
Inclusive Immigrant Justice: Racial Animus and the Origins of Crime-Based Deportation

Alina Das*

The merger of immigration and criminal law has transformed both systems, amplifying the flaws in each. In critiquing this merger, most scholarly accounts begin with legislative changes in the 1980s and 1990s that vastly expanded criminal grounds of deportation and eliminated many forms of discretionary relief. As a result of these changes, immigrant communities have experienced skyrocketing rates of detention and deportation, with a disparate impact on people of color. Despite increasing awareness of the harshness of the modern system, however, many people still view criminal records as a relatively neutral mechanism for identifying immigrants as priorities for detention and deportation. Drawing on the early history of crime-based deportation, this essay argues that criminal records have never been a neutral means for prioritizing immigrants for detention and deportation from the United States. Rather, as this essay sets forth, racial animus has driven the creation and development of crime-based deportation from the beginning.

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INTRODUCTION

The merger of immigration and criminal law has had a transformative effect on both systems in the United States. Immigration law and enforcement relies heavily on determinations made in the criminal legal system to identify targets for deportation. In FY 2017, federal immigration agents within the U.S. Department of Homeland Security (“DHS”) Immigration and Customs Enforcement deported over 127,000 people from the United States on criminal grounds — fifty-six percent of all individuals deported.¹ Moreover, immigration status and immigration-related violations are playing an increasingly significant role in the criminal legal system. Criminal immigration violations, including “illegal entry” and “illegal reentry” at U.S. borders, represented the largest percentage of crimes prosecuted in the federal system.² In many ways, the two systems have merged to create a two-way pipeline for deportation — such that criminal records easily lead to deportation, and lack of immigration status increasingly factors into whether one may get a criminal record.

As scholars have written, the merger of the immigration and criminal systems has amplified the flaws in each.³ The longstanding racial disparities in the criminal legal system have led to similarly racialized effects in detention and deportation based on crime.⁴ The

¹ U.S. IMMIGRATION & CUSTOMS ENF’T, U.S. DEP’T OF HOMELAND SEC., FISCAL YEAR 2017 ICE ENFORCEMENT & REMOVAL OPERATIONS REPORT 11-13 (2017), <https://www.ice.gov/sites/default/files/documents/Report/2017/iceEndOfYearFY2017.pdf>.

² *Immigration Now 52 Percent of All Federal Criminal Prosecutions*, TRAC REPORTS (Nov. 28, 2016), <http://trac.syr.edu/tracreports/crim/446>.

³ See, e.g., Mary Bosworth & Emma Kaufman, *Foreigners in a Carceral Age: Immigration and Imprisonment in the United States*, 22 STAN. L. & POL’Y REV. 429, 440-41 (2011); Jennifer M. Chacón, *Managing Migration Through Crime*, 109 COLUM. L. REV. SIDEBAR 135, 137-39 (2009); Jennifer M. Chacón, *Overcriminalizing Immigration*, 102 J. CRIM. L. & CRIMINOLOGY 613, 629-30 (2012); Angélica Cházaro, *Challenging the “Criminal Alien” Paradigm*, 63 UCLA L. REV. 594, 659-60 (2016); Allegra M. McLeod, *The U.S. Criminal-Immigration Convergence and Its Possible Undoing*, 49 AM. CRIM. L. REV. 105, 113-15 (2012); Teresa A. Miller, *Blurring the Boundaries Between Immigration and Crime Control After September 11th*, 25 B.C. THIRD WORLD L.J. 81, 83-86 (2005); Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 379-81 (2006) [hereinafter *Crimmigration Crisis*].

⁴ See, e.g., JULIANA MORGAN-TROSTLE & KEXIN ZHANG, *THE STATE OF BLACK IMMIGRANTS REPORT PART II: BLACK IMMIGRANTS IN THE MASS CRIMINALIZATION SYSTEM 15* (2016), <http://www.stateofblackimmigrants.com/assets/sobi-deportation-sept27.pdf> (describing the disparate impact of mass criminalization on Black immigrants facing deportation and detention); César Cuauhtémoc García Hernández, *Creating Crimmigration*, 2013 BYU L. REV. 1457, 1461-67 (describing the disparate racial impacts of the criminal justice system on modern federal immigration enforcement);

lack of due process in the immigration system has perverted the criminal legal system, limiting the impact of criminal law reforms aimed at reducing the harshest criminal penalties.⁵ Thousands of people who find themselves at this intersection between immigration and criminal law — labeled as so-called “criminal aliens” — are left vulnerable to political scapegoating and hyperenforcement.⁶

In pursuing these rich and important critiques, scholars have explored the modern manifestations of the immigration-criminal law merger, focusing largely on 1996 laws that transformed our current immigration system.⁷ This focus makes sense given how these laws both dramatically expanded criminal grounds of removal and mandatory detention, and eliminated previously longstanding options

Kevin R. Johnson, *Doubling Down on Racial Discrimination: The Racially Disparate Impacts of Crime-Based Removals*, 66 CASE W. RES. L. REV. 993, 994 (2016) (describing the racially disparate impact of crime-based deportation, particularly on Latinx communities); Kevin R. Johnson, *Racial Profiling in the War on Drugs Meets the Immigration Removal Process: The Case of Moncrieffe v. Holder*, 48 U. MICH. J.L. REFORM 967, 968 (2015) (contending that “the racially disparate impacts of the criminal justice system exacerbate the racially disparate impacts of the modern immigration removal system”); Yolanda Vázquez, *Constructing Crimmigration: Latino Subordination in a “Post-Racial” World*, 76 OHIO ST. L.J. 599, 640-50 (2015) (evaluating the evolution of the conception of the “criminal alien” under the U.S. immigration laws); Yolanda Vázquez, *Perpetuating the Marginalization of Latinos: A Collateral Consequence of the Incorporation of Immigration Law into the Criminal Justice System*, 54 HOW. L.J. 639, 655-60 (2011) (discussing the impact of the immigration-criminal law merger on Latino immigrants).

⁵ See, e.g., Jason A. Cade, *Deporting the Pardoned*, 46 UC DAVIS L. REV. 355, 374-75 (2012); Alina Das, *Immigrants and Problem-Solving Courts*, 33 CRIM. JUST. REV. 308, 309 (2008); Aaron S. Hass, *Deportation and Double Jeopardy After Padilla*, 26 GEO. IMMIGR. L.J. 121, 123-25 (2011) (acknowledging that immigrants can face the threat of removal as a result of criminal convictions long after their sentence is served and rehabilitation achieved); Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469, 494-95 (2007); Juliet P. Stumpf, *Doing Time: Crimmigration Law and the Perils of Haste*, 58 UCLA L. REV. 1705, 1709-10 (2011) [hereinafter *Doing Time*] (noting that in establishing deportation as the ultimate consequence, “crimmigration” law ignores the question of reentry into the community as part of criminal sentencing for immigrants).

⁶ Rebecca Sharpless, *“Immigrants Are Not Criminals”: Respectability, Immigration Reform, and Hyperincarceration*, 53 HOUS. L. REV. 691, 716-26 (2016).

