CRIMES OF MIGRATION

Daniel I. Morales[*]

INTRODUCTION

Exactly 97,384 migrants—a new record—were prosecuted in federal court for entering the United States without permission in 2013.[1] These nearly 100,000 aliens will serve a total of 44,940 years of incarceration for committing these crimes.[2] After that time served, each migrant will be deported to his or her country of origin.[3] Incarceration, then deportation—en masse.

Criminal punishment has been called "the most powerful weapon in the [S]tate arsenal"; it is said that a government "can do nothing worse to its citizens."[4] Aliens, though, are not citizens, and

---

* Assistant Professor of Law, DePaul College of Law; BA Williams College, JD Yale Law School. Many thanks to Washington University School of Law in St. Louis for inviting me to present this Article at the Regional Junior Scholars Workshop, where I received thoughtful comments from Carli Conklin, Deborah Dinner, Sam Halabi, John Inazu, Kit Johnson, David Rubenstein, Laurent Sacharoff, Elizabeth Sepper, and Ganesh Sitaraman. Comments received at the Immigration Law Teacher's Workshop from Raquel Aldana, Jennifer Chacón, Alina Das, Eisha Jain, Allegra McLeod, Barbara Schwartz, and Veronica Thronson were equally helpful. Thanks also to Monu Bedi, César Cuauhtémoc García Hernández, Michelle Dempsey, Chad Flanders, Enrique Guerra-Pujol, Doug Husak, Anders Kaye, Andrew Kim, David Kwok, Margaret Lewis, Ediberto Roman, Stephen Siegel, Juliet Stumpf, Allison Tirres, and Deborah Tuerkheimer for their invaluable insights. This Article is dedicated to Calista Isadora Morales, who knows all her animal sounds.

1. *At Nearly 100,000, Immigration Prosecutions Reach All-Time High in FY 2013: Illegal Re-entry Prosecutions Jump 76% During Obama Administration*, TRAC IMMIGR. (Nov. 25, 2013), http://www.trac.syr.edu/immigration/reports/336/ [hereinafter *Immigration Prosecutions Reach All-Time High*].

2. These are conservative estimates derived from data available at TRAC Immigration. TRAC IMMIGR., http://www.trac.syr.edu/immigration/ (last visited Mar. 8, 2014). The average sentence is approximately six months, long enough to concern criminal law theory. *See infra* Parts III & IV. Moreover, the key aim of this Article is to consider these sentences in light of their imposition in excess of deportation. In that context, I argue, even the average sentence is wrongfully imposed for being gratuitous because deportation alone exhausts the State's interest in criminalizing migration. *See infra* Parts III & IV. The alien's lack of consent to the border regime creates further problems. *See infra* Subpart III.C.

3. HUMAN RIGHTS WATCH, TURNING MIGRANTS INTO CRIMINALS: THE HARMFUL IMPACT OF U.S. BORDER PROSECUTIONS 2 (2013).

4. DOUGLAS HUSAK, OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW 95 (2008).

so there is another option—deportation—which is thought to be the equivalent of banishment, a forced exile.[5] These two distinct, and distinctly violent, practices[6] combine when crimes of migration[7] are enforced.

---

5. *See, e.g.*, Costello v. Immigration & Naturalization Serv., 376 U.S. 120, 131 (1964) (noting that deportation cases "involv[e] as [they] may the equivalent of banishment or exile"); Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948) ("[D]eportation is a drastic measure and at times the equivalent of banishment or exile."); Delgadillo v. Carmichael, 332 U.S. 388, 391 (1947) ("Deportation can be the equivalent of banishment or exile."); Fong Yue Ting v. United States, 149 U.S. 698, 740–41 (1893) (Brewer, J., dissenting) (noting that deportation is a form of punishment).

6. Throughout I invoke a background conception of "legal violence" in the sense described by Robert M. Cover in *Violence and the Word*, 95 YALE. L.J. 1601 (1986). There, Cover describes the way that law organizes violence socially, distributing the execution of a legal judgment, interpretation, or disposition over a variety of legal actors in order to overcome our individual resistance to enacting violence. *Id.* at 1628. For Cover, violence and law are inextricably intertwined, neither a legal utterance

> nor the violence it occasions may be properly understood apart from one another . . . .
>
> . . . .
>
> . . . [T]he relationship between legal interpretation and the infliction of pain remains operative even in the most routine of legal acts. The act of sentencing a convicted defendant is among these most routine of acts performed by judges. Yet it is immensely revealing of the way in which interpretation is distinctively shaped by violence. First, examine the event from the perspective of the defendant. The defendant's world is threatened. But he sits, usually quietly, as if engaged in a civil discourse. If convicted, the defendant customarily walks—escorted—to prolonged confinement, usually without significant disturbance to the civil appearance of the event. It is, of course, grotesque to assume that the civil facade is "voluntary" except in the sense that it represents the defendant's autonomous recognition of the overwhelming array of violence ranged against him, and of the hopelessness of resistance or outcry.

Id. at 1601, 1607. In this formulation, deportation enacts a similar sort of socialized legal violence, ending with the forced return of a migrant to the State that recognizes her as a citizen. Cover's emphasis on the *social* imposition of violence is important for this Article because I wish for American readers to understand that all members of the polity bear some responsibility for the legal practices I identify as normatively problematic.

7. I refer to immigration crimes as "crimes of migration" in this Article because one of my aims is to call attention to the fact that immigration crimes are not natural or inevitable. Immigration crimes are crimes made *of* the act of migration. Calling them crimes of migration draws attention to the fact that the behavioral content of these crimes is also, under different conditions, considered benign or positive. Additionally, the creation of the legal category "immigration crimes" naturalizes the wrongfulness of certain kinds of migration practices by tracking the form of other criminal categories, like "property crimes." Because I resist that naturalization here, my language follows suit. Crimes of migration, by contrast, separates the behavior—migration—from the decision by the State to criminalize that behavior. All criminal laws are constructed in this way, but we usually do not dwell on this fact. Even the

Crimes of migration thus impose on aliens the most coercive power the State may inflict on its own people *on top of* the power it reserves only for others. In modern practice, this is done at a staggering volume. Indeed, the most powerful government on earth has made crimes of migration its criminal priority; crimes of migration have been rated as the most prosecuted federal crimes since 2004.[8] Last year was no blip; it was a new apex on a trend line that has pointed in that direction for at least a decade.[9] Skeptical evaluation of these practices is even more urgent now as Congress has considered expanding immigration crimes to encompass mere presence without permission.[10]

This concerning phenomenon has not escaped notice,[11] but no one has posed the fundamental question that crimes of migration

---

paradigmatic *mala in se* crime—murder—is, in important part, a legal construct:

> Death is at least conceptually independent of the law, as are killing and being killed. But murder is a legal construct, and the construction of law is a public, collective enterprise. Indeed, the Latin word *crimen* referred not to the offender's action but to the public one—to the accusation and judgment. Even once the English word crime began to be used to refer to the prohibited act, it remained important to distinguish crime from sin and to emphasize, again, the political, constructed character of crime.

Alice Ristroph, *Responsibility for the Criminal Law*, *in* PHILOSOPHICAL FOUNDATIONS OF CRIMINAL LAW 107, 107–08 (Ra Duff & Stuart P. Green eds., 2011).

8. *See* U.S. DEP'T OF JUSTICE, COMPENDIUM OF FEDERAL JUSTICE STATISTICS, 2004, 9 (Dec. 2006), *available at* http://www.bjs.gov/content/pub/pdf/cfjs0402.pdf (showing the first time that immigration crime prosecutions overtook those for drug offenses).

9. Total prosecutions for crimes of migration are up 1420% in the last two decades, 367% in the last decade, and 22.6% in the last five years. *Immigration Prosecutions Reach All-Time High*, *supra* note 1. The trend in unlawful border crossing has varied over the period, peaking in 2007. *Illegal Immigration to U.S. Drops After Rising for Decade*, CBS NEWS (Dec. 6, 2012, 7:13 AM), http://www.cbsnews.com/news/illegal-immigration-to-us-drops-after-rising-for-decade/; *see also* HUMAN RIGHTS WATCH, *supra* note 3, at 23–31.

10. *See, e.g.*, Alan Gomez, *Bill to Crack down on Illegal Immigration Criticized*, USA TODAY (June 19, 2013, 10:51 AM), http://www.usatoday.com/story/news/politics/2013/06/17/immigration-house-illegal-presence-crime/2420387/.

11. *See, e.g.*, Jennifer M. Chacón, *Overcriminalizing Immigration*, 102 J. CRIM. L. & CRIMINOLOGY 613 (2012); Ingrid V. Eagly, *Prosecuting Immigration*, 104 NW. U. L. REV. 1281 (2010); Doug Keller, *Re-thinking Illegal Entry and Re-entry*, 44 LOY. U. CHI. L.J. 65 (2012); Allegra M. McLeod, *The U.S. Criminal-Immigration Convergence and Its Possible Undoing*, 49 AM. CRIM. L. REV. 105 (2012); Juliet P. Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367 (2006) [hereinafter Stumpf, *The Crimmigration Crisis*]; Juliet P. Stumpf, *Fitting Punishment*, 66 WASH. & LEE L. REV. 1683 (2009) [hereinafter Stumpf, *Fitting Punishment*]. Victor Romero has previously called for the decriminalization of unpermitted border crossing in the United States because doing so would provide domestic policy benefits. *See* Victor Romero, *Decriminalizing Border Crossings*, 38 FORDHAM URB. L.J.

raise: is this use of criminal law legitimate?[12] In this Article, I engage criminal law theory, political theory, and federal sentencing norms and find that they all cut decidedly against criminalizing acts of migration.

Exposing the illegitimacy of crimes of migration not only breaks new ground, it contributes substantially to two important legal literatures: "crimmigration" and the intersection of political theory and the criminal law.

Crimmigration scholarship describes and critiques the way that immigration and criminal law intersect.[13] A prominent concern is that the overlap of these two regimes undermines the assumptions, values, and design of each independently.[14] For example, a local police officer might arrest someone for a crime because he appears to be present in the United States without permission—that is, for an "immigration" reason—not because the officer believes that an arrest should be enforced for the underlying crime on the particular occasion. Here, the resources of the criminal justice system are being deployed for immigration ends but in a way that is divorced from the norms and controls of the immigration system. This and other similar phenomena have created the "crimmigration crisis"[15]

---

273 (2010). Ana Aliverti undertook a sociological study of migration criminalization in Britain. *See* ANA ALIVERTI, CRIMES OF MOBILITY: CRIMINAL LAW AND THE REGULATION OF IMMIGRATION (2013) (examining the role of criminal law in the enforcement of laws against the entry and stay of migrants).

12. I am referring here and throughout to a normative legitimacy that is distinct from what legal doctrine provides. Legal doctrine is doubly unhelpful in critically assessing crimes of migration since immigration law and substantive criminal law are subject to notoriously limited constitutional regulation. *See* Darryl K. Brown, *Can Criminal Law Be Controlled?*, 108 MICH. L. REV. 971, 982 (2010) (discussing the utter lack of constitutional supervision of the content of the criminal law); Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 549 (1990) (noting the lack of formal constitutional regulation of immigration law, but positing that some de facto constitutional regulation occurs via permissive statutory interpretation).

13. *See* Stumpf, *The Crimmigration Crisis*, *supra* note 11, at 376.

14. The crimmigration literature is largely focused on the way that non-immigration criminal convictions trigger deportation. *See id.* at 369–71. The ease with which the State cuts off the ties that an immigrant has made with the American community based on a whiff of criminality is similar to the pre-enlightenment sovereignty on display when the State puts a migrant in jail for crossing the border. *See id.* at 371. Similarly, the procedural debasement of the criminal law where it intersects with migration is enabled by the facial legitimacy of crimes of migration and the actual absence of democratic assent to that exercise of state enforcement powers. *See id.* at 370 n.11. The unprecedented "assembly-line" justice that characterizes criminal immigration enforcement through "cattle-call" proceedings and expedited "fast-track" plea bargaining is enabled by the fact that crimes of migration are accorded the stature of any other federal criminal law and yet exclusively affect people with no democratic standing.

15. *See id.*

documented in the literature. The core objection, at a higher level of abstraction, is to the dissolution of the boundaries between separate criminal and immigration spheres, and the way that this move enables the magnification of the coercive force deployed against migrants.

Crimes of migration track this pattern—naming migration a crime undermines the normative premises of immigration law and the criminal law. But the logic of this critique here, no less than elsewhere, depends on the assumption that these bodies of law should have coherence and integrity separate from one another. Engaging the literature that defines the criminal law as a distinct and legitimate body of law is thus essential to grounding the crimmigration critique. Here, I provide this critical analysis.

Pulling at the root of crimes of migration is essential for practical reasons as well. The criminal law's nominal embrace fortifies crimmigration practices by lending them an aura of moral legitimacy. More concretely, the federal criminalization of migration binds together two powerful federal agencies: the Department of Homeland Security ("DHS"), responsible for immigration,[16] and the Department of Justice ("DOJ"), charged with criminal prosecution.[17] The amplified resources that result from this merger have obvious impacts—such as more prosecutions—but the symbolic effects of naming migration a crime should not be underestimated. The steep rise in prosecutions for crossing the border without permission has dovetailed with a drastic devaluation of the interests of those who migrate through proper channels but commit minor crimes.[18] By making migration criminal, crimes of migration have sped the transition of the United States from a nation that sees migration of any sort as legal to one that presumes it to be harmful or wrong.

This Article's contribution to criminal law theory is also substantial. Democratic political theory infuses this Article and increasingly informs the conversation among scholars of criminal law.[19] Criminal law theory's engagement with political theory has

16. 6 U.S.C. § 202 (2012).

17. 28 U.S.C. § 515(a) (2012). The agencies are also bound together in deportation, since the attorney general oversees the adjudication of immigration violations brought by DHS.

18. HUMAN RIGHTS WATCH, *supra* note 3.

19. Markus Dubber locates politics at the foundation of the criminal law and views the criminal law as serving a distinctive political function:

> [C]riminal law is regarded as a political act, as one instance of a mode of state governance ("law") that manifests state power. As a political act, its foundations are political, ie [sic] located within the project of state government as a whole. As political, the foundations of criminal law are also man-made (or, rather, person-made) and therefore subject to discussion and agreement, to disagreement and critique, both

gained steam as the stark realities of mass incarceration and over-criminalization have begun to attract serious scrutiny.[20] As the discussion has recently been revived,[21] there has been little effort to apply theoretical insights to particular criminal law provisions. My example here can serve as a catalyst and a model for the application of these theories to new and practical domains. Alice Ristoph has said that "[c]riminal law theory *needs* political theory";[22] immigration law, I contend, needs political theory just as much. Here, I usefully apply theory to a pressing immigration and criminal law problem.

My argument proceeds in four parts. In Part I, I introduce the history of crimes of migration, unpack their structure, and discuss the contemporary conditions of their enforcement—showing that crimes of migration have several features, like the fact that citizenship is a complete defense, that make them outliers in the American criminal law. In the history section, I discuss how crimes of migration were never meant to express any moral or pre-legal condemnation of crossing the U.S. border without permission but were rather instruments that filled in a regulatory gap: we had neither the will nor the technology to prevent undocumented migration over U.S. land borders. Lastly, I set out the conditions of contemporary enforcement practices and argue that they reflect a posture towards migrants that is dehumanizing. Within the coercive apparatus built to process 100,000 prosecutions per year, migrants are merely objects subject to coercive power; very little about migrants' interactions within this system registers their humanity, much less their capacity, as human beings, to become members of the polity.

In Part II, I remark that crimes usually denote wrongs and ask what kind of wrong a crime of migration is. I acknowledge that in

---

actually (see Habermans) and constructively (see Kant's and Rawls's thought experiments).

Markus D. Dubber, *Foundations of State Punishment in Modern Liberal Democracies: Toward a Genealogy of American Criminal Law*, *in* PHILOSOPHICAL FOUNDATIONS OF CRIMINAL LAW, *supra* note 7, at 83, 88. Alice Ristoph sees the criminal law as inherently political. "[T]he very category crime is distinctively political. . . . Perhaps sin is pre-legal and pre-political, but crimes take place only in the context of a political community that has established a legal system." Ristroph, *supra* note 7, at 107.

20. *See, e.g.*, HUSAK, *supra* note 4.

21. Though political and moral philosophers have long scrutinized criminal condemnation and punishment, their purchase in the American legal academy is of relatively recent vintage. This neglect of systematic theory in legal circles, Darryl Brown claims, helps to explain the paucity of constitutional limitations on the growth and structure of the substantive criminal law. "[A]s a sustained normative account [criminal-law theory] has been under development for only about fifty years, not necessarily a long time to permeate scholarly, popular, and judicial culture." Brown, *supra* note 12, at 983.

22. Ristroph, *supra* note 7, at 108 (emphasis added).

substance it looks like a regulatory wrong, but the better view is that it marks a wrong against the political theory we assert at the border, which posits that aliens have a duty to respect the unilateral prerogative of the United States to exclude them for any or no reason.[23] Committing a crime of migration is wrong, then, for failing to respect this theory. But that theory is itself normatively controversial, and the aliens subject to the forceful execution of this theory have had no say in formulating it—indeed, the theory posits this exclusion of alien voices as legitimate. The normative controversy coupled with the absence of even a thin version of democratic consent to crimes of migration means that aliens may legitimately claim that their action was not wrong at all but rather that the wrongful act lies in the State's exclusion. This is uniquely problematic terrain on which to impose criminal condemnation and punishment. After establishing the wrong criminalized by crimes of migration, I defend it against more intuitive conceptions of harm, like trespass to property, unfair labor competition, and harms to legal administration. Seeing harm in any of these cases, I urge, rests on the legitimacy of the sovereign power that the United States asserts at the border. Because of this contingency and because the violation of sovereignty is itself perceived as a harm, crimes of migration should be viewed as wrongs against a political theory.

In Part III, I evaluate crimes of migration in light of leading theories that specify the boundaries of the legitimate use of the criminal power. Crimes of migration fare quite poorly under these criteria, even those—like utilitarianism—that are consequentialist. Even so, I cannot conclude that these theories definitively forbid the criminalization of migration because they proceed from an implicit assumption of a closed political community. To counter this failing, I offer my own account of the criminal law that views democratic consent as an essential feature of legitimate criminal punishment, and I urge that crimes of migration are less legitimate for lacking it. And indeed, the lack of consent, and the further lack of democratic participation by aliens that it implies, compounds the normative doubt at the core of immigration exclusion since there is no recognized means by which aliens may counter our assertion that migration without permission is a criminal wrong. Ultimately, I conclude, we should refrain from criminalizing migration because we lack substantive—borders as a means to exclude peaceful

23. We commonly designate this political theory as "sovereignty." I deliberately resist this label here because I want to denaturalize the term; the kind of sovereignty over persons we currently assert is one of many possible theories of legitimate political authority and therefore demands careful scrutiny. See Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255, for examples of theories contesting the legitimacy of sovereignty as practiced by rich democracies.

persons are normatively controversial—*and* procedural—aliens have no say in the border regime they are subject to—confidence in the moral condemnation we express by criminalizing migration.

Part IV focuses on punishment. I assume arguendo the legitimacy of criminalizing border crossing but expose how imposing incarceration on top of deportation in response to crimes of migration is gratuitous. Deportation as a punishment for crimes of migration, I argue, relies on the ancient punitive principle of an "eye for an eye." Under this symmetrical theory of just punishment, deportation extinguishes the State's punitive interest by revisiting on the wrongdoer exactly what he wrought—even meeting, incidentally, the State's recidivism concerns. It follows that incarceration on top of deportation is necessarily excessive because deportation has exhausted the State's interest—there is simply nothing left for incarceration to vindicate.

Ultimately, I do not resolve the question whether borders can have force; I describe what kind of force the border may bring to bear and what theory can ground the imposition of that force. I conclude here that crimes of migration have grave normative flaws that should lead us to revoke their status in the criminal law. More robustly, incarceration cannot justifiably act as a supplement to deportation in response to a crime of migration. The double coercion it imposes exceeds the interest the United States can assert under the eye-for-an-eye theory of just punishment that imposing deportation relies on in this context.

