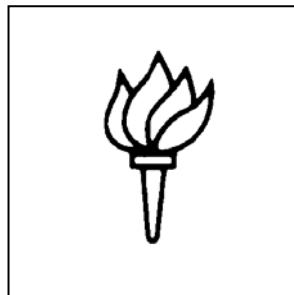


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INCLUSIVE IMMIGRANT JUSTICE: RACIAL ANIMUS AND THE ORIGINS OF CRIME- BASED DEPORTATION

Alina Das

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ABSTRACT

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

INTRODUCTION

The merger of immigration and criminal law has had a transformative effect on both systems in the United States. Immigration law and enforcement relies heavily on determinations made in the criminal legal system to identify targets for deportation. In FY 2016, federal immigration agents within the U.S. Department of Homeland Security (DHS) Immigration and Customs Enforcement deported over 130,000 people from the United States on criminal grounds—58% of all individuals deported.¹ Moreover, immigration status and immigration-related violations are playing an increasingly significant role in the criminal legal system. Criminal immigration violations, including “illegal entry” and “illegal reentry” at U.S. borders, represented the largest percentage of crimes prosecuted in the federal system.² In many ways, the two systems have merged to create a two-way pipeline for deportation—such that criminal records easily lead to deportation, and lack of immigration status increasingly factors into whether one may get a criminal record.

^{*} Professor of Clinical Law, New York University School of Law. I thank the organizers, panelists, and participants of the U.C. Davis Law Review 2017 Symposium for their helpful comments and dialogue on these issues. I am also grateful for the research assistance of Liz McLean.

¹ OFFICE OF THE PRESS SEC., *DHS Releases End of Year Fiscal Year 2016 Statistics*, DEPARTMENT OF HOMELAND SECURITY (Dec. 30, 2016), <https://www.dhs.gov/news/2016/12/30/dhs-releases-end-year-fiscal-year-2016-statistics>.

² *Immigration Now 52 Percent of All Federal Criminal Prosecutions*, TRAC REPORTS, <http://trac.syr.edu/tracreports/crim/446/> (last visited Oct. 6, 2017).

As scholars have written, the merger of the immigration and criminal systems has amplified the flaws in each.³ The longstanding racial disparities in the criminal legal system have led to similarly racialized effects in detention and deportation based on crime.⁴ The lack of due process in the immigration system has perverted the criminal legal system, limiting the impact of criminal law reforms aimed at reducing the harshest criminal penalties.⁵ The vulnerability of people who find themselves at this intersection between immigration and criminal law—labeled as so-called “criminal aliens”—has left thousands of individuals vulnerable to political scapegoating and hyperenforcement.⁶

In pursuing these rich and important critiques, scholars have explored the modern manifestations of the immigration-criminal law merger, focusing in large part on the 1996 laws that transformed our current immigration system.⁷ This focus makes sense

³ Mary Bosworth & Emma Kaufman, *Foreigners in a Carceral Age: Immigration and Imprisonment in the United States*, 22 STAN. L. & POL'Y REV. 429, 440–41 (2011); Jennifer M. Chacón, *Overcriminalizing Immigration*, 102 J. Crim. L. & Criminology 613 (2012); Jennifer M. Chacón, *Managing Migration Through Crime*, 109 COLUM. L. REV. SIDEBAR 135, 137–39 (2009); Angélica Cházaro, *Challenging the "Criminal Alien" Paradigm*, 63 UCLA L. REV. 594, 660 (2016); Allegra M. McLeod, *The U.S. Criminal-Immigration Convergence and Its Possible Undoing*, 49 AM. CRIM. L. REV. 105 (2012); Teresa A. Miller, *Blurring the Boundaries Between Immigration and Crime Control After September 11th*, 25 B.C. THIRD WORLD L.J. 81, 83–86 (2005); Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367 (2006).

⁴ César Cuauhtémoc García Hernández, *Creating Crimmigration*, 2013 BYU L. REV. 1457, 1461–67 (2013) (describing the disparate racial impacts of the criminal justice system on modern federal immigration enforcement); Kevin R. Johnson, *Doubling Down on Racial Discrimination: The Racially Disparate Impacts of Crime-Based Removals*, 66 CASE W. RES. L. REV. 993, 994 (2016) (describing the racially disparate impact of crime-based deportation, particularly on Latinx communities); Kevin R. Johnson, *Racial Profiling in the War on Drugs Meets the Immigration Removal Process: The Case of Moncrieffe v. Holder*, 48 U. MICH. J.L. REFORM 967, 968 (2015) (contending that “the racially disparate impacts of the criminal justice system exacerbate the racially disparate impacts of the modern immigration removal system”); Yolanda Vázquez, *Constructing Crimmigration: Latino Subordination in a “Post-Racial” World*, 76 OHIO ST. L.J. 599, 640–50 (2015) (evaluating the evolution of the conception of the “criminal alien” under the U.S. immigration laws); Yolanda Vázquez, *Perpetuating the Marginalization of Latinos: A Collateral Consequence of the Incorporation of Immigration Law into the Criminal Justice System*, 54 HOW. L.J. 639, 655–60 (2011) (discussing the impact of the immigration-criminal law merger on Latino immigrants); Juliana Morgan-Trostle & Kexin Zhang, STATE OF BLACK IMMIGRANTS REPORT PART II: BLACK IMMIGRANTS IN THE MASS CRIMINALIZATION SYSTEM (2016), <http://www.stateofblackimmigrants.com/assets/sobi-deportation-sept27.pdf> (describing the disparate impact of mass criminalization on Black immigrants facing deportation and detention).

⁵ Jason A. Cade, *Deporting the Pardoned*, 46 U.C. DAVIS L. REV. 355, 375 (2012); Alina Das, *Immigrants and Problem-Solving Courts*, 33 CRIM. JUST. REV. 308 (2008); Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469 (2007); Aaron S. Hass, *Deportation and Double Jeopardy After Padilla*, 26 GEO. IMMIGR. L.J. 121, 124 (2011) (acknowledging that immigrants can face the threat of removal as a result of criminal convictions long after their sentence is served and rehabilitation achieved); Juliet P. Stumpf, *Doing Time: Crimmigration Law and the Perils of Haste*, 58 UCLA L. REV. 1705, 1709 (2011) (noting that in establishing deportation as the ultimate consequence, “crimmigration” law ignores the question of reentry into the community as part of criminal sentencing for immigrants).

