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Decriminalizing Border Crossings

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DECRIMINALIZING BORDER CROSSINGS

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ABSTRACT

An international border crosser should only be deemed a criminal if the United States government can prove that, with requisite criminal intent, she engaged in an act aside from crossing the border that would constitute a crime. No longer should crossing the border be a strict liability criminal offense. Doing so will restore balance to the civil immigration system, conserve scarce enforcement resources to target truly criminal behavior, enhance our standing abroad, and help heal our racially-polarized discourse on immigration policy.

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I. BORDERS AND THE LAW

Recent national polls suggest that a majority of Americans favor the controversial Arizona bill[1] that makes it a criminal trespass for noncitizens to be present in the state without carrying their immigration documents with them.[2] The law's relevance may be measured in the number of copycat bills that have been introduced into other state legislatures[3] and some municipalities[4] of late. Proponents of the law argue that by criminalizing illegal presence, Arizona will be able to effectively and directly induce undocumented persons to leave the state, not to return under threat of sanction. Opponents respond that only the federal government is authorized to regulate immigration and individual state laws enforced by local police unfamiliar with complex federal immigration laws will inevitably, though un-

1. S.B. 1070, 49th Leg., 2d Reg. Sess. (Ariz. 2010), as amended by H.B. 2162, 49th Leg., 2d Reg. Sess. (Ariz. 2010), *available at* http://www.azleg.gov/legtext/49leg/2r/summary/h.sb1070_asamendedbyhb2162.doc.htm. As of this writing, a partial preliminary injunction was granted to prevent enforcement of some of the more controversial portions of the bill, including the criminal "trespass" provision based on undocumented presence. *See, e.g.*, Randal C. Archibold, *Judge Blocks Arizona's Immigration Law*, N.Y. TIMES, July 28, 2010, at A1. Rather than regard this as irrational localist activism, Rick Su sees these sub-federal anti-immigration initiatives as understandable outgrowths of garden-variety local concerns that pit current residents against new ones. *See* Rick Su, *A Localist Reading of Local Immigration Regulations*, 86 N.C. L. REV. 1619 (2008). Keith Aoki, John Shuford, Kristi Young, and Thomas Hwei, in turn, analyze the same issue from not only the localist perspective, but from an international perspective as well, contrasting these with the conventional federalism model of analysis. *See* Keith Aoki et al., *(In)Visible Cities: Three Local Government Models and Immigration Regulation*, 10 OR. REV. INT'L L. 453 (2008).

2. *See, e.g.*, Paul Steinhauser, *Recent Polls: Majority Support Arizona Law*, CNN POLITICAL TICKER BLOG (July 6, 2010, 3:58 PM), http://politicalticker.blogs.cnn.com/2010/07/06/recent-polls-majority-support-arizona-law/?fbid=G0SvXVsDsRj. On a related note, most oppose the federal government's recent lawsuit claiming that S.B. 1070 is preempted by federal immigration law and policy. *See, e.g.*, Michael Muskal, *Poll: Most Americans Oppose Federal Suit to Block Arizona Immigration Law*, L.A. TIMES BLOG (July 9, 2010, 8:11 AM), http://latimesblogs.latimes.com/dcnow/2010/07/poll-most-americans-oppose-federal-suit-to-block-arizona-immigration-law.html.

3. *See, e.g.*, Marcelo Ballvé, *Arizona Law Spurs Copycat Legislation*, NEW AM. MEDIA (May 3, 2010), http://newamericamedia.org/2010/05/arizonas-immigration-law-spurs-copycat-legislation.php.

4. While the Hazleton, Pennsylvania anti-immigrant ordinance may be the best known, the Irondale, Alabama resolution noting that police officers should ascertain traffic arrestees' immigration status may be one of the most recent. *See* Victoria L. Coman, *Irondale Passes Resolution on Immigration Status Checks*, ALA. LIVE BLOG, (July 6, 2010, 11:38 PM), http://blog.al.com/spotnews/2010/07/irondale_passes_resolution_on.html.

intentionally, resort to racial and ethnic profiling, especially in states with sizeable undocumented Latino populations.

Missing from this dialogue, however, is a serious re-examination of existing *federal* laws that criminalize border crossings. Constitutional immigration jurisprudence has long held that Congress's plenary power legitimately vests in the federal political branches the sovereign authority to exclude and deport noncitizens, even on racially discriminatory grounds.[5] On a related note, Fourth Amendment law generally recognizes that race may be a factor in deciding whether immigration officers have a reasonable suspicion that a person is undocumented.[6] Accordingly, most people accept the idea that Congress can reasonably decide to criminalize the very act of crossing the United States border, whether from Mexico or Canada.

This essay challenges conventional wisdom by arguing for the decriminalization of international border crossings into the United States, leaving this regulation to the civil enforcement realm. A border crosser should only be deemed a criminal if the federal government can prove that, with requisite criminal intent, she engaged in an act aside from crossing the border that would constitute a crime. No longer should crossing the border be a strict liability crime.

To make this case, I examine the broader concept of "border crossings" in an effort to discern the underlying moral and practical reasons for when and why American society chooses to criminalize such conduct.[7] The tendency to favor strict liability regimes stems from the desire to aid law enforcement in its battle against more serious border crimes—human trafficking, for instance—by relaxing the standard for proving that a crime has been committed. If catching a person close to the border is enough to render her a criminal suspect, then law enforcement automatically has an opportunity to investigate and discern whether she has violated some other crime.

While a useful tool, strict liability regimes also create the temptation to charge the innocent border crosser—the one who has committed no other crime—with the strict liability crime of border crossing. Although one would hope such decisions would be made only when the government strongly suspects but cannot prove more nefarious activity, such power should be severely limited in the immigration context, where the law uniformly treats noncitizens less favorably than citizens as a default. To err on the side of criminalizing innocent border crossings only adds to the stigma that already plagues undocumented persons, most of whom are una-

5. *See infra* Part II.A.1.
6. *See infra* Part II.A.2.
7. *See infra* Part I.B.

ble to meet our stringent requirements for admission, and once here, become productive members of our society.

A. A Broader Perspective on Borders and Law: Lessons From a Traffic Stop

To invoke the law is to invoke a border between legal and illegal conduct, a bright line that separates the owner from the trespasser, the citizen from the foreigner. Children in affluent societies learn from a very early age to invoke the law and borders when they scream, "that toy is mine!"—clutching their favorite toy close to their chest while sternly warning—". . . and I'm going to tell Dad you tried to get it!" Similarly, in the United States, the idea of demarcating and respecting private property boundaries finds protection in our Constitution's due process clauses.[8] Additionally, all over the world, albeit to differing degrees, nation states recognize the importance of territorial sovereignty that boundaries help define and support. From the personal, to the corporate, to the global, the law helps give borders shape and substance, contributing to the ordering of civilized society.

Three policy questions emerge from a discussion of law and borders. First, when should the law formally recognize a border, whether personal or corporate, private or public? Second, when is that border unlawfully transgressed by another's actions? And third, what legal consequence should follow that border transgression? In sum, these questions focus on the *reason for*, the *breach of*, and the *consequences of breaching* the border.

To put these questions in context, consider the following example. The Fourth Amendment recognizes that we each enjoy a right to be free from unreasonable governmental searches.[9] This provision ensures that law enforcement respects individual privacy. A clear example of a Fourth Amendment violation would be if the government, without a warrant, ransacks your house looking for contraband, causing extensive damage to your property, but finding nothing.[10]

While seemingly clear on its face, this border between private space and legitimate police action is a highly contested one. To tease this issue out,

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8. U.S. CONST. amends. V, XIV (requiring that due process be served before life, liberty, or property may be taken by the government).

9. U.S. CONST. amend. IV.

10. *See* Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388, 389 (1971) (recognizing a constitutional tort cause of action for violation of the Fourth Amendment).

my encounter with a Los Angeles police officer should help illustrate this murky line even further.

When I was a first-year law student, I was legitimately stopped by a police officer on a California freeway en route to the Los Angeles airport to pick up my girlfriend. I had recently moved to Los Angeles from New York, had not driven in months, and was borrowing a friend's car. It was evening on the busy Los Angeles freeways and my driving was less than stellar. Seeing the patrol car's flashing lights in my rearview mirror, I obediently pulled over and waited anxiously for the officer to approach.

Having studied and taught Criminal Procedure, I know now (though I probably would have expected it then) that even though this was not my car, I enjoyed a privacy interest in it; therefore, the officer could not enter the car to search it without my permission or some other legitimate excuse.[11] There was a legal border between the officer and me, which he knew about, and I, at the time, instinctively assumed.