⁷ See, e.g., Leisy Abrego et al., *Making Immigrants into Criminals: Legal Processes of Criminalization in the Post-IIRIRA Era*, 5 J. ON MIGRATION & HUM. SECURITY 694, 695 (2017); García Hernández, *supra* note 4, at 1469; Stumpf, *Crimmigration Crisis*, *supra* note 3, at 383-84. These articles and others describe the enormous impact of the Anti-terrorism and Effective Death Penalty Act of 1996 and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, along with predecessor laws in the 1980s, on the immigration system.

for relief from removability.⁸ Those of us who study this area of law and work closely with people directly impacted by these changes denounce the scapegoating of individuals with criminal records. We call for inclusive immigrant justice — a reframing of the immigrant rights debate away from the good-versus-bad, criminal versus non-criminal immigrant narrative, and towards principles that honor each immigrant’s human dignity and right to due process. By necessity, we focus on the modern impact and harms of the criminal immigration system.

Because of this modern focus, the story of the criminalization of immigrants often begins with discussion of federal legislation in the 1980s and 1990s that criminalized certain acts and vastly expanded the criminal grounds of deportability and exclusion (known as inadmissibility) in the United States.⁹ One recent article, for example, described this legislation as “the specific laws that first linked and then solidified the association between undocumented immigrants and criminality.”¹⁰ It goes on to provide a rich and helpful critique of that linkage, as do many other articles that begin their story of the merger of criminal and immigration law in the 1980s and 1990s.

The benefits of a modern-day focus are clearly reflected in the massive changes that the wave of anti-immigrant legislation of the 1980s and 1990s brought to the current system. The Immigration Reform and Control Act introduced new federal immigration crimes, criminalizing the hiring of undocumented workers and smuggling offenses.¹¹ The 1988 Anti-Drug Abuse Act gave birth to the immigration law term “aggravated felony” — which in turn ushered in bars to discretionary relief from deportation, bars to bond hearings for the detained, and sentencing enhancements for illegal reentry.¹² The 1996 Illegal Immigration Reform and Immigrant Responsibility Act and the 1996 Antiterrorism and Effective Death Penalty Act led to an explosion in the criminal grounds of removal. These laws created even more draconian bars to discretionary relief, expanded no-bond detention, and increased criminalization overall. Moreover, these laws came during the same period when reliance on mandatory minimums

⁸ Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 HARV. L. REV. 1936, 1938-39 (2000).

⁹ Abrego et al., *supra* note 7, at 695; García Hernández, *supra* note 4, at 1467-73; Stumpf, *Crimmigration Crisis*, *supra* note 3, at 369.

¹⁰ Abrego et al., *supra* note 7, at 695.

¹¹ Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359, 3360.

¹² Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181.

and harsh drug laws were transforming the criminal legal system as well. A vastly expanded role in immigration enforcement at the state and local level has also contributed to further criminalization. Thirty years later, we are still reeling under the weight of these draconian changes to the system, and attention to these developments is well-deserved.

The danger of a modern-day focus, however, is that it creates room for a relatively sanitized view of our history. It assumes that the criminalization of immigrants began in the 1980s and 90s, and that the systems that existed prior to this time were free from the flaws that came with this more recent merger. But criminalization and the subsequent targeting of immigrants as “criminals” goes much further back in time than these more recent draconian policies and legal overhauls. One must look back further into our history to understand that criminal records have never been a neutral means for prioritizing immigrants for deportation from the United States.

For these reasons, the success of any call for inclusive immigrant justice requires more than a critique of the modern merger of the immigration and criminal legal systems. It requires a deeper dive into the historical antecedents of this merger. Despite an increasingly nuanced public understanding of the ills of the criminal system, many people still view criminal records as a reasonable, racially-neutral mechanism for identifying immigrants as priorities for detention and deportation. By examining the origins of crime-based deportation, we begin to see that the racialized outcomes of the modern-day system are no accident of history. Nor is the targeting of immigrants with criminal records an inevitable aspect of immigration regulation.

In this essay, I explore the racialized origins of crime-based deportation, which I define to include the development of criminal grounds of removal and immigration status based crimes. As I argue below, the linkage between animus against immigrants and animus against people with criminal records is not a modern phenomenon. Rather, racialized animus towards immigrants triggered the criminalization of actions that had been legal, which in turn provided the desired justification to deport immigrants from the United States. This interconnected, symbiotic relationship between racism, criminalization, and deportation pervades the earliest origins of the crime-based deportation grounds that many people take for granted as legitimate parts of our immigration system today.

Part I sets forth the early development of crime-based deportation in the late 1800s and early 1900s. It describes in further detail why most scholarly accounts pay little attention to the consistent thread of racial

animus undergirding these laws. Parts II–IV then look at three specific areas of development in crime-based deportation to demonstrate the critical role that racial animus played in these early examples of the immigration-criminal law merger. Part II looks at the first federal law barring immigrants from the United States based on purported criminality, the 1875 Page Act. Part III looks at the first federal laws barring and deporting immigrants from the United States based on drug offenses. It ties these laws to the racial animus that criminalized drug offenses during those same periods. Part IV looks at the first federal laws creating immigration status based crimes, which begin in the late 1800s and flourish into the criminalization of unauthorized entry and reentry into the U.S. Each of these major developments in the merger of immigration and criminal law demonstrate that the criminalization of immigrants took root a century prior to where most discussions begin. I conclude with some thoughts about how this history may help us better build an inclusive immigrant justice movement today.

I. THE UNEXPLORED ORIGINS OF CRIME-BASED DEPORTATION

In a time when complex immigration regulation is commonplace, it is worth reminding ourselves that migration is a natural phenomenon. Throughout history, humanity has survived and flourished because of migration. Restrictions on migration — forcing or barring movement — are recent human inventions.

As a human invention, the regulation of movement has often been used as a tool of oppression, and not just in the context of immigration. The “antecedents” of American deportation policy include the Trail of Tears, Fugitive Slave Laws, and Black Codes.¹³ European colonizers forced the indigenous people of America from their ancestral lands by violence and coercion, bolstered by laws like the 1830 Indian Removal Act. This resulted in the death of thousands and the confinement of survivors in “reservations” as foreigners to the state.¹⁴ The new conquests of land led to a nearly unquenchable thirst for free labor, driving the demand for slaves from Africa and the Caribbean. As societal views on slavery splintered the country and

¹³ DANIEL KANSTROOM, *DEPORTATION NATION: OUTSIDERS IN AMERICAN HISTORY* 21-90 (2007) (describing the Trail of Tears and Fugitive Slave Laws as the “antecedents” of American deportation policy); see DAVID BACON, *ILLEGAL PEOPLE: HOW GLOBALIZATION CREATES MIGRATION AND CRIMINALIZES IMMIGRANTS* 203-05 (2008) (describing how the American system of chattel slavery and Black Codes influenced policies controlling the migration of Chinese and Asian immigrants in the 1800s).