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

⁷ See, e.g., García Hernández, *supra* note 4, at 1469; Stumpf, *supra* note 3, at 384; Leisy Abrego, Mat Coleman, Daniel E. Martinez, Cecilia Menjivar & Jeremy Slack, *Making Immigrants into Criminals: Legal*

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

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

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

Processes of Criminalization in the Post-IIRIRA Era, 5 J. ON MIGRATION & HUM. SECURITY 694, 695 (2017). These articles and others describe the enormous impact of the Anti-terrorism and Effective Death Penalty Act of 1996 (AEDPA) and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), along with predecessor laws in the 1980s, on the immigration system.

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

⁹ Hernandez, *supra* note 4, at 1467–73; Stumpf, *supra* note 3, at 369; Abrego, et al, *supra* note 7, at 695.

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

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

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

criminalization. Thirty years later, we are still reeling under the weight of these draconian changes to the system, and attention to these developments is well-deserved.

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

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

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

Part I lays forth the early development of crime-based deportation in the late 1800s and early 1900s, and describes in further detail why most scholarly accounts pay little attention to the consistent thread of racial animus undergirding these laws. Parts II-IV then look at three specific areas of development in crime-based deportation to demonstrate the critical role of racial animus has played in these early examples of the immigration-criminal law merger. Part II looks at the first federal law barring immigrants from the United States based on their criminal records, the 1875 Page Act. Part III looks at the first federal laws barring and deporting immigrants from the United States based on drug offenses, tying them to the racial animus that criminalized drug offenses during

those same periods. Part IV looks at the first federal laws creating immigration-status based crimes, which begin in the late 1800s and flourish into the criminalization of unauthorized entry and reentry into the U.S. Each of these major developments in the merger of immigration and criminal law demonstrate that the criminalization of immigrants took root a century prior to where most discussions begin. I conclude with some thoughts about how this history may help us better build an inclusive immigrant justice movement today.

I. THE UNEXPLORED ORIGINS OF CRIME-BASED DEPORTATION

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

As a human invention, the regulation of movement has often been used as a tool of oppression, and not just in the context of immigration. As Daniel Kanstroom writes, the antecedents of American deportation policy include the Trail of Tears and Fugitive Slave Laws.¹³ European colonizers forced American Indians from their ancestral lands by violence and coercion, bolstered by laws like the 1830 Indian Removal Act, resulting in death of thousands and the confinement of survivors in “reservations” as foreigners to the state.¹⁴ The new conquests of land led to a nearly unquenchable thirst for free labor, driving the demand for slaves from Africa and the Caribbean. As societal views on slavery splintered the country and slaves escaped their masters to seek refuge in free Northern states, fugitive slave laws were enacted to permit the physical transfer of runaway slaves to back to the South.¹⁵ These laws became the “legitimizing theories” of our modern-day deportation system.¹⁶

The regulation of movement has thus long been about power, control, and belonging in society. Hence it should come as no surprise that deportation takes aim on those most vulnerable in society, including those with criminal records. At first, America was on the receiving end of this phenomenon. In the 1600s and 1700s, England routinely sent people convicted of a broad set of crimes abroad, including to its colonies in America, as an alternative to execution.¹⁷ The colonies reacted by enacting orders and resolutions to block or otherwise regulate the immigration of people with certain criminal

¹³ Daniel Kanstroom, *DEPORTATION NATION: OUTSIDERS IN AMERICAN HISTORY* 21–90 (2007).

¹⁴ *Id.* at 63–70.

¹⁵ *Id.* at 77–83.

¹⁶ *Id.* at 7.

¹⁷ Kanstroom, *supra* note 13, at 26–28; Gerald L. Neuman, *The Lost Century of American Immigration Law (1776–1875)*, 93 COLUM. L. REV. 1883, 1841–42 (1993).

records to their lands.¹⁸ In 1717, however, Great Britain enacted a Transportation Act to give English courts the direct authority to sentence people to “transportation” abroad for felonies.¹⁹ Tens of thousands of people with felony convictions were transported to America under this law.²⁰ The practice formally ended in 1776, resuming on a smaller scale from various European countries after the Revolutionary War.²¹

As the colonies began to exert their independence, they attempt to quell the tide of deportation to America. In 1788, shortly after ratifying the U.S. Constitution, the Continental Congress urged states to adopt laws excluding “convicted malefactors” from their borders.²² During this early period of state immigration regulation, numerous states passed laws barring “convicts” from entering their borders, and exercising the right to fine ships that brought such individuals into the United States.²³ These laws were initially deemed constitutional, and when the federal government assumed its plenary power over immigration in a contest with the states, it too assumed the power to exclude people with convictions.²⁴ In 1875, Congress passed the Page Act, excluding “prostitutes” and people with felony convictions.²⁵

Thus began a long line of legislative acts that used criminal records to exclude or deport immigrants from the United States, or used immigration status to create criminal acts to prosecute and incarcerate immigrants within the United States. In 1891, Congress passed a law that excluded immigrants with convicted of “involving moral turpitude.”²⁶ In 1917, Congress expanded crimes involving moral turpitude from a ground of exclusion to the United States into a ground of deportation from the United States.²⁷ In 1922, Congress first made offenses related to narcotics grounds for deportation.²⁸ In 1929, Congress made unauthorized entry a federal crime punishable by up to one year in prison, or two years for one who had been previously deported.²⁹ Over the next fifty years, each of these provisions have been amended and expanded several times, leading finally to the explosion of immigration and criminal provisions that came in the 1980s and 1990s.

¹⁸ Edward Prince Hutchinson, LEGISLATIVE HISTORY OF AMERICAN IMMIGRATION POLICY 1798–1965, at 393 (1981).

¹⁹ Transportation Act of 1717, 4 GEO. I, c. 11.

