional and nonconstitutional rules of criminal procedure").

[80] *See id.* at 439–40 (distinguishing criminal law's harsher penalties, including incarceration, from its ability to harness the power of stigma and moral blame); *see also* Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 405 (1958) (defining crime as that which will incur "moral condemnation of the community"); Steiker, *supra* note 29, at 806–09 (arguing that the criminal law must maintain its separate sphere because it "harness[es] the power of blame").

[81] Motomura, *supra* note 53, at 547 (explaining that this definition of "immigration law" is common in the scholarship).

[82] Functional descriptions of immigration law that cast it as being limited to the law of admission and removal necessarily omit important critiques of the broader set of laws and practices that impact immigrants and create alienage distinctions. For excellent examples of those critiques, see BOSNIAK, *supra* note 53, at 124–25, arguing for "sphere separation"—a "hard outside" and "soft inside" conception of citizenship; Ahmad, *supra* note 55, at 2, 14, 21, 25, examining the effects of post-9/11 policies on noncitizens; Devon W. Carbado, *Racial Naturalization*, 57 AM. Q. 633, 637 (2005), investigating the distinction between formal understandings of naturalization and the concept of "racial naturalization," which views whiteness as part of the American identity; Jennifer Gordon & R.A. Lenhardt, *Rethinking Work and Citizenship,* 55 UCLA L. REV. 1161, 1168–69 (2008), exploring how factors such as race and group history intersect with formal citizenship status; and Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. REV. 1575, 1575–76 (2002), describing how post-9/11 terrorism policies have distanced those who appear Middle Eastern, Arab, or Muslim from the core of citizenship.

[83] Passport Act of 1918, Pub. L. No. 65-154, ch. 81, §§ 1–3, 40 Stat. 559, 559.

[84] Flora v. Rustad, 8 F.2d 335, 337–38 (8th Cir. 1925). *See generally* JANE PERRY CLARK, DEPORTATION OF ALIENS FROM THE UNITED STATES TO EUROPE 265–66 (1969) (pro-

between punishment and screening: "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."[85] Immediately after the Eighth Circuit's decision, criminal prosecution of immigration decreased significantly.[86]

With the proposal of the first comprehensive immigration crime statute a decade later, the Department of Labor (then in charge of immigration) maintained that criminal law should be used against foreigners who sought repeatedly to enter the United States.[87] Consistent with this view, the Senate's proposed bill made reentry following deportation a felony.[88] The focus of legislators in proposing the so-called Undesirable Aliens Act of 1929 was on "the most dangerous classes of criminals and those aliens who smuggle or who assist in smuggling other aliens into the United States."[89] After a combined House–Senate committee discussed the new law, the final version of the bill added the House's language making simple illegal entry a misdemeanor, punishable by up to one year.[90] Crucially, however, illegal presence was not made a crime—a distinction between the civil and criminal immigration law that remains today.[91] As one Congressman noted during the debates, even an immigrant who initially enters the country illegally can be said, under the immigration law, to be "a good man, entitled to sym-

viding a brief history of the Passport Act's passage and use up until the *Flora v. Rustad* decision).

[85] *Flora*, 8 F.2d at 337.

[86] *See* REPORT OF ASSISTANT ATTORNEY GENERAL OSCAR R. LUHRING, CRIMINAL DIVISION, *in* 1927 ATT'Y GEN. ANN. REP. 47, 47–48 (attributing a decrease in the number of immigration prosecutions to the fact that "the criminal provisions of the war time passport control act of 1918 ha[d] been rendered inoperative," and, generally speaking, "deportation from the United States [wa]s the only remedy open as against the alien who enters the country without the requisite documents"); *see also infra* Figure 4 (showing a decrease in immigration crime cases terminated in the post-1925 period).

[87] James J. Davis, *The Immigration Law to Be Strengthened*, N.Y. TIMES, Nov. 27, 1927, at XX5 (publicizing the Department of Labor's blueprint for a system that would subject previously deported aliens attempting to re-enter the country to "penalties in addition to deportation").

[88] 70 CONG. REC. 2086, 2092 (1929) (introducing S. 5094, 70th Cong. (1929)); *see also* S. REP. NO. 1456, at 1 (1929) (proposing additional sanctions for illegal reentry).

[89] 70 CONG. REC. 3529, 3542 (1929) (statement of Rep. Johnson).

[90] *See* Act of Mar. 4, 1929, Pub. L. No. 70-1018, § 2, 45 Stat. 1551, 1551 (final version of the law); *see also* 70 CONG. REC. 5007 (1929) (House version). The American Civil Liberties Union submitted a written opposition to the House's bill, noting that the illegal entry provision was especially objectionable because it would result in criminalization rather than deportation of someone who "may be quite ignorant of this law before he starts on his journey." Memorandum from the Amer. Civil Liberties Union to the U.S. House of Representatives, Comm. on Immigration & Naturalization 9 (1929) (on file with author).

[91] *See* discussion *infra* notes 363–68 and accompanying text.

pathy, [who] should be given citizenship and the privilege of bringing in his relatives."[92]

Jump ahead to the most recent upturn in criminal immigration prosecution that began in the 1990s.[93] The formal strategy for the ramp-up, which was spearheaded by the U.S. Attorney's Office for the Southern District of California,[94] focused on repeat violators and smugglers.[95] As a policy matter, prosecutors and immigration officials have argued that immigration law can be used to screen out those present in the United States in violation of the law, reserving the criminal law to punish the "worst of the worst"—those that "citizens of any community would want off the streets."[96]

The punishment–screening line thus has figured prominently over time in pronouncements of public policy. In recent years, some immigration scholars have begun to destabilize the traditional view of immigration law as simply adjudicating admission and removal. Challenging the continuing classification of deportation as "civil,"[97] these scholars have argued that at least certain forms of immigration law are in fact "punishment" in the criminal sense.[98] Unexplored in this scholarship, however, is the opposite question of whether the criminal law may serve an immigration screening

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[92] 70 CONG. REC. 4907, 4954 (1929) (statement of Rep. Box). For additional discussion of this period of immigration history, see MAE NGAI, IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA (2004).

[93] *See infra* Figure 4 (reflecting a sharp increase in criminal prosecutions during the 1990s).

[94] Alan Bersin, who was the U.S. Attorney for the Southern District of California at the time, has written about his design of the immigration crime fast-track program. *See, e.g.*, Bersin & Feigin, *supra* note 14, at 300–05.

[95] *See* U.S. GEN. ACCOUNTING OFFICE, GAO/GGD-98-21, ILLEGAL IMMIGRATION, SOUTHWEST BORDER STRATEGY INCONCLUSIVE; MORE EVALUATION NEEDED 66 (1997) (describing the focus on prosecutions under 8 U.S.C. § 1326, prosecutions for coyote and alien smuggling, and prosecutions of false document vendors).

[96] Anna Gorman & Scott Glover, *Illegal Reentry into the U.S. Increasingly Leads to Prison*, L.A. TIMES, Mar. 16, 2008, at A1 (quoting Assistant Secretary of ICE Julie L. Myers); *see also* Press Release, U.S. Immigration & Customs Enforcement (ICE), Largest-Ever ICE Operation Targeting Criminal Aliens and Illegal Alien Fugitives Nets More Than 1,300 Arrests in Los Angeles Area (Oct. 3, 2007), http://www.ice.gov/pi/news/newsreleases/articles/071003losangeles.htm (reporting officials' focus on prosecuting aliens with criminal records).

[97] *See, e.g.*, INS v. Lopez-Mendoza, 468 U.S. 1032, 1038 (1984) ("A deportation proceeding is a purely civil action to determine eligibility to remain in this country, not to punish an unlawful entry . . . . ").

[98] *See, e.g.*, Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 26 (1984) (noting that deportation "reflects judgments, essentially indistinguishable from those that the criminal law routinely makes, concerning the moral worth of individual conduct"); *infra* note 386 (citing sources that advocate the application of constitutional protections in deportation proceedings because of the punitive nature of the deportation sanction).

function. Instead, in the conventional view, the criminal law's punishment function retains its independence from immigration screening.

3. Actors.—The third axis of the autonomy model is that of separate institutional actors.[99] Immigration and criminal law are described in the literature as performed within separate bureaucratic structures.[100] The criminal law is enforced by police, prosecutors, courts, and correctional agencies.[101] In the immigration crime context, prosecutors work for U.S. Attorneys under the direction of the Department of Justice. In contrast, civil immigration law is enforced by investigators, administrators, and immigration law judges. This civil agency structure is currently located within DHS, with the exception of immigration judges, who are still positioned within the Justice Department's Executive Office of Immigration Review (EOIR).[102] The enforcement arm of DHS now consists principally of the U.S. Customs and Border Protection (CBP),[103] responsible for enforcement at the border and ports of entry, and U.S. Immigration and Customs Enforcement (ICE), responsible for interior enforcement.[104]

The conventional view posits that the two systems interact in the following way: when a criminal referral is made, prosecutors—namely Assistant U.S. Attorneys—decide whether a particular case warrants criminal prosecution.[105] After conviction and completion of any criminal sentence, immigration agents and judges decide whether a suspected noncitizen should be denied admission or placed into removal proceedings. In other words, under the existing dual-bureaucracy system, the criminal process goes forward first and, only after this process is completed, the immigration system responds.[106]

Crucial to the accepted wisdom regarding the interaction between the two systems is the notion that each bureaucracy exercises discretion inde-

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[99] *See generally* Cuéllar, *supra* note 66, at 352 (contrasting criminal law that is "charged by prosecutors" with detection systems and administrative regulations that are run by "regulators" and "investigators").

[100] *See* Taylor & Wright, *supra* note 78, at 1131 (calling the immigration enforcement and criminal justice systems "two huge bureaucracies").

[101] Frase, *supra* note 79, at 439.

[102] 8 U.S.C. § 1101(b)(4) (2006); 8 C.F.R. § 1001.1(k)(1) (2009).

[103] *See Protecting Our Borders—This Is CBP*, CBP.GOV, http://www.cbp.gov/xp/cgov/about/mission/cbp.xml (describing CBP's mission) (last updated June 7, 2010).

[104] *See ICE Overview*, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, http://www.ice.gov/about/index.htm (describing ICE's mission) (last visited Oct. 21, 2010).

[105] GEORGE WEISSINGER, LAW ENFORCEMENT AND THE INS: A PARTICIPANT OBSERVATION STUDY OF CONTROL AGENTS 147 (2d ed. 2005) ("The US Attorney's office must approve all criminal prosecutions."); *see also* Richard S. Frase, *The Decision to File Federal Criminal Charges: A Quantitative Study of Prosecutorial Discretion*, 47 U. CHI. L. REV. 246, 246–56 (1980) (studying prosecutorial discretion in the federal system by studying the decisions of Assistant U.S. Attorneys).

[106] Kanstroom, *supra* note 17, at 653.

pendently within its separate jurisdiction. Within the criminal system, prosecutorial discretion defines which criminal laws are enforced by determining within a universe of potentially applicable criminal laws which crimes are actually charged.[107] Prosecutorial discretion also acts as a key check on police power.[108] The criminal process is described, even at the pretrial stage, as weeding out those who may be factually innocent by means of the prosecutor's discretionary decision to file the complaint and seek indictment before the grand jury.[109] Similarly, within the immigration system, immigration agents and judges are understood to have discretion over admission and removal.[110] Immigration authorities do, of course, refer cases for criminal prosecution, but under the conventional view, they do not make the decision whether a prosecution should be filed.[111]

II. THE PRACTICE OF PROSECUTING IMMIGRATION

This Part shifts from the conventional understanding of immigration prosecution described in Part I to an analysis of the law in action. By offering a factual account of the criminal justice system's role in immigration enforcement, this Part shows that the standard account obscures the real workings of immigration crime prosecution. In revisiting the organizational structure of the criminal system through the lens of the immigration system, this Article does not attempt to visit every point along the timeline of a criminal case. Instead, it examines representative aspects of the traditional functioning of the criminal process—police, courts, and corrections—to highlight how immigration has influenced the criminal state. The resulting analysis suggests that the classic description of how the criminal justice system processes cases does not accurately depict how it currently functions.[112]

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[107] *See, e.g.*, William Braniff, *Local Discretion, Prosecutorial Choices and the Sentencing Guidelines*, 5 FED. SENT'G REP. 309, 311 (1993) ("The U.S. Attorney, as a representative of the President, has the unique responsibility of establishing prosecution policy.").

[108] *See, e.g.*, Cuéllar, *supra* note 69, at 1 (explaining how criminal enforcement's distinctive institutional structure imposes procedural constraints on criminal law enforcement).

[109] *See* Ronald Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, 55 STAN. L. REV. 29, 32 (2002) (discussing the role of prosecutorial discretion in the screening of criminal cases).

[110] *See* Gerald L. Neuman, *Discretionary Deportation*, 20 GEO. IMMIGR. L.J. 611, 612–18 (2006).

[111] *See* Braniff, *supra* note 107, at 311 (discussing immigration crime prosecution and noting that "[i]nvestigative agencies do not make the decision to prosecute and, at a minimum, are competing with each other for acceptance of their cases").

[112] The classic diagram of the criminal system, as reproduced in many criminal textbooks, depicts the system as a linear flow chart, beginning with the commission of a crime and ending with the criminal defendant's completion of a sentence or acquittal at trial. *See, e.g.*, PRESIDENT'S COMM'N ON LAW ENFORCEMENT & ADMIN. OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 8–9 (1967) (introducing the classic diagram).

A roadmap to the criminal-immigration system emerges from the exploration of a 2008 prosecution that took place in Postville, Iowa. In one of the largest immigration crime prosecutions in history, immigration officers raided a meatpacking plant and arrested hundreds of factory workers.[113] Immigration authorities then brought these workers to an enclosed cattle fairground set up as a makeshift courtroom.[114] There, the arrestees were assigned to counsel in groups of ten or more.[115] Within four days, 270 workers had signed "exploding" plea agreements, entered binding felony guilty pleas in court, and received criminal sentences.[116]

Postville's large-scale prosecution received enormous media attention, far overshadowing the broader story of immigration crime prosecutions dominating the federal docket.[117] Criminal defense attorneys called into question whether the compressed time period to accept the pleas violated due process.[118] Immigration lawyers, who were denied access to the fairground while the workers were being interrogated,[119] charged that the defendants had been placed on a "new high-speed judicial railroad," where they were not advised of their immigration rights prior to signing the speedy plea agreements.[120] A federal Spanish language interpreter assigned to the Postville hearings came forward, bringing national attention to a day he critiqued as "the saddest procession [he had] ever witnessed, which the

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[113] Spencer S. Hsu, *Immigration Raid Jars a Small Town,* WASH. POST, May 18, 2008, at A1. It does appear, however, that the Postville prosecution is not the largest immigration prosecution in history. According to a study of the southwest border conducted by sociology professors in 1951, 549 defendants were prosecuted for immigration violations in a mass trial on July 11, 1950, in which all were given suspended sentences and deported. Lyle Saunders & Olen E. Leonard, The Wetback in the Lower Rio Grande Valley of Texas 77 (Inter-Am. Educ. Occasional Papers VII, Univ. of Tex. Austin, 1951).

[114] *See* Julia Preston, *270 Immigrants Sent to Prison in Federal Push,* N.Y. TIMES, May 24, 2008, at A1.

[115] *See* Letter from Rockne Cole, Partner, Cole & Vondra, LLP, to Representative Zoe Lofgren (July 24, 2008) (on file with author).

[116] *See, e.g.*, Preston, *supra* note 114. The Postville plea offer has often been described as "exploding" because of the strict seven-day deadline given to defendants to accept the bargains or face enhanced charges. Kathleen Campbell Walker, Railroad Justice (Am. Immigration Lawyers Assoc. (AILA) InfoNet Doc. No. 08071567, July 25, 2008), http://www.aila.org/Content/default.aspx?docid=25950.

[117] Executive Office of U.S. Attorneys, Datafile 2009 (unpublished data, acquired by author through FOIA request) (on file with author) [hereinafter EOUSA Datafile 2009] (reporting 74,924 immigration crime prosecutions terminated in fiscal year 2008).

[118] Preston, *supra* note 114.

[119] *Immigration Raids: Postville and Beyond: Hearing Before the Subcomm. on Immigration, Citizenship, Refugees, Border Security, and International Law of the H. Comm. on the Judiciary,* 110th Cong. 106 (2008) [hereinafter Leopold Statement] (statement of David Leopold, National Vice President, American Immigration Lawyers Assocation).

[120] Walker, *supra* note 116.

public would never see."[121] Two months later, Congressional hearings were held to examine the propriety of the criminal proceedings.

A close analysis of the Postville prosecution reveals many aspects of the interaction between the criminal prosecutor and the administrative apparatus of immigration. First, the Postville defendants were informed that they were ineligible for bail—not because of the formal criminal bail rules, but instead because the immigration agency had lodged an immigration detainer.[122] Despite the fact that many defendants had bail equities—including long-term residence in the United States, dependent children, friends, and family in the community, and no criminal record—not a single defendant had a bail hearing.[123] Even if hearings had been held and bond granted, the immigration detainers would have resulted in transfer into ICE custody rather than release to the community.[124] This functional denial of bail is consequential because of how it impacted plea-bargain dynamics.[125] The Postville defendants would have spent a longer time in pretrial detention awaiting a trial (six to eight months) than they would serve in prison by convicting themselves (most were offered a binding sentence of five months).[126]

Prosecutors also threatened the slaughterhouse workers with aggravated identity theft charges (carrying a mandatory two-year sentence) unless they accepted the government's "fast-track" plea.[127] Although the exact terms of specific pleas varied, most defendants pleaded guilty to false use of a document as evidence of authorized employment.[128] Under the

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[121] Erik Camayd-Freixas, Interpreting After the Largest ICE Raid in U.S. History: A Personal Account 2 (June 13, 2008), http://graphics8.nytimes.com/images/2008/07/14/opinion/14ed-camayd.pdf. Although a Spanish language interpreter was provided, it is questionable whether the interpretation was adequate, as Spanish was not the primary language of most of the defendants, who were of Mayan descent. *Id.*

[122] Camayd-Freixas, *supra* note 121, at 5, 7.

[123] *Id.* at 7. For additional discussion of immigration detainers and their impact on bail proceedings, see *infra* notes 154–58 and accompanying text.

[124] *See infra* notes 154–62 and accompanying text.

[125] Studies have consistently shown that defendants denied bond are far less likely to exercise their right to go to trial and more likely to be sentenced to jail time. *See, e.g.*, John Hagan, Ilene H. Nagel & Celesta Albonetti, *The Differential Sentencing of White-Collar Offenders in Ten Federal District Courts*, 45 AM. SOC. REV. 802, 819 (1980) (finding that bail determinations in the federal system have "pronounced effects on the sentencing of common criminals" and theorizing that "bail outcomes may constitute one of the most salient kinds of legal labelling that common criminals experience"); Hans Zeisel, *Bail Revisited*, 1979 AM. B. FOUND. RES. J. 769, 779–87 (finding pretrial detention has a substantial negative effect on case outcomes for defendants).

[126] Camayd-Freixas, *supra* note 121, at 5.

[127] Preston, *supra* note 114.

[128] *See, e.g.*, Letter from Matt M. Dummermuth, U.S. Attorney, N. Dist. of Iowa, to [Defendant's Name Redacted] (May 13, 2008), *available at* http://www.fd.org/ImmigrationRaids/PostvillePlea.pdf (setting out the standard plea agreement for violations of 18 U.S.C. § 1546(a)); Elements of False Representations About Social Security Numbers, *in*

written plea offer, the defendants received a very short timetable for deciding whether to accept the plea or face the enhanced charges.[129] In addition, once they accepted the pleas, prosecutors drastically abbreviated the normal time between the plea and sentencing. The standard sentencing process can take months,[130] but the Postville defendants pleaded guilty and were sentenced on the same day.[131] The fast-tracked pleas were entered en masse on the rented fairground, based on a uniform plea "script" written in advance by prosecutors.[132] By the time the Supreme Court, in an unrelated case, interpreted the aggravated identity theft statute so that it could not be used to prosecute garden-variety false-document cases (as prosecutors did in Postville), the Postville defendants had already served their time and had been deported.[133]

Postville prosecutors also insisted on a "stipulated removal order" as a mandatory term of the plea agreements.[134] Although the slaughterhouse workers were alleged to be undocumented, any individual defendant might have been eligible to remain legally in the United States under established immigration law. For example, laws such as cancellation of removal, adjustment of status, asylum, and U or T visas provide avenues for undocumented persons to remain legally within the United States despite having entered and lived in the country without permission.[135] However, as a prac-

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Postville Plea Packet, *available at* http://graphics8.nytimes.com/packages/pdf/national/PostvilleScript.pdf, at tab 5 (describing the elements for the standard plea agreement available to the Postville defendants).

[129] Leopold Statement, *supra* note 119, at 138.

[130] *See* FED. R. CRIM. P. 32(d)–(f) (requiring prosecutors to prepare a full presentence report and provide the report to the defendant no less than thirty-five days before sentencing, and giving the defendant fourteen days to file any objections to the report).

[131] Camayd-Freixas, *supra* note 121, at 8.

[132] *See* Script for Initial Appearances, *in* Postville Plea Packet, *supra* note 128, at tab 1.

[133] In 2009, the Supreme Court unanimously rejected the Government's bid to use the aggravated identity theft statute—18 U.S.C. § 1028A (2006)—against undocumented workers absent a showing that the defendant *knew* that the document belonged to another person. Flores-Figueroa v. United States, 129 S. Ct. 1886, 1888, 1894 (2009). As in the Postville prosecutions, the *Flores-Figueroa* prosecutor claimed that he could secure a conviction despite the fact that he did not have evidence that the defendant, Ignacio Flores-Figueroa, knew that the false identification number he used to gain work belonged to another person. *Id.* at 1889–90. As the Court explained, "[C]ourts ordinarily read a phrase in a criminal statute that introduces the elements of a crime with the word 'knowingly' as applying that word to each element." *Id.* at 1891.

[134] *See* Stipulation Request for Judicial Removal and Order of Removal, *in* Postville Plea Packet, *supra* note 128, at tab 15; Peter R. Moyers, *Butchering Statutes: The Postville Raid and the Misinterpretation of Federal Law*, 32 SEATTLE U. L. REV. 651, 699–704 (2008) (discussing the misuse of stipulated removal orders in the Postville prosecution).

[135] A cancellation of removal permits the immigration judge to adjust the status of an undocumented person to that of a legal permanent resident if he has long-term ties to the United States, has been a "person of good moral character" while in the United States, and has not violated certain laws, and if his removal would cause "exceptional and extremely

tical matter, the short-fuse exploding plea offer precluded meaningful evaluation by defense attorneys of whether such immigration relief might be possible.[136] And with stipulated orders of removal, the defendants abandoned any and all immigration claims in the criminal plea.[137]

Looking back at Postville, two stories emerge. The simple story tells of overcharging and overzealous prosecution. That story may well be true. A less obvious, but equally important, story contemplates the Postville prosecution as emblematic of the blending of our criminal and immigration systems. This Part further explores what that blending looks like on the ground by first discussing distortions in procedural rules and then examining broader structural changes in adjudication models, functions, and actors.

A. Procedure

The following analysis of procedure juxtaposes the conventional understanding of equality across the criminal law with practical outcomes of the criminal system in four separate areas of the criminal process: pretrial detention, *Miranda*, search and seizure, and sentencing. This discussion is not meant to be exhaustive, but rather to provide a framework for understanding how the immigration agency affects rights in the criminal realm.

1. Pretrial Detention.—In the criminal system, those arrested without a warrant must be brought promptly before a judicial officer for a probable cause determination before any continued restraint on liberty is imposed.[138] The Eighth Amendment's rejection of excessive bail,[139] together with the Bail Reform Act, mandates that criminal defendants be released pending a criminal trial, provided that conditions can be established to ensure against flight and danger.[140] Defendants must be taken before a neutral magistrate without "unnecessary delay" for the determination of bond.[141] Finally, re-

unusual hardship" to a United States citizen or legal resident family member. 8 U.S.C. § 1229b(b)(1) (2006). U and T visas allow undocumented individuals who have been the victims of certain crimes and who assist law enforcement in criminal investigations and prosecutions to remain in the United States legally. *See* Orde F. Kittrie, *Federalism, Deportation, and Crime Victims Afraid to Call the Police,* 91 IOWA L. REV. 1449, 1463–66 (2006) (describing visa eligibility requirements).