¹⁴ KANSTROOM, *supra* note 13, at 63-70.

slaves escaped to seek refuge in free Northern states, Congress enacted Fugitive Slave Laws to ensure physical transfer of runaway slaves back to the South.¹⁵ In the years proceeding and following the Civil War, many states passed Black Codes to control the movement and labor of Black people. In some cases, these laws rendered the presence and entry of Black people into the state unlawful.¹⁶ These laws became “legitimizing theories” of our modern-day deportation system.¹⁷

The regulation of movement has thus long been about power, control, and belonging in society. Hence it should come as no surprise that deportation takes aim on those most vulnerable in society, including those with criminal records. At first, America was on the receiving end of this phenomenon. In the 1600s and 1700s, England routinely sent people convicted of a broad set of crimes abroad, including to its American colonies, as an alternative to execution.¹⁸ The colonies reacted by enacting orders and resolutions to block or otherwise regulate the immigration of people with certain criminal records to their lands.¹⁹ In 1717, however, Great Britain enacted a Transportation Act to give English courts direct authority to sentence people to “transportation” abroad for felonies.²⁰ Great Britain transported tens of thousands of people with felony convictions to America under this law.²¹ The practice formally ended in 1776, resuming on a smaller scale from various European countries after the Revolutionary War.²²

As the colonies began to exert their independence, they attempted to quell the tide of deportation to America. In 1788, shortly after ratifying the U.S. Constitution, the Continental Congress urged states to adopt laws excluding “convicted malefactors” from their borders.²³ During this early period of state immigration regulation, numerous states passed laws barring “convicts” from entering their borders and imposing fines on ships that brought such individuals into the United

¹⁵ *Id.* at 77-83.

¹⁶ BACON, *supra* note 13, at 204-05.

¹⁷ KANSTROOM, *supra* note 13, at 7; *see also* BACON, *supra* note 13, at 203-4.

¹⁸ KANSTROOM, *supra* note 13, at 26-28; *see* Gerald L. Neuman, *The Lost Century of American Immigration Law (1776–1875)*, 93 COLUM. L. REV. 1883, 1841-42 (1993).

¹⁹ *See* EDWARD PRINCE HUTCHINSON, LEGISLATIVE HISTORY OF AMERICAN IMMIGRATION POLICY 1798–1965, at 393 (1981).

²⁰ Transportation Act of 1717, 4 Geo. I c. 11 (Gr. Brit.).

²¹ A. Roger Ekirch, *Bound for America: A Profile of British Convicts Transported to the Colonies*, 42 WM. & MARY Q. 184, 188 (1985).

²² Neuman, *supra* note 18, at 1841.

²³ *See* JOURNALS OF THE CONTINENTAL CONGRESS (Sept. 16, 1788).

States.²⁴ These laws were initially deemed constitutional, and when the federal government assumed its plenary power over immigration in a contest with the states, it too assumed the power to exclude people with convictions.²⁵ In 1875, Congress passed the Page Act, excluding “prostitutes” and people with felony convictions.²⁶

Thus began a long line of legislative acts that used criminal records to exclude or deport immigrants from the United States, or used immigration status to create criminal acts to prosecute and incarcerate immigrants within the United States. In 1891, Congress passed a law excluding immigrants convicted of crimes “involving moral turpitude.”²⁷ In 1917, Congress expanded crimes involving moral turpitude from a ground of exclusion to the United States into a ground of deportation from the United States.²⁸ In 1922, Congress first made narcotics offenses grounds for deportation.²⁹ In 1929, Congress made unauthorized entry a federal crime punishable by up to one year in prison, or two years for one who had been previously deported.³⁰ Over the next fifty years, Congress amended and expanded each of these provisions several times, culminating in the explosion of immigration and criminal provisions that came in the 1980s and 1990s.

This early history of criminal immigration law generally finds only brief references in critical discussions of the field. As a result, one might assume that Congress enacted the laws out of early disdain for people with criminal records, one divorced from any overtly racialized overtones. Particularly in light of the rejection of deportees from European countries as early colonists, one might view the early provisions as more closely aligned to class concerns than race.³¹

²⁴ Neuman, *supra* note 18, at 1842.

²⁵ *Id.*

²⁶ See *infra* Part IV. Widely recognized as the first restrictive immigration law, the Page Act of 1875 was preceded only by the short-lived Aliens Act of 1798, which criminalized reentry after removal but was never apparently applied to anyone. CÉSAR CUAUHTÉMOC GARCÍA HERNÁNDEZ, *CRIMMIGRATION LAW* 148 (2015).

²⁷ Immigration Act of 1891, ch. 551, § 1, 26 Stat. 1084, 1084.

²⁸ Immigration and Nationality Act of 1917, ch. 29, § 19, 39 Stat. 874, 889.

²⁹ Act of May 26, 1922, ch. 202, § 2, 42 Stat. 596, 597.

³⁰ Act of March 4, 1929, ch. 690, §§ 1-2, 45 Stat. 1551, 1551.

³¹ Such a critique would be of limited salience even with respect to European immigrants, however. Racialized and nativist hierarchies existed among white immigrants; the Irish, Italians, Greeks, and Slavs suffered a low social status for years. See John Tehranian, *Performing Whiteness: Naturalization Litigation and the Construction of Racial Identity in America*, 109 *YALE L.J.* 817, 825-26 (2000).

Indeed, some note that the use of crime-based deportation and immigration-based crimes was muted for decades because they were not needed to control disfavored racial groups.³² Until 1965, federal immigration contained explicit racialized barriers to immigration and citizenship. The infamous Chinese Exclusion Act of 1882 excluded Chinese laborers from entering the United States for ten years and was later expanded.³³ By the 1920s, eugenicist efforts were underway to create a quota system, culminating in the National Origins Act of 1924.³⁴ The Act numerically restricted immigration outside the Western hemisphere to 155,000 persons annually.³⁵ It divided those numbers by country of origin, permitting each country up to two percent of their foreign-born population in the United States as of 1890, and barring immigration by those ineligible to naturalize.³⁶ As a result, immigration from southern and eastern Europe, Africa, and the rest of the world beyond the western hemisphere was vastly limited, while Asians, ineligible for citizenship, were barred.³⁷ This was intentional. As one Congressional report stated, the purpose of the quotas was “to preserve, as nearly as possible, the racial status quo in the United States.”³⁸ As Mae Ngai has written, “the law constructed a white American race” and “transform[ed] immigration law into an instrument of mass racial engineering.”³⁹

Over the next few decades, the national origins quota system effectively stemmed immigration from disfavored groups outside the Western hemisphere.⁴⁰ Congress exempted the Western hemisphere from restrictions in light of demands for cheap, mostly agricultural labor.⁴¹ But the racially “undesirable” among these immigrants — namely, Mexicans — were controlled in other ways when their labor was no longer valued. During the Depression, for example, the government forcibly deported 500,000 people of Mexican descent, including U.S. citizens.⁴² In the 1950s, after World War II, the

³² See García Hernández, *supra* note 4, at 1459.

³³ See Act of May 6, 1882, ch. 126, §§ 7, 11, 22 Stat. 58, 60-61.

³⁴ Act of May 26, 1924, ch. 190, § 11, 43 Stat. 153, 159; MAE M. NGAI, IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA 21-25 (2004).

³⁵ NGAI, *supra* note 34, at 22-23.

³⁶ *Id.*

³⁷ *Id.* at 22-27.

³⁸ HUTCHINSON, *supra* note 19, at 484-85 (quoting H.R. REP. NO. 68-350, pt. 1, at 16 (1924)).

³⁹ NGAI, *supra* note 34, at 25, 27.

⁴⁰ See *id.* at 21-25.

⁴¹ *Id.* at 49-52; see Act of May 26, 1924, ch. 190, § 4(c), 43 Stat. 153, 155.