²⁰ A. Roger Ekirch, *Bound for America: A Profile of British Convicts Transported to the Colonies*, 42 WM. & MARY Q. 184, 188 (1985).

²¹ Neuman, *supra* note 17, at 1841.

²² 13 J. of Cong. 105–06 (Sept. 16, 1788).

²³ Neuman, *supra* note 17, at 1842.

²⁴ *Id.*

²⁵ *See infra*. Widely recognized as the first restrictive immigration law, the Page Act of 1875 was preceded only by the short-lived Aliens Act of 1798, which criminalized reentry after removal but was never apparently applied to anyone. César Cuauhtémoc García Hernández, CRIMMIGRATION LAW 148 (2015).

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

²⁷ Immigration and Nationality Act of 1917, ch. 29, §17, Pub. L. No. 301, 39 Stat. 874, 889.

²⁸ Act of May 26, 1922, ch. 202, Pub. L. No. 227, 42 Stat. 596, 597.

²⁹ Act of March 4, 1929, ch. 690, Pub. L. No. 1018, 45 Stat. 1551, 1551.

This early history of criminal immigration law generally finds itself the briefest references in critical discussions of the field. As a result, one might assume that Congress enacted the laws out of an early disdain for people with criminal records, one divorced from any overtly racialized overtones. Particularly in light of the rejection of deportees from European countries as early colonialists, one might view the early provisions are more closely aligned to class concerns than race.³⁰

Indeed, some note that the use of crime-based deportation and immigration-based crimes was muted for decades because they were not needed to control disfavored racial groups.³¹ Until 1965, federal immigration contained explicit racialized barriers to immigration and to citizenship. The infamous Chinese Exclusion Act of 1882 excluded Chinese laborers from entering the United States for ten years, and was later expanded.³² By the 1920s, eugenicist efforts were underway to create a quota system, culminating in the National Origins Act of 1924.³³ The Act numerically restricted immigration outside the Western hemisphere to 155,000 persons annually, and divided those numbers by country of origin, permitting each country up to 2 percent of their foreign born population in the United States as of 1890, and barring immigration by those ineligible to naturalize.³⁴ As a result, immigration from southern and eastern Europe, Africa, and the rest of the world beyond the western hemisphere was vastly limited; Asians, ineligible for citizenship, were barred.³⁵ This was intentional; as one Congressional report stated, the purpose of the quotas was “to preserve, as nearly as possible, the racial status quo in the United States.”³⁶ As Mae Ngai has written, “the law constructed a white American race” and “transform[ed] immigration law into an instrument of mass racial engineering.”³⁷

Over the next few decades, the National Origins Quota System effectively stemmed immigration from the disfavored groups outside the Western hemisphere.³⁸ The Western hemisphere was exempted from restrictions in light of demands for cheap, mostly agricultural labor.³⁹ But the racially “undesirable” among these immigrants—namely, Mexicans—were controlled in other ways when their labor was no longer valued. During the Depression, for example, the government forcibly deported 500,000

³⁰ Such a critique would be of limited salience even with respect to European immigrants, however. Racialized and nativist hierarchies existed among white immigrants; the Irish, Italians, Greeks, and Slavs suffered a low social status for years. See John Tehranian, *Performing Whiteness: Naturalization Litigation and the Construction of Racial Identity in America*, 109 YALE L.J. 817, 825–26 (2000).

³¹ García Hernández, *supra* note 4, at 1459.

³² Act of May 6, 1882, ch. 126, §§7, 11, 22 Stat. 58, 60–61.

³³ Mae M. Ngai, IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA 21–25 (2004).

³⁴ *Id.* at 22.

³⁵ *Id.* at 22–27.

³⁶ Hutchinson, *supra* note 18, at 484–85 (1981) (quoting H.R. REP. NO. 68-350, pt. 1, at 16 (1924)).

³⁷ Ngai, *supra* note 33, at 25, 27.

³⁸ *Id.* at 21–25.

³⁹ *Id.* at 49–52.

people of Mexican descent, including U.S. citizens.⁴⁰ In the 1950s, after World War II, the government deported another 1,000,000 Mexicans, including U.S. citizens, through a program unabashedly dubbed “Operation Wetback.”⁴¹ Between the quotas that restricted overseas immigration and these mass acts of immigration enforcement targeting Mexicans, federal immigration authorities managed to keep America’s desired White homogeneity. Only in 1965 was the National Origins Quota eliminated.⁴² The system that replaced it was far from perfect; the visa allocation system that Congress formulated still relies on numerical restrictions that have a disparate impact on Mexico and certain Asian countries.⁴³ Nonetheless, the Immigration Act of 1965 is a celebrated moment in United States immigration history, heralded as the time when we finally repealed the most overly racist screening requirements for immigration to the United States. Approximately a decade and a half later, in the vacuum created, more draconian, crime-based immigration policies take root.

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

As discussed below, the advent of criminal grounds of deportation, and immigration-based crimes, were largely motivated by the same racialized animus that undergirded the development of immigration law overall during this early period. In particular, animus towards Chinese and Mexican immigrants was the driving force behind many of the worst legislative developments that tied immigration and criminal law together to deport and incarcerate people of color. The remainder of this essay takes on three areas: the first crime-based ground of federal immigration restriction, the addition of drug offenses to the grounds of deportation, and the conceptualization of immigration-based crimes.

⁴⁰ Kevin R. Johnson, *The Forgotten “Repatriation” of Persons of Mexican Ancestry and Lessons for the “War on Terror”*, 26 PACE L. REV. 1 (2005).

⁴¹ Kanstroom, *supra* note 13, at 219–224.

⁴² Immigration and Naturalization Act of 1965, Pub. L. No. 89-236, 79 Stat. 911, 911.

⁴³ Kanstroom, *supra* note 13, at 225 (finding that the 120,000 yearly quota for the western hemisphere led to backlogs in visa-processing time for Mexican and other Latin American countries, increasing the pressure to enter the country without inspection); JoAnne D. Spotts, *U.S. Immigration Policy on the Southwest Border from Reagan through Clinton, 1981-2001*, 16 GEO. IMMIGR. L.J. 601, 606–07 (2002) (acknowledging that immigration ceilings for countries in the western hemisphere created backlogs of applications for immigrant visas from Mexico).