Exposing crimes of migration as among the most problematic expressions of a liberal democracy's power over migrants should reorient scholarly agendas and reform efforts, which are currently organized around the critique and reform of deportation. More practically, the arguments raised here should spark reflection in those charged with executing these criminal laws. Legal actors working in democratic societies, Dan Markel argued, could find good reasons in political theory to enforce misguided or bad laws.[24] This rationale, I show, has no purchase in this context, and so legal actors should be troubled in giving force to crimes of migration.

I. CRIMES OF MIGRATION: DESIGN, ORIGIN, AND PRACTICE

Crimes of migration are now a dominant part of federal criminal practice, but they are not a natural, inevitable, or obvious articulation of the immigration power. That distinction, if it exists, must go to deportation.[25] If we nonetheless view crimes of migration in pre-legal, moral terms, we do so because we have an extraordinarily capacious and entrenched view of the scope of state

24. *See supra* note 12 and discussion.
25. *See infra* Part III for discussion.

sovereignty.[26] While that view is unassailably correct as a descriptive matter, it is precarious as a normative one.[27] At the outset, then, I ask the reader to suspend a strictly formal view of legal legitimacy and imagine that sovereignty norms might evolve as their flaws come to light. Openness to this possibility will facilitate engagement with the arguments that follow.

In this Part, I begin to unpack crimes of migration in order to later expose them to critical analysis. At this point, I aim to show three things: (1) crimes of migration have several unique characteristics that make them outliers within the corpus of American criminal law; (2) crimes of migration duplicate each other and serve in practice as a supplement to—not a substitute for—deportation; and (3) the history and practice of crimes of migration are exclusively ends oriented. We have adopted and enforced crimes of migration for strictly consequentialist reasons, not because we are confident that crimes of migration are moral wrongs. All of these descriptive claims have normative import that will be unpacked later in the Article. I develop these claims by closely reading the statutes in Subpart I.A, by providing a brief history of their origins in Subpart I.B, and by providing a condensed description of current practice in Subpart I.C.

A. Design

The crime of migration commonly referred to as "illegal entry" is titled, "Improper entry by alien."[28] Section 1325(a) of Title 8 of the United States Code designates the elements of the crime and specifies the terms of criminal punishment for those convicted:

---

26. That vision of state authority was grounded in nineteenth century international law and adopted by the Supreme Court as the "plenary power doctrine." *See generally* Legomsky, *supra* note 23 (noting and critiquing the various theories offered in support of applying the plenary power doctrine in immigration cases and providing an overview of recent developments in lower courts' application of the doctrine).

27. For examples of political theory literature contesting the legitimacy of aliens' exclusion from the body politic, see MATHIAS RISSE, ON GLOBAL JUSTICE (2012); JACQUELINE STEVENS, STATES WITHOUT NATIONS: CITIZENSHIP FOR MORTALS (2010); and Joseph H. Carens, *Aliens and Citizens: The Case for Open Borders*, 49 REV. POL. 251 (1987). The normative case for treating migrants with higher regard does not require a fully cosmopolitan view of a state's obligation. *See* Arash Abizadeh, *Democratic Theory and Border Coercion: No Right to Unilaterally Control Your Own Borders*, 36 POL. THEORY 37, 38 (2008) (arguing that a state must justify border control to noncitizens as well as citizens); Meghan Benton, *The Tyranny of the Enfranchised Majority? The Accountability of States to Their Non-citizen Population*, 16 RES PUBLICA 397, 408 (2010) (arguing that, in the immigration context, an accountability gap exists where governments do not have to give reasons for their decisions to noncitizens).

28. 8 U.S.C. § 1325 (2012).

> Any alien who (1) enters or attempts to enter the United States at any time or place other than as designated by immigration officers, or (2) eludes examination or inspection by immigration officers, or (3) attempts to enter or obtains entry to the United States by a willfully false or misleading representation or the willful concealment of a material fact, shall, for the first commission of any such offense, be fined under [T]itle 18 or imprisoned not more than 6 months, or both, and, for a subsequent commission of any such offense, be fined under [T]itle 18, or imprisoned not more than 2 years, or both.[29]

Illegal entry is a misdemeanor that has a five-year statute of limitations.[30] A lapse in the statute of limitations does not mean the State is without a remedy in response to the act of improper entry by an alien, as there is no statute of limitations on deportation.[31] Thus, a person who committed a crime of migration and went undetected for five years would remain deportable. Since in practice crimes of migration are precursors to deportation, the statute of limitations that applies to crimes of migration does not embody the same set of values that it does for all other crimes.[32] Rather than mark a moment of repose, the expiration of the five-year statute of limitations simply eliminates one of two types of coercive force that the State may impose for the same action of crossing the border without permission.[33]

The crime of migration commonly referred to as illegal reentry appears in the Code at 8 U.S.C. § 1326, where it is titled "Reentry of removed aliens."[34] The section provides:

---

29. *Id.* § 1325(a).

30. *See* 18 U.S.C. § 3282(a) (2012); *see also* United States v. Rincon-Jimenez, 595 F.2d 1192, 1193–94 (9th Cir. 1979) (applying the statute of limitations in 18 U.S.C. § 3282 to prosecution under 8 U.S.C. § 1325).

31. *See* Immigration & Nationality Act, Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified at 8 U.S.C. § 1101 (2012)) (repealing a prior law containing a statute of limitations for deportation actions); MAE M. NGAI, IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA 60 (2004) (discussing this elimination of the statute of limitations on deportation).

32. *See* Andrew J. Wistrich, *Procrastination, Deadlines, and Statutes of Limitation*, 50 WM. & MARY L. REV. 607, 616 (2008) (discussing that one value of the statute of limitations for a crime is to promote repose, reducing uncertainty for the potential defendant).

33. *See supra* text accompanying notes 28–29.

34. *See* 8 U.S.C. § 1326 (2012).

> any alien who—
>
> (1) has been denied admission, excluded, deported, or removed or has departed the United States while an order of exclusion, deportation, or removal is outstanding, and thereafter
>
> (2) enters, attempts to enter, or is at any time found in, the United States, unless (A) prior to his re-embarkation at a place outside the United States or his application for admission from foreign contiguous territory, the Attorney General has expressly consented to such alien's reapplying for admission; or (B) with respect to an alien previously denied admission and removed, unless such alien shall establish that he was not required to obtain such advance consent under this chapter or any prior Act, shall be fined under [T]itle 18, or imprisoned not more than 2 years, or both.[35]

Subsection (a) of § 1326 is subject to four enhanced penalty provisions in subsection (b). The first increases the statutory maximum penalty to ten years of incarceration where an alien was deported "subsequent to a conviction for commission of three or more misdemeanors involving drugs, crimes against the person, or both, or a felony (other than an aggravated felony)."[36] The second expands the range of incarceration to twenty years where "removal was subsequent to a conviction for commission of an aggravated felony."[37] The third applies a maximum of ten years of incarceration to persons who were deemed inadmissible to the United States based on prior terrorist activity, determined to have a propensity to commit terrorist acts, or were previously deported through special proceedings that process people whom the government deems to be alien terrorists.[38] The fourth expands the maximum term of incarceration to ten years where the alien was a nonviolent offender deported prior to the completion of a term of incarceration.[39]

---

35. *Id.* § 1326(a).
36. *Id.* § 1326(b)(1).
37. *Id.* § 1326(b)(2).
38. *Id.* § 1326(b)(3).
39. *See id.* § 1231(a)(4)(B), titled "Exception for removal of nonviolent offenders prior to completion of sentence of imprisonment," stating:

> The Attorney General is authorized to remove an alien in accordance with applicable procedures under this chapter before the alien has completed a sentence of imprisonment—
> (i) in the case of an alien in the custody of the Attorney General, if the Attorney General determines that (I) the alien is confined pursuant to a final conviction for a nonviolent offense (other than an offense related to smuggling or harboring of aliens or an offense described in section 1101(a)(43)(B), (C), (E), (I), or (L) of this title and (II) the removal of the alien is appropriate and in the best interest of the United States; or
> (ii) in the case of an alien in the custody of a State (or a political subdivision of a State), if the chief State official exercising authority with respect to the incarceration of the alien determines that (I) the

Prosecutions are, again, subject to a five-year statute of limitations.[40]

The penalty sentencing provisions in subsection (b) are distinctive in that the incarceration triggers do not aggravate the act criminalized in § 1326(a). Another oddity is that reentry of removed aliens is listed as a separate crime from improper entry.[41] After all, the actus reus in both crimes is nearly identical.[42]

One answer to the latter oddity is historical. Reentry statutes predated improper entry, and the older statutes criminalized reentry for certain disfavored classes of migrants, like persons deemed to be prostitutes.[43] The innovation of the modern reentry statute was to generalize the notion that a prior deportation should be treated as a final communication to the alien that the migrant was not welcome in the community.[44] Reentry is properly felonious on this view because we have told the alien in the most definitive terms—through a prior deportation—that she should remain outside our borders. We might see a notice norm embedded in the segregation of improper entry and reentry that obliquely acknowledges the *malum prohibitum* nature of the crime,[45] which triggers a stronger obligation to provide actual notice of the criminality of the action prior to the imposition of a felony. Actual notice might be particularly important here, since crimes of migration apply to aliens exclusively—citizenship is a complete

---

alien is confined pursuant to a final conviction for a nonviolent offense (other than an offense described in section 1101(a)(43)(C) or (E) of this title), (II) the removal is appropriate and in the best interest of the State, and (III) submits a written request to the Attorney General that such alien be so removed.

40. *See supra* text accompanying note 28.

41. *See* 8 U.S.C. § 1326.

42. *Compare id.* § 1325(a) (defining the actus reus of improper entry by an alien as entering or attempting to enter the United States), *with id.* § 1326(a) (defining the actus reus of reentry of removed aliens as entering or attempting to enter the United States).

43. *See* Act of Mar. 26, 1910, ch. 128, sec. 2, § 3, 36 Stat. 263, 264–65 (1910) (codified as amended at 8 U.S.C. § 138 (1926)).

44. *See* James P. Fleissner & James A. Shapiro, *Federal Sentences for Aliens Convicted of Illegal Reentry Following Deportation: Who Needs the Aggravation?*, 9 GEO. IMMIGR. L.J. 451, 451 (1995) (explaining that the reentry statute sanctions an alien who ignores the State's final communication, via a publically enacted deportation law, representing that the alien is no longer welcome in the State).

45. *See* Eagly, *supra* note 11, at 1297 n.90 (noting that, in 1929, the ACLU objected to the creation of improper entry on just those grounds, urging that the illegal entry provision was objectionable because it would criminally punish a person rather than deport someone who "may be quite ignorant of this law before he starts on his journey" (internal citation omitted)).

defense—and aliens are outside the political community where constructive consent could plausibly be obtained.[46]

The division between the two crimes works to legitimize the imposition of the harsher set of penalties that reentry authorizes. We impose misdemeanor penalties the first time around to communicate the wrongfulness that might not have been obvious to those outside the polity. The second time, though, we have no qualms about bringing a felony charge because our notice concerns have been cured by the prior punishment.

Significant, too, are those immigration violations that are not criminalized. Overstaying a visa, even knowingly, is not a crime,[47] even though committing that act is the functional equivalent of committing a crime of migration—both result in persons present within U.S. borders without permission. Thus, if I enter the United States on a three-month tourist visa yet remain for three years, I am not subject to criminal sanction, just deportation. This distinction might seem hard to defend, but as will become clearer in Subparts I.B and I.C, crimes of migration do more than mete out criminal condemnation and punishment; they also constitute our geographic borders. The exclusion of visa overstaying—where the alien did not violate the physical border—from the criminal ambit enjoys this kind of logical support at least.

Lastly, note that crimes of migration and deportation could, in theory, be deployed as substitutes. That is, the regime could be designed to criminally punish migrants for migrating without permission but then have the immigration system admit such migrants, penalty served, into the body politic. Instead, as we shall see, the regime uses prosecution for crimes of migration as a supplement to, not a substitute for, deportation.

B. Origins

Crimes of migration debuted in 1929,[48] on the eve of the Great Depression and in the aftermath of "one of the most spectacular displays of legislative power in American history."[49] In passing the Quota Act of 1921[50] and the Immigration Act of 1924,[51] Congress, "with two waves of its magic wand[,] . . . sought to make

---

46. *See* Drury Stevenson, *To Whom Is the Law Addressed?*, 21 YALE L. & POL'Y REV. 105, 158 (2003) (discussing the concept that citizens have constructive notice of the laws governing them).

47. *Should Overstaying a Visa Be Considered a Federal Crime (vs. a Civil Offense)?*, PROCON.ORG, http://immigration.procon.org/view.answers.php ?questionID=000781 (last updated Jan. 8, 2008, 9:46 AM).

48. *See* Act of Mar. 4, 1929, Pub. L. No. 70-1018, ch. 690, 45 Stat. 1551 (repealed 1952).

49. ARISTIDE R. ZOLBERG, A NATION BY DESIGN: IMMIGRATION POLICY IN THE FASHIONING OF AMERICA 243 (2006).

50. Emergency Quota Act of 1921, ch. 8, 42 Stat. 5 (repealed 1952).

51. Immigration Act of 1924, ch. 190, 43 Stat. 153 (repealed 1952).

immigration disappear"[52]—and it nearly succeeded. By 1929, immigration from Europe dropped to one-seventh of its level in 1921,[53] "Asian immigration was in effect extinguished,"[54] and what European migration remained was dedicated to recreating the "original American stock."[55]

Though Mexican migrants were viewed as obstacles to the racial reinvigoration of the American body politic (their mixed-race blood would "lower the average of the race value of the white population of the United States"[56]), for a variety of reasons—diplomatic, economic, and institutional[57]—"restrictionist" factions did not succeed in having immigration quotas imposed on Mexicans.[58] Instead, nominal restriction was achieved through administrative channels,[59] and congressional pressure for explicit numerical restriction of Mexican migration was dissipated through passage of a package of criminal immigration laws and enhanced penalties, most prominently, crimes of migration.[60]

While these criminal laws applied on their face to all potential unlawful entrants, legislative reports made clear that they were intended to facilitate enhanced control of the U.S.-Mexico border.[61] The House Report noted the "serious situation . . . particularly on [U.S.] land borders, whereby people deported to contiguous countries turn around and come back again without further penalty than exclusion or another deportation."[62]

Criminal deterrence fortified the border metaphysically at a time when the line between Mexico and the United States had more reality on maps than on the ground.[63] Speaking of the new criminal provisions, the Secretary of Labor, then charged with immigration enforcement, said:

---

52. ZOLBERG, *supra* note 49.
53. *Id.*
54. *Id.*
55. *Id.* (citation omitted).
56. *Id.* at 268 (citation omitted).
57. *See id.* at 267–68.
58. *Id.* at 268.
59. *See id.* The State Department applied discretionary administrative provisions selectively to Mexican migrants to deny them admission. *See id.*
60. *See id.*
61. H.R. REP. No. 70-2397, at 6 (1929).
62. *Id.*
63. *See, e.g.*, NGAI, *supra* note 31, at 67 ("[I]mmigration policy [during the 1920s] rearticulated the U.S.-Mexico border as a cultural and racial boundary, as a creator of illegal immigration. Federal officials self-consciously understood their task as creating a barrier where, in a practical sense, none had existed before.").

> [N]o prohibitive law can successfully be enforced without a deterrent penalty. The fact that possible deportation is not a sufficient deterrent to discourage those who seek to gain entry through other-than-regular channels is demonstrated by the frequency with which this department is compelled to resort to deportation proceedings for the same alien on several succeeding occasions.[64]

Straightforward enough. Yet the then-recent experience of the Secretary's own agency disproved his assertion of necessity. Coming after the dramatic success of the Department of Labor in globally administering the quota acts—*without* the use of criminal sanctions on entrants—the point was really that effectively restricting immigration through the United States' contiguous land borders presented distinct challenges for the restrictionist project; the Secretary was of the view that a criminal penalty could be useful in this difficult regulatory context.[65]

Thus, the administrative need for criminal control of migration was grounded in the geographic reality of the border region and the nascent state of surveillance there (at the time, a single officer patrolled forty miles of borderland).[66] In that context, whatever deterrent effect incarceration could provide was welcome just because effectively administering migration in the borderlands was so daunting.

The difficulty was more than administrative. The appeal of Mexican labor also played a critical role, and much of that appeal was grounded in the emerging legal fragility of Mexicans' presence in the United States. The agricultural lobby, in particular, saw Mexican labor as uniquely pliable and disposable.[67] The metaphors the lobbyists used vividly reflected this perspective: a Mexican was the most "docile animal in the world,"[68] a homing pigeon who "goes back to roost . . . and can be deported if he becomes [a burden]."[69] The appeal of Mexican labor only increased as the effective restriction of European migration took hold during the 1920s.[70]

In this historical milieu, criminal penalties for migration were an innovative tool which satisfied a variety of distinctive interests.[71] They were substitutes for the quotas desired by congressional restrictionists, a further guarantee of the docility and disposability

---

64. S. REP. No. 70-1456, at 2 (1929).
65. *Id.*
66. ZOLBERG, *supra* note 49, at 266–67.
67. *Id.* at 257.
68. *Id.*
69. *Id.* at 268 (internal quotations omitted).
70. *Id.* at 257–58.
71. We might see this concord between different interests around a particular policy as another example of what the late Derrick Bell referred to as interest convergence. *See* Derrick A. Bell, Jr., Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1979).

of Mexican labor, and a mechanism to assist an agency charged with an impossible task.[72]

Ab initio, then, crimes of migration were adopted for purely instrumental reasons. They were not forged, as ideal theory might demand, out of a robust moral conviction that crossing a border without permission is a terrible wrong. Rather, criminal penalties stepped into the breach, papering over the inadequate technologies of administration in the borderlands. With formal migration from Mexico restricted through non-quota means, demand for labor still significant (until the Depression), and geography what it was,[73] by the end of the 1920s, Mexican migration had been transformed into "illegal" migration subject to criminal sanction.[74]

Perhaps the ends-oriented foundation of crimes of migration is best expressed by the 1929 codification of crimes of migration in Title 8 of the newly established United States Code, "Aliens & Nationality,"[75] rather than in Title 18 "Crimes and Criminal Procedure," where the vast majority of federal crimes appear.[76] The specific placement of crimes of migration within Title 8 is also telling. They are contained in Chapter 12, "Immigration and Nationality," then in Subchapter II, "Immigration," and then, finally, in Part VIII, "General Penalty Provisions."[77]

---

72. *See supra* text accompanying notes 57–59.

73. ZOLBERG, *supra* note 49, at 255–57, 268.

74. Keller, *supra* note 11, at 71–72.

75. 8 U.S.C. §§ 1321–1330 (2012).

76. 18 U.S.C. §§ 1–123 (2012); *see* Keller, *supra* note 11, at 72 n.18 (discussing that under Title 8's crimes of migration initial sentencing regime, which lasted until 1987, a judge had complete discretion to select a sentence anywhere from probation to the statutory-maximum penalty); *see also* Mistretta v. United States, 488 U.S. 361, 363 (1989) (explaining the sentencing process before 1987).

77. 8 U.S.C. §§ 1321–1330. The decision to "taxonomize" in a particular way, to group some things together and some things apart, mirrors the society that produces the taxonomy. Given law's intimate relationship to the deployment of State power and law's role in creating norms, taxonomies of law create and sustain thinking about the legitimate exercise of state power and reveal something about how legal culture thinks about the deployment of state power. To illustrate the point, Foucault famously opens his book, THE ORDER OF THINGS, with a quote from a Borges short story, which quotes an imaginary Chinese encyclopedia, classifying animals in the following way:

> (a) belonging to the Emperor, (b) embalmed, (c) tame, (d) sucking pigs, (e) sirens, (f) fabulous, (g) stray dogs, (h) included in the present classification, (i) frenzied, (j) innumerable, (k) drawn with a very fine camelhair brush, (l) *et cetera*, (m) having just broken the water pitcher, (n) that from a long way off look like flies.