And so, I was a bit surprised when the officer's first words to me were, "I smell marijuana in there." Not "how are you doing this evening?" or "is everything all right?" but, "I smell marijuana in there." Because of my erratic driving, perhaps the officer suspected that I might be under the influence of drugs or alcohol. Maybe the car was the type used by drug gangs; maybe driving toward the airport was another clue that I was a drug runner. Based on his experience, the officer may have been preparing for the worst.

This would all have been reasonable and admirable police work, except that the car did not smell of marijuana, I had not been smoking marijuana, and I was not under the influence of drugs or alcohol. Looking back on the incident, I can only conclude that the officer made this story up so he would have a legitimate reason to search the car.

Upon hearing this, I quickly but politely denied that I was under the influence and calmly explained the reasons for my erratic driving, apologizing contritely. I presented my valid New York driver's license and confessed to my unfamiliarity with both my friend's car and Los Angeles driving conditions. The officer's face softened slightly, letting me go with an admonition to drive more carefully.

Going back to our three questions regarding the *reason for*, the *breach of*, and the *consequences of breaching* the border, this story (1) involves a law that establishes a border protecting the individual from unlawful governmental conduct; (2) allows for an exception that privileges an officer's

11. *See, e.g.*, Brendlin v. California, 551 U.S. 249, 251 (2007) (holding that all passengers in a car have standing to challenge a stop, not just the driver); *accord* Rakas v. Illinois, 439 U.S. 128, 133-36 (1978) (noting the owner of a car has standing to challenge a search of the car).

warrantless search of a vehicle if the officer smells drugs; but otherwise, (3) recognizes possible sanctions against the officer if the search is not reasonable.

Here, no search was conducted and the officer respected the border between us. Yet, what do we make of the officer's false allegation that he smelled marijuana? Some might argue that his actions were entirely justifiable because if he found drugs, then his "error" was harmless, and if he did not, I would be in the same position anyway, save the extra time of having had to endure a vehicle search. Officers put themselves in harm's way daily; as between the innocent driver and the harried cop-on-the-beat, shouldn't the law err in the officer's favor? But another view would be to question the legitimacy of condoning dishonest, if pragmatic, tactics by those charged with upholding our laws. Isn't the very purpose of the Fourth Amendment to ensure that law enforcement officers obey the law?

Carefully examining the contested nature of legal borders in this broader context helps illuminate our understanding of the similarly fluid legal boundaries involved in international border crossings. In important ways, negotiating the personal border between the police officer and me provides insight into the policing of our shared borders with Canada and Mexico.

Imagine border patrol officers encountering a group of Mexicans in the Sonora Desert, just on this side of the United States-Mexico border. Although none of them are criminals— they simply seek better economic opportunities in the United States—like me and my erratic driving, the Mexicans have engaged in unlawful conduct: they have crossed the border in an unauthorized place. Like the Los Angeles police officer who stopped me, these border patrol officers would have several law enforcement options, including (1) transporting the Mexicans back to the other side of the border, with a warning (not unlike my situation); (2) prior to their transport, noting on their record that they had entered the country surreptitiously, rendering them presumptively barred from future entry under civil immigration statutes (analogous to an infraction, perhaps meriting a civil fine and driver's license repercussions); or (3) detain them and recommend that they be prosecuted criminally for entering without inspection.

While the first two options have direct parallels to the potential legal consequences in my traffic stop story—a warning, in one case, and an administrative penalty, in another—the third does not. Absent the officer actually making good on his hunch and finding drugs in the car, I would not have been charged with a crime. Our current immigration law is different, however. Option three would allow immigration officials to charge border crossers with a federal misdemeanor for their first offense, and a felony for

repeat offenders.[12] Why the third option of a possible strict liability criminal offense in the international border crossing scenario? Perhaps just as excusing as "harmless error" a police officer's "white lie" that he "smelled marijuana" would facilitate drug prosecutions, relieving officers of the necessity to prove criminal intent would enhance border policing.

But such an argument only makes sense if we ignore the existence of option two. Recall that administrative penalties already exist to handle the garden-variety border-crosser, the undocumented worker who comes to the United States to earn a living. Shifting back to my traffic stop story, if we accept that erratic driving and drug possession are two distinct crimes, our Fourth Amendment laws are correct to establish privacy borders protecting careless drivers from overzealous "drug-sniffing" officers. Put another way, society recognizes that careless driving and drug possession are two different matters and should be handled differently. In the immigration context, however, this distinction disappears, for Congress has seen it fit to establish both civil, administrative penalties (option two) as well as criminal consequences (option three) for the same conduct—entry without inspection.

Even if one accepts that illegal border crossing is categorically more offensive than erratic driving or speeding (and I am not conceding this, for reasons I will explore more thoroughly below), one has to ask what is gained and what is lost by adding a criminal sanction to the civil administrative consequences of an act. As mentioned earlier, one prominent argument for criminal penalties is that they make policing easier. Like the pass for a "white lie" or warrantless search, a strict liability criminal law regime relieves the government of the burden of proving criminal intent, that the border crosser had some nefarious motive in entering the United States surreptitiously apart from the purpose to physically cross the border unnoticed.

Two negative consequences attend such a choice, however. First, because border crossers can be labeled criminals automatically, this shifts the public discourse from one of empathy to indifference, or possibly disgust; hence, criminalizing conduct that is otherwise sanctioned by civil penalty further marginalizes noncitizens already at the fringes of United States law and culture. And second, just as in my encounter with the well-meaning Los Angeles police officer, enacting criminal provisions when civil penalties will do offends constitutional safeguards of individual liberty by tempt-

12. *See* 8 U.S.C. § 1325(a) (2006) (misdemeanor provision); 8 U.S.C. § 1326 (2006) (felony provision). Unlawful entry has been a crime since 1929. *See* Act of Mar. 4, 1929, ch. 690, 45 Stat. 1551; *see also* United States v. Rincon-Jimenez, 595 F.2d 1192 (9th Cir. 1979) (holding that unlawful entry crime is complete at the time a noncitizen gains entry through an unlawful point and does not submit to an examination).

ing law enforcement to overreach. I will discuss each of these critiques in the next section.

B. When the Border Becomes the Law: "What Part of Illegal Don't You Understand?"

Ever since 9/11, there has been a national obsession over identifying possible terrorist and criminal threats to our country, and immigration policy has been viewed as an effective tool toward that end. In describing his agency's actions following the 9/11 attacks, then Attorney General John Ashcroft famously declared in December 2001, "[m]y message to America this morning, then, is this: If you fit this definition of a terrorist, fear the United States, for you will lose your liberty."[13] In the same speech, Ashcroft outlined how the Department of Justice had relied on the USA PATRIOT Act, immigration controls, and other law enforcement tools to root out terrorism suspects.[14] Nonetheless, he also warned against "fear mongering": "To those who pit Americans against immigrants, and citizens against noncitizens; to those who scare peace-loving people with phantoms of lost liberty; my message is this: Your tactics only aid terrorists—for they erode our national unity and diminish our resolve."[15]

In Ashcroft's remarks, we see the tension inherent in using immigration law as a tool for enforcing criminal laws. Ashcroft realized that immigrants are generally not terrorists or criminals; yet, he felt a responsibility to ensure that any noncitizens who were terrorists or criminals did not escape the government's notice.[16] His warnings, again stereotyping immigrants as terrorists, speak to that fine line between rational and hysterical policing.

I wonder, however, whether the post-9/11 phenomenon of anti-immigrant law-making at both the federal and local level has been driven more by fear and perception rather than the sober analysis Ashcroft's remarks call for. In a 2003 article, Kevin Johnson predicted that the federal government's focus on immigration enforcement as an anti-terrorism tool would lead to the demonization of noncitizens generally, with a disparate

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13. *Department of Justice Oversight: Preserving Our Freedoms While Defending Against Terrorism: Hearing Before the S. Comm on the Judiciary*, 107th Cong. 313 (2001) (statement of John Ashcroft, Att'y Gen. of the United States), *available at* http://www.justice.gov/ag/testimony/2001/1206transcriptsenatejudiciarycommittee.htm.