[136] Leopold Statement, *supra* note 119, at 104, 106–07. Immigration attorneys familiar with the Postville case believe that some of the Postville defendants may have qualified for one or more of these forms of relief. *See* Walker, *supra* note 116.

[137] *See* Leopold Statement, *supra* note 119, at 109–13.

[138] Gerstein v. Pugh, 420 U.S. 103, 113–14 (1975).

[139] U.S. CONST. amend. VIII ("Excessive bail shall not be required . . . .").

[140] Bail Reform Act of 1984, 18 U.S.C. §§ 3141–42, 3146–50 (2006).

[141] *See* FED. R. CRIM. P. 5(a)(1)–(2). Under the Bail Reform Act, a bond hearing must be held "immediately" at the first appearance and cannot be delayed any longer than three days if requested by the government and five days if requested by the defendant. 18 U.S.C. § 3142(f).

flecting the core doctrinal equality of the criminal law, the Bail Reform Act makes clear that the right to bond applies regardless of citizenship status.[142]

In contrast, those arrested for civil immigration violations without a warrant have no corresponding right to a judicial determination of probable cause.[143] Additionally, once formally charged,[144] immigration arrestees have no Eighth Amendment right to bond.[145] In certain situations, immigration respondents may be subjected to mandatory detention with no right to a due process hearing.[146] In practice, even noncitizens entitled to a determination of bond while in immigration custody often experience prolonged periods with no access to a due process bond hearing.[147]

The standard explanation is that these two systems of detention operate independently.[148] However, a closer examination reveals that noncitizen de-

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[142] The Act specifically provides that noncitizen defendants be "treated in accordance with the other provisions of this section, notwithstanding the applicability of other provisions of law governing release pending trial or deportation or exclusion proceedings." 18 U.S.C. § 3142(d); *see also* United States v. Adomako, 150 F. Supp. 2d 1302, 1304–05 (M.D. Fla. 2001) ("Congress chose not to exclude deportable aliens from consideration for release or detention in criminal proceedings." (citing 18 U.S.C. § 3142(a)(3), (d) (2000))).

[143] 8 C.F.R. § 287.3(a)–(b) (2009) (allowing for continued immigration detention after a warrantless arrest based only on prima facie evidence of a civil immigration violation).

[144] The immigration system has no equivalent to the criminal system's requirement of a preliminary hearing or grand jury indictment to establish probable cause on the charges to which the respondent is held to answer. Normally, charging on a civil immigration violation must occur within forty-eight hours of the arrest. *Id.* § 287.3(d). After September 11, 2001, the regulation was amended to allow for detention without charges beyond forty-eight hours in "the event of an emergency or other extraordinary circumstance." *Id.*; Custody Procedures, 66 Fed. Reg. 48,334, 48,334 (Sept. 20, 2001); *see also* Shoba Sivaprasad Wadhia, *Under Arrest: Immigrants' Rights and the Rule of Law*, 38 U. MEM. L. REV. 853, 874 (2008) (noting that the regulations do not specify what qualifies as an emergency or how long the additional period before a charging determination may last).

[145] *See* Carlson v. Landon, 342 U.S. 524, 544–46 (1952) (concluding that denial of bail in immigration proceedings does not violate the constitutional prohibition against excessive bail). *But cf.* Zadvydas v. Davis, 533 U.S 678, 689 (2001) (holding that detention may not be indefinite).

[146] For example, noncitizens detained at the border may be held without a bond hearing. 8 U.S.C. § 1225(b)(2) (2006); United States *ex rel.* Mezei v. Shaughnessy, 345 U.S. 206, 214–15 (1953). Similarly, noncitizens placed in immigration removal proceedings, or those with certain criminal convictions, may be detained without a judicial determination of dangerousness or flight. *See* 8 U.S.C. §§ 1226(c), 1231(a); Demore v. Kim, 538 U.S. 510, 513, 519 (2003).

[147] *No End in Sight: Immigrants Locked Up for Years Without Hearings,* AM. CIV. LIBERTIES UNION (June 17, 2009), http://www.aclu.org/immigrants-rights/no-end-sight-immigrants-locked-years-without-hearings ("Over the last several years, the use of detention as an immigration enforcement strategy has increased exponentially, and immigrants, including lawful permanent residents and asylum seekers, have been detained for prolonged periods of time without any finding that they are either a danger to society or a flight risk.").

[148] *See, e.g.*, Taylor & Wright, *supra* note 78, at 1171 (contrasting the standard for "immigration detention" with that for pretrial release on the "criminal side," where "the norm is to release criminal defendants prior to trial").

fendants in criminal cases must navigate both systems of detention simultaneously. In the dominant practice, noncitizens' right to criminal bond is severely constrained.[149]

Consider what happens when suspects are arrested by immigration authorities. Immediately after arrest, defendants can be placed into the immigration system, where they are held for a period of time on only civil charges. These defendants can remain in civil custody until they are eventually criminally charged. For example, according to a study recently conducted by the Warren Institute, immigration crime defendants in Del Rio, Texas, waited in immigration custody for up to twelve days before a criminal probable cause determination was made, and up to fourteen days before being taken before a magistrate judge for an initial appearance.[150]

Courts have nonetheless upheld such delays under the rationale that the bail rules of the criminal system are not triggered until actual criminal charges are filed.[151] Similarly, courts have been unwilling to find that the practice of pre-charge detention violates the Speedy Trial Act.[152] To the extent that courts have granted relief, they have placed the burden on the defendant to demonstrate that the civil immigration detention was pretextual.[153] Given obvious evidentiary difficulties in proving pretextual motive, Speedy Trial Act violations are difficult to establish.

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[149] Although this Article focuses on barriers to bond for noncitizens in the federal system, such structural barriers are not confined to the federal system. Similar issues are arising at the state level. For example, the New Jersey Supreme Court recently upheld authorities' decision to triple the bail amount based solely on evidence of an immigration "detainer." State v. Fajardo-Santos, 973 A.2d 933, 934–35 (N.J. 2009).

[150] JOANNA LYDGATE, CHIEF JUSTICE EARL WARREN INST. ON RACE, ETHNICITY & DIVERSITY, UNIV. OF CAL., BERKELEY LAW SCH., ASSEMBLY-LINE JUSTICE: A REVIEW OF OPERATION STREAMLINE 15 (2010), *available at* http://www.law.berkeley.edu/files/Operation_Streamline_Policy_Brief.pdf.

[151] *See, e.g.*, United States v. Dyer, 325 F.3d 464, 470 (3d Cir. 2003) (concluding that immigration detention prior to criminal prosecution does not implicate Federal Rule of Criminal Procedure 5(a)); United States v. Tejada, 255 F.3d 1, 3–4 (1st Cir. 2001) (same); United States v. Noel, 231 F.3d 833, 837 (11th Cir. 2000) (same); *see also* United States v. Cepeda-Luna, 989 F.2d 353, 358 (9th Cir. 1993) (finding no "unnecessary delay in processing the criminal aspects" of the case).

[152] *See, e.g.*, United States v. De La Pena-Juarez, 214 F.3d 594, 597 (5th Cir. 2000); *Noel*, 231 F.3d at 835; *Cepeda-Luna*, 989 F.2d at 355–56; United States v. Reme, 738 F.2d 1156, 1162 (11th Cir. 1984).

[153] *E.g.*, *Tejada*, 255 F.3d at 5 (finding that "in the absence of any evidence that the government deliberately employed delaying tactics for an impermissible purpose," dismissal is not warranted); *De La Pena-Juarez*, 214 F.3d at 598 (noting that the Speedy Trial Act only applies to civil detention "where the defendant demonstrates that the primary or exclusive purpose of the civil detention was to hold him for future criminal prosecution"); *Cepeda-Luna*, 989 F.2d at 357–58 (concluding that, in order to prove a violation of the Speedy Trial Act, a defendant must show actual "evidence of collusion" to have a noncitizen detained by civil immigration authorities for purposes of criminal prosecution). For an instance in which a court found a pretextual use of immigration detention sufficient to require dismissal with

As the Postville saga illustrates, once noncitizen defendants find themselves in the hands of criminal law enforcement or before a criminal judge, immigration authorities can lodge what is known as an "immigration detainer."[154] The immigration agency is not required to make a determination regarding removability prior to issuing a detainer. Instead, the detainer simply serves as a notice from immigration authorities alerting criminal officials as to the immigration agency's interest in the defendant.[155] If a defendant is granted bond in the criminal case, the detainer functions to transfer him to immigration custody.[156] Once transferred, the defendant is held in immigration custody for the remainder of the criminal case.[157] Although there is no legal authority for criminal prosecutors to hold a bonded criminal defendant in immigration custody for purposes of a criminal case,[158] this practice is rarely challenged.

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prejudice, pursuant to the Speedy Trial Act, of a complaint charging immigration crime, see United States v. Okuda, 675 F. Supp. 1552, 1555 (D. Haw. 1987), in which the court concluded that "Okuda's arrest by I.N.S. officials initiated the thirty day period under the Speedy Trial Act where the government fully intended to charge the defendant with the identical criminal charge and purposefully utilized the I.N.S. to detain the defendant pending the filing of the criminal complaint."

[154] 8 C.F.R. § 287.7(a) (2009).

[155] *Id.* ("A detainer serves to advise another law enforcement agency that the Department seeks custody of an alien presently in the custody of that agency, for the purpose of arresting and removing the alien."). Neither the regulation nor any other law provides a standard for issuance of a detainer. For an argument that DHS's current detainer practice exceeds its statutory authority, see Christopher N. Lasch, *Enforcing the Limits of the Executive's Authority to Issue Immigration Detainers*, 35 WM. MITCHELL L. REV. 164, 186–93 (2008).

[156] *See* Telephone Interview with Ron Barroso, Panel Representative, S. Dist. of Tex. (Oct. 21, 2009) [hereinafter Barroso Interview] (describing how immigration authorities put "detainers" on defendants "so if for some reason they get a bond, they w[ould] not be able to get out"); Telephone Interview with Reynaldo Cantu, Assistant Fed. Pub. Defender, S. Dist. of Tex. (Nov. 3, 2009) [hereinafter Cantu Interview] (noting that because of the immigration detainer "nobody ever tries to get bond" in immigration crime cases); Telephone Interview with Knut Johnson, Panel Representative, S. Dist. of Cal. (Oct. 6, 2009) [hereinafter Johnson Interview] (explaining that asking for bond for noncitizens is "almost pointless" because, even if bond is granted, the defendant "will go straight into immigration custody"); Telephone Interview with Gregory Torok, Indigent Def. Panel Attorney, Dist. of Ariz. (Dec. 17, 2008) [hereinafter Torok Interview] (explaining that one "wouldn't even want bond set" for a noncitizen defendant because he will be transferred to immigration custody, which is "dead time" on the criminal sentence).

[157] *See* ROBERT JAMES MCWHIRTER, THE CRIMINAL LAWYER'S GUIDE TO IMMIGRATION LAW 278–79 (2006). For those defendants who are not subject to mandatory immigration detention, it may be possible to obtain bond from the immigration judge. *See, e.g.*, Barroso Interview, *supra* note 156 (describing a case in which Barroso was able to retain an immigration attorney to obtain immigration bond for a client released by the criminal judge).

[158] *See* Government's Opposition to Defendant's Motion to Order the United States Marshals to Immediately Release Defendant Pursuant to Court's Bail Order Notwithstanding the Immigration Detainer; Memorandum of Points and Authorities; Exhibits, at 9, United States v. Abdon Martinez-Banuelos, No. 06-0547M (C.D. Cal. Apr. 7, 2006) (on file with author) (conceding that "neither the U.S. Attorney's Office nor the district court may ask or instruct

On the ground, the bail system's interaction with immigration detention has also altered the way in which bail hearings are implemented. For example, in Tucson, Arizona, rather than holding individualized bail hearings, detention orders are read en masse to those charged with immigration crime.[159] In other districts, bail hearings are held, but judges have been known to rely on the fact that a civil immigration detainer has been lodged to find that the alien defendant is categorically ineligible for criminal bond.[160] In the Southern District of California, which has a high level of immigration crime prosecutions, courts have developed a practice of granting such defendants a bond of $20,000–$25,000 that can only be satisfied with cash or corporate surety.[161] Because these defendants are not able to post this amount of cash, the grant of bond functions as an order of detention.[162]

2. Miranda.—In the criminal system, the famous post-arrest warning outlined in *Miranda v. Arizona* is constitutionally required before any custodial interrogation.[163] Statements obtained in violation of *Miranda* must be suppressed.[164] In sharp contrast, immigration law enforcement may engage its broad interrogation powers without *Miranda*.[165] Civil immigration suspects need only be advised of the reason for arrest and the right to be repre-

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ICE to detain defendant for purposes of assuring his appearance before the court in this criminal matter"); *see also* United States v. Adomako, 150 F. Supp. 2d 1302, 1307–08 (M.D. Fla. 2001) (explaining that, whether the Attorney General "wears his INS hat" or "his U.S. Attorney's hat," Congress has made clear that a criminal court must release deportable aliens by applying the "normal release and detention rules").

[159] Telephone Interview with Saul Huerta, Assistant Fed. Pub. Defender, Office of the Fed. Pub. Defender, Dist. of Ariz. (Dec. 8, 2008) [hereinafter Huerta Interview].

[160] *See, e.g.*, United States v. Rice, No. 04-83, 2006 WL 1687749, at *6 (W.D. Ky. June 19, 2006); United States v. Magallon-Toro, Nos. 02-332, 02-385, 2002 WL 31757637, at *2 (N.D. Tex. Dec. 4, 2002). Other courts have rejected this position entirely, finding that the standard bail factors must apply and that the mere lodging of a detainer by the Executive Branch cannot trump the right to bail. *See, e.g.*, United States v. Barrera-Omana, 638 F. Supp. 2d 1108, 1111–12 (D. Minn. 2009); United States v. Lozano-Miranda, No. 09-20005, 2009 WL 113407, at *3 n.13 (D. Kan. Jan. 15, 2009).

[161] Telephone Interview with Jason Ser, Supervisory Deputy Fed. Pub. Defender, S. Dist. of Cal., Fed. Defenders of San Diego, Inc. (Feb. 12, 2009) [hereinafter Ser Interview]; *see also* Thomas Bak, *Pretrial Detention in the Ninth Circuit*, 35 SAN DIEGO L. REV. 993, 1023, 1024 (1998) (discussing the "heavy use of money bail" as a means of detention in the Southern District of California).

[162] Ser Interview, *supra* note 161.

[163] 384 U.S. 436 (1966).

[164] Such statements may not be used in the prosecution's case-in-chief, but may be used for impeachment purposes should the defendant testify. Harris v. New York, 401 U.S. 222, 224–26 (1971).

[165] *See* INS v. Lopez-Mendoza, 468 U.S. 1032, 1039 (1984) (noting that courts of appeals have found that "the absence of *Miranda* warnings does not render an otherwise voluntary statement by the respondent inadmissible in a deportation case").

sented at their own expense.[166] Some courts have even found that this civil administrative warning need not be given until formal proceedings have begun, *after* the interrogation has already occurred.[167]

When viewed in action, the lower standard for civil-custodial warnings affects defendants in the criminal system. The majority of federal immigration crime defendants are arrested by law enforcement officers working for DHS.[168] Upon arrest, agents typically question the arrestees before they are transferred to the custody of the United States Marshals for federal criminal prosecution.[169] This type of questioning takes place in a custodial setting and can elicit incriminating responses. However, because it takes place in immigration custody, *Miranda* warnings are often omitted prior to such questioning.[170] Consider the frequent jail sweeps in which immigration authorities interview inmates regarding their immigration backgrounds.[171] Under such programs, immigration agents ask inmates questions such as name, date of birth, citizenship, and immigration status without first giving a *Miranda* warning.

The rights-based concern is particularly acute when criminal courts admit un-Mirandized statements made during immigration interrogations into evidence in a subsequent criminal prosecution. When immigration questioning conducted without *Miranda* is characterized as "administrative" or "noncustodial," in practice such statements may be used against the criminal defendant.[172] For example, Rafael Nambo Lugo was prosecuted

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[166] 8 C.F.R. § 287.3 (2009) (requiring notification of rights only after a suspect is arrested without a warrant and placed in formal proceedings).

[167] *See, e.g.*, Samayoa-Martinez v. Holder, 558 F.3d 897, 901–02 (9th Cir. 2009) (concluding that Border Patrol did not violate 8 C.F.R. § 287.3(c) when it questioned a noncitizen without informing him of his rights).

[168] *See* TRAC IMMIGRATION, IMMIGRATION PROSECUTIONS AT RECORD LEVELS IN FY 2009, http://trac.syr.edu/immigration/reports/218/ (last visited Oct. 12, 2010) (reporting that the lead referring agencies for immigration crime are CBP and ICE; both are within DHS).

[169] For example, immigration agents are instructed to process previous deportees for reinstatement of their original deportation orders *before* any referral for criminal prosecution occurs. U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, DETENTION AND REMOVAL OPERATIONS POLICY AND PROCEDURE MANUAL (DROPPM), at ch. 14.8(b)(4)(d) (Reinstatement of Final Orders, Criminal Prosecution) (2006) ("Whenever possible, reinstatement processing should be completed before referring an alien for criminal prosecution.").

[170] MCWHIRTER, *supra* note 157, at 281 (noting that, in practice, immigration agents generally omit *Miranda* warnings, despite the fact that their interviews often result in criminal prosecutions).

[171] *See* Gorman, *supra* note 8; Chris Strohm, *Homeland Security Launches Program to Find Illegal Immigrants in Jails*, CONGRESSDAILY, Oct. 27, 2008, http://www.govexec.com/story_page_pf.cfm?articleid=41275.

[172] *See, e.g.*, Telephone Interview with Dennis Candelaria, Assistant Fed. Pub. Defender, Fed. Pub. Defender Org., Dist. of N.M. (Dec. 11, 2008) [hereinafter Candelaria Interview] (explaining that, in his experience, immigration agents tend to describe information that they obtain without *Miranda* as "booking information," thereby insulating themselves from reading the *Miranda* warning); Telephone Interview with Selena N. Solis, Assistant Fed. Pub.

for illegal entry based in part on answers he gave to unwarned questioning by an immigration agent while he was in jail on another offense.[173] The federal judge in Texas that presided over the trial found that the interview conducted by the Border Patrol Criminal Alien Program was custodial,[174] yet he declined to find that *Miranda* was required.[175] As the judge explained, it "did not amount to a practice the agents should know was reasonably likely to elicit an incriminating response."[176] In so ruling, the court relied explicitly on the organizing principle of institutional autonomy: administrative immigration agents are "merely fact finders" who have "no discretion regarding whether or not the defendant will be prosecuted or subjected to administrative proceedings."[177]

In a similar case, Jorge Lopez-Garcia was prosecuted in the Northern District of Georgia for illegal reentry based on evidence elicited by immigration agents while he was in custody on unrelated drug charges.[178] Despite the lack of a *Miranda* warning, incriminating statements made during the interview were admitted at trial.[179] As the court explained, the immigration agent who conducted the interrogation was only "tasked with facilitating the removal of individuals illegally present in the country."[180] The decision to bring criminal charges was, in the agent's words, simply "not his call."[181] In affirming Mr. Lopez-Garcia's conviction on appeal, the Eleventh Circuit endorsed the concept of functional separation to conclude that *Miranda* was not required. The purpose of the immigration interview, as the court described, "was to determine whether the detainee had the documentation necessary to remain in the United States," and "not to initiate criminal charges against those present in the country illegally."[182] *Miranda* was not required where the ICE agent had "no reason to believe" that Mr. Lopez-Garcia would confess to illegal entry and later be prosecuted

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Defender, Office of the Fed. Pub. Defender, W. Dist. of Tex. (Jan. 5, 2009) [hereinafter Solis Interview] (recounting a case in which an immigration crime client was not read her *Miranda* rights while questioned in handcuffs, yet the judge found no *Miranda* violation because she was not in "custody").

[173] United States v. Lugo, 289 F. Supp. 2d 790, 791–92 (S.D. Tex. 2003).

[174] *Id.* at 795–96.

[175] *Id.* at 797–99.

[176] *Id.* at 798–99.

[177] *Id.* However, the court did acknowledge that a jail program known to operate "more closely in conjunction with prosecutors" might demand the protection of *Miranda*. *Id.* at 799 n.5; *cf.* United States v. Chen, 439 F.3d 1037, 1043 (9th Cir. 2006) (holding that *Miranda* was required where the government was interested in the defendant's testimony for a criminal case and the U.S. Attorney had a practice of pursuing illegal entry prosecutions).

[178] United States v. Lopez-Garcia, 565 F.3d 1306, 1311–12 (11th Cir. 2009).

[179] *Id.* at 1312.

[180] *Id.* at 1317.

[181] *Id.*

[182] *Id.* at 1311.

for the offense.[183] It was precisely the separation of spheres that justified the court's retreat from the equality principle, converting the civil immigration standard (void of *Miranda*) into the rule for the criminal case.

Rights-based concerns also arise when courts admit statements obtained during a "criminal" interrogation despite the fact that an identical "immigration" interrogation (without *Miranda*) preceded it. The standard scenario is familiar. Immigration agents first ask the suspect the relevant questions such as identity, alienage, and immigration history without providing a *Miranda* warning. Later, they re-interrogate the defendant, this time providing the appropriate *Miranda* warning, and then seek to enter the second statement at trial. This strategy is thought to be effective because someone who has already provided information to authorities may be more likely to continue talking, even when told about the option to remain silent.[184]

In the two-tiered immigration interrogation, prosecutors argue that authorities who fail to Mirandize are not engaging in a deliberate protocol to evade the constitutional requirement. Instead, they are simply completing routine administrative processing without considering whether it may lead to criminal prosecution.[185] For example, when Oscar Javier Garcia-Hernandez was arrested in San Diego, immigration agents read him only an administrative warning during his first interrogation.[186] Six hours later, agents interviewed him again and obtained the same statement—this time with *Miranda*.[187] At trial, the prosecutor convinced the court to admit the second statement into evidence.[188] In allowing the statement, the conventional view of immigration and criminal enforcement as separate institutions with distinct functions and actors was critical to the court's logic. As the judge explained, there was an institutional "disconnect in the objectives

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[183] *Id.* at 1317.

[184] Under established Supreme Court precedent, two-step interrogations are acceptable only if they do not deliberately evade *Miranda*. Oregon v. Elstad, 470 U.S. 298, 314 (1985) (holding that a post-*Miranda* statement will not automatically be excluded because of an earlier, pre-*Miranda* confession). Thus, in a murder investigation where police intentionally delayed reading *Miranda* until midstream in the interrogation of a murder suspect, the resulting statements were deemed inadmissible. Missouri v. Seibert, 542 U.S. 600, 604 (2004) (suppressing a statement obtained as a result of an official police protocol directing officers to first interrogate suspects extensively without *Miranda*).

[185] *See, e.g.*, United States v. Hernandez-Hernandez, 384 F.3d 562, 567 (8th Cir. 2004) (holding that a confession was properly admitted despite a previous interrogation of the defendant without *Miranda*); United States v. Garcia-Hernandez, 550 F. Supp. 2d 1228, 1232–34 (S.D. Cal. 2008) (same).

[186] *Garcia-Hernandez*, 550 F. Supp. 2d at 1232.

[187] *Id.* at 1232–33.

[188] *See id.* at 1235.

in the separate questioning"—the first set was for immigration screening, and the second was for criminal punishment.[189]

This analysis of the way in which *Miranda* operates in the immigration sphere supplements the ongoing academic debate questioning the law's practical significance in light of modern interrogation methods. For example, some scholars have argued that, across all categories of criminal prosecution, American police have learned to work around *Miranda* by interrogating outside of custodial settings or by using sophisticated psychological tactics to convince suspects to waive their rights.[190] What has not garnered focus in the literature is the way in which immigration's supplemental law enforcement powers can be used to complement the criminal prosecution in ways that disrupt *Miranda*'s practical application. Although this effect is most acute in the context of immigration crime prosecution, in practice it can function in the same way across all crime categories when the defendant is a noncitizen subject to civil immigration interrogation.