MICHEL FOUCAULT, THE ORDER OF THINGS: AN ARCHAEOLOGY OF THE HUMAN SCIENCES, at xv (1970). This fictional classification structure, whose logic is impenetrable to us, calls attention to the latent meaning residing in our own classification structures. Taxonomies, following Foucault, can reflect "historically enduring discursive regularities, the ordering, often unconscious, that gives rise to distinctive forms of thought which underlie the intellectual

Crimes of migration, then, were never exactly crimes with the deep moral resonances which that designation implies. They were conceived and presented as useful penalties for violations of immigration law that deploy the tools and procedures of the criminal law as a means of reaching those immigration objectives. Significantly, deportation, the other kind of punitive action the State regularly takes against migrants after their conviction for crimes of migration, is not listed in the penalty category. "Removal," the formal designation for deportation, appears in a section of Title 8 that also covers inspection and apprehension of aliens.[78] Crimes of migration are thus the only penalties that the immigration law acknowledges itself to inflict.

This ends-orientation remains the working philosophy of the criminal and civil agencies that enforce crimes of migration. Though, over the course of this century and the last, crimes of migration have acquired an ersatz[79] moral patina that was absent at the start.

C. Crimes of Migration in Practice

In the beginning, crimes of migration stood in for a gap in regulatory know-how in the border region that became conspicuous as immigration restriction succeeded everywhere else in the world. Today, by contrast, crimes of migration stand at the very center of the immigration enforcement regime—a sprawling, resource-rich apparatus that draws strategically on the personnel, legal regimes, and norms of myriad federal agencies, along with state and municipal governments.[80]

Crimes of migration are central for two principal reasons. First, they set the tone. The regime's emphasis on regulating "migration through crime"[81] is most clearly expressed in the criminalization of the act of migration itself. The attitude of nearly all the actors in the regime proceeds from the premise that the work they do helps to control *crime*—not civil infractions; criminalization lends heft and meaning to the work of regulating migration. The prior presumption that such infractions sounded in civil law has been fully reversed.[82]

---

disciplines." ALAN HUNT & GARY WICKHAM, FOUCAULT AND LAW: TOWARDS A SOCIOLOGY OF LAW AS GOVERNANCE 9 (1994).

78. 8 U.S.C. § 1229(a).

79. See *infra* Part II for why the patina is ersatz.

80. For extensive discussion of the intricate overlap between federal immigration enforcement and federal criminal law, see generally Chacón, *supra* note 11; Eagly, *supra* note 11; McLeod, *supra* note 11; Stumpf, *The Crimmigration Crisis*, *supra* note 11.

81. *See* Jennifer M. Chacón, *Managing Migration Through Crime*, 109 COLUM. L. REV. SIDEBAR 135 (2009).

82. *Id.* at 136–37.

Second, crimes of migration stitch together two of the most powerful players in the wealthiest and most powerful government in the world: the DOJ and the DHS. And their bond is deployed in one of the central aims of the regime, to eradicate undocumented migration[83]—an aspiration in line with the immigration agency's historical mission to enforce numerical restriction.

Where numerical restriction is the aim, the numbers tell the story. Over the last eleven years, prosecution of crimes of migration has increased by 677%, from 12,529 to 97,384 per year.[84] Deportations climbed dramatically as well: between 2002 and 2012 the number of deportations rose by 154%, from 165,000 to 419,000.[85] These statistics are an exponential increase from those the government posted just a decade earlier. In 1990, the United States deported 30,000 migrants and prosecuted 6480 migrants for crimes of migration.[86]

As prosecutions for crimes of migration have escalated, the sum of the years migrants spend in jail for migrating has reached staggering levels. The totals from 2013 alone will amount to 44,940 years, costing taxpayers nearly one billion dollars.[87]

The regime would not have been able to reach such heights so quickly without the relationship between the DOJ and the DHS (and its predecessors) created by crimes of migration. A few examples are instructive. A key driver of the massive prosecution numbers is a program called Operation Streamline ("Streamline"). Streamline prosecutes *every* noncitizen who crosses certain portions of the U.S.-Mexico border and charges her with a crime of migration, usually entry without inspection.[88] Streamline defendants are

---

83. *See* HUMAN RIGHTS WATCH, *supra* note 3.

84. *See id.* at 13; *Immigration Prosecutions Reach All-Time High*, *supra* note 1.

85. David Olson, *Illegal Immigration: Ways of Counting Deportations*, PRESS ENTERPRISE (Apr. 3, 2014, 1:17 AM), http://www.pe.com/articles/-744675—.html.

86. Amanda Peterson Beadle, *Cost of a Broken System: U.S. Spent More on Immigration than All Other Federal Enforcement Agencies Combined*, THINK PROGRESS (Jan. 7, 2013, 4:20 PM), http://thinkprogress.org/justice/2013/01/07/1407461/cost-of-a-broken-system-us-spent-more-on-immigration-than-all-other-federal-enforcement-agencies-combined/; *Lead Charges for Criminal Immigration Prosecutions: FY 1986 – FY 2011*, TRAC IMMIGR., http://trac.syr.edu/immigration/reports/251/include/imm_charges.html (last visited Oct. 2, 2014).

87. To determine this figure, I multiplied the estimated 44,940 years of incarceration imposed this year on those convicted of crimes of migration, see *supra* note 2, by the $21,000 annual cost of minimum-security federal prison: $943,740,000. For federal prison cost estimates, see Ezra Klein & Evan Soltas, *Wonkbook: 11 Facts About America's Prison Population*, WASH. POST WONKBLOG (Aug. 13, 2013), http://www.washingtonpost.com/blogs/wonkblog/wp/2013/08/13/wonkbook-11-facts-about-americas-prison-population/.

88. *See* Eagly, *supra* note 11, at 1328.

quickly prosecuted in magistrate courts.[89] "[M]any . . . defendants complete the entire [criminal] proceeding—meeting with counsel, making an initial appearance, pleading guilty, and being sentenced . . . in a single day."[90] After the migrants serve their criminal sentence, they are deported.[91]

Streamline was invented by enterprising immigration officials working in Eagle Pass, Texas, in 2005.[92] Faced with a shortage of detention bed space, the officials had to release deportable migrants.[93] But bed space was available nearby in federal pretrial detention.[94] Once charged with a crime of migration, the deportable migrants could be kept in the custody of the federal prison system while the criminal and civil cases proceeded simultaneously.[95] By prosecuting migrants for crimes of migration, rather than simply deporting them, the DHS was able to work around its resource limitations.[96] This local innovation was adapted and distributed all across the border region.[97] Critically, however, the idea was generated and scaled because of the overlapping prosecutorial systems that could be adapted to serve the same end.

Another example: the volumetric focus of the immigration agency informs and structures how the DOJ conceives criminal-immigration enforcement. A key tool that allows the federal criminal system to approach the volume of the less procedurally onerous immigration system is the "flip-flop" plea agreement, where prosecutors charge all migrants that have had a prior deportation or crime-of-migration conviction with both misdemeanor improper entry and felony reentry.[98] In exchange for a guilty plea to improper entry, the prosecutor drops the illegal reentry charge, and the case is "flopped" to a magistrate court, where it proceeds very

---

89. Federal immigration authorities helped persuade Congress to pass the Federal Magistrates Act. Anticipating passage, the immigration agency asked Congress to reduce the penalty for entry without inspection so that it could be prosecuted in magistrate court. *See* Eagly, *supra* note 11, at 1326–27 & n.265 (providing a list of hearings discussing the benefits of converting the former commissioner system into a new magistrate court with more expansive criminal jurisdiction).

90. Joanna Jacobbi Lydgate, *Assembly-Line Justice: A Review of Operation Streamline*, 98 CALIF. L. REV. 481, 486 (2010). The program retains all the trappings of criminal prosecution without much of the substance. *See* Fernanda Santos, *Detainees Sentenced in Seconds in "Streamline" Justice on Border*, N.Y. TIMES, Feb. 12, 2014, at A12.

91. *See* Santos, *supra* note 90.

92. Lydgate, *supra* note 90, at 493.

93. *Id.* at 492.

94. *Id.* at 493.

95. *Id.*

96. *Id.*

97. *Id.* at 494.

98. Eagly, *supra* note 11, at 1329.

expeditiously.[99] In this way, the threat of serious criminal sanctions available through felony reentry prosecutions—for the functionally identical criminal act: entering without permission—is used by prosecutors as leverage to secure an expeditious conviction and deportation.

The flip-flop is possible because the immigration agency itself helped to secure the passage of the act that set up magistrate courts, as well as the reduction in the statutory penalty for improper entry that allowed that crime of migration to fall within the magistrate court's jurisdiction.[100] There, guarantees like a jury trial and grand jury indictment do not apply.[101]

Again, we can see crimes of migration as a central facilitator here. Entry without inspection gave the immigration agency a hook into the criminal realm that allowed it to create a criminal-like court in its image, one that mirrors its "due process–light" immigration court. And indeed most of the time the DHS actually controls prosecution in these courts. DHS officers are deputized as Special Assistant U.S. Attorneys to prosecute the case in magistrate court, and even in district court, the DOJ permits the DHS to dictate whom the DOJ prosecutes.[102]

The strategies of the immigration enforcement regime could form a thick catalog, but we have surveyed enough for our purposes here. We can take a few things from this Subpart going forward. First, the U.S.-Mexico border is no longer metaphysical. Crimes of migration aim criminal coercion at persons who cross that border for crossing it. Therefore, they, along with the border fence project, drones, and the increased manpower deployed by the border patrol, represent an optimization of administrative technology that aims to make undocumented border crossing disappear. The hardening of the border means that the likelihood of apprehension is radically higher than it was when crimes of migration debuted in the 1920s. That escalation in enforcement resources produces a deterrent effect of a magnitude larger than what was usually the idle threat of criminal punishment for most of the twentieth century. The deterrent effect secured by the massive increase in enforcement resources is obtained equally whether crimes of migration trigger deportation alone or by tacking on criminal punishment as a supplement.

Second, the way crimes of migration are administered bears little resemblance to the administration of any other federal crime. The numbers make transparent the privileging of volume to a degree that is discordant with the practice of federal prosecution in other areas.

---

99. *Id.*
100. *Id.* at 1326–27.
101. *Id.* at 1327.
102. *Id.* at 1332.

Third, the procedural shortcuts and volumetric focus of the regime dehumanizes a Latino population that we view as racially distinct. By not conferring procedural protections to those who commit crimes of migration, we are marking a specific group as deserving a lesser form of criminal justice. Volume purchased with lesser rights, and disproportionately targeting a racial group, magnifies the criminal stigma prosecution imposes, giving greater purchase to the stereotype that Latinos are criminals. While this elision of procedural protections is often viewed as conferring benefits to individuals who commit crimes of migration, those benefits are illusory as soon as we look at the calculus collectively. Slower process would mean fewer prosecutions. Deportation in lieu of, rather than in addition to, criminal prosecution would constrict the ability of the State to take either action, as well as lessen the criminal stigma.

Before turning our attention to theory for the rest of this Article, I want to underscore the material: the breathtaking amount of coercive power the regime deploys exclusively on migrants and the communities that sustain them. It is a force, moreover, that applies without any meaningful restraint, allowing it to exhibit a capricious, even gratuitous, character. Legal theorist Paul Kahn observed that "[b]efore the age of democracy . . . [s]tatecraft rested on the production of terror, not consent."[103] The unconsented coercive practices deployed against migrants and facilitated by crimes of migration sound in this premodern mode.

II. THE WRONG IN CRIMES OF MIGRATION

Crimes are usually thought to designate a wrong that demands a public response. Criminal prosecution and punishment, in turn, vindicate that wrong. What sort of wrong do we right when enforcing crimes of migration? In this Part, I examine crimes of migration and describe the wrong that inheres in their commission; I conclude that crimes of migration are best described as wrongs against a political theory, much like treason, which is wrong because our theory of political authority posits that citizens owe duties of loyalty to their sovereigns; treasonous acts breach that duty. The political theory that is wronged by a crime of migration asserts, in essence, that aliens have a duty to respect the unilateral prerogative of the United States to exclude them from its territory on whatever basis it—and it alone—chooses. Committing a crime of migration is "wrong," then, for failing to respect this theory.

After elaborating this account of wrongfulness, I defend it against alternatives that would ground the wrong in harms to persons, property, or legal administration—grounds more central to

103. PAUL W. KAHN, SACRED VIOLENCE: TORTURE, TERROR, AND SOVEREIGNTY 23 (2008).

the criminal law's work. With the wrong identified, we move on, in Part III, to assess the normative validity of crimes of migration in light of prominent criminal law theories.

A. Finding the Wrong in the Alienage Element

The contours of the wrong that crimes of migration criminalize emerge from a close consideration of the crimes' most distinctive aspect: the alienage element. Crimes are usually addressed to everyone—"whosoever," "any person," "an actor who."[104] General forms of address are so commonplace in criminal codes that they register as statutory throat-clearing.

The boilerplate does become a contested issue on occasion. For instance, some feminist scholars have argued that rape (contra a generalizing trend) should remain a crime that names the sexual violence men perpetrate against women.[105] On this view, generalizing rape law to address women who rape men, men who rape men, or women who rape women, would mask the fact that rape, in practice, is something that is overwhelmingly done to women by men.[106] Worse, it might allow men, who enjoy the general privileges that the raping of women sustains, to capture rape law's hard-won moral authority in service of men's own interests.

The reasons that rape law might merit an exception to the criminal law's rule of general address are the same reasons why most crimes are addressed to everyone: to signify equality before the

---

104. *See, e.g.*, N.J. STAT. ANN. § 2C:7-9 (West 2005).

105. Patricia Novotny, *Rape Victims in the (Gender) Neutral Zone: The Assimilation of Resistance?*, 1 SEATTLE J. FOR SOC. JUST. 743, 743–44 (2003) ("'Victim' describes the feminine role in rape, just as 'passive' describes the feminine role in paradigmatic sexual intercourse.").

106. Naffine has argued that gender neutrality "mystifies" the crime of rape. Ngaire Naffine, *A Struggle over Meaning: A Feminist Commentary on Rape Law Reform*, AUSTL. & N.Z. J. CRIMINOLOGY 100, 102 (1994). Similarly, Catharine MacKinnon urges that neutrality in rape law is a "cover[-]up for the gendered reality that [is] really going on." Catharine A. MacKinnon, *Liberalism and the Death of Feminism*, *in* THE SEXUAL LIBERALS AND THE ATTACK ON FEMINISM 3, 4 (Dorchen Leidholdt & Janice G. Raymond eds., 1990). In reflecting upon changes in views within the feminist movement since the 1970s, MacKinnon also argues that "[w]hen this movement criticized rape, it meant rapists and the point of view that saw rape as sex." *Id.* at 3. She argues that gender neutrality shifts the focus away from female victimization: "[S]o-called gender neutrality—ignoring what is distinctively done to women and ignoring who is doing it—became termed the feminist position. . . . Gender neutrality means that you cannot take gender into account, you cannot recognize, as we once knew we had to, that neutrality enforces a non-neutral status quo." *Id.* at 6, 12. Elsewhere, MacKinnon argues that "[w]omen and men are not similarly situated with regard to sexual assault in the sense that they are not equally subject to it or equally subjected to it." Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1304 (1991).

law.[107] We defend rape law's address to men exclusively because rape and its omnipresent threat create inequality between men and women. Rape law is one mechanism we use to help make equality between men and women real. The departure from general address expresses this intention.

Relatedly, the universal register bolsters the moral authority of the criminal law. Rules that address all impliedly claim a consensus about the wrongfulness of the covered act, along with a universal coercive authority to command and to punish: thou shalt not kill; not: Jews/Christians/Muslims shalt not kill. Uniquely, the moral authority of rape, or so the argument goes, is best preserved by exclusive address to men.[108]

What, then, are we to make of the fact that crimes of migration speak only to aliens; that they begin not with "whosoever," but with "any alien who"?[109] Does this mean that they lack the moral authority of generally addressed crimes? Do they enact a problematic inequality? A citizen, after all, could run afoul of the other elements of illegal entry. A (rare) citizen might

> enter . . . the United States at any time or place other than as designated by immigration officers, or (2) elude examination or inspection by immigration officers, or (3) attempt to enter or obtain entry to the United States by a willfully false or misleading representation or the willful concealment of a material fact.[110]

Perhaps exclusion of citizens from the ambit of this statute is of minor significance because a citizen acting in this manner would violate other criminal prohibitions that are addressed to all. Thus, the narrow applicability of illegal entry to aliens might not result in a failure universally to regulate whatever wrongful conduct the other elements of illegal entry mark out for opprobrium. But if such overlap exists, then these universally addressed crimes would

---

107. Dubber claims that from a normative perspective the universal claim of the criminal law should reflect personhood, that is, all persons within the territory controlled by the set of criminal laws are, in effect, entitled to its acknowledgment. *See* Markus D. Dubber, *Citizenship and Penal Law*, 13 NEW CRIM. L. REV. 190, 197 (2010).

108. This attention to address may seem picayune, but language matters in the criminal law in ways more substantial than the usual attribution of such concerns to the criminal law's expressive value or, in postmodern parlance, its discursive effects. Recall that the language of criminal statutes is deployed at multiple public sites in the criminal process. The criminal trial, where the jury is instructed in the criminal law, is just one prominent example. Statutory language is also the terrain on which a criminal defendant contests the criminal law's opprobrium. You need not agree that the criminal law is primarily designed to publicly hold a wrongdoer accountable to concede that the language we use in the criminal law reverberates through the social and political worlds.

109. *See* 8 U.S.C. § 1326(a) (2012).

110. *Id.* § 1325.

equally apply to aliens, rendering illegal entry superfluous (at a practical level, at least). What then is gained from specifying crimes of migration as applicable only to aliens? What does it mean that alienage is an element of illegal entry and reentry?

Consider first the content of the statute with the alienage element omitted. A crime in this form would be best described as condemning a wrong against legal administration—perhaps vindicating an interest in the efficient management of entry into the United States or in having a full and accurate account of which persons are present within the United States at any particular moment.[111] Its claim to moral authority would stem from its universal application and its adoption through democratic processes.[112] If we were to question whether such a crime should be a crime at all, we might question whether the harm it covers is too de minimis to merit the coercive penalties and moral opprobrium of the criminal law.[113]

If, in the absence of alienage, illegal entry inflicts a regulatory harm that might be de minimis, what character does the harm take on when alienage is added? If an alien—as opposed to a citizen—commits the act, is it more wrongful? The statute's inclusion of an alienage element seems to suggest that it is. In what way could this be true?

It might help now to specify how U.S. law defines alienage. An alien is any person who is not a "national of the United States."[114] A national of the United States is, in turn, anyone owing permanent allegiance to the United States—nearly always a citizen.[115] An alien is thus any person *not* owing permanent allegiance to the United States.[116] Accordingly, we might say that an alien is a person without any permanent political relationship with the United

111. That kind of regulation has long been at the heart of the State's aspirations. *See generally* JAMES C. SCOTT, SEEING LIKE A STATE: HOW CERTAIN SCHEMES TO IMPROVE THE HUMAN CONDITION HAVE FAILED (1999) (discussing social planning and taxation, etc.).

112. *See generally* Dan Markel, *Retributive Justice and the Demands of Democratic Citizenship*, 1 VA. J. CRIM. L. 1, 15 (2012) (arguing that democracies have the moral authority to create moral obligations on behalf of their citizens to conform to a wide range of criminal laws). However, the fact that aliens at the border do not consent to or form part of the democratic community that Markel describes is a problem for Markel's theory in this particular context. *See infra* Subpart III.C.

113. *See infra* Part III for discussion.

114. 8 U.S.C. § 1101(a)(3) (2012).

115. *See id.* § 1101(a)(22) ("The term 'national of the United States' means (A) a citizen of the United States, or (B) a person who, though not a citizen of the United States, owes permanent allegiance to the United States.").

116. Allegiance is a concept tracing back to feudal notions of fealty between a subject and a lord. Dubber, *supra* note 107, at 207.