⁴² Kevin R. Johnson, *The Forgotten “Repatriation” of Persons of Mexican Ancestry*

government deported another 1,000,000 Mexicans, including U.S. citizens, through a program unabashedly dubbed “Operation Wetback.”⁴³ Between the quotas that restricted overseas immigration and these mass acts of immigration enforcement targeting Mexicans, federal immigration authorities managed to keep America’s desired White homogeneity. Only in 1965 was the national origins quota system eliminated.⁴⁴ The system that replaced it was far from perfect. The new visa allocation system that Congress formulated still relies on numerical restrictions that have a disparate impact on Mexico and certain Asian countries.⁴⁵ Nonetheless, the Immigration Act of 1965 is a celebrated moment in United States immigration history, heralded as the time when we finally repealed the most overly racist screening requirements for immigration to the United States. Approximately a decade and a half later, in the vacuum created, more draconian, crime-based immigration policies have taken root.

This history sheds light on the relative numbers — why skyrocketing crime-based deportations and immigration prosecutions occur in recent decades, rather than in the first years of federalized immigration enforcement. But it does not explain the motivations behind crime-based deportation and the prosecution of immigration crimes. If one treats the history of racialized restriction from the United States as separate and apart from the history of crime-based deportation, one might take the position that the development of criminal grounds of removal and immigration-based crimes serves a different, more legitimate purpose in immigration law. But this view would be wrong.

As discussed below, the advent of criminal grounds of deportation and immigration-based crimes was largely motivated by the same racialized animus that undergirded the development of immigration law overall during this early period. In particular, animus towards Chinese and Mexican immigrants drove many of the worst legislative developments that tied immigration and criminal law together to

and Lessons for the “War on Terror,” 26 PACE L. REV. 1, 5 (2005) [hereinafter *The Forgotten*].

⁴³ KANSTROOM, *supra* note 13, at 219-24.

⁴⁴ Immigration and Naturalization Act of 1965, Pub. L. No. 89-236, 79 Stat. 911, 911.

⁴⁵ KANSTROOM, *supra* note 13, at 225 (finding that the 120,000 yearly quota for the western hemisphere led to backlogs in visa-processing time for Mexican and other Latin American countries, increasing the pressure to enter the country without inspection); see JoAnne D. Spotts, *U.S. Immigration Policy on the Southwest Border from Reagan Through Clinton, 1981-2001*, 16 GEO. IMMIGR. L.J. 601, 606-07 (2002) (acknowledging that immigration ceilings for countries in the western hemisphere created backlogs of applications for immigrant visas from Mexico).

deport and incarcerate people of color. The remainder of this essay takes on three areas: the first crime-based ground of federal immigration restriction, the addition of drug offenses to the grounds of deportation, and the conceptualization of immigration-based crimes.

II. RACIAL ANIMUS AND THE ORIGINS OF THE FIRST FEDERAL LAW OF CRIME-BASED DEPORTATION

For the first century of the United States, immigration law and restrictions were the province of the states, not the federal government.⁴⁶ States would restrict and regulate migration both between states and from beyond the country's borders.⁴⁷ The Supreme Court initially recognized state regulation of immigration, including requirements for ship passenger lists and bonds, as a valid exercise of state police power, noting in one 1837 case that it was necessary to guard "against the moral pestilence of paupers, vagabonds, and possibly convicts."⁴⁸ In the 1849 Passenger Cases, however, the Supreme Court struck down state regulations imposing taxes on arriving foreign passengers as an invalid exercise of federal commerce power.⁴⁹ Only in 1875 did the Supreme Court recognize immigration regulations as exclusively the province of the federal government.⁵⁰ As Kerry Abrams has written, the space between these cases invited state regulation where it could be framed as an exercise of police power — thus encouraging states who sought to restrict noncitizen migration to frame unwanted immigrants as "paupers," "vagabonds," and "convicts."⁵¹

Enter nineteenth-century California — where a slumping economy led to a backlash against Chinese immigrants. In the mid-1800s, Chinese migrants came in large numbers to the West Coast during the Gold Rush and were welcomed, initially, to build the nation's rail system.⁵² Backlash eventually ensued, both racially and economically motivated, reaching a fever pitch in the post-Civil War economic

⁴⁶ Neuman, *supra* note 18, at 1841-42.

⁴⁷ *Id.*

⁴⁸ *New York v. Miln*, 36 U.S. (11 Pet.) 102, 142-43 (1837).

⁴⁹ *See Smith v. Turner*, 48 U.S. (7 How.) 283, 283-86 (1849).

⁵⁰ *Chy Lung v. Freeman*, 92 U.S. 275, 280 (1875).

⁵¹ Kerry Abrams, *Polygamy, Prostitution, and the Federalization of Immigration Law*, 105 COLUM. L. REV. 641, 666-67 (2005).

⁵² KANSTROOM, *supra* note 13, at 98.

slump.⁵³ California led the way in racially restrictive legislation against Chinese immigrants and others. It passed laws to tax foreign minors, restrict Chinese immigrants from land ownership, require bonds of ships bringing Chinese women passengers from overseas, promote segregation in schools, and to limit the ability of people of color to testify against White persons in court.⁵⁴

As Abrams has described, the California legislature responded with a series of acts that attempted to prevent Chinese immigration. Legislators originally framed laws around economics by taxing arriving passengers “incompetent to become a citizen” (i.e., Chinese) and “protecting free white labor against competition with coolie Chinese labor.”⁵⁵ But the California Supreme Court struck down these laws as encroachments on federal commerce power.⁵⁶

The California Supreme Court decisions recognized, however, that the state retained its police power over immigration — encouraging a legislative “solution” that would label Chinese immigrants as criminals. Legislators thus labeled Chinese men as kidnappers and human traffickers and Chinese women as prostitutes. In 1870, the California legislature targeted both groups through the Anti-Kidnapping Act⁵⁷ and the Anti-Coolie Act.⁵⁸ The Anti-Kidnapping Act criminalized the “kidnapping and importation of Mongolian, Chinese and Japanese females” and treated Asian immigrant woman as presumptive prostitutes.⁵⁹ It required each to obtain a license to enter the United States upon a showing that she is a “person of correct habits and good character.”⁶⁰ The Anti-Coolie Act, entitled “An Act to prevent the importation of Chinese criminals and to prevent the establishment of Coolie slavery” made a similar requirement of Chinese laborers.⁶¹ As Abrams notes, the law framed laborers as criminals, stating that “[c]riminals and malefactors are being constantly imported from Chinese seaports” creating a “burdensome

⁵³ *Id.*

⁵⁴ *Id.* at 93-100, 103-07; BILL ONG HING, *THE MAKING AND REMAKING OF ASIAN AMERICA THROUGH IMMIGRATION POLICY: 1850-1990*, at 21-23 (1993).

⁵⁵ Act of Apr. 26, 1862, ch. 339, 1862 Cal. Stat. 462 (repealed 1939); Act of Apr. 28, 1855, ch. 153, 1855 Cal. Stat. 194 (repealed 1955).

⁵⁶ *Lin Sing v. Washburn*, 20 Cal. 534, 580-81 (1862); *People v. Downer*, 7 Cal. 169, 171 (1857); Abrams, *supra* note 51, at 671-75.

⁵⁷ Act of Mar. 18, 1870, ch. 230, 1870 Cal. Stat. 330, 330-32.

⁵⁸ Act of Mar. 18, 1870, ch. 231, 1870 Cal. Stat. 332, 332-33.

⁵⁹ See Ch. 230, 1870 Cal. Stat. 330, 330-31.

⁶⁰ *Id.* at 331.