14. *See id.*

15. *Id.*

16. *See id.*

impact upon Mexican immigrants in particular.[17] My own experiences suggest that Dean Johnson was right. Upon receiving the following e-mails in September 2004, I realized that negative feelings regarding undocumented border crossers had turned increasingly bitter:

> Dear Sir,
>
> Illegal immigrants are in this country illegally, regardless of whether they have jobs that "nobody else wants". Would you excuse a rapist on the grounds that he has a job "nobody else wants"?
>
> I applaud the efforts of the [Pennsylvania] police to enforce the law, regardless of who breaks it. This has nothing to do with racism or racial profiling. It has to do with lawbreaking . . . which you, as a law professor, ought to be concerned about.[18]

Another correspondent noted:

> I read of you being upset that the feds have started enforcing laws by at least giving some small effort to rounding up illegals. Just one question for you . . . if, because one is mexican [sic] (and really no other reason), you thereby have a right to break which law(s) you want to break, i.e., being here ILLEGALLY, then can I, as a middle-class actual citizen pick and choose which laws I want to obey? I am thinking I would like to disobey the "breaking into a bank and stealing other people's money" law. Since it would help me financially to break into a bank and steal other people's money, using your logic, I should be able to—right? Very sophisticated logic you use to denounce the feds, who have too long ignored massive hordes of illegal mexicans [sic] breaking the law in OUR country. After this e-mail, I will be e-mailing Bush to ask him if he can quit sucking up to big business (and their lust for cheap illegal labor) long enough to start focusing on deporting more, and hopefully all, illegals. You might try actually to actually use LOGIC in your thinking, since you are a professor and all . . . .[19]

Perhaps naively, I was not expecting the barely-concealed anger seething in these e-mail reactions to my comments published in a September 2004 Pittsburgh Post-Gazette article about Pennsylvania's Stop Terrorism on Patrol (STOP) campaign.[20] As reported in the *Post-Gazette*, the STOP initiative allowed state troopers conducting routine traffic stops to request immigration documents from persons whom they suspected of being here

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17. *See* Kevin R. Johnson, *September 11 and Mexican Immigrants: Collateral Damage Comes Home*, 52 DEPAUL L. REV. 849, 850-52 (2003).

18. E-mail to author, (Sept. 26, 2004, 20:33 EST) (on file with author).

19. E-mail to Author (Sep. 26, 2004, 23:00 EST) (on file with author).

20. Paula Reed Ward, *Troopers Snare Illegal Aliens on Interstates 80, 79*, PITTSBURGH POST-GAZETTE, Sept. 26, 2004, *available at* http://www.post-gazette.com/pg/04270/384914.stm.

illegally.[21] I told the reporter I was skeptical of state efforts to effectively enforce federal immigration law, given that migrants of color would be the most likely targets of such profiling; instead of terrorists, cops were probably going to catch Latino migrant workers who took jobs U.S. workers would not.[22]

Having taught and written on race and immigration for several years, I knew my views would be difficult to capture in a few newspaper quotes and would not be very popular, but I was little prepared for the strident and disturbing rhetoric employed by a few of my correspondents (including one who tracked down my phone number, leaving me an angry voicemail). Their argument goes something like this:

> As a sovereign nation, the United States has the right to protect its borders. Mexicans and others have violated those borders by sneaking in illegally rather than by waiting their turn like everyone else. These illegals are criminals. They have stolen jobs from hard-working citizens, undercutting wages in the process. It is therefore entirely reasonable for us to use all public resources at our disposal, whether federal, state, or local, to send them back to where they came from. Even assuming they're taking jobs no one wants, that's irrelevant; their illegal status means they have no legal right to work here. This is not racial profiling; it's furthering respect for the rule of law. To call this profiling insults the hard work of law enforcement officers who put themselves in harm's way to keep this country safe day in and day out.

That experience in September 2004 was an eye-opener for me. It marked the first time I noticed a palpable shift in our discourse around immigration policy, where, instead of calmly debating the issues, people began to attack each other personally, conflating and confusing the position with the person. In a country where a robust right of free speech has long been a hallmark of democracy, similar rhetorical fights are being waged over socialism and the welfare state, abortion and gender equality, race and affirmative action, and the rights of sexual minorities. Concerns about immigration are no exception.

Yet, I wonder whether anti-immigrant restrictionists feel particularly vindicated because the law provides an "option three"—the option to treat border crossers as criminals? My sense is that it has, and indeed, this has also led to the proliferation of anti-immigrant legislation by states and local governments, especially of late. Although Arizona's S.B. 1070[23] is but the latest example, states and localities frustrated with the Bush and Obama

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21. *Id.*
22. *Id.*
23. S.B. 1070, 49th Leg., 2d Reg. Sess. (Ariz. 2010).

administrations' apparent inability to pass comprehensive immigration reform have taken matters into their own hands.

The thinking goes as follows: if, like my e-mail correspondents, most of the public feels justified in marginalizing undocumented persons because our immigration laws criminalize such conduct, and if state and local politicians wish to send Washington a message about immigration reform, then laws like Arizona's become more understandable and politically feasible, if arguably morally suspect. Put differently, if undocumented persons are criminals under federal law, then treating them as criminals under state law appears reasonable. In Arizona's case, if S.B. 1070[24] renders undocumented persons criminal trespassers under state law, this simply reflects the federal government's decision to treat illegal border crossings as a criminal offense.

Of course, an overarching policy question still remains: why make illegal border crossings criminal when administrative sanctions are readily available? Why risk the piling on and overreaching by private individuals and non-federal public entities based largely on the legal imprimatur bestowed by the Immigration and Nationality Act upon the criminalization of border crossings? Put differently, why should the border *become the law*, the law and the border essentially merging into one with criminal sanction as the linchpin of enforcement?

To be clear, state and local private and public entities have not been the only ones that have accepted the popular notion that undocumented persons are *de facto* dangerous criminals; indeed, the federal government has long struggled with separating fact from fiction in formulating a just immigration policy, from time-to-time erring on the side of treating civil immigration law more like criminal law.[25] While Arizona's law has been uniformly pilloried by civil liberties advocates as an example of state chauvinism gone wild, a careful examination of the three federal branches of government reveals a long-standing tension between preserving sovereignty and according fair treatment to foreign nationals. The track record of the United States Supreme Court, Congress, and the Presidency on immigration policy and enforcement will be examined in the next section.

24. *See id.*

25. *See infra* Part II.B.

II. LIVING IN A CRIMMIGRATION[26] NATION

While in this post-*Brown v. Board of Education*[27] era, we have come to accept equality as a touchstone of constitutional jurisprudence, all three branches of the federal government have supported the idea that immigration law and policy is exceptional, and that much leeway is to be given the national sovereign in its dealings with foreign citizens. So while *de jure* segregation based on race is no longer acceptable, divisions based on citizenship define what immigration law and policy is about. To the extent that one's immigrant status happens to coincide with some other outsider status like race, poverty, or criminality, immigration law becomes a ready proxy for weeding out undesirables, as the targeting of Arabs and Muslims after 9/11 bears out.

Fortunately, the United States Constitution, while it clearly preserves our sovereignty by differentiating citizens from others, also requires that all "persons"—not just citizens—be afforded due process and equal treatment under the law. The challenge then is for all three federal branches to promote an immigration policy that seeks to balance the importance of maintaining a sovereign nation that values its citizenry against the desire to ensure fair treatment of those guests who reside therein.

A. Supreme Court Complicity

1. The Plenary Power Doctrine

As the final arbiter of the Constitution's meaning,[28] the United States Supreme Court has long held that immigration policy resides in the national government, with Congress primarily responsible for defining that policy and the President responsible for enforcing it. Deliberately, the Court has taken a back seat, declaring that laws regarding the exclusion and expulsion of noncitizens from the United States are the political branches' preroga-

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26. Although this essay focuses on the criminalization of border crossings, much thoughtful work has been done on the criminalization of immigration law in general. *See, e.g.*, 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); Andrew Moore, *Criminal Deportation, Post-Conviction Relief and the Lost Cause of Uniformity*, 22 GEO. IMMIGR. L.J. 665 (2008); Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367 (2006).

27. 347 U.S. 483 (1954).

