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Repository Citation
Banks, Angela M., "The Normative & Historical Cases for Proportional Deportation" (2013). *Faculty Publications*. 1549.
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THE NORMATIVE AND HISTORICAL CASES FOR PROPORTIONAL DEPORTATION

Angela M. Banks[*]

ABSTRACT

Is citizenship status a legitimate basis for allocating rights in the United States?

In immigration law the right to remain in the United States is significantly tied to citizenship status. Citizens have an absolutely secure right to remain in the United States regardless of their actions. Noncitizens' right to remain is less secure because they can be deported if convicted of specific criminal offenses. This Article contends that citizenship is not a legitimate basis for allocating the right to remain. This Article offers normative and historical arguments for a right to remain for noncitizens. This right should be granted to members of the society—those with significant connections, commitment, and obligations to the State. Citizenship status is one proxy for identifying members, but it can be both under- and over-inclusive. Numerous green card holders are committed to, have strong connections to, and undertake obligations to the United States. Deporting these individuals for crimes like perjury, receipt of stolen property, or failure to appear in court can be excessively harsh. It can mean depriving "a man and his family of all that makes life worth while [sic]." Deportation should only be utilized when it is a proportionate response to criminal activity.

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INTRODUCTION

Gerardo Antonio Mosquera, Sr. was a green card holder in the United States for twenty-nine years before he was deported to a country where he barely spoke the language.[1] At the age of twenty-nine, after residing in the United States for almost twenty years, he sold a $10 bag of marijuana to a paid police informant.[2] Gerardo was arrested and he pleaded guilty to the sale and

[1] Patrick J. McDonnell, *Deportation Shatters Family*, L.A. TIMES, Mar. 14, 1998, at B1; *see also* JOSEPH NEVINS, OPERATION GATEKEEPER AND BEYOND: THE WAR ON "ILLEGALS" AND THE REMAKING OF THE U.S.–MEXICO BOUNDARY 180 (2d ed. 2010). Gerardo immigrated to the United States as a lawful permanent resident in 1969 from Colombia. McDonnell, *supra*. He came to the United States with his mother and five siblings to join his father, who was working as a car dealer. *Id.*

[2] McDonnell, *supra* note 1.

transportation of 0.6 grams of marijuana.[3] He was sentenced to ninety days in jail, three years' probation, and a $150 fine.[4] Gerardo served his sentence and paid his fine. His crime constituted an aggravated felony under the 1996 reforms to the Immigration and Nationality Act.[5] Having an aggravated felony conviction meant that he was deportable and ineligible for discretionary relief.[6] No judge heard about Gerardo's twenty-nine years of lawful residence in the United States, his U.S. citizen children and wife, his employment record, or the hardship that his family would experience if Gerardo were deported.[7] There was no relief available to Gerardo, and he was removed from the United States in December 1997.[8]

The outcome of this case would have been very different for someone like a hypothetical Antoinette. She was born in the United States but raised in England since the age of two. Her entire family lives in England and Antoinette has spent no time in the United States since her departure. At the age of twenty-five she decided to pursue graduate studies in the United States. If, after being in the United States for one year, Antoinette sold a $10 bag of marijuana to a paid police informant, she would not be at risk of being removed to England because she is a U.S. citizen. Pursuant to the Fourteenth Amendment, her birth in the United States makes her a U.S. citizen.[9] She would only be subject to a criminal sentence similar to what Gerardo faced: ninety days in jail, three years' probation, and a $150 fine. Gerardo arguably has stronger connections to the United States, and thus a stronger liberty interest in remaining in the United States than Antoinette. Antoinette however is the one with the right to remain.

In this Article I argue that the right to remain should not depend on citizenship status. The right to remain should be granted to members of the society—those with significant connections, commitment, and obligations to the State. Citizenship status is one proxy for identifying members, but it can be

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[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] *See id.* (noting that the revisions subjected noncitizen offenders to deportation regardless of the amount of illicit drugs sold, whereas previous law allowed offenders to demonstrate countervailing factors such as strong U.S. family ties). The family depended on Gerardo's $300-a-week salary, and they were struggling to survive on his wife Maria's salary as a school bus driver. *See id.* Gerardo's son, Gerardo Anthony Mosquera, Jr., went into a deep depression after his father's deportation and killed himself. *Id.*

[8] *Id.*

[9] U.S. CONST. amend. XIV, § 1.

both under- and over-inclusive, as demonstrated by Gerardo and Antoinette. Numerous green card holders, like Gerardo, are committed to, have strong connections to, and undertake obligations to the United States.[10] Deporting these individuals for crimes like perjury, receipt of stolen property, or failure to appear in court can be excessively harsh.[11] It can mean depriving "a man and his family of all that makes life worth while [sic]."[12] Deportation should only be utilized when it is a proportionate response to criminal activity. This Article extends my prior work on proportional deportation. I have previously argued that the punitive nature of crime-based deportation can give rise to a substantive due process right to proportionality.[13] This Article offers normative and historical arguments for proportionality in crime-based deportation.

The use of different proxies, such as length of residence, family connections, or service to local, state, or national communities, can better ensure that green card holders' liberty interest in remaining in the United States is adequately protected.[14] This was the approach utilized in the United States' first comprehensive crime-based deportation regime, and it can be utilized today through complex rule-like directives.[15]

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[10] This Article focuses on the right to remain for green card holders, also referred to as lawful permanent residents (LPRs). I leave for another day whether the analysis for other noncitizens, such as unauthorized migrants, would be the same.

[11] *See* Angela M. Banks, *Proportional Deportation*, 55 WAYNE L. REV. 1651 (2009) (discussing the need for proportionality in deportation); Juliet Stumpf, *Fitting Punishment*, 66 WASH. & LEE L. REV. 1683, 1685–88 (2009) (same); Michael J. Wishnie, *Proportionality: The Struggle for Balance in U.S. Immigration Policy*, 72 U. PITT. L. REV. 431 (2011) (same).

[12] Harisiades v. Shaughnessy, 342 U.S. 580, 600 (1952) (Douglas, J., dissenting). The deportation of such connected residents is also negatively impacting the health, education, and financial security of American families. *See* JONATHAN BAUM, ROSHA JONES & CATHERINE BARRY, IN THE CHILD'S BEST INTEREST? THE CONSEQUENCES OF LOSING A LAWFUL IMMIGRANT PARENT TO DEPORTATION (2010), *available at* http://www.law.berkeley.edu/files/Human_Rights_report.pdf; AJAY CHAUDRY ET AL., URBAN INST., FACING OUR FUTURE: CHILDREN IN THE AFTERMATH OF IMMIGRATION ENFORCEMENT (2010), *available at* http://www.urban.org/UploadedPDF/412020_FacingOurFuture_final.pdf; HUMAN RIGHTS WATCH, FORCED APART: FAMILIES SEPARATED AND IMMIGRANTS HARMED BY UNITED STATES DEPORTATION POLICY 4, 51–52, 61–63, 69, 82 (2007); Jacqueline Hagan et al., *The Effects of U.S. Deportation Policies on Immigrant Families and Communities: Cross-Border Perspectives*, 88 N.C. L. REV. 1799 (2010).

[13] Banks, *supra* note 11.

[14] In this Article I argue that proxies other than citizenship status should be used to identify residents whose right to remain should be protected. I do not, however, argue that citizens' right to remain should be subjected to the same proxies. See *infra* text accompanying notes 337, 339 for additional discussion of limiting citizens' right to remain.

[15] See *infra* Part V.B for a discussion of complex rule-like directives that utilize alternative proxies for connections, commitment, and obligations to a polity.

Building on the work of citizenship scholars, I contend that citizenship status is an under-inclusive proxy for significant connections, commitment, and obligations to a State.[16] Citizenship scholars have explored the meaning of citizenship in Western democracies and how citizenship rights should be allocated.[17] Many of these scholars have concluded that numerous rights exclusively allocated to citizens should be accessible to noncitizens through increased access to citizenship.[18] I take a different approach in this Article and argue that the right to remain should not depend on citizenship status.

This argument proceeds in five parts. Part I describes the current crime-based deportation regime and the harsh consequences it creates for long-term green card holders and their families. Part II presents a normative argument for expanding green card holders' right to remain in the United States. This argument is based on Ayelet Shachar's *jus nexi* framework for identifying members of a polity and the idea that noncitizens have a liberty interest in remaining in the United States.[19] I contend that deporting members for minor criminal activity is an illegitimate deprivation of the liberty interest to remain in the United States because it is disproportionate. Within Part II, I respond to concerns that my approach to the right to remain may devalue American citizenship. Part III demonstrates that our first comprehensive post-entry

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[16] *See, e.g.*, SEYLA BENHABIB, THE RIGHTS OF OTHERS: ALIENS, RESIDENTS, AND CITIZENS (2004); LINDA BOSNIAK, THE CITIZEN AND THE ALIEN: DILEMMAS OF CONTEMPORARY MEMBERSHIP 82–93 (2006); JOSEPH H. CARENS, IMMIGRANTS AND THE RIGHT TO STAY (2010); HIROSHI MOTOMURA, AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES (2006); AYELET SHACHAR, THE BIRTHRIGHT LOTTERY: CITIZENSHIP AND GLOBAL INEQUALITY (2009); PETER J. SPIRO, BEYOND CITIZENSHIP: AMERICAN IDENTITY AFTER GLOBALIZATION (2008); MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY (1983); Joseph H. Carens, *The Case for Amnesty*, BOS. REV., May/June 2009, at 7.

[17] *See, e.g.*, BOSNIAK, *supra* note 16, at 82–93; CARENS, *supra* note 16; DAVID JACOBSON, RIGHTS ACROSS BORDERS: IMMIGRATION AND THE DECLINE OF CITIZENSHIP (1996); CHRISTIAN JOPPKE, CITIZENSHIP AND IMMIGRATION 28–30 (2010); SASKIA SASSEN, LOSING CONTROL? SOVEREIGNTY IN AN AGE OF GLOBALIZATION (1996); PETER H. SCHUCK, CITIZENS, STRANGERS, AND IN-BETWEENS: ESSAYS ON IMMIGRATION AND CITIZENSHIP (1998); SHACHAR, *supra* note 16; YASEMIN NUHOĞLU SOYSAL, LIMITS OF CITIZENSHIP: MIGRANTS AND POSTNATIONAL MEMBERSHIP IN EUROPE (1994); SPIRO, *supra* note 16; Dimitry Kochenov, Ius Tractum *of Many Faces: European Citizenship and the Difficult Relationship Between Status and Rights*, 15 COLUM. J. EUR. L. 169, 214–34 (2009); *see also* MARTHA C. NUSSBAUM, FRONTIERS OF JUSTICE: DISABILITY, NATIONALITY, SPECIES MEMBERSHIP 69–81 (2006) (discussing the capabilities approach to identifying core human entitlements).

[18] *See, e.g.*, JACOBSON, *supra* note 17; SCHUCK, *supra* note 17; SHACHAR, *supra* note 16; William Rogers Brubaker, *Membership Without Citizenship: The Economic and Social Rights of Noncitizens*, *in* IMMIGRATION AND THE POLITICS OF CITIZENSHIP IN EUROPE AND NORTH AMERICA 145 (William Rogers Brubaker ed., 1989). These scholars advocate increased access to citizenship for noncitizens rather than extending all of the rights currently coupled with citizenship status to noncitizens. *See, e.g.*, Brubaker, *supra*.

[19] *See* SHACHAR, *supra* note 16, at 16.

crime-based deportation regime was rooted in the proportionality principle. Part IV argues that reliance on the foundational norms of our crime-based deportation regime—connection and proportionality—has diminished and must be restored in order to have a more just deportation regime. Part V contends that citizenship status is an under- and over-inclusive proxy for membership that leaves numerous noncitizens' liberty interest in remaining in the United States inadequately protected. I conclude that in order to achieve this goal the right to remain cannot depend on citizenship status.

I. CRIME-BASED DEPORTATION

Citizenship status has become increasingly important in protecting an individual's liberty interest in remaining in the United States. United States citizens have an absolutely secure right to remain within the territorial boundaries of the United States.[20] Green card holders, technically referred to as lawful permanent residents (LPRs), have a relatively secure right to remain within the territorial boundaries of the United States after being admitted.[21] This right is not absolutely secure because it is subject to certain conditions. LPRs can be removed from the United States based on the deportation grounds provided in the Immigration and Nationality Act (INA). All noncitizens, including LPRs, are deportable for violating immigration rules and engaging in a variety of criminal activities.[22] One of the most important crime-based deportation grounds is conviction of an aggravated felony.[23] In addition to being deportable, an individual with an aggravated felony conviction is generally ineligible for discretionary relief from deportation, prohibited from returning to the United States, eligible for expedited removal proceedings, and subject to mandatory detention while in removal proceedings.[24]

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[20] SCHUCK, *supra* note 17, at 167.

[21] *See id.*

[22] 8 U.S.C. § 1227(a) (2012). See *infra* text accompanying notes 262–66 for details regarding the number of noncitizens deported based on criminal activity and the type of criminal activity.

[23] 8 U.S.C. § 1227(a)(2)(A)(iii) (stating "[a]ny alien who is convicted of an aggravated felony at any time after admission is deportable").

[24] *Id.* § 1182(a)(9)(A) (stating aggravated felons are inadmissible forever); *id.* § 1226(c)(1) (mandating detention during removal proceedings for aggravated felons); *id.* § 1228(a)(3) (providing for expedited proceedings); *id.* § 1229b(a)–(b) (making aggravated felons ineligible for cancellation of removal); *id.* § 1231(b)(3)(B) (limiting access to withholding of removal).

Individuals with an aggravated felony conviction are ineligible for Section 240A(a) cancellation of removal. *Id.* § 1229b(a). Individuals are ineligible for Section 240A(b) relief if they do not have good moral character, *id.* § 1229b(b)(1)(B), and Section 101(f) precludes the Attorney General from finding that an individual with an aggravated felony conviction has good moral character. *Id.* § 1101(f). Withholding of removal is generally available if the Attorney General decides that the alien's life or freedom would be

Individuals like Gerardo face these possibilities.[25] If aggravated felonies were crimes that were aggravated and felonies, then this outcome could be a proportionate response to criminal activity. The definition, however, is much broader. *Aggravated felony* is a term of art defined in the INA, and it can include state misdemeanors.[26] The term was introduced in 1988 and it was originally limited to the serious crimes of murder, drug trafficking, and illicit trafficking in firearms and destructive devices.[27] In the 1990s Congress significantly expanded the aggravated felony definition. Initial expansions used length of prison sentence to differentiate more serious crimes from less serious crimes. For example, a theft offense or crime of violence was only an aggravated felony if there was an imposed sentence of at least five years.[28] The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) reduced that sentence to at least one year.[29] The IIRIRA and other immigration reforms also added additional crimes to the aggravated felony

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threatened because of the alien's race, religion, nationality, membership in a particular social group, or political opinion. *Id.* § 1231(b)(3)(A). However, this relief is not available if the alien has been convicted "of a particularly serious crime [and thus] is a danger to the community of the United States." *Id.* § 1231(b)(3)(B)(ii). Individuals with aggravated felony convictions fall into both of these categories. *See id.* § 1231(b)(3)(B).

An exception to this is the availability of a Section 212(h) waiver. This waiver is available for individuals with an aggravated felony conviction if they are not a lawful permanent resident. *Id.* § 1182(h)(2). Section 212(h) waives specific crime-based inadmissibility grounds and can be relevant in deportation proceedings when an individual is seeking to adjust from nonimmigrant to immigrant status. The Attorney General can grant this form of discretionary relief if deportation will result in "extreme hardship to the United States citizen or lawfully resident spouse, parent, son, or daughter of such alien." *Id.* § 1182(h)(1)(B).

[25] Gerardo was prohibited from returning to the United States for his son's funeral. McDonnell, *supra* note 1. Section 212(a)(9)(A)(i) of the INA prohibited his return and he was not granted a waiver. *See* 8 U.S.C. § 1182(a)(9)(A)(i); McDonnell, *supra* note 1.

[26] 8 U.S.C. § 1101(a)(43); Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 HARV. L. REV. 1936, 1939 (2000).

[27] Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7342, 102 Stat. 4181, 4469–70 (current version at 8 U.S.C. § 1101(a)(43)).

[28] Immigration Act of 1990, Pub. L. No. 101-649, § 501, 104 Stat. 4978, 5048 (current version at 8 U.S.C. § 1101(a)(43)); Immigration and Nationality Technical Corrections Act of 1994, Pub. L. No. 103-416, § 222(a), 108 Stat. 4305, 4320–22 (current version at 8 U.S.C. § 1101(a)(43)).

[29] Pub. L. No. 104-208, div. C, § 321, 110 Stat. 3009-546, 3009-627 to -28 (codified as amended at 8 U.S.C. § 1101(a)(43)). For example, a noncitizen with a shoplifting conviction who obtained a one-year suspended sentence has an aggravated felony conviction even if the crime would be considered a state misdemeanor. *See* Morawetz, *supra* note 26, at 1939, 1942. This outcome is due to the expanded definition of an aggravated felony and the new definition of a term of imprisonment adopted in IIRIRA. *See id.* at 1939 n.16. A term of imprisonment now includes the period of time ordered by the court regardless of any time suspended or time actually served. 8 U.S.C. § 1101(a)(48). This further minimizes the usefulness of the imposed sentence as a proxy for seriousness.

definition like perjury and obstruction of justice.[30] A significant number of noncitizens are subject to deportation based on an aggravated felony conviction not only because of the expanding definition, but also because of the retroactive application of this definition.[31] Congress made the definition retroactive to facilitate administrative efficiency.[32] Consequently long-term LPRs can be deported based on pre-1996 criminal activity that was not a deportable offense at the time the crime was committed.[33]

Citizens like Antoinette avoid all of these consequences, but noncitizens like Gerardo face deportation without any opportunity to have their connections and contributions to the United States considered.[34] Deportation is the guaranteed response to an aggravated felony conviction for most

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[30] *See* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 440(e), 110 Stat. 1214, 1277–78 (codified as amended at 8 U.S.C. § 1101(a)(43)). The definition of an aggravated felony was expanded several times between 1988 and 1996. *See* Illegal Immigration Reform and Immigrant Responsibility Act § 321; Antiterrorism and Effective Death Penalty Act § 440(e); Immigration and Nationality Technical Corrections Act § 222(a); Immigration Act of 1990 § 501.

[31] *See* HUMAN RIGHTS WATCH, *supra* note 12, at 31.

[32] *See id.* at 32. Without retroactivity federal immigration authorities would have to determine which aggravated felony definition applied to which noncitizens. *Id.* This additional step in determining deportability was predicted to require significant administrative resources and retroactivity eliminated this problem. *See id.* at 31–32.

[33] Nancy Morawetz, *Rethinking Retroactive Deportation Laws and the Due Process Clause*, 73 N.Y.U. L. REV. 97, 106–18 (1998) [hereinafter Morawetz, *Rethinking Retroactive Deportation*]; Morawetz, *supra* note 26, at 1936–37. One might contend that LPRs should realize that their ability to reside in the United States could be threatened if they engage in criminal activity. While the 1996 reforms may have added new retroactive deportation grounds, all they did was make a broader range of criminal activity the basis for deportation. Thus the general security of LPRs residence rights remained unchanged. This would be a reasonable conclusion if it were reasonable to assume that any criminal activity constitutes a serious threat to public safety or national security. The crime-based deportation grounds before 1996, particularly the definition of an aggravated felony, were designed to remove noncitizens who engaged in criminal activity that was serious and threatened public safety. *See infra* text accompanying note 264. Congressional discussions and debates surrounding the 1996 reforms emphasized this as the justification for crime-based deportation grounds. *See infra* text accompanying note 264. Thus it would not be reasonable for LPRs to conclude that any criminal activity (e.g., jaywalking or speeding) would be serious enough to constitute a serious threat to public safety or national security. It would be reasonable for LPRs to believe that serious crimes like murder, rape, drug trafficking, or sexual abuse of a minor would be the type of criminal activity giving rise to deportation. Yet the 1996 reforms included a much broader range of criminal activity. Not only is the purchase of a $10 bag of marijuana now a deportable offense, so is perjury and receipt of stolen property. *See supra* text accompanying notes 29–30. LPRs should not get a pass for this activity. They, like citizens, should be subject to the punishments provided for within the criminal justice system. Deportation, however, should be limited to the instances in which it would be proportionate.