3. Search and Seizure.—The Fourth Amendment is thought to embody the principles of doctrinal equality. Generally characterized as "transsubstantive," the Fourth Amendment is frequently described as applying equally across all crime categories.[191] It is also traditionally understood to apply to all persons present within the confines of the United States regardless of citizenship status.[192]

Despite this understanding, conceptions of privacy and reasonableness embodied in the Fourth Amendment have evolved to allocate different levels of protection from search and seizure in a variety of immigration-specific contexts—including in certain geographic zones (e.g., the border) or for certain types of enforcement (e.g., administrative immigration enforcement). The Supreme Court has made clear that routine searches at the border "are not subject to any requirement of reasonable suspicion, probable cause, or warrant."[193] What was once the customs officer's power to

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[189] *Id.*

[190] *See, e.g.*, Richard A. Leo, *Questioning the Relevance of* Miranda *in the Twenty-first Century*, 99 MICH. L. REV. 1000, 1009–10, 1016–23 (2001); *see also* Charles D. Weisselberg, *Mourning* Miranda, 96 CAL. L. REV. 1519, 1521, 1546–48 (2008) (arguing that *Miranda* has become ineffective because law enforcement officers have learned how to take advantage of the ruling in ways that weaken its purpose).

[191] *See, e.g.*, William J. Stuntz, Commentary, *O.J. Simpson, Bill Clinton, and the Transsubstantive Fourth Amendment*, 114 HARV. L. REV. 842, 847 (2001) [hereinafter Stuntz, *Transsubstantive Fourth Amendment*]. For a discussion of some of the advantages and difficulties with drawing Fourth Amendment constitutional lines in accordance with crime severity, see Eugene Volokh, *Crime Severity and Constitutional Line-Drawing*, 90 VA. L. REV. 1957 (2004).

[192] *See, e.g.*, M. Isabel Medina, *Exploring the Use of the Word "Citizen" in Writings on the Fourth Amendment*, 83 IND. L.J. 1557, 1558 (2008) ("Traditionally, courts have not required citizenship for Fourth Amendment protections to apply . . . .").

[193] United States v. Montoya de Hernandez, 473 U.S. 531, 538 (1985).

search vessels at the border has broadened over the years. For example, courts now approve warrantless, suspicionless searches at the "functional equivalent" of the border, such as airports and border stations.[194] Even prolonged detention and non-routine searches (such as body cavity searches) may be permissible at the border with less than probable cause.[195]

The border's reach has also extended inward, with permanent checkpoint inspections for illegal aliens found to be reasonable even when particularized suspicion is lacking.[196] As the Supreme Court has explained, alien checkpoints meet the Fourth Amendment standard of reasonableness[197] because of the "formidable law enforcement problems" posed by the fact that "it remains relatively easy for individuals to enter the United States without detection."[198] A few district courts have gone so far as to move the functional border into the homes of previously deported aliens, concluding that defendants in illegal reentry prosecutions were stripped of any Fourth Amendment protections at the time of their previous deportation.[199] In an extreme example, a district judge in Kansas refused to suppress evidence found in a warrantless search of an undocumented defendant's private residence, characterizing him as a "trespasser" or "squatter" in his own home.[200]

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[194] *See* Almeida-Sanchez v. United States, 413 U.S. 266, 272–73 (1973); *see also* 8 U.S.C. § 1357(a)(3) (2006) (permitting immigration agents, without warrants, to search vessels within U.S. territorial waters, rail cars, aircrafts, and other vehicles, and to patrol private lands within twenty-five miles of the border).

[195] *See, e.g.*, *Montoya de Hernandez*, 473 U.S. at 541 (holding that an agent needs only reasonable suspicion to detain a person at the border to search the person's alimentary canal).

[196] *See* United States v. Martinez-Fuerte, 428 U.S. 543 (1976).

[197] *Id.* at 566.

[198] *Id.* at 552.

[199] *See* United States v. Ullah, No. 04-30A(F), 2005 WL 629487, at *29 (W.D.N.Y. Mar. 17, 2005); United States v. Esparza-Mendoza, 265 F. Supp. 2d 1254, 1267–71 (D. Utah 2003), *aff'd on other grounds*, 386 F.3d 953 (10th Cir. 2004). Both of these cases relied on the Supreme Court's decision in *United States v. Verdugo-Urquidez*, which found that a Mexican citizen brought to the United States for a criminal trial enjoyed no Fourth Amendment protection from the warrantless seizure of his property in Mexico and left open the question of whether undocumented persons within the United States are protected by the Fourth Amendment in other contexts. 494 U.S. 259, 271–72 (1990). The *Ullah* court used *Verdugo-Urquidez* to support the proposition that unless an alien established a pre-search "'significant voluntary connection with the United States' the Fourth Amendment does not apply to the search." *Ullah*, 2005 WL 629487, at *29 (quoting *Verdugo-Urquidez*, 494 U.S. at 271). The *Esparza-Mendoza* court also cited the "sufficient connection" test from *Verdugo-Urquidez* in concluding that aliens who had been previously deported do not have a "sufficient connection to this country" and therefore "stand outside 'the People' covered by the Fourth Amendment." *Esparza-Mendoza*, 265 F. Supp. 2d at 1267–71, *aff'd on other grounds*, 386 F.3d 953 (10th Cir. 2004) (finding that the defendant's encounter with police was consensual and therefore did not implicate the Fourth Amendment).

[200] United States v. Gutierrez-Casada, 553 F. Supp. 2d 1259, 1269–70 (D. Kan. 2008) (explaining that "a deported felonious alien is wrongfully present anywhere in the United States" and therefore "obtains no greater Fourth Amendment rights by reentering the United

The classification of investigations by immigration authorities as "regulatory" rather than "investigatory" has also provided justification for conducting searches, questioning individuals, and seizing evidence related to immigration violations with a lower level of scrutiny than would be acceptable in the criminal system.[201] This "special needs" doctrine[202] is premised on an assumption of institutional autonomy. In other words, such searches are validated despite their lower level of constitutional scrutiny because they are conducted for administrative purposes by officers other than the police.[203]

In practice, one of the primary areas for application of the special needs doctrine is immigration. Consider the frequently cited decision of *Blackie's House of Beef, Inc. v. Castillo*, in which the D.C. Circuit agreed with immigration authorities conducting a workplace raid that, "given the nature of the particular law enforcement activity," the level of "particularized description" that would be necessary for a criminal warrant is not required in the administrative immigration context.[204] The *Blackie's* court was clear that such warrants—known as "open ended" or "hybrid" warrants—were acceptable precisely because of the perceived division between the civil and criminal systems. As the D.C. Circuit carefully explained, the warrant "was issued to aid the agency in the enforcement of its statutory mandate, not to aid police in the enforcement of criminal laws."[205]

However, the divide between enforcing immigration's statutory mandate and the criminal law is not so clear-cut. Law enforcement authorities have sometimes used administrative warrants to aid in hybrid criminal-civil prosecutions. The 2006 raids of Swift & Co. offer a recent example.[206] A

States than he would have had if he had remained outside the United States"). For a critique of this view, see Kal Raustiala, *The Geography of Justice,* 73 FORDHAM L. REV. 2501, 2554 (2005), claiming that "as a doctrinal matter, the connection between deepening ties on the part of aliens and the level of constitutional protection has little support."

[201] *See* CHARLES H. WHITEBREAD & CHRISTOPHER SLOBOGIN, CRIMINAL PROCEDURE: AN ANALYSIS OF CASES AND CONCEPTS 315–16 (5th ed. 2008); Anil Kalhan, *The Fourth Amendment and Privacy Implications of Interior Immigration Enforcement*, 41 U.C. DAVIS L. REV. 1137, 1191–205 (2008).

[202] In immigration and other administrative contexts, the Court has allowed searches to proceed without warrants or particularized suspicion. *See, e.g.*, Camara v. Mun. Court, 387 U.S. 523, 538 (1967) (holding that a warrant for housing inspection may issue "if reasonable legislative or administrative standards for conducting an area inspection are satisfied with respect to a particular dwelling").

[203] *See* WHITEBREAD & SLOBOGIN, *supra* note 201, at 315.

[204] 659 F.2d 1211, 1222 (D.C. Cir. 1981); *see also* Int'l Molders' & Allied Workers' Local Union No. 164 v. Nelson, 799 F.2d 547, 553 (9th Cir. 1986) (agreeing with the D.C. Circuit that a requirement of including specific identifying information on an administrative warrant would "impose[] an unreasonable and impractical burden on the INS").

[205] *Blackie's*, 659 F.2d at 1218.

[206] *See* Julia Preston, *U.S. Raids 6 Meat Plants in ID Case*, N.Y. TIMES, Dec. 13, 2006, at A24.

criminal investigation into meatpacking plants culminated in the issuance of administrative warrants to search company workplaces across six states.[207] Nationally, 1282 workers were arrested, and approximately 240 were criminally charged with identity theft and other similar crimes.[208] Yet ICE used an administrative search warrant based on reasonable suspicion rather than probable cause, one that lacked particularized descriptions of the individuals sought.[209]

An administrative warrant was famously used by immigration authorities in the seminal Supreme Court case involving a workplace raid, *INS v. Delgado*.[210] Authorities gained access to a garment factory using a warrant that, like the Swift warrant, did not name the particular aliens who would be subjected to the "factory surveys."[211] Once inside, authorities closed the factory doors and began asking the workers where they were from and whether they had papers.[212] Agreeing that the warrant did not allow them to question the workers,[213] the Government argued instead that questioning about immigration status, as the workers were going about their business in the factory, did not implicate Fourth Amendment rights at all, and the Supreme Court agreed.[214] Closing the factory's doors and asking questions regarding citizenship did not rise to the level of an investigatory stop that would require probable cause of a crime or, at least, reasonable suspicion.[215] Since *Delgado*, workplace raids have been increasingly tied to criminal prosecution,[216] yet the government has continued to argue that it may stop,

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[207] *See* Aldana, *supra* note 7, at 1101–02.

[208] *Id.* at 1093.

[209] Similar to the warrant in *Blackie's*, 659 F.2d at 1214, the Swift & Co. warrant authorized agents to "enter any locked room on the premises in order to locate persons who may be such aliens in the United States without legal authority, and . . . to question them to determine whether they are such aliens and, if there is probable cause to believe they are such aliens, to arrest them." Barrera v. U.S. Dep't of Homeland Sec., No. 07-3879, 2009 WL 825787, at *5 (D. Minn. Mar. 27, 2009).

[210] 466 U.S. 210, 212 (1984).

[211] *Id.* at 212–13. The "factory surveys," as described by the Court, were brief interviews regarding citizenship. *See id.*

[212] *Id.*

[213] Before the Ninth Circuit, the INS claimed that it relied on the warrant to gain entry to the factory but not to interrogate the workers. *See* Int'l Ladies' Garment Workers' Union v. Sureck, 681 F.2d 624, 629 n.8 (9th Cir. 1982).

[214] *Delgado*, 466 U.S. at 220.

[215] *Id.* at 220–21.

[216] Workplace raids such as those discussed in this Article—Postville and Swift & Co.—have *combined* criminal prosecution with civil immigration charges. The policy decision to blend civil and criminal prosecution workplace enforcement has been explicit. *E.g.*, Press Release, Dep't of Homeland Sec., Press Conference with Sec'y of Homeland Sec. Michael Chertoff, Assistant Sec'y for Immigration and Customs Enforcement Julie Myers, and U.S. Attorney Glenn Suddaby (Apr. 20, 2006), *available at* http://www.dhs.gov/xnews/releases/press_release_0892.shtm (announcing a new workplace "interior enforcement strategy" that combines "criminal enforcement and immigration enforcement tools").

detain, and interrogate without individualized suspicion in the context of worksite enforcement.[217]

Finally, a comment about the exclusionary rule is in order. The exclusionary rule's power to suppress evidence that is illegally obtained is considered to be one of the most important restraints on police behavior.[218] However, in the immigration sphere, suppression based on the exclusionary rule becomes an available remedy only upon a heightened showing of an "egregious" or "widespread" violation.[219] In practice, this leeway to proceed despite judicially condemned police procedures can impact immigration enforcement across the criminal-civil spectrum.

As discussed later in this Part, immigration crime produces more guilty pleas at a faster rate than all other federal crime.[220] As a result, law enforcement violations are unlikely to be challenged on the criminal side of the immigration enforcement divide. Similarly, on the administrative immigration side, the heavy use of "voluntary departure" in lieu of judicial orders of removal also drastically reduces challenges to the exercise of law enforcement power.[221] Voluntary departure, which can be granted informally by immigration agents working for DHS prior to the completion of removal proceedings, is essentially a form of plea bargaining in which noncitizens give up the right to any relief from removal that they may be able to

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[217] *See, e.g.*, Department of Homeland Security Opposition to Terminate and Objections, *In re* [identifying information redacted], No. [redacted] (U.S. Immigr. Ct., L.A., Cal., Apr. 17, 2009) (on file with author) (arguing that *Delgado* gives permission to engage in "questioning and limited detention" without individualized suspicion because "[i]ndividualized suspicion is not a requirement in a worksite enforcement context" (citing *Delgado*, 466 U.S. 210)).

[218] ERWIN CHEMERINSKY & LAURIE L. LEVENSON, CRIMINAL PROCEDURE 291 (2008) (describing the exclusionary rule as "[t]he most important enforcement mechanism" for constitutional violations in the criminal system).

[219] INS v. Lopez-Mendoza, 468 U.S. 1032, 1050–51 (1984) (leaving open the possibility that the exclusionary rule might still apply in cases where there is a "good reason to believe" that violations are "widespread" and in cases involving "egregious violations of Fourth Amendment or other liberties that might transgress notions of fundamental fairness and undermine the probative value of the evidence obtained"). Circuit courts have not agreed on the appropriate standard for applying the exclusionary rule under the egregious conduct standard. *Compare* Lopez-Rodriguez v. Mukasey, 536 F.3d 1012, 1018–19 (9th Cir. 2008) (holding that the exclusion of evidence in immigration court turns on whether the agents committed the violations deliberately or by conduct a reasonable officer should have known would violate the Constitution), *with* Kandamar v. Gonzales, 464 F.3d 65, 71 (1st Cir. 2006) (requiring "specific evidence of . . . government misconduct by threats, coercion or physical abuse" to demonstrate egregiousness).

[220] Statistical data that I collected reflect that the rate of guilty pleas over time is significantly higher for immigration crime than the rest of the criminal docket in both district court and magistrate court. *See infra* Figure 1.

[221] *See generally* 8 U.S.C. § 1229c (2006) (describing the "voluntary departure" mechanism).

obtain in a formal hearing.[222] This agency-driven practice of returning noncitizens without a formal judicial order of removal has, for a long time, dominated the immigration system.[223] In practice, the ready availability of this plea-bargained option operates to drastically reduce judicial decision-making in immigration. In the process, reliance on voluntary departure forecloses legal challenges to abuse of law enforcement authority in the immigration context.[224]

4. Sentencing and Corrections.—The formal understanding of the criminal system provides that all defendants must be sentenced based on neutral sentencing factors and not punished based on their alienage.[225] However, emerging evidence suggests that, in practice, noncitizens in the criminal justice system are treated differently along alienage lines. Consider sentencing trends. According to a study released in 2009, noncitizens convicted in the federal system are far less likely to be sentenced to alternative sentences (such as probation) than are citizens.[226] The divergence in sentencing decisions made by federal judges is marked. Citizen defendants

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[222] For a more complete discussion of voluntary departure, see ALEINIKOFF ET AL., *supra* note 62, at 820–21, describing "two types of voluntary departure," one of which occurs prior to the completion of removal proceedings and requires waiver of the right to a full removal hearing.

[223] DHS records most voluntary departures granted by DHS officers as "voluntary returns." U.S. DEP'T OF JUSTICE, OFFICE OF THE INSPECTOR GEN., INSPECTIONS DIV., VOLUNTARY DEPARTURE: INEFFECTIVE ENFORCEMENT AND LACK OF SUFFICIENT CONTROLS HAMPER THE PROCESS, REPORT NUMBER I-99-09, at Introduction (1999), *available at* http://www.justice.gov/oig/reports/INS/e9909/; *see also* OFFICE OF IMMIGRATION STATISTICS, U.S. DEP'T OF HOMELAND SEC., 2008 YEARBOOK OF IMMIGRATION STATISTICS 95 n.2 (2009), *available at* http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2008/ois_yb_2008.pdf (defining "voluntary returns" as "the confirmed movement of an inadmissible or deportable alien out of the United States not based on an order of removal"). Voluntary returns, which have been recorded since 1927, have steadily increased over time and now dominate the immigration system. *Id.* at 95 tbl.36. In 2008, voluntary returns represented 69% of agency movement of noncitizens to their home country. *Id.*

[224] *See Lopez-Mendoza*, 468 U.S. at 1044 (explaining that the dominant practice of "voluntary deportation" has resulted in a system where "[e]very INS agent knows . . . that it is highly unlikely that any particular arrestee will end up challenging the lawfulness of his arrest in a formal deportation proceeding"). Despite the high rates of voluntary departure, immigration attorneys recently have successfully challenged specific instances of police abuse by bringing suppression motions in immigration court. *See* discussion *infra* notes 388–89 and accompanying text.

[225] *See* 18 U.S.C. § 3553 (2006) (listing factors on which a federal judge must rely in sentencing, such as the nature and circumstances of the offense, the history and characteristics of the defendant, and the kinds of sentences available).

[226] U.S. SENTENCING COMM'N, ALTERNATIVE SENTENCING IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 4–5 & tbls.4 & 5 (2009) [hereinafter ALTERNATIVE SENTENCING], *available at* http://www.ussc.gov/general/20090206_Alternatives.pdf. Under the federal system, there are numerous sentencing options available short of imprisonment, including probation only, probation with confinement, or some combination of prison with community confinement. *See id.* at 3.

facing a recommended sentence of six months or less are sentenced to probation 75% of the time.[227] Noncitizens with the same recommended sentence, in contrast, are sent to prison 86% of the time.[228] Even for defendants facing a higher recommended sentence under the Sentencing Guidelines,[229] the citizenship effect is pronounced: over 60% of citizens in an eight-to-sixteen-month Guideline range are sentenced to prison alternatives, whereas over 90% of noncitizens in the same range are given prison time.[230]

Differences linked with citizenship do not end with sentencing. Instead, they continue through the corrections process. All noncitizen inmates are classified as "deportable aliens" by the Bureau of Prisons.[231] This designation is applied without a finding of dangerousness or risk of flight[232] and despite the fact that studies have suggested that deportable aliens do not have higher recidivism rates.[233] Nonetheless, once the "deportable alien" designation is made, noncitizens are subject to a number of conditions that have the effect of increasing the severity of their punishments.

All deportable aliens are assigned to facilities with higher security levels.[234] Such facilities have more stringent regulations, provide fewer recreational programs, and may be located farther away from the inmate's friends

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[227] *Id.* at 3, 5 tbl.5.

[228] *Id.* at 5 tbl.4.

[229] The U.S. Sentencing Guidelines, which advise federal judges on criminal sentencing, were created by the Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (codified as amended in scattered sections of 18 U.S.C. and 28 U.S.C.), as part of Congress's attempt to seek uniformity in sentencing. U.S. SENTENCING GUIDELINES MANUAL § 1A1(3) (2009).

[230] ALTERNATIVE SENTENCING, *supra* note 226, at 3, 5 tbls.4 & 5. Understanding why these marked disparities occur, and how they map onto specific categories of crime, presents interesting questions for future research.

[231] U.S. DEP'T OF JUSTICE, FED. BUREAU OF PRISONS, PROGRAM STATEMENT NO. P5100.08: INMATE SECURITY DESIGNATION AND CUSTODY CLASSIFICATION ch. 5, at 9 (2006) [hereinafter BOP PROGRAM STATEMENT P5100.08] (explaining that the "deportable alien" classification is assigned to "[a] male or female inmate who is not a citizen of the United States"). This designation, known as a "Public Safety Factor," *id.* ch. 5, at 7, refers to a federal prison classification system used to determine the security level of the facility where the prisoner will be detained. *See id.* ch. 2, at 4. Other categories of inmates assigned higher security designations include sex offenders, persons who have escaped from jails or prisons, and violent inmates. *Id.* ch. 5, at 7–13.

[232] *See id.* ch. 5, at 9.

[233] Laura J. Hickman & Marika J. Suttorp, *Are Deportable Aliens a Unique Threat to Public Safety? Comparing the Recidivism of Deportable and Nondeportable Aliens*, 7 CRIMINOLOGY & PUB. POL'Y 59, 77 (2008) (finding no difference in re-arrest rates between deportable and nondeportable aliens released from the Los Angeles County Jail).

[234] Pursuant to BOP policy, a deportable alien "shall be housed in at least a Low security level institution." BOP PROGRAM STATEMENT P5100.08, *supra* note 231, ch. 5, at 9. Absent a Public Safety Factor designation, inmates are to be placed in the least restrictive facility for which they qualify within 500 miles of a release residence. Alan Ellis, *Securing the Best Placement and Earliest Release*, CRIM. JUST., Winter 2008, at 53.

and family.[235] Deportable aliens may also be rendered ineligible to participate in available prison programming, which can include paid work, educational courses, occupational training, and drug abuse treatment.[236] Given that successful completion of certain programs can make inmates eligible for earlier release, bars on participation have the practical result of lengthening the sentences of noncitizens. For example, deportable aliens are ineligible to participate in a popular residential drug treatment program that shortens prison sentences by up to one year.[237] "Deportable alien" status can also render inmates ineligible for the program option of serving the last six months of one's sentence in a community corrections setting.[238]

Noncitizens are also frequently held in immigration custody both before and after their federal prison sentences.[239] This additional period of detention results in a lengthened period of incarceration because, pursuant to Bureau of Prisons policy, noncitizens are unlikely to receive credit toward their sentence for time served in immigration custody.[240] Such a policy is a natural extension of the concept of institutional autonomy: immigration custody is not considered to be "official detention" for purposes of criminal justice. In sum, despite the principle of equality, noncitizen defendants endure longer periods of detention under more restrictive conditions.[241]

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[235] *See, e.g.*, Alan Ellis, J. Michael Henderson & James H. Feldman, Jr., *Securing a Favorable Federal Prison Placement*, CHAMPION, Apr. 2006, at 22.

[236] *See* Nora V. Demleitner, *Terms of Imprisonment: Treating the Noncitizen Offender Equally*, 21 FED. SENT'G REP. 174, 174–75 (2009) (discussing ineligibility of noncitizen offenders for certain prison programming).

[237] *See* 18 U.S.C. § 3621(e)(2) (2006); *see also* U.S. DEP'T OF JUSTICE, FED. BUREAU OF PRISONS, PROGRAM STATEMENT NO. P5331.02: EARLY RELEASE PROCEDURES UNDER 18 U.S.C. § 3621(e), at 3, 5 (2009) (specifying that those with immigration detainers are not eligible for early release under § 3621(e)).

[238] U.S. DEP'T OF JUSTICE, FED. BUREAU OF PRISONS, CHANGE NOTICE NO. 7310.04, at 10 (1998); *see also* 18 U.S.C. § 3624(c) (2006) (establishing the pre-release community corrections placement practice).

[239] *Public Hearing Before the U.S. Sentencing Commission* 189–90, 196–97 (Feb. 10–11, 2009) (testimony of Hector Flores, Cuban-American Bar Association), *available at* http://www.ussc.gov/AGENDAS/20090210/Transcript.pdf (explaining that defendants can be held in immigration custody for weeks or months before being charged and again after completing their sentences, yet they rarely receive credit for such confinement).

[240] U.S. DEP'T OF JUSTICE, FED. BUREAU OF PRISONS, PROGRAM STATEMENT NO. 5880.28, at 1–15A (1999) ("Official detention does not include time spent in the custody of the U.S. Immigration and Naturalization Service (INS) under the provisions of 8 U.S.C. § 1252 pending a final determination of deportability. An inmate being held by INS pending a civil deportation determination is not being held in 'official detention' pending criminal charges." (emphasis omitted)).