28. *See, e.g.*, Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) (stating it is the Court's prerogative to "say what the law is").

tive, and that the judiciary therefore has no business substituting its judgment for theirs.[29]

In two landmark cases from the late 1800s, the Supreme Court firmly entrenched in Congress's hands the power to exclude and expel noncitizens. In *Chae Chan Ping v. United States*,[30] the plaintiff was a Chinese laborer who had lived in the United States for many years and wished to return to China temporarily.[31] Prior to his departure, he secured a certificate of return from United States authorities, which he was instructed to present at port when he got back.[32] During his time abroad, Congress passed the Chinese Exclusion Act of 1882, forbidding any further entry of Chinese nationals[33] on the ground that there were too many of them in the United States after the completion of their work on the westward expansion of the railway system.[34] Upon the plaintiff's return to the United States, he presented his previously-issued certificate of return.[35] Rather than accept this as valid, authorities confiscated and revoked it, citing the intervening Chinese Exclusion Act as representing the government's new policy.[36]

Despite the absence of a war between China and the United States, or of evidence to suggest that the plaintiffs were anything other than upstanding citizens, the Court upheld the Chinese Exclusion Act, deferring to the political branches' power to retroactively apply the Act to these returning residents.[37] Indeed, the Court gave effect to Congress's conclusion that all Chinese, including returning United States residents, were an unassimilable security threat:

> If, therefore, the government of the United States, through its legislative department, considers the presence of foreigners of a different race in this country, who will not assimilate with us, to be dangerous to its peace and security, their exclusion is not to be stayed because at the time there are no actual hostilities with the nation of which the foreigners are subjects.[38]

Such a determination is "conclusive upon the judiciary."[39]

A short four years later, the Court extended Congress's plenary power to include the deportation as well as the exclusion of noncitizens. In *Fong*

29. *See id.*
30. 130 U.S. 581 (1889).
31. *See id.* at 582.
32. *See id.*
33. *See id.* at 599.
34. *See id.* at 594-95.
35. *See id.* at 582.
36. *See id.*
37. *See id.* at 606-07.
38. *Id.* at 606.
39. *Id.*

Yue Ting v. United States,[40] another provision of the Chinese Exclusion Act was called into question.[41] To avoid deportation, Chinese residents were required to prove that they had lived in the United States for at least one year.[42] The one catch was that a "credible white witness" had to be produced to vouch for the Chinese resident.[43] Congress believed that it would be easy for the Chinese to find compatriots who would lie for them; in their view, the Chinese were easily corruptible. If true, Congress could have remedied this simply by asking for a "credible witness" only, regardless of race and national origin. Plaintiff Fong was able to produce only a Chinese witness and was therefore found to be deportable.[44]

Faced once again with articulating the scope of congressional power over immigration issues, the Court viewed exclusion and deportation as two sides of the same coin:

> The right of a nation to expel or deport foreigners who have not been naturalized, or taken any steps towards becoming citizens of the country, rests upon the same grounds [as exclusion], and is as absolute and unqualified as the right to prohibit and prevent their entrance into the country.[45]

Aside from the white witness requirement, another racial aspect to this case is that even though the Court faulted plaintiffs for not choosing to naturalize, under applicable law at the time, the Chinese were not permitted to become United States citizens.[46]

Taken together, *Chae Chan Ping* and *Fong Yue Ting* formed the basis for what is now called the "plenary power" doctrine—the idea that Congress has virtually absolute power to determine immigration policy, including whom to exclude and expel, even if those decisions might be based on questionable criteria like race and national origin, rather than assessing individual dangerousness.[47]

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40. 149 U.S. 698 (1893).

41. *See id.* at 703.

42. *See id.* at 698 n.1.

43. *Id.*

44. *See id.* at 703.

45. *Id.* at 707.

46. *See infra* text accompanying notes 79-81.

47. Jack Chin argues that the plenary power doctrine's racist history was simply a reflection of racism in domestic law at the time. *See* Gabriel J. Chin, *Is There a Plenary Power Doctrine? A Tentative Apology and Prediction for Our Strange but Unexceptional Constitutional Immigration Law*, 14 GEO. IMMIGR. L.J. 257 (2000); *see also* Kevin R. Johnson, *Race and Immigration Law and Enforcement: A Response to Is There A Plenary Power Doctrine?*, 14 GEO. IMMIGR. L.J. 289 (2000); Stephen H. Legomsky, *Immigration Exceptionalism: Commentary On Is There A Plenary Power Doctrine?*, 14 GEO. IMMIGR. L.J. 307 (2000). Taking a less optimistic view, Kevin Johnson has argued that United States immigration law reflects the citizenry's true feelings toward domestic minorities by enshrining

While certainly understandable in terms of maintaining a principled separation of powers among the three branches, and justifiably practical given that Congress is the lawmaking body charged with developing a working immigration policy, the plenary power doctrine has been used to shield prejudicial policies from judicial scrutiny, threatening individual liberty in the process. Let us examine one historical example from the 1950s and a more contemporary one from the post-9/11 era.

In *Shaughnessy v. Mezei*,[48] a twenty-five year resident from Europe decided to visit his ailing mother for nineteen months in Rumania.[49] Upon his return to the United States, he was indefinitely detained on Ellis Island because he was adjudged a security risk due to his time behind the Iron Curtain.[50] Mezei filed suit, claiming that he was denied a meaningful hearing to address these allegations.[51] The Supreme Court upheld the detention, rejecting Mezei's due process claim.[52] Despite his prior twenty-five year residence in the United States, Mezei was viewed in the same light as a new immigrant entering the country for the first time. Citing another Cold War precedent, the Court noted, "[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned."[53]

This abdication of judicial authority to review Mezei's potential indefinite detention on Ellis Island was criticized bitterly by the dissent. Justice Jackson skeptically questioned the government's assertion that Mezei was free to leave:

> Government counsel ingeniously argued that Ellis Island is his 'refuge' whence he is free to take leave in any direction except west. That might mean freedom, if only he were an amphibian! Realistically, this man is incarcerated by a combination of forces which keeps him as effectually as a prison, the dominant and proximate of these forces being the United States immigration authority.[54]

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discrimination based on race, gender, class, and sexual orientation in immigration law, which, by virtue of the plenary power doctrine, allows for discrimination against noncitizens on a wide variety of grounds not accepted within domestic law. *See generally* KEVIN R. JOHNSON, THE "HUDDLED MASSES" MYTH: IMMIGRATION AND CIVIL RIGHTS (2004) [hereinafter JOHNSON, HUDDLED MASSES MYTH].

48. 345 U.S. 206 (1953).

49. *Id.* at 208.

50. *Id.*

51. *Id.* at 209.

52. *Id.* at 215-16.

53. *Id.* at 212 (citing Knauff v. Shaughnessy, 338 U.S. 537, 544 (1950)).

54. *Id.* at 220 (Jackson, J., dissenting).

Although the Court has periodically asserted due process as a constitutional ground for overriding some immigration decisions,[55] this general deference to Congress and the President in the fashioning of immigration policy continues today, especially in cases where, as in *Mezei*, the government asserts a national security threat posed by a noncitizen. A more recent example appears in *Iqbal v. Ashcroft*.[56]

In *Iqbal*, the Supreme Court upheld the dismissal of a constitutional law claim made by a Pakistani national against the federal government.[57] Javaid Iqbal, a Pakistani Muslim man detained as part of John Ashcroft's post-9/11 anti-terrorism sweep, claimed that Ashcroft and FBI Director Robert Mueller discriminated against Arabs and Muslims during the round-up because they knew a disproportionately high number of those detained would be from these groups.[58] Like in *Mezei*, no evidence had been produced to prove he was a terrorist; indeed, unlike many suspected terrorists who were typically incarcerated indefinitely in Guantanamo, Iqbal was simply deported home.[59]

The Court dismissed the claims against Ashcroft and Muller, holding that it was not enough for them to know that Arabs and Muslims would be disproportionately represented among the terrorism suspects, but that Iqbal needed to prove that the defendants purposefully intended to target Arabs and Muslims because of their race, national origin, and religion.[60] Rather than invidious discrimination, the Court reasoned that Ashcroft and Mueller's intent was to detain all noncitizens who might be terror suspects, and that Iqbal was included in the sweep not because of his race, national origin, or religion, but because he was a "suspected terrorist."[61] Yet, nothing in Iqbal's background suggests that he was a terrorist; that the government chose to deport him rather than detain and try him suggests that they knew he was not a terrorist. Indeed, the only characteristics linking him to the 9/11 suspects were his race, national origin, and religion.[62] Just as Mezei was rendered immediately suspect because of his travels in communist territory, so was Iqbal deemed a security threat simply because he fit a profile.

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55. *See, e.g.*, Landon v. Plasencia, 459 U.S. 21 (1982) (holding that due process hearing is required for excluded lawful permanent resident who made only a brief trip to Mexico).

56. 129 S. Ct. 1937 (2009).