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

For the first century of the United States, immigration law and restrictions were the province of the states, not the federal government.⁴⁴ States would restrict and regulate migration both between states and from beyond the country's borders.⁴⁵ The Supreme Court initially recognized state regulation of immigration, including requirements for ship passenger lists and bonds, as a valid exercise of state police power, noting in one 1937 case that it was necessary to guard "against the moral pestilence of paupers, vagabonds, and possibly convicts."⁴⁶ In the 1949 Passenger Cases, however, the Supreme Court struck down state regulations imposing taxes on arriving foreign passengers as an invalid exercise of federal commerce power.⁴⁷ Only in 1876 did the Supreme Court recognize immigration regulations as exclusively the province of the federal government.⁴⁸ As Kerry Abrams has written, the space between these cases invited state regulation where it could be framed as an exercise of police power—thus encouraging states who sought to restrict noncitizen migration to frame unwanted immigrants as "paupers," "vagabonds," and "convicts."⁴⁹

Enter nineteenth century California—where a slumping economy led to a backlash against Chinese immigrants. In the mid-1800s, Chinese migrants came in large numbers to the West Coast during the Gold Rush and were welcomed, initially, for to build the nation's rail system.⁵⁰ Backlash eventually ensued, both racially and economically motivated, reaching a fever pitch in the post-Civil War economic slump.⁵¹ California led the way in racially restrictive legislation against Chinese immigrants and others, passing laws to tax foreign minors, restrict Chinese immigrants from land ownership, require bonds of ships bringing Chinese women passengers from overseas, promote segregation in schools, and to limit the ability of people of color to testify against White persons in court.⁵²

As Abrams has described, the California legislature responded with a series of acts that attempted to prevent Chinese immigration. Initial laws were framed around economics—laws that taxed arriving passengers "incompetent to become a citizen" (i.e.,

⁴⁴ Neuman, *supra* note 17, at 1841–42.

⁴⁵ *Id.*

⁴⁶ *Mayor, Aldermen, & Commonalty of New York v. Miln*, 36 U.S. (11 Pet.) 102, 142 (1837).

⁴⁷ *Smith v. Turner* (Passenger Cases), 48 U.S. (7 How.) 283, 283–86 (1849).

⁴⁸ *Chy Lung v. Freeman*, 92 U.S. 275 (1875).

⁴⁹ Kerry Abrams, *Polygamy, Prostitution, and the Federalization of Immigration Law*, 105 COLUM. L. REV. 641, 666–67 (2005).

⁵⁰ Kanstroom, *supra* note 13, at 98.

⁵¹ *Id.*

⁵² *Id.* at 93–100, 103–107; Bill Ong Hing, *THE MAKING AND REMAKING OF ASIAN AMERICA THROUGH IMMIGRATION POLICY: 1850–1990*, at 21–23 (1993).

Chinese) or aimed at “protecting free white labor against competition with coolie Chinese labor.”⁵³ But these were struck down by the California Supreme Court as encroachments on federal commerce power.⁵⁴

The California Supreme Court decisions recognized, however, that the state retained its police power over immigration—encouraging a legislative “solution” that would label Chinese immigrants as criminals. Chinese men were labeled as kidnappers and human traffickers, while Chinese women were labeled as prostitutes. In 1870, the California legislature targeted both groups through the Anti-Kidnapping Act⁵⁵ and the Anti-Coolie Act.⁵⁶ The Anti-Kidnapping Act criminalized the “kidnapping and important of Mongolian, Chinese and Japanese females” and treated Asian immigrant woman as presumptive prostitutes, requiring each to obtain a license to enter the United States upon a showing that she is a “good person of correct habits and good character.”⁵⁷ The Anti-Coolie Act, entitled “An Act to prevent the important of Chinese criminals and to prevent the establishment of Coolie slavery” made a similar requirement of Chinese laborers.⁵⁸ As Abrams notes, the law framed laborers as criminals, stating that “criminals and malefactors are being constantly imported from Chinese seaports” creating a “burdensome expense upon the administration of criminal justice.”⁵⁹ These laws were amended several times, and by 1874 ship captains were required to post a \$500 bond for any immigrant passenger who fell into a long list of undesired categories, including any “convicted criminal” or “lewd or debauched woman.”⁶⁰

The anti-Chinese sentiment in California swayed the nation’s conversations about immigration and criminality as well. Congressional debates in the 1860s spoke of the Chinese along criminalized lines: “The women are prostitutes, and the men petty thieves.”⁶¹ Although a treaty initially limited the federal government’s ability to restrict Chinese migration directly,⁶² anti-Chinese sentiment found a national champion in U.S. Congressman Horace Page of California. In addition characterizing Chinese women as

⁵³ Act of Apr. 26, 1862, ch. 339, 1862 Cal. Stat. 462 (repealed 1939); Act of Apr. 28, 1855, ch. 153, 1855 Cal. Stat. 194 (repealed 1955).

⁵⁴ *Lin Sing v. Washburn*, 20 Cal. 534, 536 (1862); *People v. Downer*, 7 Cal. 169, 170 (1857); Abrams, *supra* note at 49, at 672–77 (2005).

⁵⁵ Act of Mar. 18, 1870, ch. 230, 1870 Cal. Stat. 330, 330-31.

⁵⁶ *Id.*

⁵⁷ *Id.* § 1.

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

⁵⁹ *Id.*

⁶⁰ 1873-1874 Acts Amendatory of the Codes of California § 70, at 39, *quoted in* Abrams, *supra* note 49, at 675.

⁶¹ Cong. Globe, 40th Cong., 3d Sess. 287 (1869) (remarks of Sen. Garrett Davis), *quoted in* Ming M. Zhu, *The Page Act of 1975: In the Name of Morality* 9 (2009), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1577213.