[34] Gerardo was not eligible for a Section 212(h) waiver because his aggravated felony was committed after his admission as an LPR. *See* 8 U.S.C. § 1182(h).

noncitizens.[35] This is a departure from the system that existed before 1996. Between 1917, when Congress enacted the first comprehensive post-entry crime-based deportation regime, and 1996, a noncitizen's connections to the polity, rather than citizenship status, were determinative of his or her ability to remain in the United States after a criminal conviction.[36]

The expansion of the aggravated felony definition to include crimes like perjury and receipt of stolen property has made noncitizens deportable for a wide range of criminal activity. What makes the current system particularly harsh is that those with aggravated felony convictions are generally ineligible for discretionary relief. Once found guilty of an aggravated felony, deportation is a near certainty. This approach to crime and deportation ignores the various liberty interests that noncitizens can have in remaining in the United States and it allows for disproportionate outcomes.

II. *JUS NEXI* AND A RIGHT TO REMAIN

The *jus nexi* principle provides a basis for noncitizens, specifically green card holders, to be recognized as members of the United States polity.[37] Membership status within the polity strengthens these individuals' liberty interest in remaining in the United States. Deportation infringes upon this interest and should only be done when it is a proportionate response to an immigrant's activities in the United States. This Part begins by laying out the *jus nexi* principle and then demonstrates the significant role that this principle had in protecting noncitizens' right to remain in the United States. Some may contend that this approach to the right to remain devalues citizenship. The final section of this Part responds to that critique.

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[35] *See* Padilla v. Kentucky, 130 S. Ct. 1473, 1481 (2010); Morawetz, *Rethinking Retroactive Deportation*, *supra* note 33, at 121.

[36] Morawetz, *Rethinking Retroactive Deportation*, *supra* note 33, at 107–10; *see infra* text accompanying notes 116–17. Post-entry-conduct deportation grounds are deportation grounds that focus on the activity of noncitizens after they have been admitted to the United States. *See* DANIEL KANSTROOM, DEPORTATION NATION: OUTSIDERS IN AMERICAN HISTORY 6 (2007). The most common post-entry-conduct grounds are based on criminal convictions in the United States. *See* 8 U.S.C. § 1227(a). These deportation grounds are contrasted with what Daniel Kanstroom refers to as "extended border control" deportation grounds. *See* KANSTROOM, *supra*, at 5–6. These deportation grounds require the deportation of individuals who should never have been admitted or who have violated the terms of their admission. *See id.* at 5.

[37] SHACHAR, *supra* note 16, at 164–66.

A. Jus Nexi

1. The Connection Principle

Ayelet Shachar has argued that citizenship should be available based on the *jus nexi* principle in addition to, or instead of, the *jus sanguinis* and *jus soli* principles.[38] The *jus nexi* principle supports allocating citizenship based on an individual's genuine connection to a polity rather than a bloodline connection to the State or birth within the State's territory.[39] Within this framework political membership is conveyed based on "connection, union, or linkage" to the state of residence.[40] The emphasis is on the "social fact of membership."[41] The social fact of membership is evident when an individual has a "genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties" with a specific state.[42] This can be said to exist when "an individual's long-term circumstances of life . . . link her own well-being to a particular polity."[43]

Shachar's *jus nexi* principle draws on "the growing acceptance of the genuine-connection criterion in court decisions, regulatory regimes, and academic commentaries."[44] For example, in 1955 the International Court of Justice (ICJ) adopted a "functional, genuine-connection" test to determine whether to give international effect to a naturalized citizen's new citizenship.[45] In the Nottebohm Case, a German citizen resided in Guatemala for the majority of his adult life, but was naturalized and became a citizen of Liechtenstein in 1939.[46] Guatemala refused to recognize Nottebohm as a citizen of Liechtenstein because he had minimal connections to Liechtenstein.[47] His habitual residence had remained in Guatemala, as did his

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[38] *See id.* at 165. The *jus soli* principle extends citizenship based on birth within the territory. *Id.* at 7. The *jus sanguinis* principle extends citizenship based on having a blood relative who is a citizen. *Id.*

[39] *Id.* at 16.

[40] *Id.* at 16, 165.

[41] *Id.* at 165 (emphasis omitted).

[42] Nottebohm Case (Liech. v. Guat.), 1955 I.C.J. 4, 23 (Apr. 6).

[43] Rainer Bauböck, *Stakeholder Citizenship and Democratic Participation in Migration Contexts*, *in* THE TIES THAT BIND: ACCOMMODATING DIVERSITY IN CANADA AND THE EUROPEAN UNION 105, 111 (John Erik Fossum et al. eds., 2009).

[44] SHACHAR, *supra* note 16, at 165.

[45] *Id.* at 166; *see also Nottebohm Case*, 1955 I.C.J. at 22–23 (establishing the functional, genuine-connection test).

[46] *Nottebohm Case*, 1955 I.C.J. at 13.

[47] *Id.* at 19.

business activities and some of his family ties.[48] The ICJ concluded that citizenship "constitute[s] the juridical expression of the fact that the individual upon whom it is conferred . . . is in fact more closely connected with the population of the State conferring nationality than with that of any other State."[49]

While Shachar uses the *jus nexi* principle to advocate for increased access to citizenship, I however contend that this principle also supports recognition of something less than citizenship—the right to remain.[50] The *jus nexi* principle provides a basis for identifying members of a polity. Rather than identifying members based on formal status, the *jus nexi* principle allows those with "real and substantive ties" to a polity to be recognized as members entitled to certain rights and protections.[51] It is my contention that individuals with these "real and substantive ties" have a strong liberty interest in remaining in the United States.[52]

Within U.S. law, immigration-related rights have been extended to noncitizens based on the *jus nexi* principle. Hiroshi Motomura's notion of "immigration as affiliation" captures this perspective.[53] "This is the view that the treatment of lawful immigrants and other noncitizens should depend on the ties that they have formed in this country."[54] Noncitizens' connections have been relevant in determining who is eligible for deportation, who is actually deported, who can be admitted to the United States, and who is seeking admission. For example, length of residence has been used to define who within the noncitizen population is deportable.[55] Certain deportation grounds, like a crime-involving-moral-turpitude conviction, only apply within the first five years of admission.[56] A statute of limitations is essentially created that exempts long-term residents from the deportation ground.[57] Favorable grants

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48 *Id.* at 13, 19.

49 *Id.* at 23.

50 I believe that the *jus nexi* principle provides a basis for citizenship, but I do not think that citizenship status is necessary to protect certain noncitizens' right to remain in the United States.

51 SHACHAR, *supra* note 16, at 166.

52 *See id.* See *infra* Part II.A.2 for further discussion of noncitizens' liberty interest in remaining in the United States.

53 MOTOMURA, *supra* note 16, at 10–12.

54 *Id.* at 11.

55 *See, e.g.*, 8 U.S.C. § 1227(a)(2)(A)(i) (2012) (declaring an alien deportable based, in part, on a conviction for a crime involving moral turpitude committed within five years (or ten years for an alien having lawful permanent resident status) after admission).

56 *Id.*

57 *Id.* § 1227.

of discretionary relief from deportation have also depended on length of residence, family ties, employment history, property ownership, business connections, and service in the U.S. Armed Forces.[58] Additionally certain admission categories are based on family connections to the United States, and connections more generally have been used to determine whether or not a noncitizen is seeking admission.[59]

Noncitizens' connections to the United States are also based on their obligations to the polity. For example, territorial presence gives rise to an obligation for all noncitizens to pay taxes and abide by state and federal law.[60] Male noncitizens have an additional obligation of registering with the Selective Service (the draft).[61]

The Supreme Court has utilized the *jus nexi* principle to allocate rights to noncitizens in the immigration context. The various connections and responsibilities that noncitizens develop in the United States have played a role in determining what rights noncitizens have in the immigration context and how those rights will be protected. For example, the Court has repeatedly held that noncitizens physically present in the United States or returning to the United States have greater due process rights than noncitizens at the border seeking admission for the first time.[62] This has occurred despite the Court's insistence that admission and residence in the United States are privileges for

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[58] *See, e.g.*, *In re* C-V-T-, 22 I. & N. Dec. 7, 11 (B.I.A. 1998) (citing *In re* Marin, 16 I. & N. Dec. 581, 584–85 (B.I.A. 1978)); Angela M. Banks, *Deporting Families: Legal Matter or Political Question?*, 27 GA. ST. U. L. REV. 489, 508–09 (2011).

[59] In a series of cases, the Supreme Court had to determine whether a returning LPR was seeking admission. *E.g.*, Landon v. Plasencia, 459 U.S. 21, 22–23 (1982); Rosenberg v. Fleuti, 374 U.S. 449, 450–53 (1963); Kwong Hai Chew v. Colding, 344 U.S. 590, 591–92 (1953). If the LPR was seeking admission, he or she would be subject to the exclusion grounds and receive less procedural protection. *See Plasencia*, 459 U.S. at 25–27. If the LPR was not seeking admission, he or she would not have to contend with the exclusion grounds and would be admitted to the United States. *See id.* In *Kwong Hai Chew v. Colding*, *Rosenberg v. Fleuti*, and *Landon v. Plasencia*, the returning LPRs had potentially engaged in activity since their initial admission that would make them inadmissible. *Id.* at 23–24; *Rosenberg*, 374 U.S. at 450–51; *Colding*, 344 U.S. at 594–95. Thus, if the exclusion grounds applied, they would be denied the ability to return to their life in the United States. In each of these cases, the fact that the noncitizens were LPRs and had resided in the United States for significant periods of time influenced the Court's analysis. *See Plasencia*, 459 U.S. at 32–34; *Rosenberg*, 374 U.S. at 460–61; *Colding*, 344 U.S. at 592.

[60] Adam B. Cox & Eric A. Posner, *The Rights of Migrants: An Optimal Contract Framework*, 84 N.Y.U. L. Rev. 1403, 1410 (2009).

[61] Selective Service Act of 1948, ch. 625, § 3, 62 Stat. 604, 605.

[62] *See, e.g.*, *Plasencia*, 459 U.S. at 32–33; *Colding*, 344 U.S. at 596–98; United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 544–47 (1950); Yamataya v. Fisher (The Japanese Immigrant Case), 189 U.S. 86, 101 (1903). *But see* Shaughnessy v. United States *ex rel*. Mezei, 345 U.S. 206, 212–15 (1953).

noncitizens.[63] The *jus nexi* principle helps to explain the additional protections for present and returning noncitizens.

Membership within a polity is a proxy for determining who is so connected to the polity that deportation would be an excessively harsh consequence. Deportation often deprives noncitizens of the ability to reside in the place that they know as home. As Justice Douglas explained:

> [Deportation] is punishment in the practical sense. It may deprive a man and his family of all that makes life worth while [sic]. Those who have their roots here have an important stake in this country. Their plans for themselves and their hopes for their children all depend on their right to stay. If they are uprooted and sent to lands no longer known to them, no longer hospitable, they become displaced, homeless people condemned to bitterness and despair.[64]

Joseph Carens echoed this sentiment when he wrote that "there is something deeply wrong in forcing people to leave a place where they have lived for a long time."[65] This is because:

> Most people form their deepest human connections where they live—it becomes home. Even if someone has arrived only as an adult, it seems cruel and inhumane to uproot a person who has spent fifteen or twenty years as a contributing member of society in the name of enforcing immigration restrictions.[66]

While Carens focuses on deporting unauthorized migrants, his comments about connection and membership apply to all noncitizens. Deportation for nonmembers may be disruptive and dash hopes for a different or better life, but it does not deprive them of their home as it does for members.

Historically, the right to reside within a particular community has been tied to one's membership status within the community.[67] Members could not be banished or exiled from their community, but nonmembers could be.[68] Throughout U.S. history different criteria have been used to define members, including economic status, adherence to local rules and customs, and length of stay within the community.[69] During the mid-nineteenth century, U.S. states

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63 *Plasencia*, 459 U.S. at 32; Kleindienst v. Mandel, 408 U.S. 753, 762 (1972); *Knauff*, 338 U.S. at 542.
64 Harisiades v. Shaughnessy, 342 U.S. 580, 600 (1952) (Douglas, J., dissenting).
65 CARENS, *supra* note 16, at 12.
66 *Id.*
67 *See* KANSTROOM, *supra* note 36, at 123–43.
68 *Id.*
69 *Id.*

began prohibiting banishment and exile as a form of punishment in state constitutions.[70] The state legislatures concluded that the comity costs of banishment and exile were too high to maintain the practice.[71] Comity does not raise the same concerns in the international context, and by 1917 the federal government was willing to banish or exile noncitizens based on post-entry conduct.[72] Yet Congress was not willing to banish "our" criminals because it was viewed as a disproportionate response to criminal activity.[73] Congressional discussions about who is one of "ours" focused on factors related to the *jus nexi* principle.[74]

Scholars such as Professors Cox and Posner have critiqued a membership approach to allocating immigration-related rights.[75] Rather than focusing on membership status, Cox and Posner have contended that rights should be allocated based on an examination of migrants' reasons for entering a state and the state's interest in having individuals migrate and remain.[76] In the context of deportation, Cox and Posner identified flexibility as an important state interest.[77] Flexibility ensures that the State can terminate the residence of noncitizens "any time events change such that the benefits from the migrant's presence no longer exceed the costs."[78] Granting the State maximum

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[70] *See, e.g.*, ALA. CONST. art. I, § 30; ARK. CONST. art. II, § 21; GA. CONST. art. I, § 1, para. 21; ILL. CONST. art I, § 11; KAN. CONST. Bill of Rights § 12 (amended 1972); MD. CONST. art. XXIV; MASS. CONST. pt. 1, art. XII; NEB. CONST. art. I, § 15; N.H. CONST. pt. 1, art. 15; N.C. CONST. art. I, § 19; OHIO CONST. art. I, § 12; OKLA. CONST. art. II, § 29; TENN. CONST. art. I, § 8; TEX. CONST. art. I, § 20; VT. CONST. ch. I, art. 21; W. VA. CONST. art. III, § 5. The banishment and exile prohibited was interstate. *See, e.g.*, ARK. CONST. art. II, § 21. Intrastate banishment has been held to be constitutional under some of these state constitutions. *E.g.*, State v. Collett, 208 S.E.2d 472, 472, 474 (Ga. 1974).

[71] *Cf.* Wm. Garth Snider, *Banishment: The History of Its Use and a Proposal for Its Abolition Under the First Amendment*, 24 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 455, 466 (1998) (discussing comity as a justification for eliminating banishment). Banishment is, however, used intrastate as a condition of release for sex offenders. *See, e.g.*, Sarah Geraghty, *Challenging the Banishment of Registered Sex Offenders from the State of Georgia: A Practitioner's Perspective*, 42 HARV. C.R.-C.L. L. REV. 513 (2007); Amber Leigh Bagley, Comment, *"An Era of Human Zoning": Banishing Sex Offenders from Communities Through Residence and Work Restrictions*, 57 EMORY L.J. 1347 (2008).

[72] *See* Immigration Act of 1917, ch. 29, § 19, 39 Stat. 874, 889–90.

[73] *See* 42 CONG. REC. 2723, 2752–53 (1908). In 1916, Representative Riley J. Wilson said that an immigrant who comes "with a good record, with good purposes and good intentions, and makes good when he arrives here" should not be deported based on post-entry criminal activity because that immigrant "might be our criminal, and it might not be just fair to deport him." *Restriction of Immigration: Hearing on H.R. 10384 Before the H. Comm. on Immigration & Naturalization*, 64th Cong. 15 (1916) [hereinafter *1916 Hearings*] (statement of Rep. Riley J. Wilson, Member, H. Comm. on Immigration & Naturalization).

[74] *See infra* Parts II.B and IV.C.

[75] Cox & Posner, *supra* note 60, at 1407–09.

[76] *Id.*

[77] *Id.* at 1407–08.

[78] *Id.* at 1407.

flexibility, however, could be counterproductive.[79] If migrants fear that they can be removed relatively easily, they are unlikely to make the country-specific investments that would enable them to succeed and that make immigration beneficial for the State.[80] Thus Cox and Posner concluded that the optimal migration contract will balance the State's interest in flexibility with the noncitizens' interest in limiting the State's deportation power.[81]

Cox and Posner have contended that this approach to immigrant rights provides a wider range of rights and opportunities than a lock-step membership approach.[82] While the approach offered in this Article focuses on membership as the basis for allocating rights, it does not articulate a lock-step approach. The right to remain is protected based on a variety of factors in order to allow a variety of outcomes. Green card holders' connections, commitment, and obligations to the United States, in addition to the crime committed, are evaluated to determine if deportation would be proportionate. The emphasis on proportionality grants green card holders the assurances they need and the flexibility the government desires. This approach ensures green card holders that if they make the effort to socially, culturally, and economically integrate into U.S. society they cannot be easily removed. This approach also grants the government sufficient flexibility to remove individuals in the specific cases in which removal is necessary.

2. A Liberty Interest in Remaining

The right to remain is based on an individual's liberty interest in remaining in his state of residence. The U.S. Constitution ensures that no person shall be "deprived of life, liberty, or property, without due process of law."[83] Thus all persons' liberty interests are protected under U.S. law. Yet membership plays a decisive role in determining whether an individual has been legitimately deprived of her liberty interest in remaining in the United States after a criminal conviction.

The United States Supreme Court first recognized a resident noncitizen's liberty interest in remaining in the United States in 1903 in *Yamataya v.*

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79 *Id.* at 1407–08.

80 *Id.* Country-specific investments include learning the local language and developing social networks. *Id.* at 1407.

81 *Id.* at 1408 (arguing that this balance can be achieved "by granting migrants more or less generous rights and by making it harder or easier for the government to change those rights").

82 *Id.* at 1408–09.

83 U.S. CONST. amends. V, XIV.

Fisher.[84] Kaoru Yamataya entered the United States on July 11, 1901.[85] Four days after her admission, an immigration inspector concluded that she entered the United States in violation of law because she was a "pauper and a person likely to become a public charge."[86] The Secretary of the Treasury ordered that she be taken into custody and deported to Japan.[87] Yamataya contested the deportation order arguing that she had been deprived of liberty without due process of law.[88] The Court recognized that "no person shall be deprived of his liberty without opportunity, at some time, to be heard, before such officers, in respect of the matters upon which that liberty depends."[89] Deporting a noncitizen "who has entered the country, and has become subject in all respects to its jurisdiction, and a part of its population, although alleged to be illegally here" implicates a liberty interest.[90] Before a noncitizen can be deprived of this liberty interest, he or she must be given "all opportunity to be heard upon the questions involving his right to be and remain in the United States."[91] In *Bridges v. Wixon* a noncitizen challenged his deportation order.[92] The Court explicitly stated that "the liberty of an individual is at stake" in deportation cases.[93] Echoing a similar sentiment seven years later, Justice

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[84] 189 U.S. 86, 100–01 (1903). The Court has been willing to police the procedures used when liberty interests are infringed upon, but not the substantive decisions implicating liberty interests. *See id.* at 100 ("Leaving on one side the question whether an alien can rightfully invoke the due process clause of the Constitution . . . we have to say that the rigid construction of the acts of Congress suggested by the appellant are not justified.").

[85] *Id.* at 87.

[86] *Id.* The Court's recognition of a noncitizen's liberty interest in remaining in the United States marked an important departure from its 1893 conclusion that a State's power to deport noncitizens is "absolute and unqualified." Fong Yue Ting v. United States, 149 U.S. 698, 707 (1893). In *Fong Yue Ting*, the Court concluded that international law provided no limits on a State's power to deport noncitizens and did not recognize any individual interests at stake for deportation. *Id.* at 708. The Court did acknowledge that the U.S. Constitution could provide limits, but concluded that the power to deport had been allocated to the political branches of government and the courts would not police the substantive basis for deportation decisions. *Id.* at 711–13.

[87] *Yamataya*, 189 U.S. at 87.

[88] *See id.* at 87–88.

[89] *Id.* at 101.

[90] *Id.*

[91] *Id.*

[92] 326 U.S. 135 (1945).

[93] *Id.* at 154. Bridges was ordered deported for being affiliated with the Communist Party, and the Court held that the government misapplied this deportation ground. *Id.* at 156–57. The Court stated that due to the liberty interest at stake with deportation, "[m]eticulous care must be exercised lest the procedure by which [the immigrant] is deprived of that liberty not meet the essential standards of fairness." *Id.* at 154. While the Court has not always required robust procedural guarantees protecting this liberty interest, the Court has consistently recognized that deportation affects noncitizens' liberty interest in remaining in the United States. In *Galvan v. Press*, the Court noted:

Douglas stated that he "would stay the hand of the Government and let those to whom we have extended our hospitality and who have become members of our communities remain here and enjoy the life and liberty which the Constitution guarantees."[94]

While recognizing noncitizens' liberty interest in remaining in the United States, Justice Douglas acknowledged that there were limits. He could imagine certain noncitizen activities endangering public welfare such that deportation would be appropriate regardless of length of residence.[95] He invoked the proportionality principle to strike the appropriate balance. I similarly contend that recognizing that noncitizens have a liberty interest in remaining in the United States does not mean that they could not be deported under any circumstances. Individuals have a variety of interests, but they are not absolute. Individual interests and state interests have to be balanced against one another. For example, when an individual has been convicted of a crime she can be sent to prison. Imprisonment infringes on an individual's liberty interest, yet it is permitted in light of the State's interest in protecting public safety. Yet the State is limited in how it can punish because constitutional provisions protect against disproportionate or excessive punishment.