57. *See id.* at 1954.

58. *See id.* at 1944.

59. *See id.* at 1943.

60. *See id.* at 1952.

61. *See id.* at 1951-52.

62. As I explain in a recent essay, Iqbal had pleaded guilty to a minor forgery offense, but the government had not proven that the incident bore any relation to terrorist activity. *See* Victor C. Romero, *Interrogating* Iqbal, 114 PENN. ST. L. REV. (forthcoming 2010).

Reluctant to hinder the government's war on terror, the Court was willing to dismiss instead the civil liberties claims of an individual whose legal status was marginalized and compromised by his foreign nationality.[63]

Aside from this broad deference to Congress in immigration matters, the Court has also condoned the use of race as a factor in aiding presidential and agency enforcement of the law. As we will discover in the next section, preserving racial profiling as a law enforcement tool has arguably made it more palatable for courts to pass the buck, leaving the balancing of rights and responsibilities in individual cases to the administration.

2. *Fourth Amendment Jurisprudence on "Alien" Profiling*

In *United States v. Brignoni-Ponce*,[64] federal border patrol agents stopped a vehicle traveling near the United States-Mexico border based solely on the fact that its occupants appeared to be of Mexican descent and were therefore possibly illegal border crossers.[65] Upon stopping the vehicle, agents discovered that their suspicions were correct and Brignoni-Ponce, the driver, was subsequently charged with smuggling undocumented persons into the United States.[66] Brignoni-Ponce challenged the conviction, claiming that it was illegal for the officers to stop his car solely on the grounds that he and his companions appeared to be Mexican.[67] The Supreme Court agreed.[68] While recognizing that border patrol officers could use a suspect's Latino appearance as one factor in deciding whether to briefly inquire about one's immigration status, relying on race alone was impermissible:

> [Apparent Mexican ancestry] alone would justify neither a reasonable belief that they were aliens, nor a reasonable belief that the car concealed other aliens who were illegally in the country. Large numbers of native born and naturalized citizens have the physical characteristics identified with Mexican ancestry, and even in the border area, a relatively small proportion of them are aliens.[69]

With Pandora's Box now open, *Brignoni-Ponce* paved the way for widespread use of racial profiling in the immigration context, notwithstanding the Court's admonition that it should play but a minor role in determining

63. *See Iqbal*, 129 S. Ct. at 1954.
64. 422 U.S. 873 (1975).
65. *See id.* at 874.
66. *See id.* at 875.
67. *See id.* at 885-86.
68. *See id.* at 886.
69. *Id.*

reasonable suspicion.[70] First, *Brignoni-Ponce* legitimized the idea that there exists a Mexican phenotype, when, in truth, Mexicans, like many other nationalities, are extremely diverse in their racial makeup.[71] In addition, a study of immigration enforcement in the years following *Brignoni-Ponce* revealed that, in practice, the Court's articulation of a broad range of non-race-based factors encouraged immigration officers to supply reasons justifying a stop *after* they had begun to interview a suspect.[72] As such, even when lower courts have criticized law enforcement for its inappropriate use of race as a factor, they have sometimes upheld traffic stops because of the proper use of other *Brignoni-Ponce* criteria. In *United States v. Montero-Camargo*,[73] for instance, the Ninth Circuit criticized the border patrol's reliance on "the Hispanic appearance of the vehicle['s] occupants" because the search was conducted in an area heavily populated by lawful Latino residents, although the court ultimately concluded that other race-neutral factors justified the stop.[74]

When viewed through the lens of United States immigration history, federal court deference to the political branches in both the construction of immigration policy and the federal enforcement of immigration law has led to an increasing preoccupation with our southern border, as the next section illustrates.

B. Congress and the Criminalization of Federal Immigration Law

Prior to the federalization of United States immigration law in 1875, individual states restricted immigration by establishing qualitative barriers to

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70. *See* Kevin R. Johnson, *How Racial Profiling Became the Law of the Land:* United States v. Brignoni-Ponce *and* Whren v. United States *and the Need for Truly Rebellious Lawyering*, 98 GEO. L.J. 1005, 1024-42 (2010) (criticizing *Brignoni-Ponce* and its progeny for legitimizing racial profiling in law enforcement); *see also* Gabriel J. Chin & Kevin R. Johnson, *Profiling's Enabler: High Court Ruling Underpins Arizona Immigration Law*, WASH. POST, July 13, 2010, at A15 (arguing that *Brignoni-Ponce*'s approval of racial profiling contributed to the recent Arizona law's apparent popularity), *available at* http://www.washingtonpost.com/wp-dyn/content/article/2010/07/12/AR2010071204049.html. For more on the tension between the Fourth Amendment's privacy expectations and federal immigration enforcement, see, e.g., Raquel Aldana, *Of* Katz *and "Aliens": Privacy Expectations and the Immigration Raids*, 41 U.C. DAVIS L. REV. 1081 (2008); Anil Kalhan, *The Fourth Amendment and Privacy Implications of Interior Immigration Enforcement*, 41 U.C. DAVIS L. REV. 1137 (2008).

71. Johnson, *supra* note 70, at 1025.

72. Edwin Harwood, *Arrests Without Warrant: The Legal and Organizational Environment of Immigration Law Enforcement*, 17 U.C. DAVIS L. REV. 505, 531 (1984).

73. 208 F.3d 1122 (9th Cir. 2000) (en banc).

74. *See id.* at 1128; *see also* United States v. Manzo-Jurado, 457 F.3d 928, 936 n.6 (9th Cir. 2006) (finding *Montero-Camargo* inapplicable because the United States-Canada border area was not heavily populated by Latinos).

entry on the basis of criminal activity, poverty and disability, contagious disease, race and slavery, and ideological grounds; some states also required that noncitizens register as a prerequisite to entry.[75]

When Congress began to assert its federal immigration power, qualitative grounds were also the focus; it was not until the 1920s that quantitative restrictions were established against Europeans and Asians, with Mexicans and other western hemisphere residents exempt from quota.[76]

As historian Mae Ngai observes:

> Notwithstanding Congress's absolute power over admission and expulsion, as a practical matter mass immigration from Europe faced few legal impediments in the late nineteenth and early twentieth century. . . . Despite the growing list of excludable categories, the Immigration Service excluded only 1 percent of the 25 million immigrants from Europe who arrived in the United States from 1880 to World War I.[77]

By the advent of World War I, however, political resentment of "hyphenated Americans," especially German-Americans, and the maturing economy of the United States coincided with the emerging primacy of the nation-state, leading to the widespread adoption of passport and migration controls in both the United States and Europe.[78]

Aside from the Chinese Exclusion Act of the late 1800s, wartime legislation of the 1910s restricted the movement of eastern and southern Europeans, followed by the first quantitative limit on immigration in May 1921, when Congress passed an emergency measure curtailing total migration to 355,000 per year.[79] By 1924, Congress established a permanent national origins quota system that favored the English over other Europeans, barred East and South Asians from entry and citizenship, and exempted western hemisphere nations, including Mexico, from these quotas.[80] Reflecting the domestic politics of the time, United States immigration policy favored whites over non-whites, both qualitatively and quantitatively. "If Congress did not go so far as to sponsor race breeding, it did seek to transform immigration law into an instrument of mass racial engineering."[81]

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75. *See generally* Gerald L. Neuman, *The Lost Century of American Immigration Law (1776-1875)*, 93 COLUM. L. REV. 1833, 1833-83 (1993) (describing general categories of state exclusionary grounds).

76. MAE M. NGAI, IMPOSSIBLE SUBJECTS 50 (2004).

77. *Id.* at 18.

78. *Id.* at 19.

79. *Id.* at 20.

80. Immigration Act of 1924, Pub. L. 68-139, 43 Stat. 153 (1924).

81. NGAI, *supra* note 76, at 27; *see also* JOHNSON, HUDDLED MASSES MYTH, *supra* note 47 (tracing the legacy of racism and exclusion reflected in the history of U.S. immigration policy).

