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*Crimmigration: At the Intersection of Criminal and Immigration Law***

***Fitting Punishment*  
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Thank you for being here on a Saturday morning when I realize you could be on your way home.

My current research project is called *Fitting Punishment*, for reasons which will hopefully become apparent. I'll start by briefly describing what crimmigration law is, and then take up one aspect of crimmigration law that doesn't fit the mold: sanctions for immigration law violations.

Crimmigration law refers to the convergence of criminal law with immigration law. The criminalization of immigration law has transformed the landscape of immigration enforcement as criminal enforcement norms have become entwined with the fabric of US immigration law. Since the early 1980s, we've seen a trend toward criminalizing violations of immigration law and broadly imposing immigration consequences for criminal acts.

The first aspect of crimmigration law is criminalizing violations of immigration law. Immigration-related conduct that was previously either not unlawful or handled as a civil matter has often been transformed into a crime. In 1986, Congress provided for imprisonment and criminal fines for a pattern or practice of knowingly hiring undocumented workers, and then that same year created the crime of marrying to evade immigration laws. Since then Congress has created a host of new immigration crimes, including falsely claiming U.S. citizenship to obtain a benefit or employment and failing to cooperate in the execution of one's removal order.

Congress has also imposed immigration consequences for criminal acts. Tax evasion, forgery, certain gambling offenses, and offenses related to skipping bail are deportable offenses, to name just a few. Congress has also included many minor crimes in the deportation ground for “aggravated felonies,” including crimes that are actually misdemeanors under state law.

Procedurally, what that means is that a noncitizen can be convicted for a crime in the normal course of the criminal justice system, serve a sentence, and then be subject to a civil removal proceeding to determine deportability.

Enforcement of these crimmigration laws has increased. Immigration-related prosecutions currently outnumber all other types of federal criminal prosecutions, including drugs and weapons crimes. A recent worksite raid in Postville, Iowa resulted in hundreds of meatpacking workers pleading to criminal charges relating to their use of false documents to get employment at the plant – conduct that was unnecessary prior to 1986, and usually handled as an administrative matter through immigration proceedings, not through the criminal justice system. The Postville raid was big news, but wasn’t a new tactic. ICE has for a long time been prosecuting border crossers in the south in an effort called Operation Streamline. Postville is merely an example of the shift of crimmigration enforcement from the border to the interior.

Together, these developments are what I have been calling “crimmigration law.” Crimmigration law is our current approach to immigration enforcement. As a phenomenon, it might start to explain why Congress has been stymied in passing comprehensive immigration reform – or really any immigration law beyond building a bigger wall. Crimmigration in a post-9-11 world paints a different picture of the alien as “illegal” and frightening -- a criminal and potential terrorist. When

employers, family members, immigrant rights groups, and others push for comprehensive immigration reform, that image of the criminal alien terrorist makes it increasingly difficult for many members of Congress to take action that includes legalization.

While the enforcement of immigration law has imported substantive criminal law norms, it has left behind the procedural protections that underlie the criminal justice system: the right to a trial by an Article III court, the right to a jury trial, the right to counsel at government expense, the right not to incriminate oneself, etc.

Today I'd like to address a different failing of immigration law: the absence in immigration law of the kind of graduated system of sanctions upon which criminal punishment is based. In particular, criminal justice norms that influence the framework of criminal penalties have found no foothold in immigration law.

If deportation is properly considered a sanction within immigration law and not solely a means of correcting an unlawful situation (and in *Bridges v. Wixon*, the Court acknowledged that it is a penalty, even if not a criminal punishment), immigration law is unique in its approach to sanctioning violations. While criminal punishment is animated by the idea that the punishment should be proportionate to the crime, proportionality is absent from immigration law. Criminal law embodies proportionality in punishment schemes that impose milder sanctions such as short or suspended sentences for lesser crimes, and harsher sanctions for graver crimes.

In contrast, the Immigration and Nationality Act employs deportation as an on-off switch. The statutory sanction for almost every immigration violation is removal from the country. The availability of relief from deportation means that deportation is not always effected. But regardless of whether the immigration violation is grave or slight, the statutory penalty

is removal, and that becomes the focus of the removal proceeding. A college student with a student visa who works an hour over the maximum mandated by law is removable from the United States for violating the terms of her visa to the same extent that a serial killer on a tourist visa is removable as an “aggravated felon” (now that’s an interesting vacation).

As a practical matter, the enforcement priorities of the Immigration and Customs Enforcement agency place the felon in greater danger of deportation than the over-achieving student. Nevertheless, under the Immigration and Nationality Act, the consequence for violating immigration law paints both with the same brush.