[241] Recognizing these disparities in sentencing impact, the U.S. Sentencing Commission recently published a notice of proposed amendments to the Sentencing Guidelines that would permit a downward sentencing departure based on collateral consequences for noncitizens. *See* Sentencing Guidelines for United States Courts, 75 Fed. Reg. 3525, 3525 (proposed Jan. 21, 2010). If adopted, this guidance would be consistent with suggestions made by the American Bar Association. *See* AM. BAR ASS'N, ABA STANDARDS FOR CRIMINAL JUSTICE:

B. Structure

Wong Wing's legacy is not merely equal treatment across the criminal law but also separation of the institution of immigration from that of criminal punishment. When criminal punishment follows a violation of the immigration laws, guilt must be decided by a jury trial in an Article III court rather than by "executive or subordinate officials."[242] The two systems—one for exacting criminal punishment and the other for expelling or forbidding entry—are thus ostensibly conducted in different court systems, with a distinct set of sanctions and government decisionmakers. But does this separation actually exist in practice? The following discussion shows that it does not.

1. Adjudicatory Model.—Asymmetrical comparisons of the criminal and immigration systems depict the criminal system as governed by an adversarial, trial-centered model, while portraying the immigration system as governed by an administrative model void of most constitutional protections.[243] Typically absent from the scholarship is any acknowledgment of what are, in reality, striking similarities between the adjudicatory models of both systems.[244] Indeed, immigration and criminal law are curiously similar in their lack of formalized administrative control. Both function as regulatory systems with extensive discretionary enforcement power. They also both operate independently from the constraints of an external administrative review process.[245] Scholars in both the immigration and criminal fields

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COLLATERAL SANCTIONS AND DISCRETIONARY DISQUALIFICATION OF CONVICTED PERSONS § 19-2.4(a), at 29 (3d ed. 2004) ("The legislature should authorize the sentencing court to take into account, and the court should consider, applicable collateral sanctions in determining an offender's overall sentence."). Emerging scholarship has begun to re-envision how the sanctioning regimes of both immigration and criminal law could better take into account the interaction between the two systems. *See* Gabriel J. Chin & Doralina Skidmore, Quasi-Crime and Quasi-Punishment: Criminal Process Effects of Immigration Status 4 (Mar. 9, 2010) (unpublished manuscript, on file with author) (arguing that courts and prosecutors in criminal cases should consider whether deportation "would be excessive punishment" and "try to make the overall punishment consistent with those who will not be deported as a result of similar conduct"); Stumpf, *supra* note 76, at 1689 (calling for immigration law to adopt "a system of graduated sanctions like that in criminal law").

[242] Wong Wing v. United States, 163 U.S. 228, 237 (1896).

[243] *See supra* note 28 (collecting literature depicting this contrast in procedural protections).

[244] *But see* Cox & Rodríguez, *supra* note 24, at 519 ("[T]he administration of immigration law look[s] more and more like the administration of criminal law . . . . ").

[245] The Administrative Procedure Act, 5 U.S.C. §§ 661–674 (2006), does not apply to criminal law, nor does it apply to review of immigration removal proceedings. Congress originally included deportation under the Act's purview, but immigration authorities did not comply with the Act until the Supreme Court mandated its application to deportation proceedings in *Wong Yang Sung v. McGrath*, 339 U.S. 33, 51 (1950). During the brief window of time that *Wong Yang Sung* was in effect, the mere threat of administrative review of deportation orders caused the INS to turn away from its reliance on the formal deportation pro-

have thus forcefully argued that each is a discretionary system subject to little formal regulation or supervision.[246]

The criminal adjudication of immigration—like the immigration system—is a plea-bargain system in which prosecutors hold the cards.[247] To criminal law scholars, the administrative reality of immigration crime is unlikely to be surprising. As commentators have described, the federal prosecutor plays the "role of God," adjudicating both guilt and sentencing in the bargained justice system.[248] However, such substantively neutral descriptions gloss over important structural variations in the adjudication of immigration crime compared to other substantive areas. Postville did not garner so much attention because it resulted in guilty pleas. Rather, it was the speed, location, and method that made a Midwest town prosecution into the subject of Congressional hearings. As Postville and other immigration prosecutions highlight, immigration has bred a unique form of federal criminal adjudication. "Fast-track" plea bargaining and heavy reliance on magistrate-court case processing are the two most visible examples of this design.

a. Fast-track pleas.—The speed and prevalence of plea bargaining in the immigration realm has been institutionalized with what is popularly known as the fast-track plea agreement. This fast-track concept originated with federal prosecutors in Southern California during the 1990s.[249] Recognizing that the criminal system "as structured was ill equipped to handle the large number of additional criminal alien cases," San Diego prosecutors decided they could no longer proceed "case by case" and

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cedure by delaying hearings and relying instead on voluntary departure. *See* 1949 ATT'Y GEN. ANN. REP. 60. However, the *Wong Yang Sung* decision was short-lived due to Congress's acting that same year to formally exempt deportation proceedings from the Act. *See* Supplemental Appropriation Act of 1951, ch. 1052, 64 Stat. 1044, 1048 (1950); *see also* Ardestani v. INS, 502 U.S. 129, 133–34 (1991) (explaining that deportation proceedings are not subject to the Administrative Procedure Act).

[246] *See, e.g.*, Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 1025 (2006) ("Despite the significance of prosecutorial power, prosecutors operate with little oversight or regulation."); Neuman, *supra* note 110, at 611, 627–33 (describing how the structure of deportation law gives the Executive broad enforcement discretion that is subject to little judicial or administrative oversight).

[247] *See* Arenella, *supra* note 23, at 498 (describing how "the prosecutor has become the most powerful and important official in our criminal process"); *supra* note 221 and accompanying text (identifying the prevalent use of plea bargaining in civil immigration proceedings).

[248] Panel Discussion, *supra* note 15, at 682 (quoting Professor Jerry Lynch of Columbia Law School). *But see* Máximo Langer, *Rethinking Plea Bargaining: The Practice and Reform of Prosecutorial Adjudication in American Criminal Procedure*, 33 AM. J. CRIM. L. 223, 225 (2006) (arguing that prosecutors only serve as the "de facto adjudicators" of the criminal outcome when adjudication is unilateral, as opposed to bilateral).

[249] Bersin & Feigin, *supra* note 14, at 301.

instead needed a mass processing system to handle "a dramatic increase in felony prosecutions."[250] Fast tracks were the answer.

The standard deal under the fast-track plea bargain requires that the defendant accept the plea before the deadline for indictment. This pre-indictment timeline generally requires the defendant to accept the plea within two weeks or less.[251] In exchange for sentencing concessions, defendants must waive their rights to grand jury indictment, jury trial, discovery, a full presentence report, constitutional challenges, and appeal.[252] Defendants who do not accept the fast track within the time allotted are indicted on more serious charges that carry heftier penalties.[253] Increasingly, fast-track agreements are made pursuant to Federal Rule of Criminal Procedure 11(c)(1)(C), which makes the sentencing bargain of the agreement binding on federal judges that accept the plea.[254]

By 2003, fast tracks had become so popular across the southwest border that Congress and the United States Sentencing Commission formalized the system.[255] Under the Attorney General's fast track—the "early disposition program"—the Attorney General may authorize discounted sentences in support of high-volume prosecutorial initiatives.[256] Although the early

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[250] *Id.* at 300–01.

[251] *See, e.g.*, Johnson Interview, *supra* note 156 (explaining that the current fast-track program in the Southern District of California requires defense counsel to confirm acceptance of the plea in writing within one week of being assigned to the case).

[252] *See, e.g.*, Letter from Maria E. Stratton, Fed. Pub. Defender, Cent. Dist. of Cal., to Michael Courlander, U.S. Sentencing Comm'n, Office of Pub. Affairs 2 (Sept. 18, 2003), *available at* http://www.ussc.gov/hearings/9_23_03/stratton.pdf (describing the fast-track program in the Central District of California).

[253] *See, e.g.*, Government's Response to Defendant's Sentencing Memorandum at 2, United States v. Medrano-Duran, 386 F. Supp. 2d 943 (N.D. Ill. 2005) (No. 04-CR-884) (describing both charge bargaining and sentencing bargaining fast-track programs in different judicial districts).

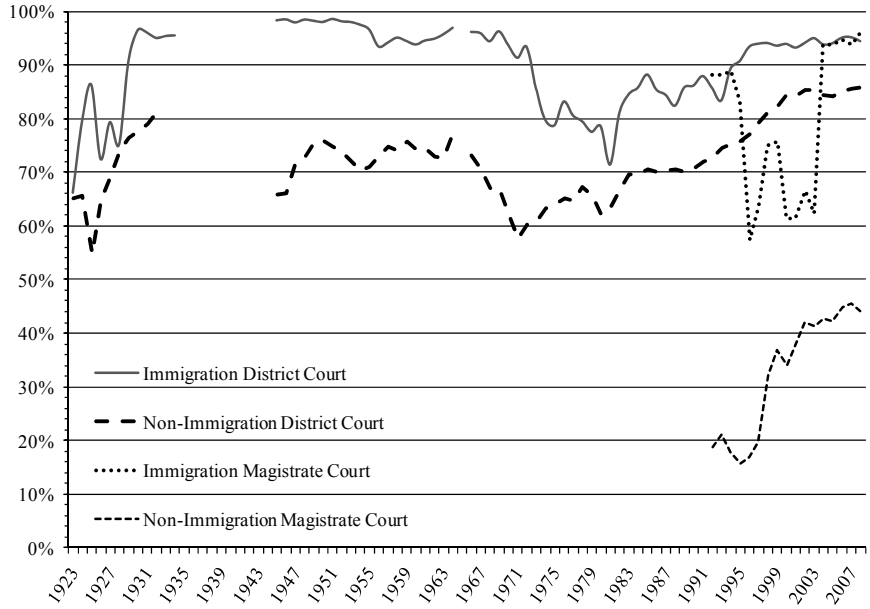
[254] Brief of Federal Public Defender for the Central District of California as Amicus Curiae in Support of Appellant's Petition for Panel Rehearing at 3–4, United States v. Lomeli-Mences, 567 F.3d 501 (9th Cir. 2009) (No. 07-50452) (explaining that the standard fast-track plea offer in the Central District of California is binding and prohibits the parties from making "any arguments that the defendant should be sentenced to any term outside the advisory guideline range"); Candelaria Interview, *supra* note 172 (describing binding Rule 11 fast-track plea agreements in New Mexico). *But see* Barroso Interview, *supra* note 156 (noting that judges in the Southern District of Texas do not accept binding plea agreements).

[255] *See* Prosecutorial Remedies and Tools Against the Exploitation of Children Today (PROTECT) Act of 2003, Pub. L. No. 108-21, § 401(m)(2)(B), 117 Stat. 650, 675; U.S. SENTENCING GUIDELINES MANUAL § 5K3.1 (2004); Memorandum from Attorney Gen. John Ashcroft, Setting Forth Justice Department's "Fast-Track" Policies (Sept. 22, 2003) [hereinafter Ashcroft Memorandum], *reprinted in* 16 FED. SENT'G REP. 134, 135 (2003) (listing waivers the defendant must make in order to participate in a "fast-track" plea agreement).

[256] *See* Ashcroft Memorandum, *supra* note 255, at 134–35 (describing the showings of high-incidence offenses a district must make in order to participate in the "fast-track" program).

disposition program in theory could apply to any type of crime, as of 2008 there were thirty-nine programs approved, thirty-two of which were for illegal reentry, alien smuggling, and fraudulent documents or aggravated identity theft.[257] In practice, fast tracks are for immigration.

FIGURE 1: GUILTY PLEAS AS PERCENT OF TOTAL TERMINATED CASES (1923–1935); GUILTY PLEAS AS PERCENT OF TOTAL TERMINATED DEFENDANTS (1944–2008).



Sources: U.S. DEPARTMENT OF JUSTICE, ANNUAL REPORTS OF THE ATTORNEY GENERAL (U.S. DISTRICT COURTS, 1923–1939); DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE U.S. COURTS, ANNUAL REPORTS (U.S. DISTRICT COURTS, 1944–2008); EXECUTIVE OFFICE OF U.S. ATTORNEYS, STATISTICS DIVISION (U.S. MAGISTRATE COURTS, 1992–2008).

The numbers are striking. As seen in Figure 1, the percent of immigration cases resolved by plea bargaining is significantly higher than in other substantive areas.[258] This difference in plea-bargain rates has existed since

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[257] Memorandum from Craig Morford, Acting Deputy Attorney Gen, U.S. Dep't of Justice, to U.S. Attorneys in 21 Districts (Feb. 1, 2008), *available at* www.fd.org/pdf_lib/Fast_Track_Reauthorization08.pdf (listing all approved fast-track programs). However, not all districts or divisions have a fast track for immigration crime. *See, e.g.*, Solis Interview, *supra* note 172 (explaining that the El Paso Division of the Western District of Texas does not have a fast track). Disparities in fast-track programs have been cited by scholars and practitioners as causing cross-district sentencing inequality. *See, e.g.*, Bibas, *supra* note 14, at 146–47; Alison Siegler, *Disparities and Discretion in Fast-Track Sentencing*, 21 FED. SENT'G. REP. 299, 299 (2009).

[258] Plea rates displayed in Figure 1 were calculated for this Article using the total number of terminated defendants (which includes cases that were dismissed) as the base rate. Data for terminations before 1936 are only available for terminated "cases." Therefore, calcula-

immigration crime was first recorded by the Attorney General as a statistical category of federal crime in 1923. The plea-bargain differential also holds true across magistrate and district court. Quite simply, more immigration on the criminal docket means fewer criminal trials.[259]

Fast tracks are also fast. Really fast. As displayed in Figure 2, district court data reveal that the number of days between the initial prosecutor's filing and completion of the case are fewer for immigration crime than for any other category of crime.[260] By 2008, the median number of days for immigration case processing was less than ten, compared with over 250 for other crime categories (such as terrorism, weapons, white collar, and narcotics). Not only do federal prosecutors spend less time on these cases, but judges also spend less time. In fact, when compared to all other felony criminal matters, judges spend the least time on immigration.[261] Scholars and practitioners have expressed concerns that the speed of immigration

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tion of plea rates for this period is an imperfect calculation of total defendants who pleaded guilty divided by total cases. From 1933 to 1939, certain guilty plea data are not available for the district court and therefore have been omitted from Figure 1. The Administrative Office of United States Courts does not collect magistrate court dispositional data for the subcategory of immigration crime (e.g., plea rates, dismissal rates, trial rates). As a result, I obtained data for magistrate court plea rates through a FOIA request to the Executive Office of U.S. Attorneys. These data contain all cases terminated in magistrate court that are recorded by the U.S. Attorneys in the LIONS database. For further discussion on methods for calculating plea rates, see GEORGE FISHER, PLEA BARGAINING'S TRIUMPH: A HISTORY OF PLEA BARGAINING IN AMERICA 343 n.76 (2003); Ronald F. Wright, Federal Criminal Workload, Guilty Pleas, and Acquittals: Statistical Background 4–5 (Sept. 27, 2005) (unpublished manuscript), *available at* http://ssrn.com/abstract=809124.

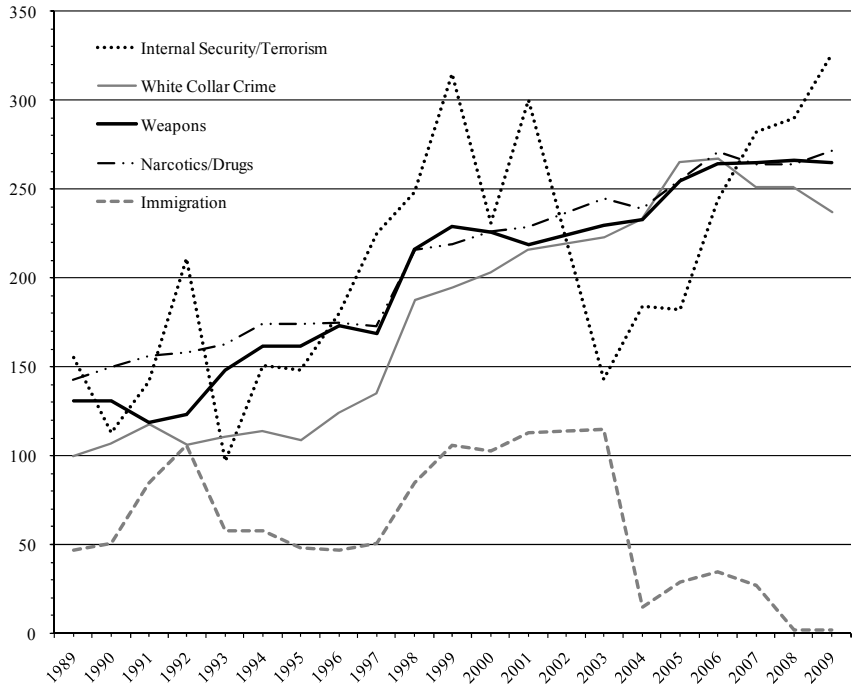
[259] These data regarding immigration guilty-plea rates raise interesting questions for scholars of plea bargaining. Ronald F. Wright noted in his recent study of district court guilty pleas that the percentage of immigration crime prosecuted in a district has a significant influence on a district's guilty plea rate. Ronald F. Wright, *Trial Distortion and the End of Innocence in Federal Criminal Justice*, 154 U. PA. L. REV. 79, 135 (2005). In contrast, George Fisher's district court plea-bargain study, which calculated plea rates as a proportion of only adjudicated cases, concluded that the type of case was a "relatively small factor" in the plea rate. FISHER, *supra* note 258, at 343–44 nn.76–77. Neither Wright's nor Fisher's work has looked at federal magistrate court dispositions.

[260] I obtained data for Figure 2 from the Transactional Records Access Clearinghouse [hereinafter TRAC] using the following search criteria: Select District to Focus on: U.S.; Select Factor to Compare: Median Days After Court Filing; Programs Sorted by: Rank Order; Select Data: Annual Series; Select Time Period: [insert years]. Using these search terms, data for 2002 are unavailable. As magistrate courts do not record the date of filing, comparable measurements for the median number of days between filing and termination are only available for U.S. district courts. TRAC, Data Dictionary for Criminal Referrals: Summary File, http://trac.syr.edu/documents/atf_referralDict.html.

[261] PATRICIA LOMBARD & CAROL KRAFKA, FED. JUDICIAL CTR., 2003–2004 DISTRICT COURT CASE-WEIGHTING STUDY: FINAL REPORT TO THE SUBCOMMITTEE ON JUDICIAL STATISTICS OF THE COMMITTEE ON JUDICIAL RESOURCES OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 6 tbl.1 (2005), *available at* http://www.fjc.gov/public/home.nsf/autoframe?openform&url_l=/public/home.nsf/inavgeneral?openpage&url_r=/public/home.nsf/pages/665.

crime adjudications reduces due process and increases the likelihood of convicting the innocent.[262]

FIGURE 2: MEDIAN NUMBER OF DAYS BETWEEN FILING AND TERMINATION IN U.S. DISTRICT COURTS (1989–2009).



Source: TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, Syracuse University.

b. Two-track "petty" courts.—A key complement to fast-track plea bargaining for felony immigration prosecutions is a parallel, expedited court system known as the magistrate court. From the early days of *Wong Wing*, United States commissioners discharged certain court duties without

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[262] *See* Joint Statement of Thomas W. Hillier II, Fed. Pub. Defender, W. Dist. of Wash., & Davina Chen, Assistant Fed. Pub. Defender, Cent. Dist. of Cal., at 28 (prepared statement for *The Sentencing Reform Act of 1984: 25 Years Later: Public Hearing Before the U.S. Sentencing Comm.* (May 27, 2009)), *available at* http://www.fd.org/pdf_lib/Testimony_Stanford_final.pdf ("Clients who are offered fast track agreements in the Central District of California must agree to them before we have adequate time to investigate their lives and circumstances. . . . Competent attorneys have had the experience of advising their clients to plead guilty and learning only later that they were U.S. citizens, or were unlawfully deported."); Bibas, *supra* note 14, at 147 ("And in the process, fast-track programs bypass most procedural safeguards, truncating plea bargaining even more and increasing the risk of convicting the innocent."); Michael P. O'Connor & Celio Rumann, *Future: The Death of Advocacy in Re-Entry After Deportation Cases*, CHAMPION, Nov. 1999, at 42 (arguing that duress results from forcing acceptance of the standard plea within a short time period).

Article III status. However, commissioners were not permitted to hear criminal cases.[263] Everything changed in 1968 when the federal magistrate court—and the accompanying position of magistrate judge—was established and empowered to adjudicate certain misdemeanor cases.[264]

The immigration agency was instrumental to the creation of this new magistrate system for criminal prosecution. After a surge in immigration prosecution in the 1950s, the immigration agency lobbied Congress to establish a misdemeanor court that would allow for criminal immigration enforcement "at less expense and with a greater amount of effectiveness" than was possible with Article III courts.[265] Foreshadowing the anticipated creation of such a court, immigration authorities convinced Congress in 1952 to amend the Immigration and Nationality Act to *reduce* the penalty for the crime of simple illegal entry from one year to six months.[266] With this change in place, illegal entry met the federal definition of "petty offense."[267] This reduction in maximum sentence was critical because it meant that ille-

[263] Although the federal court commissioners had existed since 1793, their jurisdiction did not extend to general criminal cases, with the exception of petty offenses on federal Indian lands. U.S. COMMISSIONERS: A REPORT TO THE JUDICIAL CONFERENCE BY THE ADMIN. OFFICE OF THE U.S. COURTS, app. A (1942); *see also* DIR. OF THE ADMIN. OFFICE OF THE U.S. COURTS, ANNUAL REPORT 249 (1972) (noting that, prior to 1972, commissioners were unable to handle criminal immigration cases).

[264] Federal Magistrates Act, Pub. L. 90-578, 82 Stat. 1107 (1968). Magistrate judges, like the former commissioners, are not given lifetime appointments and are not Article III judges. *See* 28 U.S.C. § 631 (2006). Other scholars have explored the overall shift toward the use of non-tenured "statutory judges" to handle certain types of federal judicial work, *see, e.g.*, Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924, 989–90 (2000), but the role of magistrate judges in shaping immigration prosecution has not received special attention.

[265] *Federal Magistrates Act: Hearing on H.R. 9970 Before Subcomm. No. 4 of the H. Comm. on the Judiciary*, 90th Cong. 102 (1968) (statement of Glenn L. Weatherman, INS, Del Rio, Texas); *see also Federal Magistrates Act: Hearing on S. 3475 Before the Subcomm. on Improvements in Judicial Machinery of the S. Comm. on the Judiciary,* 89th Cong. 9–17 (1966) (Memorandum Prepared by the Staff of the Subcomm. on Improvements in Judicial Machinery, Apr. 28, 1966) (discussing the benefits of converting the former commissioner system into a new magistrate court with more expansive criminal jurisdiction).

[266] Act of June 27, 1952, Pub. L. 82-414, ch. 8, § 275, 66 Stat. 229, 229 (amending 8 U.S.C. § 1325). As initially passed in 1929, the maximum penalty for illegal entry was one year, a $1000 fine, or both. Act of Mar. 24, 1929, Pub. L. 70-1018, § 2, 45 Stat. 1551, 1551 (making it a felony with penalty for certain aliens to enter the United States under certain conditions in violation of law).