⁶² Congress renegotiated its treaty with China in 1880, paving the way for the Chinese Exclusion Act in 1882. *See* An Act to Execute Certain Treaty Stipulations in Relation to Chinese,” ch. 126, 22 Stat. 58 (1882) (repealed 1943); *see also* Zhu, *supra* note 61, at 6.

prostitutes, Congressman Page’s speeches were filled with criminalizing rhetoric about Chinese immigrants in generally, noting that “[t]hievary, trickery, cheating, and fraud are taught and encouraged as the essential elements of success” in Chinese institutions.⁶³

The anti-Chinese laws of California thus eventually laid the blueprint for the Page Act of 1875.⁶⁴ It criminalized the transportation of Chinese, Japanese, and other “Oriental” passengers without their consent, as well as the importation of “women for the purposes of prostitution.”⁶⁵ In the first federal provision to restrict immigration to the United States, the Page Act also excluded “persons who are undergoing a sentence for conviction in their own country of felonious crimes other than political . . . or whose sentences have been remitted on condition of their emigration” and “women ‘imported for the purposes of prostitution’.”⁶⁶ While the prohibition on immigrants whose sentences were remitted for their transportation to the United States echoed early complaints about undesirable European migration, the rest of the immigration prohibitions mirrored the targeting of Chinese men and women as criminals and prostitutes, respectively.

The focus on prostitution was particularly transformative given the fact that, during this period, prostitution was generally not considered a crime (which is partially why prohibitions against prostitution and against people with convictions were listed separately in the statute). Regulation and segregation of places of prostitution, rather than criminalization of prostitution itself, were the norm in many parts of the country through the beginning of the twentieth century.⁶⁷ Criminalization related to prostitution during this early period focused primarily on penalizing acts of commercialized vice, vagrancy, and lewdness.⁶⁸ By ratcheting up moral concerns over prostitution and targeting women directly, anti-Chinese sentiment helped to pave the way for the criminalization of prostitution itself. The criminalization of prostitution in California, for example, in many ways outpaced criminalization in other parts of the country.⁶⁹ Over the next several decades, as states began criminalizing the act of prostitution itself, immigrant women were often doubly targeted in the criminal and immigration systems.

Thus, far from developing separate and apart from more overtly racialized restrictions on immigration in federal law, the origin of crime-based deportation is intertwined with those restrictions. Our decision to exclude immigrants with criminal

⁶³ Cong. Rec., 2d Sess., 1974, P. 4535 (quoted in Zhu, *supra* note 61, at 10).

⁶⁴ Abrams, *supra* note 49, at 690; Act of Mar. 3, 1875 (Page Law), ch. 141, 18 Stat. 477 (repealed 1974).

⁶⁵ Act of Mar. 3, 1875 (Page Law), ch. 141, 18 Stat. 477 (repealed 1974), §§ 2-3.

⁶⁶ *Id.* § 4.

⁶⁷ Aaron D. Simowitz, *How Criminal Law Shapes Institutional Structures: A Case Study of American Prostitution*, 50 AM. CRIM. L. REV. 417, 430-31 (2013); Melissa Hope Ditmore, PROSTITUTION AND SEX WORK 71 (2011)

⁶⁸ Ditmore, *supra* note 67, at 71.

⁶⁹ Simowitz, *supra* note 67, at 436 n. 125.

records from the United States was motivated by the larger desire to exclude Asians from the United States at the time.

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

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

The use and sale of drugs was widely unregulated in early American history. Most substances initially were heralded for their medicinal purposes. Opium was the first such narcotic drug, promoted by medical and pharmaceutical industries in the 1800s.⁷⁰ Concerns about drug addiction slowly grew, but it was not until the face of the addict population changed that opium became criminalized.⁷¹ The growing association between opium smoking and Chinese immigrants in the Western United States prompted one of the nation's first criminal laws directed at drug use: a 1875 San Francisco ordinance banning the smoking of opium outside designated opium dens.⁷² As with prostitution and human trafficking, local and state ordinances criminalizing drugs began to proliferate as part of a general anti-Chinese hysteria. As Doris Marie Provine has written, “[a]dvocates of vigorous enforcement . . . routinely exploited white fears of racial mixing,” framing opium as a substance by which Chinese immigrants would tempt white women and youth into addiction.⁷³ Early federal court decisions upheld the constitutionality and lawfulness of prosecutions against Chinese immigrants under these laws in spite of their recognition that the laws may “proceed[] more from a desire to vex and annoy the ‘Heathen Chinees’. . . than to protect the people from the evil habit.”⁷⁴

The growing anti-immigrant sentiment against opium, combined with a similarly racialized association between African Americans and cocaine, played a significant role in the federal criminalization of narcotics, leading to several acts in the 1900s to regulate, tax, and eventually criminalize drug use and sale.⁷⁵ It did not take long for these federal criminal drug laws to include a provision on deportation—the first new category of crime-based immigration penalties since prostitution and “crimes involving moral turpitude.” The Narcotic Drugs Import and Export Act of 1922 both criminalized the importation of narcotics offenses and provided that “any alien who at any time after his

⁷⁰ Doris Marie Provine, *UNEQUAL UNDER LAW: RACE IN THE WAR ON DRUGS* 65 (2008).

⁷¹ *Id.* at 67–68.

⁷² Charles E. Terry and Mildred Pellens, *THE OPIUM PROBLEM* 807 (1928).

⁷³ Provine, *supra* note 70, at 71–72.

⁷⁴ *Id.* at 72 (quoting *Ex parte Yung Jon*, 28 F. 308, 312 (D. Ore. 1886)).