The Court has not evaluated whether deportation is a disproportionate or excessive punishment because it held in 1893 that deportation is not punishment.[96] I have previously critiqued the Court's continued reliance on this conclusion in the face of changing deportation grounds.[97] In 1893,

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> [C]onsidering what it means to deport an alien who legally became part of the American community, and the extent to which, since he is a 'person,' an alien has the same protection for his life, liberty and property under the Due Process Clause as is afforded to a citizen, deportation without permitting the alien to prove that he was unaware of the Communist Party's advocacy of violence strikes one with a sense of harsh incongruity.

347 U.S. 522, 530 (1954).

Recognizing the liberty interests implicated by deportation is the basis for the Court requiring that deportation proceedings adhere to constitutional due process requirements. *See* Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 COLUM. L. REV. 1625 (1992). Since *Yamataya*, the Court has provided robust judicial review of claims alleging that deportation proceedings violate procedural due process. *See* BOSNIAK, *supra* note 16, at 51.

94 Harisiades v. Shaughnessy, 342 U.S. 580, 601 (1952) (Douglas, J., dissenting).

95 *Id.* (noting that there could be "occasions when the continued presence of an alien, no matter how long he may have been here, would be hostile to the safety or welfare of the Nation due to the nature of his conduct").

96 Fong Yue Ting v. United States, 149 U.S. 698, 709, 730 (1893).

97 Banks, *supra* note 11, at 1659–63.

deportation was used to rectify admissions mistakes.[98] It was not until 1917 that Congress enacted a comprehensive regime whereby post-entry criminal activity was the basis for deportation.[99] The Supreme Court has recently recognized the punitive nature of such deportation in *Padilla v. Kentucky*.[100] In this case the Court acknowledged that "deportation is an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes."[101]

While there is a growing judicial awareness of the punitive nature of deportation, the Court has recognized the liberty interests at stake with deportation since 1903. The *jus nexi* principle assists in determining when deportation is disproportionate and thus an illegitimate deprivation of that liberty interest.

B. The Historical Case

In 1917 Congress considered noncitizen connections to the polity relevant in determining who would be deportable based on post-entry criminal activity. Length of residence within the United States and citizenship were the two factors most commonly discussed.[102] This section demonstrates how Congress reached a consensus in 1917 that eligibility for deportation should be based on the *jus nexi* principle rather than citizenship status.

Some members of Congress argued that foreign-born residents should be deportable based on post-entry conduct until the time that they became citizens.[103] Others were concerned that citizenship was an under-inclusive

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98 *Id.* at 1651.

99 KANSTROOM, *supra* note 36, at 133.

100 130 S. Ct. 1473 (2010).

101 *Id.* at 1480 (footnote omitted).

102 Aaron Levy of the National Liberal Immigration League remarked that "it is a difficult question to determine just what is the right limit to impose." *Hearing Relative to the Dillingham Bill, S. 3175, to Regulate the Immigration of Aliens to and the Residence of Aliens in the United States: Hearing Before the H. Comm. on Immigration & Naturalization*, 62nd Cong. 44 (1912) [hereinafter *1912 Hearings*].

103 An interesting constitutional concern raised during the debates was whether Congress had the authority to deport a noncitizen regardless of how long he or she had resided in the United States. In 1916, the provision before the House required the criminal conviction to be based on an act committed within five years of entry. 53 CONG. REC. 5165 (1916). Representative Bennet explained that the House Immigration and Naturalization Committee chose five years because it was concerned that deportation based on a criminal act any time after admission would be unconstitutional. *Id.* Basing his concerns on a Supreme Court opinion, he stated that Justice Holmes had intimated that "you could not provide that an alien could be deported at any time; that there had to be a limit, and that the length of time for deportation was analogous to the time in which a person could be naturalized." *Id.* Representative Bennet was quickly corrected by Representatives Burnett and Sabath.

proxy for membership and that length of residence in the United States better identified members entitled to remain. Proponents of crime-based deportation thought that if an immigrant naturalized then "he takes his chance with the rest of us, but until he assumes the responsibilities of citizenship with the rest of us, he should be subject to deportation if he shows that he is not the kind of man we want here."[104] For Arthur Woods, the police commissioner of New York City, membership categories less than citizen did not entail the same level of responsibilities, and thus should not support a right to remain.[105] This idea was shared by Representative Bennet of New York who introduced the bills in 1908, 1910, and 1911 providing for post-entry crime-based deportation.[106] Representative Bennet's proposals would have made all noncitizens deportable if convicted of a serious crime.[107] It did not matter how long the noncitizen had resided in the United States, what connections he or she had, or what impact deportation would have on United States interests. These proposals were not enacted because a congressional consensus developed that some noncitizens were "ours" even though they had not naturalized.[108]

In 1917 the *jus nexi* principle was operationalized as length of residence in the United States. Noncitizens were only deportable for a crime involving moral turpitude within the first five years of admission.[109] Congress presumed that noncitizens developed a genuine connection to the United States in five years.[110] Deportation for a single conviction for a crime involving moral turpitude after five years was viewed as disproportionate.[111] Congress reached a different conclusion regarding the proportionality of deporting long-term

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Id. at 5165–68. Representative Burnett informed the House that the case referred to by Representative Bennet had been overruled in 1914. *Id.* at 5165 (referencing Lapina v. Williams, 232 U.S. 78 (1914)). Representative Sabath reminded the House that existing law provided for the deportation of noncitizens engaging in prostitution any time after their admission to the United States. *Id.* at 5168. This law had been found constitutional and was used to deport 214 prostitutes and procurers by the end of the 1915 fiscal year. *Id.*

104 *1916 Hearings*, *supra* note 73, at 12 (statement of Arthur Woods, Police Comm'r of New York City).

105 *Id.*

106 *Id.* at 13.

107 *See* 42 CONG. REC. 2752 (1908).

108 *See 1916 Hearings*, *supra* note 73, at 13–14 (statement of Rep. Adolph J. Sabath, Member, H. Comm. on Immigration & Naturalization) ("A great many people who have been here a great many years can not [sic] due to unfortunate conditions that exist, become citizens. Meanwhile they might have been married; they might have an American wife, a woman who has been born here, and they might have two or three children.").

109 Immigration Act of 1917, ch. 29, § 19, 39 Stat. 874, 889. The Immigration Act of 1917 made post-entry criminal activity deportable by making noncitizens with a crime-involving-moral-turpitude conviction deportable. *See infra* Part III.B.

110 53 CONG. REC. 5165–72 (1916).

111 *Id.*

residents for prostitution-related crimes and multiple convictions for crimes involving moral turpitude.[112]

Time provides for the development of connections. If a noncitizen engaged in criminal activity after developing the connections that give rise to membership, Representative Wilson of Louisiana concluded that the United States would have to take responsibility for that. He said:

> Now, I agree with the chairman that the man who may come here with a good record, with good purposes and good intentions, and makes good when he arrives here, owing to the fact that our atmosphere is not so perfect as it might be and his associates might not be of the best, might not be entirely responsible for the commission of a crime. *I feel as if he might be our criminal, and it might not be just fair to deport him.*[113]

Representative Burnett of Alabama agreed with this perspective, and the House Committee on Immigration did not take Commissioner Woods's recommendation to provide for deportation any time before naturalization.[114] Five years came to represent the probationary period for becoming part of the American community. One needed to reside in the United States for five years to become a U.S. citizen, and after residing in the United States for five years one could not be deported based on a crime involving moral turpitude.[115]

In 1917, Congress decided that the right to remain should extend to those who were members of the polity based on the social facts of their lives.[116] The

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[112] Prostitution-related crimes became deportation grounds in 1907. KANSTROOM, *supra* note 36, at 125. This and the subsequent prostitution-related deportation grounds were aimed at rectifying admission mistakes. Prostitutes were ineligible for admission and the deportation grounds provided for their removal if they were mistakenly admitted to the United States. *Id.* Initially there was a three-year statute of limitations but immigration officers found it difficult to accurately determine a noncitizen's entry date. *Id.* Women could avoid deportation by claiming admission more than three years prior. *Id.* at 125–26. The statute of limitations was removed to address this problem. *Id.* Individuals with multiple crimes-involving-moral-turpitude convictions were viewed as recidivists and their deportation was deemed proportionate regardless of their connections to the United States. 53 CONG. REC. 5169 (1916).

[113] *1916 Hearings*, *supra* note 73, at 15 (emphasis added).

[114] The provisions for anarchists and prostitutes are an exception. Noncitizens could be deported for these actions any time after admission. Immigration Act of 1917, ch. 29, § 19, 39 Stat. 874, 889.

[115] Representative Sabath attempted to change the five-year period to three years in 1916. 53 CONG. REC. 5169 (1916). He seemed to believe that genuine connections to the United States developed before five years. *See id.* Representative Burnett responded by noting that the provisions for judicial recommendation against deportation would mitigate any harshness. *Id.*

[116] MAE M. NGAI, IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA 59 (2004) (noting that the use of statutes of limitations for deportation grounds reflected "the general philosophy of the melting pot: it seemed unconscionable to expel immigrants after they had settled in the country and had

social fact of membership for noncitizens was determined by examining the connections that an immigrant had to the United States.[117] Between 1917 and 1996, factors such as length of residence, military service, community service, family ties, community connections, property ownership, and business connections to the polity were used to identify members.[118] Members were seen to have a heightened liberty interest in remaining in the United States, and this interest was protected through statutes of limitations and access to discretionary relief.

Congressional conclusions about the proportionality of deportation varied between 1917 and 1996. As concerns about national security increased, Congress became less concerned that deportation would be a disproportionate response.[119] For example, the 1952 Immigration and Nationality Act added numerous new deportation grounds.[120] Many of the additions reflected the United States' embroilment in the Cold War and deep concerns about national security. Noncitizens were deportable for being members of the Communist Party of the United States or advocating communism, failing to comply with various provisions of the Subversive Activities Control Act of 1950, and engaging in activities prejudicial to the public interest.[121] Of the new deportation grounds, only two included a statute of limitations—alien smuggling and failure to comply with Title I of the Alien Registration Act.[122] The same trend is evident with the 1996 reforms. At that time, Congress viewed unauthorized migration and violent drug crimes as serious enough to warrant deportation regardless of a noncitizen's social membership. There also

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begun to assimilate"); *see also id.* at 75 (explaining that unauthorized European immigrants in the late 1920s and 1930s "were accepted as members of society" and deporting them "struck many as simply unjust" because it "caused hardship and suffering to these immigrants and their families").

[117] Another factor that was implicitly considered was race and ethnicity. Historian Mae Ngai has documented the role of race and ethnicity in perceptions about which immigrants were accepted as members of society. She notes that Mexican migrants were less likely to be viewed as members of American society despite long-term residence and family ties. *Id.* at 75, 82. The role of race and ethnicity in shaping ideas about membership in American society is beyond the scope of this Article. This Article focuses on the idea that noncitizens could be considered members of American society despite their lack of citizenship status.

[118] *See, e.g.*, *In re* C-V-T-, 22 I. & N. Dec. 7, 11 (B.I.A. 1998) (citing *In re* Marin, 16 I. & N. Dec. 581, 584–85 (B.I.A. 1978)).

[119] With the adoption of each law, more and more noncitizens were deportable. While connection became less relevant in defining who was deportable, it remained important in deciding which noncitizens actually got deported until 1996.

[120] Immigration and Nationality Act of 1952, ch. 477, § 241(a), 66 Stat. 163, 204–08 (current version at 8 U.S.C. § 1227 (2012)).

[121] *Id.* § 241(a)(6)(C)–(E), (7). Other additions dealt with general criminal matters like convictions related to firearms and narcotics and immigration-related crimes like alien smuggling. *Id.* § 241(a)(11), (13), (14).

[122] *Id.* § 241(a)(13), (15) (providing a five-year statute of limitations).

seemed to be some presumption that unauthorized migrants have few meaningful connections to or within the United States to give rise to social membership.

Between 1917 and 1996, the *jus nexi* principle played an important role in determining which noncitizens were considered members and thus not subject to post-entry crime-based deportation grounds. Over time concerns about national security and public safety have shifted congressional concerns about who is a member, yet the *jus nexi* principle has not been abandoned.

C. Devaluing Citizenship?

The conception of membership articulated in this Article is based on connections, commitment, and obligation to the state of residence rather than legal status. Scholars such as Peter Schuck and David Jacobson have argued that the decreasing relevance of citizenship status for legal rights and economic opportunities devalues citizenship.[123] The lack of significant distinction between green card holders and citizens reduces LPRs' incentive to naturalize and "alter[s] the social significance of citizenship."[124] Professor Schuck has identified four dangers associated with devalued American citizenship.[125] The first is compromising effective governance.[126] By having a large population of noncitizens who are unable to vote, government officials have little incentive to identify and respond to the claims of noncitizens.[127] This creates a situation in which "the gap between power and accountability widens and the potential for exploiting non-citizens grows."[128] The second danger is related to cultural assimilation.[129] In pursuit of naturalization, noncitizens learn English, civics, and American history.[130] Absent an incentive to naturalize, noncitizens may not develop these skills, which are necessary for their incorporation within American society and the effective functioning of the United States.[131] Professor Schuck's third danger is that a devaluation of American citizenship

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123 SCHUCK, *supra* note 17, at 163 ("United States citizenship . . . confers few legal or economic advantages over the status of permanent resident alien."); *cf.* JACOBSON, *supra* note 17, at 40 (focusing on Western European, and particularly German, experiences).

124 SCHUCK, *supra* note 17, at 163–64.

125 *Id.* at 171–72.

126 *Id.* at 171.

127 *Id.*

128 *Id.*

129 *See id.* at 171–72; *see also* JACOBSON, *supra* note 17, at 40 (discussing similar concerns in France).

130 *See* SCHUCK, *supra* note 17, at 172 (noting that citizenship requires "mastery of language and social knowledge").

131 *Id.* at 171–72.

may undermine the civic virtues underlying democracy.[132] If noncitizens are able to obtain the benefits of citizenship without the obligations, they may develop an "entitlement mentality" and erode "the democratic spirit of their communities."[133] Finally, citizenship provides a bond in "polyglot societ[ies] like [the United States]."[134] In a society without racial, ethnic, or religious commonalities, citizenship serves as a basis for commonality.[135] Absent citizenship, it may be difficult for individuals to transcend their differences.

My approach to allocating the right to remain takes into account the factors that Professor Schuck has identified as making citizenship valuable. The right to remain would not be granted to every noncitizen present in the United States. Rather it would be available to noncitizens who have the required connections, commitment, and obligations to the United States. It is these factors—connection, commitment, and obligation—that ensure cultural assimilation and adherence to civic virtues. Concerns about government accountability can be addressed by extending the right to vote to the noncitizens I have identified. At various points in U.S. history, noncitizens have been able to vote.[136] This right can be extended to individuals based on their connections, commitment, and obligations to the United States rather than their legal status. Finally, I have less confidence in the ability of citizenship status to create bonds of commonality in the United States. Throughout history, women and various racial and ethnic groups have struggled to have their citizenship status acknowledged and valued by mainstream American society, and that struggle continues today.[137] Stories about presumed foreignness from second- and third-generation Mexican and Latin American immigrants suggest that additional work is needed before citizenship status operates as a bond of commonality in the United States.[138] Consequently, I do not see lower

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[132] *Id.* at 172 ("[Democracy] is also a normative order, an ethos that legitimizes certain process values and nourishes particular ways of thinking about the means and ends of politics.").

[133] *Id.*

[134] *Id.*

[135] *Id.*; *see also* JACOBSON, *supra* note 17, at 40 (discussing similar concerns in Germany and France).

[136] Leon E. Aylsworth, *The Passing of Alien Suffrage*, 25 AM. POL. SCI. REV. 114, 114 (1931) (discussing history of noncitizen voting in the United States); Cristina M. Rodríguez, *Noncitizen Voting and the Extraconstitutional Construction of the Polity*, 8 INT'L J. CONST. L. 30 (2010) (same); Sarah Song, *Democracy and Noncitizen Voting Rights*, 13 CITIZENSHIP STUD. 607, 608 (2009) (same).

[137] *See, e.g.*, MIA TUAN, FOREVER FOREIGNERS OR HONORARY WHITES? THE ASIAN ETHNIC EXPERIENCE TODAY (1998); *see also* RONALD TAKAKI, STRANGERS FROM A DIFFERENT SHORE: A HISTORY OF ASIAN AMERICANS 379–405 (updated and rev. ed. 1998) (discussing the internment of Japanese Americans).

[138] *See* TOMÁS R. JIMÉNEZ, REPLENISHED ETHNICITY: MEXICAN AMERICANS, IMMIGRATION, AND IDENTITY 140–41 (2010); ALEJANDRO PORTES & RUBÉN G. RUMBAUT, IMMIGRANT AMERICA: A PORTRAIT

naturalization rates as a significant threat to developing common bonds in the United States. By focusing on noncitizens with significant connections, commitment, and obligations to the United States, my approach to protecting an individual's right to remain bolsters the essence and substance of citizenship rather than devalues it. My approach seeks to identify the reasons why citizenship is valuable and measure those factors, rather than relying on citizenship status as an effective proxy for those factors.

The connections that LPRs develop during their residence in the United States provide a basis for being recognized as a member of a polity. Legal membership is thought to be the "juridical expression" of social membership.[139] As Professor Peter Spiro has noted, the goal of citizenship law is to "map[] the boundaries of community" by tracking "the social facts of community membership."[140] Yet, the social fact of such membership is not always legally recognized. The social facts of an individual, like Gerardo's life, suggest membership, and he should have a robust right to remain in the United States.

III. PROPORTIONALITY

The right to remain is a tool for protecting an individual's liberty interest in remaining in the United States. The connections an individual has with the polity, rather than citizenship status, are an important factor in determining whether deportation is disproportionate. Since the introduction of post-entry-conduct deportation grounds in the United States, the proportionality principle has guided congressional decision making.

This Part demonstrates that concerns about proportionality were expressed through debates about the seriousness of deportable crimes and the impact deportation would have. There was disagreement about how to define crimes serious enough to warrant deportation, whether foreign-born residents should have to naturalize to escape deportation, if naturalization was not required how long should one have to reside in the United States before deportation was no longer appropriate, and what role family hardship should play in the analysis. Within these debates there was remarkable agreement that deportation based on post-entry conduct needed to be proportionate. While there was no love lost

255–58 (3d ed. 2006); ALEJANDRO PORTES & RUBÉN G. RUMBAUT, LEGACIES: THE STORY OF THE IMMIGRANT SECOND GENERATION (2001).

139 Nottebohm Case (Liech. v. Guat.), 1955 I.C.J. 4, 23 (Apr. 6).

140 SPIRO, *supra* note 16, at 5.

for noncitizens committing serious crimes in the United States, there was consensus that some noncitizens are significantly connected to the United States such that deporting them could be excessive and unjust.[141]

A. The Proportionality Principle

Proportionality is a foundational principle in numerous areas of law.[142] This principle dictates that punitive measures should be proportionate to the wrongdoing. Punitive measures, whether criminal or civil, can restrict an individual's fundamental rights.[143] The proportionality principle provides a basis for balancing the government's interest in punishment and an individual's fundamental rights.[144] The Supreme Court has recognized the importance of proportionality in the criminal and civil contexts.[145] In the criminal context, this is expressed through the idea "that punishment for [a] crime should be graduated and proportioned to [the] offense."[146] The Eighth Amendment protects against cruel and unusual punishment,[147] and the Federal Sentencing Guidelines seek to provide punishments that are proportionate to the seriousness of the criminal offense and the harm to the victim and community.[148] In the civil context, the Supreme Court has concluded that disproportionate punitive damages awards can violate the Constitution's protection of substantive due process.[149] In each of these contexts, the proportionality principle "provides a basis for ensuring that the appropriate balance is struck between restraining fundamental liberty interests and

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[141] See *infra* Part V.B for a discussion of how to balance noncitizens' connections and the seriousness of their criminal activity.

[142] Stumpf, *supra* note 11, at 1687–89 (discussing proportionality in criminal law, contracts, and torts).

[143] In the criminal context, an individual's physical liberty could be at stake. In the civil context, the Supreme Court has held that excessively large punitive damage awards can violate a substantive due process right to reasonable punitive damages. *See* BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 562 (1996); TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 453–62 (1993) (plurality opinion); Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 18–19 (1991).

[144] Eric Engle, *The History of the General Principle of Proportionality: An Overview*, DARTMOUTH L.J., Winter 2012, at 1.