[267] Since 1930, "petty offenses" have been defined under federal law to include those offenses with a maximum sentence of six months, a $500 fine, or both. Act of Dec. 16, 1930, ch. 15, 46 Stat. 1029, 1029–30 (amending 18 U.S.C. § 541). Although this was the first formal inclusion of petty crime in federal law, the concept had existed for a long time. Indeed, when the U.S. Constitution was adopted, there were many offenses that were described as "petty" and were customarily tried in summary proceedings without a jury. *See* Felix Frankfurter & Thomas G. Corcoran, *Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury*, 39 HARV. L. REV. 917, 922–65, 983–1019 (1926) (collecting examples of petty offense statutes from England and the colonies).

gal entry cases could proceed before magistrate judges without the right to trial by jury or grand jury indictment.[268]

A fundamental realignment of the immigration prosecution regime stemmed from the creation of a simple illegal entry crime that could be prosecuted without grand jury indictment or jury trial in a separate track court system. Removal of the jury screen disconnected immigration crime from the traditional system of checks and balances on prosecutorial overreaching. Along the southwest border, juries could be powerful; grand jury members would often not indict in immigration crime cases because such laws were "locally unpopular."[269] For example, in El Paso, Texas in the late 1940s, over 90% of immigration crime cases sent to the grand jury were returned as "no bills."[270] After the implementation of the magistrate court in 1971, petty illegal entry cases soon accounted for nearly 90% of federal criminal enforcement of immigration, virtually eliminating any form of jury screen from the charging or trial process for immigration crime.[271] The volume of immigration crime also rose dramatically. Nationwide, criminal immigration prosecutions increased by over 700%, from 2536 in the year that the Federal Magistrate Act was passed to 17,858 in 1974.[272]

More recently, a border prosecution program known as Operation Streamline, or simply "Streamline," has exclusively used the magistrate

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[268] *See* District of Columbia v. Clawans, 300 U.S. 617, 624–25 (1937) (finding that the jury trial right does not extend to federal "petty" crimes); Duke v. United States, 301 U.S. 492, 494–95 (1937) (clarifying that the Fifth Amendment's requirement of grand jury indictment for "capital and infamous" crimes does not extend to federal petty crimes or misdemeanors).

[269] *Immigration and Naturalization: Hearing Before the S. Subcomm. on Immigration of the S. Comm. on the Judiciary*, 80th Cong. 30 (1948) [hereinafter *1948 Immigration Hearing*] (statement of Mr. Hollen) (claiming that most of the immigration crime-related cases that he tried to prosecute involved farmers or employees of farmers and that grand jury members in El Paso refused to indict despite sufficient proof of guilt). The published results of the Senate Judiciary Committee's comprehensive study of immigration enforcement that followed hearings such as the one in El Paso may be found in S. REP. NO. 81-1515, at 290–412 (1950). It was after these hearings were held that illegal entry was made a petty crime. *See supra* note 266 and accompanying text.

[270] *1948 Immigration Hearing*, *supra* note 269, at 30.

[271] *See* DIR. OF THE ADMIN. OFFICE OF THE U.S. COURTS, ANNUAL REPORT 472 tbl.D-4, 538–39 tbl.M-1 (1974). In prior years, only one-third of the caseload concerned simple illegal entry. *Federal Magistrates Act: Hearing on S. 3475 Before the S. Subcomm. on Improvements in Judicial Machinery of the Comm. on the Judiciary*, 89th Cong. 603–05 (1967) (Letter from Fred J. Morton, U.S. Comm'r, Western District of Texas, to Sen. Joseph D. Tydings, Chairman, Subcomm. on Improvements in Judicial Machinery (June 27, 1966)).

[272] *Compare* DIR. OF THE ADMIN. OFFICE OF THE U.S. COURTS, ANNUAL REPORT 263 tbl.D-4 (1968), *with* DIR. OF THE ADMIN. OFFICE OF THE U.S. COURTS, ANNUAL REPORT 472 tbl.D-4, 538–39 tbl.M-1 (1974). For a graphic display of this increase, see *infra* Figure 4.

courts.[273] Under Streamline, the government has adopted a zero-tolerance stance, prosecuting every noncitizen arrested sneaking across certain portions of the Mexican border, primarily with the crime of entry without inspection.[274] Defendants in Streamline waive rights, enter guilty pleas, and are sentenced in proceedings that may last only minutes.[275] Frequently, Streamline proceedings include multiple defendants in the same hearing.[276] As Chief Judge Martha Vasquez of the District of New Mexico has explained, defendants are being asked to give up critical rights in hearings that are conducted "in a way that we've never had to conduct them before":[277] "We put them in a courtroom full of people that are not always charged with the same offense" and ask them to "waive important constitutional rights."[278]

The Ninth Circuit recently considered whether the en masse plea hearings that typify Streamline violate federal law and found that they do.[279] Bulk plea processing of fifty or more defendants in a single plea colloquy does not, according to the Ninth Circuit, comport with the Federal Rules of Criminal Procedure.[280] No judge overseeing such mass proceedings could possibly determine that each defendant in the packed courtroom voluntarily and knowingly pleaded guilty, as required under federal law.[281]

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[273] NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, ADOPTED NACDL POLICY ON OPERATION STREAMLINE (May 4, 2008), http://www.nacdl.org/public.nsf/26cf10555dafce2b85256d97005c8fd0/064ff68eac7e3ac5852575c80057c114?OpenDocument.

[274] *See* LYDGATE, *supra* note 150, at 3–4. *See generally* 8 U.S.C. § 1325(a) (2006) (defining the criminal offense of "improper entry by alien").

[275] Michael Riley, *Criminal Crossing*, DENVER POST, Mar. 6, 2007, at 1A (describing a fifty-one minute hearing in which twenty-one defendants pleaded guilty and were sentenced "in unison" before a magistrate judge); Huerta Interview, *supra* note 159 (explaining that Streamline prosecutions in Arizona are typically resolved very quickly, with a guilty plea and sentencing in the same day); TRAC DHS, NEW FINDINGS (2005), http://trac.syr.edu/tracins/latest/131/ (characterizing the handling of magistrate immigration cases as "cursory").

[276] *See Hearing Before the Subcomm. on Commercial and Administrative Law of the H. Comm. on the Judiciary,* 110th Cong. 45–46 (2008) (testimony of Heather E. Williams, First Assistant, Office of the Fed. Pub. Defender, Dist. of Ariz.) (describing mass Streamline prosecutions in Tucson, Arizona); Solis Interview, *supra* note 172 (describing mass magistrate court Streamline hearings in El Paso, Texas that merge guilty pleas with sentencing and assign multiple defendants to one defense attorney).

[277] IMPACT REPORT, *supra* note 6, at 16.

[278] Videotape: Crisis on the Border: Case Overload (Administrative Office of U.S. Courts 2006) (on file with Administrative Office of U.S. Courts) (interviewing Chief Judge Martha Vasquez of the District of New Mexico).

[279] *See* United States v. Roblero-Solis, 588 F.3d 692, 693–94 (9th Cir. 2009).

[280] *Id.* at 693–94, 700 (citing FED. R. CRIM. P. 11).

[281] *Id.* at 700 ("To be specific, no judge, however alert, could tell whether every single person in a group of 47 or 50 affirmatively answered her questions when the answers were taken at the same time. . . . Neither an indistinct murmur or medley of yeses nor a presump-

The guilty plea rate for immigration crime in magistrate court has increased significantly under the Streamline program—from 63% in 2004 to 97% in 2009.[282] With sentences as short as time served[283] and trials not likely to be held for months,[284] defendants would spend more time in custody by demanding a trial than by simply pleading guilty.[285] The logical result is an almost perfect guilty plea rate.[286]

Under Streamline, not only are first-time entrants processed through the magistrate court, but more serious offenders are "flopped" into magistrate proceedings. With the "flip-flop" plea agreement, smugglers or illegal entrants with prior removal orders are charged with both unlawful reentry (a felony) and unlawful entry (a misdemeanor). If the defendant pleads guilty to the lesser charge within an expedited time period, the case is resolved as a misdemeanor before an Article I magistrate judge.[287]

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tion that all those brought to court by the Border Patrol must have crossed the border is sufficient to show that each defendant pleaded voluntarily.").

[282] *See* EOUSA Datafile 2010, *supra* note 2; EOUSA Datafile 2009, *supra* note 117. The guilty plea rate under Operation Streamline is so high that local attorneys refer to it as Operation "Culpable," the Spanish term for "guilty." Telephone Interview with David Aguilar, Indigent Def. Panel Attorney, Dist. of Ariz. (Jan. 19, 2009).

[283] Huerta Interview, *supra* note 159 (indicating that Streamline defendants with no criminal or immigration history are generally sentenced to "time served" in Tucson, Arizona); *see infra* note 406 (citing additional examples of short sentences under Streamline).

[284] Telephone Interview with Francisco Morales, Assistant Fed. Pub. Defender, Office of the Fed. Pub. Defender, W. Dist. of Tex. (Dec. 5, 2008) [hereinafter Morales Interview] (explaining that, although the delay in scheduling trials for immigration crime cases technically would violate the Speedy Trial Act, there are no "teeth" behind the Act for immigration crime prosecution because even if the defense obtains a dismissal, the government will hold the defendant in immigration custody and re-prosecute).

[285] Telephone Interview with Mark Willimann, Indigent Def. Panel Attorney, Dist. of Ariz. (Jan. 7, 2009) [hereinafter Willimann Interview] (explaining that in Streamline there is "no benefit to go to trial" because defendants would have to wait forty-five to sixty days for a trial, but in the "worst case scenario" under Streamline defendants are "looking at 30 days").

[286] Systemic pressure to plead guilty for crimes that involve low-level punishments has been well documented in the literature. Malcolm Feeley's classic study aptly described this phenomenon, in which "the process is the punishment." MALCOLM M. FEELEY, THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT 30, 200–01 (1979). For more recent contributions to the understanding of the problem, see Josh Bowers, *Punishing the Innocent*, 156 U. PA. L. REV. 1117, 1119–24, 1134–35 (2008); Ian Weinstein, *The Adjudication of Minor Offenses in New York City*, 31 FORDHAM URB. L.J. 1157, 1170–75 (2004).

[287] Huerta Interview, *supra* note 159 (describing the "flip-flop" program in Arizona); Telephone Interview with Juan Rocha, Deputy Fed. Pub. Defender, Office of the Fed. Pub. Defender, Dist. of Ariz. (Dec. 5, 2008) [hereinafter Rocha Interview] (same); Willimann Interview, *supra* note 285 (same); *see also* Memorandum from John Grasty Crews, II, to Natalie Voris & Daniel Fridman 1 (July 26, 2006) [hereinafter Crews Memorandum to Voris & Fridman], *available at* http://media.washingtonpost.com/wp-srv/politics/pdf/DAG2106-2166.pdf ("The 'flip/flop' system allows the defendant to enter a plea to a misdemeanor but requires that the defendant serve some jail time.").

Between 1992 and 2009, the proportion of the total U.S. Attorney workload processed by magistrate judges increased from 24% to 47%. Furthermore, within the magistrate caseload, the percentage of immigration-related matters rose during the same period from 24% to 82%.[288] In other words, immigration prosecution has shifted much of the work of the federal criminal system into a separate system that is governed by distinct procedural rules. In the process, the magistrate criminal court has been defined, especially in the Southwest, as a separate adjudicatory system reserved almost exclusively for immigration crime.

The increased reliance on petty courts has also shaped the landscape of the judiciary. In certain areas along the southwest border, magistrate judges are the dominant (and sometimes only) judicial presence. For example, Yuma, Arizona, has only one magistrate judge and no district court judge;[289] Tucson, Arizona, has seven full-time magistrates, but only four full-time district judges;[290] and Las Cruces, New Mexico, has five magistrate judges and only one district court judge.[291] Between 1997 and 2007, the Judicial Conference authorized seventeen new magistrate judge positions to handle immigration crime along the southwest border, and as their courtrooms have filled, requests for more magistrates have been approved by the legislature.[292]

2. Function.—In *Wong Wing* the Court struck down the explicit fusion of immigration and criminal proceedings in a single hearing before a commissioner. Instead, criminal punishment would have to be adjudicated separately from immigration removal. Today, however, this separation of the institutional location of these functions is disappearing.[293] Immigration status is increasingly being adjudicated as part of the criminal case.

Since 1994, U.S. Attorneys have been able to seek removal as part of the sentencing process.[294] Under a "judicial order of removal," a hearing is held before a criminal court judge to determine whether the individual will be deported.[295] Federal prosecutors are also authorized to pursue a "[s]tipulated judicial order of removal."[296] The stipulated removal order requires the defendant to agree to removal from the United States in exchange

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[288] *See* EOUSA Datafile 2010, *supra* note 2; EOUSA Datafile 2009, *supra* note 117.

[289] U.S. Dist. Court, Dist. of Ariz., Judicial Officers Directory, http://www.azd.uscourts.gov (select "Judge's Mailing Addresses" from the "Judges and Courtrooms" link).

[290] *Id.*

[291] U.S. Dist. Court, Dist. of N.M., Judges, http://www.nmcourt.fed.us/web/DCDOCS/files/judges.html.

[292] IMPACT REPORT, *supra* note 6, at 13.

[293] *See* Taylor & Wright, *supra* note 78, at 1132 (discussing the convergence of the "criminal enforcement and immigration enforcement bureaucracies").

[294] 8 U.S.C. § 1228(c)(1) (2006).

[295] *Id.* § 1228(c)(1)–(2).

[296] *Id.* § 1228(c)(5).

for a recommendation from the prosecutor for a shorter sentence.[297] During the 1990s, when immigration prosecutions expanded significantly in the San Diego area, the standard illegal reentry plea agreement included a stipulated removal order as a condition of the plea.[298]

Another current practice that intertwines the ostensibly separate criminal and immigration spheres is the inclusion of an immigration waiver as a standard term of the criminal plea agreement. Rather than engage in the adversarial court proceeding for judicial removal[299] or satisfy the requirements of a stipulated judicial order of removal, prosecutors increasingly include a waiver of immigration rights in the plea agreement itself. For example, fast-track plea agreements in New Mexico and Arizona require defendants to agree that they have no legal immigration status in the United States and waive all challenges that could otherwise be made to removal.[300] Including immigration waivers within criminal plea agreements short-circuits the processes contemplated in stipulated and judicial removal. In addition, as with other aspects of plea bargaining, this inclusion allows for adjudication of rights without any provision for judicial oversight.

3. Actors.—According to the static view, criminal prosecutors and agency officials play separate institutional roles. Discretion to file criminal charges is exercised by prosecutors working for the Department of Justice, while immigration screening decisions are made by immigration officials working for DHS. The previous discussion critiqued one aspect of this binary view by demonstrating how the institutional location of screening decisions has migrated into the criminal system: in practice, immigration screening may be folded into a criminal plea bargain or follow as a mandatory consequence of the criminal prosecution. This section turns to a related point—a crossover of actors. As immigration screening has moved into the criminal system, immigration agency actors—namely DHS attor-

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[297] *See* U.S. DEP'T OF JUSTICE, U.S. ATTORNEYS' CRIMINAL RESOURCE MANUAL § 1921 (2000) (describing stipulated removal orders in deportation plea agreements), *added to* U.S. DEP'T OF JUSTICE, U.S. ATTORNEYS' MANUAL § 9-73.500 (1997), *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm01921.htm.

[298] *See* Bersin & Feigin, *supra* note 14, at 300–01.

[299] *See* Memorandum from the Attorney General to All Federal Prosecutors Regarding the Deportation of Criminal Aliens (Apr. 28, 1995), *available at* http://www.justice.gov/ag/readingroom/deportation95.htm (warning prosecutors to seek removal orders through this adversarial process only in limited circumstances so as to avoid "becom[ing] involved in contentious immigration issues").

[300] Candelaria Interview, *supra* note 172 (discussing New Mexico fast-track agreements); Huerta Interview, *supra* note 159 (discussing Arizona fast-track agreements); *see also* Fast Track Plea Agreement for the District of Arizona (on file with author); Fast Track Plea Agreement for the District of New Mexico (on file with author).

neys and agents—have begun to play roles that are classically understood as reserved for criminal prosecutors.[301]

A significant development in immigration prosecution over the past decade has been the rise of "Special Assistant" U.S. Attorneys. SAUSAs, as they are frequently referred to, are employed by DHS rather than by the Department of Justice.[302] Yet like regular Assistant U.S. Attorneys, they play the role of criminal prosecutor in the courtroom. Special Assistants have been particularly critical to the development and expansion of the Operation Streamline program described earlier.[303] According to a recent judiciary report, along the border, Streamline has been almost entirely run by attorneys employed by the Border Patrol.[304] In the interior, attorneys employed by ICE have conducted large criminal worksite enforcement actions and have also presided over the surge in illegal reentry prosecutions.[305]

Occasionally, even agents themselves serve as prosecutors in court. For example, in Del Rio, Texas, Border Patrol agents—popularly referred to in this area as "Prosecutions"—were in charge of misdemeanor immigra-

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[301] As Kris Kobach has noted, immigration agents and agency attorneys play a key role in prosecutorial decisionmaking. Kris W. Kobach, *The Quintessential Force Multiplier: The Inherent Authority of Local Police to Make Immigration Arrests*, 69 ALB. L. REV. 179, 224 (2005) ("It is not as if two parallel enforcement structures operate alongside one another, with ICE pursuing civil penalties while the Department of Justice pursues criminal penalties.").

[302] *See generally* 28 U.S.C. § 543 (2006) (authorizing the Attorney General to appoint Special Assistants when "the public interest so requires"); U.S. DEP'T OF JUSTICE, U.S. ATTORNEYS' MANUAL § 3-2.300 (1997) (describing the SAUSAs' role on "special cases" as being done "without compensation other than that paid by their own agency").

[303] *See supra* notes 273–92 and accompanying text. *See also* John Grasty Crews, II, *The Executive Office for United States Attorneys' Involvement in Immigration Law Enforcement*, 56 U.S. ATTORNEYS' BULL., Nov. 2008, at 1, 3, *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usab5606.pdf.

[304] IMPACT REPORT, *supra* note 6, at 8 ("Operation Streamline II is made possible in large measure because the Department of Justice relies on Border Patrol attorneys to prosecute misdemeanor immigration cases in the capacity of special assistant U.S. attorneys."); U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, ICE ANNUAL REPORT 2007, *available at* http://www.ice.gov/doclib/news/library/reports/annual-report/2007annual-report.pdf (noting that ICE attorneys participate as SAUSAs and "spearhead[] criminal prosecutions" along "the southwest border"); Huerta Interview, *supra* note 159 (describing SAUSA attorneys "on detail from Border Patrol" who handle only Streamline cases).

[305] *See* Crews, *supra* note 303, at 3 (describing the use of SAUSAs in criminal immigration worksite enforcement prosecutions); *see also* Statement of John P. Torres, Deputy Assistant Sec'y, U.S. Immigration & Customs Enforcement 10 (prepared statement for *Securing the Borders and America's Points of Entry, What Remains to be Done: Hearing Before the Subcomm. on Immigration, Refugees and Homeland Security of the S. Comm. on the Judiciary*, 111th Cong. 7–9 (2009)), *available at* http://judiciary.senate.gov/pdf/5-20-09Torres%20Testimony.pdf (highlighting an initiative "to prevent the re-entry of criminal aliens" that provides for criminal prosecution by assigning ICE lawyers as SAUSAs).

tion prosecutions for several years.[306] Under this model, the same agent who signs the criminal complaint handles the actual court proceeding, including presiding over the change of plea and sentencing hearing. Only if a defendant were to request a trial would a licensed attorney prosecutor be called to the courtroom.[307] In Yuma, Arizona, the current practice is to have Border Patrol agents—locally known as "Prosecuting Agents"—represent the government in court. Prosecuting Agents do the traditional work of agents: they investigate and sign affidavits filed with complaints. However, they also do the traditional work of prosecutors: they make verbal plea offers, resolve cases, and represent the government at change-of-plea hearings in federal court.[308] In other prosecutor offices, such as San Diego, immigration agents known as "Liaison Officers" do not engage in the traditional courtroom and plea-bargaining work of prosecutors, but they do work inside the U.S. Attorney's office as quasi-prosecutors, screening cases for prosecution.[309]

The institutional overlap of the two systems is also reflected in the way that prosecutorial decisions are made in practice. In immigration crime, the standard agent–prosecutor referral system for charging decisions is inverted. Generally, a prosecutor receives referrals for prosecution from an agent and then exercises discretion as to who should be criminally charged.[310] The frequency with which the prosecutor rejects agency referrals is known as the declination rate. In immigration crime, however, criminal prosecutors issue confidential prosecution "thresholds."[311] For example, a district might require a certain type of prior conviction for an illegal reentry prosecution or a minimum number of transported aliens for a smuggling prosecution. As other scholars have documented, determining who falls within this threshold and who should be exempted from it has historically been left to the immigration agency under a blanket waiver of prosecutorial discretion.[312]

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[306] Morales Interview, *supra* note 284 (describing the Del Rio, Texas, practice of using Border Patrol agents as prosecutors, but clarifying that this local practice has recently been discontinued).

[307] *Id.* (explaining that Border Patrol agents who handled criminal prosecutions only handed cases over to U.S. Attorneys if the defendant demanded a trial).

[308] Rocha Interview, *supra* note 287; Torok Interview, *supra* note 156.

[309] *See* WEISSINGER, *supra* note 105, at 147 (discussing the general practice of INS "liaison officers"); Ser Interview, *supra* note 161 (describing a practice in the Southern District of California by which three to four "rotating Border Patrol agents" work in the "Border Unit" of the U.S. Attorney's Office).

[310] *See generally* Wright & Miller, *supra* note 109 (emphasizing the importance of prosecutorial "screening" of cases referred by police and investigators).

[311] *See* Crews Memorandum to Voris & Fridman, *supra* note 287, at 6 ("Along the [southwest border] all of the USAO's have intake thresholds regarding immigration prosecutions.").

[312] *See* WEISSINGER, *supra* note 105, at 147 ("In many instances, the INS can decline criminal prosecution based on a general or *blanket* waiver granted to the INS by the US At-

An examination of what is known as the "declination rate," or the extent to which prosecutors decline to prosecute cases that are referred to them from investigative agencies, is helpful in understanding how these blanket waivers of prosecutorial discretion operate in practice. As seen in Figure 3, the declination rate for immigration crime is markedly lower than for any other major category of federal prosecution. The rate at which prosecutors decline to prosecute immigration crimes has been as low as two percent in recent years, while other bread-and-butter categories of federal prosecution, such as weapons offenses and white collar crime, have declination rates that hover between thirty and forty percent.[313]

To be sure, this low rate reflects a certain prioritization of immigration referrals by federal prosecutors.[314] It may also reflect the strength of such cases, political pressure to proceed, or the dominance of federal jurisdiction over immigration prosecution.[315] Yet such explanations do not provide a complete picture. Although the number of immigration prosecutions has reached an unprecedented high, recent data show that the number of individuals apprehended and removed each year by immigration authorities still vastly outnumbers those who are actually prosecuted.[316] The overall low rate of criminal prosecution of those apprehended by immigration officials coupled with a prosecutorial declination rate approaching zero shows that, in practice, it is the agency's decision to refer for criminal prosecution that serves as the de facto prosecutorial declination decision. The referral deci-

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torney to decline prosecution on certain types of cases."); Robert L. Rabin, *Agency Criminal Referrals in the Federal System: An Empirical Study of Prosecutorial Discretion*, 24 STAN. L. REV. 1036, 1051 n.44 (1972) (documenting the policy of granting "blanket" prosecutorial discretion to the agency for immigration crime cases).

[313] I obtained data on percent of referrals declined for Figure 3 from a database maintained by the Transactional Records Access Clearinghouse using the following search: Select District To Focus On: US; Select Factor to Compare: Percent of Referrals Declined; Programs Sorted by: Rank Order; Select Data: Annual Series; Select Time Period: [insert years]. Using these search terms, data for 2001 are only available for the immigration category.