⁷⁵ *Id.* at 70–81.

entry is convicted [of such an importation offense] shall upon termination of imprisonment be taken into custody and deported.”⁷⁶

As subsequent laws expanded the range of criminalized substances, deportation provisions were similarly expanded. People who were convicted and sentenced to imprisonment for a wide range of controlled substance offenses also faced deportation if they were noncitizens.⁷⁷ In 1940, Congress eliminated the prior law’s requirement of a sentence thus making a conviction alone sufficient for deportation, and extended the provisions to apply to any noncitizens convicted under state and federal law.⁷⁸

A growing anti-immigrant sentiment against a different racialized group, Mexicans, combined with ongoing anti-Black sentiment to spur further changes to the drug laws. Cannabis, a substance that, like opium, was initially valued for its medicinal purposes, became associated with Mexicans as “marijuana.”⁷⁹ The Federal Narcotics Bureau capitalized on the anti-immigrant sentiments of the time to drum up opposition to marijuana at the local and state level.⁸⁰ Claiming that marijuana was associated with violent crime from Mexican laborers, African Americans, and other communities of color, the Bureau led a campaign against the “marijuana menace.”⁸¹ Eventually, marijuana trade became criminalized federally.⁸²

As federal criminal law road this wave of racist sentiment to expand past the importation and sale of drugs to criminalizing use and possession, so too did federal immigration law. In 1952, when Congress enacted the Immigration and Nationality Act, which remains the blueprint for immigration law today, it expanded upon previous drug provisions for deportation⁸³ to include both people whom officers had “reason to believe”

⁷⁶ See Smoking Opium Exclusion Act of 1909, ch. 100, Pub. L. No. 222, 35 Stat. 614, *amended by* Narcotic Drugs Import and Export Act of 1922, ch. 202, Pub. L. No. 227, 42 Stat. 596, 597 (specifying that “any alien who at any time after his entry is convicted under subdivision (c) [narcotics offense under the act] shall, upon the termination of the imprisonment . . . be taken into custody and deported” (emphasis added)).

⁷⁷ Act of February 18, 1931, ch. 224, Pub. L. No. 683, 46 Stat. 1171, 1171 (providing that a noncitizen “convicted and sentenced for violation or conspiracy to violate any statute of the United States taxing, prohibiting, or regulating the manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation, or exportation of opium, coca leaves, heroin, or any salt, derivative, or preparation of opium or coca leaves” shall be detained and deported (emphases added)).

⁷⁸ See Act of June 28, 1940, ch. 439, title III, § 30, 54 Stat. 670, 673.

⁷⁹ Provine, *supra* note 70, at 82; see also Carrie Rosenbaum, *What (and Whom) State Marijuana Reformers Forgot: Crimmigration Law and Noncitizens*, 9 DEPAUL J. FOR SOC. JUST. 1, 17 (2016) (discussing how “[r]acialized and negative views of Mexicans contributed to the criminalization of marijuana”).

⁸⁰ Provine, *supra* note 70, at 82–83; Rosenbaum, *supra* note 79, at 17 (describing how Federal Bureau of Narcotics Commissioner Harry Anslinger “read anti-Mexican statements into the record in a House Ways and Means Committee hearing on marijuana referring to marijuana users as ‘degenerate Spanish-speaking residents’” (citing Jordan Cummings, *Nonserious Marijuana Offenses and Noncitizens: Uncounseled Pleas and Disproportionate Consequences*, 62 UCLA L. REV. 510, 519 n.42 (2015))).

⁸¹ Provine, *supra* note 70, at 84.

⁸² *Id.* at 85–87.

⁸³ In the 1952 Act, Congress broadened the grounds of drug-conviction-based deportability to make deportable any noncitizen “who at any time has been convicted of a violation of any law or regulation

were “illicit trafficker(s)” as well as “drug addicts.”⁸⁴ A few years later, in 1956, Congress amended the Immigration and Nationality Act to include convictions for “illicit possession” of narcotic drugs.⁸⁵ In 1960, Congress further expanded the act to include convictions for “illicit possession” of marijuana, with an exception later written into the ground of deportation for one-time simple possession of less than 30 grams of marijuana.⁸⁶

The 1970s and 1980s brought a renewed vigor for drug criminalization, fueled in large part by the continued vilification of African Americans in the post-Civil Rights era. President Richard Nixon first called for a “war on drugs” in the 1970s, laying the groundwork for the “war on drugs” declared by President Ronald Reagan in 1982.⁸⁷ The media helped to stoke fears over crack cocaine, a new drug derived from cocaine that became associated with African American drug use in biased public rhetoric over its dangerousness.⁸⁸

After the drug-induced death of two popular sports stars, widely misreported as crack overdoses, Congress rushed to enact new, harsh drug legislation.⁸⁹ In 1986, Congress acted the Anti-Drug Abuse Act, which set lengthy mandatory minimum for drug offenses and set harsher penalties for the possession of crack cocaine than powder cocaine, the former of which was associated with African Americans.⁹⁰ The hastily written 1986 criminal law also included a provision targeting immigrants, expanding drug deportability and exclusion to a conviction of “any violation” of a law involving any controlled substance on the federal drug schedule.⁹¹

relating to the illicit traffic in narcotic drugs” or “who has been convicted of a violation of any law or regulation governing or controlling the taxing, manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation, exportation, or the possession for the purpose of the manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation or exportation of opium, coca leaves, heroin, marihuana, any salt derivative or preparation of opium or coca leaves or isonipecaine or any addiction-forming or addiction sustaining opiate.” Immigration and Nationality Act of 1952, ch. 5, § 241, Pub. L. No. 414, 66 Stat. 163, 206–207.

⁸⁴ Immigration and Nationality Act of 1952, ch. 2, § 212, Pub. L. No. 414, 66 Stat. 163, 182–184. These provisions continue to exist in the present-day version of the statute. 8 U.S.C. §§ 1182(a)(1)(A)(iv) (“drug abuser or addict” inadmissibility), 1182(a)(2)(C), (“reason to believe . . . illicit trafficker” inadmissibility), § 1227(a)(2)(B)(ii) (“drug abuser or addict” deportability).

⁸⁵ Act of July 18, 1956, ch. 629, tit. III, § 301, Pub. L. No. 728, 70 Stat. 567, 575.

⁸⁶ Act of July 14, 1960, Pub. L. No. 86-648, 74 Stat. 504, 505.

⁸⁷ Michelle Alexander, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 47–49 (2010).

⁸⁸ *Id.* at 51–52.

⁸⁹ *Id.*

⁹⁰ *Id.* at 53.

⁹¹ See Anti-Drug Abuse Act of 1986, §1751, Pub. L. No. 99-570, 100 Stat. 3207-47 (allowing deportation for a noncitizen “convicted of . . . a violation of . . . any law . . . of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)”).