States. A citizen, by contrast, owes a permanent duty of political fidelity to the United States, on pain of a treason conviction.[117]

Though the legal definition of a citizen is specified in terms of duties owed to the State, the relationship between the United States and its citizens is reciprocal. A citizen owes allegiance just because the United States confers upon him a certain set of rights and privileges; that is the benefit of the bargain.[118] Within this formulation the alien, on the other hand, is owed nothing; she is foreign to the State.

With this we can posit some ways in which alienage colors the acts that illegal entry proscribes. The privilege of citizenship most related to the conduct regulated by illegal entry is the nearly unconditional privilege citizens enjoy to enter and remain present in the United States on their own prerogative.[119] Indeed, the inability to expatriate a citizen has been posited as perhaps the only irrevocable attribute of citizenship.[120] An alien, by contrast, can be excluded or deported on any basis, so long as it is compatible with domestic laws over which the alien has no say. For an alien to enter

> the United States at any time or place other than as designated by immigration officers, or (2) elude[] examination or inspection by immigration officers, or (3) attempt[] to enter or obtain[] entry to the United States by a willfully false or misleading representation or the willful concealment of a material fact[121]

---

117. *Id.* at 196.

118. *Id.* at 207.

119. *See* Trop v. Dulles, 356 U.S. 86, 92 (1958) ("It is my conviction that citizenship is not subject to the general powers of the National Government, and therefore cannot be divested in the exercise of those powers. The right may be voluntarily relinquished or abandoned either by express language or by language and conduct that show a renunciation of citizenship."); Knauer v. United States, 328 U.S. 654, 658 (1946) ("Citizenship obtained through naturalization is not a second-class citizenship. It has been said that citizenship carries with it all of the rights and prerogatives of citizenship obtained by birth in this country 'save that of the eligibility to the Presidency.'" (quoting Luria v. United States, 231 U.S. 9, 22 (1913))).

120. This was not always the case. *See* Afroyim v. Rusk, 387 U.S. 253, 267–68 (1967) (holding that Congress may not pass a law that infringes on a citizen's rights under the Fourteenth Amendment, and specifically, Congress may not take away a person's citizenship, explicitly overruling *Perez v. Brownell*, 356 U.S. 44 (1958)); *Trop*, 356 U.S. at 101 (discussing the constitutionality of denaturalization as punishment for desertion and holding that it is unconstitutional to denaturalize a citizen because the Eighth Amendment forbids cruel and unusual punishment); *Perez*, 356 U.S. at 62 (holding that Congress had the power to take away citizenship from anyone who votes in a foreign political election), *overruled in part by Afroyim*, 387 U.S. 253.

121. 8 U.S.C. § 1325(a) (2012). To be sure, I am downplaying here other theories that might support specific applications of the statute in favor of identifying a core theory of criminalization. For instance, that the statute

is thus either a *claim to*—or a theft of—the privilege of self-determined entry and exit, which the State reserves for citizens exclusively.[122]

B. Implications: The Perspectival Divergence

Notice that when I described the wrong that crimes of migration mark, I said that committing a crime of migration is *either* a claim to, or a theft of, a right to entry that the State claims exclusive authority to distribute. Which characterization of the act of committing a crime of migration is most apt depends on one's perspective. From the point of view of the alien, a claim to the rights and privileges of citizenship is simply what the United States denied her through its unilateral choice to exclude, a right which she claims by the only mechanism available: committing a crime of migration. On the other hand, the United States can view the alien's act as a kind of theft and as a precursor to the willful taking of other related privileges of citizenship accessible from inside the territory. That might be a serious infraction indeed, since it challenges the right of the State to define who may enjoy the privileges of citizenship and the fruits of the American territory. Certainly, that crimes of migration make no effort to mask their exclusive impact on aliens—bucking the norm that the criminal law should speak in the universal register—underscores that the category "alien" is highly legitimate in the eyes of the polity, as is the attendant right to exclude someone so labeled.

This weighty take on the wrongness of migration crimes also tracks criminal law theorist Antony Duff's distillation of consensus criteria that emerge from the cacophonous debate over "which kinds of conduct should be criminal. . . . Is the wrong one that injures 'the public' rather than any individual victim?"[123] Yes, the American public is the only arguably coherent victim of crimes of migration.[124]

---

covers a species of fraud. It will become clear later in this Article why this omission is defensible. For now it is enough to say, I think, that other fraud statutes would cover this kind of conduct, and so the State would still have to justify the need for this particular kind of fraud to receive separate statutory coverage.

122. That the criminalized claim to a privilege of citizenship by an alien is a territorial privilege underscores the fact that the State is primarily concerned with defending a territorial vision of its power. The alien who overstays a visa is not so treated because her act does not threaten the territorial boundary in the same way. Linda Bosniak has called the distinctive treatment of the State's power over migrants at the border, and once they are in the interior, as the "hard-on-the-outside, soft-on-the-inside" model. LINDA BOSNIAK, THE CITIZEN AND THE ALIEN: DILEMMAS OF CONTEMPORARY MEMBERSHIP 119 (2006).

123. Antony Duff, *Theories of Criminal Law*, THE STAN. ENCYCLOPEDIA OF PHIL. § 6 (Edward N. Zalta ed., 2013), http://plato.stanford.edu/archives/sum2013/entries/criminal-law/.

124. For an argument against conceptualizing harm to other aliens in undocumented migration, see *infra* notes 132–37 and accompanying text.

"Is [the wrong] one that flouts or implicitly denies the core values by which we define ourselves as a polity, and which supposedly underpin our civic relationships?"[125] Yes, again. It is arguably the threat to the "core values by which we define ourselves as a polity" because it "flouts or implicitly denies" our power to define whose voice counts in the formation of collective values.[126] "Is it one from which we should be able to expect the protection of our fellow citizens . . . ?"[127] The dramatic and escalating public expenditure on border protection and immigration enforcement—in lieu of a licensure or liability model of remedy for the violation—arguably answers this question in the affirmative as well.[128]

Yet the perspective of the alien who commits a crime of migration is radically opposed to these characterizations. An alien who commits a crime of migration perceives the wrong not in her migration, but instead in her exclusion without consent or consultation from the United States. That person essentially rejects her own alienage, asserting a privilege that the United States reserves for its citizens (and invited guests) alone.[129]

The alienage element highlights the dramatic impact one's vantage point has on the wrong that crimes of migration purport to criminalize. I dub that difference the perspectival divergence. From one perspective, the wrong goes to the very core of the integrity of the United States; it appears as the ultimate (strictly political) wrong that an alien can perpetrate. From the alien's point of view, however, committing a crime of migration is not a crime at all; it is a just action in the face of unjust exclusion from the polity.

In the next Part, I will consider what effect, if any, the shape of the wrong that crimes of migration condemn has on their legitimacy under normative criminal law theory. But, before I turn to that analysis, I will defend below my account of crimes of migration as wrongs against a political theory by considering other, more intuitive, characterizations of the wrong.

C. *Are Crimes of Migration Harmless?*

Most criminal law theorists and scholars (though not all[130]) view crimes as wrongful, at least in part, because they cause harm to

---

125. Duff, *supra* note 123.
126. *Id.*
127. *Id.*
128. *See, e.g.*, McLeod, *supra* note 11, at 107.
129. We can perhaps reformulate all crimes in this way, but not as sensibly. Take marital rape, for instance. We could say that from the perspective of the rapist, he is making a claim to the flesh of the rape victim, rather than stealing it from her. The difference with crimes of migration is the migration law violator has the backing of an entire normative literature, whereas that the rapist has no normative leg to stand on.
130. Arthur Ripstein famously rejects the value of harm in understanding the legitimate reach of the criminal law. *See* Arthur Ripstein, *Beyond the Harm*

persons, property, or state administrative interests. Even non-consequentialist theorists recognize that harm structures human conceptions of what is morally wrong, and thus what is criminal.[131] My formulation of crimes of migration as crimes against a political theory suggests that committing a crime of migration causes no harm, or that, if it causes harm, the harm is of the most metaphysical variety—a crime of migration "harms" a concept, a political theory.

In this Subpart, I will defend the plausibility of this account of crimes of migration by examining other possibilities, asking whether crimes of migration cause harm to persons, property, or legal administration. With each of these, I will show that the persuasiveness of such accounts depends critically on the legitimacy of the political theory that crimes of migration arguably wrong. Thus, these concrete harms are only cognizable as criminal harms that wrong someone or something if the prerogative of the United States to exclude any alien it wishes is legitimate.

For example, we can posit that crimes of migration harm legal administration only if we agree that the political theory grounding the right to exclude that person is normatively correct. If it is not, then legal administration cannot be "harmed" through fraud or deception because its authority is illegitimate in the first instance. Each of the other candidates for harm is moored to the American theory of sovereignty in similar fashion. For this foundational reason, I argue, crimes of migration are best conceived as harming our political theory of border exclusion and are wrong for just that reason.

1. Harm to Property?

The prototypical crime of migration might be said to "harm" property. Crossing the border and entering onto land that does not belong to you without permission appears clearly to be a form of trespass that is criminalizable on the same grounds as any other criminal trespass.[132] A trespass theory, though, hinges on the legitimacy of the underlying theory of legal exclusion. If the alien's perspective on the perspectival divergence carries the day, so to speak, then exclusion itself was wrongful and our characterization of crimes of migration as harmful for being trespasses does not hold.

Principle, 34 PHIL. & PUB. AFF. 215, 215 (2006). Despite Ripstein's compelling analysis, consideration of harm still informs mainstream criminal law theory. *See, e.g.*, HUSAK, *supra* note 4, at 105, 119 (discussing wrongfulness in terms of harm). Nonetheless, I will discuss Ripstein's theory, *infra* note 143, since he posits individual "sovereignty" in lieu of harm as the organizing principle of criminal wrongfulness, and *collective* sovereignty is the ground on which I posit that the United States criminalizes migration.

131. *See* HUSAK, *supra* note 4.

132. *See* 8 U.S.C. § 1325 (2012).

To the extent it does hold, it holds because the United States properly has the right to exclude the migrant.

Another conception of property harm was put forward by the State of Arizona in *Arizona v. United States*[133] with: the rendering of public land unusable for being so heavily trafficked with people committing crimes of migration.[134] Again though, if we open ourselves to an underlying skepticism about the right to exclude at all, then it becomes significant that the relatively recent transition of migrant pathways through Arizona was a product of federal design. The federal government sought to make crossing into the United States more difficult by deploying enforcement resources in safer, less environmentally sensitive, urban areas, thereby shifting migration routes to the more dangerous and ecologically fragile Arizona terrain.[135] No matter where the movement goes, the point still holds: if we take seriously that the wrong lies in exclusion not trespass, then harm to land is caused by the form that exclusion takes, which the migrant has absolutely no say in; the migrant is taking the path that the State has left available to him. As a result, whatever harm to land that Arizona can identify should be attributed to the federal government, since it, in an important sense, directed migration onto that land. Again, whether this is ultimately a wrong depends on whether we buy the political theory of the border.

2. Harm to Persons?

Any physical harm visited on citizens or lawfully present noncitizens by people who commit crimes of migration are properly covered by other criminal prohibitions that apply universally to all physically present within our borders, so the imposition of physical harm cannot underwrite crimes of migration per se. The harms that citizens usually concern themselves with, however, tend to be more abstract and can be equally characterized as harms to personal property. For instance, Justice Scalia, in a blistering dissent to the majority opinion in *Arizona*, spoke on behalf of those who felt their jobs were being taken from them by undocumented workers, or that their wages suffered because of their presence.[136] There is no empirical evidence to support Scalia's statement,[137] but it certainly

133. *See* Brief for Petitioners, Arizona v. United States, 132 S. Ct. 2492 (2012) (No. 11-182).

134. *See id.* at 1.

135. *See* Daniel Ibsen Morales, *In Democracy's Shadow: Fences, Raids, and the Production of Migrant Illegality*, 5 STAN. J. C.R. & C.L. 23, 29, 43–44 (2009).

136. *See Arizona*, 132 S. Ct. at 2522 (Scalia, J., dissenting).

137. *See, e.g., E-Verify—Preserving Jobs for American Workers: Hearing Before the Subcomm. on Immigration Policy and Enforcement of the H. Comm. on the Judiciary*, 112th Cong. 7–8 (2011) (statement of Tyler Moran, Policy Director, National Immigration Law Center); IMMIGRATION POLICY CTR., II IMMIGRATION AND NATIVE-BORN UNEMPLOYMENT ACROSS

reflects a common public sentiment. Again, however, even assuming that Scalia is right, whether wage or job competition between unlawfully present aliens and citizens may be thought of as harms depends on whether access to American jobs is something that is properly under exclusive domestic control. If American jobs and wages are properly a property right attending citizenship or legal residence only, then crimes of migration lead quite proximately to this harm. If not, then no right to jobs or lesser labor competition is cognizable, and so no harm obtains.

3. Harm to Legal Administration?

In addition to the trespass model of unlawful entry, crimes of migration also criminalize entry by means of willful deception or deceit.[138] So, like perjury, we might say that crimes of migration harm legal administration, mainly by decreasing its efficacy and increasing its cost.[139] There are a variety of ways that harm to legal administration might be said to occur as a result of the commission of crimes of migration. All of these are quite obvious—lying at a port of entry, using a false passport, or crossing at a non-designated port of entry and evading detection. If no alien took any of these actions to facilitate migration without permission, then the immigration regime would be perfectly administered and the costs of enforcing U.S. immigration prerogatives would be zero, or nearly zero. Because many aliens do commit crimes of migration and because we have recently chosen to "get tough" on these infractions, the costs of enforcement are, in fact, quite large.[140]

By now the refrain should be familiar: these are harms only because the political theory underlying crimes of migration is legitimate. If it is not legitimate, then lower efficacy and higher costs are just the price of conforming migrants' behavior to an illegitimate political authority and are not properly considered harms relevant to criminalization.

Another common formulation of the harm to legal administration that crimes of migration cause is to the immigration system. In the most common articulation of this harm, those who commit crimes of migration are not waiting their turn or harming

---

RACIAL/ETHNIC GROUPS: UNTYING THE KNOT 5, 7 (2009), *available at* http://www.immigrationpolicy.org/sites/default/files/docs/Part%202%20-%20Unemployment%20Race%20Disconnect%2005-19-09.pdf; Giovanni Peri & Chad Sparber, *Task Specialization, Immigration, and Wages*, 1 AM. ECON. J.: APPLIED ECON. 135, 136–37, 164–65 (2009).

138. *See* 8 U.S.C. § 1306 (2012) (penalizing any alien's failure to register and be fingerprinted, failure to notify change of address, fraudulent statements, and counterfeiting); 19 U.S.C. § 1459 (2012) (outlining reporting requirements for individuals arriving in the United States and describing unlawful acts).

139. *See* McLeod, *supra* note 11, at 147.

140. *See id.* at 147–50; Klein & Soltas, *supra* note 87.

migrants who wait patiently in line for permission to enter.[141] This formulation of harm is much less compelling and concrete than it seems, even absent the exclusion-legitimacy argument. Consider that "waiting in line" for a legal visa and entering lawfully confers its own substantial benefits to lawful migrants vis-à-vis undocumented migrants. Legal migrants may live openly in the United States, work in the legitimate economy, sponsor relatives to migrate legally, etc. These benefits more than compensate for the wait that those who commit crimes of migration forgo.

Moreover, from the perspective of aliens, who have no voice in the formulation of the criteria for legal entry, the difference between legal and illegal migration is rather arbitrary. Rosa gets to enter lawfully from Honduras because she won the diversity visa lottery or because her mother got a visa because Rosa's uncle had been granted a visa before that—these are all the products of chance, from the excluded alien's perspective. The decision carries no moral or political weight to someone who was not blessed with the luck that facilitated Rosa's legal migration. Even visa criteria based on skill sets, which seem less arbitrary from our perspective, are arbitrary from the perspective of aliens seeking entry because they place the marginal needs of a community that excludes them—the United States—above the concrete material needs that motivate migration. That is, our decision to privilege the entry of engineers may not be arbitrary to American citizens (we gain economic productivity at the margin from the engineer's entry), but it appears arbitrary from the perspective of the Spanish literature scholar who cannot enter because her skills are unwanted by the United States. With respect to all humans whose lives would be drastically improved through migration, nearly any distinguishing criteria can be persuasively characterized as morally arbitrary or unfair.[142]

A structural objection in this vein is that those who commit crimes of migration diminish domestic political support for a more permissive migration regime. This may or may not be true, but this kind of very abstract, attenuated harm is not of the sort that the criminal law usually concerns itself with. What is more, that

---

141. I have a procedural objection to this formulation because it is one that is most often invoked by members of the countries seeking to exclude migrants to justify the moral significance of migrating legally versus without permission. When members of wealthy nations say this, we are speaking for "others," usually oppressed, in part by the global system that countries of immigration mostly benefit from. For this reason, we should see through this formulation as a self-serving argument that justifies distinctions that are not justifiable on more robust normative grounds. *See* Gayatri Chakravorty Spivak, *Can the Subaltern Speak?*, *in* MARXISM AND THE INTERPRETATION OF CULTURE 271, 280–81 (Cary Nelson & Lawrence Grossberg eds., 1988) (critiquing this form of co-optation).

142. This is a central tenet of cosmopolitan theories of borders. *See, e.g.*, STEVENS, *supra* note 27, at 55–56; Carens, *supra* note 27, at 265–66.

argument stakes itself on the legitimacy of the United States' unilateral authority to determine the content of its immigration policy and so turns on the same normative question that every other alternative conception of harm has turned on. If we take the perspectival divergence seriously, perhaps those *subject to* American immigration policy should have a say in its structure as well. If that were the case, it is not clear that unlawful migration would have any effect at all on the political support for liberalization.

From this brief discussion of alternative conceptions of the wrong in crimes of migration, the superiority of its formulation as a wrong against the United States' political theory at the border—sovereignty[143]—should be clear. This formulation is best because it captures a severable harm that crimes of migration can be said to criminalize—the metaphysical harm of wronging a political theory—

---

143. In *Beyond the Harm Principle*, Arthur Ripstein posits his sovereignty principle of just criminalization as an alternative to the harm principle that, at least since Mill, has dominated discussion of criminal law. Ripstein, *supra* note 130. I address it in detail here because of its superficial relationship to the rights flowing from *collective* sovereignty that I urge that aliens make a claim to by committing a crime of migration. Mill's notion that any act which does not harm others should not be criminalized is lacking, Ripstein argues, because most of us would find harmless acts of trespass, like an intruder sleeping in one's bed and then departing without a trace of their presence, to be wrongful and probably subject to criminal opprobrium for reasons irrespective of the risk that such actions would result in concrete harm. *Id.* at 218.

Instead of harm, Ripstein argues that we should substitute the "sovereignty principle," which holds that "the only legitimate restrictions on conduct are those that secure the mutual independence of free persons from each other." *Id.* at 229. Under this principle, "harmlessly" sleeping in a stranger's bed without his or her permission wrongs you "by using your home for a purpose that you did not authorize." *Id.* at 227. This is wrong because under Ripstein's conception of liberal political freedom, using someone's home and bed in this way dominates them and makes them the perpetrator's "subject," at least in this narrow context. *Id.* at 231. The harmless bed user commits a wrong against the owner because he has told that person what to do within their legitimate sphere of individual authority. "You are sovereign because no one else gets to tell you what to do; you would be their subject if they did." *Id.*

Ripstein's theory has much to offer as an account of core crimes in the criminal canon, but his theory, like most others I discuss in Part III, assumes the legitimacy of the closed political community that makes the criminal law and so has little to say about the problem of the boundary that I pose here. Indeed, if anything, his sovereignty principle, derived from individualist liberal theory, might properly be seen as supporting the view that crimes of migration should not be crimes because they limit, without consent, an alien's ability to pursue her independent purposes. Border restrictions thus violate an alien's individual sovereignty unjustifiably. (Indeed, they do so in the most meaningful possible way, given the vastly unequal opportunity structures between nations.) This interpretation of Ripstein would dovetail nicely with Jacqueline Stevens' forceful account of how the same individual-centered liberal theory on which Ripstein relies mandates free movement of persons across national borders. *See* STEVENS, *supra* note 27, at 96.

while the other theories of wrongfulness are ultimately derivative of and dependent upon the standing of that political theory.