⁶¹ Ch. 231, 1870 Cal. Stat. 332, 332.

expense upon the administration of criminal justice.”⁶² California legislators amended these laws several times. By 1874 ship captains were required to post a \$500 bond for any immigrant passenger who fell into a long list of undesired categories, including any “convicted criminal” or “lewd or debauched woman.”⁶³

The anti-Chinese sentiment in California swayed the nation’s conversations about immigration and criminality as well. Congressional debates in the 1860s spoke of the Chinese along criminalized lines: “The women are prostitutes, and the men petty thieves.”⁶⁴ Although a treaty initially limited the federal government’s ability to restrict Chinese migration directly,⁶⁵ anti-Chinese sentiment found a national champion in U.S. Congressman Horace Page of California. In addition, characterizing Chinese women as prostitutes, Congressman Page filled his speeches with criminalizing rhetoric about Chinese immigrants generally, noting that “[t]hieving, trickery, cheating, and fraud are taught and encouraged as the essential elements of success” in Chinese institutions.⁶⁶

The anti-Chinese laws of California thus eventually laid the blueprint for the Page Act of 1875.⁶⁷ It criminalized the transportation of Chinese, Japanese, and other “Oriental” passengers without their consent, as well as the importation of “women for the purposes of prostitution.”⁶⁸ The first federal provision to restrict immigration to the United States, the Page Act, also excluded “persons who are undergoing a sentence for conviction in their own country of felonious crimes other than political . . . or whose sentence has been remitted on condition of their emigration” and “women imported for the purposes of prostitution.”⁶⁹ While the prohibition on immigrants whose sentences were remitted for their transportation to the United

⁶² Abrams, *supra* note 51 (construing Ch. 231, 1870 Cal. Stat. 332, 332).

⁶³ Act of March 30, 1874, § 70, at pp. 39-40 (amending CAL. POL. CODE §§ 2952, 2953 (1872)) (quoted in Abrams, *supra* note 51, at 677).

⁶⁴ CONG. GLOBE, 37th Cong., 2d Sess. 2939 (1862) (remarks of Sen. Aaron Sargent) (quoted in Ming M. Zhu, *The Page Act of 1875: In the Name of Morality* 9 (Mar. 23, 2010) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1577213).

⁶⁵ Congress renegotiated its treaty with China in 1880, paving the way for the Chinese Exclusion Act in 1882. *See* Chinese Exclusion Act, ch. 126, 22 Stat. 58, 58-60 (1882) (repealed 1943) (noted in Zhu, *supra* note 64, at 6).

⁶⁶ 2 CONG. REC. 4535 (1874) (quoted in Zhu, *supra* note 64, at 10).

⁶⁷ Abrams, *supra* note 51, at 690; *see* Page Act, ch. 141, 18 Stat. 477, 477-78 (1875).

⁶⁸ §§ 2-3, 18 Stat. at 477.

⁶⁹ *Id.* §§ 3, 5; *see also* Abrams, *supra* note 51, at 697.

States echoed early complaints about undesirable European migration, the rest of the immigration prohibitions mirrored the targeting of Chinese men and women as criminals and prostitutes, respectively.

The focus on prostitution was particularly transformative given that, during this period, prostitution was generally not considered a crime. This is partially why prohibitions against prostitution and against people with convictions were listed separately in the statute. Regulation and segregation of places of prostitution, rather than criminalization of prostitution itself, were the norm in many parts of the country through the beginning of the twentieth century.⁷⁰ Criminalization relating to prostitution during this early period focused primarily on penalizing acts of vice, vagrancy, and lewdness.⁷¹ By ratcheting up moral concerns over prostitution and targeting women directly, anti-Chinese sentiment helped to pave the way for the criminalization of prostitution itself. The criminalization of prostitution in California, for example, in many ways outpaced criminalization in other parts of the country.⁷² Over the next several decades, as states began criminalizing the act of prostitution itself, immigrant women were often doubly targeted in the criminal and immigration systems.

Thus, far from developing separate and apart from more overtly racialized restrictions on immigration in federal law, the origin of crime-based deportation is intertwined with those restrictions. Our decision to exclude immigrants with criminal records from the United States was motivated by the larger desire to exclude Asians from the United States at the time.

III. RACIAL ANIMUS AND THE ORIGINS OF DRUG-BASED DEPORTATION

A second example of the early connection between racialized animus and crime-based deportation comes at the initiation of drug criminalization. Many scholars focus on the connections between the modern war on drugs and the war on immigrants, but few look back to the origin of the drug laws and drug-based deportability itself. As with the origin of crime-based deportation generally, the drug context demonstrates that racism and criminalization were closely linked from the inception of these laws.

⁷⁰ Aaron D. Simowitz, *How Criminal Law Shapes Institutional Structures: A Case Study of American Prostitution*, 50 AM. CRIM. L. REV. 417, 430-31 (2013); see also MELISSA HOPE DITMORE, PROSTITUTION AND SEX WORK 71 (2011).

⁷¹ DITMORE, *supra* note 70, at 71.

⁷² See Simowitz, *supra* note 70, at 436 n.125.

The use and sale of drugs was widely unregulated in early American history. Most substances initially were heralded for their medicinal purposes.⁷³ Opium was the first such narcotic drug, promoted by medical and pharmaceutical industries in the 1800s.⁷⁴ Concerns about drug addiction slowly grew, but it was not until the face of the addict population changed that opium became criminalized.⁷⁵ The growing association between opium smoking and Chinese immigrants in the Western United States prompted one of the nation's first criminal laws directed at drug use: a 1875 San Francisco ordinance penalizing any person who keeps or visits an opium den.⁷⁶ As with prostitution and human trafficking, local and state ordinances criminalizing drugs began to proliferate as part of a general anti-Chinese hysteria. As Doris Marie Provine has written, “[a]dvocates of vigorous enforcement . . . routinely exploited white fears of racial mixing” by framing opium as a substance by which Chinese immigrants would tempt white women and youth into addiction.⁷⁷ Early federal court decisions upheld the constitutionality and lawfulness of prosecutions against Chinese immigrants under these laws despite their recognition that the laws may “proceed[] more from a desire to vex and annoy the ‘Heathen Chinee’ . . . than to protect the people from the evil habit.”⁷⁸

The growing anti-immigrant sentiment against opium, combined with a similarly racialized association between African Americans and cocaine, played a significant role in the federal criminalization of narcotics.⁷⁹ This led to several acts in the 1900s to regulate, tax, and eventually criminalize drug use and sale.⁸⁰ It did not take long for these federal criminal drug laws to include a deportation provision — the first new category of crime-based immigration penalties since prostitution and “crimes involving moral turpitude.” The Narcotic Drugs Import and Export Act of 1922 both criminalized the importation of narcotics offenses and provided that “any alien who at any time after his entry is convicted [of such an importation offense]

⁷³ DORIS MARIE PROVINE, *UNEQUAL UNDER LAW: RACE IN THE WAR ON DRUGS* 65 (2007).

⁷⁴ *Id.* at 65 n.2.

⁷⁵ *Id.* at 67-68.

⁷⁶ Mikelis Beitiks, “Devilishly Uncomfortable”: *In the Matter of Sic — The California Supreme Court Strikes a Balance Between Race, Drugs and Government in 1880s California*, 6 CAL. LEGAL HIST. 229, 238 (2011); see also CHARLES E. TERRY & MILDRED PELLEN, *THE OPIUM PROBLEM* 807 (1928).

⁷⁷ PROVINE, *supra* note 73, at 71-72.