[145] *See* Banks, *supra* note 11, at 1662–71.

[146] Weems v. United States, 217 U.S. 349, 367 (1910).

[147] U.S. CONST. amend. VIII.

[148] *See* Lockyer v. Andrade, 538 U.S. 63, 72 (2003) (noting that grossly disproportionate criminal sentences violate the Eighth Amendment); U.S. SENTENCING GUIDELINES MANUAL ch. 5, pt. A, introductory cmt. (2008).

[149] *See* State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408 (2003); Hudson v. United States, 522 U.S. 93, 103 (1997) (noting that the "Due Process and Equal Protection Clauses already protect individuals from sanctions which are downright irrational); BMW of N. Am., Inc. v. Gore, 517 U.S. 559 (1996).

punishment."[150] In 1917, Congress sought to achieve the right balance between protecting noncitizens' liberty interest in remaining in the United States and protecting public safety.[151] The seriousness of the crime and what impacts deportation would have on the deportee, his family, his local community, and the country shaped whether deportation was considered a proportionate response to criminal activity.[152]

B. Defining Serious Crime

The 1917 Immigration Act marked a significant turning point in the use of deportation in the United States.[153] With this legislation deportation was used to regulate the post-entry conduct of foreign-born residents.[154] Foreign-born residents who failed to naturalize were now deportable if they were found to be anarchists within five years of admission; prostitutes; convicted of importing noncitizens for the purpose of prostitution or other immoral purposes; convicted of a crime involving moral turpitude and sentenced to one year or more imprisonment within five years of admission; or convicted of more than one crime involving moral turpitude with sentences of one year or more.[155] Creating these deportable offenses was not easy for Congress, and it took

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150 Banks, *supra* note 11, at 1655.

151 *See* KANSTROOM, *supra* note 36, at 133–34.

152 *Id.*

153 Between 1888 and 1917, Congress slowly expanded the Executive Branch's authority to deport foreign-born residents. *See id.* at 91–136. This expansion reflected new strategies for border control. The 1888 immigration legislation provided for the deportation of foreign-born residents who violated the contract labor laws within one year of entry. *Id.* at 112. Entering the United States in violation of law became a deportable offense in 1891. *Id.* at 115. One year later a revision of the Chinese Exclusion Act authorized the deportation of Chinese laborers present in the United States without the government-issued certificate indicating their presence in the United States before the enactment of the first Chinese Exclusion Act. *Id.* at 116. Beginning in 1907 any noncitizen woman or girl who was working as a prostitute within three years of her admission was deportable. *Id.* at 125. This provision and the other expansions of the deportation authority bolstered the power of the government to remove foreign-born residents who should not have been admitted in the first place. *See* KANSTROOM, *supra* note 36.

154 In 1907, immigration law provided for the deportation of any noncitizen woman or girl found to be a prostitute within three years of her admission. *Id.* at 125. Daniel Kanstroom has noted that while this looks like post-entry conduct-based deportation it is not. This law "actually related to the long-standing attempt to prevent the entry of prostitutes into the United States." *Id.* The three-year limit made this deportation ground difficult to utilize because immigration officers found it rather difficult to accurately determine a noncitizen's entry date. Women could avoid deportation by claiming admission more than three years prior. *Id.* at 125–26. In 1910, the three-year limit was eliminated to address this problem. *Id.* at 126. Technically the 1907 and 1910 immigration laws provided for deportation for post-entry conduct, but the target was removing prostitutes who should not have been admitted in the first place. *Id.* at 125. The 1917 Immigration Act was the first comprehensive scheme for deporting noncitizens solely based on their behavior while in the United States.

155 Immigration Act of 1917, ch. 29, § 19, 39 Stat. 874, 889.

almost eight years.[156] In the early part of the twentieth century it was not uncommon to view deportation based on post-entry criminal conduct as punishment.[157] Accordingly, some members of Congress wanted to ensure that any such deportation was proportionate.[158]

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[156] *See infra* notes 160–68 and accompanying text.

[157] At various points during the debates and hearings, this sentiment was expressed. For example, Representative Driscoll stated that "it is a punishment to deport a man." 42 CONG. REC. 2752 (1908). Representative Mann noted that he did not think Congress "ought to . . . permit [a noncitizen] to be taken away as an additional penalty for a crime he may have committed." *Id.* at 2754. He also questioned whether additional penalties, such as deportation for post-entry conduct, should be considered before previous immigration legislation had been fully implemented. *Id.* (remarking "Why, now, should we be endeavoring to add more penalties before the law we have recently enacted has well gone into effect?"). The idea that post-entry crime-based deportation is punishment was also acknowledged in discussions about deterrence. Representative Burnett stated:

> [O]ne of the worst punishments that could be inflicted on people of some countries—for instance, of Russia—would be that of being sent back to his country, and the very threat hung over the man of that kind of deportation would be as powerful a stimulus to good citizenship and obedience to the law as anything else.

1912 Hearings, *supra* note 102, at 44. Aaron Levy of the National Liberal Immigration League made a similar comment stating that "in principle there ought [not] to be any objection to holding over the man who desires to become a citizen of this country some threat of punishment in case he does not demean himself properly." *Id.*

Those who supported deportation based on post-entry criminal convictions argued that deporting a foreign-born resident with a criminal conviction was not punishment; rather, it was the removal of an "undesirable citizen." 53 CONG. REC. 5168, 5170 (1916). This perspective is based on the idea that admission to and residence within the United States is a privilege granted to certain foreign-born residents. Once a noncitizen demonstrates that they are not deserving of the privilege, removing them from the United States is not punishment, it is merely rescinding a privilege offered. *See, e.g.*, H.R. REP. NO. 61-404, at 1 (1910); 42 CONG. REC. 2752, 2753 (1908). This reasoning mirrors arguments made by the Supreme Court in *Fong Yue Ting v. United States*. 149 U.S. 698, 709, 730 (1893).

[158] Additionally, there was a concern that such deportation grounds would violate the Ex Post Facto Clause of the Constitution. For those who saw deportation based on post-entry criminal convictions as punishment, the Ex Post Facto Clause posed a significant problem. Due to the retroactive nature of the proposals, noncitizens would have been deportable based on criminal convictions obtained before the enactment of the new immigration law. These noncitizens would be subject to an additional punishment that did not exist at the time they were convicted. Representative Sabath stated:

> I am quite satisfied that this bill, besides being essentially cruel in its effects, is also clearly unconstitutional. It conflicts with section 9 of Article I of the Constitution, which provides that "no bill of attainder or ex post facto law shall be passed." The bill provides that "any alien who is now under sentence because of conviction of a felony shall at the expiration of his sentence be taken into custody and returned to the country whence he came." Bishop, in his work on Criminal Law, says: An ex post facto law may, with reasonable precision, be defined to be one making punishable what was innocent when done, or subjecting the doer to a heavier penalty or burden than was then provided.

42 CONG. REC. 2755 (1908). He reiterated these ideas two years later, this time joined by Representatives Küstermann and O'Connell. Again, they were concerned for the following reason:

Between 1908 and 1916, debates ensued about which crimes were serious enough to warrant deportation. During each series of debates, members of Congress disagreed about what terminology accurately described serious crimes. In 1908 the concern was about the term *felony*, in 1910 it was about imprisonment for at least one year, and by 1916 it was about crimes involving moral turpitude.[159] Each of these phrases was considered to encompass minor crimes for which deportation was a drastic consequence. Use of the term *felony* caused problems because "[i]n some of our States the stealing of a lamb, a chicken, a chunk of coal, a loaf of bread, or anything, no matter how insignificant, the selling of liquor, playing cards, or wagering on a horse race are made felonies."[160] Determining seriousness based on the length of sentence raised similar concerns about uniformity. In 1910:

> [i]n some States violation of laws concerning the liquor traffic is punished more severely than in others; in some States, it is said, the breaking open of a poultry crate with intent to steal poultry therefrom (however small the value of the latter may be) is punishable severely as a felony; in a number of States various acts have been declared

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> [The post-entry crime-based deportation ground] prejudices and affects the offender because of his past misdeeds for which he is already serving his sentence. This proviso in said bill is clearly retroactive. The cardinal rule of law applicable in this instance is that laws must be prospective. Besides, where an offender is now under sentence, this act would, if passed during the period of his confinement in a jail, enhance his punishment, one legally pronounced by the court at the time of sentence. And of such additional punishment the offender has had absolutely no knowledge.

H.R. REP. NO. 61-404, pt. 2, at 1.

The Supreme Court did not explicitly answer this question until 1954. That year the Court held that the Ex Post Facto Clause had no application to deportation. Galvan v. Press, 347 U.S. 522, 531 (1954). Previous cases like *Fong Yue Ting* had held that deportation was not punishment and other constitutional provisions dealing with criminal law were inapplicable. 149 U.S. at 709, 730. Yet when *Fong Yue Ting* was decided in 1893, deportation was not used to regulate noncitizens' post-entry conduct, rather it was used as a form of extended border control. *See* KANSTROOM, *supra* note 36, at 122, 124. Due to the significant consequences of deportation, the Supreme Court has recently softened its categorization of deportation. In *Padilla v. Kentucky*, the Court held that failure to advise a noncitizen about the immigration consequences of a guilty plea in a criminal case could violate the noncitizen's Sixth Amendment right to effective assistance of counsel. 130 S. Ct. 1473, 1486 (2010). Writing for the majority, Justice Stevens frequently referred to deportation based on an aggravated felony conviction as a penalty. *Id.* at 1480–81, 1486. This may signal a new understanding of deportation as punishment when based on post-entry criminal convictions.

[159] *See infra notes* 160–61, 162–68.

[160] 42 CONG. REC. 2754 (1908) (statement of Rep. Adolph Sabath). He also noted that the relationship between felonies and misdemeanors was being reduced because "at the present time nearly every offense punishable with imprisonment in the State prison or penitentiary is a felony. In nearly all the States imprisonment in the penitentiary has been made the penalty for almost all misdemeanors, thereby transforming them into felonies." *Id.*

> unlawful, while such acts in other States are either not punishable at all or are punishable by fine or imprisonment for one year or less.[161]

Use of the phrase "crime involving moral turpitude" raised the same problems as the term *felony*. Representative Sabath of Illinois explained:

> [A] crime involving moral turpitude has not been defined. No one can really say what is meant by saying a crime involving moral turpitude. Under some circumstances, larceny is considered a crime involving moral turpitude—that is, stealing. We have laws in some States under which picking out a chunk of coal on a railroad track is considered larceny or stealing. In some States it is considered a felony. Some States hold that every felony is a crime involving moral turpitude. In some places the stealing of a watermelon or a chicken is larceny. In some States the amount is not stated. Of course, if the larceny is of an article, or a thing which is less than $20 in value, it is a misdemeanor in some States, but in other States there is no distinction.[162]

Other members of Congress, like Representative Bennet, felt that the phrase "crime involving moral turpitude" conveyed the desired degree of seriousness.[163] He was supported by individuals such as Arthur Woods, the police commissioner of New York City.[164] Commissioner Woods testified before the House Committee on Immigration and Naturalization and explained that the Secretary of Labor would determine what constituted a crime involving moral turpitude and that it was "not a question of watermelons, chickens, or coal."[165] Crime-based deportation was justified as necessary to protect public safety and develop the desired citizenry.[166] Commissioner Woods was only interested in serious crime, not "petty crimes—political crimes or misdemeanors."[167] He was focused on the noncitizen "who knocks down people in the street, who murders or who attempts to murder people, who burglarizes our houses with blackjack and revolver, who attacks our women in the city."[168]

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[161] H.R. REP. NO. 61-496, pt. 2, at 1 (1910). The report's authors were concerned that the proposal was "too drastic, too sweeping in its effects, and . . . will be found promotive of severe hardships, which in many cases amount to cruelty and inhumanity." *Id.*

[162] *1916 Hearings*, *supra* note 73, at 8.

[163] 53 CONG. REC. 5168 (1916).

[164] *Id.*

[165] *1916 Hearings*, *supra* note 73, at 8.

[166] *Id.* at 14.

[167] *Id.* at 3. He later reiterated his position stating, "I would not say if he has committed some offense, but I say if he has committed a serious crime, a crime involving moral turpitude." *Id.* at 8.

[168] *Id.* at 14.

Commissioner Woods's sentiments were shared within Congress and a consensus was reached that crimes involving moral turpitude with imprisonment for at least one year were serious enough to warrant deportation.[169] Consensus on this point was reached only after Congress agreed to authorize criminal trial judges to prevent deportation when it would be disproportionate by issuing a judicial recommendation against deportation (JRAD).[170] Congress broadly defined the class of deportable noncitizens, but in light of continuing concerns about the range of crimes constituting crimes involving moral turpitude Congress provided for individualized proportionality decisions by criminal trial judges.[171] JRADs provided a procedural mechanism whereby the impact of deportation could be taken into account.[172]

Congress's conclusion about what crimes would be the basis for deportation was shaped by the idea that deportation was a serious consequence, perhaps even punitive.[173] In light of the impact that deportation would have, members of Congress were only willing to make serious crimes the basis for deportation.

C. Impact of Deportation

Deporting noncitizens can have positive and negative effects on United States interests. Those that supported crime-based deportation highlighted the positive effects—removing undesirable individuals and protecting law-abiding residents.[174] Those with concerns about the new deportation grounds worried about family hardship.[175] Congress presumed that within five years of residing in the United States, immigrants would get married, have children, and deepen

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169 *See supra* note 155 and accompanying text.

170 *See* KANSTROOM, *supra* note 36, at 134. Another limitation placed on deportations based on crimes involving moral turpitude (CIMT) was a five-year statute of limitations. Only within the first five years of admission was a noncitizen deportable based on a CIMT conviction. This limitation was based on the sense that noncitizens became sufficiently connected, and thus members of the national community, in five years.

171 Immigration Act of 1917, ch. 29, § 19, 39 Stat. 874, 889–90. See *supra* Part II for further discussion about access to discretionary relief from deportation.

172 *See 1916 Hearings*, *supra* note 73, at 13–14.

173 *See supra* note 157 and accompanying text.

174 *See 1912 Hearings*, *supra* note 102, at 44. Some saw deportation based on post-entry criminal conduct as an effective deterrent. *See id.* Aaron Levy, of the National Liberal Immigration League, had no "objection to holding over the man who desires to become a citizen of this country some threat of punishment in case he does not demean himself properly." *Id.* He did, however, recognize that individual cases may involve hardship that the law should address, but he did not think that it was wrong to hold "some threat over the head of the man who wants to become part of us." *Id.*

175 *See, e.g.*, NGAI, *supra* note 116, at 57 ("Critics argued that deportation was unjust in cases where it separated families or exacted other hardships that were out of proportion to the offense committed.").

their connections to and within the United States.[176] The idea that the spouse and children could be United States citizens only increased the importance of those connections.[177] What would become of the wives and children if the husband or father were deported?[178] Concerns about family hardship focused on two issues: financial hardship and family separation.

Financial hardship was a congressional concern because of the broader societal impact it could have. There was a presumption that the deported noncitizen would be a man and the impacted family members would be his wife and children.[179] There were real concerns that the wife and children would become financially destitute and possibly wards of the state. Representative Sabath initially raised this concern in 1908 asking:

> What is to become of [the wife and children]? Friendless, the wife and children of a felon—a felon by the force of our unfair and unequal law, shunned by neighbors, unable to obtain work wherewith to earn a living, destitution staring them in the face. Who will provide for them? Who will so shape their affairs for them that the children may have the advantage of an education and grow up to become good citizens?[180]

Representative Sulzer of New York expressed a similar concern that year, asking "what is to become of his children and what is to become of his wife? Where do they go, and what is to become of them?"[181] When the issue was discussed during the hearings before the House Immigration and Naturalization Committee in 1912, Aaron W. Levy, representing the National Liberal Immigration League, raised a similar concern.[182] He thought that deportation based on post-entry criminal activity would create "a situation where we would have doubtless a husband deported under the terms of this provision, and a

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176 *1912 Hearings*, *supra* note 102, at 44 (statement of Rep. Caleb Powers of Kentucky) (noting that after five years of residence an immigrant had "established a home, and all that").

177 *See* 42 CONG. REC. 2753 (1908).

178 *See infra* text accompanying notes 180–84.

179 *See* 53 CONG. REC. 5169 (1916); 42 CONG. REC. 2753 (1908). While there were significant concerns about prostitution within the immigrant population, there was little to no discussion of immigrant women having spouses or children who would be negatively impacted by deportation. *See* 53 CONG. REC. 5169 (1916); 42 CONG. REC. 2753 (1908). A notable exception was a statement from Representatives Goldfogle, Sabath, Küstermann, and O'Connell in a minority report in 1910. H.R. REP. NO. 61-496, pt. 2, at 2 (1910). They were concerned that "[i]f the convicted person was a woman having a family, though she had prior to the commission of her offense lived uprightly, she would have to be deported and separated from her children, probably forever." *Id.*

180 42 CONG. REC. 2755 (1908).

181 *Id. at* 2753.

182 *See 1912 Hearings*, *supra* note 102, at 36.

wife and children remaining charges upon the public for their support."[183] Representative Sabath reiterated his concern in 1916 stating:

> We may very likely have cases where a man has married within five years after his arrival in this country. He may have married an American woman and may have children. What will become of his wife and his children if he is deported? The danger is not so great if we change the limit to three years.[184]

The actual separation of families was also seen as a family hardship impacting United States interests. Representatives Goldfogle, Sabath, Küstermann, and O'Connell recognized that deportation could lead to permanent family separation.[185] They were concerned that this separation would cause a hardship on the wife left behind.[186] Their report stated:

> If [the deported individual] were married, then whether his wife was an American citizen or his children were born here would be immaterial matters, for the deportation would follow just the same. Be the wife ever so pure and her children ever so helpless, still in some States she could not obtain a divorce and would be compelled to remain in a state of permanent separation from her exiled husband.[187]

Other members of Congress even thought that such separation could constitute cruel and unusual punishment.[188]

Congress recognized that deporting noncitizens would have an impact on families. Deportation could cause financial hardships and family separation, which were seen as undesirable and potentially disproportionate outcomes. To limit the occurrence of such outcomes, Congress provided for individualized review of deportation decisions.

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183 *Id.* at 41–42.

184 53 CONG. REC. 5169 (1916).

185 H.R. REP. NO. 61-496, pt. 2, at 2 (1910) ("The deportation would in most cases work a complete separation of the alien from his wife and children.").

186 *Id.*

187 *Id.*

188 42 CONG. REC. 2755 (1908). While discussing his constitutional concerns, Representative Sabath noted:

> Surely the deportation and separation forever from those nearest and dearest to him of a person for any minor offense which we constitute or call a felony is so cruel and unusual a punishment as to come clearly within the purview of [the Eighth Amendment] of the Federal Constitution.

Id. He repeated this concern in 1912, asking, "Would not this be a discrimination? Would this not be an unusual punishment, to separate a husband from wife and child?" *1912 Hearings*, *supra* note 102, at 42.

D. Protecting Proportionality

Congress utilized two types of discretionary relief to limit disproportionate outcomes in crime-based deportation cases. Criminal trial judges granted one type of relief and immigration judges granted a second type of relief.

Criminal trial judges issued judicial recommendations against deportation (JRADs). Members of Congress such as Representatives Goldfogle, Sabath, Küstermann, and O'Connell saw JRADs as a critical feature of any post-entry crime-based deportation regime.[189] At first they wanted trial judges to affirmatively recommend deportation to the Secretary of Labor.[190] They believed that the trial judge was "best able to tell whether the offense is of a character so grave, aggravated, and serious as will warrant deportation."[191] They had faith in the judiciary to determine when deportation would be disproportionate.[192] They believed that trial judges were sufficiently publicly oriented to recommend deportation when it was necessary to protect public safety.[193] By 1916 the House Immigration and Naturalization Committee agreed to allow trial judges to issue recommendations against deportation to the Secretary of Labor.[194]

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189 H.R. REP. NO. 61-496, pt. 2, at 2.

190 *Id.*

191 *Id.*

192 *Id.* ("The judiciary may be trusted to determine by way of recommendation to our Government whether such convicted person should be deported.").

193 *Id.* They wrote:

> We believe no federal, state, or territorial judge would hesitate for a moment, if he found that the welfare or safety of the State actually required it, to recommend deportation of criminals. The judiciary may well be invested with the province of making such recommendation, for no judge with due regard to the sentiment of the community in which he serves would withhold it in any proper case.

Id.