Two years later, the Anti-Drug Abuse Act of 1988, ushered in a new low in the interweaving of criminal and immigration law. This act expanded mandatory minimums for drug offenses and the use of the death penalty in certain cases. It also marked a new series of non-criminal penalties for drug offenses, including possible eviction from public housing and bars to student loans.⁹² Perhaps the most severe non-criminal consequences were reserved for immigrants. The Anti-Drug Abuse Act of 1988 gave birth to the term “aggravated felony,” a ground for mandatory detention and deportation.

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

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

The concept of criminalizing offenses based on migration or one’s status has similarly been rooted in longstanding racialized animus. As most commentators note, immigration crimes such as illegal entry and reentry did not become heavily prosecuted until the 1990s and 2000s.⁹³ Today, immigration offenses exceed even drug offenses as the most federally arrested and prosecuted crime.⁹⁴ There are prisons dedicated to the incarceration of immigrants for these crimes, which prop up the mass incarceration system in the light of drug and sentencing reform.⁹⁵

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

An examination of the origins of criminalizing undesired migration demonstrates that racial animus was a driving force behind legislative attempts to create immigration

⁹² Alexander, *supra* note 87, at 53.

⁹³ García Hernández, CRIMMIGRATION LAW, *supra* note 25, at 11; Patrisia Macías-Rojas, FROM DEPORTATION TO PRISON: THE POLITICS OF IMMIGRATION ENFORCEMENT IN POST-CIVIL RIGHTS AMERICA 17-18 (2016).

⁹⁴ *Immigration Now 52 Percent of All Federal Criminal Prosecutions*, TRAC REPORTS, <http://trac.syr.edu/tracreports/crim/446/> (last visited Oct. 6, 2017); John Gramlich & Kristen Bialik, Pew Research Center, *Immigration offenses make up a growing share of federal arrests* (Apr. 10, 2017), available at <http://www.pewresearch.org/fact-tank/2017/04/10/immigration-offenses-make-up-a-growing-share-of-federal-arrests/>; see also Macías-Rojas, *supra* note 93, at 18.

⁹⁵ AMERICAN CIVIL LIBERTIES UNION, WAREHOUSED AND FORGOTTEN: IMMIGRANTS TRAPPED IN OUR SHADOW PRIVATE PRISON SYSTEM (June 2014), available at <https://www.aclu.org/sites/default/files/assets/060614-aclu-car-reportonline.pdf> (describing “criminal alien requirement” prisons).

crimes. As noted above, the borders to the United States were relative open through the late 1880s, when the first federally restrictive immigration laws were enacted.⁹⁶ The Page Act of 1875, which as discussed above was an early expression of anti-Chinese animus, was soon followed by the Chinese Exclusion Act of 1882, which excluded Chinese laborers from entering the United States for ten years.⁹⁷ The Geary Act of 1892 expanded the bar, which was eventually made indefinite.⁹⁸

Each of these laws paired restrictions on immigration with new provisions that criminalized immigration-related violations. As noted above, the Page Act criminalized labor and sex trafficking by labelling Chinese men and women as traffickers and prostitutes.⁹⁹ The Chinese Exclusion Act not only prohibited Chinese laborers from coming to the United States, it also criminalized anyone who helped a Chinese person enter by up to one year in prison.¹⁰⁰ And the Geary Act criminalized Chinese laborers directly, requiring Chinese laborers already in the United States to register and prove their legal status (through the testimony of at least one White witness that they had entered the United States prior to 1882), and specifying that Chinese immigrants who could not prove their legal residency could be convicted, sentenced to up to one year of imprisonment and hard labor, and deported.¹⁰¹ The adjudication of these penalties—criminal and civil—was provided for in a summary proceeding without a jury.¹⁰²

The passage of the Geary Act, like the Page Act, demonstrates how virulent anti-Chinese sentiment set the stage for the criminalization of migration itself. Led by Congressman Thomas Geary, unsurprisingly representing a district in California, the Geary legislation was designed to appease western White residents who believed that the 1882 Chinese Exclusion Act was not enough.¹⁰³ As Kelly Lytle Hernández writes, “[t]he Chinese Exclusion Act stemmed the rise of Chinese immigration into the United States, but it did not purge Chinese immigrants from the U.S. West.”¹⁰⁴ Legislators claimed that Chinese were “surreptitiously entering the United States... using false documents to entry the country as ‘merchants,’ a category exempt from the 1882 exclusion law.”¹⁰⁵ Only

⁹⁶ Prior to the late 1880s, states attempted to regulate and restrict migration in a variety of ways. Gerald L. Neuman, *The Lost Century of American Immigration Law (1776-1875)*, 93 COLUM. L. REV. 1883, 1841-42 (1993).

⁹⁷ Act of May 6, 1882, ch. 126, §§7, 11, 22 Stat. 58, 60-61.

⁹⁸ Act of May 5, 1892, ch.60, 27 Stat. 25.

⁹⁹ See Part II, *supra*.

¹⁰⁰ Act of May 6, 1882 (Chinese Exclusion Act), ch. 126, §§7, 11, 22 Stat. 58, 60-61 (repealed by Chinese Exclusion Repeal Act of 1943, Ch. 344, 57 Stat. 600).

¹⁰¹ Geary Act of 1892, ch. 60, §4, 27 Stat. 25, 25.

¹⁰² *Id.* §§ 2-3.

¹⁰³ Kelly Lytle Hernández, *CITY OF INMATES: CONQUEST, REBELLION, AND THE RISE OF HUMAN CAGING IN LOS ANGELES, 1771-1965*, 64-69 (2017).

¹⁰⁴ *Id.* at 68.