This brief history of federal immigration policy from the mid-1870s to the early 1920s paints a picture of a Congress determined to help keep the United States racially homogeneous through qualitative and quantitative restrictions on European and Asian immigration, with the notable exception of the western hemisphere nations. But why the exemption for Latin America, especially if we consider modern sensibilities post-*Brignoni-Ponce*, where "Mexican appearance" tends to evoke the unflattering, prejudicial image of the brown-skinned illegal border crosser? The reason is political: Euro-Americans likely did not consider Mexicans their equals, but neither did they believe it feasible to impose quotas upon their southern neighbors without also restricting Canadian migration. Add to this the need for Mexican agricultural labor in the southwest and we have a clearer picture as to why Latin America was exempt from the national origins restrictions of the 1924 Act.[82]

This is not to say that Mexicans did not suffer discrimination even then. Euro-Americans' perceived "manifest destiny" led to the annexation of Mexican land in Texas and California—sometimes by conquest, sometimes by intermarriage between wealthy Anglos and Mexicans—resulting in the assimilation and homogenization of the Mexican elite. From 1900 to 1920, the westward migration of midwestern Anglo farmers and the northward movement of rural laborers fleeing the Mexican Revolution of 1910-1920 led to the class and racial dichotomy currently existing in the agricultural southwest today, with white property owners employing unskilled landless Mexican laborers.[83]

The United States-Mexico border during the first two decades of the twentieth century was not the militarized zone we know today. "Before the 1920s the Immigration Service paid little attention to the nation's land borders because the overwhelming majority of immigrants entering the United States landed at Ellis Island and other seaports."[84] Rather than patrolling the southern border, immigration inspectors assumed that market demands for Mexican labor would regulate migration; the government also described the southern states as the Mexicans' "natural habitat," begrudgingly acknowledging their claims to their former homeland to justify its lax en-

82. NGAI, *supra* note 76, at 50-51.

83. *See id.* at 51-52.

84. *Id.* at 64; *accord* PETER ANDREAS, BORDER GAMES: POLICING THE U.S.-MEXICO DIVIDE 32 (2000) ("Whereas formal, legal entry was a complicated process, crossing the border illegally was relatively simple and largely overlooked.").

forcement policies.[85] Indeed, Mexicans were not even required to apply for admission at ports of entry until 1919.[86]

But with the advent of the national origins quota system and the barred Asiatic zone in the 1920s, deportation became the preferred remedy for immigration violations, eventually leading to the criminalization of border crossings. In the 1924 Act, Congress eliminated the statute of limitations on deportation, providing for the removal of any person who arrived without inspection or without a valid visa after July 1, 1924.[87] In 1929, Congress added a criminal sanction to the deportation remedy, making it a crime for anyone to cross the border without inspection—a misdemeanor charge for first-time offenders, a felony conviction for recidivists.[88]

The 1920s emphasis on numerical restriction, deportation, and criminal enforcement eventually led to the association of illegal immigration with Mexican immigration despite Mexicans' then-exemption from quota rules. Due to the advent of these more stringent laws, many Europeans began hiring smugglers to help them enter the United States from across both the Canadian and Mexican borders. By the late 1920s, however, ineligible Europeans from countries like Italy and Poland found a legal alternative. They began exploiting Canadian residency as an alternate means to immigrate; by residing in Canada for five years, these Europeans were allowed to legally immigrate into the United States. In addition, along the southern border, Anglo ranch owners often complained about the rough treatment they received from Border Patrol agents. These twin developments eventually led to the better, more courteous treatment of Anglos and Europeans by immigration agents, while Mexicans and other Latinos suffered the indignities of a more stringent border policy and racialized politics, fueled in part by the growing class divide between white owners and Mexican laborers in the south.[89]

So, even though Mexicans at the time were not subject to quotas like the Europeans or banned from naturalization and immigration like the Asians, they became associated with illegal migration,[90] eventually giving rise to the race-based law enforcement profile evident in *Brignoni-Ponce*. As Ngai explains,

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85. NGAI, *supra* note 76, at 64.

86. *Id.*

87. *See id.* at 60; Immigration Act of 1924, Pub. L. 68-139, 43 Stat. 153.

88. Immigration Act of 1924, Pub. L. 68-139, 43 Stat. 153.

89. NGAI, *supra* note 76, at 64-70.

90. *Id.* at 71 ("It was ironic that Mexicans became so associated with illegal immigration because, unlike Europeans, they were not subject to numerical quotas and, unlike Asiatics, they were not excluded as racially ineligible to citizenship.").

> as numerical restrictions assumed primacy in immigration policy, its enforcement aspects—inspection procedures, deportation, the Border Patrol, criminal prosecution, and irregular categories of immigration—created many thousands of illegal Mexican immigrants. The undocumented laborer who crossed the border to work in the burgeoning industry of commercial agriculture thus emerged as the prototypical illegal alien.[91]

From 1930 to 1965, Congress vacillated between deportation and legalization as it attempted to craft policies that met the needs of United States agriculture, provided sufficient protection for exploited Mexican workers, and gave coherence to the deportation system it had created.[92] Perhaps the symbiotic relationship between United States employers and Mexican farm-workers may best be illustrated by the recorded numbers at the end of the Bracero program, a migrant labor initiative begun in the 1950s. Up to 1964, the number of workers almost equaled the number of deportees, at close to five million each.[93]

Also contributing to the marginalization of the Mexican border crosser has been the war on drugs. Although the anti-drug initiative was not an immigration policy, to the extent that it prioritized international drug smuggling as a federal criminal concern, Congress has had to pay increasingly close attention to the United States-Mexico border. By the 1950s and 1960s, Mexico supplied approximately seventy-five percent of marijuana in the United States market and ten to fifteen percent of heroin.[94] This reality arguably enhanced the perception in some circles that Mexicans were invariably ignorant, indolent, and criminal.[95] Of course, not only were most Mexicans not drug runners, but neither were they illegal border crossers—many were either regular commuters or seasonal migrant workers, legally employed in the United States but permanently residing in Mexico.[96]

In sum, despite the longstanding interdependence of United States employers and foreign farm-workers, the 1920s creation of the "illegal immigrant" through numerical restrictions, enhanced border patrol, and enforcement via deportation and criminal punishment, helped fuel the public's association of undocumented migration with Mexican migration.

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91. *Id.*

92. *See* DAN KANSTROOM, DEPORTATION NATION 214-24 (2007) (describing deportation of Mexicans from 1930-1965).

93. *Id.* at 224.

94. ANDREAS, *supra* note 84, at 40.

95. NGAI, *supra* note 76, at 53 ("Anti-Mexican rhetoric invariably focused on allegations of ignorance, filth, indolence, and criminality.").

96. *Id.* at 70-71 (describing the irregular, though legal, patterns of migration some Mexicans engaged in, including commuting and seasonal migrant work).

Moreover, the United States' growing concern over the war on drugs and Mexico's notoriety as a prominent source of contraband may have further contributed to a concern over border patrol and the perception of the Mexican migrant as criminal, despite studies clearly demonstrating the higher incidence of criminality among the native-born versus the immigrant.[97] It is no wonder then that border crossing is popularly viewed today as a criminal activity requiring punishment and deterrence.

A final contributor to this misperception has been the militarization of the border. Owing to concerns over the smuggling of drugs and humans, as well as individual border crossings, the federal government has fortified the United States-Mexico border substantially over the years. Despite efforts to pass comprehensive immigration reform in 2006 and 2007, President Bush and the 109th Congress might instead be remembered for the notorious Secure Fence Act of 2006,[98] which famously authorized the creation of 700 miles of new border fence, although it was unclear that any funds for the project were forthcoming. While praised by restrictionists for decreasing the number of border crossings into San Diego, California from 1999 to 2004, critics assert that the militarized border has not only deterred seasonal migrants from returning home, but has also forced those coming from Mexico to cross at more dangerous points through the Sonora Desert into southern Arizona, leading to a record number of deaths in recent years.[99] Instead of the continued fortification, migration scholar Douglas Massey argues for increased investment in Mexico, better ports and transportation, and a robust guest worker program.[100] Congress appears undeterred; during the summer of 2010, federal budget negotiations over war spending had the House pressing for an additional 700 million dollars for border security.[101]

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97. *See, e.g.*, RUBEN G. RUMBAUT & WALTER A. EWING, THE MYTH OF IMMIGRANT CRIMINALITY AND THE PARADOX OF ASSIMILATION (2007); Kristen F. Butcher & Anne Morrison Piehl, *Recent Immigrants: Unexpected Implications for Crime and Incarceration* (Nat'l Bureau of Econ. Research, Working Paper No. 6067, 1997).

98. Pub. L. No. 109-367, 120 Stat. 2638.

99. *See* VICTOR C. ROMERO, EVERYDAY LAW FOR IMMIGRANTS 90-91 (2009) (describing pros and cons of increased border security). "[The federal government's] tougher enforcement measures have pushed smugglers and illegal immigrants to take their chances on isolated trails through the deserts and mountains of southern Arizona, where they must sometimes walk for three or four days before reaching a road." James C. McKinley, Jr., *An Arizona Morgue Goes Crowded*, N.Y. Times, July 29, 2010, at A14.