Now that I have established the *wrongfulness* of crimes of migration, I will discuss, in Part III, whether that conception survives the scrutiny of leading theories of criminal law.

III. WHEN IS CRIMINAL PUNISHMENT JUST?

The criminal law is special. This much we know. Its authorization of criminal punishment, "the most powerful weapon in the [S]tate arsenal,"[144] is the most tangible distinction between the criminal and civil realms. No matter what the equities of a civil lawsuit, the judge cannot throw the defendant in jail; coercion short of that, of course, is possible, but incarceration as a remedy for civil suits is off the table.[145]

The rest of criminal law's distinctiveness follows from the special violence and the moral condemnation that it deploys: attorneys provided at public expense, evidence excluded for flaws in a warrant or violations of *Miranda*, and habeas corpus review. We think these protections are vital just because of the stakes—the deprivation of freedom by means of incarceration. And, in modern criminal law, when the violence of criminal punishment escalates, the procedures that precede its imposition can become more elaborate; the extensive procedural protections required to impose the death penalty are the best example.

Immigration, too, is distinctive law for two major reasons. It is a law made by citizens that does not apply to them, and it authorizes deportation—the forcible transportation of an alien from her present State of residence to another.[146] As a formal matter, deportation is not considered punishment.[147] For this reason, the process protections that distinguish the criminal law from the civil realm do not apply to immigration law; it is nominally civil, but

144. HUSAK, *supra* note 4.

145. Contempt of court in a civil case is, of course, grounds for incarceration. Civil commitment statutes and immigration detention also impose confinement that is materially indistinguishable from incarceration. *See* César Cuauhtémoc García Hernández, *Immigration Detention as Punishment*, 61 UCLA L. REV. 1346, 1351–56 (2014). Yet the use of carceral force is not the core of civil law; its deployment in the civil context forms the basis for critique of those practices, in part for being executed without the criminal law's procedural protections. Moreover, the criminal law theory literature has, among other things, dedicated itself to articulating the distinctive space occupied by the criminal law. This normative commitment to a separate criminal realm is what allows us to coherently formulate the civil law's use of criminal law tools as a deviation.

146. *See also* MERRIAM-WEBSTER'S DICTIONARY OF LAW 133 (1996) (defining deportation as "the removal from a country of an alien whose presence is illegal or detrimental to the public welfare").

147. Fong Yue Ting v. United States, 149 U.S. 698, 730 (1893).

without the civil jury trial right, and with access to a unique, highly coercive power to vindicate its interests.[148]

Law's failure to adequately acknowledge the criminal-like, punitive nature of deportation and to mandate the accompanying procedural protections has been an occasional source of judicial embarrassment[149] and the foundation for a rich vein of scholarly commentary.[150] Nonetheless, severe as it is, deportation is distinguishable from the modern practice of punitive incarceration. It may impose a kind of exile, but it does not impose the carceral confinement and supervision that are the hallmarks of modern criminal punishment.[151]

Crimes of migration are situated between these two unique bodies of law. Like deportation, crimes of migration may be prosecuted against aliens only (recall that citizenship is a complete defense),[152] and like most criminal laws, crimes of migration mete out punishment denominated in the currency used to satisfy most other criminal convictions: time behind bars.[153]

Crimes of migration are also unique for playing a supporting role to deportation, the civil remedy. Usually, of course, it is the civil law that augments the penalties and censure of the criminal law.[154] With crimes of migration, however, incarceration is a punitive supplement to the ultimate, nominally civil, end—deportation.[155] Crimes of migration, then, are border crimes; this is true in a literal sense, as they regulate conduct at the United States' geographic boundaries, and more figuratively, as they lie somewhere between criminal law and civil-immigration law.

In this Part, I subject these border crimes to theories that mark the legitimate scope of criminal law to see whether they pass muster. I conclude that they do not fit very well into either of the major categories of criminal law and punishment theory: retributivism and utilitarianism. On examination, it turns out that both theoretical modes are premised, in different ways, on the normative assumption of a closed political community. Since crimes of migration impose criminal punishment for seeking entry into a

148. *See* Stumpf, *Fitting Punishment*, *supra* note 11, at 1686–87.

149. *See* Padilla v. Kentucky, 559 U.S. 356 (2010); *Fong Yue Ting*, 149 U.S. at 730 ("The order of deportation is not a punishment for crime. It is not a banishment, in the sense in which that word is often applied to the expulsion of a citizen from his country by way of punishment.").

150. *See, e.g.*, DANIEL KANSTROOM, DEPORTATION NATION: OUTSIDERS IN AMERICAN HISTORY 15 (2007).

151. *But cf.* Stumpf, *Fitting Punishment*, *supra* note 11, at 1691, 1720 (noting that the deportation process often involves incarceration).

152. *See* KANSTROOM, *supra* note 150, at 17.

153. Stumpf, *Fitting Punishment*, *supra* note 11, at 1730.

154. *See* Kenneth Mann, *Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law*, 101 YALE L.J. 1795, 1798 (1992).

155. *See* Stumpf, *Fitting Punishment*, *supra* note 11, at 1721.

closed political community, they beg the question of the legitimacy of the political boundary that these theories have assumed from the start. Still, crimes of migration fail a number of constraints on criminalization that are tied to personhood, a concept firmly rooted in the American criminal law tradition. These failures give us good reason to doubt whether crimes of migration should be crimes.

Next, peering beneath these theories, I surface the normative principle that stands behind the assumption of political closure: consent. As I show, a thin—but essential—version of consent operates to legitimize even the vaguest, or most inchoate, of criminal laws. This consent separates the modern invocation of criminal coercion and censure from its monarchical origins and makes it more legitimate. But that font of legitimacy is unavailable to migrants who violate crimes of migration. They have not consented to their exclusion from the political community and do not consent to the criminal law until they join the political community (by invitation, or by their own intentional crossing of the border). As a result, crimes of migration fail this most basic test for the legitimate imposition of criminal condemnation and punishment.

Our theories of the criminal law, I show, provide no good answer to why criminal punishment for committing crimes of migration is a proper exercise of the power to criminally punish or condemn. A utilitarian view of restrictions on migration, unpermitted or otherwise, is indeterminate—we can never know definitively whether exclusion is welfare maximizing in comparison to open borders. And explicit and assumed tenants of retributive theories are violated in the case of crimes of migration. Given the myriad doubts I uncover, I conclude that crimes of migration are an illegitimate use of the criminal power. But as I argue in Part III, assuming arguendo that I am wrong and the State may properly criminalize migration, the State can seek recourse to an ancient theory of just punishment, *lex talionis* (an eye for an eye), to justify the imposition of deportation in response to a crime of migration. But if that principle grounds criminal punishment here, then incarceration on top of deportation cannot be justified.

A. Retributivism

Retributive theories of the criminal law and punishment are various,[156] though they tend to converge around certain tenets: a commitment to criminal punishment as a moral good, as opposed to a means to an end; a corresponding commitment to the notion that punishing a violator is a dignifying act that acknowledges the violator's humanity and ontology; and a constraint on criminalization and the imposition of criminal punishment that restricts the criminal law to punishing pre-legal wrongs.

156. *See* Duff, *supra* note 123, § 4.

In this Subpart, I will examine crimes of migration through the lens of two influential and emblematic retributive theories of the criminal law. The theories bookend the period during which criminal punishment rose to such great heights in the United States that it came to be diagnosed as pathology in need of a cure.[157]

1. A Right to be Punished for Crimes of Migration?

In *Persons and Punishment*, Herbert Morris posits a human right to be punished and argues for this right along with three corollary propositions: "[T]his right derives from a fundamental human right to be treated as a person; . . . this fundamental right is a natural, inalienable, and absolute right; [and] . . . denial of this right implies the denial of all moral rights and duties."[158] Withholding criminal punishment is a failure to treat someone who commits a crime as a person because it fails to respect his choice to commit the crime.[159] In choosing that course of action, he can be said also to have chosen his punishment. Withholding punishment in favor of therapy or rehabilitation fails to respect that person's ability to choose his course of conduct and so treats him as an object, rather than a person.[160]

On such an account, the failure to criminally punish a migrant for committing a crime of migration would be to deny his very humanity. Is this right? On consideration of the assumptions that support Morris's right to be punished, I think not.

Morris's theory is designed to account for the core of the criminal law, which he defines as "rules that prohibit violence and deception and compliance with which provides benefits for all persons" and a secure "sphere for each person . . . which is immune from interference by others."[161] Punishment is just the flip side of protecting a system where "the rules establish a mutuality of benefit and burden and in which the benefits of noninterference are conditional upon the assumption of burdens."[162]

How do crimes of migration fit into this framework? They can certainly be characterized as crimes that prohibit deception and so fall within the scope of Morris's account. The militarization of the southern border means that crossing the border without permission nowadays is done in such a way as to evade detection, and that is

157. For a chronicle of this rise and a pathologic diagnosis, see generally DAVID GARLAND, THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY (2001).

158. Herbert Morris, *Persons and Punishment*, 52 MONIST 475, 476 (1968).

159. *Id.* at 486–87.

160. *See id.* at 488–90.

161. *Id.* at 477. This is also the core criminal law protection that Arthur Ripstein locates in *Beyond the Harm Principle*, *supra* note 130, at 215–16.

162. Morris, *supra* note 158, at 477.

certainly a deceptive act. But after this initial success in tying crimes of migration to Morris's theory, we quickly run aground.

Can we say that compliance with law of migration "provides benefits for all persons?" The answer appears to be no. It provides benefits[163] to citizens who want the restriction; it might also provide benefits to those who migrate at the express invitation of citizens by increasing the value of their visa at the margin. However, under conditions where immigration is unilaterally limited by citizens and many aliens have no realistic possibility of being invited to immigrate (for lack of desired skills, family connections, etc.), it would seem that aliens who commit a crime of migration do not receive any clear benefit from compliance with that restriction. Indeed, it seems more plausible to assert the reverse: by committing a crime of migration, the alien is taking for himself the benefit he was unfairly denied by his unilateral exclusion.

To be sure, it is not impossible to reach the conclusion that those who commit a crime of migration would benefit from compliance with the restriction. After all, the system of nation-states is itself thought to confer a mutuality of benefits and burdens.[164] In this formulation, all Mexicans would benefit from complying with crimes of migration, just as all Americans would. Stated concretely, however, this position is quite implausible. It is implausible because we know about the relative wealth of the two respective nations and the histories that formed the borders between them.[165] We also know that Mexico seeks the migration of Americans, and we criminally punish Mexicans who migrate without permission.[166] So the proposition that Mexico benefits from compliance with crimes of migration with anything approximating the mutuality of the way in which I benefit from my fellow citizens or migrants, say, not picking my pocket, is implausible.

I will say more about this later in this Part, but for now I want to underscore that Morris's mutuality assumption typifies a category of assumptions that underwrites criminal punishment beyond crimes to the person: most theories assume a stable, normatively legitimate, democratic community in which criminal punishment is meted out. For Morris, we have a natural and inalienable right to be punished.[167] But this tells us very little about our particular

---

163. And these material benefits are questionable even when considered from the perspective of the United States. McLeod, *supra* note 11, at 145–51. The metaphysical benefits of asserting control are much more challenging to gauge and contest.

164. *See* RISSE, *supra* note 27, at 324.

165. For a critical history of this relationship, see generally LAURA E. GÓMEZ, MANIFEST DESTINIES: THE MAKING OF THE MEXICAN AMERICAN RACE (2007).

166. STEVEN W. BENDER, RUN FOR THE BORDER: VICE AND VIRTUE IN U.S.-MEXICO BORDER CROSSINGS 27–28 (2012).

167. *Contra* Morris, *supra* note 158, at 476, 485–86.

problem. What does the kind of mutuality Morris has in mind mean at the border?

The right to be punished as a human right to which aliens are entitled should appear all the more problematic in light of the consequentialist, inhumane manner in which migrants are in fact treated by the United States, as described in Part I. The ends orientation of the immigration enforcement regime to migrants in general, and particularly to migrants who enter without permission, belies the notion that the United States is vindicating a right to be punished when it enforces crimes of migration.

Morris can get traction for a proposition that he acknowledges is perverse[168] because of all the other rights, duties, and mutual obligations that persons assume within the context of a consensual and democratic political community. Those conditions obviously do not obtain for aliens at the border, and so we leave our engagement with Morris, having located problems and questions rather than answers.

2. A Right Not to be Punished for Crimes of Migration?

If Morris's "right to be punished" was vulnerable to accusations of perversity when he wrote in 1968, today's reader, conscious of the dramatic escalation in criminal punishment since the 1980s, might be forgiven for thinking it sadistic. Much has changed over the last forty years. The rehabilitative ideal that Morris and others wrote against fell out of favor and was replaced with more punitive practices that superficially hewed to retributive thought.[169] The retributive invocation to give wrongdoers their just desserts, in proportion to the wrong committed, was put into practice with mandatory minimums and other nondiscretionary sentencing regimes.[170] Alongside this expansion in criminal punishment was an expansion in the sheer volume of criminal laws,[171] which amplified the coercive power of the State over persons. With so many criminal laws to choose from, too often the question for those with enforcement power was not whether a given person had violated the law and if they could prove it, but whether one was categorically excluded as an object of criminal concern[172] or

168. *See id.* at 476.

169. Morris refers to the emphasis on rehabilitation as the "ideology of disease and therapy." *Id.* at 482.

170. HUSAK, *supra* note 4, at 18–19.

171. *Id.* at 10–11.

172. Consider that whites and African Americans use drugs at similar rates, yet whites are not incarcerated proportionally to their use. MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 182, 185 (2012).

otherwise merited discretion not to prosecute. The result, by some lights, is mass incarceration, or "the new Jim Crow."[173]

The empirical reality of contemporary criminal punishment has prompted a robust and ranging theoretical response. I will focus on Douglas Husak's theory because it is emblematic of broader trends, is highly influential, and is focused on the problem of over-criminalization (of which crimes of migration are a part[174]). After setting out Husak's constraints on criminal punishment, I will apply those conditions to crimes of migration.

Husak divides his theory of criminal law into two broad categories, internal and external constraints, both of which have to be met for any given imposition of criminal punishment and censure to properly obtain.[175] "[I]nternal constraints are best construed as addressed to individuals who are punished."[176] The constraints permit criminalization only where the statute addresses an act that is wrong prior to or independent of law[177] (the "wrongfulness" constraint) and causes nontrivial harms or evils. On the punishment side, "[p]unishment is justified only when and to the extent it is deserved."[178] A society seeking to criminalize a particular behavior must meet these requirements. "Punishment requires special justification, and that justification must come from a set of reasons beyond merely majoritarian preferences—reasons found in the harm, [moral] wrongfulness, and dessert requirements."[179]

The external constraints are less straightforward. They address those who are punished as well as "the citizens who are asked to create and maintain a system of punitive sanctions."[180] For criminalization and criminal punishment to be proper under these constraints, "[f]irst the [S]tate must have a substantial interest in whatever objective the statute is designed to achieve[, s]econd, the law must directly achieve that interest[, and t]hird, the statute must be no more extensive than necessary to achieve its purpose."[181]

---

173. *Id.* at 180.
174. Chacón, *supra* note 11, at 614.
175. *See* HUSAK, *supra* note 4, at 121.
176. *Id.*
177. Husak's term is "wrongfulness," which he derives from an analysis of defenses to criminal punishment, such as necessity. *See id.* at 66. Reading his application of the underspecified wrongfulness principle in chapter two section IV, we can understand Husak's wrongfulness constraint as roughly coextensive with his definition of *malum prohibitum* offenses, whole swaths of which he finds illegitimate for not being wrongful. *See id.* at 105, 119; *see also* Markel, *supra* note 112, at 10 (taking the same view of the boundary of Husak's wrongfulness constraint).
178. Brown, *supra* note 12, at 976 (quoting HUSAK, *supra* note 4, at 82).
179. *See id.* (citing HUSAK, *supra* note 4, at 102–03).
180. HUSAK, *supra* note 4, at 121.
181. *Id.* at 132.

Husak acknowledges that all of these constraints will often or usually be highly controversial in application.[182] I will, nonetheless, endeavor to apply them to crimes of migration below. The question whether crimes of migration are legitimate under Husak's theory will not be definitively resolved by this analysis, but we will emerge from the exercise with a better grasp of the friction points.

B. Wrongfulness

To be properly criminalized, following Husak, the act must be wrongful "prior to or independent of law."[183] It is difficult to stuff crimes of migration into this criterion. After all, it is precisely the legal institution of the nation-state, and its sovereignty over its boundary, that we claim the migrant wrongfully violates by committing a crime of migration.[184] And even if we credit that obligations to respect such boundaries would flow from international acceptance of those boundaries, in international law or de facto international agreements, the wrong is still a wrong committed against a legal institution, just at one level removed.

In order to credibly view crimes of migration as wrongs prior to or independent of law, one would need an account of the state of nature where the State was already present. A full review of the political theory literature on the state of nature is beyond the scope of this Article, but I will engage the issue briefly. Hobbes and Locke do not provide such an account. Locke saw property as natural, but only where one's labor produced it; thus, the State was not in the state of nature.[185] Rawls thought delimited democratic communities survived the veil of ignorance, but this has been vociferously contested.[186] Matthias Risse, whose contemporary political theory most systematically addresses this point, applies Rawls to conclude that in the state of nature all humans were original owners of the earth.[187] While Risse reasons that States and their boundaries are just to some degree, on the specific issue of migration without consent he concludes that the United States cannot reasonably expect outsiders to abide by its boundaries.[188] This is obviously a position difficult to reconcile with the idea that committing a crime of migration is a pre-legal wrong.

---

182. *Id.* at 156–57.

183. *Id.* at 105.

184. *See supra* Part II.

185. *See* JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT 17 (Thomas P. Peardon ed., Liberal Arts Press 1952) (1609).

186. *See, e.g.*, STEVENS *supra* note 27, at 35; Carens, *supra* note 27, at 255–57.

187. *See* RISSE, *supra* note 27, at 36 (stating that humanity has "collective ownership of the earth").

188. *Id.* at 165.

Obviously I have not settled the issue, but it is difficult to see how a conception of wrongfulness—the least controversial criterion in Husak's theory—could be grounded on such unstable terrain. It seems we are obligated to conclude that committing a crime of migration is not a wrong prior to and independent of law.

C. *Nontrivial Harm or Evil*

With this constraint, the perspectival divergence discussed in Part II creates an impasse. Husak tells us that we must look to more than majoritarian preferences[189] in applying his constraints. And many scholars have aimed to do so and found that the harm caused by crimes of migration, considered from an objective, empirical perspective, is de minimis.[190] But this "objective" rationale for rejecting the view that committing a crime of migration is harmful is inapt.

Recall that crimes of migration are wrongs against a *political theory*. That theory is that a democratic polity may exclude whom it likes without his or her consent or consultation and, essentially, on any terms it sees fit. There is a disjuncture between the consent-based authority of democracy and the kind of raw, undemocratic power asserted at the border. But since the wrong is against the political theory of the border that a *democratic* polity is asserting, it would seem quite odd to leave majoritarian preferences to the side in considering the harm produced. The staggering deployment of resources to defend the political theory underlying border enforcement suggests that the polity thinks the harm that crimes of migration inflict is quite serious. Moreover, it would seem that only the political community itself can gauge how harmful crimes of migration are to its integrity. Objective measurement is ill suited to resolve a question so intimately related to democratic self-determination.

Yet the privileging of the polity's view on harm is complicated by our need to address the supposed wrongdoer and provide an explanation for why criminal punishment is being inflicted upon her (one of Husak's internal constraints).[191] How do we accomplish this? Can we meet this requirement by providing an explanation of border legitimacy that is highly contestable? As discussed in Part II, the alien has good reasons not to share in the polity's view on this matter.[192] Standing outside the political community seeking entry, the alien's harm lies in the exclusion without consent or consultation, not in the entry. Moreover, those who commit crimes of migration almost invariably work and materially contribute to the

189. HUSAK, *supra* note 4, at 102.
190. *See* McLeod, *supra* note 11, at 110.
191. HUSAK, *supra* note 4, at 77.
192. *See supra* Part II.

political community. Much empirical research substantiates this fact.[193]

Whether any of this should matter for thinking about harm is an open question. If we follow the general intuition of most in the world (and the implied assumption of Husak's theory) that states have some right to select the composition of their residents and defend that selection criteria,[194] then the alien's perspective on harm should not matter much. Despite the objective empirics and the perspective of the alien, then, we can tentatively conclude that crimes of migration cause nontrivial harm.