194 53 CONG. REC. 5165 (1916). In 1916 the major debate about JRADs concerned when judges should be allowed to issue them. *See id.* at 5169–71. The committee language required the recommendation to be made at the time of judgment or sentencing. *Id.* at 5169. Representative Sabath wanted judges to have additional time to ensure that the recommendation got made and that judges had time to become knowledgeable about all of the relevant facts. *Id.* He explained:

> I am trying to give the court jurisdiction so that it can, at any time after imposing judgment, make a recommendation that the alien be not deported. I believe this is a fair amendment. Frequently during the trial of a case the judge may omit or forget to make a recommendation, and thereby the alien may be deprived of the provisions of this act and of the benefits which we are trying to give him.

Id. He was also concerned about the information available to courts at the time of judgment and sentencing because "frequently, after the conviction, conditions arise that may lead a judge to make recommendations that

Judicial recommendations against deportation remained a part of U.S. immigration law until 1990, yet they did not have the mitigating effect envisioned by Representative Sabath.[195] The potential power of JRADs was never realized because judicial authority to issue a JRAD was not widely known and was therefore rarely used.[196] Professors Taylor and Wright have reported that in most jurisdictions JRADs were "'virtually unheard of.'"[197] While criminal trial judges did not play a significant role in ensuring that deportations were proportional, immigration judges exercised their power to provide discretionary relief from deportation.

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the man should not be deported, whereas if he made the recommendation at the same time he might, in view of the conditions that existed then, recommend immediate deportation." *Id.* at 5170. His proposal to allow judges to make a JRAD any time after sentencing was rejected, as was a proposal by Representative Siegel of New York giving judges thirty days after judgment or sentencing. *Id.* at 5171–72. Later that day, however, the House agreed that a judge or a court would have thirty days after judgment or sentencing to make a JRAD. *Id.* at 5174. When Representative Powers offered his amendment to give judges thirty days to issue a JRAD, he explained:

> I believe that things might arise within 30 days after the sentence has been passed that would completely change the mind of the court and make him aware within that time that he ought to make his recommendation when he would not know it immediately after passing sentence. The State, under my amendment, is to have due notice of the proposed action of the judge or court.

Id. This time there was no discussion of the amendment and it became part of the 1917 Immigration Act. *See id.* The debates over Representatives Sabath's and Siegel's proposed amendments focused on whether courts or judges would have the authority to issue a JRAD after sentencing was complete. *See id.* at 5171–74. There was little debate as to whether judges ought to make such recommendations. *See id.* at 5164, 5169–72. Even in 1910 the Acting Secretary of Labor and Commerce did not object to this proposal. H.R. REP. NO. 61-496, at 3 (1910). He thought that either trial courts or the Secretary of Labor and Commerce should "decide in all cases whether the alien convicted shall be deported." *Id.* He did, however, object to both institutions having this authority, stating that the "responsibility should be on either the court or the Secretary." *Id.*

[195] *See* Margaret H. Taylor & Ronald F. Wright, *The Sentencing Judge as Immigration Judge*, 51 EMORY L.J. 1131, 1148–52 (2002). JRADs were eliminated in a crime control bill that became part of the Immigration Act of 1990. *Id.* at 1150–51. The legislative history is remarkably silent as to why JRADs were eliminated. *See id.* at 1151. JRAD proponents lobbied Congress, but "the issue was never addressed in congressional debates." *Id.* The elimination of JRADs came along with "the waves of increasingly harsh congressional measures intended to crack down on noncitizen criminal offenders." *Id.*

[196] *Id.* at 1148–49. Furthermore the high rates of plea bargains meant that sentencing judges did not have JRAD determinations in the record. *Id.* at 1148.

Interestingly Immigration and Naturalization Services did not keep statistics on JRAD grants or denials. *Id.* at 1148. The INS did estimate however that it received 3,000 responses for JRADs in the 1990s. *Id.* at 1148 n.63.

[197] *Id.* at 1148 (quoting United States v. Sanchez-Guzman, 744 F. Supp. 997, 997 (E.D. Wash. 1990)). Ironically in 1994 Congress provided for judicial deportation. *See* H.R. REP. NO. 104-469, pt. 1, at 125 (1996). Despite congressional conclusions in 1990 that criminal trial judges should not issue JRADs because immigration law is so complicated, in 1994 Congress concluded that these judges should be able to deport noncitizens. *Id.* The desire to accelerate the removal of noncitizens with criminal convictions appears to have overridden earlier congressional concerns that criminal trial judges may not get the immigration law correct.

The 1952 INA provided two ways in which immigration judges could provide relief from deportation in cases where deportation would be disproportionate—Section 212(c) relief and suspension of deportation. Section 212(c) relief was available to LPRs who had resided in the United States for at least seven consecutive years.[198] Suspension of deportation was available to any noncitizen who had been continuously present in the United States for seven years, had good moral character, and whose deportation would cause extreme hardship to the noncitizen or his or her citizen or LPR spouse, parent, or child.[199] To make these determinations, immigration judges were directed to "balance the adverse factors evidencing the alien's undesirability as a permanent resident with the social and humane considerations presented in his [or her] behalf to determine whether the granting of . . . relief appears in the best interest of this country."[200]

Immigration judges were trusted to balance the severity of the criminal act and the connections to the United States to decide if deportation was

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198 Immigration and Nationality Act of 1952, ch. 477, § 212(c), 66 Stat. 163, 187 (repealed 1996). Section 212(c) authorized the Attorney General to admit noncitizens, even if they were inadmissible under the statute, if the individual was an LPR "who temporarily proceeded abroad voluntarily and not under an order of deportation, and who [was] returning to a lawful unrelinquished domicile of seven consecutive years." *Id.* The Attorney General's discretion was limited to certain inadmissibility grounds. The INA did not authorize the Attorney General to waive inadmissibility grounds that addressed national security. *See id.*

The language of the statute created a situation in which LPRs who left and were seeking admission could have inadmissibility grounds waived, but LPRs who remained in the United States and became deportable based on the same activity could not have their deportation waived. For example, if an individual had committed a crime involving moral turpitude, Section 212(c) would allow the inadmissibility ground to be waived, but not the deportation ground. The Second Circuit addressed this issue in *Francis v. INS* and held that distinguishing between LPRs who have departed the United States and those who have not was "wholly unrelated to any legitimate governmental interest." 532 F.2d 268, 273 (2d Cir. 1976). As such, it failed the rational basis test. *Id.* The Board of Immigration Appeals followed the *Francis* rule in *In re Silva*. 16 I. & N. Dec. 26, 30 (B.I.A. 1976). Between 1976 and 1996, deportable LPRs could seek relief from deportation pursuant to § 212(c).

199 Immigration and Nationality Act of 1952 § 212(c).

200 *In re* C-V-T-, 22 I. & N. Dec. 7, 11 (B.I.A. 1998) (alteration in original) (quoting *In re* Marin, 16 I. & N. Dec. 581, 584–85 (B.I.A. 1978)) (internal quotation marks omitted). Additionally:

> Favorable factors considered by immigration judges include[d] family ties to the United States, length of residence in the United States, evidence of hardship to the individual deemed deportable and his or her family in the case of deportation, employment history, property or business ties to the United States, service in the U.S. Armed Forces, value and service to the community, proof of genuine rehabilitation from criminal behavior, and other evidence of good character. Adverse factors considered by immigration judges include[d] the nature and underlying circumstances of the exclusion or deportation ground at issue, additional significant violations of U.S. immigration law, a criminal record, and other evidence of bad character.

Banks, *supra* note 58, at 509 (footnote omitted).

warranted. Immigration judges served as gatekeepers ensuring that deportation was a proportionate response to a specific noncitizen's criminal activity.

The deportation regime introduced in the 1917 Immigration Act was based on two ideas—the *jus nexi* principle and proportionality. Congress recognized that noncitizens may be "ours" based on their connections to the United States and that deportation could be a disproportionate response to criminal activity. To address this concern, the crime-based deportation regime adopted that year created statutes of limitation for deportable criminal offenses and provided for individualized review. The normative principles identified in Parts II and III provided the foundation for our first comprehensive crime-based deportation regime.[201] By 1996 it was difficult to see these principles at play in the crime-based deportation regime. Part IV offers an explanation of this trajectory and contends that a return to these principles is necessary for a just deportation regime.

IV. NEW PERSPECTIVES ON MEMBERSHIP AND PROPORTIONALITY

The dominant congressional narrative about immigrants and crime in 1917 recognized that there was variation within the immigrant population. By 1996 there was little acknowledgement of such variation. During the late 1980s, congressional discourse about immigrants and crime was dominated by concerns about unauthorized migrants and the impact that the illicit drug trade was having on American communities.[202] The narrative focusing on unauthorized migrants and illicit drugs had the most resonance within Congress. Simultaneously the notion of serious crime was expanding. As members of Congress began to see a wider range of criminal activity as serious, it became easier to view deportation as a proportionate response. This Part argues that the dominant narrative about immigrants and crime and a broad conception of serious crime have led to a new understanding of deportation as a proportionate response to criminal activity.

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201 *See supra* Parts II, III.

202 *See, e.g.*, Jennifer M. Chacón, Commentary, *Unsecured Borders: Immigration Restrictions, Crime Control and National Security*, 39 CONN. L. REV. 1827 (2007); Kevin R. Johnson & Bernard Trujillo, *Immigration Reform, National Security After September 11, and the Future of North American Integration*, 91 MINN. L. REV. 1369 (2007).

A. The Immigrants at Issue

The congressional discourse surrounding the 1996 immigration reforms focused on immigrants being violent criminals who entered the country unlawfully. Members of Congress saw a causal relationship between the increase in unauthorized migration and an increase in violent crimes.[203] For example, then-Congressman Schumer stated that "the repeated violence and costly burden of criminal aliens is one of the most vexing problems of our criminal justice system."[204] He then went on to note that many of these criminals "entered the country illegally" and have "forfeited their right to reside here."[205] The narrative focused on the unauthorized status of the noncitizens engaged in criminal activity. A Senate report on immigrants and crime stated that "[c]riminal aliens occupy the intersection of two areas of great concern to the American people: crime and the control of our borders."[206] Representative Bilbray expressed concern about the high rate of recidivism amongst unauthorized migrants in Los Angeles County.[207]

The legislative histories for the Anti-Terrorism and Effective Death Penalty Act of 1996 and IIRIRA are littered with references to "illegal aliens" and "criminal aliens" as the most pressing immigration issues. The terms were often conflated and it is not always clear whom the speaker considered a "criminal alien." At times the term was used to refer to all unauthorized migrants who entered without inspection (EWIs), sometimes only to EWIs who had been convicted of a criminal offense, and other times any noncitizen who had been convicted of a criminal offense. The conflation of "illegal aliens" and "criminal aliens" made it easier for members of Congress to

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[203] *See infra* text accompanying notes 213–23.

[204] *Criminal Aliens: Hearing on H.R. 723, H.R. 1067, H.R. 1279, H.R. 1459, H.R. 1496, H.R. 2041, H.R. 2438, H.R. 2730, H.R. 2993, H.R. 3302, H.R. 3320 (Title IV), H.R. 3860 (Titles II, V, VI), H.R. 3872, and H. Con. Res. 47 Before the Subcomm. on Int'l Law, Immigration, & Refugees of the H. Comm. on the Judiciary*, 103d Cong. 117 (1994) [hereinafter *Criminal Aliens Hearing*].

[205] *Id.*

[206] S. REP. NO. 104-48, at 1 (1995). The report also noted that "[c]riminal aliens are a growing threat to the public safety and a growing drain on scarce criminal justice resources." *Id.* at 6.

[207] He noted:

> In Los Angeles [C]ounty about 40% of illegal aliens are rearrested later for new criminal offenses. This last statistic, I believe, is very important. It is important because if we take action to deal with criminal aliens and do nothing about the ease of entering the United States illegally, then criminal aliens that we deport will continue to re-enter the country and commit crimes. That is why I believe that Congress must reform, not just one section of the law, but our nation's laws governing both legal and illegal immigration in their entirety.

Criminal Aliens Hearing, *supra* note 204, at 129.

conclude that deportation was an appropriate and proportionate response to any criminal activity.[208] During the 1994 hearings on criminal aliens, Representative Becerra asked for clarification as to "what we mean by a criminal alien."[209] Information from the Department of Justice officials stated that the statistics they had tracked citizenship status, but not immigration status.[210] The statistics could identify the number of noncitizen inmates, but not the number of inmates who were unauthorized migrants.[211] Witnesses reporting on state prison statistics, however, did indicate the number of unauthorized migrant inmates.[212] So some witnesses were referring to noncitizens with criminal records while others focused on unauthorized migrants with criminal records. The variety of immigration statuses within the "criminal alien" category was lost on many members of Congress. There was very little recognition that the reforms adopted would impact long-term green card holders just as much as they would impact unauthorized migrants. The limited use of a more complex narrative about immigrants and crime by members of Congress made it easier to conclude that deportation was a proportionate and legitimate government response to a wide range of criminal activities.

B. Defining Serious Crime

Congressional concerns about noncitizens and crime were not new in the late 1980s. As noted in Part III, this concern led to the enactment of the first comprehensive post-entry crime-based deportation regime in 1917.[213] What was different by the mid-twentieth century was the sense that crime by immigrants was a pervasive and consistent threat to American communities.[214] Then-Congressman Schumer remarked that the "Federal Government [was]

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208 *See, e.g.*, S. REP. NO. 104-48; 142 CONG. REC. 10,053–62 (1996).

209 *Criminal Aliens Hearing*, *supra* note 204, at 140.

210 *Id.* at 141, 186–87.

211 *Id.* at 140–41, 165–67, 186–87.

212 *Id.* at 130 (California); *id.* at 150 (New York, Florida).

213 Debates about which crimes were serious enough to warrant deportation did not end with the enactment of the 1917 Immigration Act. Between 1917 and 1996, the criminal grounds for deportation based on post-entry conduct expanded. *See supra* text accompanying notes 119–22.

214 Senator Roth reported to Congress that a subcommittee investigation found that "criminal aliens are a serious and growing threat to our public safety." 142 CONG. REC. 10,054 (1996) (referencing S. REP. NO. 104-48 (1995)). Representative Hunter noted that there was "a massive drain on the Federal Treasury and a massive loss in terms of property loss and human life loss and a misery index with respect to the damage that criminal aliens inflict on this country and on our people." *Criminal Aliens Hearing*, *supra* note 204, at 130.

failing in its first duty . . . to protect citizens from violent crime."[215] Representative Lamar Smith made a similar statement one year later. He noted:

> An increasing amount of crime is being committed by noncitizens: both legal and illegal aliens. About 25 percent of all Federal prisoners are foreign-born. An astounding 42 percent of all Federal prisoners in my State of Texas are foreign-born. Recidivism rates for criminal aliens are high—a recent GAO study revealed that 77 percent of noncitizens convicted of felonies go on to be arrested at least one more time.[216]

To address this problem, members of Congress sought to make it easier and faster to remove immigrants with criminal records. This was achieved by expanding the aggravated felony definition and creating expedited removal proceedings for aggravated felons.[217] But the discourse surrounding the need for this expansion was based on the threat that serious drug crimes posed. Between 1986 and 1996, numerous hearings were held and debates took place examining the issue of immigrants and crime.[218] A significant portion of these hearings and debates focused on unauthorized migrants' involvement in serious drug-related crimes. The need to create harsh consequences for these

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[215] *Criminal Aliens Hearing*, *supra* note 204, at 117–18. During the 1994 House hearings on the subject of noncitizens and crime, then-Congressman Schumer also stated:

> If you look at it through the eyes of our constituents, here we have tens of thousands of violent criminals, repeat offenders of the worst kind, many of them who entered the country illegally, all of them have forfeited their right to reside here, and yet our system is paralyzed; it doesn't promptly deport these violent criminals.

Id. at 117.

[216] 141 CONG. REC. E330 (daily ed. Feb. 13, 1995).

[217] *See* Cristina M. Rodríguez, *The Citizenship Paradox in a Transnational Age*, 106 MICH. L. REV. 1111, 1123 (2008) (book review).

[218] *See, e.g.*, *Removal of Criminal and Illegal Aliens: Hearing Before the Subcomm. on Immigration & Claims of the H. Comm. on the Judiciary*, 104th Cong. 1–3 (1995) (statement of Rep. Lamar Smith, Chairman, H. Subcomm. on Immigration & Claims) (supporting enlarging the scope and size of the INS); *Criminal Aliens Hearing*, *supra* note 204; *Criminal Aliens in the United States: Hearings Before the Permanent Subcomm. on Investigations of the S. Comm. on Governmental Affairs*, 103d Cong. (1993) [hereinafter *Criminal Aliens in the Unites States Hearing*] (noting the costs involved in re-apprehending deported criminal aliens who reentered the country); H.R. REP. NO. 104-518, at 47 (1996); S. REP. NO. 104-48, at 7–10; H.R. REP. NO. 104-22, at 1 (1995) (recommending passage of the Criminal Alien Deportation Improvements Act of 1995); H.R. REP. NO. 101-955 (1990) (Conf. Rep.) (dealing with the Immigration Act of 1990); 142 CONG. REC. 26,634–35, 26,669 (1996) (concerning the cost of immigration and other bills in the Omnibus Consolidated Appropriations Act, 1997); *id.* at 10,045 (debating the Immigration Control and Financial Responsibility Act of 1996); *id.* at 7548; 141 CONG. REC. 15,038 (1995); *id.* at 8436 (statement of Sen. Dianne Feinstein on the Illegal Immigration Control and Enforcement Act of 1995); 141 CONG. REC. E330 (daily ed. Feb. 13, 1995) (statement of Rep. Lamar Smith); 141 CONG. REC. 4396 (1995) (regarding House Bill 668, the Criminal Alien Deportation Improvements Act of 1995).

crimes did not justify similar consequences for crimes such as perjury or receipt of stolen property. Several witnesses and members of Congress raised this concern, but they were unsuccessful in persuading Congress. The desire to get tough on serious drug-related crime set the tone for dealing with all aggravated felonies.

The hearings and debates on immigrants and crime between 1986 and 1996 focused on two problems: the cost of crime committed by unauthorized migrants and the threat unauthorized migrants' drug crimes posed to American communities.[219] Both of these factors ultimately influenced which crimes members of Congress concluded were serious enough to warrant deportation.

Members of Congress testified that states had to shoulder a drastic increase in criminal justice costs because of the federal government's failure to prevent unauthorized migration. Unauthorized migrants were said to be responsible for increases in crime rates, particularly drug crimes.[220] The costs were staggering. For example, Congress was informed that California expected to pay $375 million during the 1994–1995 fiscal year to incarcerate criminals who were unauthorized migrants.[221] The costs in New York and Florida were estimated to be $63 million and $58.6 million, respectively.[222] Overall, it was reported that federal and state prisons combined spent $723 million annually on unauthorized migrant prisoners.[223]

In addition to these costs, members of Congress were concerned about the type of criminal activity engaged in by unauthorized migrants. During the 1994 hearings on "criminal aliens," Congress was informed that there had been a "rapid increase in drug related offenses for criminal aliens between 1987 and 1992" in San Diego County.[224] Individuals testified that while drug-related offenses were increasing throughout San Diego County, the increase within the total population was "markedly slower."[225] The unauthorized migrant

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219 Another area that received significant attention was immigration crimes.

220 *See, e.g.*, *Criminal Aliens Hearing*, *supra* note 204, at 132 (statement of Rep. Duncan Hunter).

221 *Id.* at 133 (statement of Rep. Richard H. Lehman). In today's dollars, this would be over $500 million. *See Inflation Calculator*, DAVEMANUEL.COM, http://www.davemanuel.com/inflation-calculator.php (last visited June 18, 2013).

222 *Criminal Aliens Hearing*, *supra* note 204, at 150 (statement of Rep. Gary A. Condit).

223 *Id.* at 128 (statement of Rep. James H. Bilbray).

224 *Id.* at 132 (statement of Rep. Duncan Hunter).

225 *Id.*

population was seen as directly responsible for the increase in drug-related crimes.[226] In 1990, Senator Graham noted:

> Of the 2,400 criminal aliens the Florida statewide Prosecutor's Office could provide me information on, 657 were convicted on cocaine trafficking—over 25 percent. This number indicates the magnitude of the problem and the urgency of the need to provide States with relief. It is the Federal Government's responsibility to protect our borders. If the Government fails to prevent dangerous aliens from crossing our borders, it then becomes the responsibility of the Federal Government to help the States cope with the crime and the costs of prosecuting criminal aliens. Finally, the Federal Government must make sure that dangerous aliens are not on the streets, not allowed to commit new crimes, and not caught in a lengthy deportation process.[227]

This became a persistent theme by the mid-1990s. For example, Representative Duncan Hunter testified that "[o]ver half of the felony crimes committed by undocumented immigrants in San Diego during 1992 were drug related, representing over 18% of the total felony drug offenses in the county."[228] Broad terms like *drug-related crimes*, *drug offenses*, and *drug violations* were used during the hearings, but it appears that the focus was on drug trafficking.[229] Kathleen Hawk, Director of the Federal Bureau of Prisons, testified that 81% of the noncitizen criminals in federal prison for drug law violations were serving sentences for drug trafficking.[230] Another 18% were serving sentences for drug importation.[231] These figures mirrored general trends in federal incarceration. In 1995, 60% of federal inmates were incarcerated for drug offenses.[232] Drug offenders accounted for over 80% of the total growth in federal inmates between 1985 and 1995.[233] By the mid-

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[226] The Border Patrol's seizure of record numbers of narcotics was cited as a "prime indicator of the increase in criminal alien behavior in California." *Id.*; *Criminal Aliens in the United States Hearing*, *supra* note 218, at 1 (statement of Sen. Sam Nunn) ("Criminal aliens, for example, are widely seen as having been and continuing to be a significant part of the Nation's drug problem. Problems involving criminal aliens also came to our attention in a vivid way in 1987 in the aftermath of the notorious Cuban Mariel boat lift.").