⁷⁸ *Id.* at 72 (quoting *Ex parte Yung Jon*, 28 F. 308, 312 (D. Or. 1886)).

⁷⁹ *Id.* at 70-81.

⁸⁰ *Id.* 70-87.

shall upon termination of imprisonment be taken into custody and deported.”⁸¹

As subsequent laws expanded the range of criminalized substances, deportation provisions were similarly expanded. People who were convicted and sentenced to imprisonment for a wide range of controlled substance offenses also faced deportation if they were noncitizens.⁸² In 1940, Congress eliminated the prior law’s requirement of a sentence thus making conviction alone sufficient for deportation, and extended the provisions to apply to noncitizens convicted under state and federal law.⁸³

A growing anti-immigrant sentiment against a different racialized group, Mexicans, combined with ongoing anti-Black sentiment, to spur further changes to the drug laws. Cannabis, a substance that, like opium, was initially valued for its medicinal purposes, became associated with Mexicans as “marijuana.”⁸⁴ The Federal Narcotics Bureau capitalized on the anti-immigrant sentiments of the time to drum up opposition to marijuana at the local and state level.⁸⁵ Claiming that marijuana was associated with violent crime from Mexican laborers, African Americans, and other communities of color, the Bureau led a campaign against the “marijuana menace.”⁸⁶ Eventually, marijuana trade became criminalized federally.⁸⁷

As federal criminal law rode this wave of racist sentiment to criminalize drug use and possession in addition to importation and

⁸¹ Narcotic Drugs Import and Export Act of 1922, ch. 202, 42 Stat. 596, 596-97.

⁸² Act of February 18, 1931, ch. 224, 46 Stat. 1171, 1171 (providing that a noncitizen “convicted and sentenced for violation of or conspiracy to violate any statute of the United States taxing, prohibiting, or regulating the manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation, or exportation of opium, coca leaves, heroin, or any salt, derivative, or preparation of opium or coca leaves” shall be detained and deported).

⁸³ Act of June 28, 1940, ch. 439, tit. II, § 21, 54 Stat. 670, 673.

⁸⁴ PROVINE, *supra* note 73, at 65, 82; *see also* Carrie Rosenbaum, *What (and Whom) State Marijuana Reformers Forgot: Crimmigration Law and Noncitizens*, 9 DEPAUL J. FOR SOC. JUST. 1, 16 (2016) (discussing how “[r]acialized and negative views of Mexicans contributed to the criminalization of marijuana”).

⁸⁵ PROVINE, *supra* note 73, at 83-84; Rosenbaum, *supra* note 84, at 17 (citing Jordan Cummings, *Nonserious Marijuana Offenses and Noncitizens: Uncounseled Pleas and Disproportionate Consequences*, 62 UCLA L. REV. 510, 519 n.42 (2015)) (describing how Federal Bureau of Narcotics Commissioner Harry Anslinger “read anti-Mexican statements into the record in a House Ways and Means Committee hearing on marijuana referring to marijuana users as ‘degenerate Spanish-speaking residents’”).

⁸⁶ PROVINE, *supra* note 73, at 83-84.

⁸⁷ *Id.* at 85-87.

sale, so too did federal immigration law. In 1952, Congress enacted the Immigration and Nationality Act, which remains the blueprint for immigration law today. In the new law, Congress expanded upon previous drug provisions for deportation⁸⁸ to include any “drug abuser or addict” or any individual whom officers had “reason to believe” was an “illicit trafficker.”⁸⁹ A few years later, Congress amended the Immigration and Nationality Act to include convictions for “illicit possession” of narcotic drugs⁹⁰ as well as convictions for “illicit possession” of marijuana.⁹¹ Today, possession of any controlled substance is ground for deportation, with the single exception of one-time simple possession of less than thirty grams of marijuana.⁹²

The 1970s and 1980s brought a renewed vigor for drug criminalization, fueled in large part by the continued vilification of African Americans in the post-Civil Rights era. President Richard Nixon first called for a “war on drugs” in the 1970s, laying the groundwork for the “war on drugs” declared by President Ronald Reagan in 1982.⁹³ The media helped to stoke fears over crack cocaine, a new drug derived from cocaine that became associated with drug use

⁸⁸ In the 1952 Act, Congress broadened the grounds of drug-conviction-based deportability to make deportable any noncitizen:

[W]ho at any time has been convicted of a violation of any law or regulation relating to the illicit traffic in narcotic drugs, or who has been convicted of a violation of any law or regulation governing or controlling the taxing, manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation, exportation, or the possession for the purpose of the manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation or exportation of opium, coca leaves, heroin, marihuana, any salt derivative or preparation of opium or coca leaves or isonipecaine or any addiction-forming or addiction sustaining opiate.

Immigration and Nationality Act of 1952, Pub. L. No. 414, 66 Stat. 163, 206-07 (codified at 8 U.S.C. § 1251 (2018)).

⁸⁹ *Id.* at 182-84 (alteration in original). These provisions continue to exist in the present-day version of the statute. 8 U.S.C. § 1182(a)(1)(A)(iv) (2018) (“drug abuser or addict” inadmissibility); *id.* § 1182(a)(2)(C)(i) (“reason to believe . . . illicit trafficker” inadmissibility); *id.* § 1227(a)(2)(B)(ii) (2008) (“drug abuser or addict” deportability).

⁹⁰ Act of July 18, 1956, Pub. L. No. 728, 70 Stat. 567, 575 (codified at 8 U.S.C. § 1182 (2018)).

⁹¹ Act of July 14, 1960, Pub. L. No. 86-648, 74 Stat. 504, 505 (codified at 8 U.S.C. § 1182 (2018)).

⁹² 8 U.S.C. § 1227(a)(2)(B)(i).

⁹³ MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 47-49 (rev. ed. 2012).

by African Americans in biased public rhetoric over its dangerousness.⁹⁴

After the drug-induced death of two popular sports stars, widely misreported as crack overdoses, Congress rushed to enact new, harsh drug legislation.⁹⁵ In 1986, Congress enacted the Anti-Drug Abuse Act, which set lengthy mandatory minimums for drug offenses and set harsher penalties for the possession of crack cocaine than powder cocaine, the former of which was associated with African Americans.⁹⁶ The hastily written 1986 criminal law also included a provision targeting immigrants, expanding drug deportability and exclusion to a conviction of any violation of a law involving any controlled substance on the federal drug schedule.⁹⁷

Two years later, the Anti-Drug Abuse Act of 1988 ushered in a new low in the interweaving of criminal and immigration law. This act expanded mandatory minimums for drug offenses and the use of the death penalty in certain cases. It also marked a new series of non-criminal penalties for drug offenses, including possible eviction from public housing and bars to student loans.⁹⁸ Perhaps the most severe non-criminal consequences were reserved for immigrants. The Anti-Drug Abuse Act of 1988 gave birth to the term “aggravated felony,” a ground for mandatory detention and deportation.⁹⁹

The 1988 drug law is where most historical critiques of the immigration-criminal law merger begin. But, as noted above, anti-immigrant sentiment has shaped drug laws — and drug-based deportation — from the beginning of the regulation of drugs in the United States. There never was anything racially neutral about criminalizing and deporting people for their use of drugs.

IV. RACIAL ANIMUS AND THE ORIGINS OF IMMIGRATION-BASED CRIMES

The concept of criminalizing offenses based on acts of migration or one’s immigration status has similarly been rooted in longstanding

⁹⁴ *Id.* at 52-53.