D. Proportional Punishment

I fully address this question in Part IV. For now I will say that incarceration for commission of crimes of migration is disproportionate because whatever interest the State has in criminalizing migration is dispatched on deportation—whether or not it is technically criminal "punishment."

E. External Factors: Substantial Interest

Does the United States have a substantial interest in defending its political theory such that it, and only it, may decide who enters the territory at its land borders? Since Husak's external factors are addressed primarily to "citizens who are asked to create and maintain a system of punitive sanctions[,]"[195] the answer here is plainly yes. This follows from our previous discussion of the internal factors from the perspective of citizens seeking to control entry into the nation-state.

F. Do Crimes of Migration Directly Advance the United States' Substantial Interest?

For this, again, Husak requires empirical evidence that crimes of migration directly advance the interest the State asserts in criminalizing the action.[196] To the extent crimes of migration would advance an interest subject to objective empirical proof, they would do so by deterring perpetrators themselves (specific deterrence)[197] or all people considering migrating (general deterrence)[198] from entering the territory in violation of the United States' wishes.

---

193. *See* KEVIN R. JOHNSON, OPENING THE FLOODGATES: WHY AMERICA NEEDS TO RETHINK ITS BORDERS AND IMMIGRATION LAWS 131–67 (2007) (discussing the economic benefits from immigrant labor); *see also* Adam Davidson, *Coming to America: Are Illegal Immigrants Actually Detrimental to the U.S. Economy?*, N.Y. TIMES MAG., Feb. 17, 2013, at 17, 17–18.

194. *See generally* HUSAK, *supra* note 4.

195. *Id.* at 121.

196. *Id.* at 144–45.

197. BLACK'S LAW DICTIONARY 544 (10th ed. 2014) ("specific deterrence").

198. *Id.* ("general deterrence").

But the civil deportation system, of course, works toward this end as well and is executed in addition to criminal punishment for crimes of migration. Thus, as the early advocates of crimes of migration asserted in the 1920s, crimes of migration claim to advance the defense of the political theory on which the United States excludes by deterring specifically and generally. Husak, and many other scholars, are skeptical of deterrence as a rationale for nearly any crime. Internalization of legal norms[199] or the threat of apprehension—not the quantum of punishment—is what deters conduct. In so far as crimes of migration act as force multipliers increasing the quantity of deportations, then they might be said to effectively deter them. But, as discussed in Part I, this is incidental to the criminalization of migration without permission, not directly achieved by such criminalization.[200]

On the other hand, migration without permission into the United States through its land borders presents a very challenging problem. If social science tells us that people obey laws because of internalized norms, not deterrent penalties,[201] we have a standoff because the migrant can offer principled arguments for why his exclusion is illegitimate. Thus, it is difficult to see how normative persuasion would occur absent coercive force.

Oddly, then, where the underlying wrongness of the act is objectively indeterminate, deterrent force is the only tool one has unless citizens are willing to bargain on the subject of migration as democratic equals with aliens. But the standing of aliens in the political community is precisely what crimes of migration are seeking to deny.

Yet, even if we accept that it is fine to pursue this deterrent end and that criminalizing migration deters unpermitted border crossing at the margin, to secure *effective*—that is, direct—deterrence through punishment, would require excessive punishment in relation to the wrong, violating another one of Husak's constraints.[202] And arguably, this proportionality constraint is more robust than some other constraints since it is grounded doctrinally in the parsimony provision of the federal sentencing statute and is a core concept in myriad theories of just punishment, even nominally consequentialist ones.[203]

---

199. HUSAK, *supra* note 4, at 7 (citing TOM TYLER, WHY PEOPLE OBEY THE LAW (1990)).

200. *See supra* Part I.

201. HUSAK, *supra* note 4, at 7 (citing TOM TYLER, WHY PEOPLE OBEY THE LAW (1990)).

202. *See id.* (expressing the proposition that punishment is generally an ineffective means to promote deterrence); *see also infra* Part IV.

203. *See* 18 U.S.C. § 3553(a) (2012). Proportional punishment is often a side constraint of consequentialist criminal law theories. See this discussed in Antony Duff, STAN. ENCYCLOPEDIA PHIL. ch. 4 (Jan. 2, 2001), http://plato.stanford.edu/entries/legal-punishment/#SidConConPun.

G. No More Extensive than Necessary

This constraint requires narrow tailoring of criminal statutes and forbids criminalization where there is "no alternative [statute] that is equally effective and less extensive than the statute."[204] The concern is that statutes will be over inclusive,[205] covering too much conduct not closely related to the underlying harm, or the interest that the State asserts in criminalization. Husak singles out crimes of risk prevention as "especially vulnerable to problems of over-inclusion." [206] For example, "[i]f given chemicals are dangerous only when stored improperly . . . a statute should not proscribe their possession *simpliciter*. An unqualified prohibition is more extensive than necessary to achieve its objective."[207]

On their face, the elements of crimes of migration do not appear to be over inclusive, given that the interest asserted is to defend an exclusionary political theory and all aliens who enter without permission arguably wrong that theory. But the drastic escalation in penalties applying to those who commit crimes of migration—up to twenty years in prison—after having been convicted of prior criminal acts—including prior crimes of migration[208]—is driven by a desire to lower criminal risk. A crime of risk prevention has come to lurk in the statute, and the only "element" required to satisfy it is a *prior* criminal act.

This aspect of crimes of migration is vulnerable to charges of over inclusion. Consider the case of a longstanding alien resident of the United States who is deported for picking pockets. He crosses the border without permission a few years later to see his family. The authorities hear about his presence and arrest him, and, based on the prior conviction for picking pockets, the judge sentences him to multiple years of incarceration after which he will be deported anew. This application of the statute is arguably over inclusive in the way that Husak's dangerous chemical was over inclusive. Just like the cautious chemist who carefully stores his chemicals, and thus should not be subject to sanction where there is no harm in cautious action, the returning alien knew that he was vulnerable to deportation and criminal sanctioning for migrating without permission anew and therefore took precautions against engaging in non-immigration criminal activity (i.e., was deterred) just because of the risk of immigration sanction.[209] By using the past conviction to enhance punishment for crimes of migration despite the fact that the threat of a subsequent deportation on its own secures deterrence

204. HUSAK, *supra* note 4, at 154.
205. *Id.*
206. *Id.*
207. *Id.* at 176.
208. *See, e.g.*, 8 U.S.C. § 1326(b)(2) (2012).
209. Daniel Kanstroom refers to this phenomenon as "post-entry social control." *See generally* KANSTROOM, *supra* note 150.

from non-immigration criminal activity, crimes of migration are over inclusive. Indeed, only *past* criminal acts trigger enhanced punishment; criminal conduct on return does not. This aspect of illegal reentry is over inclusive in Husak's terms.

H. Are Aliens Entitled to the "Right Not to be Punished"?

In the final analysis, it seems that many of Husak's constraints are at least arguably violated by crimes of migration. Since Husak posits that any violation of these constraints prohibits criminalization, Husak's theory appears to support the position that crimes of migration should not be crimes at all.

But this may be altogether too simple. I deliberately left out one of Husak's constraints because it presents a question that might threaten the entire project of applying his theory to crimes of migration. The evidentiary burden that I have been using to flesh out the analysis of each individual constraint—proof based on more than majoritarian preferences—derives from Husak's "right not to be punished." He calls this a fourth internal constraint,[210] but read in the context of the whole project, it appears more like a master constraint that provides a touchstone for all the others. The question is: are aliens entitled to this right?

It seems clear that once present in the territory, this right not to be punished extends to all other crimes addressed to all as a result of settled U.S. constitutional doctrine holding that aliens stand as citizens when they are present in criminal court; they are held, as a formal matter, to the same standards and granted the same rights, regardless of the manner in which the alien entered.[211] But does this right apply with the same force at the border?

Husak's theory appears to point in both directions. When he speaks of the right not to be punished, he speaks of it being held by "persons."[212] But when he talks about institutions of punishment and the way that criminalization is problematic for subjecting persons to public censure[213] (this, along with the punitive deprivation, are the reasons the right not to be punished exists), it is hard to know where the alien at the border fits. Censure seems to be meaningful only within a political community, particularly for something like a crime of migration. An alien standing outside the political community entering unlawfully is somewhat immune to public censure because he is not a part of the community that censures him, and he has good normative reasons for thinking his action just and not harmful. And, indeed, we can surmise that the political community where the alien at the border does have

---

210. HUSAK, *supra* note 4, at 100.

211. *See* Wong Wing v. United States, 163 U.S. 228, 238 (1896); *see also* Eagly, *supra* note 11, at 1291 (discussing *Wong Wing*).

212. HUSAK, *supra* note 4, at 93.

213. *Id.*

standing approves, or at least does not morally disdain, the act of entering the United States without permission.

We might think, then, that the incarceration that crimes of migration metes out might be thought to cure the problem of imposing censure on those outside the community by adding to the deprivation imposed by deportation: this "extra" punishment forces the alien to internalize the censure of the American political community.[214] Though whether you think that the failure of censure is a problem in need of a cure depends on how persuaded you are that the alien has legitimate grounds to enter without permission.[215]

On the other hand, Husak seems to view punishment's imposition of sanctioned violence as in need of justification irrespective of standing in the political community when he says, "punishments treat persons in a manner that implicates their moral rights."[216] Aliens are plainly persons bearing moral rights, and so from this perspective we might conclude that Husak's right not to be punished plainly applies.

In the end, we cannot settle on a bulletproof application of the litany of Husak's constraints, in part because crimes of migration throw into relief an aspect of Husak's theory that he admits to eliding. His theory is only a "sketch," he concedes, because "a comprehensive theory of criminalization requires nothing less than a theory of the [S]tate."[217] Nonetheless, it seems that we might, less controversially, believe that Husak's core internal constraints—wrongfulness, nontrivial harm, and proportionate punishment[218]—should apply to aliens standing at the border. We can think this because Husak has derived these constraints from a position internal to the American criminal law, and the American criminal law does not formally recognize the distinction between alien and citizen. Of these more robust constraints, I have shown that the wrongfulness constraint is thoroughly violated here, and I will show in Part IV that incarceration on top of deportation violates the proportional punishment restraint. Since violating a single constraint triggers decriminalization, I can conclude that Husak's theory does not support crimes of migration.

---

214. *See generally* Franz Kafka, *The Penal Colony*, *in* THE PENAL COLONY: STORIES AND SHORT PIECES 191 (Willa Muir & Edwin Muir trans., 1948) (explaining, in a graphic manner, the way that criminal punishment seeks to make the wrongdoer understand his wrong through the infliction of physical pain).

215. See *supra* Part II for discussion.

216. HUSAK, *supra* note 4.

217. *Id.* at 120.

218. *Id.* at 55.

I. Utilitarianism: Whose Utility?

Utilitarianism is ubiquitous in legal and social thinking. Applied to difficult and contentious problems of social organization, its appeal is hard to deny. It offers the promise that we may use the tools of the bookkeeper to solve the most unwieldy social problems: we consider the costs and benefits—material and metaphysical—of any policy or law and adopt that which maximizes total utility. Jeremy Bentham sold the method this way:

> The general object which all laws . . . ought to have . . . in common, is to augment the total happiness of the community; and therefore, in the first place, to exclude, as far as may be, every thing that tends to subtract from that happiness: in other words, to exclude mischief.[219]

In light of prior discussions, a difficulty (though certainly not the only difficulty[220]) with applying utilitarian rationales in support of crimes of migration[221] should be clear: which community's utility should be maximized? The behavior of the United States, devoting ever more resources to the prosecution of crimes of migration, suggests that the United States believes itself to be maximizing its own utility by doing so. But global utility, that is, the utility of all the people in the world, is usually thought to increase in response to liberalizing the movement of persons around the globe. Some, however, would contend this calculus is much too facile. This group claims that the nation-state—and the exclusionary political theory supporting it—adds welfare value that would be lost if liberalized migration came to pass.[222] Others, of course, dispute this.[223] The impasse is an epistemic roadblock since we cannot know if the positive utility in the world is predicated on nation-states with an inviolable power to exclude just because that has been the case for much of recent history; correlation, after all, is not causation. Nor can those who would throw open national borders to migration prove that utility would in fact be maximized through the liberalization of migration. There are simply too many unknowns and the question of utility, or value, is too dependent on subjective judgments.

Given these difficulties, we usually sidestep the issue and adopt the utilitarian position that obtains in practice. States act self-interestedly, so we should evaluate policies—even those affecting aliens—from this internal perspective. Were we to do this with

---

219. JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 170 (Hafner Publ'g Co. 1948) (1843).

220. HUSAK, *supra* note 4, at 188–95.

221. *See* McLeod, *supra* note 11, at 165–66.

222. *See, e.g.*, Peter H. Schuck, *The Re-evaluation of American Citizenship*, *in* CHALLENGE TO THE NATION-STATE: IMMIGRATION IN WESTERN EUROPE AND THE UNITED STATES 191, 191–231 (Christian Joppke ed., 1998).

223. *See generally* JOHNSON, *supra* note 193; STEVENS, *supra* note 25.

crimes of migration, however, it is not clear that the practice would survive scrutiny. Allegra McLeod has forcefully argued that the imbrication of immigration and the criminal law is far from welfare maximizing, particularly when we account for the extraordinary costs involved in the enforcement escalation and the minimal benefits.[224] Though McLeod is mostly concerned with the phenomenon of deportation as a result of criminal convictions,[225] her analysis applies with equal force to the crimes-of-migration context because its aim, at the margin, is to deter entry without permission over and above the deterrence secured through deportation, and deterrence in general is prominently criticized for being inefficacious.[226] Its efficacy might be even lower in this context for reasons others have addressed.[227]

Now, where we conceive of the harm in crimes of migration as an assault on a political theory, it becomes more difficult to definitively say that any quantity expense for any marginal benefit is too much to defend our "sovereignty." But that insight just brings again to the fore the question whether we were right, at the start of our analysis, to exclude from our calculus the utility of outsiders. At what point does the concrete cost of defending against a largely metaphysical harm,[228] coupled with the clear harm to the utility of outsiders, become so large that whatever value we claim our metaphysical injuries have is swamped by these material costs?

And once we think that the amount of harm (for punishment causes disutility, Bentham teaches[229]) that crimes of migration inflict on aliens matters at all, the calculus shifts dramatically against their vindication. This is particularly true because this punishment is meted out on top of deportation—a coercive act that is widely acknowledged to be extreme.[230]

---

224. McLeod, *supra* note 11, at 108–09.

225. This is a practice Eric Posner and Adam Cox have prominently defended as economically efficient. *See* Adam B. Cox & Eric A. Posner, *The Second-Order Structure of Immigration Law*, 59 STAN. L. REV. 809, 829–30 (2007).

226. HUSAK, *supra* note 4, at 7. Imposing the death penalty for crimes of migration might be an effective deterrent, but our society is, for unimpeachable reasons, unwilling to go to that extreme.

227. *See, e.g.*, McLeod, *supra* note 11, at 145–47.

228. *See supra* Subpart II.B.

229. BENTHAM, *supra* note 219, at 83.

230. *See, e.g.*, Kristina Davis, *ACLU: Suit Puts End to Deceived Detainees*, U-T SAN DIEGO (Aug. 27, 2014, 8:26 PM), http://www.utsandiego.com/news/2014/aug/27/immigration-lawsuit-voluntary-return-settlement/3/?#article-copy; *Public Divided over Increased Deportation of Unauthorized Immigrants*, PEWRESEARCH (Feb. 27, 2014), http://www.people-press.org/2014/02/27/public-divided-over-increased-deportation-of-unauthorized-immigrants/ (stating that about forty-five percent of Americans believe that the number of deportations is too high).

For these reasons, utilitarianism, the most promising theory on which to vindicate crimes of migration and the carceral punishment it imposes, does not present us with an open-and-shut case for their legitimacy. This is true even when we "run the numbers" by treating aliens as objects rather than humans. As soon as aliens' humanity surfaces and is accounted for, the balance of the equation shifts decidedly against crimes of migration when imposed, as it is, on top of deportation.

J. Consent, Just Punishment, and Crimes of Migration

Crimes of migration are far from alone in their violation of well-founded constraints on criminalization and punishment. But, in this Subpart, I argue that they are a more problematic expression of the broader phenomenon. The enforcement of crimes of migration has more in common with the relationship between king and subject, than "government of the people, by the people, for the people"[231] because it imposes state-sanctioned violence on aliens absent even the thinnest version of consent.

I build my case for the problematic nature of punishment sans consent by uncovering the background legitimating work of democratic consent in the criminal law. I motivate the argument by looking closely at scholarship that critiques another crime against a political theory: treason. Criminal law theorist Markus Dubber has urged that the myriad flaws in the American treason statute—vagueness, inchoacy, overbreadth—typify the way in which the power exercised by the American criminal law was never rethought in light of constitutional democratic values.[232] Dubber makes the point by considering the broader implications of the fact that the American treason statute was imported without meaningful modification from England at the time of the Founding.[233]

I argue that Dubber's account misses something of theoretical significance that a thoughtful consideration of crimes of migration reveals: the work of democratic consent. Even the thinnest version of consent meaningfully distinguishes treason, and by extension the rest of American criminal law, from the regal antecedents that color the enforcement of a crime of migration. Viewed in comparison, it is apparent that crimes of migration sound most fully in the raw form of power that the United States claims to have left behind after its break with England.

In the second part of this Subpart, I apply my theory of consent to an exaggerated penalty imposed for a minor criminal act to showcase the work that democratic consent does to legitimate the

---

231. Abraham Lincoln, The Gettysburg Address (Nov. 19, 1863).

232. *See* Markus D. Dubber, The State as Victim: Treason and the Paradox of American Criminal Law 5 (Dec. 21, 2009) (unpublished manuscript), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1526787.

233. *Id.*

criminal law's violence. Considered together with the doubts I have raised by engaging orthodox accounts of the criminal law, crimes of migration should not be criminalized as we lack both the substantive and procedural assurances that justify the criminal law in our democracy.

K. Treason and Democratic Consent

Treason is a crime against the sovereign.[234] Like crimes of migration, treason eschews the universal register to speak exclusively to a group of persons defined by a political theory: those "owing allegiance to the United States."[235] The flipped status of fealty in treason and crimes of migration shows how the crimes mirror each other: owing allegiance to the United States is a complete defense to crimes of migration and an element of treason.[236]

Markus Dubber has called treason the "paradigmatic" offense of American criminal law.[237] This claim rests on the way that treason typifies the failure of American criminal law to grapple with the radical reorientation in the nature of state power that the American Revolution ushered in. The point is made most concretely when Dubber illustrates how the federal treason statute is essentially unchanged from the language used in the English Treason Act of 1351.[238] That Act was promulgated under pressure from the lords of the realm to have some written definition of treason so as to differentiate it from a felony.[239] The distinction mattered because it distributed spoils. A felon's property escheated to his lord and a traitor's to the king.[240] The lords' efforts yielded their assent[241] to a very vague, very broad statute whose open texture preserved the sovereign caprice that codification was supposed to remedy.

The definition of treason in Article III and the modern federal treason statute substituted "the United States" for "king" and omitted clauses that were nonsensical in the absence of an

---

234. *See* 18 THE OXFORD ENGLISH DICTIONARY 459 (2d ed. 1989) (defining "treason" as "a [v]iolation by a subject of his allegiance to his sovereign or to the state").

235. 18 U.S.C. § 2381 (2012).

236. *See* 8 U.S.C. § 1448(a) (2012) (showing that a statement of allegiance is an element of citizenship); 18 U.S.C. § 2381.

237. Dubber, *supra* note 232, at 7.

238. *Id.* at 5.