[227] 136 CONG. REC. 36,456–57 (1990) (statement of Sen. Bob Graham).

[228] *Criminal Aliens Hearing*, *supra* note 204, at 132 (statement of Rep. Duncan Hunter).

[229] *See, e.g.*, *id.* at 115–16 (statement of Rep. Benjamin Gilman) (referring to "serious criminal activity, such as drug trafficking").

[230] *Id.* at 167 (statement of Kathleen Hawk, Director, Federal Bureau of Prisons).

[231] *Id.*

[232] CHRISTOPHER J. MUMOLA & ALLEN J. BECK, U.S. DEP'T OF JUSTICE, NCJ 164619, PRISONERS IN 1996, at 11 (1997).

[233] *Id.*

1990s, drug activity was an important factor in increased rates of incarceration.[234]

The high drug-related incarceration numbers are not driven by noncitizens because they have very low incarceration rates. In 1980, immigrants' institutionalization rate was only 30% of the institutionalization rate for native-born individuals.[235] By 1990, immigrants' institutionalization rate increased to almost 50% of the institutionalization rate for native-born individuals but dropped in 2000 to 20%.[236] These figures correspond with the evidence available since the early 1900s and indicate that there is no connection between increased immigration and increased crime rates. In 1910, the U.S. Immigration Committee (popularly known as the Dillingham Commission) concluded:

> No satisfactory evidence has yet been produced to show that immigration has resulted in an increase in crime disproportionate to the increase in adult population. Such comparable statistics of crime and population as it has been possible to obtain indicate that immigrants are less prone to commit crime than are native Americans.[237]

In 1994, the United States Commission on Immigration Reform reached similar conclusions.[238] At the time that Congress was debating the 1996 immigration reforms, evidence demonstrated that increased immigration, even unauthorized migration, was not causing or correlated with an increase in crime in the United States.[239] Evidence, however, did not carry the day. The

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[234] The National Center on Addiction and Substance Abuse at Columbia University has found that 80% of federal inmates were incarcerated based on drug or alcohol laws; had regularly used an illegal drug; were under the influence of drugs or alcohol at the time they committed the crime; committed the offense to get money for drugs; or have a history with alcohol abuse. NAT'L CTR. ON ADDICTION & SUBSTANCE ABUSE AT COLUMBIA UNIV., BEHIND BARS: SUBSTANCE ABUSE AND AMERICA'S PRISON POPULATION 2 (1998).

[235] KRISTIN F. BUTCHER & ANNE MORRISON PIEHL, WHY ARE IMMIGRANTS' INCARCERATION RATES SO LOW? EVIDENCE ON SELECTIVE IMMIGRATION, DETERRENCE, AND DEPORTATION 10 (2005). The institutionalization rate covers individuals in correctional facilities, mental hospitals, and other institutions. Kristin F. Butcher & Anne Morrison Piehl, *Why Are Immigrants' Incarceration Rates So Low? Evidence on Selective Immigration, Deterrence, and Deportation* 5 (Nat'l Bureau of Econ. Research, Working Paper No. 13229, 2007). Researchers have concluded that for men aged 18 to 40, institutionalization closely approximates incarceration. *Id.* at 5–6.

[236] BUTCHER & PIEHL, *supra* note 235, at 10.

[237] U.S. IMMIGRATION COMM'N, IMMIGRATION AND CRIME, S. DOC. NO. 61-750, at 1 (3d Sess. 1910).

[238] U.S. COMM'N ON IMMIGRATION REFORM, U.S. IMMIGRATION POLICY: RESTORING CREDIBILITY 4 (1994).

[239] The trends from the 1980s and 1990s continued into the twenty-first century. Crime rates declined in the 1990s and early 2000s despite historic highs in authorized and unauthorized migration. RUBÉN G. RUMBAUT & WALTER A. EWING, AM. IMMIGRATION LAW FOUND., THE MYTH OF IMMIGRANT CRIMINALITY

perception that serious crime is caused or aggravated by immigrants persisted.[240] Although there was significant evidence that noncitizens were involved in serious crimes, which increased criminal justice costs for states,[241] a holistic review of criminal justice costs and incarceration rates demonstrates that noncitizens were responsible for a small portion of those increases.[242]

Testimony about noncitizens and drug trafficking supported the creation of a deportation regime that provided for swifter and more certain deportation.[243] Yet the reforms enacted for accelerated and certain deportation were not limited to drug traffickers; they were applied to all aggravated felonies. As discussed in Part I, when the term *aggravated felony* was first introduced, it referred to specific serious crimes—murder, drug trafficking, and illicit trafficking in firearms or destructive devices.[244] Through the enactment of several laws in the 1990s, the aggravated felony definition was expanded to cover a much wider range of criminal activity.[245] These laws expanded the definition of an aggravated felony to include crimes such as perjury, obstruction of justice, a crime of violence, theft (including receipt of stolen property), and burglary.[246]

The expanded definition was justified as necessary to ensure that immigrants who engaged in serious criminal activity would be deported and

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AND THE PARADOX OF ASSIMILATION: INCARCERATION RATES AMONG NATIVE AND FOREIGN-BORN MEN 4 (2007). Between 1994 and 2006, the foreign-born population increased 71%, from 22 million to 38 million. M. Kathleen Dingeman & Rubén G. Rumbaut, *The Immigration–Crime Nexus and Post-Deportation Experiences: En/Countering Stereotypes in Southern California and El Salvador*, 31 U. LA VERNE L. REV. 363, 373 (2010). During approximately the same time period, there was a 34.2% decrease in the violent crime rate. RUMBAUT & EWING, *supra*, at 4. Additionally, the homicide rate decreased 37.8%, the robbery rate dropped 40.8%, and the assault rate fell 31.9%. *Id.*

240 RUMBAUT & EWING, *supra* note 239, at 14.

241 *See, e.g.*, *Criminal Aliens Hearing*, *supra* note 204, at 111 (statement of Rep. Charles T. Canady).

242 *See* Butcher & Piehl, *supra* note 235, at 24 (noting that in 2000, the institutionalization rate of immigrants was one-fifth that of native-born Americans).

243 *See, e.g.*, *Criminal Aliens Hearing*, *supra* note 204, at 121 (statement of Rep. Charles E. Schumer).

244 Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7342, 102 Stat. 4181, 4469–70 (current version at 8 U.S.C. § 1101(a)(43)).

245 *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, div. C, § 321, 110 Stat. 3009-546, 3009-627 to -628 (codified as amended at 8 U.S.C. § 1101(a)(43)); Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 440(e), 110 Stat. 1214, 1277–78 (current version at 8 U.S.C. § 1101(a)(43)); Immigration and Nationality Technical Corrections Act of 1994, Pub. L. No. 103-416, § 222(a), 108 Stat. 4305, 4320–22 (current version at 8 U.S.C. § 1101(a)(43)); Immigration Act of 1990, Pub. L. No. 101-649, § 501, 104 Stat. 4978, 5048 (current version at 8 U.S.C. § 1101(a)(43)).

246 8 U.S.C. § 1101(a)(43).

unable to return to the United States.[247] The Immigration and Naturalization Service (INS) Deputy Commissioner, Chris Sale, testified that the expanded definition proposed in 1994 included "sufficiently serious offenses" because they corresponded to Class A to E felonies under federal law.[248] Between 1994 and 1995, when this issue was discussed in Congress, members of Congress also noted that the expanded definition captured "those egregious crimes of violence that are often concomitant with drug-related crimes."[249]

Despite this conception of seriousness, some executive officials and members of the bar were concerned that the expanding deportation regime would result in disproportionate responses to criminal activity. Executive officials were particularly concerned about the aggravated felony definition's implications for compliance with the Refugee Convention. Members of the bar raised broader concerns about proportionality. The Refugee Convention

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[247] *See, e.g.*, *Criminal Aliens in the United States Hearing*, *supra* note 218, at 51 (statement of Doris M. Meissner, Comm'r, Immigration and Naturalization Service) (remarking that the aggravated felony definition "is helpful to us because it eliminates certain forms of relief that have been time consuming where effective deportation has been concerned"); 142 CONG. REC. 26,635 (1996) (statement of Sen. Orrin Hatch) (noting that the expanded aggravated felony definition will mean that "[m]ore criminal aliens will be deportable and fewer will be eligible for waivers of deportation"); 141 CONG. REC. 8437 (1995) (statement of Sen. Dianne Feinstein) (explaining that the expanded aggravated felony definition will "increase the number of criminals who would qualify for deportation as having committed [an] aggravated felony"); *id.* at 4395 (statement of Rep. Tillie Fowler) (expressing support for the Criminal Alien Deportation Improvements Act because it makes "it easier to deport criminal aliens who have been convicted of a felony").

Representative Hunter argued that expanding the definition would "help reduce the admittance of recidivist aliens." *Criminal Aliens Hearing*, *supra* note 204, at 132. By 1996, one of the immigration consequences of being deported as an aggravated felon was being permanently barred from reentering the United States. 8 U.S.C. § 1182(a)(9)(A)(i). Representative Hunter used this argument to justify adding certain crimes, including "burglary, child pornography, prostitution, perjury, espionage, alien smuggling, and tax evasion" to the aggravated felony definition. *Criminal Aliens Hearing*, *supra* note 204, at 134.

[248] *Criminal Aliens Hearing*, *supra* note 204, at 194 (statement of Chris Sale, Deputy Comm'r, Immigration and Naturalization Service). At that time, Class E felonies were subject to no more than three years imprisonment and Class A felonies were subject to life imprisonment. 18 U.S.C. § 3581(b)(5) (1994). The same is true today. 18 U.S.C. § 3581(b)(5) (2012). The House Report on the Criminal Alien Deportation Improvements Act of 1995 made a similar observation:

> In adding crimes to the list, effort was made to ensure that the overall reach of the definition would be consistent with the sentencing guidelines established by the United States Sentencing Commission. With only certain limited exceptions, the Committee attempted to ensure that all of the crimes defined as aggravated felonies carry a base offense level of at least 12. These minimums have been selected to ensure that only the most serious crimes, or the more serious convictions of lesser crimes, render the alien deportable.

H.R. REP. NO. 104-22, at 7–8 (1995).

[249] 136 CONG. REC. 11,194 (1990). Representative Mazzoli noted that the aggravated felony definition was expanded to include "other violent crimes" and "various other extremely serious crimes." 140 CONG. REC. 29,219 (1994).

prohibits signatories from expelling or returning a refugee to a country where his "life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."[250] One way the United States implements this treaty obligation is through withholding of deportation.[251] This treaty obligation does not extend to individuals who have been convicted of a "particularly serious crime" and are a danger to the United States.[252] Therefore those with an aggravated felony conviction cannot avoid deportation.[253] Mary Ryan, Assistant Secretary for Consular Affairs at the State Department, and INS Deputy Commissioner Chris Sale expressed concern that the expanded definition of an aggravated felony included crimes that were not "particularly serious."[254] Assistant Secretary Ryan was concerned that the extension of the "definition of aggravated felony to some property offenses that, while serious, may not provide an adequate or appropriate basis for denial of withholding of deportation to an alien who would face a real risk of persecution in the country of return."[255] Deputy Commissioner Sale provided testimony that "[t]heft, gambling, prostitution, perjury, and failure to appear in court" were "not the type of 'particularly serious crimes' which would justify denying withholding of deportation on account of persecution or threat of torture or death if the

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[250] United Nations Convention Relating to the Status of Refugees art. 33(1), July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 137 [hereinafter Refugee Convention]. A refugee is defined as an individual who:

> [a]s a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

Id. at art. 1(A)(2). The 1967 Protocol removed the requirement that the events occurred before January 1, 1951. United Nations Protocol Relating to the Status of Refugees art. 1(2), Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 [hereinafter Refugee Protocol].

The United States became legally bound to the terms of the Protocol on November 1, 1968 and enacted implementing legislation in 1980 through the Refugee Act of 1980. Pub. L. No. 96-212, 94 Stat. 102 (codified as amended in scattered sections of 8 U.S.C. and 22 U.S.C.); UNITED NATIONS HIGH COMM'R FOR REFUGEES, STATES PARTIES TO THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES AND THE 1967 PROTOCOL, at 4 (2011).

[251] Withholding of deportation is available if the Attorney General "decides that the [noncitizen's] life or freedom would be threatened . . . because of the [noncitizen's] race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1231(b)(3)(A).

[252] Refugee Convention, *supra* note 250, at art. 33(2); *see also* Refugee Protocol, *supra* note 250, at art. 1(1) (incorporating Refugee Convention, *supra* note 250, at art. 33(2)).

[253] 8 U.S.C. § 1231(b)(3)(B)(ii).

[254] *Criminal Aliens Hearing*, *supra* note 204, at 164, 194.

[255] *Id.* at 164.

person is returned to the home country."[256] Despite these repeated concerns by executive officials, Congress enacted an expanded aggravated felony definition that included the problematic crimes.[257]

In addition to these concerns, the American Bar Association (ABA) and the American Immigration Lawyers Association (AILA) informed Congress that the expanded aggravated felony definition would lead to disproportionate deportations.[258] The AILA accepted that "those who commit serious criminal offenses should be subject to serious consequences, up to and including deportation in many cases."[259] Yet it and the ABA saw the new aggravated felony definition as including "relatively minor crimes."[260] To illustrate this point the ABA explained that "a person convicted of transporting a pig across state lines, or stealing a postcard from a mail carrier, would be subject to expedited procedures, barred from most forms of relief, including asylum and perhaps 212(c), and ineligible for future immigration benefits."[261] AILA concluded that the proposed expansion would be "absurd in its result."[262]

The concerns of the ABA and executive officials are stronger today than they were in the 1990s in light of the number of long-term residents deported for minor criminal activity.[263] Despite Congress's desire to target unauthorized migrants involved in violent drug-related crimes, the vast majority of those deported under the 1996 reforms have been nonviolent offenders. Between 1997 and 2010, the United States government deported approximately 1.25 million immigrants due to criminal convictions.[264] Only 24% of these

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256 *Id.* at 194.

257 Congress addressed the Refugee Convention concern by only making noncitizens with an aggravated felony conviction who have been sentenced to at least five years imprisonment ineligible for withholding from deportation. 8 U.S.C. § 1231(b)(3)(B).

258 *Criminal Aliens Hearing*, *supra* note 204, at 199.

259 *Id.* at 213.

260 *Id.*

261 *Id.* at 201.

262 *Id.* at 213.

263 *See* HUMAN RIGHTS WATCH, *supra* note 12; HUMAN RIGHTS WATCH, FORCED APART (BY THE NUMBERS): NON-CITIZENS DEPORTED MOSTLY FOR NONVIOLENT OFFENSES (2009) [hereinafter HUMAN RIGHTS WATCH, BY THE NUMBERS].

264 OFFICE OF IMMIGRATION STATISTICS, U.S. DEP'T OF HOMELAND SEC., IMMIGRATION ENFORCEMENT ACTIONS: 2010, at 4 (2011) [hereinafter 2010 IMMIGRATION ENFORCEMENT ACTIONS]; OFFICE OF IMMIGRATION STATISTICS, U.S. DEP'T OF HOMELAND SEC., 2009 YEARBOOK OF IMMIGRATION STATISTICS 97 (2010) [hereinafter 2009 YEARBOOK]; OFFICE OF IMMIGRATION STATISTICS, U.S. DEP'T OF HOMELAND SEC., IMMIGRATION ENFORCEMENT ACTIONS: 2009, at 4 (2010) [hereinafter 2009 IMMIGRATION ENFORCEMENT ACTIONS]; OFFICE OF IMMIGRATION STATISTICS, U.S. DEP'T OF HOMELAND SEC., IMMIGRATION ENFORCEMENT ACTIONS: 2008, at 4 (2009) [hereinafter 2008 IMMIGRATION ENFORCEMENT ACTIONS]; OFFICE OF IMMIGRATION STATISTICS, U.S. DEP'T OF HOMELAND SEC., IMMIGRATION ENFORCEMENT ACTIONS: 2007,

deportations have been due to violent crimes.[265] The most frequent basis for deportation was a nonviolent drug offense, which include crimes like possession.[266] Based on the way deportation figures are reported, it is difficult to know how many noncitizens have been deported for drug trafficking. Research by Human Rights Watch, however, provides some insight. A review of deportation data from 1997 and 2007 suggests that deportations based on drug trafficking account for at most 16.8% of deportations for which crime data is available.[267]

Members of Congress rarely raised the concerns raised by the ABA as they had in 1917.[268] There was considerably less discussion on the record by members of Congress challenging the expansion of the aggravated felony

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at 4 (2008) [hereinafter 2007 IMMIGRATION ENFORCEMENT ACTIONS]; OFFICE OF IMMIGRATION STATISTICS, U.S. DEP'T OF HOMELAND SEC., IMMIGRATION ENFORCEMENT ACTIONS: 2006, at 4 (2008) [hereinafter 2006 IMMIGRATION ENFORCEMENT ACTIONS]; OFFICE OF IMMIGRATION STATISTICS, U.S. DEP'T OF HOMELAND SEC., IMMIGRATION ENFORCEMENT ACTIONS: 2005, at 5 (2006) [hereinafter 2005 IMMIGRATION ENFORCEMENT ACTIONS]; OFFICE OF IMMIGRATION STATISTICS, U.S. DEP'T OF HOMELAND SEC., IMMIGRATION ENFORCEMENT ACTIONS: 2004, at 6 (2005) [hereinafter 2004 IMMIGRATION ENFORCEMENT ACTIONS]; OFFICE OF IMMIGRATION STATISTICS, U.S. DEP'T OF HOMELAND SEC., 2003 YEARBOOK OF IMMIGRATION STATISTICS 150 (2004) [hereinafter 2003 YEARBOOK]; OFFICE OF IMMIGRATION STATISTICS, U.S. DEP'T OF HOMELAND SEC., 2002 YEARBOOK OF IMMIGRATION STATISTICS 177 (2003) [hereinafter 2002 YEARBOOK]; INS, U.S. DEP'T OF JUSTICE, 2001 STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE 236 (2003) [hereinafter 2001 STATISTICAL YEARBOOK]; INS, U.S. DEP'T OF JUSTICE, 2000 STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE 235 (2002) [hereinafter 2000 STATISTICAL YEARBOOK]; INS, U.S. DEP'T OF JUSTICE, 1999 STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE 204 (2002) [hereinafter 1999 STATISTICAL YEARBOOK]; INS, U.S. DEP'T OF JUSTICE, 1998 STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE 203–04 (2000) [hereinafter 1998 STATISTICAL YEARBOOK]; INS, U.S. DEP'T OF JUSTICE, 1997 STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE 167 (1999) [hereinafter 1997 STATISTICAL YEARBOOK].

265 *See supra* note 264. Human Rights Watch (HRW) has provided similar statistics concluding that only 27.8% of crime-based deportations were based on violent crimes. HUMAN RIGHTS WATCH, BY THE NUMBERS, *supra* note 263, at 33. The statistics provided by HRW are based on data obtained through a Freedom of Information Act request to the Department of Homeland Security. *Id.* at 1. HRW received data on 897,099 deportations based on crime. *Id.* at 19. The data, however, is incomplete because for 395,272 cases, the data did not include crime data, despite being characterized as a crime-based deportation. *Id.* at 28.