¹⁰⁵ *Id.* at 69.

criminalization could ensure that these unwelcome Chinese immigrants could be punished and expelled from the country. By criminalizing unregistered status (i.e., undocumented status), the Geary Act “broadened the basic framework of U.S. immigration control beyond the nation’s borders to include crime and punishment within the United States.”¹⁰⁶

Chinese activists led a concerted battle to strike down the Geary Act.¹⁰⁷ While the Supreme Court upheld the power of the federal government to deport Chinese residents under the law, it ultimately struck down the Geary Act’s sentence-without-trial provision in *Wong Wing v. United States*.¹⁰⁸ In *Wong Wing*, the Supreme Court held that the imposition of a criminal sentence must be accompanied by the protections of the Fifth and Sixth Amendment, including the right to a jury trial.¹⁰⁹

The failure of the Geary Act’s provision did not spell the death knell for criminalizing migration. On the contrary, it provided a blueprint for future criminalization when the 1920s National Origins Quota system was put into place to control migration.¹¹⁰ As noted above, the quota system effectively stemmed immigration from the disfavored groups outside the Western hemisphere, while leaving more flexibility as to the regulation and control of Mexican immigrants.¹¹¹ When Congress finally decided to criminalize unlawful entry and reentry, it did so with Chinese and Mexican immigrants, among others, in mind.¹¹² It simply accomplished the task by fully situating the offense as a crime, with the attendant procedural rights that *Wong Wing* required.

Thus, the 1929 federal offenses of illegal entry and reentry were informed both by *Wong Wing* and by a growing desire to regulate migration at the U.S.-Mexico border. Although Mexican immigrants were not subject to the new quota system, they were required to apply for obtain expensive visas and pay head taxes upon entry.¹¹³ Shortly after passing the 1924 National Origins Act, Congress formed the U.S. Border Patrol to

¹⁰⁶ *Id.* at 72.

¹⁰⁷ *Id.* at 73-74.

¹⁰⁸ *Wong Wing v. United States*, 163 U.S. 228, 237-38 (1896); Gerald L. Neuman, *Wong Wing v. United States: The Bill of Rights Protects Illegal Aliens*, in IMMIGRATION STORIES 31, 40-41 (David A. Martin & Peter H. Schuck eds., 2005).

¹⁰⁹ *Wong Wing*, 163 U.S. at 237.

¹¹⁰ See Part I, *supra*.

¹¹¹ Ngai, *supra* note 34, at 21-25.

¹¹² Europeans—particularly those from Southern and Eastern Europe—were also targeted by attempts to criminalize migration at this time. See Ingrid V. Eagly, *Prosecuting Immigration*, 104 NW. U. L. REV. 1281, 1296 (2010) (discussing early attempts to criminalize border entry through the Passport Act of 1918 and court responses).

¹¹³ Ngai, *supra* note 33, at 67.

police the borders.¹¹⁴ A growing segment of immigrants from Mexico found themselves subject to deportation for evading these prohibitive requirements.¹¹⁵ By 1929, over 15,000 Mexicans had been deported annually, over seven times the number that had been deported just four years earlier.¹¹⁶

As Hernández explains, the eugenicists who fought hard for the passage of the National Origins Quota were never satisfied with the exemption reserved for migration from the Western hemisphere.¹¹⁷ Hearings were repeatedly held about stemming Mexican migration, with nativists pitted against agricultural business interests.¹¹⁸ The anti-Mexican movement found their champion in the white supremacist South Carolina Senator Coleman Blease. He broke the stalemate between those who wanted an outright ban on Mexican migration with those who wanted to keep control over Mexican labor by proposing criminalizing those who came without authorization.¹¹⁹ Thus in 1929 came the first law criminalizing illegal entry and reentry to the United States.¹²⁰

The law was broadly written, addressing the growing anti-Mexican sentiment as well as providing an additional mechanism to punish unauthorized entry by barred classes like Asian immigrants. Learning from the outcome in *Wong Wing*, Congress ensured the criminal offense carried the trial and due process rights that normally attended criminal prosecutions at the time, and turned the act of migration into a crime. Over time, the criminal offense of illegal entry and illegal reentry allowed “illegal immigration” to be associated primarily with Mexican immigrants, in part because criminal enforcement took on a special role for those not subject to numerical quotas. The “enforcement aspects [of immigration policy]—inspection procedures, deportation, the Border Patrol, criminal prosecution, and irregular categories of immigration—created many thousands of illegal Mexican immigrants.”¹²¹

Illegal entry and reentry provisions, as noted above, were not as heavily prosecuted at in the first several decades of their inception as they are today. For decades, the government had access to other options for expelling Mexican people across the border—including massive operations that led to the repatriation of Mexican Americans and the deportation of Mexican immigrants in the 1930s and 1950s.¹²² Nonetheless, the 1929 law did have a transformative impact on the federal criminal system from the start.

¹¹⁴ Hernández, *supra* note 103, at 134.

¹¹⁵ Ngai, *supra* note 34, at 67.

¹¹⁶ *Id.*

¹¹⁷ Hernández, *supra* note 103, at 133-37.

¹¹⁸ *Id.* at 134.

¹¹⁹ *Id.* at 137-38.

¹²⁰ Act of Mar. 4, 1929, Pub. L. No. 70-1018, §2, 45 Stat. 1551, 1551.

¹²¹ Ngai, *supra* note 33, at 71.

¹²² Kevin R. Johnson, *The Forgotten “Repatriation” of Persons of Mexican Ancestry and Lessons for the “War on Terror”*, 26 PACE L. REV. 1 (2005); Kanstroom, *supra* note 13, at 219-224.

In the years that followed, no other law sent more Mexicans to federal prison than illegal entry and reentry.¹²³ By 1930, immigration convictions were second only to liquor charges at the height of prohibition in the federal system.¹²⁴ Prosecution of immigration crimes fueled the growth of federal criminal system throughout the 1930s, spurring the federal government to build more prisons and laying the groundwork for the massive federal prison system we have today.¹²⁵

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

CONCLUSION

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

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

These fault lines betray a misunderstanding of how layered the process of criminalizing immigrants has been over time. Immigrants have been criminalized throughout U.S. history by policies that first associate immigrants with criminality, and then penalize immigrants for that association. The early years of American history involve the criminalization of acts that we take for granted as crimes—prostitution, drug use and sale, evading border inspection—which might have been treated very differently

¹²³ Hernández, *supra* note 103, at 139.

¹²⁴ *Id.*

¹²⁵ *Id.*

in our regulatory system had the supposed perpetrators not been people of color in this country. Yet we forget that history when we look at our immigration policies today, and doubly condemn immigrants who violate criminal laws with incarceration and deportation.

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