239. Hugh Chisholm, Encyclopedia Britannica: A Dictionary of Arts, Sciences, Literature and General Information XXVII, 224 (11th ed. 1911) (stating that the Act was passed in response to the Commons desiring a definition of high treason to help judges distinguish between treason and felony).

240. *Id.* at 3.

241. "Assent" is defined as: "To conform in practice, submit, yield (*to*)." 18 THE OXFORD ENGLISH DICTIONARY 707 (2d ed. 1989). The distinction I am drawing between *assent* and *consent* turns on voluntariness.

individual human sovereign but retained the breadth and ambiguity of the fourteenth-century statute it parroted.[242] As Dubber puts it, "[L]evying war and giving aid or comfort to the sovereign's enemies are . . . broader and vaguer than the [omitted fourteenth-century] clause proscribing compassing or imagining the king's death."[243] Those sections were plainly inapplicable to the republican context but at least demanded an inquiry into an alleged perpetrator's state of mind. "[T]he American definition of treason contained, and still contains, no requirement of mens rea whatsoever."[244] Moreover,

> "levying war" specifies neither the activity (levying) nor its object (war) . . . [and] "giving aid or comfort" does not differentiate between levels of aid—or comfort—and makes no attempt to relate itself to general modes of vicarious criminal liability, with their doctrinal constraints, instead creating the impression of a malleable *sui generis* offense.[245]

The inchoacy of these acts is so extreme, Dubber continues, "that it flies in the face of the other bedrock principle of Anglo-American criminal law, *actus reus*."[246]

According to Dubber, this is all par for the course in the American criminal law:

> Inchoacy remained a central feature of . . . American criminal law. . . . [T]he 1351 statute's reference to "compassing or imagining" [the death of the king] appears almost quaint in comparison to the broad concepts of attempt, conspiracy, facilitation, and solicitation that populate American criminal law to this day, including prominently in the influential Model Penal Code of 1962, which explicitly revolves around the project of assessing criminal dangerousness.[247]

Dubber paints a troubling portrait of a medieval criminal law seated alongside an enlightenment-inspired—and sustained—constitutional republic. Yet, if we step just outside the frame, we can see that the substitution of "We the People" for "His Royal Highness" does identify a meaningful difference between a criminal law of a divine monarch and a democratic sovereign: an ability to work with other co-sovereigns to modify the criminal law by forging nonviolent democratic consensus—rather than overthrowing the king. The lords of 1351 *assented* to the king's definition of treason, which he provided as an act of grace.[248] Modern treason is a

---

242. Dubber, *supra* note 232.
243. *Id.*
244. *Id.* at 6.
245. *Id.*
246. *Id.*
247. *Id.*
248. *Id.*

criminal law that is as it is because of a meaningful degree of democratic *consent*.[249]

After all, we can easily (if perhaps not satisfactorily) theorize a manner in which the breach of allegiance criminalized by the treason statute can be compatible with a democratic sovereign: as a breach of the social contract. Citizens consent to the bargain of being a democratic subject, gaining privileges alongside burdens. Breaching the contract in a particularly severe way by levying war and giving aid or comfort to the sovereign's enemies[250] leads to the ultimate punishment—death.[251] The citizen consents to the terms and is notified in advance of the consequences of breach.

To be sure, Dubber's vagueness concerns remain intact. How can consent be meaningful if notice is inadequate because the terms of breach are undefined? But, again, in some meaningful way the traitor has consented to the vagueness of the power that adjudges him. We may not think that the consent the traitor exercised in advance of his condemnation is robust enough because the criminal law, as many have argued,[252] is a product of a particularly strong strain of democratic failure. But that objection illustrates the not-enlightened-enough quality of our democracy; it does not show that there is not a difference between treason law in a democracy and in a monarchy.

That the United States' treason statute is essentially unmodified since the 1351 Act does denote the retention of a pre-democratic theory of sovereignty within the criminal code, but that retention is consensual in large part because it is open to modification through the democratic process. It is not as if the Framers and the successive series of state and federal legislators of the United States imported laws written on stone tablets and left judges and juries to consult them in an ossified library. The path from the Treason Act of 1351 to contemporary criminal law was

---

249. Voluntariness is what marks the relationship between the people and the sovereign in the United States, contra the Founders, many or most of whom followed the holdover view of the king/subject relationship that a citizen could not break the bond of allegiance except by the king's grace—the modern rule reverses this position. Under modern constitutional law, it is the nonpersonal sovereign who has no power to denationalize, while citizens can forge allegiance—and its obligations—at their discretion. This line of doctrinal thought grounds this asymmetry in the fact that the collective of individual people—not any institution—is sovereign. So manifestations of sovereign power are always indirect since sovereignty exists in the people, outside any institution that acts on their behalf. This logic leads to the conclusion that there is a personal right to relinquish sovereignty. Any citizen now enjoys a right formerly held by the king alone.

250. *See* 18 U.S.C. § 2381 (2012).

251. *Id.*

252. *See generally* GARLAND, *supra* note 157; JAMES Q. WHITMAN, HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE (2003).

paved with innumerable moments of democratic consent to the continuation of the medieval mode.

Thus, the unreconstructed status of treason specifically, and the American criminal law in general, is not simply a holdover from a monarchical political theory. To the extent that the American criminal law has been immune to the liberal principles of the enlightenment, the immunity stems from a flaw in, or a failure of, American democratic governance or will.[253] Either way, the imperfect consent which secures our democracy, meaningfully distinguishes American criminal law from its regal antecedents.

L. Crimes of Migration as Punishment Without Consent

The democratic polity has consented to allow the State to exercise a sovereign caprice over it, an under-specified authority that is like a king's whim or prerogative. So the problem of the American criminal law is more precisely that the caprice, excess, and unpredictability of the sovereign has been retained and refigured as a consensual delegation of power from the people themselves.

The medieval character of the American criminal law has two distinct aspects. One revolves around the existence or sufficiency of consent. The other, which preoccupies Dubber, I call "sovereign excess": an uncertainty and caprice that colors criminal condemnation and punishment. Both the criminal law in general and crimes of migration manifest sovereign excess. But crimes of migration also illustrate a very basic consent problem that treason, and the rest of the American criminal law, simply do not.

There is sovereign excess in the breadth of the police power, which underwrites the American criminal law, but there is a purer sovereign excess in the power the United States wields over aliens. If treason is the paradigmatic exercise of the democratic sovereign's criminal enforcement power, then crimes of migration are exceptional because "democratic" is erased, leaving us with just "the sovereign" wielding the power to punish, the "hard essence of sovereignty," over the alien without his consent.[254]

If Dubber is right, American criminal law embodies the sovereign in an ancient, pejorative sense.[255] Yet if we reflect on the

---

253. *See generally* GARLAND, *supra* note 157; WHITMAN, *supra* note 252.

254. The grounding of crimes of migration in this most archaic form of sovereignty dovetails with their "taxonomization" in Title 8 of the United States Code, containing immigration law; crimes of migration all suffer from a consent problem, grounded in the organizing assumption of immigration law that the sovereign has an unlimited right to exclude. *See* 8 U.S.C. §§ 1101–1537 (2012).

255. Note that many others have noted the un-reconstructed quality of the American criminal law, but in different terms. *See* Brown, *supra* note 12, at 983; William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 508 (2001).

difference between crimes of migration and the rest of the criminal law, we see that there has been an important evolution in the structure of authority between medieval England and the contemporary United States: the shift from criminal punishment proceeding from citizens' involuntary assent to their consent in a system of laws and institutions that mete out criminal justice of a similar character.[256] By contrast, crimes of migration carry forward the medieval spirit more robustly because they are imposed on persons without the relevant ex ante, legitimating characteristics.[257]

M. Democratic Consent, Criminalization, and Excessive Punishment

Just because carceral punishment for crimes of migration is excessive, as I show in Part IV, does not necessarily mean that it is unjustifiable. We tolerate a huge amount of arguably excessive criminal punishment in the United States, and we still meaningfully maintain that the United States "respects rights" and is a democracy. Consent to and the potential for democratic change in the criminal law, among other reasons, are why we can maintain these positions. But consent is absent for crimes of migration; this poses a distinctive problem for the imposition of excessive or erroneous punishment that has not been squarely addressed in the literature.

Consent to the criminal law is usually assumed, and theories that criticize the criminal law proceed forward while this assumption operates in the background. We do not usually consider the role of ex ante consent and consultation when we raise the question whether criminalization or punishment are legitimate, since that minimal criterion is nearly always met.

But we can bring the role of consent to the surface with little difficulty. Consider deterrence, a core utilitarian rationale for criminal condemnation and punishment. Deterrence is always constrained by other criteria and goals, at least in the United States, so the deterrence question for criminal law or sentencing is always: to what extent do we deter through punishment or other means?

---

256. We might also see a legal analogue in the way that after a controversial judicial interpretation, courts will sometimes infer from legislative inaction a certain degree of approval. *See, e.g.*, Flood v. Kuhn, 407 U.S. 258, 273–74 (1972).

257. Peter Schuck and Roger Smith used the lack of consent to an alien's entry into the United States as a basis to read the Fourteenth Amendment's birthright citizenship clause to deny citizenship to children born to undocumented aliens, that is, those who committed crimes of migration. *See* PETER H. SCHUCK & ROGER M. SMITH, CITIZENSHIP WITHOUT CONSENT: ILLEGAL ALIENS IN THE AMERICAN POLITY (1985). Though a full engagement with Schuck and Smith's argument is beyond the scope of this Article, it is worth noting that consent to the conferral of citizenship and consent to the criminal law are distinct questions.

But the appropriate level of deterrence in a particular case, or for a particular kind of crime, is not amenable to determination through a purely scientific analysis. Figuring out what level of deterrence or rehabilitation is welfare maximizing requires a relevant community in which to analyze the pros and cons of one level or another. We can also presume, to some degree anyway, that whatever penalty we adopt in the name of deterrence is the product of a politicized version of the utilitarian calculus. For example, if shoplifting were punishable by death we might presume there would be much less shoplifting. That we do not punish shoplifting in this manner indicates to some extent that the polity thinks the benefit of deterring shoplifting is exceeded by the harm of taking the life of someone for a relatively minor crime.

But what if we did, democratically, impose the death penalty for shoplifting? It seems abundantly clear that imposing such a penalty for shoplifting is utterly excessive from a retributive perspective and from a less political, more objectively grounded utilitarian perspective. So the penalty of death for shoplifting is "erroneous" from a point of view external to the legal and political process. Still, as a practical matter, the penalty is the law produced through the proper democratic channels. How then would we defend such a penalty to the shoplifter when he argues that it is excessive? We might say: you had notice of the wrongfulness of your action, and you are a voluntary member of our community who consented to the force imposed in order to validate our shared commitments. You had an opportunity to either conform your conduct to the law or band together with others to change the law so that it was less draconian.

None of this may be satisfying to the shoplifter, or to us, but that is not because consent plays no role in legitimating the criminal law in liberal democracies: it is because, as so many scholars have ably documented, the politics of criminalization are pathological,[258] so the response to the shoplifter's plea rings hollow. Still, the more contestable criminalization or punishment is, the more important ex ante consent becomes to the legitimating discourse of state action. At the extreme I have described here, it becomes the primary ground (along with notice) through which the State can assert the legitimacy of the punishment.

That the State can credibly assert consent as a grounds for the legitimacy of its actions is distinct from saying that the punishment is fully legitimate just for having obtained democratic consent. The point is rather that consent is one of a cadre of concepts that collectively legitimate the imposition of State punishment and condemnation for criminal violations. Consent is not hollow, either. Because consent marks the shoplifter's belonging to an enfranchised

258. *See generally* ALEXANDER, *supra* note 172; GARLAND, *supra* note 157.

political community that survives him, the shoplifter's death can posthumously become a *cri de coeur* for other citizens to use in order to change the law. Democratic consent implies the existence of a superstructure of democratic discourse in which the punished is a formal participant.[259]

The lack of ex ante consent and the exceptional remoteness of the possibility for democratic correction of excessive punishment for crimes of migration further undermines the case for criminalization. Not only did the migrant enjoy no formal political representation before a crime of migration was imposed, but the oppositional way that the migrant's relationship to the polity is defined means that building a coalition or even a tractable political argument for change ex post will be much more complicated and difficult than in the shoplifter's case.[260] Without consent *and* absent a firm normative anchor for imposing criminal condemnation and punishment, we should refrain from criminalizing migration.

N. Summary

In this Part, I have shown that crimes of migration fare rather poorly when analyzed under established theories of criminalization and punishment and conclude that on balance they forbid criminalization. Yet the theories also should have appeared somewhat inapt because all of them were designed to run on the background assumption of a stable, legitimate, and closed political community that metes out justice on members. Crimes of migration sit at the edge of these theories, making it difficult to say without qualification that they preclude criminalization and punishment for migration without permission.

---

259. Anthony Duff argues that the democratic community is critical to the imposition of just punishment:

> [T]o be responsible the accused must be answerable to his fellow citizens, which requires that the fellow citizens have "standing" to demand an answer from the accused. If an individual has been "systematically excluded from full participation in the polity", the polity arguably "lacks standing to call him to account" for his violation of the laws. . . . On this account, the defendant is not responsible to the polity (though he may be responsible to others, including the direct victim of his crime) because the polity has failed in its obligations. Ideally, the polity itself would take responsibility for its own failures.

Ristroph, *supra* note 7, at 123 (quoting Duff).

260. This is not to say that political mobilization on these issues is impossible for migrants to achieve. Sympathetic citizens and their representatives might amend such laws. But such political movements are at a distinct disadvantage from other disfavored minority social movements, and that disadvantage matters for criminal legitimacy. *See* Daniel I. Morales, *Immigration Reform and the Democratic Will*, 16 U. PA. J.L. & SOC. CHANGE 49, 52 (2013).

This may mean that there are other plausible and reasonable grounds on which to anchor the criminalization of crimes of migration. Indeed, one possibility that follows from the assumption of closed political communities in theories of criminalization is that crimes of migration are criminalizable precisely because they threaten the political communities from which the obligations of criminal justice arise.

To counter this intuition, I examined the role that consent plays in underwriting excessive punishment. I suggest that consent plays a critical role in a theory of just punishment that takes seriously erroneous sentencing practices—just as it takes seriously the possibility of erroneous convictions. Without ex ante consent and the possibility of future democratic correction, nearly any criminal justice system looks monstrous. Since crimes of migration lack just this kind of consent and suffer from uniquely serious roadblocks to political correction, we have another reason to be wary of them.

The sui generis consent problem posed by crimes of migration, coupled with all of the insufficiencies crimes of migration suffer from under more generic normative analyses, raises fatal doubts about the legitimacy of criminalizing migration without aliens' permission. Those who would defend the practice must now articulate sound reasons why crimes of migration are justifiable despite their failure under a number of prominent criteria for just punishment and the more implicit criteria I have surfaced.

I have not shown, however, that all restrictions on free migration are impermissible.[261] More modestly, I have shown that the criminal law, as refracted through theory, is not properly deployed against migrants who cross a United States land border without permission. That means we should not name such acts a crime, and we should not use the institutions and punishments of the criminal law to address these acts.

Of course, this leaves unresolved a central question of immigration law: Is deportation alone, using civil institutions, in response to unpermitted border crossing permissible? If so, under what conditions? Though these questions are beyond the scope of this Article, I contribute to that more foundational discussion in the next Part.

In the final Part, I assume arguendo that I am wrong about the legitimacy of criminalization and focus on what constitutes legitimate punishment for committing a crime of migration. I argue that deportation in response to a crime of migration is minimally

---

261. I have relied on those who argue for the necessity of liberalized borders in applying some of the criminal law theory that I have engaged in, but I have not taken up that question in earnest. Instead, I take as given—as most crimmigration critiques impliedly do—that the criminal law should have its own autonomy and integrity, and I show how criminalizing migration violates those concepts.

justifiable because deporting migrants for committing a crime of migration imposes a perfectly symmetrical response—an equal and opposite reaction—to an alien who migrates without permission, dispatching the regulatory or political interests the State asserts by criminalizing crimes of migration. With the perfection of deportation in response to a crime of migration established, we see that imposing incarceration for commission of a crime of migration *on top of deportation* is necessarily excessive and without adequate justification for being so.

This argument is anchored in the way that deportation operates in response to a crime of migration as an eye-for-an-eye punishment (*lex talionis*). While I use this analogy to delegitimize incarceration for crimes of migration, my novel analogy could equally be deployed to expose the illegitimacy of deportation in general. After all, while *lex talionis* has enjoyed something of a revival among retributive criminal theorists, its ancient pedigree and blunt, aestheticized sense of justice can equally serve as the basis for critique in other projects.

IV. DEPORTATION AS PERFECT PUNISHMENT / INCARCERATION AS PERFECT EXCESS

Deportation for a crime of migration is like an eye for an eye or a tooth for a tooth. A simple enough analogy, but it appears no one has ever drawn it or explored the implications of the fact that imposing deportation for a crime of migration follows the ancient punitive logic of *lex talionis*.

In this Part, I unpack the talionic quality of deportation for crimes of migration. By comparing deportation in response to crimes of migration to other classic talionic punishments, I show not only that deportation in this context works in the same manner as murdering the murderer or raping the rapist, but also that it does them one better by *erasing* the act of migration without permission. Where we murder the murderer, for instance, we act symmetrically, but are still left with a dead body. Deportation, by contrast, not only responds symmetrically to a crime of migration, but in doing so repairs the metaphysical wrong the State has identified. For achieving this erasure, it is a perfect punishment;[262] nowhere else in

262. I mean this, as I will show *infra*, in a very narrow and formal sense. In my reading of *lex talionis*, the justice it provides is grounded in an aesthetic symmetry between wrong and punishment. Because I see the "perfection" of deportation as a talionic punishment in this narrow sense, I do not argue that deportation is reliably just on consequentialist or even most retributive grounds. My point, rather, is to say that given the ambiguity I have shown in reconciling crimes of migration with mainstream branches of criminal law theory, this ancient kind of justice may serve as a ground for imposing deportation in response to a crime of migration, assuming criminalization is proper. But once the State relies on this rationale, an important consequence

the practice of punishment is this erasure of the initial wrong as perfectly wrought.

The payoff from viewing deportation in response to crimes of migration this way is manifold. What follows from the perfection of deportation as a punishment for crimes of migration is that incarceration imposed on top of deportation is gratuitous, a profoundly excessive punishment, routinely imposed. This excess, in the individual case and in the aggregate, embodies most fully the rawness of the power that crimes of migration deploy against migrants. Yet assuming the propriety of criminalization, deportation survives as a minimally justifiable vindication of the United States' view of the wrong the alien has committed. It survives because its appeal to ancient principles of symmetrical retaliation for wrongs provides a basis to ground the practice that stands outside indeterminate contemporary debates about punishment. Indeed *lex talionis* shares a pedigree with the sovereignty it vindicates, as both are hoary and intuitive ways of thinking about state authority. Moreover, though I assume here that deportation is punishment, I also acknowledge that it is not the same kind of punishment as incarceration. That distinction also provides a space to escape some of the objections to criminalization detailed in Part III.

A. Deportation as Talionic Punishment

Consider how deportation functions as a punitive measure imposed on someone who has committed a crime of migration: it forcibly unwinds the wrong the migrant committed—crossing the border without permission—by having the deportee recross the border in the other direction at the state's behest—that is, without the perpetrator's permission. This is a symmetrical punishment for the act of migrating without permission; it imposes on the violator to the precise degree that the violator imposed on the State. It is perfect conceptually for achieving this symmetry between wrong and recompense; it is perfect in practice because it *erases* the wrong in a way that is rarely achieved where criminal punishment is imposed.

My claim here is that the symmetry of deportation for crimes of migration means that it enjoys an ancient normative pedigree that stands outside the raging and indeterminate debates about just punishment. This normative standing is particularly useful here because I showed in Part III that the major strands of normative criminal law theory did not provide an unassailable answer to the question that crimes of migration pose. The facial symmetry of

---

follows: the State finds itself unable to justify carceral punishment in excess of deportation. Since *lex talionis* justifies punishment by deportation, the State is held to the consequences of that ground—its interest in punishment is exhausted when the aesthetic symmetry of a talionic punishment is imposed.

deportation in response to a crime of migration provides a justice that does not depend on the resolution of theoretical debates, or even a specific conception of wrongfulness.