266 2010 IMMIGRATION ENFORCEMENT ACTIONS, *supra* note 264, at 4; 2009 YEARBOOK, *supra* note 264, at 97; 2009 IMMIGRATION ENFORCEMENT ACTIONS, *supra* note 264, at 4; 2008 IMMIGRATION ENFORCEMENT ACTIONS, *supra* note 264, at 4; 2007 IMMIGRATION ENFORCEMENT ACTIONS, *supra* note 264, at 4; 2006 IMMIGRATION ENFORCEMENT ACTIONS, *supra* note 264, at 4; 2005 IMMIGRATION ENFORCEMENT ACTIONS, *supra* note 264, at 5; 2004 IMMIGRATION ENFORCEMENT ACTIONS, *supra* note 264, at 6; 2003 YEARBOOK, *supra* note 264, at 150; 2002 YEARBOOK, *supra* note 264, at 177; 2001 STATISTICAL YEARBOOK, *supra* note 264, at 236; 2000 STATISTICAL YEARBOOK, *supra* note 264, at 235; 1999 STATISTICAL YEARBOOK, *supra* note 264, at 204; 1998 STATISTICAL YEARBOOK, *supra* note 264, at 204; 1997 STATISTICAL YEARBOOK, *supra* note 264, at 167; *see also* HUMAN RIGHTS WATCH, BY THE NUMBERS, *supra* note 263, at 32, 56.

267 HUMAN RIGHTS WATCH, BY THE NUMBERS, *supra* note 263, at 32.

268 *See supra* Part III.B (discussing the lengthy debate preceding enactment of the 1917 Immigration Act).

definition. The late Professor Stuntz argued that rational legislators will support legislation authorizing criminal punishment that is appropriate in a small number of egregious cases, but excessive in most other cases.[269] This occurs because legislators risk getting blamed if a horrible case ends with punishment the public thinks is lenient and the prosecutor explains that the legislator did not provide the "tools necessary to do justice."[270] In agreeing to the extreme punishment, Congress is trusting prosecutors and judges to exercise their discretion to reach the appropriate result in each case. The legislators are assuming that the extreme punishment will not be applied in every case. Yet that is exactly what has happened in the immigration context.

Representative Lamar Smith articulated the dominant perspective about immigrants and crime and their right to remain in the United States. He stated:

> Americans should not have to tolerate the presence of those who abuse both our immigration and criminal laws. Criminal aliens should be on the fast track out of the country. This bill addresses the concerns of the American people by giving the INS and prosecutors tools they need to expedite the deportation of criminal aliens.[271]

This perspective supported the expansion of the aggravated felony definition and the conclusion that deportation for these crimes is appropriate and proportionate. Members of Congress and others testifying before Congress repeatedly justified the expansion of the aggravated felony definition based on the idea that it targeted serious criminals.[272] The reality has turned out to be more complicated. The vast majority of those deported under the 1996 reforms have been nonviolent offenders.[273]

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[269] William J. Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 HARV. L. REV. 2548, 2558 (2004).

[270] *Id.* Members of Congress seem to have had similar concerns in the mid-1990s. HUMAN RIGHTS WATCH, *supra* note 12, at 31–32 (recounting statement of David A. Martin, former INS General Counsel, that "even when [members of Congress] were presented with sympathetic facts, they just didn't want to appear soft on immigration").

[271] 141 CONG. REC. E330 (daily ed. Feb. 13, 1995) (statement of Rep. Lamar S. Smith); *see also Criminal Aliens Hearing*, *supra* note 204, at 112 (statement of Rep. Lamar Smith) ("We on the task force believe that all aliens who abuse the privilege of residing in this country by committing aggravated felonies should be deported. No excuses, no delay."); *id.* at 172 (statement of Rep. Anthony C. Beilenson) ("Bluntly put, an alien who has been convicted of a criminal act in this country and has served his or her term in jail or prison should not be allowed to remain here."); S. REP. NO. 104-48, at 6 (1995) ("[T]here is just no place in America for non-U.S. citizens who commit criminal acts here. America has enough criminals without importing more.").

[272] *See supra* text accompanying notes 247–49.

[273] *See supra* text accompanying notes 264–67; *see also* HUMAN RIGHTS WATCH, *supra* note 12, at 42; Hagan et al., *supra* note 12, at 1809.

C. Impact of Deportation

The deportation of nearly 1.25 million noncitizens due to criminal activity since 1996[274] has occurred with little examination of the connections that these noncitizens have to the United States. Most members of Congress did not see the importance of distinguishing between connected and less connected noncitizens. Failing to acknowledge such distinctions negatively impacts American families.

1. Congressional Testimony

Distinguishing among noncitizens with criminal convictions was important to some members of Congress, but they were unable to generate a robust debate on this issue and persuade their colleagues. Representative Mazzoli, Senator Kennedy, and others provided testimony to Congress that offered a more complex narrative of immigrants and crime. This narrative included the idea that some immigrants with criminal convictions are members of American families and the American polity.[275] Representative Mazzoli remarked:

> [I]t is a very different ball game if these people are permanent residents who may have lived in the San Fernando Valley for 15 years but decide one day to hold up a convenience store, and a person who sneaked across the border a year ago or 5 months ago and decided to stick up that same convenience store . . . .[276]

Senator Kennedy noted that barring aggravated felons from discretionary relief would deny relief to permanent residents for minor crimes.[277] An individual "could live here productively for 30 years and have an American citizen wife and children. But for them, it is one strike and you are out."[278] As an example he noted:

> A long-time permanent resident could decide to go fishing. He hooks and kills what he does not realize is a rare fish, which is a strict liability felony with a mandatory minimum of 1 year. Even though he is married to an American and has U.S.-citizen children, he is

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274 *See supra* note 264 and accompanying text.

275 *See, e.g.*, *Criminal Aliens Hearing*, *supra* note 204, at 188.

276 *Id.* (statement of Rep. Romano L. Mazzoli, Chairman, Subcomm. on Int'l Law, Immigration, & Refugees).

277 141 CONG. REC. 15,069 (1995) (statement of Sen. Ted Kennedy).

278 *Id.*

> convicted, serves his time, and is immediately deported with no prospect for judicial review.[279]

Senator Kennedy supported Section 212(c) relief because it allowed an immigration judge to determine whether the immigrant's "equities in the United States—such as American citizen spouses or children or contributions to [his or her] communit[y]"—outweighed the seriousness of his or her criminal offense.[280] This narrative of a connected member of the polity was raised within the congressional debates, but it gained little traction.

A retired immigration judge, the American Bar Association, and the American Immigration Lawyers Association all provided testimony to Congress utilizing this more complex narrative. Arvid Boyes, a retired immigration judge, recognized that immigrants with criminal convictions could be long-term residents with significant ties to the United States.[281] He thought:

> [T]he best and the most sensible way of dealing with long term resident aliens with ties to this Nation who have committed crimes is to leave the resolution of their request for relief under section 212(c) in the sound discretion of immigration judges. That is the state of the law now, and I approve of it. To simply bar a long term resident alien from even seeking section 212(c) relief by making him or her statutorily ineligible (because he has been sentenced to a certain number of years, as the new amendment proposes to do) is to disregard numerous factors that rightly must be taken into account.[282]

He believed that the relevant factors included "closeness of a family relationship, the emotional need of the alien and his or her spouse to remain together in the United States, the likelihood that deportation would cause the destruction of a family, [and] the social, psychological and emotional effects on young U.S. citizen children."[283] The American Bar Association similarly recognized that immigrants with criminal convictions could be members of American families.[284] Finally, the AILA explained that immigrants' connections to the United States could make deportation a disproportionate

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279 *Id.*

280 *Id.*

281 *Criminal Aliens Hearing*, *supra* note 204, at 205.

282 *Id.* at 206 (statement of Arvid C. Boyes, U.S. Immigration J. (retired)).

283 *Id.* at 205–06 (statement of Arvid C. Boyes, U.S. Immigration J. (retired)).

284 *See id.* at 200 (statement of Robert D. Evans, American Bar Association) ("The resulting deportation may separate U.S. citizen children from their parents or force innocent children to be uprooted to a distant land.").

penalty.[285] The AILA concluded that barring aggravated felons from discretionary relief would "result in the deportation of many lawful permanent residents whose crime is far outweighed by the contributions they make to their U.S. families and communities."[286]

Department of Justice officials also acknowledged this complex narrative. David Martin, former general counsel to the Immigration and Naturalization Service, noted that Department of Justice officials were "keenly aware" that those covered by criminal deportation grounds included "a vast spectrum of human character and behavior. Some such criminals are truly dangerous, but a large fraction of this class made single mistakes or had shown genuine rehabilitation and remorse."[287] INS officials thought that "most such deportable aliens should at least be eligible for consideration of release during proceedings and for a discretionary waiver of deportation altogether."[288]

The narrative offered by Representative Mazzoli, Senator Kennedy, and other witnesses never took hold the way it did in the early 1900s. The unauthorized violent criminal narrative prevailed despite the availability of evidence to the contrary.[289] The prevalence of this misconception is not uncommon.[290] Seventy-three percent of individuals surveyed in the National Opinion Research Center's 2000 General Social Survey thought that it was very likely or somewhat likely that "'more immigrants cause higher crime rates.'"[291] This dominant perception of immigrants and crime shaped Congress's conclusions about what constitutes a serious crime and whether deportation would be a disproportionate penalty.

2. Social Science Research

Researchers have documented a variety of negative impacts that deportation has on American families. Many families that experience

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285 *See id.* at 214.

286 *Id.* (statement of Warren R. Leiden, Executive Director, and Jeanne A. Butterfield, Senior Policy Analyst, American Immigration Lawyers Association).

287 David A. Martin, *Graduated Application of Constitutional Protections for Aliens: The Real Meaning of* Zadvydas v. Davis, 2001 SUP. CT. REV. 47, 64.

288 *Id.*

289 *See supra* text accompanying notes 232–40.

290 *See* RUMBAUT & EWING, *supra* note 239, at 14 (noting the persistence of this misconception "among policymakers, the media, and the general public").

291 *Id.* at 3.

deportation are mixed-status families.[292] This means that the family may be a combination of U.S citizens (by birth or naturalization), green card holders, nonimmigrants, or unauthorized migrants.[293] Often the children of deported noncitizens are U.S. citizens.[294] Between April 1997 and August 2007, 87,884 LPRs were deported for criminal convictions.[295] On average these individuals had lived in the United States for ten years.[296] These LPRs were the parents of approximately 103,000 children, and 86% of these children were United States citizens.[297] These families are experiencing educational, health, and financial hardships that reverberate throughout society.[298]

A 2010 study by the Urban Institute examined the impact of deportation on children.[299] This report was based on a study of 190 children in eighty-five families in six locations throughout the United States.[300] The study "examine[d] the consequences of parental arrest, detention, and deportation."[301] The parents in this study "were arrested in work-site raids, raids on their homes, or operations by local police officers."[302] This study focused on parents who were unauthorized and therefore deportable.[303] The educational, health, and financial consequences for children of deportable parents may differ from children whose parents are LPRs. It is possible that LPR parents have more structural support in place so that when they are deported the consequences differ. However, the consequences identified in this study[304] are similar to the consequences identified in studies on parental incarceration.[305] This suggests that the actual family separation leads to the

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292 *See* Michael Fix & Wendy Zimmermann, *All Under One Roof: Mixed-Status Families in an Era of Reform*, 35 INT'L MIGRATION REV. 397, 400 (2001) (noting that "85 percent of immigrant families . . . are mixed-status families"). The 1998 Current Population Survey indicated that 9% of U.S. families with children were mixed-status families. *Id.* at 399. Eighty-five percent of immigrant families (families with at least one noncitizen parent) at this time were mixed-status families. *Id.* at 400. This translates into 10% of children in the United States living in mixed-status families. *Id.* at 400.

293 *Id.* at 397–98.

294 BAUM ET AL., *supra* note 12, at 4.

295 *Id.*

296 *Id.*

297 *Id.*

298 *See* CHAUDRY ET AL., *supra* note 12, at 27–53.

299 *Id.*

300 *Id.* at vii.

301 *Id.*

302 *Id.*

303 *Id.*

304 *Id.* at 27–53.

305 *See* BAUM ET AL., *supra* note 12, at 8 ("Available data on children whose parents are absent as a result of incarceration suggest that these children may suffer a number of health problems.").

identified consequences. But at this point it is not possible to claim a causal link. More data and research are needed to get a more accurate picture about the consequences of deportation on children.

The Urban Institute study found that after the arrest of a deportable parent, children missed school, struggled to maintain good grades, exhibited behavioral and emotional problems in the classroom, and some considered dropping out.[306] And a variety of physical and mental health effects have been documented in children whose parents have been arrested and deported.[307]

For example, over 40% of the children in the Urban Institute study experienced behavioral changes within nine months.[308] Children's eating and sleeping routines were disrupted and they began having difficulty controlling their emotions.[309] More than half of the children cried more frequently and experienced more fear, and more than a third experienced more anxiety.[310] Other reactions were to become "clingy, withdrawn, angry, or aggressive."[311] Families experiencing deportation face a loss of income, which impacts access to housing and food.[312] Families reported frequent moving, moving in with relatives to lower housing costs, and losing homes because the cost became too great.[313] Another result of income loss is food hardship. The Urban Institute found that 60% of the households in the study reported having difficulty paying for food "sometimes" or "frequently."[314] As a result parents would cut back on their food consumption to ensure that their children had enough to eat.[315] Over 20% of the parents reported that they experienced hunger.[316]

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306 CHAUDRY ET AL., *supra* note 12, at 49–51; *cf.* RANDY CAPPS ET AL., URBAN INST., PAYING THE PRICE: THE IMPACT OF IMMIGRATION RAIDS ON AMERICA'S CHILDREN 48–50 (2007) (noting that students missed school, and that there were disruptions to academic performance and behavior).

307 CHAUDRY ET AL., *supra* note 12, at 41–48; *see also* CAPPS ET AL., *supra* note 306, at 50–54. Relatively little research has been done in this area, but the work that has been done indicates that the effects of parental deportation on children are similar to the effects of parental incarceration. *See* BAUM ET AL., *supra* note 12, at 8 (noting studies that found mental health impacts for children after a parent was deported). Research on immigrant children in the United States who experienced parental separation because of immigration, divorce, or death has found similar effects. *Id.* These children are more likely to exhibit signs of depression and feelings of loss and sadness. *Id.*

308 BAUM ET AL., *supra* note 12, at 8.

309 *Id.*

310 *Id.*

311 *Id.*

312 *Id.* at 5.

313 CHAUDRY ET AL., *supra* note 12, at 30–31; *see also* CAPPS ET AL., *supra* note 306, at 46–47.

314 CHAUDRY ET AL., *supra* note 12, at 31 (internal quotation marks omitted); *see also* CAPPS ET AL., *supra* note 306, at 47–48.

315 CHAUDRY ET AL., *supra* note 12, at 31.

316 *Id.* at 32 tbl.3.3.

Members of Congress failed to seriously evaluate these impacts of the 1996 reforms because the discourse focused on unauthorized migrants involved in violent, drug-related crime.

D. New Conclusions

The dominant narrative of immigrants and crime led to the elimination of Section 212(c) relief in 1996. Later that year the more complex narrative offered by AILA and others began to have some impact. Congress enacted a new form of discretionary relief to replace Section 212(c) relief: cancellation of removal.[317] Some form of discretionary relief was needed because the existing crime-based deportation regime could be disproportionate. Senator Hatch explained the amendment as necessary because "there was some concern that there might be certain rare circumstances we had not contemplated, when removal of a particular criminal alien might not be appropriate."[318] An example of such a situation offered by Senator Hatch was "an alien with one minor criminal conviction several decades ago, who has clearly reformed and led an exemplary life and made great contributions to this country."[319] He stated that in the "unusual cases involving exceptional immigrants whose criminal records consist only of minor crimes committed many years ago," relief from deportation would be appropriate.[320]

While he did not use the language of proportionality, Senator Hatch's comments reflected the importance of proportionality in a crime-based deportation regime. But the legal directives enacted in 1996 did very little to effectuate his desired outcome and members of Congress have increasingly questioned the proportionality of the regime enacted. In 1999, Representative McCollum of Florida introduced the Fairness for Permanent Residents Act to mitigate the harsh impact of the IIRIRA (the 1996 reforms).[321] In introducing the bill, he said:

> Congress made several modifications to our country's immigration code that have had a harsh and unintended impact on many people living in the United States. These individuals, permanent resident aliens, have the legal right to reside in the country and apply for US citizenship. They serve in the military, own businesses and made

317 8 U.S.C. § 1229b (2012).
318 142 CONG. REC. 27,216 (1996) (statement of Sen. Orrin Hatch).
319 *Id.*
320 *Id.*
321 *See* HUMAN RIGHTS WATCH, *supra* note 12, at 34.

> valuable contributions to society . . . . Our bill returns balance to our existing laws by allowing people with compelling or unusual circumstances to argue their cases for reconsideration. The legislation does not automatically waive the deportation order, it simply grants a permanent resident alien the right to have the Attorney General review the merits of his case.[322]

Representative McCollum had been a proponent of the IIRIRA, but came to see the detrimental impact of Congress's proportionality conclusions.[323] Representative Conyers of Michigan also sponsored the Restoration of Fairness in Immigration Law Act of 2000 to mitigate the impacts of the IIRIRA.[324] The bill redefined crimes involving "moral turpitude, aggravated felonies, and the definition of conviction to limit deportation to the most serious crimes" and granted immigration judges discretion to prevent the deportation of certain noncitizens when their deportation would result in extreme hardship to U.S. citizen or LPR family members.[325] Representative Conyers explained that the bill "restores fairness to the immigration process by making sure that each person has a chance to have their case heard by a fair and impartial decision maker. No one here is looking to give immigrants a free ride, just a fair chance."[326] That same year Senator Kennedy sponsored a bill that similarly redefined deportable criminal offenses and increased access to cancellation of removal.[327] The bill specifically stated that existing immigration laws "punish legal residents out of proportion to their crimes."[328] None of these proposals have been enacted. The factors that facilitated the

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[322] *See id.* at 35 (alteration in original) (quoting statement by Representative Bill McCollum to the House of Representatives, Oct. 4, 1999).

[323] *Id.* at 34.

[324] H.R. 4966, 106th Cong. (2000).

[325] *See* HUMAN RIGHTS WATCH, *supra* note 12, at 35–36.

[326] *See id.* at 36 (quoting Press Release, Congressman John Conyers, Jr., Conyers Re-Introduces the Omnibus "Fix '96' Immigration Bill" (Mar. 7, 2002)).

[327] Immigrant Fairness Restoration Act of 2000, S. 3120, 106th Cong. (2000).

[328] *Id.* § 2. Additional attempts to provide for more individualized proportionality review include a bill sponsored by "Senator Daniel Patrick Moynihan of New York . . . [that] would have made non-citizens convicted of an aggravated felony with a sentence of less than five years [in prison] eligible for cancellation of removal." *See* HUMAN RIGHTS WATCH, *supra* note 12, at 36. Senator Patrick Leahy of Vermont attempted to provide noncitizen veterans additional review by making them eligible for cancellation of removal regardless of any criminal convictions. *See* Fairness to Immigrant Veterans Act of 1999, S. 871, 106th Cong. § 3(a) (1999). In 2006, Representative José Serrano of New York introduced the Citizen Child Protection Act, which would authorize immigration judges to consider the best interests of U.S. citizen children in deportation cases. H.R. 1176, 110th Cong. (2007).

enactment of the 1996 reforms continue to prevail and prevent reforms that would reevaluate the 1996 proportionality conclusions.[329]

The potential for disproportionate deportation decisions increases when the variation within the immigrant community is ignored. Important variations include immigration status, length of residence, connections to the polity, and seriousness of criminal activity. In 1917 this variation was acknowledged and the crime-based deportation regime took these factors into account in defining deportable crimes and by allowing individualized deportation decisions to be made. By 1996 this variation was largely ignored. The narrow focus on unauthorized migrants and violent drug crimes led to the enactment of a crime-based deportation regime that fails to allow for a different proportionality analysis for long-term LPRs with minor criminal convictions who are deeply connected to U.S. communities.

V. THE CITIZENSHIP PROXY

Citizenship is a reasonable proxy for determining who has the requisite connections to make deportation disproportionate, but this proxy can be both under- and over-inclusive. Use of this proxy causes LPRs' liberty interest in remaining in the United States to be inadequately protected. Section A details the ways in which citizenship status is an imperfect proxy and section B offers an alternative framework for identifying members based on the *jus nexi* principle.

A. An Imperfect Proxy

Naturalization requirements reflect one conception of which foreign-born residents are sufficiently connected and committed to be members of the American polity. In order to naturalize, an individual must be 1) eighteen years old; 2) a green card holder who has resided in the United States continuously for five years;[330] 3) "a person of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States"; 4) able to read, write and speak English; and 5) knowledgeable about U.S. history and government.[331] Satisfying these requirements signals that the individual "is in fact more

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[329] *See supra* text accompanying notes 289–91.

[330] The residency requirement is only three years if the individual is the spouse of a U.S. citizen. 8 U.S.C. § 1430 (2012).

