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## IMMIGRATION LAW AND THE FOURTH DIMENSION

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### Introduction

Criminal law and immigration law play different roles, one serving to regulate conduct within a community, and the other governing the entry and expulsion of individuals across borders. From that perspective, it makes sense for localities to police criminal conduct and national governments to regulate immigration. Criminal law and immigration law have in common that they serve as systems for excluding individuals from the community.<sup>2</sup>

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<sup>2</sup> See generally Nora V. Demleitner, *Preventing Internal Exile: The Need For Restrictions On Collateral Sentencing Consequences*, 11 STAN. L. & POL'Y REV. 153, 158 (1999) (describing ex-offenders and permanent residents as societal outsiders); Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U.

Crimmigration law, or the intersection of immigration and criminal law,<sup>3</sup> combines and heightens the exclusionary power of criminal and immigration law.<sup>4</sup> Three mechanisms enable this exclusion. First, by expanding the number of crimes that constitute deportability grounds, crimmigration law excludes noncitizens by removing them beyond the physical borders of the nation.<sup>5</sup> At the same time, by expanding the type of immigration-related conduct that constitutes a crime, crimmigration law excludes noncitizens from U.S. society through incarceration and then deportation, or through a plea bargain that includes deportation.<sup>6</sup>

Second, by creating a dual-track process that provides fewer procedural protections for noncitizens than for citizens, crimmigration law excludes noncitizens from equal access to the criminal justice system.<sup>7</sup> Finally, crimmigration law tends toward removing the discretion not to exclude or deport that is traditionally held by institutional actors such as immigration authorities and criminal sentencing judges.<sup>8</sup>

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L. REV. 367 (2006) (applying membership theory to map the exclusionary effects of the criminalization of immigration law).

<sup>3</sup> Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetrical Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469 (2007); Jennifer Chacón, *Managing Migration Through Crime*, 109 COLUM. L. REV. Sidebar 135 (2009); Raquel Aldana, *Of Katz and "Aliens": Privacy Expectations and the Immigration Raids*, 41 U.C. DAVIS L. REV. 1081 (2008); Raquel Aldana, *Aliens in Our Midst Post-9/11: Legislating Outsiderness Within the Borders*, 38 U.C. DAVIS L. REV., 1683 (2005); Raquel Aldana, *The September 11 Immigration Detentions and Unconstitutional Executive Legislation*, 29 S. ILL. U. L.J. 5 (2004-2005); Kris Kobach, *The Quintessential Force Multiplier: The Inherent Authority of Local Police to Make Immigration Arrests*, 69 ALB. L. REV. 179 (2005-2006).

<sup>4</sup> See Demleitner, *supra* note 2, at 158; Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367 (2006).

<sup>5</sup> Stephen Legomsky describes this as the second "port of entry" through which the criminal enforcement model has entered immigration law. Legomsky, *Asymmetrical Norms*, *supra* note \_\_, at 482-86. See also Stumpf, *Crimmigration Crisis*, *supra* note 2, at \_\_ (describing the exclusive nature of criminalizing immigration-related conduct); Juliet P. Stumpf, *Fitting Punishment*, 66 WASH. & LEE L. REV. 1683, 1721 (2009) (describing the evolution of expanded criminal penalties in the immigration law arena).

<sup>6</sup> This is Professor Legomsky's first "port of entry" through which the criminal enforcement models enters immigration law. See Legomsky, *Asymmetrical Norms*, *supra* note \_\_, at 476-82. See also Stumpf, *Crimmigration Crisis*, *supra* note \_\_, at \_\_ (describing the criminalization of immigration law as an exclusionary force).

<sup>7</sup> See *infra*, notes \_\_ - \_\_ and accompanying text.

<sup>8</sup> The role of discretion in immigration law generally has been incisively explored by several scholars. See Daniel Kanstroom, *The Better Part of Valor: The Real ID Act, Discretion, and the "Rule" of Immigration Law*, 51 N.Y. L. SCH. L. REV. 161, 166 (2006-2007) ("Discretion has been so deeply intertwined with statutory immigration law for more than fifty years that much of the whole enterprise could fairly be described as a fabric of discretion. This is particularly true of deportation law."). See generally Daniel Kanstroom, *Surrounding the Hole in the*

This paper explores the nature of these exclusions. It posits that the establishment of crimmigration law narrows the decision whether to exclude to a single moment in time: the moment of the crime. That singular focus on the moment of the crime exempts from consideration any events occurring prior to or after the crime for which the noncitizen may be prosecuted or is deportable.