Other consequences for immigration violations are occasionally imposed, but they are in addition to deportation, not instead of it. Some examples are incarceration, fines, or bars to re-entering the United States. Criminal conduct that also constitutes an immigration violation can result in truncated review of the individual’s claim to valid immigration status. Yet these consequences merely accompany deportation. Unlike criminal sentencing schemes that erect ladders of progressively harsher sanctions, immigration law begins with deportation as a consequence of any violation, and then piles additional sanctions on top of it.

My article proposes to introduce proportionality norms into immigration law. Particularly in light of the criminalization of immigration law, it makes sense for immigration law to have a system of graduated sanctions like that in criminal law. Minor violations, especially if committed by those with significant ties to this country would result in lesser penalties. More serious violations, especially if committed by those with little stake in this country, could result in harsher penalties, and potentially removal from the United States.

Historically, our immigration penalty scheme drew from criminal punishment. Criminal penalties, including incarceration, fines, and hard

labor, were the first tools Congress chose to enforce early immigration laws. The Chinese Exclusion Act of 1882 subjected the master of any vessel who knowingly transported a Chinese laborer to imprisonment for up to one year. So did aiding a Chinese person who was ineligible to lawfully enter the U.S. In 1884, aiding a noncitizen's entry in violation of the anti-Chinese labor contract laws could lead to a fine of \$500. A fraudulent immigration certificate could lead to imprisonment for up to 5 years. I won't argue that these penalties match the gravity of the violation with the size of the penalty – it's more likely that they match the degree of racism toward Chinese immigrants at the time.

So what would an immigration sanctions scheme look like if it incorporated proportionality? First, criminal law employs a spectrum of severity, imposing lighter sentences for lesser crimes and harsher sentences for more serious crimes. This has resulted in a system reflecting a range of penalties, including suspended sentences, parole, criminal fines, and community service requirements.

Second, criminal sentencing usually takes into account both the nature of the violation and the circumstances surrounding it. For example, crimes involving violence against persons tend to trigger harsher punishment than nonviolent crimes against property. The motive of the criminal defendant are relevant in setting the sentence. A graduated system of sanctions would incorporate these considerations into the sanctions scheme.

I propose a proportionate system of sanctions for immigration violations that would consider: (1) the gravity of the violation, (2) the stake that the noncitizen has in this country, (3) any benefit to the United States of imposing the proposed sanction and, conversely, any harm to the United States, the noncitizen, or other individuals resulting from its imposition.

This multi-factor analysis results in a spectrum of sanctions. When the immigration violation is relatively minor, the circumstances surrounding it warrant mitigation, and the individual has strong ties to the country – and therefore a strong stake in remaining, the sanction should be lighter. When the immigration violation is egregious, the surrounding context reprehensible, and the individual has few ties to the United States, the sanction should be heavier.

In the paper, I apply this scheme to several categories of citizenship status to illustrate how the analysis might work, but I'll just give a few examples here.

First, let's consider a lawful permanent resident who has resided in the US for 20 years, has a U.S. citizen wife and 2 kids and a steady job as a landscaper. Most lawful permanent residents facing deportation under current law are subject to the criminal deportability grounds. So assume he is convicted for tax evasion, which is an aggravated felony under immigration law.

The scheme I propose would first take into account the gravity of the crime – tax evasion, perhaps by looking at how criminal punishment for that crime measures up against other crimes. Second, the permanent resident's stake in the US – here, strong family ties, interest in continued employment, perhaps community ties.

Third, the benefit or harm to the US of imposing the proposed sanction. That's where things get interesting. Let's start with deportation as one possible sanction. One argument is that deportation would benefit the US by ridding the country of a noncitizen who is unfit to become a USC. It would also deter others from similar crimes.

On the other hand, there are US persons who would be harmed by deportation – the resident family members and the employer. Other harms that may result if our permanent resident plays an economic or caretaker

role in the family. The state may have to use scarce resources such as welfare benefits to substitute for the deported father. So deportation may be too blunt a sanction in that circumstance.

Alternative sanctions, such as fines, conceivably achieve the deterrence purpose, but admittedly fail to remove a tax evader who has signaled unwillingness to take on the burdens of US citizenship. A fine would have less of a negative impact on the family and employer, and (unless it's very big) on the state's resources. Another approach is to consider the criminal sentence imposed for the conviction sufficient to stand in for the immigration sanction.

Now contrast a permanent resident who entered the US less than a year ago as the spouse of a US citizen. His crime is murder, and the victim was his spouse. So the gravity of the crime is severe. Stake in the US is now pretty weak, since the basis for his immigration status was his wife and he hasn't had time to form other ties. Benefit to the US of various sanctions: deportation would rid the country of a convicted murderer, and there isn't apparently harm to the US.

The harder cases are those in between the sympathetic and unsympathetic examples I've drawn. The other hard question is how this would apply to undocumented immigrants. But as I'm out of time, I'll stop here.