[331] *Id.* § 1427; *accord* 8 C.F.R. §§ 312.1–.2 (2012).

closely connected with the population of the [United] State[s] . . . than with [the population] of any other State."[332]

The *jus nexi* principle is operationalized through length of residence requirements. Longer periods of residence allow for the development of connections that enable one to become part of a state's social, cultural, and economic communities. Relevant connections include employment, family, friends, community involvement, and property ownership. Through these connections individuals have the opportunity to learn about the nation's fundamental principles and values and to accept and adhere to them. In 1790 Congress concluded that two years was a sufficient time period to establish such connections, but in 1795 concluded that five years was necessary to facilitate sufficient acculturation to American values.[333] Length of residence is a commonly used proxy for attachment. Since 1802 the United States has generally considered five years the length of time within which one develops a genuine connection and is entitled to citizenship.

Naturalization is undoubtedly a proxy for commitment to the State. Naturalized citizens take an oath to renounce foreign allegiances, to support and defend the United States Constitution and laws, and to "perform work of national importance under civilian direction when required by the law."[334] This oath marks the most significant difference between green card holders and naturalized citizens. In deciding to become a United States citizen, an individual is publicly demonstrating allegiance and commitment to the United States. Yet individuals can have multiple allegiances, and this is acknowledged

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[332] Nottebohm Case (Liech. v. Guat.), 1955 I.C.J. 4, 23 (Apr. 6) (referring to the relationship between the State of citizenship and all other States).

[333] Naturalization Act of 1795, ch. 20, § 1, 1 Stat. 414, 414; Karin Scherner-Kim, Note, *The Role of the Oath of Renunciation in Current U.S. Nationality Policy—to Enforce, to Omit, or Maybe to Change*, 88 GEO. L.J. 329, 338–39 (2000).

With a brief exception between 1798 and 1802, the residence requirement for naturalization has remained five years in most cases. The residency requirements were changed as part of the Alien and Sedition Acts of 1798. The Naturalization Act of 1798 drastically increased the residency requirement to fourteen years. Scholars have argued that domestic political concerns led Congress to limit noncitizens' access to citizenship in order to limit their participation in the electorate. *See* KANSTROOM, *supra* note 36, at 54. One exception to the five-year requirement is for spouses of U.S. citizens, who have a three-year residence requirement. 8 U.S.C. § 1430(a).

[334] *Naturalization Oath of Allegiance to the United States of America*, U.S. CITIZENSHIP & IMMIGR. SERVICES, http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=facd6db8d7e37210VgnVCM100000082ca60aRCRD&vgnextchannel=dd7ffe9dd4aa3210VgnVCM100000b92ca60aRCRD (last visited June 18, 2013).

through the practical acceptance of dual citizenship.[335] Thus, deciding to naturalize may not indicate superior loyalty or allegiance to the United States.

Citizenship status is an under-inclusive proxy for membership in the polity. Noncitizens can have a variety of family and community relationships that connect them to American social, cultural, and economic communities. Commitment to the American polity can be seen when green card holders serve in the armed forces, engage in service work to improve their communities, or work for the U.S. government. The commitment of members of the armed forces and those who work for U.S. federal judges can be seen in the oath that they take to uphold and defend the U.S. Constitution. The extension of voting rights to noncitizens, historically and today, recognizes the under-inclusiveness of citizenship status as the basis for identifying members of the polity.[336]

Citizenship can also be over-inclusive. Individuals born in the United States but raised outside of its borders may have very few connections or commitments to the United States.[337] Their socialization outside of the United

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[335] The United States permits dual citizenship and does not limit the right to remain of dual citizens. *See* SPIRO, *supra* note 16, at 59–60, 67–75. Dual citizenship is permitted for birthright citizens who may also have birthright citizenship in another country based on *jus sanguinis* principles. While naturalized citizens are required to renounce prior citizenships, in practice the U.S. government rarely takes action against naturalized citizens who retain their initial citizenship. Irene Bloemraad, Research Note, *The North American Naturalization Gap: An Institutional Approach to Citizenship Acquisition in the United States and Canada*, 36 INT'L MIGRATION REV. 193, 204 (2002). Additionally, it is difficult for naturalized citizens to have their citizenship involuntarily revoked, but it can occur if the applicant obtained citizenship illegally, concealed a material fact, or engaged in willful misrepresentation. 8 U.S.C. § 1451; Afroyim v. Rusk, 387 U.S. 253 (1967); Schneiderman v. United States, 320 U.S. 118, 122, 125 (1943).

In allowing dual citizenship, the United States extends the right to remain to individuals who may have significant connections, commitment, and obligations to a foreign country. For these individuals, multiple allegiances do not preclude them from enjoying the right to remain. The same should be true for green card holders. To the extent that they can demonstrate the social fact of membership within the American polity, the potential for multiple allegiances should not deny them the right to remain in the United States after a criminal conviction. The fact of multiple allegiances should, however, be considered in the proportionality analysis to determine whether deportation would be an impermissible infringement of liberty. The European Court of Human Rights has considered a noncitizen's connections to his or her country of nationality in determining whether his or her right to family life has been violated. Banks, *supra* note 58, at 527–30.

[336] *See* Song, *supra* note 136, at 608; *see also* Aylsworth, *supra* note 136, at 114 (demonstrating that noncitizens historically were able to vote in the United States). Since 2006, noncitizens have been allowed to vote in school board elections in Chicago and in local elections in six cities in Maryland. *See* Song, *supra* note 136, at 608. Noncitizens were also able to vote in school board elections in New York City from 1970 until 2003. *Id.*

[337] *See* Jennifer Medina, *Arriving as Pregnant Tourists, Leaving with American Babies*, N.Y. TIMES, Mar. 29, 2011, at A1 (discussing the increasing number of foreign women who travel to the United States to deliver their children and then depart with them).

States could limit their ability to connect significantly to the United States. Yet, based on the Fourteenth Amendment, these individuals are citizens entitled to all of the rights and protections associated with citizenship, including the right to remain.[338] As a theoretical matter, my arguments could be used to suggest that citizens should, in some circumstances, have their rights to remain curtailed. Adopting a regime in which every individual's right to remain is subjected to an inquiry to determine their connections, commitment, and obligations to the United States would require significant government resources to administer. I do not believe that the cost of such a system would be justified because the majority of citizens would satisfy the connections, commitment, and obligations standard.[339] The same, however, cannot be said about LPRs. A significant number of these individuals will similarly satisfy the connections, commitment, and obligations standard. The additional administrative costs involved in gathering this information during the deportation process would be justified to ensure that the liberty interests of these residents are protected.

Gerardo and Antoinette's stories from the introduction highlight the ways in which citizenship can be both an under- and over-inclusive proxy for connection and commitment to the United States. Gerardo arrived in the United States as a young child and as an LPR with his mother and five siblings to join his father.[340] After being in the United States for twenty years, Gerardo was convicted for selling a ten dollar bag of marijuana to a police informant.[341] After living in the United States for twenty-nine years, being gainfully employed, married to a U.S. citizen, and having U.S. citizen children, Gerardo was deported due to his criminal conviction.[342]

Antoinette was born in the United States but raised in England since the age of two. Her entire family lives in England and Antoinette has spent no time in the United States since her departure at age two. After returning to the United States at the age of twenty-five to pursue graduate studies in the United States, if Antoinette sold a ten dollar bag of marijuana she would not be at risk

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338 *See* U.S. CONST. amend. XIV, § 1.

339 There has been a lot of national media attention given to stories of noncitizen women travelling to the United States to give birth and then leaving to raise their children abroad. The government, however, does not keep statistics on these births. *See* Jessica Vaughan, *Birthright Citizenship Report Sparks Debate*, CENTER FOR IMMIGR. STUD. (Apr. 7, 2011), http://cis.org/Vaughan/BirthrightCitizenshipReport. The Center for Immigration Studies estimates the figure to be 200,000 a year. *See id.*

340 *See* McDonnell, *supra* note 1.

341 *See id.*

342 *See id.*

of being deported to England. She would only be subject to a criminal sentence.[343] Gerardo is arguably more connected and committed to the United States than Antoinette, yet Antoinette is the one with the right to remain.

One of Gerardo's regrets was not naturalizing.[344] Had he naturalized and become a U.S. citizen, his fate would have been the same as Antoinette's. Gerardo did not explain why he did not naturalize, but a variety of explanations have been offered in the social science literature.[345] These explanations focus on the individual skills and resources of the immigrant, regulatory or bureaucratic barriers to naturalization, the relative costs and benefits of naturalizing, and government reception.[346] These explanations consider a wide variety of factors, but none of them contend that the failure to naturalize results from weak connections or a fragile commitment to the United States.[347] Rather, these theories highlight that the failure to naturalize is often related to insufficient knowledge about the benefits of being a citizen or the legal detriments of being a noncitizen.[348]

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343 *See* BOSNIAK, *supra* note 16, at 71.

344 *See id.*

345 *See* GUILLERMINA JASSO & MARK R. ROSENZWEIG, THE NEW CHOSEN PEOPLE: IMMIGRANTS IN THE UNITED STATES 109–21 (1990) (explaining that the likelihood of naturalizing turns on balancing the costs and benefits of doing so); MICHAEL JONES-CORREA, BETWEEN TWO NATIONS: THE POLITICAL PREDICAMENT OF LATINOS IN NEW YORK CITY 69–106 (1998) (examining the costs that immigrants face in an effort to explain why their decisions to naturalize are difficult to make); SCHUCK, *supra* note 17, at 163–75 (contending that a changing meaning of American citizenship has minimized the incentive to naturalize); Irene Bloemraad, *Citizenship Lessons from the Past: The Contours of Immigrant Naturalization in the Early 20th Century*, 87 SOC. SCI. Q. 927, 928 (2006) [hereinafter Bloemraad, *Citizenship Lessons from the Past*]; Louis DeSipio, *Building America, One Person at a Time: Naturalization and Political Behavior of the Naturalized in Contemporary American Politics*, *in* E PLURIBUS UNUM? CONTEMPORARY AND HISTORICAL PERSPECTIVES ON IMMIGRANT POLITICAL INCORPORATION 67, 71–80 (Gary Gerstle & John Mollenkopf eds., 2001) (discussing incentives to naturalize); Alejandro Portes & Rafael Mozo, *The Political Adaptation Process of Cubans and Other Ethnic Minorities in the United States: A Preliminary Analysis*, 19 INT'L MIGRATION REV. 35, 40–41 (1985) (explaining that whether immigrants naturalize in their host countries depends upon their political motivations and proximity to their native countries). *See generally* IRENE BLOEMRAAD, BECOMING A CITIZEN: INCORPORATING IMMIGRANTS AND REFUGEES IN THE UNITED STATES AND CANADA (2006) (arguing that social networks and a government's attitude toward immigrants affect whether they naturalize); Robert R. Alvarez, *A Profile of the Citizenship Process Among Hispanics in the United States*, 21 INT'L MIGRATION REV. 327 (1987) (discussing a holistic approach to determining whether an immigrant will choose to naturalize); Irene Bloemraad, *Becoming a Citizen in the United States and Canada: Structured Mobilization and Immigrant Political Incorporation*, 85 SOC. FORCES 667 (2006) (advocating an alternative model of citizenship—structured mobilization—that focuses upon social networks and a government's policies, to explain whether immigrants naturalize); Philip Q. Yang, *Explaining Immigrant Naturalization*, 28 INT'L MIGRATION REV. 449 (1994) (proposing a broad framework to explain whether immigrants naturalize, which includes their individual characteristics and larger social contexts).

346 *See supra* note 345.

347 *See, e.g.*, Bloemraad, *Citizenship Lessons from the Past*, *supra* note 345.

348 *See id.*

Citizenship status can be both an under- and over-inclusive proxy for membership in the American polity. Numerous noncitizens have deep, significant connections, commitment, and obligations to the United States. These connections, commitment, and obligations establish bonds that cause the noncitizens to be "more closely connected" to the United States than any other State.[349] Creating a just deportation regime requires recognizing an individual's membership within the American polity. The following section outlines an approach for achieving this goal.

B. Alternatives to the Citizenship Proxy

Citizenship as a proxy for membership is easier to administer than examining a noncitizen's various connections to the United States. Requiring a multifaceted review for every deportable noncitizen would require a significant amount of additional resources. Relying on citizenship status uses fewer human and financial resources and limits opportunities for inconsistent decisions. But there is a middle ground that uses categories other than citizenship status as proxies for connections. Rather than making the right to remain depend on citizenship status, the system could grant the right to remain to categories of noncitizens based on immigration status, length of residence, family ties, military service, or other factors that accurately reflect connections. Complex, rule-like directives could be used to achieve this goal. Congress could create a system like the Federal Sentencing Guidelines that takes account of a variety of factors in determining an individual's punishment.[350] Congress could amend the INA to condition deportation on age, length of residence within the country, or family status. For example, a noncitizen would be deportable if convicted of an aggravated felony unless the individual has continuously resided in the United States for at least ten years, or unless the noncitizen is the spouse or parent of a U.S. citizen or LPR. Complex rules could also be used to deal with the seriousness of the criminal-activity prong as well. The earlier definitions of an aggravated felony required serving a

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349 *See* Nottebohm Case (Liech. v. Guat.), 1955 I.C.J. 4, 23 (Apr. 6).

350 The use of sentencing guidelines has been critiqued for limiting the discretion of judges and requiring unnecessarily harsh sentences. *See generally* Kate Stith, *The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion*, 117 YALE L.J. 1420 (2008) (discussing the debates regarding the history of discretion); Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223 (1993) (discussing the debates regarding the history of discretion). This critique speaks to the difficulty of abstract proportionality analyses, but it also illustrates what types of rules are enacted when a wide variety of crimes are deemed serious. *See* Stith, *supra*, at 1453.

sentence of at least five years imprisonment.[351] This is one way to distinguish between crimes where the seriousness can vary. For example, theft could be receipt of stolen property worth $500 or $20,000. Length of sentence would help to distinguish these cases.

This approach to membership and proportionality would require Congress to investigate and deliberate two issues. First, what connections create the social fact of membership such that deportation could be disproportionate? Second, what crimes are serious enough to warrant deportation despite these connections? These questions were explicitly discussed during the debates and deliberations for the 1917 Immigration Act, but they were less central for the 1996 immigration reforms. Explicitly addressing these questions would allow Congress to decide who is sufficiently connected to the United States to have a heightened liberty interest in remaining in the United States and when deportation is a proportionate response to specific criminal activity.

The current approach to crime-based deportation relies on a distinction between citizens and noncitizens that is often incorrect. When the same or a similar level of connection exists for noncitizens and citizens, we should be able to implement a deportation system that extends the right to remain to those with the requisite connections rather than only to those with the proxy of the connections.[352]

C. Implications of Abandoning the Citizenship Proxy

The argument I have offered would limit the State's ability to deport noncitizens. One implication of this approach is that the requirements for admission to the United States could increase. For example, in light of a reduced ability to deport, the government may seek greater assurances that LPRs are unlikely to commit crimes. This could lead to greater background checks to obtain a green card. Noncitizens currently seeking entry to the United States as an LPR undergo an extensive background check to ensure that they do not fall within one of the various crime-based or national-security-based inadmissibility grounds.[353] The use of FBI name checks, FBI fingerprint checks, and Interagency Border Inspection Services checks has led to

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[351] *See* Morawetz, *supra* note 26, at 1955.

[352] *See generally* SPIRO, *supra* note 16 (discussing the ways in which citizenship can be an under- and over-inclusive tool for identifying members of a national community).

[353] *See* 8 U.S.C. § 1182 (2012).

significant delays in the processing of visa applications.[354] While additional background checks may provide additional information that would limit the admission of future criminals, government officials would have to deem the cost of obtaining that information less than the financial and security costs of noncitizen crime. Gathering additional information for all visa applicants would potentially be significantly more expensive than the costs associated with noncitizen crime.[355]

An additional implication of my approach to the right to remain is that individuals who have engaged in violent crimes may remain in the United States. This poses less of a concern because the United States has a system for addressing these kinds of threats to public safety—the criminal justice system. My argument does not limit the criminal justice system's ability to punish noncitizens to the full extent of the law. I do, however, recognize that states within the United States feel as though they are unable to bear the fiscal burden of noncitizen crime.[356] The proportionality principle provides a useful tool for balancing these concerns.[357]

CONCLUSION

Deportation is a legitimate tool for enforcing U.S. immigration law, but the use of this tool for post-entry criminal activity can be disproportionate. Proportionality is a foundational principle in American criminal and civil law, which dictates that punitive measures should be proportionate to the wrongdoing. The deportation of LPRs for minor criminal activity raises serious

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354 *See* U.S. Citizenship & Immigration Servs., *Questions & Answers: Background Check Policy Update*, U.S. CITIZENSHIP & IMMIGR. SERVICES (Feb. 28, 2008), http://www.uscis.gov/files/article/NameCheckQA_28Feb08.pdf [hereinafter U.S. Citizenship & Immigration Servs., *Questions & Answers*]; U.S. Citizenship & Immigration Servs., *Fact Sheet: Immigration Security Checks—How and Why the Process Works*, U.S. CITIZENSHIP & IMMIGR. SERVICES (Apr. 25, 2006), http://www.uscis.gov/files/pressrelease/security_checks_42506.pdf. In 2008, the U.S. Citizenship and Immigration Services allowed applications to be processed that were waiting on the FBI name check, but had passed the other checks. *See* U.S. Citizenship & Immigration Servs., *Questions & Answers*, *supra*.

355 *See supra* text accompanying notes 234–39 for a discussion of noncitizen crime rates.

356 *See, e.g.*, *Criminal Aliens Hearing*, *supra* note 204, at 126 (noting that, as of 1994, the United States had been spending $723 million per year on unauthorized migrant prisoners); H.R. REP. NO. 104-22, at 9 (1995). With respect to states in particular, Nevada spent $3.5 million incarcerating "criminal aliens." *See Criminal Aliens Hearing*, *supra* note 204, at 128. Los Angeles County spent $75 million "on deportable criminal aliens on incarceration and prosecution," and California was expected to pay more than $375 million in the 1994–1995 fiscal year to incarcerate unauthorized migrant criminals. *See id.* at 133. The Governor of New York estimated spending $63 million to incarcerate unauthorized migrants, and Florida estimated its costs at $58.6 million. *See id.* at 150.

357 *See supra* Part III.A.

questions about the proportionality of the U.S. deportation regime. Pursuant to the *jus nexi* principle, LPRs can be members of our polity based on their connections to our social, cultural, and economic communities. As members of the polity, deportation can be a significant infringement of their liberty interest in remaining in the United States. Protecting these interests requires delinking the right to remain from citizenship status. Citizenship status is an under-inclusive proxy for the connections, commitment, and obligations that are relevant for determining when deportation is disproportionate and thus illegitimate. Some immigration and citizenship scholars seek to protect immigrants' rights by increasing immigrant access to citizenship and encouraging naturalization. I have taken a different approach and argued for decoupling the right to remain and citizenship status. The increased coupling of citizenship status and the right to remain has created more distinctions between similarly situated persons and a less egalitarian society.

In 1917 Congress recognized the significant hardship that families could experience if a long-term resident were deported.[358] By 1996 Congress had a different understanding of immigrants and crime, and thus a different conclusion about when crime-based deportation would be disproportionate. The predominant narrative in the late 1980s and early 1990s was simplistic and inaccurate. The focus was on unauthorized migrants involved in drug trafficking and the violent crimes that accompany it. This narrative allowed Congress to conclude that deportation was a proportionate consequence. Yet this analysis was extended beyond drug trafficking and related violent crimes. The aggravated felony definition was expanded with little discussion about the actual seriousness of the new crimes. This has created a system in which individuals like Gerardo can be deported for selling a ten dollar bag of marijuana. While the criminal justice system did not view his crime as serious enough to warrant a prison sentence, he was deported.[359] The fact that he had lawfully resided in the United States for over twenty years and his wife and

[358] *See, e.g.*, *supra* Part II.B. The narrative about immigrants and crime was complex. Immigrants were described as being long-term residents and recent arrivals, family men and confirmed bachelors, contributing members of society who made a mistake and opportunistic criminals, future citizens and perpetual outsiders. This narrative allowed members of Congress to conclude that a one-size-fits-all deportation regime would be inappropriate. Congress was also concerned with protecting public safety from the crime being committed by immigrants. These competing concerns were balanced by providing statutes of limitations and individualized proportionality reviews. This approach to balancing individual hardship and protecting public safety lasted until 1996. *See supra* Part III.

[359] Gerardo was sentenced to only ninety days in jail. *See* McDonnell, *supra* note 1.

children were U.S. citizens could not be taken into account when deciding if he would be deported.

Some members of Congress recognize the harshness of our current deportation regime. They have sponsored legislation that would allow immigrants' connections to be considered when deportation decisions are made. The success of these efforts depends on an accurate conception of serious threats to public safety and a new national narrative about immigrants and crime. The new narrative must reflect the variation within the immigrant community and resonate with American voters. These are both difficult, but necessary, challenges to overcome in order to create a just crime-based deportation regime.