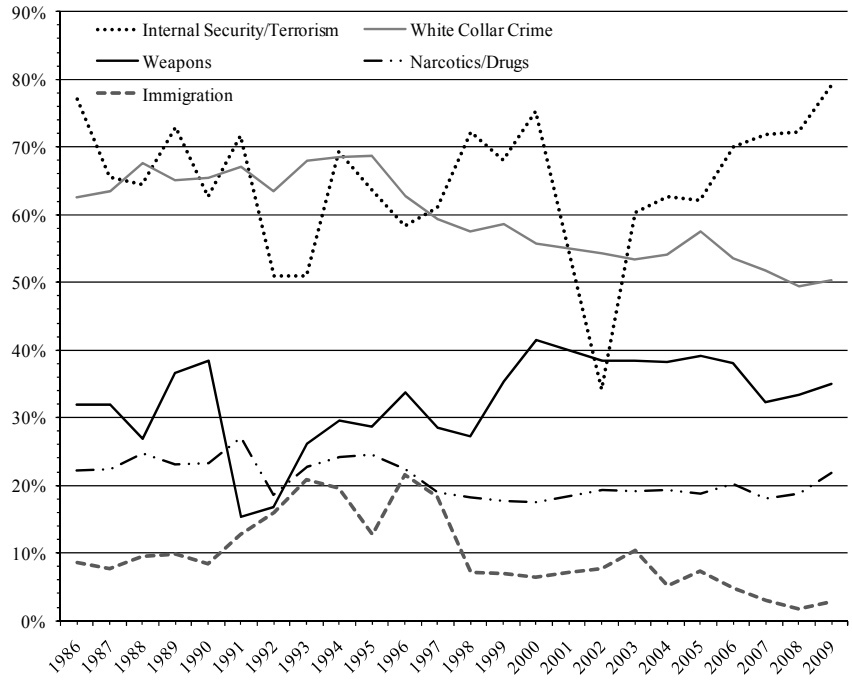
[314] *See* Michael Edmund O'Neill, *Understanding Federal Prosecutorial Declinations: An Empirical Analysis of Predictive Factors*, 41 AM. CRIM. L. REV. 1439, 1449–50 (2004) (concluding that the low declination rate for immigration crime "could reflect policy decisions made within the DOJ to pursue immigration cases vigorously"); *see also* Moore, *supra* note 4, at A1 (describing the prioritization of immigration prosecutions as a Bush Administration policy and discussing the costs of prosecuting immigration offenses more fervently than other serious crimes).

[315] *See* Daniel Richman, *Prosecutors and Their Agents, Agents and Their Prosecutors*, 103 COLUM. L. REV. 749, 758–67 (2003) (discussing the many pressures that can impact the rate at which federal prosecutors decline prosecutions).

[316] In 2008, for example, U.S. Attorneys prosecuted 74,924 immigration crime cases, EOUSA Datafile 2009, *supra* note 117, but a staggering 1,170,149 noncitizens were subject to voluntary removal or a judicial order of removal, OFFICE OF IMMIGRATION STATISTICS, U.S. DEP'T OF HOMELAND SEC., 2008 YEARBOOK OF IMMIGRATION STATISTICS 95 tbl.36 (2009).

sion of the immigration agency, however, is not captured in the standard measure for prosecutorial declination rate reflected in Figure 3.[317]

FIGURE 3: PERCENT REFERRALS TO U.S. ATTORNEYS DECLINED, BY CASE TYPE (1986–2009).



Source: TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, Syracuse University.

A recent decision by a federal magistrate judge in the Western District of Texas highlights this movement in prosecutorial discretion from the prosecutor to the agency. At the sentencing of three defendants for illegal reentry, the prosecuting Assistant U.S. Attorney could not "state a reason that these three defendants were prosecuted rather than simply removed from the United States."[318] In other words, although the decision on whether to pursue criminal charges ostensibly lies exclusively with the criminal prosecutor, he was unable to explain to the court why the individuals who were being sentenced had been charged in the first place. The presiding judge criticized the prosecutor for "not screening these cases to eliminate those persons who need no federal prosecution and should simply

[317] *See* Rabin, *supra* note 312, at 1051 n.44 ("Where this practice is followed, the agency is required to submit regular periodic reports to the U.S. Attorney indicating the number of cases declined pursuant to the authorization.").

[318] United States v. Ordones-Soto, No. A-09-CR-590-SS, slip op. at 1 (W.D. Tex. Feb. 5, 2010).

be returned to their own country" and ordered the Government to "be prepared in all future sentencings . . . to state the substantive reason(s) for the prosecution of each individual case."[319]

The dominant role of agency actors in the criminal prosecution of immigration crime is a significant, but relatively unnoticed, development in federal prosecution.[320] Their existence changes how we think about agency-prosecutorial relationships and warrants further study. Generally, prosecutors are thought to drive agency investigations while tempering agency enthusiasm.[321] Enter Prosecuting Agents and SAUSAs, and the dynamic shifts. The agency now plays a key role in charging decisions, which are traditionally considered to be a core prosecutorial function.[322] With the dual agent–prosecutor role comes different training, institutional pressures, career goals, and values.[323] For example, a recent study of Streamline prosecutions reports that agency prosecutors work out of agency offices, are not subjected to the same level of oversight as criminal prosecutors, and are less willing to engage in the give-and-take of criminal plea bargaining.[324]

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[319] *Id.* at 2.

[320] SAUSAs have only been mentioned in a handful of law review articles to date.

[321] In his classic ethnographic study of U.S. Attorneys, James Eisenstein described the relationship between federal prosecutors and investigative agencies as one in which the prosecutor is dominant in the relationship, acting either as a "manager" or an "innovator." JAMES EISENSTEIN, COUNSEL FOR THE UNITED STATES: U.S. ATTORNEYS IN THE POLITICAL AND LEGAL SYSTEMS 150–69 (1978). More recently, Todd Lochner's study of federal prosecutors has shown a correlation between lack of prosecutorial experience and the levels at which prosecutors' offices allow agency priorities to determine prosecutorial priorities. Todd Lochner, *Strategic Behavior and Prosecutorial Agenda Setting in United States Attorneys' Offices: The Role of U.S. Attorneys and Their Assistants*, 23 JUST. SYS. J. 271, 277 (2002).

[322] Rachel Barkow has stressed that the charging decision is such an important prosecutorial function that it should be treated as an adjudicative decision and separated from investigative decisions through application of an administrative law model to federal prosecutors. Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869, 874 (2009).

[323] EISENSTEIN, *supra* note 321, at 21, 74, 204 (arguing that factors such as prosecutors' own personal values and career goals shape prosecutorial agendas).

[324] As the Warren Institute's report underscores, SAUSAs prosecuting Operation Streamline cases "do not function, in practice, as part of the U.S. Attorney's Office, working largely out of the Border Patrol office and receiving little oversight from the USAO." LYDGATE, *supra* note 150, at 15. Defense attorneys interviewed for the report noted that Border Patrol attorneys were "more difficult to negotiate with than U.S. attorneys." *Id.* The report also cautions that the use of SAUSAs may raise ethical concerns, given that "prosecutorial independence may not be adequately preserved, nor potential conflicts of interest sufficiently considered." *Id.*

Part II has documented how the current, practical interdependence of the criminal law and immigration systems informs the procedure and design of immigration prosecution. From the initiation of the investigative stage of a criminal case to the completion of any criminal sentence, immigration prosecution has reshaped the standard flow of the criminal system. Non-citizen defendants can enter the system based not only on suspicion of a crime, but also on suspicion of a civil immigration violation. Protections against unreasonable searches and coercive interrogations can be undermined through diluted agency standards. Once inside the formal criminal system, bail hearings are erased, plea bargaining is placed on a fast-track timetable, and adjudication is often funneled into a magistrate court system that lacks the safeguards of Article III and is designed for expediency. Role reversal abounds: the agency exerts high levels of control over criminal charging decisions, whereas criminal prosecutors effectuate the immigration screening process within the criminal system.

III. THE STRUCTURAL IMPLICATIONS OF IMMIGRATION ENFORCEMENT

As Part II has shown, criminal immigration prosecution is not the equal, autonomous system mythologized in *Wong Wing*. Exposing this reality has significant consequences for understanding how immigration prosecution operates in practice. More broadly, however, close study of immigration prosecution reveals how agency function and citizenship status inform the criminal justice system in substantive areas beyond the confines of immigration crime. As discussed in this Part, the immigration prosecution regime sheds light on the incentive structure of criminal enforcement and the aims of the criminal law.

A. Immigration Enforcement, Incentives, and Equality

It is widely agreed that, while police are afforded tremendous power to enforce the criminal law, their criminal powers are strictly constrained by the Constitution.[325] In a series of influential articles, William Stuntz has argued that this constitutionalization of criminal procedure creates an incentive to broaden the substantive criminal law to escape the stringent requirements of criminal procedure.[326] Broader criminal codes, after all, would allow police and prosecutors to enjoy the benefits of criminal law en-

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[325] *See, e.g.*, Joseph Goldstein, *Police Discretion Not to Invoke the Criminal Process: Low-Visibility Decisions in the Administration of Justice*, 69 YALE L.J. 543, 554 (1960) ("The police have a duty not to enforce the substantive law of crimes unless invocation of the process can be achieved within bounds set by constitution, statute, court decision, and possibly official pronouncements of the prosecutor.").

[326] Stuntz, *Civil-Criminal Line*, *supra* note 35, at 7–8.

forcement techniques in a wider range of situations.[327] Effectively, the burden of criminal law's procedure is reduced.

As an example of this broadening, police may pull someone over for violating a law criminalizing driving with a broken taillight—even though the real goal may be to investigate, say, a murder.[328] A broader criminal code allows for more criminal investigation, whereas a narrower criminal code (one that only criminalizes murder) might have barred the investigation of the "real" targeted criminal activity. With the broader criminal code in place, the person in the car can be taken into custody even though there may not be sufficient suspicion of murder to satisfy the probable cause standard required by the Constitution.[329]

Recently, scholars have drawn on Stuntz's criminal law analysis and applied it to immigration law. Treating immigration as a separate realm (albeit one with many structural similarities to criminal law), these scholars have argued that the expansion of substantive immigration law over time may be caused by a set of incentives similar to those that have expanded the substance of criminal law.[330] A broader immigration code, so the argument goes, gives civil immigration authorities greater discretion to enforce the immigration laws of admission and removal. In addition, a broader immigration code increases civil prosecutorial power to press pleas and, in so doing, effectively skirts the basic procedural due process rights that would otherwise govern immigration proceedings.[331]

These parallel immigration and criminal literatures offer a rich analysis of the structural design of each system. However, they do not examine the

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[327] Stuntz, *Pathological Politics*, *supra* note 19, at 509 ("As criminal law expands, both lawmaking and adjudication pass into the hands of police and prosecutors; law enforcers, not the law, determine who goes to prison and for how long.").

[328] This example draws on a similar example, offered by Professor Stuntz, of a criminal law prohibiting riding a bicycle without bells. *See* Stuntz, *Civil-Criminal Line, supra* note 35, at 10–11.

[329] *See* Atwater v. City of Lago Vista, 532 U.S. 318, 354–55 (2001) (finding a state law allowing for a custodial arrest based on a minor "fine only" traffic violation was constitutionally reasonable); Whren v. United States, 517 U.S. 806, 812–13 (1996) (concluding that a police officer intending to investigate a drug crime may legitimately stop an individual based solely on suspicion of an unrelated traffic offense).

[330] *See* Cox & Posner, *supra* note 24, at 840–41 n.114 ("The expansion of deportation may track the story that Bill Stuntz has told about the expansion of substantive criminal law."); *see also* Cox & Rodríguez, *supra* note 24, at 464 n.12 ("[I]mmigration policymaking shares much in common with Bill Stuntz's account of modern criminal law.").

[331] Cox & Posner, *supra* note 24, at 840 n.114, 843–44; Cox & Rodríguez, *supra* note 24, at 529 (noting that "[w]ere such an account true, immigration law would involve a sort of one-way ratchet of ever-widening deportability for noncitizens"); *see also* David A. Martin, *Due Process and Membership in the National Community: Political Asylum and Beyond*, 44 U. PITT. L. REV. 165, 185 (1983) (noting that, in response to cumbersome procedural guarantees in asylum cases, Congress can just change the substantive provisions of immigration law).

interaction between the two systems. Instead, the criminal view describes a one-way pull to expand the substance of criminal law in order to enhance criminal enforcement. The immigration view assumes a similar pull to expand the substance of the civil immigration law in order to enhance civil immigration enforcement. What happens if we shift the view from one that looks within each procedural sphere to one that transcends the procedural divide? With immigration, interaction between civil and criminal enforcement has created its own set of incentives that work across the procedural line. In other words, the incentives do not operate within a single procedural subsystem. Instead, a change in the substantive law on one side of the divide (the immigration law) in practice can distort procedural outcomes on the other side (the criminal law).

One of the reasons why this interaction has gone unrecognized is that, as a general rule, police have more power in the criminal system than in the civil system.[332] Immigration has inverted this traditional criminal-civil enforcement relationship. Civil immigration law invites opportunities to arrest, interrogate, and detain without the need to comply with criminal law's requirements. Thus, no longer do law enforcement powers expand from civil to criminal. Instead, in immigration, law enforcement powers expand in the opposite direction: from criminal to civil.

This role reversal shifts the standard set of incentives. Police need not rely on the criminal law if they can arrest, detain, and search with their immigration powers. Furthermore, because the police can access law enforcement with fewer procedural restraints on the immigration side without invoking their criminal powers, they may be incentivized to proceed as immigration enforcers rather than criminal enforcers. The law enforcement power inversion thus also inverts the traditional incentive to draw on the criminal law.

Raul Mesa Oscar-Torres certainly understands this dynamic.[333] Officers presenting themselves as immigration enforcers rather than criminal police stopped Mr. Oscar-Torres without particularized suspicion outside

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[332] *See, e.g.*, Kenneth Mann, *Procedural Rules and Information Control: Gaining Leverage over White Collar Crime*, *in* WHITE-COLLAR CRIME RECONSIDERED 337–40 (Kip Schlegel & David Weisburd eds., 1992) (describing criminal law enforcement as "significantly more powerful"); Stuntz, *Civil-Criminal Line*, *supra* note 35, at 9 ("[L]aw enforcement power does not contract as one moves from civil to criminal. On the contrary, it expands."). In other work, Mann and Stuntz have both begun to note the expansion of regulatory law enforcement power but have not documented the inversion of power allocations argued here. *See* Mann, *supra*, at 345 (arguing that the recent "granting of broad investigatory powers to administrative agencies and to the civil divisions of state and federal enforcement agencies has to be seen as a fundamental shift in the information-related characteristics of civil law"); Stuntz, *Transsubstantive Fourth Amendment*, *supra* note 191, at 860 (noting that, "as the regulatory state has expanded," so too has the array of enforcement powers given to those agencies).

[333] United States v. Oscar-Torres, 507 F.3d 224 (4th Cir. 2007).

his apartment complex in Raleigh, North Carolina.[334] When questioned, Mr. Oscar-Torres admitted to being undocumented and was taken to the station-house where he was photographed and fingerprinted.[335] This booking information led to the discovery of his prior immigration and criminal history.[336]

The magistrate judge assigned to the criminal case found that the arrest itself was in fact illegal.[337] The Government stipulated that it would not use any of Mr. Oscar-Torres' statements in its case-in-chief but argued that the fingerprints and resulting identity information were admissible regardless of the legality of the arrest.[338] On review, the Court of Appeals concluded that the identity information could only be suppressed if it was motivated by a criminal investigative purpose.[339] If, however, the evidence was sought merely as part of administrative booking procedures to effectuate civil deportation, it could be used in the criminal prosecution.[340] In other words, if immigration agents arrest someone "simply to deport" and fingerprint as part of the "normal processing for an alien," the identity evidence becomes admissible in the criminal trial.[341]

The *Oscar-Torres* case highlights how law enforcement powers can expand in practice when law enforcement relies on the civil side of the putative divide. Not only did the police not need to have suspicion of a *crime* to stop and question Mr. Oscar-Torres, but they did not need any suspicion at all. The fact that the stop was illegally conducted can be forgiven on the immigration side of the divide. Under the court's decision, that forgiveness can later be imported into the criminal case.

Abel v. United States provides another view into how this hybrid system operates.[342] In *Abel*, the Department of Justice lacked sufficient evidence of criminal conduct to justify a search or arrest warrant.[343] FBI agents working on the case therefore sought the cooperation of immigration enforcement agents.[344] Doing so had a clear benefit: it allowed the FBI to access investigative techniques of the immigration system. Moreover, it

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[334] *Id.* at 226.
[335] *Id.*
[336] *Id.*
[337] *Id.* at 226–27.
[338] *Id.* at 226.
[339] *Id.* at 231–32.
[340] *Id.* The Fourth Circuit thus remanded the case to the district court for an evidentiary hearing. *Id.* at 232. However, because Mr. Oscar-Torres completed his criminal sentence and was deported before an evidentiary hearing could be held, the factual determination was never made. United States v. Oscar-Torres, No. 05-224, at 1 (E.D.N.C. Jan. 22, 2008) (indictment dismissed).
[341] *See Oscar-Torres*, 507 F.3d at 232.
[342] 362 U.S. 217 (1960).
[343] *See id.* at 221.
[344] *Id.*

enabled the FBI to bypass the criminal standards for police conduct that would have otherwise applied to the investigation.

In a plan worked out between INS and the FBI, immigration agents obtained a civil arrest warrant and then accompanied the FBI agents to the hotel where Mr. Abel resided.[345] Immigration agents took control: they entered the hotel room, arrested Mr. Abel, and searched the room for fifteen to twenty minutes.[346] Mr. Abel was then flown one thousand miles to an immigration detention center in Texas, where he was detained without bond or criminal charges for three weeks, and again interrogated by both the FBI and the INS.[347] Eventually, he was criminally charged with espionage.[348] At the criminal trial, items seized during the search by immigration authorities were admitted into evidence over defense objection.[349] In upholding the conviction, the Court reasoned that that the search was simply part of the "administrative" process, within the bounds of the "scope of rightful cooperation" between the agency and the prosecutor.[350]

Another instance of this incentive to draw on administrative powers for criminal prosecution occurs in the context of bail. Recall the function of immigration detention in the criminal process.[351] When noncitizens are granted bail in the criminal case, prosecutors use the immigration system to detain them during their criminal proceedings. In practice, the prosecutor gains enhanced detention powers from the immigration system that the criminal system cannot deliver.

This incentive structure—which encourages reliance on civil enforcement power to expand criminal enforcement—has increasingly been shared with state and local law enforcement. For example, through what are known as section 287(g) agreements, state and local police can be deputized with civil administrative law powers of immigration officers.[352] Under this authority, local police may investigate civil immigration violations and arrest based on reasonable belief of such violations.[353] Even beyond such

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[345] *Id.* at 222.

[346] *Id.* at 223.

[347] *Id.* at 225; *id.* at 245 (Douglas, J., dissenting); *id.* at 252 (Brennan, J., dissenting).

[348] *Id.* at 225 (majority opinion).

[349] *See id.* at 234–41.

[350] *Id.* at 228, 241.

[351] *See supra* Part II.A.1.

[352] Immigration and Nationality Act (INA) § 287(g), 8 U.S.C. § 1357(g) (2006); Michael J. Wishnie, *State and Local Police Enforcement of Immigration Laws*, 6 U. PA. J. CONST. L. 1084, 1094–95 (2004) (discussing the use of section 287(g) agreements to enforce federal immigration law at the state level). For a recent study of section 287(g) agreements, see CRISTINA RODRÍGUEZ ET AL., MIGRATION POLICY INST., A PROGRAM IN FLUX: NEW PRIORITIES AND IMPLEMENTATION CHALLENGES FOR 287(G) (2010), http://www.migrationpolicy.org/pubs/287g-March2010.pdf, which describes various features of section 287(g) collaborations between the federal government and localities.

[353] *See* 8 U.S.C. § 1357(a)(2).

formal agreements, the Department of Justice in 2002 reversed its long-standing position that local authorities could not enforce civil immigration law.[354] According to this controversial legal opinion, even the local sheriff can stop and detain solely on suspicion of civil deportability.[355] Armed with the power to enforce immigration law alongside bread-and-butter criminal law, state and local police can choose whether they are acting in their criminal capacity as "police" (investigating a crime) or in their administrative capacity (looking for "illegal aliens").[356] When they choose the civil side, they are subject to fewer constraints.

What might this merging of civil and criminal mean for the structure of the immigration enforcement system? On the immigration law side, it means that the expansion of the substantive immigration law (and the corresponding enforcement powers) may not be only about maximizing administrative discretion to deport or reducing procedural protections in immigration proceedings. Instead, it may also be motivated by a desire to create a broad discretionary system of immigration enforcement across the civil and criminal law. That is, broader substantive immigration law also makes it easier to investigate and prosecute immigration crime. In fact, broader immigration law makes it easy to investigate any criminal activity thought to be committed by noncitizens.

On the criminal law side, this analysis suggests that, in immigration, expansion of the substance of federal criminal immigration law may not be necessary to avoid the strict restraints of criminal procedure.[357] Like the

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[354] *Compare* Memorandum from Jay S. Bybee, Assistant Attorney Gen., Office of Legal Counsel, U.S. Dep't of Justice, on Non-Preemption of the Authority of State and Local Law Enforcement Officials to Arrest Aliens for Immigration Violations 1–4, 13 (Apr. 3, 2002), *available at* http://www.aclu.org/FilesPDFs/ACF27DA.pdf (finding that states have "inherent power" to enforce civil immigration laws), *with* Memorandum Opinion for the U.S. Attorney, S. Dist. of Cal., from Teresa Wynn Roseborough, Deputy Assistant Attorney Gen., Office of Legal Counsel, U.S. Dep't of Justice (Feb. 5, 1996), *available at* http://www.usdoj.gov/olc/immstopo1a.htm (concluding that, while "state and local police may constitutionally detain or arrest aliens for violating the criminal provisions of the Immigration and Naturalization Act," they "lack recognized legal authority to stop and detain an alien solely on suspicion of civil deportability, as opposed to a criminal violation of the immigration laws or other laws").

[355] Bybee Memorandum, *supra* note 354. *See generally* Kobach, *supra* note 301, at 199–201 (arguing that states and localities have the "inherent arrest authority" to enforce "all immigration violations," both civil and criminal). For a critique of the inherent authority position, see Huyen Pham, *The Inherent Flaws in the Inherent Authority Postion: Why Inviting Local Enforcement of Immigration Laws Violates the Constitution*, 31 FLA. ST. L. REV. 975 (2004).

[356] *Cf.* J. Skelly Wright, *Beyond Discretionary Justice*, 81 YALE L.J. 575, 575–76 (1972) (book review) (noting that most police decisions are made on the basis of standards that are apparent only to themselves).

[357] *But cf.* Stuntz, *Pathological Politics, supra* note 19, at 508–09, 547 (describing the criminal system as one in which substantive criminal codes have continued to expand, and arguing that expansion has distorted criminal process).

broken taillight law, the civil immigration law can funnel cases into the criminal system in ways that loosen the procedural rules that ordinarily would restrict police behavior. Yet the civil immigration law is more likely to have that effect than the criminal taillight law because, whereas the police are constrained by the Constitution in investigating the taillight, they have greater flexibility when investigating immigration.

The evolution of the substantive criminal and civil law of immigration is consistent with this analysis. Rather than a system in which civil and criminal immigration law have simultaneously expanded to their outer limits, our hybrid immigration system is significantly broader on the civil side than on the criminal side. Indeed, on the criminal side, the law has remained fairly static over time. For example, the criminal illegal entry and reentry law passed in 1929 remains the core of the immigration crime law today. Other laws criminalizing smuggling, harboring, and document fraud appeared among the first federal immigration laws and have not been radically expanded.[358] There have no doubt been a number of additional crimes added over the course of the century—for example, criminalization of marriage and certain employment-related document frauds.[359] Nonetheless, this type of expansion is not nearly as broad as it could be. The criminal immigration laws, as the Ninth Circuit has noted, remain "few in number and relatively simple in their terms."[360]

In fact, the standard crime of border crossing, which constitutes over half of the government's prosecutions in this area,[361] has actually moved in the direction of decriminalization—to a petty crime. Although entering without permission garnered a sentence of up to a year when it was first passed, today it tops out at half that length.[362] Also of major significance is the distinction between illegal entry and illegal presence. Although the act of illegal entry is a crime, mere presence in the United States without permission has never been made a crime.[363] Criminalizing unlawful presence

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[358] For example, as early as 1907 the Immigration Act imposed a penalty of up to two years for bringing in or landing any alien who was not entitled to enter the United States. Immigration Act of 1907, ch. 1134, § 8, 34 Stat. 898, 900. By 1917 smuggling, harboring, or concealing a migrant was a misdemeanor punishable by up to five years in prison. Act of Feb. 5, 1917, Pub. L. No. 64-301, § 8, 39 Stat. 874, 880.