⁹⁵ *Id.*

⁹⁶ *Id.* at 53.

⁹⁷ Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, § 1751, 100 Stat. 3207, 3207-47 (codified at 8 U.S.C. § 1182 (2018)) (allowing deportation of a noncitizen convicted of a violation of “any law . . . of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802))”).

⁹⁸ ALEXANDER, *supra* note 93, at 53.

⁹⁹ See Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181, 4469-70 (codified in 8 U.S.C. 1252(a) (2018)).

racialized animus. As most commentators note, immigration crimes such as illegal entry and reentry did not become heavily prosecuted until the 1990s and 2000s.¹⁰⁰ Today, immigration offenses exceed even drug offenses as the most federally arrested and prosecuted crimes.¹⁰¹ There are prisons dedicated to incarceration of immigrants for these crimes, which prop up the mass incarceration system in light of drug and sentencing reform.¹⁰²

Because the prosecution of immigration crimes did not skyrocket until the 1990s and 2000s, many commentators tie this phenomenon to the same modern developments that have driven the expansion of crime-based grounds of deportation. Again, the early history of these crimes is seldom discussed, and most Americans take for granted that we would criminalize entry into our borders.

An examination of the origins of criminalizing undesired migration demonstrates that racial animus was a driving force behind legislative attempts to create immigration crimes. As noted above, the borders to the United States were relatively open through the late 1880s when Congress enacted the first federally restrictive immigration laws.¹⁰³ The Page Act of 1875, which as discussed above was an early expression of anti-Chinese animus, was soon followed by the Chinese Exclusion Act of 1882, which excluded Chinese laborers from entering the United States for ten years.¹⁰⁴ The Geary Act of 1892 expanded the bar, which was eventually made indefinite.¹⁰⁵

Each of these laws paired restrictions on immigration with new provisions that criminalized immigration-related violations. As noted above, the Page Act criminalized labor and sex trafficking by labeling

¹⁰⁰ GARCÍA HERNÁNDEZ, *supra* note 26, at 11; see PATRISIA MACÍAS-ROJAS, FROM DEPORTATION TO PRISON: THE POLITICS OF IMMIGRATION ENFORCEMENT IN POST-CIVIL RIGHTS AMERICA 17-18 (2016).

¹⁰¹ John Gramlich & Kristen Bialik, *Immigration Offenses Make Up a Growing Share of Federal Arrests* PEW RESEARCH CTR. (Apr. 10, 2017), <http://www.pewresearch.org/fact-tank/2017/04/10/immigration-offenses-make-up-a-growing-share-of-federal-arrests/>; *Immigration Now 52 Percent of All Federal Criminal Prosecutions*, TRAC REPORTS (Nov. 28, 2016), <http://trac.syr.edu/tracreports/crim/446/>; see also MACÍAS-ROJAS, *supra* note 100, at 18.

¹⁰² See AM. CIVIL LIBERTIES UNION, WAREHOUSED AND FORGOTTEN: IMMIGRANTS TRAPPED IN OUR SHADOW PRIVATE PRISON SYSTEM 16-18 (2014), <https://www.aclu.org/sites/default/files/assets/060614-aclu-car-reportonline.pdf> (describing “criminal alien requirement” prisons).

¹⁰³ Prior to the late 1880s, states attempted to regulate and restrict migration in a variety of ways. See Gerald L. Neuman, *The Lost Century of American Immigration Law (1776-1875)*, 93 COLUM. L. REV. 1833, 1841-42 (1993).

¹⁰⁴ Chinese Exclusion Act, ch. 126, 22 Stat. 58, 59 (1882) (repealed 1943).

¹⁰⁵ Geary Act of 1892, ch. 60, 27 Stat. 25, 25-26.

Chinese men and women as traffickers and prostitutes.¹⁰⁶ The Chinese Exclusion Act not only prohibited Chinese laborers from coming to the United States, but also criminalized anyone who helped a Chinese person enter by up to one year in prison.¹⁰⁷ The Geary Act criminalized Chinese laborers directly, requiring Chinese laborers already in the United States to register and prove legal status (through the testimony of at least one White witness that they had entered the United States prior to 1882).¹⁰⁸ It specified that Chinese immigrants who could not prove legal residency could be convicted, sentenced to up to one year of imprisonment and hard labor, and deported.¹⁰⁹ The adjudication of these penalties — criminal and civil — was provided for in a summary proceeding without a jury.¹¹⁰

The passage of the Geary Act, like the Page Act, demonstrates how virulent anti-Chinese sentiment set the stage for the criminalization of migration itself. Led by Congressman Thomas Geary, unsurprisingly representing a district in California, the Geary legislation was designed to appease western White residents who believed that the 1882 Chinese Exclusion Act was not enough.¹¹¹ As Kelly Lytle Hernández writes, “[t]he Chinese Exclusion Act stemmed the rise of Chinese immigration into the United States, but it did not purge Chinese immigrants from the U.S. West.”¹¹² Legislators claimed that Chinese “surreptitiously entered the United States . . . using false documents to enter the country as ‘merchants,’ a category exempt from the 1882 exclusion law.”¹¹³ Only criminalization could ensure punishment and expulsion of unwelcome Chinese immigrants. By criminalizing unregistered status (i.e., undocumented status), the Geary Act “broadened the basic framework of U.S. immigration control beyond the nation’s borders to include crime and punishment within the United States.”¹¹⁴

Chinese activists led a concerted battle to strike down the Geary Act.¹¹⁵ While the Supreme Court upheld the power of the federal

¹⁰⁶ *See supra* Part II.

¹⁰⁷ Chinese Exclusion Act, ch. 126, § 11, 22 Stat. 58, 61 (1882) (repealed 1943).

¹⁰⁸ § 6, 27 Stat. at 25-26.

¹⁰⁹ *Id.* § 4.

¹¹⁰ *Id.* §§ 2-3.

¹¹¹ KELLY LYTLE HERNÁNDEZ, *CITY OF INMATES: CONQUEST, REBELLION, AND THE RISE OF HUMAN CAGING IN LOS ANGELES, 1771–1965*, at 64-69 (2017).

¹¹² *Id.* at 68.

¹¹³ *Id.* at 69.

¹¹⁴ *Id.* at 72.

¹¹⁵ *Id.* at 73-74.

government to deport Chinese residents, it ultimately struck down the Geary Act's sentence-without-trial provision in *Wong Wing v. United States*.¹¹⁶ In *Wong Wing*, the Supreme Court held that Fifth and Sixth Amendment protections, including the right to a jury trial, must accompany the imposition of a sentence.¹¹⁷

The failure of the Geary Act's provision did not spell the death knell for criminalizing migration. On the contrary, it provided a blueprint for future criminalization when Congress enacted the 1920s national origins quota system to control migration.¹¹⁸ As noted above, the quota system effectively stemmed immigration from disfavored groups outside the Western hemisphere, while leaving more flexibility as to the regulation and control of Mexican immigrants.¹¹⁹ When Congress finally decided to criminalize unlawful entry and reentry, it did so with Chinese and Mexican immigrants, among others, in mind.¹²⁰ It simply accomplished the task by fully situating the offense as a crime, with the attendant procedural rights that *Wong Wing* required.