100. *See* Tyche Hendricks, *Study: Price for Border Fence Up to $49 Billion*, S.F. CHRON., Jan. 8, 2007, at B-1, *available at* http://sfgate.com/cgi-bin/article.cgi?f=/c/a/2007/01/08/BAG6RNEJJG1.DTL.

101. *See* Ted Barrett & Deirdre Walsh, *Senate Democrats Say House Must Cut Teachers Money From War Spending Bill*, CNN POLITICAL TICKER BLOG (July 19, 2010, 8:13 PM),

Just as pleas for alternatives to border militarization have fallen on deaf ears in Congress, they have apparently been politically unpalatable to the current President, whose immigration policy seems to emphasize enforcement over integration.

C. The Presidency: "Enforcement Now, Enforcement Forever"

As with other political initiatives, United States immigration enforcement has waxed and waned over the years, depending on the Executive's concerns over foreign policy, national security, and the domestic economy, among other things. As the federal lawmaking body, Congress has been largely responsible for setting the Executive's agenda, and yet, presidents and their appointed officers have also been greatly influential in setting the tone for enforcement.

This section will sample immigration leadership under two Democratic presidents who are often compared—Franklin Delano Roosevelt ("FDR") and Barack Obama—to get a sense of the negotiation between Congress and the president over the execution of enacted immigration policy.[102]

Following Congress's growing concern over immigration regulation in the 1920s and the advent of deportation and criminal sanction as the preferred enforcement mechanisms, the immigration leadership in FDR's administration served as an important check against overzealous enforcement. Secretary of Labor Frances Perkins took seriously criticisms leveled at the Immigration and Naturalization Service (INS) noting that "much of the odium which has attached to the Service has been due to the policies and methods followed in connection with deportations and removals."[103] Perkins appointed the Ellis Island Committee to study the Service's practices; the Committee's March 1934 report favored the need for administrative discretion not to deport in cases of extreme hardship, for instance, where families might be separated.[104] Perkins found a willing ally in the new head of the INS, Daniel MacCormack. MacCormack vigorously lobbied for Congress to pass legislation granting such administrative discretion, expressing the view that "illegal entry in itself is not a criterion on character."[105] Indeed, he testified that "the mother who braces the hardship and danger frequently involved in an illegal entry for purpose of rejoining her

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http://politicalticker.blogs.cnn.com/2010/07/19/senate-democrats-say-house-must-cut-teachers-money-from-war-spending-bill/?fbid=G0SvXVsDsRj.

102. *See, e.g.*, David M. Kennedy, *FDR's Lessons For Obama*, TIME, July 6, 2009, at 26.

103. NGAI, *supra* note 76, at 83.

104. *See id.*

105. *Id.* at 84.

children cannot be held by that sole act to be a person of bad character."[106] Because economic recovery following the Great Depression pushed immigration reform to the backburner, Perkins and MacCormack creatively used existing provisions of the law to suspend deportations and legalize undocumented persons in cases of extreme hardship.[107]

In some ways, President Obama's Department of Homeland Security (DHS) has taken a cue from Perkins and MacCormack. For instance, DHS Secretary Janet Napolitano last year decided not to deport foreign nationals who, because of the untimely death of their United States citizen spouses, could not adjust to permanent resident status as they had been married for less than two years.[108] Realizing the unfairness this created, Congress eliminated this "widow's penalty" late last year.[109] Similarly, Attorney General Eric Holder vacated the Board of Immigration Appeals' decision in *Matter of Compean*, restoring the right of deportees to claim ineffective assistance of counsel on motions to reopen proceedings.[110]

In other ways, however, much of the Obama administration's immigration strategy smacks of the mantra: "Enforcement Now, Enforcement Forever." Despite the DHS's insistence that it will prioritize the prosecution of criminal noncitizens first, a study by Syracuse University's Transaction Records Access Clearinghouse reveals that in the 2009 fiscal year, the top two immigration crimes charged were for entries without inspection, the modern version of the 1929 laws that first criminalized unauthorized border

106. *Id.*

107. *See id.*

108. *See* Press Release, U.S. Dep't of Homeland Sec., DHS Establishes Interim Relief for Widows of U.S. Citizens (June 9, 2009), *available at* http://www.dhs.gov/ynews/releases/pr_1244578412501.shtm. Similarly, Shoba Sivaprasad Wadhia has argued strongly for greater and more prudent exercise of prosecutorial discretion among immigration attorneys. *See* Shoba Sivaprasad Wadhia, *The Role of Prosecutorial Discretion in Immigration Law*, 9 CONN. PUB. INT. L.J. 243, 243 (2010); *see also* Joanna Lydgate, *Assembly-Line Justice: A Review of Operation Streamline*, 2010 C.J. EARL WARREN INST. ON RACE, ETHNICITY & DIVERSITY 1 ("The current administration is committed to combating the drug and weapon trafficking and human smuggling at the root of violence along the U.S.-Mexico border. But a Bush-era immigration enforcement program called Operation Streamline threatens to undermine that effort. Operation Streamline requires the federal criminal prosecution and imprisonment of all unlawful border crossers. The program, which mainly targets migrant workers with no criminal history, has caused skyrocketing caseloads in many federal district courts along the border."), *available at* http://www.law.berkeley.edu/6807.htm.

109. Kirk Semple, *Measure Gives Rights to Widows of Citizens*, N.Y. TIMES, Oct. 21, 2009, at A19.

110. *In re* Compean, 25 I. & N. Dec. 1 (A.G. 2009) (vacating prior decision, thereby restoring BIA and IJ authority to review motions to reopen based on claims of ineffective assistance of counsel).

crossings.[111] Apparently, President Obama is simply continuing the policy of his predecessors; criminal charges for entry and re-entry without inspection have been in the top three among immigration charges brought over the last twenty years.[112] Despite this longstanding preference for charging undocumented entries via the criminal law, a 2009 Pew Hispanic Center report reveals that, although it has stabilized in recent years, the undocumented population increased rapidly from 1990 to 2006.[113] All this has only further entrenched the stereotype of the Latino man as undocumented migrant.[114]

In his July 2010 speech calling for immigration reform, enforcement and the rule of law were again the pillars of Obama's platform.[115] Rejecting popular calls for either blanket amnesty for or aggressive deportation of all eleven million undocumented persons currently living in the U.S., Obama presented a middle way that, while outlining a pathway to citizenship for the undocumented, emphasized securing the southern border, holding unscrupulous businesses accountable for illegal hiring, and requiring that penalties be assessed and civic responsibilities be imposed upon those wanting to legalize their status.[116] While it is possible that Obama could only sell amnesty to Congress and the public by emphasizing law enforcement,

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111. *Immigration Prosecutions at Record Levels in FY 2009*, TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, SYRACUSE UNIV., http://trac.syr.edu/immigration/reports/218/ (last visited Oct. 25, 2010).

112. *See id.*

113. Jeffrey S. Passel & D'Vera Cohn, A PORTRAIT OF UNAUTHORIZED IMMIGRANTS IN THE UNITED STATES, PEW HISP. CTR. (Apr. 14, 2009), *available at* http://pewhispanic.org/reports/report.php?ReportID=107.

114. *See, e.g.*, LEO R. CHAVEZ, THE LATINO THREAT: CONSTRUCTING IMMIGRANTS, CITIZENS, AND THE NATION (2008) (arguing how fear-mongering anti-immigrant rhetoric targeted at Latinos has permeated both media and popular works of late). *See generally* Ediberto Roman, *The Alien Invasion?*, 45 HOUS. L. REV. 841 (2008) (decrying the nativism and xenophobia evident in the current rhetoric surrounding Latino immigration).

115. Press release, President Barack Obama, Remarks by the President on Comprehensive Immigration Reform (July 1, 2010), *available at* http://www.whitehouse.gov/the-press-office/remarks-president-comprehensive-immigration-reform [hereinafter Remarks on Immigration Reform]. Even among conservatives, the question of comprehensive immigration reform is a tricky one. *Compare Conservatives for Comprehensive Immigration Reform*, IMMIGRATIONPROF BLOG (July 18, 2010), http://lawprofessors.typepad.com/immigration/2010/07/conservatives-for-immigration-reform.html, *with* Edwin Meese III, *An Amnesty By Any Other Name . . .*, N.Y. TIMES, May 24, 2006, *available at* http://www.nytimes.com/2006/05/24/opinion/24meese.html (arguing against amnesty; Meese, the Attorney General who signed on to Reagan's 1986 amnesty, asserts: "The fair and sound policy is to give those who are here illegally the opportunity to correct their status by returning to their country of origin and getting in line with everyone else. This, along with serious enforcement and control of the illegal inflow at the border—a combination of incentives and disincentives—will significantly reduce over time our population of illegal immigrants.").