[359] *See* Maria Isabel Medina, *The Criminalization of Immigration Law: Employer Sanctions and Marriage Fraud*, 5 GEO. MASON L. REV. 669, 671–72 (1997).

[360] Gonzales v. City of Peoria, 722 F.2d 468, 475 (9th Cir. 1983), *overruled on other grounds by* Hodgers-Durgin v. de la Vina, 199 F.3d 1037 (9th Cir. 1999). Kris Kobach has criticized the *Gonzales* court's conclusion that immigration crime laws are "few in number," noting that there are forty-seven immigration crimes currently on the books. Kobach, *supra* note 301, at 219. Yet Professor Kobach agrees that most of the forty-seven immigration crimes in place today have been on the books for decades. *Id.*

[361] *See* EOUSA Datafile 2010, *supra* note 2; EOUSA Datafile 2009, *supra* note 117.

[362] *See supra* notes 266–67 and accompanying text.

[363] *See, e.g.*, *Gonzales*, 722 F.2d at 476 (noting that illegal presence in the United States is only a civil violation under the Immigration and Nationality Act); MICHAEL JOHN GARCIA,

could vastly expand criminal law enforcement tools to the investigation of nearly twelve million undocumented immigrants in the United States.[364] However, lawmakers have repeatedly rejected such proposals.[365] One major concern with such proposals is that a law criminalizing presence would force already vulnerable populations, such as children, senior citizens, low-income workers, and asylum seekers further underground.[366] Moreover, such a law would be unenforceable given that it would not be feasible to criminally prosecute the millions who are present without permission.[367] Instead, illegal presence has remained under administrative control, subjecting the violator to administrative removal, but not to criminal prosecution.[368]

It is true that the sentencing structure for some criminal immigration laws has expanded. In this regard, the increase in the maximum sentence for illegal reentry from two to twenty years over the past two decades is the most dramatic.[369] The U.S. Sentencing Commission's corresponding recommended Guideline sentence for illegal reentry has also increased significantly.[370] The use of a two-year mandatory minimum fraud statute in

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CONG. RESEARCH SERV., CRS REPORT FOR CONGRESS: CRIMINALIZING UNLAWFUL PRESENCE: SELECTED ISSUES, at CRS-5 (2006) (explaining that unlawful presence is not a federal crime). The Geary Act, enacted as part of Chinese Exclusion, constitutes a limited exception. *See supra* Part I.A.

[364] *See Gonzales,* 722 F.2d at 476 (distinguishing between the illegal entry crime and the illegal presence civil violation and noting that an officer cannot infer probable cause of illegal entry based only on probable cause of illegal presence); GARCIA, *supra* note 363, at CRS-5 (arguing that criminalizing unlawful presence would allow state and local law enforcement to play a greater role in apprehending immigration law violators).

[365] For examples of rejected bills proposing to criminalize illegal presence, see Securing America's Borders Act, S. 2454, 109th Cong. (2006); Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005, H.R. 4437, 109th Cong.; S. DOC. NO. 237, at 6 (1931) (Letter from W.N. Doak, Sec'y of Labor, to Edwin P. Thayer, Sec'y of Senate, Dec. 26, 1930).

[366] *See* 151 CONG. REC. 28,554, 28,556, 28,691 (Dec. 15, 2005); 152 CONG. REC. S2514 (daily ed. Mar. 25, 2006).

[367] As Republican presidential candidate and former U.S. Attorney Rudy Giuliani explained during his campaign, illegal presence should not be a crime "because the government wouldn't be able to prosecute it. We couldn't prosecute 12 million people. We have only 2 million people in jail right now for all the crimes that are committed in the country, 2.5 million." Editorial, *Giuliani*, *Crime-Buster*, N.Y. SUN, Sept. 10, 2007, at 1.

[368] *See* 8 U.S.C. § 1227(a)(1)(B) (2006) ("Any alien who is present in the United States in violation of this chapter . . . is deportable.").

[369] *See* Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 2023 (increasing the 8 U.S.C. § 1326 maximum sentence for illegal reentry to twenty years); Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4471 (increasing the 8 U.S.C. § 1326 maximum sentence for illegal reentry from two to fifteen years).

[370] *See* McWhirter & Sands, *supra* note 14, at 275–76 (tracking the increase that occurred between 1988 and 1996 in the recommended Guideline range for illegal reentry). In fact, 56% of federal judges now report that the Guideline range for reentry is too long. U.S. SENTENCING COMM'N, FINAL REPORT: SURVEY OF ARTICLE III JUDGES ON THE FEDERAL SENTENCING GUIDELINES, at II-4 (2003), *available at* http://www.ussc.gov/judsurv/jsfull.pdf.

Postville is another example of aggressive sentencing for immigration violations. Although Postville-style use of the aggravated identity statute was invalidated by the Court,[371] a proposal is currently pending in the House that would create a mandatory minimum sentence of as many as ten years for the crime of illegal reentry.[372] Steeper sentences are, of course, effective in encouraging plea bargaining and, along the way, in obtaining waivers of immigration rights.[373] However, increasing the sentencing severity of the existing law is not the same as widening the criminal law's applicability to encompass a broader range of activities.

In contrast to the criminal immigration law's resistance to expansion, the civil immigration law is bursting at its seams.[374] Its growth over the years has been sweeping. The earliest federal immigration law did not even provide for deportation. Instead, once immigrants arrived and began living in the United States, they were allowed to remain.[375] At the turn of the century, illegal entrants could be subject to deportation, but only for one year after their arrival.[376] The statute of limitations was gradually extended until 1924 when it was removed entirely, subjecting all clandestine entrants to discretionary removal by civil authorities at any time.[377] Subsequent to that time, immigration law has continued to add a plethora of additional grounds for removal (even for permanent residents) and eliminated or severely narrowed many forms of relief from removal. For example, in 1996, the Anti-Terrorism and Effective Death Penalty Act[378] and the Illegal Immigration Reform and Immigrant Responsibility Act[379] expanded the grounds for deportation of noncitizens, particularly by expanding the list of aggravated felonies and reducing the availability of relief.[380]

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[371] Flores-Figueroa v. United States, 129 S. Ct. 1886, 1888, 1894 (2009). *See supra* note 133.

[372] *See* Criminal Alien Accountability Act, H.R. 2837, 111th Cong. § 2(b) (2009) (proposing mandatory minimum sentences of one, five, and ten years for offenses under 8 U.S.C. § 1326).

[373] *See* FISHER, *supra* note 258, at 221–23 (revealing that an increase in sentence severity has accompanied the rise of plea bargaining).

[374] As the Ninth Circuit has described, the civil immigration law is a "pervasive regulatory scheme." Gonzales v. City of Peoria, 722 F.2d 468, 475 (9th Cir. 1983).

[375] *See* NGAI, *supra* note 92, at 59 (explaining that no federal law required removal of discovered aliens).

[376] *See id.*

[377] *Id.* at 59–60; *see also* 8 U.S.C. §§ 1182(a)(6), 1227(a)(1)(A) (2006) (entry without inspection renders an alien both inadmissible and deportable).

[378] Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214.

[379] Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546.

[380] *See generally* Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 HARV. L. REV. 1936, 1938–43 (2000) (discussing the 1996 changes in the law).

Of course, there may be other factors that have shaped this asymmetrical substantive structure of the criminal and civil immigration law. One important influence is public opinion.[381] Despite strong enforcement rhetoric, the fact that nearly twelve million undocumented people are living and working in the United States reflects a certain ambivalence about increased immigration enforcement. Use of the criminal law to sanction the undocumented, at least in the interior, is not always politically popular.[382] Another possible factor is that immigration crime prosecution has traditionally been an exclusively federal endeavor. Although states prosecuted immigration crime a century ago,[383] and more recently some states have enacted criminal immigration laws of their own,[384] as a whole, immigration is unlike other areas of federal enforcement that overlap significantly with state law (such as narcotics, weapons, and gang prosecutions). This pressure on the federal government as the baseline for immigration prosecution may also temper the expansion of criminal immigration law. Today, with the undocumented population over five times the size of the entire United States prison population, further expansion of criminal immigration law would overwhelm prosecutorial resources.[385]

Immigration law is thus a regulatory area that challenges the normal order of things. Immigration's substantive configuration on both the civil and criminal sides fosters this dynamic, inviting broad-based discretionary civil enforcement. Such civil actions can, in turn, spill over into criminal enforcement in ways that distort the constitutional protections that otherwise would apply. The threat to the criminal law's equality principle is thus ironically rooted in the same formal enforcement limits that follow from the

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[381] *Cf.* Darryl K. Brown, *Democracy and Decriminalization*, 86 TEX. L. REV. 223, 225 (2007) (arguing that interest groups and popular opinion sometimes influence decriminalization).

[382] *See, e.g.*, Edwin Harwood, *Can Immigration Laws Be Enforced?*, PUB. INT., Summer 1983, at 107, 114 (noting that in the early 1980s prosecutors sometimes refused to take INS cases because "there [wa]s no point . . . when, as the jury w[ould] view the matter, the man [wa]s just trying to feed his family"); Editorial, *"The Jungle," Again*, N.Y. TIMES, Aug. 1, 2008, at A18 (calling the Postville prosecution "a national disgrace"); Solis Interview, *supra* note 172 (describing strong negative reactions by El Paso residents to local police enforcement of immigration).

[383] According to Gerald Neuman, during the eighteenth century state criminal laws punished the movement of those considered noncitizens, including free African-Americans, across state lines. Gerald L. Neuman, *The Lost Century of American Immigration Law (1776–1875)*, 93 COLUM. L. REV. 1833, 1865–70, 1883–84 (1993).

[384] *See supra* note 40 (citing examples).

[385] *Compare* HOEFER, RYTINA & BAKER, *supra* note 10, at 2–3 & tbl.1 (estimating the unauthorized immigrant population to be 11.6 million in January 2008), *with* Press Release, Dep't of Justice, Office of Justice Programs, Growth in Prison and Jail Populations Slowing: 16 States Report Declines in the Number of Prisoners (Mar. 31, 2009), http://www.ojp.usdoj.gov/newsroom/pressreleases/2009/BJS090331.htm (reporting 1,610,584 persons incarcerated under state or federal supervision and 785,556 persons incarcerated under county or local supervision).

constitutional divide between the two systems. Rather than foster equality, the divide has invited inequality.

This Article's goal is to provide a structural mapping of the criminal immigration enforcement system, not to provide normative solutions. Yet for those concerned by the criminal inequality, it is useful to disentangle two distinct normative responses. One strategy for promoting greater equality between citizen and noncitizen defendants would be to erase (or at least reduce) the procedural line between civil and criminal enforcement.[386] Some of this work has already begun. On the ground, litigation has chipped away at the practice of prolonged immigration detention without a bond hearing.[387] Similarly, suppression motions brought in recent immigration proceedings have successfully invoked the exclusionary rule—potentially serving as a restraint on law enforcement abuse.[388] For example, in the context of a workplace raid, an immigration judge in Los Angeles recently found that failure to read a *Miranda*-like warning to an immigration detainee violated agency regulations and therefore necessitated suppression of the resulting statement.[389] In addition, the possibility of providing counsel

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[386] Reflecting this view are those scholars that have argued in favor of applying constitutional protections to immigration proceedings in certain contexts. *See, e.g.*, KANSTROOM, *supra* note 28, at 122–24; Peter L. Markowitz, *Straddling the Civil-Criminal Divide: A Bifurcated Approach to Understanding the Nature of Immigration Removal Proceedings*, 43 HARV. C.R.-C.L. L. REV. 289, 345–50 (2008); Robert Pauw, *A New Look at Deportation as Punishment: Why at Least Some of the Constitution's Criminal Procedure Protections Must Apply*, 52 ADMIN. L. REV. 305, 324–25, 337–44 (2000).

[387] *See, e.g.*, Rodriguez v. Hayes, 591 F.3d 1105 (9th Cir. 2010) (certifying a class action lawsuit brought by persons detained in immigration custody for more than six months without bond hearings).

[388] For discussion of recent decisions of immigration judges excluding evidence and terminating proceedings based on egregious violations of the Constitution and agency rules, see *Illegal Immigrants' Rights Were Violated, Judge Says*, N.Y. TIMES, June 9, 2009, at A24, which discusses an immigration case in Fair Haven, Connecticut, where the judge held that federal agents' raids constituted egregious constitutional violations, and Anna Gorman, *Immigration Case Dismissed: ICE Agents Violated Regulations in Van Nuys Raid, Judge Says in Ruling That Could Affect Dozens of Other Cases*, L.A. TIMES, Feb. 21, 2009, at B3, which reports on a judge's termination of immigration removal proceedings based on agency rule violations.

[389] *See In re* [identifying information redacted], No. A [redacted] (U.S. Immigr. Ct., L.A., Cal., Feb. 10, 2009) (on file with author) (explaining that immigration regulations "protect individuals from unlawful or coercive interrogation tactics by informing them that any statement may be used against them . . . and that they have the right to hire an attorney"). There are earlier examples of immigration courts drawing on principles of criminal procedure to protect the rights of immigration respondents. *See, e.g.*, Orantes-Hernandez v. Meese, 685 F. Supp. 1488, 1498–99, 1506–07 (C.D. Cal. 1988) (mandating that a *Miranda*-like advisal be read to asylum applicants after finding that immigration officials engaged in widespread practices of coercing asylum applicants to waive rights and consent to removal), *aff'd sub nom.*, Orantes-Hernandez v. Thornburgh, 919 F.2d 549 (9th Cir. 1990). *See generally* Motomura, *supra* note 53 (identifying the practice of courts' interpreting immigration statutes in accordance with constitutional norms).

at no cost to detained and imprisoned immigrants has received increased attention.[390]

An alternative (or perhaps complementary) normative response would be to re-inscribe the distinction between the immigration and criminal spheres. The rise of criminal immigration prosecution over time can be understood as requiring a clear definition of when enforcement is "administrative" and when it is "criminal." As one district court judge noted recently, increased criminal prosecution of immigration may warrant "administrative agencies or the appellate courts" to define more clearly the point at which constitutional guarantees must attach to immigration investigations.[391] For example, as a policy or legal matter, it might be wise to require *Miranda* warnings when suspects are brought into secondary inspection areas by immigration authorities in airports.[392] Training materials and handbooks for law enforcement could also help officers and prosecutors maneuver the criminal-civil immigration line.[393] Although state agencies have increasingly become involved in immigration enforcement, they lack developed written guidelines on how officers should structure their decisionmaking when noncitizens are encountered.[394] In sum, enhanced training and the creation of standards to apply when a suspected noncitizen is encountered would refortify the criminal-civil divide.[395]

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[390] *See, e.g.*, DORIS MEISSNER & DONALD KERWIN, MIGRATION POLICY INST., DHS AND IMMIGRATION: TAKING STOCK AND CORRECTING COURSE 46 (2009), http://www.migrationpolicy.org/pubs/DHS_Feb09.pdf. Currently in immigration proceedings, aliens have the right to counsel but not at government expense. 8 U.S.C. § 1229a(b)(4)(A) (2006). For a discussion of issues surrounding the right to competent counsel in immigration removal proceedings, see LaJuana Davis, *Reconsidering Remedies for Ensuring Competent Representation in Removal Proceedings*, 58 DRAKE L. REV. 123, 150–69 (2009).

[391] *United States v. Fnu Lnu*, 261 F.R.D. 1, 4 (E.D.N.Y. 2008) (suggesting that, for example, *Miranda* warnings may be appropriate "when a person entering the country is questioned in a secondary inspection area" at an airport).

[392] *See id.*

[393] Currently, publicly available training materials for federal immigration officials contain few details as to how the distinction between "civil" and "criminal" enforcement should be made by officers in the field. *See, e.g.*, U.S. CUSTOMS & BORDER PROTECTION, INSPECTOR'S FIELD MANUAL (Charles M. Miller ed., 2008), *available at* http://www.ilw.com/immigrationdaily/News/2008,0513-cbp.pdf; U.S. DEP'T OF JUSTICE, INS, THE LAW OF ARREST, SEARCH, AND SEIZURE FOR IMMIGRATION OFFICERS (1983).

[394] A recent study of police enforcement of immigration found that only 39% of local police departments have written policies for dealing with persons suspected to be undocumented. Scott H. Decker et al., *On the Frontier of Local Law Enforcement: Local Police and Federal Immigration Law*, 13 SOC. CRIME L. & DEVIANCE 261, 269 (2009).

[395] Clarification of police rules could, for example, reduce the problem of racial profiling that has been documented by scholars. *See, e.g.*, Ashar, *supra* note 11, at 1192–94 (discussing the post-September 11 profiling of Arabs and Muslims); Jennifer M. Chacón, *Whose Community Shield?: Examining the Removal of the "Criminal Street Gang Member,"* 2007 U. CHI. LEGAL F. 317, 337–41 (explaining that enforcement programs such as Operation Community Shield result in blatant stereotyping and racial profiling that are difficult to chal-

As the procedural line has dissolved, critical rights of the noncitizen criminal defendant remain uncertain. Movement of immigration law into the fold of constitutional norms, as well as more clearly defined borders between the two systems, not only could improve the due process of the immigration system but also could preserve the equality of the criminal system.

B. Criminal Law as Immigration Law

Access to the criminal sanction of incarceration, as opposed to the adjudication of immigration rights, has consistently been a formal organizing principle for criminal immigration prosecution. Under the conventional view, when administrative processing fails, the criminal system makes a punishment decision. In contrast, when the government wants to remove someone from the country, the immigration agency makes a screening decision.

This Article has demonstrated that this long-standing conception of the criminal-civil division of labor does not reflect how the system actually operates. Instead, when the criminal system is activated, the de facto immigration screening decision is made on the criminal side of the divide. In a very real sense, for noncitizens, criminal law acts as immigration law.[396]

As the criminal system has taken on the screening function of the immigration agency, the immigration agency's role within the criminal prosecution has expanded. An extreme example of this phenomenon in the federal system is the use of Prosecuting Agents to criminally prosecute immigration crime.[397] Literally, they are Border Patrol agents in the criminal courtroom. Despite the fact that the Prosecuting Agent is formally employed by the immigration agency and is not even an attorney, when he sets foot in the criminal courtroom and negotiates a criminal plea bargain, he fills the shoes of the criminal prosecutor. In doing so, he uses the criminal law as leverage in the immigration screening process. When the criminal law is used as immigration law, the institutional location of the screening decision is transferred into the criminal system.

Outside the realm of criminal immigration prosecution, in other substantive areas of criminal prosecution and in state courtrooms around the

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lenge because there are no "investigative guidelines" on whether criminal or civil norms ought to apply).

[396] In contexts outside of the criminal law, immigration scholars have noted how other non-immigration laws, such as welfare and housing laws, draw alienage lines that can be "surrogates" for immigration laws. *See, e.g.*, Clare Huntington, *The Constitutional Dimension of Immigration Federalism*, 61 VAND. L. REV. 787, 798–99, 826 (2008) ("[I]t makes more sense to think about immigration law and alienage law as part of a continuum of immigration regulation."); Hiroshi Motomura, *Immigration and Alienage, Federalism and Proposition 187*, 35 VA. J. INT'L L. 201, 202 (1994) (noting that "'alienage' rules," such as California's Proposition 187, "may be surrogates for 'immigration' rules").

[397] *See supra* notes 306–09 and accompanying text.

country, we do not see Border Patrol agents acting as criminal prosecutors. However, the lessons learned by this close study of immigration crime still hold true. Across the criminal system, criminal law can function as immigration law in at least three different ways. First, by *plea bargaining immigration status*, prosecutors can place waivers of immigration rights directly into a criminal plea bargain. Postville's inclusion of a stipulated removal order as a mandatory condition of the plea bargain epitomizes this use of the criminal law as immigration law. Moreover, regardless of the substance of the criminal charge, prosecutors charging noncitizens with crimes can engage in plea bargaining over immigration status. The more powerful the criminal charge, the more likely the prosecutor can extract a waiver of immigration claims that might not otherwise be obtained in the immigration removal process.

Second, criminal prosecution can function as an immigration screen by *mandating immigration removal.* Rather than face removal as part of an explicit term of a plea agreement, a noncitizen can be subject to mandatory removal by the very fact that he has certain criminal convictions.[398] That certainly was the case for Jose Padilla, a legal permanent resident who pleaded guilty to drug trafficking in Kentucky and recently found himself before the U.S. Supreme Court.[399] After pleading guilty to an aggravated felony, Mr. Padilla learned he was subject to mandatory deportation. Despite the fact that he lived legally in the United States for over four decades and fought in the Vietnam War, his deportation was nonnegotiable. In a very real sense, the criminal prosecution is where Mr. Padilla's deportation was adjudicated.[400] By pleading guilty, he agreed to deportation.[401]

With mandatory deportation rules, the criminal prosecutor becomes the immigration screener.[402] Many violations of civil immigration law may be

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[398] For a comprehensive discussion of immigration consequences of criminal convictions, see DAN KESSELBRENNER & LORY D. ROSENBERG, IMMIGRATION LAW AND CRIMES (2009), and NORTON TOOBY & JOSEPH J. ROLLIN, CRIMINAL DEFENSE OF IMMIGRANTS (2007).

[399] Padilla v. Kentucky, 130 S. Ct. 1473, 1477 (2010).

[400] As Mr. Padilla's counsel argued before the Supreme Court, "[I]mmigration status and consequences are inextricably intertwined with the defense of criminal charges against an immigrant defendant, and only in the criminal case can a defendant charged with an aggravated felony effectively defend his right to remain in this country." Reply Brief of Petitioner at 4, *Padilla*, 130 S. Ct. 1473 (No. 08-651), 2009 WL 2917817.

[401] *Padilla*, 130 S. Ct. at 1477. Ultimately, the Supreme Court held that the Sixth Amendment requires defense counsel to advise their clients on immigration consequences of criminal convictions. *Id.* at 1486–87. As a result of the Court's ruling, Mr. Padilla, who was wrongly told by his attorney that he "did not have to worry about immigration status since he had been in the country so long," *id.* at 1478 (internal quotation marks omitted), is now entitled to a hearing on post-conviction relief, *id.* at 1486–87.

[402] As Nora Demleitner and Jon Sands have noted, in some cases prosecutors "may view deportation as a necessary or even desirable corollary" of the criminal prosecution itself. Nora V. Demleitner & Jon M. Sands, *Non-Citizen Offenders and Immigration Crimes: New Challenges in the Federal System*, 14 FED. SENT'G REP. 247, 250 (2002).

forgiven under accepted immigration law or not acted upon at the discretion of immigration officials. When criminal prosecutors pursue an immigration violation, however, they effectively supersede the agency's discretion regarding removal. Consider the criminal prosecution of terrorism suspect Javaid Iqbal. Although he had a work permit and was married to a U.S. citizen, he was criminally prosecuted for identity document fraud (even after he was cleared of any terrorist link) and ultimately deported by operation of the criminal case.[403] The key here is that, although the immigration system may technically "complete" the removal process, the criminal prosecutor is the one who has the discretion to determine the type and severity of the criminal charge that triggers the removal. With this charging discretion, control over immigration screening now lies in the hands of the criminal prosecutor.

The third way that the criminal law can function as immigration law is by *operating as a border screening device*. In the immigration crime context, criminal law plays this basic border screening role when it is used to prosecute first-time illegal entrants in petty cases that result in little or no jail time. The magistrate court's processing of high-volume, low-stakes cases in Operation Streamline is the prime example of the prosecutorial screening device. Streamline's zero tolerance stance results in the criminalization of first-time entrants—a population that would otherwise be subject only to civil immigration screening.[404]

Not only does Streamline's criminal process function as a substitute for traditional immigration removal processing, but also its structural design resembles immigration court in many respects. There is no right to jury trial or grand jury charge. Defendants are processed en masse in what is frequently described as a "cattle call" or an "assembly line" in which defense attorneys provide minimal legal representation, often to multiple defendants at the same time.[405] The prosecutors are employed by DHS and may even

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[403] David Stout, *Justices to Rule on Bias Suit by Detainee*, N.Y. TIMES, June 17, 2008, http://www.nytimes.com/2008/06/17/washington/16cnd-scotus.html; *see also* Docket Entry No. 25, United States v. Iqbal, No. 01-318 (E.D.N.Y. Sept. 17, 2002). Although Mr. Iqbal's related civil suit, *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), has brought much attention to what it might mean for the law of civil procedure, the workings of the underlying criminal prosecution on immigration status have gone with little comment in the academic literature. *But cf.* Juliet P. Stumpf, *The Implausible Alien:* Iqbal *and the Influence of Immigration Law*, 14 LEWIS & CLARK L. REV. 231 (2010) (describing the relevance of Mr. Iqbal's immigration status to the outcome of his civil suit).