Thus, the 1929 federal offenses of illegal entry and reentry were informed both by *Wong Wing* and by a growing desire to regulate migration at the U.S.-Mexico border. Although Mexican immigrants were not subject to the new quota system, they were required to apply for and obtain expensive visas and pay head taxes upon entry.¹²¹ Shortly after passing the 1924 National Origins Act, Congress formed the U.S. Border Patrol to police the borders.¹²² A growing segment of immigrants from Mexico found themselves subject to deportation for evading these prohibitive requirements.¹²³ By 1929, over 15,000 Mexicans were deported annually, over seven times the number deported just four years earlier.¹²⁴

¹¹⁶ *Wong Wing v. United States*, 163 U.S. 228, 237 (1896); Gerald L. Neuman, *Wong Wing v. United States: The Bill of Rights Protects Illegal Aliens*, in *IMMIGRATION STORIES* 31, 40 (David A. Martin & Peter H. Schuck eds., 2005).

¹¹⁷ *Wong Wing*, 163 U.S. at 238.

¹¹⁸ See *supra* Part I (discussing National Origins Act and quota system).

¹¹⁹ NGAI, *supra* note 34, at 23.

¹²⁰ Europeans were also targeted by attempts to criminalize migration. See Ingrid V. Eagly, *Prosecuting Immigration*, 104 *Nw. U.L. REV.* 1281, 1296 & n.84 (2010) (discussing early attempts to criminalize border entry through the Passport Act of 1918 and court responses); *The Immigration Act of 1924 (The Johnson-Reed Act)*, OFFICE OF THE HISTORIAN, <https://history.state.gov/milestones/1921-1936/immigration-act> (last visited Sept. 15, 2018).

¹²¹ NGAI, *supra* note 34, at 67.

¹²² See HERNÁNDEZ, *supra* note 111, at 134.

¹²³ NGAI, *supra* note 34, at 67.

¹²⁴ *Id.*

As Hernández explains, the nativists who fought hard for the national origins quota were never satisfied with the exemption reserved for migration from the Western hemisphere.¹²⁵ Hearings were repeatedly held about stemming Mexican migration, with nativists pitted against agricultural business interests.¹²⁶ The anti-Mexican movement found their champion in the white supremacist South Carolina Senator Coleman Blease. He broke the stalemate between those who wanted an outright ban on Mexican migration and those who wanted to keep control over Mexican labor by proposing criminalizing those who came without authorization.¹²⁷ Thus in 1929 came the first law criminalizing illegal entry and reentry to the United States.¹²⁸

The law was broadly written, addressing growing anti-Mexican sentiment as well as providing an additional mechanism to punish unauthorized entry by barred classes like Asian immigrants. Learning from the outcome in *Wong Wing*, Congress ensured the criminal offense carried the trial and due process rights that normally attended criminal prosecutions at the time and turned the act of migration into a crime. Over time, the criminal offenses of illegal entry and reentry allowed “illegal immigration” to be associated primarily with Mexican immigrants, in part because criminal enforcement took on a special role for those not subject to numerical quotas. The “enforcement aspects [of immigration policy] — inspection procedures, deportation, the Border Patrol, criminal prosecution, and irregular categories of immigration — created many thousands of illegal Mexican immigrants.”¹²⁹

Illegal entry and reentry provisions, as noted above, were not as heavily prosecuted in the first several decades of their inception as they are today. For decades, the government had access to other options for expelling Mexican people across the border — including massive operations that led to the repatriation of Mexican Americans and the deportation of Mexican immigrants in the 1930s and 1950s.¹³⁰ Nonetheless, the 1929 law had a transformative impact on the federal criminal system from the start. In the years that followed, no other law sent more Mexicans to federal prison than illegal entry and reentry.¹³¹

¹²⁵ HERNÁNDEZ, *supra* note 111, at 133-37.

¹²⁶ *Id.* at 135.

¹²⁷ *Id.* at 137-38.

¹²⁸ Act of Mar. 4, 1929, Pub. L. No. 70-1018, 45 Stat. 1551.

¹²⁹ NGAI, *supra* note 34, at 71.

¹³⁰ Johnson, *The Forgotten*, *supra* note 42, at 4; KANSTROOM, *supra* note 13, at 222.

¹³¹ HERNÁNDEZ, *supra* note 111, at 139.

By 1930, immigration convictions were second only to liquor charges at the height of prohibition in the federal system.¹³² Prosecution of immigration crimes fueled the growth of the federal criminal system throughout the 1930s, spurring the federal government to build more prisons and laying the groundwork for the massive federal prison system we have today.¹³³

The history of the criminalization of unauthorized migration demonstrates criminal immigration laws, like crime-based deportation laws generally, were not initially adopted in a race-neutral manner. Racial animus towards immigrants, first Chinese and then Mexican, explains in large part the impetus for the creation of the first immigration crimes.

CONCLUSION

Throughout the earliest chapters of federal immigration law in the United States, racial animus has played a significant role in the creation and development of crime-based deportation. Modern laws to identify, convict, incarcerate, detain, and deport immigrants rest on these racially oppressive foundations, which must be understood in order to be deconstructed.

This understanding is particularly important in light of the scapegoating that immigrants with criminal records suffer today in political debates around immigrant justice. When people denounce the criminalization of immigrants, they often do so by creating a line between “legitimate” and “illegitimate” crimes. Federal and state initiatives to criminalize undocumented status of immigrants currently living in the U.S. garnered massive protests on the streets. Yet, few people protest the deportation of immigrants who have criminal records for drug offenses and other crimes. Many immigrant rights activists denounced President Donald J. Trump’s executive order expanding crime-based deportation priorities to reach people who have never been convicted of a crime.¹³⁴ Yet, few critiqued President Barack Obama’s immigration enforcement memorandum which prioritized immigrants with criminal records for deportation.¹³⁵

¹³² *Id.*

¹³³ *See id.* at 139-40.

¹³⁴ *See* Exec. Order No. 13,768, 82 Fed. Reg. 8799 (Jan. 30, 2017).

¹³⁵ *See* Memorandum from Jeh Charles Johnson, Sec’y, Dep’t of Homeland Sec. Policies for the Appreciation, Detention, and Removal of Undocumented Immigrants (Nov. 20, 2014) https://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf.

These fault lines betray a misunderstanding of how layered the process of criminalizing immigrants has been over time. As described above, immigrants have been criminalized throughout U.S. history by policies that first associate immigrants with criminality and then penalize immigrants for that association. The early years of American history involve the criminalization of acts that we take for granted as crimes — prostitution, drug use and sale, evading border inspection — which might have been treated very differently in our regulatory system had the supposed perpetrators not been people of color in this country. Yet we forget that history when we look at our immigration policies today and doubly condemn immigrants who violate criminal laws with incarceration and deportation.

Reclaiming this history of racialized oppression and its role in the criminalization of immigrants may set us on a better path. Rather than draw lines between good and bad immigrants, we can instead focus on restoring rights to all immigrants, regardless of the reasons they face deportation or incarceration in the current system. While we fight for a broader abolition of detention and deportation policies as punitive measures, a first step would be to hold basic rights that exist in other punitive systems sacred for all immigrants. This should include, at minimum, a right to a day in court on the harms of deportation, a right to see a judge and to have government-appointed counsel, a right to bail hearings and community alternatives to detention. To do that, we must reject carve-outs that categorically make immigrants with criminal records ineligible for these basic rights. If those of us in the immigrant rights community cannot champion rights for all immigrants, then we are simply building upon the legacy of racism and oppression that led us to this massive deportation system in the first place.