116. *See* Remarks on Immigration Reform, *supra* note 115.

it remains to be seen whether bringing undocumented workers out of the shadows so that they eventually become full citizens becomes the cornerstone of a more just immigration policy, or just a front for stricter border and interior enforcement.[117]

Historically, crossing international borders was not a crime. Nativist fears, the rise of nation-states, and concerns over economics and national security prompted a shift to a numbers-based United States immigration policy in the 1920s. Criminalization of border crossings soon followed, as did the growing perception that Mexicans were the prototypical "illegal aliens," despite their relatively favored immigration status compared to Europeans and Asians at the time. Congressional and presidential concern over human and drug trafficking led to the increasing militarization of the southern border, aided by the Supreme Court's blessing of racial profiling as a constitutionally sound tool in identifying undocumented migrants. And yet, this enforcement-heavy approach has not seemed to curtail undocumented migration significantly, but instead, has arguably encouraged states such as Arizona to pass their own immigration ordinances, further perpetuating anti-Mexican sentiment.

The next section advocates a different approach that takes enforcement seriously by arguing for the decriminalization of border crossings. Doing so would help restore balance to an immigration system that should reserve sanctions for those whose non-border-crossing criminal conduct merits such punishment.

III. AN ALTERNATIVE: DECRIMINALIZING BORDER CROSSINGS

Criminalizing border crossings violates the basic premise of criminal law that the punishment fit the crime. Historically, it was not until 1929 that border crossing was deemed a criminal act; civil deportations, though hugely disruptive, did not involve incarceration as a punishment for immigration violations. In a sense, deporting individuals for disobeying civil immigration law simply holds migrants to the terms of their bargain with the United States: failure to comply with conditions of entry means that the person would not be permitted to remain.[118] Keeping only the civil remedy

117. The reason for skepticism is real. The New York Times recently reported that the Obama administration has silently begun conducting audits of businesses, forcing them to fire all undocumented workers. *See* Julia Preston, *Illegal Workers Swept from Jobs in 'Silent Raids,'* N.Y. TIMES, July 9, 2010, at A1.

118. I should make clear that I do not endorse this "immigration as contract" view, although I believe it best expresses the realities of current United States policy. *See* ROMERO, *supra* note 99, at ch. 1. I would prefer either a more open admissions policy, *e.g.*, KEVIN R. JOHNSON, OPENING THE FLOODGATES: WHY AMERICA NEEDS TO RETHINK ITS BORDERS AND IMMIGRATION LAWS (2007), or one that better facilitates the transition from foreigner to citi-

for immigration violations—deportation—while discarding all criminal sanctions for undocumented border crossings enhances United States immigration policy in several concrete ways.

First, decriminalizing border crossings helps restore order and balance to what should be a civil, not criminal, immigration system only. As FDR's INS Chief MacCormack noted, there is nothing inherently immoral about a person entering the U.S. without inspection.[119] Treating border crossers as civil law violators allows immigration agents and adjudicators the opportunity to treat each case on an individual basis, balancing hardship against transgression, without the stigma of possible criminal sanction coloring the decision-maker's judgment. To update MacCormack's hypothetical, with today's militarized border funneling migrant workers across the Sonoran Desert, very few would find a mother's decision to risk such a dangerous trek to be reunited with her children unworthy of sympathy.

Second, decriminalizing border crossings helps the perennially understaffed and underfunded immigration agencies better channel scarce resources by prioritizing targets. If entry without inspection is no longer a crime, immigration authorities can help other federal law enforcement officers focus on true migrant threats, for instance, those who smuggle drugs and weapons across the border, often bringing violence in their wake.

Third, decriminalizing border crossings will enhance the United States' image abroad. When a nation committed to equality and due process is able to extend fair treatment to foreign guests, other countries begin to respect and trust it, rather than worry about whether its actions will betray its words.

Finally, decriminalizing border crossings should help heal our racially-polarized discourse over immigration policy and change the culture for the better. Over time, society will come to understand entry without inspection for what it is—not a crime, but a desperate act of persons forced to leave everything familiar to begin a new life in a foreign land.

A critic might balk at the thought of emasculating immigration authorities by depriving them of the ability to charge suspected criminal migrants with a strict liability crime. Criminally charging someone with entry without inspection saves law enforcement the trouble of having to prove the intent—*mens rea*—to commit a crime when the evidence is not readily available. However, as Joshua Dressler correctly observes, "[m]ost modern

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zen, *e.g.*, HIROSHI MOTOMURA, AMERICANS IN WAITING: THE LAST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES (2006). I also firmly believe that, like any remedy, deportation should be weighed against compelling individual circumstances meriting exception, for maintaining family unity, for example.

119. *See supra* text accompanying note 105.

criminal law scholars look unkindly upon the abandonment of the *mens rea* requirement" because criminally punishing people for bad intent "is consistent with the retributive principle that one who does not choose to cause social harm, and who is not otherwise morally to blame for its commission, does not deserve to be punished."[120] In contrast, those few who favor strict liability in criminal law generally believe that there is some utilitarian benefit to society as a whole that outweighs the unfairness to the accused, especially since the attendant penalties are typically slight.[121]

In the context of immigration law, this rationale becomes difficult to fathom, given that deportation is a readily available civil remedy for entry without inspection. Even in the context of recidivists, it would be better to ascertain the reasons for the repeated unauthorized crossings rather than to simply assume criminal intent. Further, current criminal statutes for entry without inspection carry with them the stigma of a federal misdemeanor at best,[122] and a federal felony conviction at worst.[123] Finally, despite the vigorous enforcement[124] of these criminal immigration provisions over the last twenty years, undocumented migration has continued largely unabated, as the Pew Hispanic Center's recent report suggests.[125] Strict liability does not appear to be a particularly attractive option within the immigration law context.[126]

CONCLUSION: BORDERING ON JUSTICE AND FAIRNESS

Instead of bordering on law, United States immigration policy should border on justice and fairness. This requires shifting focus from categorical laws that automatically deem all border crossers as criminals, to having faith that our current administrative laws will suffice. Doing so will restore balance to the civil immigration system, conserve scarce enforcement re-

120. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 148 (5th ed. 2009).

121. *Id.*

122. Immigration and Nationality Act § 275, 8 U.S.C. § 1325 (2006).

123. Immigration and Nationality Act § 276, 8 U.S.C. § 1326 (2006).

124. *See supra* text accompanying notes 111-12.

125. *See supra* text accompanying note 113.

126. One might argue that even under the current criminal border crossing statutes, the government must prove intent to cross into the United States illegally, which satisfies *mens rea*. However, like MacCormack, I see nothing inherently wrong in intending to cross the border without documents, especially if one's "choice" is based on necessity, like the mother wishing to be reunited with her child. Thus, I favor requiring government to prove some other criminal intent—like the intent to transport illegal contraband—if it wishes to criminally prosecute a border crosser, but to otherwise treat all other garden-variety border crossers under the existing administrative law regime.

sources to target truly criminal behavior, enhance our standing abroad, and help heal our racially-polarized discourse on immigration policy.

Although the Puritan immigrants did not always do right by the Native Americans whose lands they invaded, Massachusetts Bay Colony Governor John Winthrop expressed a vision of a civilized society worth aspiring to in the following words: "We must delight in each other, make others' conditions our own, rejoice together, mourn together, labor and suffer together, always having before our eyes our community as members of the same body."[127] Choosing an immigration policy that treats noncitizens fairly reflects well upon the body politic as a whole.

127. *See* DON HAWKINSON, CHARACTER FOR LIFE: AN AMERICAN HERITAGE 155 (2005) (quoting Winthrop's "A Model of Christian Charity" sermon). Recently, The Economist decried the over-criminalization of United States law, arguing that "[a]cts that can be regulated should not be criminalised [sic]." *Rough Justice*, ECONOMIST, July 24, 2010, at 13. Immigration law violations that can be handled within administrative law, like border crossings, arguably fit the bill.