[404] *See, e.g.*, Solis Interview, *supra* note 172 (explaining that charges under 8 U.S.C. § 1325 for simple illegal entry are now brought "even if it is [an alien's] first entry").

[405] Barroso Interview, *supra* note 156 (explaining that Streamline hearings in Brownsville, Texas, are like a "cattle call"); Solis Interview, *supra* note 172 (noting that, at times, misdemeanor Streamline hearings in the Western District of Texas have the feel of a "cattle call"); Willimann Interview, *supra* note 285 (describing the role of defense attorneys under Streamline in Tucson, Arizona, as "not really practicing law" but rather "sort of like doing administrative detail"); *see also* LYDGATE, *supra* note 150, at 12 & n.88 (quoting U.S. Mag-

be border agents rather than attorneys. Defendants appear before judges and are "convicted," but almost immediately deported. The greatest punishment that can result from these petty prosecutions is six months; in practice, defendants receive little or no jail time.[406]

A glance back at history reveals that, when immigration enforcement peaks, the criminal system increasingly orients itself around border screening. The current peak in prosecutions has been driven to a large extent by these low-level border prosecutions. A similar shift in focus marked a 1950s surge in prosecution. Under what was referred to by the Attorney General as the "wet-back" cases,[407] the federal government charged thousands of laborers, gave them little or no jail time, and sent them home.[408] In Arizona, the U.S. Attorney's Office instituted a policy of prosecuting all illegal border crossers.[409] Simple illegal entry rose quickly to become the most prosecuted crime on the entire federal docket.[410] A similar pattern occurred during an immigration ramp-up in the early 1930s. This period also

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istrate Judge Norbert Garney of the Western District of Texas describing Operation Streamline as "assembly-line justice").

[406] *See* TRAC IMMIGRATION, SURGE IN IMMIGRATION PROSECUTIONS CONTINUES (2008), http://trac.syr.edu/immigration/reports/188/ (reporting median sentences for all immigration convictions at two months in San Diego, one month in Arizona and New Mexico, and zero months in the Southern and Western Districts of Texas, based on data through March 2008); Cantu Interview, *supra* note 156 (clarifying that Streamline defendants that do not have any record almost always receive sentences of "time served"); Willimann Interview, *supra* note 285 (explaining that the longest sentence he has heard of in Tucson's Streamline program is thirty days).

[407] DIR. OF THE ADMIN. OFFICE OF THE U.S. COURTS, ANNUAL REPORT 112 (1953). For additional discussion of "Operation Wetback," see KELLY LYTLE HERNÁNDEZ, MIGRA!: A HISTORY OF THE U.S. BORDER PATROL 151–217 (2010).

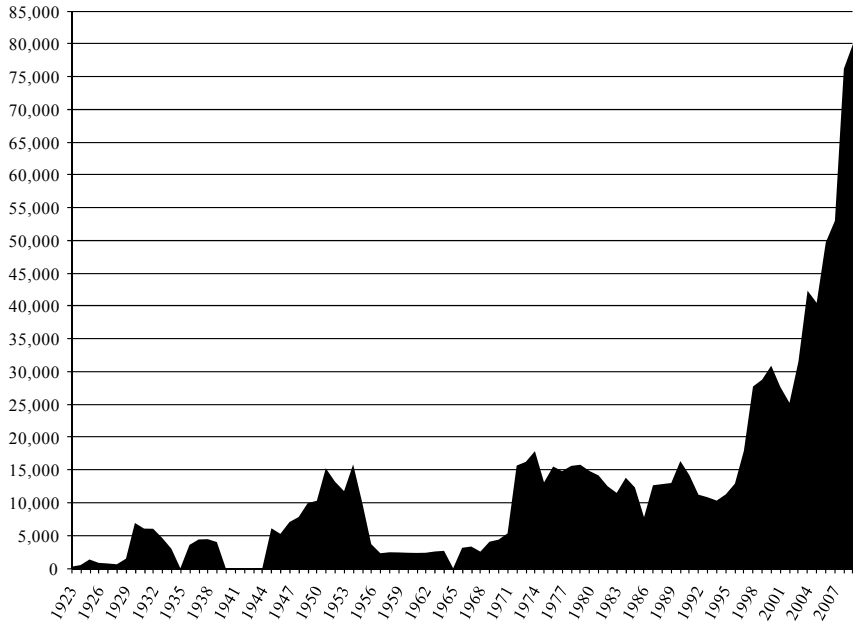
[408] *Hearing Before the Subcomm. of the S. Comm. on Appropriations*, 82d Cong. 160–61 (1951) (statement of J.M. McInerney, Assistant Att'y Gen.) (requesting that his budget be nearly doubled due to the increased need to criminally prosecute "Mexican laborers coming across the Rio Grande and at other points along the southern border to seek employment in the Southwestern States and in California"); *Immigration and Naturalization: Hearing Before the Subcomm. on Immigration & Naturalization of the S. Comm. on the Judiciary*, 80th Cong. 8 (1948) (unpublished hearing on file with author) (criticizing "lenient" sentencing practices of federal judges in California).

[409] *Arizona Jails Full in "Wetback" Drive*, N.Y. TIMES, June 21, 1953, at 33 (discussing the zero-tolerance prosecution policy, and noting that prior to the prosecution surge only one in seven arrested entrants was prosecuted).

[410] *See infra* Figure 4; *see also* DIR. OF THE ADMIN. OFFICE OF THE U.S. COURTS, ANNUAL REPORT 118 (1959) (showing that, in 1954, immigration-related cases represented 38% of the total caseload). This high number of immigration prosecutions was almost entirely attributable to illegal entry prosecutions. *See* U.S. DEP'T OF JUSTICE, INS, ANNUAL REPORT 9 (1952) (reporting that 91% of immigration prosecutions were for illegal entry); U.S. DEP'T OF JUSTICE, INS, ANNUAL REPORT 10 (1951) (reporting that 94% of immigration prosecutions were for illegal entry); *see also* Saunders & Leonard, *supra* note 113, at 77 (discussing the surge in immigration prosecutions in the Southwest in 1950, which were accompanied by only "token punishment").

was marked by criminal prosecutions along the border typified by simple illegal entry charges, elevated guilty plea rates, and short sentences.[411]

FIGURE 4: TOTAL IMMIGRATION CRIME CASES TERMINATED IN U.S. DISTRICT COURTS (1923–1935); TOTAL IMMIGRATION CRIME DEFENDANTS TERMINATED IN U.S. MAGISTRATE AND U.S. DISTRICT COURTS (1936–2009).



Sources: U.S. DEPARTMENT OF JUSTICE, ANNUAL REPORTS OF THE ATTORNEY GENERAL (1923–1939); DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE U.S. COURTS, ANNUAL REPORTS (1944–2009).

Even outside the specific context of immigration crime, the criminal law can function as a border screening device. At the state and local level, police can enforce petty criminal laws with the goal of engaging in border screening. For example, the Criminal Alien Program (CAP), now implemented in many jails, allows local authorities to hold noncitizen arrestees in custody so that removal proceedings can be pursued. A recent study of this jail-based program in Irving, Texas, found that, after it began, discretionary arrests of Latinos for low-level offenses (such as minor traffic offenses) rose dramatically.[412] Arrest data obtained from Irving, Texas, suggest that

[411] Together, Figures 1 and 4 reflect the corresponding increases in immigration prosecution and guilty plea rates that occurred at the end of the 1920s and early 1930s. Also, see NAT'L COMM'N ON LAW OBSERVANCE & ENFORCEMENT, REPORT ON THE ENFORCEMENT OF THE DEPORTATION LAWS OF THE UNITED STATES 113–14 (1931), for a description of the high number of guilty pleas in immigration prosecutions, and CLARK, *supra* note 84, at 269–70, for an account of the use of short and suspended sentences during this period.

[412] TREVOR GARDNER II & AARTI KOHLI, CHIEF JUSTICE EARL WARREN INST. ON RACE, ETHNICITY & DIVERSITY, UNIV. OF CAL., BERKELEY LAW SCH., POLICE BRIEF: THE C.A.P.

criminal authorities participating in CAP may have engaged in racial profiling: immediately after the program's implementation, local police arrested Latinos for petty misdemeanor offenses in significantly higher numbers than whites or African-Americans.[413] Moreover, the initiation of the program coincided with a shift in criminal law enforcement priorities away from felonies and toward petty offenses. In fact, almost all of those detained under the program were arrested for only misdemeanor offenses.[414]

The criminal law is particularly potent as immigration law when defendants otherwise have, or might obtain, legal status to live in the United States. In such cases, intervention by the criminal prosecutor can actually distort the normal function of immigration law. In the immigration crime context, Postville provides one example of this dynamic. Whereas immigration law may have granted some of the Postville workers a legal right to remain in the United States, the criminal law intervened to deport all those who were targeted by criminal prosecutors.

Another important example is the government's criminal prosecution of asylum seekers for using false identity documents to escape their countries of origin.[415] Under civil immigration law, DHS is prohibited from bringing removal proceedings against certain refugees based on document fraud.[416] This prohibition, which recognizes that asylees may need to resort to false documents in order to flee countries where they are persecuted, is also embodied in international law.[417] Although immigration and international law both require asylum to be granted without regard to document fraud, certain criminal convictions can bar eligibility for asylum under United States law.[418] In other words, although asylum petitions remain viable under the immigration law despite the use of false documents, an asylum claim can be trumped by an intervening criminal prosecution. What is more, in contrast to immigration law's explicit limitation on using docu-

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EFFECT: RACIAL PROFILING IN THE ICE CRIMINAL ALIEN PROGRAM 1 (2009), *available at* http://www.law.berkeley.edu/files/policybrief_irving_FINAL.pdf.

[413] *Id.* at 2, 4.

[414] *Id.* at 1–2 (reporting that, since the program began in 2006, 98% of arrestees were charged with misdemeanors and only 2% with felonies).

[415] *See* Stanley Mailman & Stephen Yale-Loehr, *Detaining and Criminalizing Asylum Seekers*, 8 BENDER'S IMMIGR. BULL. 763 (2003) (discussing the increased criminal prosecution of asylum applicants).

[416] 8 C.F.R. § 270.2(j) (2009).

[417] United Nations Convention Relating to the Status of Refugees art. 31(1), July 28, 1951, 189 U.N.T.S. 150 (prohibiting the imposition of penalties for illegal entry provided that refugees present themselves to authorities without delay). The United States is not a signatory to the Convention but is obligated to comply. *See* Protocol Relating to the Status of Refugees art. 1(1), Jan. 31, 1967, 19 U.S.T. 6223.

[418] Immigration law bars asylum for an alien who is convicted of a "particularly serious crime" in the United States that makes him or her "a danger to the community." 8 U.S.C. § 1158(b)(2)(A)(ii) (2006). "[P]articularly serious crimes" include aggravated felonies as well as other crimes so designated by the Attorney General. *Id.* § 1158(b)(2)(B)(i)–(ii).

ment fraud to justify discretionary denials of asylum, there is no parallel regulation in criminal law that restricts the prosecution of asylum seekers.

The recent cases of asylum-seekers Linda Malenge[419] and Ramatulai Barry[420] illustrate this problem. According to court documents, Linda Malenge was arrested on an Amtrak train with a fake passport as she attempted to join her refugee husband in the United States.[421] Her father had been murdered by government officials in the Democratic Republic of Congo, and her brother had been missing since 2003.[422] Fearing for her life, she made arrangements for her five-year-old son and fled the country.[423] Ramatulai Barry was similarly arrested with a false passport as she crossed the border.[424] Ms. Barry was attempting to escape Guinea, where she had been tortured and raped by prison guards, to join her husband in the United States.[425]

Both women applied for asylum, but the Government chose to criminally prosecute them before adjudicating their asylum applications.[426] Before the criminal court, the Government argued that international law and administrative immigration regulations could not bar the criminal prosecution.[427] On review, the Second Circuit openly criticized the government's practice of prosecuting asylum seekers—calling it "troubling, to say the least"—but declined to find that the court had "authority to prevent [Malenge's criminal] prosecution in order to protect the substance of her asylum claims."[428]

This Article's functional analysis of the criminal law has some parallels to a distinction that Daniel Kanstroom has drawn in the context of deportation law. In his view, deportation law acts as "extended border control" when it enforces standards of admission and exclusion.[429] In contrast, it acts as "post-entry social control" when it regulates social behavior after legal entry—the quintessential example being the deportation of long-

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[419] United States v. Malenge (*Malenge II*), 294 F. App'x 642 (2d Cir. 2008).

[420] United States v. Barry (*Barry II*), 294 F. App'x 641 (2d Cir. 2008).

[421] Declaration of Linda Adeline Malenge at 2, United States v. Malenge (*Malenge I*), 472 F. Supp. 2d 269 (N.D.N.Y. 2007) (No. 06-CR-70), 2006 WL 4824692.

[422] *Id.* at 1–2.

[423] *Id.* at 2.

[424] *Barry II*, 294 F. App'x at 641.

[425] *Id.*

[426] *See* Reply to Government's Response in Opposition to Defendant's Motion to Dismiss at 2, *Malenge I*, 472. F. Supp. 2d 269 (No. 06-CR-70), 2006 WL 4686655; Reply to Government's Response in Opposition to Defendant's Motion to Dismiss at 2, United States v. Barry (*Barry I*), 500 F. Supp. 2d 125 (N.D.N.Y. 2007) (No. 06-CR-356), 2007 WL 2788143.

[427] *See* Government's Memorandum in Opposition to Defendant's Motion at 5, *Barry I*, 500 F. Supp. 2d 125 (No. 06-CR-356), 2007 WL 2788142.

[428] *Malenge II*, 294 F. App'x 642, 644 (2d Cir. 2008).

[429] KANSTROOM, *supra* note 28, at 5–6.

term legal residents based on petty criminal conduct.[430] This conceptual distinction between border control and social control is useful in understanding the role of criminal law as immigration law. The criminal law can, of course, perform a social control function—influencing the way that people behave. For example, criminal immigration law shapes how the undocumented people live in the United States,[431] the dangers that they endure upon crossing,[432] and the punishment they receive if caught. Yet as in the deportation context, the criminal law can also serve a border control function—enforcing standards of admission and exclusion. Plea-bargained immigration status, mandatory immigration removal, and border screening are three of the principal mechanisms that allow the criminal law to act as border control.

However, the criminal law does not operate exclusively as either border control or social control. Instead, when noncitizens are prosecuted, the criminal law necessarily takes on a dual functionality.[433] That said, in some cases, the primacy of the social control function of criminal punishment fades—particularly with probationary or "time served" sentences. At the same time, the border control role of criminal prosecution may become more pronounced—for example, when waivers of immigration rights that would not be obtained on the immigration side are pressed into the criminal plea. Nonetheless, the two functions of border and social control necessarily remain connected in the context of criminal prosecution of noncitizens—whether the criminal charge is immigration crime or some other type of crime, such as murder, fraud, or a traffic violation.

Despite the consistent rise in criminal immigration prosecution over the past century, underenforcement remains a hallmark of the immigration system.[434] Indeed, the sustained presence of a large illegal immigrant popu-

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[430] *Id.* According to Kanstroom, when immigration law functions as "post-entry social control," it applies in criminal-like punishment, and constitutional protections ought to apply. *Id.* at 6, 19.

[431] Smith, *supra* note 31, at 749–64.

[432] *See* SUSAN BIBLER COUTIN, NATIONS OF EMIGRANTS: SHIFTING BOUNDARIES OF CITIZENSHIP IN EL SALVADOR AND THE UNITED STATES 10 (2007) ("Stiffened border enforcement can lead to increased suffering as would-be migrants pay smugglers higher fees and resort to more deadly methods of clandestine entry, while increased reliance on prosecution and deportation can create a permanent underclass of unauthorized residents." (internal citations omitted)).

[433] For related commentary, see Cox, *supra* note 54, at 343, which argues that Kanstroom's distinction between border and social control is "false" because "*any* territorially bounded rule that imposes a duty on a person" exerts dual pressures of selection and control.

[434] *See, e.g.*, Hiroshi Motomura, *Immigration Outside the Law*, 108 COLUM. L. REV. 2037, 2049 (2008) ("[C]hronic and intentional underenforcement of immigration law has been de facto federal policy for over a century . . . . "); Alexandra Natapoff, *Underenforcement*, 75 FORDHAM L. REV. 1715, 1735 (2006) (characterizing the systematic underenforce-

lation in the United States can be viewed as a policy choice to encourage migration rather than to vigorously enforce the immigration laws.[435] The undocumented population in the United States unquestionably provides a useful, low-cost labor supply. Dependence on the immigrant workforce has translated into resistance, or at least indifference, to mass enforcement of immigration laws. Indeed, Congress has structured both deportation and criminal law to support this system for illegal immigration, giving the government broad-based discretion without expecting total enforcement.[436]

Other aspects of immigration's structure also embody this indifference. Although illegal entry can subject the violator to criminal prosecution, there is a long history of a parallel set of rules in the civil immigration law that forgive illegal entry. Indeed, immigration law, at least in part, reflects an ideology that those who come to the United States should be treated based on the ties that they form here, rather than on their method of entry.[437] For example, despite illegal entry, immigration law still allows long-term undocumented migrants to adjust their status to that of a legal permanent resident in certain cases.[438] Immigration law also offers visas for certain victims of crime who would otherwise be subject to removal.[439] Perhaps the clearest example of broad-based forgiveness of illegal status is the tradition of immigration amnesty, granted most recently in 1986.[440]

The current system for unauthorized immigration has often been described as a substitute for an expanded legal immigration system.[441] The government may prefer to rely on unauthorized migration instead of legal

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ment of immigration law as the "paradigmatic example of the failure of the government enforcement apparatus").

[435] *See* Bill Ong Hing, *The Immigrant as Criminal: Punishing Dreamers*, 9 HASTINGS WOMEN'S L.J. 79 (1998) (discussing the racial origins of U.S. immigration law that has simultaneously lured workers while criminalizing them); Gerald P. López, *Undocumented Mexican Migration: In Search of a Just Immigration Law and Policy*, 28 UCLA L. REV. 615, 618 (1981) ("[O]ur country has actively promoted migration and half-heartedly enforced immigration laws . . . . ").

[436] *See* Neuman, *supra* note 110, at 611 (discussing this point in the deportation context).

[437] *See* HIROSHI MOTOMURA, AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES 9, 151–52 (2006) (introducing "immigration as transition" and "immigration as affiliation" as two concepts that reflect this view).

[438] *Id.* at 99 (discussing the availability of cancellation of removal for undocumented residents whose relatives would otherwise suffer "exceptional and extremely unusual hardship" or for those who have lived in the country since 1972).

[439] *See* Leopold Statement, *supra* note 119, at 112.

[440] The Immigration Reform and Control Act of 1986 created a path to permanent residence for most unlawfully present noncitizens that had been in the United States since January 1982. Pub. L. No. 99-603, 100 Stat. 3359 (1986) (codified as amended at 8 U.S.C. § 1255a (2006)).

[441] *See, e.g.*, Cox & Posner, *supra* note 24, at 846–47, 851 (suggesting that the underenforcement of laws against illegal immigration demonstrates a conscientious preference over a legal immigration program).

migration because it allows the government to retain discretionary enforcement power while providing few constitutional or statutory protections to the undocumented population.[442] This Article thus contributes to the understanding of the structure of immigration enforcement by clarifying that, in practice, the immigration screening decision is not always reserved for the civil immigration system. Instead, it can be situated within the criminal prosecution itself. The structure of immigration law, which over time has taken away most discretion to prevent removal once a noncitizen is criminally convicted of certain crimes, intensifies the immigration role of the criminal law. The criminal law's screening role is also fostered by the administrative reality of the criminal process, which has absorbed various plea-bargain-based models for adjudicating immigration status within the criminal case.

Finally, this analysis of the immigration function of the criminal law also suggests why the government might be motivated to use the criminal law to regulate immigration. The conventional understanding of the criminal-civil divide teaches that, given the choice between civil and criminal enforcement, the government chooses civil enforcement because it is cheaper, more efficient, and avoids constitutional challenges.[443] According to this understanding, civil immigration proceedings have the distinct advantage of evading the exacting standards of criminal procedure.[444]

This Article's reframing of the criminal prosecutor as the de facto immigration screener reveals how, in practice, each system actually offers a distinct set of advantages. Indeed, efficiency and burden of proof can work in both directions. Compare, for example, Postville's criminal processing of guilty pleas and removal orders in only a few days with the outcome of a similar workplace raid that same year, which was conducted in Van Nuys,

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[442] As Adam Cox and Eric Posner have argued, the government can remove someone who has entered illegally with much greater ease than it can remove someone who has been granted legal permission to reside in the United States. *Id.* at 846, 851 (stressing that screening takes place on an ex post basis in the illegal system, and an ex ante basis in the legal system).

[443] *See generally* Susan R. Klein, *Redrawing the Criminal-Civil Boundary*, 2 BUFF. CRIM. L. REV. 679, 709–14 (1999) (detailing how civil sanctions can evade the protections associated with the criminal system); Issachar Rosen-Zvi & Talia Fisher, *Overcoming Procedural Boundaries*, 94 VA. L. REV. 79, 121–32 (2008) (describing the literature regarding practical and constitutional implications of the criminal-civil divide).

[444] *See, e.g.*, Muneer I. Ahmad, *A Rage Shared by Law: Post-September 11 Racial Violence as Crimes of Passion*, 92 CAL. L. REV. 1259, 1272 (2004) ("Where noncitizens are involved, immigration law provides the government with far greater latitude to engage in preventive practices than does the criminal law."); Susan Bibler Coutin, *Contesting Criminality: Illegal Immigration and the Spatialization of Legality*, 9 THEORETICAL CRIMINOLOGY 5, 13 (2005) (noting that "immigration officials' use of civil proceedings permits them to remove aliens more efficiently" than in the criminal system); *see also supra* note 18 (listing additional sources).

California.[445] In Postville, the workers waived their administrative immigration rights with speedy criminal pleas despite the fact that many may have been eligible for cancellation of removal, adjustment of status, asylum, or other relief.[446] In Van Nuys, in contrast, around 130 workers were processed administratively, and only a handful were criminally prosecuted.[447] Unlike the criminal defendants in Postville who have already served their sentences and been removed from the country, the Van Nuys workers who were civilly charged with removal have filed constitutional challenges in immigration court. Now, over two years later, some of the workers have succeeded in winning termination of their removal proceedings.[448] Other cases are still pending in the courts.[449]

Why this reversal of the standard efficiency equation? Formally, the civil system can only threaten removal, whereas the criminal system can impose jail time as well as removal. This distinction allows the criminal system considerable power in pressing a desired immigration screening result. The bottom line is that the combined criminal-civil immigration system incentivizes the use of the criminal system to obtain a desired immigration screening result.

CONCLUSION

This Article has argued that, rather than view the criminal justice system and immigration enforcement as separate institutions with entrenched doctrinal divisions, a more accurate picture can be drawn by examining the ways in which the two systems interact in practice. This shift in focus reveals that the civil immigration system and the criminal justice system are a single, intertwined regulatory bureaucracy that moves between criminal and civil enforcement mechanisms in a manner that blurs and reshapes law enforcement power, prosecutorial incentives, and the aims of the criminal law.

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[445] *See* Gorman, *supra* note 388.

[446] *See supra* notes 113–37 and accompanying text.

[447] *See* Gorman, *supra* note 388.

[448] *See id.*

[449] Telephone Interview with Stacy Tolchin, Staff Attorney, Van Der Hout, Brigagliano & Nightingale, LLP (July 27, 2010).