By evaluating only the moment of the crime, immigration status and other circumstances become irrelevant to the determination whether to exclude the noncitizen. Focus on that moment has the effect of flattening the hierarchy of immigration status -- from permanent resident to temporary visitor to undocumented migrant -- that has historically informed the level of constitutional and statutory rights granted to individual noncitizens.<sup>9</sup>

Crimmigration law differs from both immigration law and criminal law in this respect. In deciding whether to deport a noncitizen, immigration law generally takes into account events and relationships beyond those relating to the deportability ground, such as close family ties created before or after the conduct triggering deportability, or circumstances raising humanitarian concerns.<sup>10</sup> Criminal law disregards prior events such as the existence of family ties or humanitarian concerns when making the determination of guilt.<sup>11</sup> Criminal law's graduated

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*Doughnut: Discretion and Deference in U.S. Immigration Law*, 71 TUL. L. REV. 703, 709 (1997) (describing U.S. immigration law in practice as a "fabric of discretion and judicial deference"); Gerald L. Neuman, *Discretionary Deportation*, 20 GEO. IMMIGR. L.J. 611, 614 (2006) (describing deportation "as a rule-governed sanction with enforcement discretion"). See also *Jill Family*, *Stephen Legomsky*, *Hiroshi Motomura*.

<sup>9</sup> See David A. Martin, *Graduated Application of Constitutional Protections for Aliens: The Real Meaning of Zadvydas v. Davis*, 2001 SUP. CT. REV. 47, 107 (2001) (describing a graduated categorical approach to noncitizens' rights); HIROSHI MOTOMURA, *AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES* \_\_ (2006).

<sup>10</sup> See *infra*, notes \_\_\_ - \_\_\_ (categorizing the events and relationships that are relevant to relief from removal in ordinary removal cases).

<sup>11</sup> Provisions in the Federal Sentencing Guidelines assert the "general inappropriateness" of considering "family ties and responsibilities" in setting a term of imprisonment. U.S.S.G. § 5H1.6 (1995); see also 28 U.S.C. § 994(e) (1995). Family and community ties, however, are relevant to "the nature, extent, place of service, or other incidents of an appropriate sentence." 28 U.S.C. § 994(d) (1995). This position has been soundly critiqued. See Jack B. Weinstein, *The Effect of Sentencing on Women, Men, the Family, and the Community*, 5 COLUM. J. GENDER & L. 169, 178 (1996) (generally critiquing the Guidelines approach, and stating "[i]n certain cases, in view of the

sentencing scheme, however, does take into account events occurring after the crime: whether and when the defendant will re-join U.S. society.<sup>12</sup>

In contrast, by combining a high (sometimes certain) probability of deportation with criminal bars to lawful re-entry,<sup>13</sup> crimmigration law privileges the moment of the crime as the determining factor for often permanent exclusion. Crimmigration law thus disregards the events and relationships that otherwise factor into decisions to waive deportation. By establishing permanent exclusion as the touchstone consequence, it similarly ignores the future question of re-introduction into the community that is a central concern of criminal sentencing. Thus, the recent trend toward harsher and more punitive ways of intermeshing immigration and criminal law represents a decision to exclude noncitizens from U.S. society that is analogous to a life sentence – but one imposed *ex ante* by Congress rather *ex post* by a judge with discretion to assess the individual circumstances before her.

Part I of this article will describe the three ways in which crimmigration law restricts the focus of the exclusion decision to the moment of the crime. Part II assesses whether there are justifications for structuring the decision in that way. It analyzes the contractual theory of immigration law, which envisions crime committed by noncitizens as the breach of a bargain between the government and the noncitizen. It also examines punishment theory as a justification for crimmigration law.

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necessity of maintaining family stability in environments where father role models are few and far between, downward departures from the Guidelines and a search for alternatives to incarceration are a necessity for male defendants”); Jody L. King, *Avoiding Gender Bias in Downward Departures for Family Responsibilities Under the Federal Sentencing Guidelines*, 1996 ANN. SURV. AM. L. 273, 301 (1996) (suggesting that “the decision to grant a downward departure for family responsibilities turns on the need of the defendant’s dependents”); Placido G. Gomez, *The Struggle Against Unwarranted Uniformity: The Evolution of Federal Sentencing Departures Based on Extraordinary Family Circumstances-The Case of Low-Level Drug Offenders*, 21 J. MARSHALL L.REV. 77, 90 (1995) (recommending alternatives to incarceration for low-level drug offenders with extraordinary family responsibilities).

<sup>12</sup> cites

<sup>13</sup> See *Immigration and Nationality Act (“INA”) § 237(a)(3)(setting out criminal grounds for deportability); INA § 212(a)(9) (setting out the bars to re-entry). See also Padilla v. Kentucky*, 130 S.Ct. 1473 (2010) (describing the immigration consequences of criminal convictions).

Part III critiques the focus on the moment of the crime. It argues that this approach is inconsistent with the classic law and economics model, runs counter to the idea of immigration-as-transition, and conflicts with the basic notion of the individual as a collection of many moments composing our experiences, relationships, and circumstances. Part IV suggests a new approach.