The erasure that deportation achieves in response to a crime of migration is significant because it shows that deportation here is a special and superior expression of the talionic impulse. When we compare what deportation achieves to what talionic punishments can achieve in other contexts, we see that they usually fail to mend the social fabric in the way that deportation does. This reparative work is important because it strongly suggests that the interest the State asserts in crimes of migration is fully dispatched with deportation. Imposition of incarceration on top of deportation, then, is just gratuitous.

B. What is Lex Talionis*?*

Since we long ago abandoned *lex talionis* in the criminal law[263] for the more abstract punitive currency of time behind bars, I will specify exactly what *lex talionis* is and illustrate how deportation for crimes of migration is talionic. The modern principle of *lex talionis* stems from its articulation in the Old Testament, where it appears on three occasions:

> In Exodus, as "eye for eye, tooth for tooth, hand for hand, foot for foot, burn for burn, wound for wound, bruise for bruise"; in Leviticus, as "fracture for fracture, eye for eye", tooth for tooth; and . . . in Deuteronomy, as "life for life, eye for eye, tooth for tooth, hand for hand, foot for foot".[264]

Contemporary scholarship contends that these formulations of justice were punitive guideposts, not punishments to be literally applied.[265] An older version of *lex talionis*, however, was meted out to the letter: Hammurabi's Code.[266] "Conceptually, [Hammurabi's Code] involved the restoration of some form of rudimentary 'equilibrium.' The hallmark of this sort of proportional retaliation was its symmetry . . . ."[267] Sometimes that symmetry was purchased by imposition of a "'mirror punishment' . . . on an innocent member of the wrongdoer's family."[268] For example, "where a house collapsed on the son of its owner, the builder's *son*, and not the

---

263. *See* James Q. Whitman, *The Origins of Law and the State: Perversion of Violence, Mutilation of Bodies, or Setting of Prices?*, 71 CHI. KENT L. REV. 41, 60 (1995).

264. Morris J. Fish, *An Eye for an Eye: Proportionality as a Moral Principle of Punishment*, 28 OXFORD J. LEGAL STUD. 57, 58 (2008).

265. *Id.* at 59.

266. *Id.*

267. *Id.*

268. *Id.*

builder, was put to death."[269] The innovation of the Old Testament was to forbid such third-party punishments.

The talionic character of deportation for a crime of migration is thus based on aspects of both the Hammurabian and Old Testament versions of the principle; its literal application and its effects on innocent third parties (say, U.S. citizen children or spouses) borrow from Hammurabi, and its focus on directly imposing coercive force on the wrongdoer herself (the third-party "punitive" aspects are collateral) is grounded in the Old Testament.

C. *Seeing the Punitive Perfection of Deportation*

With the talionic quality of deportation established, consider the analogous punishment for murder: murder the murderer, perhaps even in the way that he murdered the victim. This was Kant's exhortation centuries ago.[270] Notice, however, that even this—the ultimate punishment—does not provide the degree of perfection that deportation achieves in response to a crime of migration. Where deportation leaves the State in the precise position it was in prior to the alien's migration without permission—where the unwanted alien is not present within the U.S. border—murdering the murderer still leaves a gaping tear in the social fabric that cannot be mended:[271] the victim remains dead.[272]

Punishment for rape, talionic or otherwise, suffers from the same problem. No matter what we do to the rapist's body or mind we cannot unrape the raped. Acts of physical human violation, unlike the metaphysical violation crimes of migration punish, just

---

269. *Id.*

270. *See id.* at 63 (calling for "the equalization of punishment with crime" (quoting IMMANUEL KANT, THE PHILOSOPHY OF LAW: AN EXPOSITION OF THE FUNDAMENTAL PRINCIPLES OF JURISPRUDENCE AS THE SCIENCE OF RIGHT 196, 198 (W. Hastie trans., T. & T. Clark 1887 (1796))).

271. *See* Douglas A. Berman & Stephanos Bibas, *Engaging Capital Emotions*, 102 NW. U. L. REV. COLLOQUY 355, 360 (2008) ("Crimes have torn the social fabric and demand justice, payback to condemn the crime, vindicate the victim, and denounce the wrongdoer. Where there is no anger, there is no justice and no sense of community. Grave moral wrongs demand righteous indignation and action. Executing Adolf Eichmann was hardly necessary to incapacitate or deter him, but it was essential to condemn the Holocaust and vindicate its victims.").

272. To be sure, if we solely consider the way that punishment provides just desserts to the perpetrator, then murder for the murderer inflicts as perfect a punishment as deportation does for the unauthorized migrant. But the restoration of the social fabric is usually thought to be at the very least one of several purposes of criminal punishment, and the fact that deportation achieves just desserts for crimes of migration to a greater degree than the death penalty is quite significant, even if you think that restoring society to its state prior to the commission of a criminal wrong is only a minor purpose of the criminal law, or even just an effect.

cannot be unwound or erased in the way that crimes of migration can via deportation.

D. The Excess in Incarceration for Crimes of Migration

As harsh as talionic punishments may seem, they can appear to leave unaddressed other interests, like recidivist risk, that the State routinely asserts as valid interests in imposing criminal punishment. For example, while murdering the murderer arguably achieves deterrence (as much as any punishment can) and eliminates recidivist risk through incapacitation, punishing rape with anything short of death, castration, or life in solitary imprisonment leaves open a social vulnerability: the rapist can rape again. We routinely accept this by refraining from the imposition of such punishments. This means that we tolerate recidivist risk *even where* recidivism will cause victims irreparable harm. Indeed, we can put it more strongly: by failing to perfectly incapacitate rapists, the State ensures that others will be raped in proportion to the accepted recidivist risk. This is even more true where we consider that we not only refrain from imposing the talionic punishment, we also provide a kind of due process which is designed to err on the side of letting a guilty rapist free, further amplifying the social risk of irreparable harm.

By contrast, we impose a perfect talionic punishment on a person who commits a crime of migration, *and* we impose a sentence of incarceration on top of that. We do this despite the fact that recidivating on a crime of migration does not itself pose a risk of irreparable injury to anyone, and whatever harm inheres in the repeated commission of a crime of migration can be perfectly remediated in each subsequent instance through deportation alone.

Punishment for theft exposes the excess of incarcerating migrants for migrating in a different way. A symmetrical, talionic response to theft might require stealing from the thief. Set aside the administrability issues. Even if punishing this way imposed none of the obvious burdens, it seems hardly worth doing. We are a far cry from Kant's intuition that justice commands *über alles* that the murderer be executed.[273] The more abstract harm of a wrong against property appears more susceptible to just resolution through payment in the abstract currency of incarceration.

Theft is a wrong against a convention of ownership.[274] Depending on the type of theft, it may violate a universally held convention of ownership, but regardless, theft violates a relationship

---

273. *See* Fish, *supra* note 264, at 63 (citing KANT, *supra* note 270, at 196).

274. We could surely formulate rape as violating the convention that people own their bodies. Despite this being true, it does not mean that conventionality does not allow degrees.

between a person and a thing rather than a person qua person. We are far removed from what is at stake in rape or murder.

Two relevant insights follow from this observation. First, the talionic mode seems intuitively less necessary the more abstract the harm. We might think it worth the extreme trouble of raping the rapist because the penal currency of incarceration—imposed in any amount—does not seem to meet the wrong the rapist wrought. By contrast, punishing the thief in this more abstract way seems more adequate because the violation is to ownership, not to one's person. The next insight relates to this last point. Though a theft cannot be undone, like rape or murder, the social fabric seems more capable of repairing itself with time (whatever punishment is imposed on the thief) than seems possible with rape or murder. This is also a significant reason why theft merits a less severe punishment than rape or murder, whatever currency we use to express that fact.

The abstract character of theft relative to rape and murder is still more pronounced with crimes of migration. As wrongs against political theories, crimes of migration impose a still more abstract harm. What this suggests is, as with theft, a punishment such as time in jail might be an adequate *substitute* for deportation. That we can conceive of jail time as a punishment that would suffice *in lieu of* deportation, something arguably capable of meeting the wrong that a crime of migration inflicts, is further evidence that it is excessive where imposed in addition to the talionic punishment—deportation. Unlike rape, where we might feel the inability to rape the rapist as a loss—a deviation from perfect justice—imposing jail time on a person who commits a crime of migration, rather than deporting him, seems capable of meeting the interest we express in criminalizing migration without permission.

So the talionic impulse does not appear to be as necessary for theft or crimes of migration as it might seem in the case of rape and murder. That is, we do not acutely feel the failure to impose the talionic punishment as a loss because time and human effort can reasonably repair the harm of the violation. Criminal punishment need not bear the bulk of the burden of social repair in the way it must for rape and murder. Even so, we impose a talionic punishment for crimes of migration, and one that is superior to others for completely erasing the wrong.

E. Summary

I have tried to establish in this Part that deportation is a talionic punishment for a crime of migration, and, moreover, a talionic punishment that erases the harm inflicted by a crime of migration. It leaves the State in the position it was in prior to the criminal violation—more than can be said for murdering the murderer or raping the rapist. In those cases the crime caused irreparable harm: a dead murder victim or a psychically or

physically wounded rape victim. I also used the example of raping the rapist to expose that even the harshest criminal punishments for the worst crimes may fall short of incapacitation and so leave society exposed to recidivist risk. Yet we accept this risk all the time. Crimes of migration do not pose this sort of risk, yet we pursue incapacitation by meting out a talionic punishment *and* incarceration.

Lastly, I discussed how the imposition of talionic punishment appears to have the strongest intuitive appeal where a criminal act causes irreparable harm. Talionic punishments appear overly troublesome where time can quickly and adequately heal the wound the crime inflicted. Crimes of migration are that sort of mendable crime. If anything, talionic punishment would seem to be less appropriate here, as jail time should suffice to heal whatever violation inhered in defying the nation's exclusion of a particular person. To put a finer point on it: we might—and scholars usually do—view *deportation* as excessive in many cases,[275] particularly those where long-term residents, rooted in the community,[276] are deported and estranged forever from their family and friends. If such a person returned unlawfully to the United States, we might say that deporting that person anew for committing a crime of migration would be very excessive in itself. That deportation is perfectly sufficient in other cases still marks incarceration in addition to deportation as excessive since it piles on top of a perfectly sufficient punishment for that set of migrants.

In the final Subpart I further defend my claims by showing how incarceration on top of deportation is an excessive punishment even when applied to the serial crime of migration violator.

F. The Incorrigible Border Violator

In the House floor debates regarding an early precursor to the modern reentry statute (proscribing reentry of anarchists), a supporter of the bill cited the possibility of a deported anarchist's "ad infinitum"[277] effort to return as a reason to support criminalization of reentry. The incorrigible immigration violator has haunted us ever since.

Criminal punishment is imposed in part to disincentivise violators, but there are always those who fail to conform their conduct to the law and continue to commit crimes despite a prior punishment. These recidivists are usually dealt with in criminal punishment calculations by facing escalating punishments for each new infraction. There is an appealing logic to this. If the last

---

275. *See, e.g.*, Stumpf, *Fitting Punishment*, *supra* note 11, at 1683.

276. *See* Ayelet Shachar, *Earned Citizenship: Property Lessons for Immigration Reform*, 23 YALE J.L. & HUMAN. 110, 135 (2011).

277. 56 CONG. REC. 8108, 8109 (1918) (statement of Rep. Burnett).

punishment failed to deter repetition of the wrongful behavior, then a longer sentence should do so. We might, in theory anyway, keep escalating punishments until we reach incapacitation, either by age (the criminal is not physically able to commit the crimes again) or death.

What kind of value could underwrite this practice? Prevention, of course, but why do we want to prevent crimes from recurring? Again, prevention interests escalate as the recidivist act causes more unamendable harm. We see this in the relationship expressed in the U.S. Sentencing Commission's Sentencing Table.[278] The *y* axis presents base offense levels that are tied, retributively, to the wrongness of the offense.[279] The *x* axis reflects criminal history and is designed to account for recidivist risk.[280] As we move down the retributive *y* axis, punishments escalate, topping out at life imprisonment for murder in the first degree.[281] As we move along the recidivist *x* axis, holding constant the retributive degree embodied by the value on the *x* axis for any given crime, punishments escalate as the criminal history category escalates.[282]

While first-degree murder mandates an incapacitating punishment—life in prison—on the first offense, the punitive escalation for criminal history is not so severe for crimes that are not so wrong from a retributive perspective. Consider the incorrigible pickpocket.[283] The Sentencing Guidelines prescribe that the pickpocket receives the same offense level as an alien who unlawfully reenters the United States after deportation.[284] On the first conviction the Guidelines recommend a sentence of zero to six

---

278. U.S. SENTENCING GUIDELINES MANUAL ch. 5, pt. A, sentencing tbl. (2013), *available at* http:/ussc.gov/sites/default/files/pdf/guidelines-manual/2013/manual-pdf/2013_Guidelines_Manual_Full.pdf.

279. *See id.* at ch. 5, pt. A, cmt. n.1 ("The Offense Level (1–43) forms the vertical axis of the Sentencing Table.").

280. *See id.* ("The Criminal History Category (I–VI) forms the horizontal axis of the table.").

281. *See* 18 U.S.C. § 1111 (2012) (defining the elements of murder); U.S. SENTENCING GUIDELINES MANUAL, *supra* note 278, § 2A1.1 (assigning the highest base offense level of 43 to first degree murder).

282. *See generally* U.S. SENTENCING GUIDELINES MANUAL, *supra* note 278 (illustrating the increasing months of imprisonment recommended for defendants with more extensive criminal backgrounds).

283. The federal larceny statute is located at 18 U.S.C. § 661; its scope is restricted to "the special maritime and territorial jurisdiction of the United States." 18 U.S.C. § 661 (2012).

284. Illegal Reentry receives a base offense level of eight. U.S. SENTENCING GUIDELINES MANUAL, *supra* note 278, § 2L1.2(a). Larceny receives a base offense level of six, but two points are added in the case of a pickpocket because the offense involves "[t]heft from the person of another," resulting in a base offense level of eight. *See id.* § 2B1.1 cmt. n. 1. The larceny offense level holds so long as the loss remains less than $5000. *See id.* § 2B1.1, at 79, 99–100 (including pickpocketing in the definition of "[t]heft from the person of another").

months incarceration. Say that the pickpocket is incorrigible, picks a pocket again and the recommended punishment, reflecting his prior criminal history, rises to ten months, and so on, gradually until the chart ends, and the incorrigible pickpocket is placed in the highest criminal history category with a recommended range topping out at twenty-four months imprisonment. In the current sentencing regime, where judges are given discretion to move up or down the guidelines for good reasons, the incorrigible pickpocket might be sentenced to the statutory maximum of five years imprisonment.[285]

Consider some of the implications of this scheme. First, we do not incapacitate the incorrigible pickpocket. We escalate our punishments as his incorrigibility becomes more legible from his actions, but we do not, on the sixth violation, imprison the incorrigible pickpocket for life.[286] Instead we *tolerate* the disorder and harm the incorrigible pickpocket causes and continue to punish the subsequent violation in a significant, but not "incapacitative," way. Second, notice that the harms the incorrigible pickpocket imposed add up. While a single picked pocket might present *de minimis* harm, each instance of recidivism means another person violated, another wallet stolen, cash missing, credit cards that must be cancelled, licenses that must be renewed, etc. These are not the sort of harms, to be sure, that are posed by rape or murder; having your pocket picked is unlikely irredeemably to harm a person's psyche, and it causes no physical harm, but these harms are not nothing. One's pocket cannot be unpicked. The victim might avoid the area where the crime occurred or lose trust in the ability of the State to protect victims from harm. The more pockets picked, the more those harms amount to something significant.

Now consider the incorrigible immigration violator. Set aside that the illegal reentry guideline, uniquely, double counts criminal history by ratcheting up the retributive base offense level for prior migration violations,[287] and assume that recidivist increases in punishment track with the punishment meted out on the pickpocket. Perhaps this looks reasonable. But notice that harms do not add up in quite the same way over time as they do in the case of the incorrigible pickpocket. Since there is no concrete harm in the incorrigible immigration violator's action, the cumulative harms do not amount to anything of much significance on repeat violations. A migrant being present without permission is the same in all

285. *See* 18 U.S.C. § 661 (stating that the five-year maximum applies where the stolen property was taken from the person of another).

286. Even the harshest three-strike laws require some risk of irreparable harm, manifested by a conviction for a violent felony.

287. *See* Keller, *supra* note 11, at 96 ("In 1988 . . . Congress dramatically ratcheted up the potential sentence a defendant could receive for illegal reentry.").

material respects as having a migrant present *with* permission. As a result, the total material deadweight loss to society that we accept from the pickpocket is much, much greater than for the incorrigible immigration violator. If you object that the metaphysical harms to our political theory of the border add up, you need to provide a much stronger account of the salience of metaphysical harms and their place in the criminal law than I have encountered.[288]

But now recall that the incorrigible immigration violator is also subject to deportation, the punishment which revisits the harm the immigration violator caused upon the State. So as the incorrigible immigration violator moves up the criminal history chart to the maximum twenty-four month sentence, he would be deported anew after the completion of each sentence. To see the excess here one simply needs to appreciate that where, in the pickpocket's case, the guideline sentence over time reflected a baseline of retributive wrongness and then an additional quantum of punishment to account for recidivist risk, up to a maximum threshold, with crimes of migration, deportation takes care of the retributive element of punishment in the matrix. With retributivism dispensed with through deportation, we are left with the imposition of incarceration doing exclusively deterrent work.

In other words, criminal punishment is not serving as a deterrent penalty in the usual sense because the *entire quantum* of carceral punishment for any crime of migration is grounded *exclusively* in anti-recidivist/deterrent values. This is radical relative to what occurs with all other crimes. It is even more radical when you consider that deportation itself has some deterrent effect since reentering unlawfully is costly and risky. And even if one thinks some deterrent penalty is appropriate, it is clear that within the federal sentencing system, a penalty that reflects only that value—rather than as a supplement to just desserts—is highly anomalous, if not illegal. In my terms, it is profoundly excessive.

CONCLUSION

Crimes of migration are an illegitimate use of the criminal power. They fail for not being consented to, for violating thoughtful theories of the criminal law, and for being imposed on top of deportation.

In the past, enhanced penalties for crimes of migration have been justified by recourse to worries about terrorists or drug kingpins.[289] In practice, these categories of criminals are a

---

288. *But see* Ripstein, *supra* note 130.

289. *See* U.S. BORDER PATROL, 2012–2016 BORDER PATROL STRATEGIC PLAN 8, http://nemo.cbp.gov/obp/bp_strategic_plan.pdf (last visited Sept. 8, 2014) (listing the objectives of the U.S. Border Patrol's goal to secure America's borders, including "[p]revent[ing] terrorists . . . from entering the United States" and "reduc[ing] smuggling and crimes associated with smuggling"). *But see* HUMAN

vanishing proportion of the 100,000 persons caught up in the enforcement apparatus.[290] Moreover, if these are the real concerns driving immigration criminal enforcement, we should instead rely on the criminal laws that prohibit specific, serious conduct, like drug distribution or terrorism—or even the numerous inchoate crimes, like conspiracy and attempt—to capture and punish such individuals. These serious criminals should not be used as a wedge to justify the prosecution of 100,000 aliens per year.

Some members of Congress have recently proposed that we *expand* immigration crimes to encompass mere presence in the United States without permission.[291] My analysis here shows that doing so would further exacerbate what is already a grave injustice.

RIGHTS WATCH, *supra* note 3, at 23 ("The US government has a strong public safety interest in keeping dangerous criminals from entering its borders. Human Rights Watch's research, however, indicates that prosecutions are targeting many persons who pose no such threat."); Keller, *supra* note 11, at 97 (describing the rationale for prosecuting illegal reentry cases that target illegal reentrants who come to the United States to commit crimes).

290. *See supra* notes 1–2 and accompanying text.

291. *See* Gomez, *supra* note 10.