

DEPORTATION AND JUSTICE: A CONSTITUTIONAL DIALOGUE

DANIEL KANSTROOM*

Abstract: Recent statutory changes to United States immigration law have resulted in a large increase in the number of lawful permanent resident noncitizens who are deported because of prior criminal conduct. Now, deportation is often a virtually automatic consequence of conviction for an increasingly minor array of crimes including possessory drug offenses and shoplifting. Under current statutory law, permanent resident noncitizens may be deported for crimes that were not grounds for deportation when they were committed and there may be no possibility of mercy or humanitarian relief. This Dialogue explores arguments for and against this system. Specifically, it examines the idea, rooted in history, that deportation is an unconstitutional punishment for criminal offenses.

[T]o understand what a constitution is, one must look not for some crystal-line core or essence of unambiguous meaning but precisely at the ambiguities, the specific oppositions that this specific concept helps us to hold in tension.¹

Critic: Mr. Kanstroom, I have read your two most recent articles² and I think I get the gist of your arguments but I am puzzled by a few things. First, could you state your basic criticism of the current state of U.S. deportation law?

Author: Our current deportation laws are disproportionately harsh and unforgiving. The system as a whole is unjust. As a social experi-

* © 2000 Daniel Kanstroom. Associate Clinical Professor of Law, Boston College Law School; Director, Boston College Immigration and Asylum Project.

¹ Hanna Fenichel Pitkin, *The Idea of a Constitution*, 37 J. LEGAL EDUC. 167, 167 (1987). See generally HANNA FENICHEL PITKIN, WITTGENSTEIN AND JUSTICE (1972) (elaborating further on this theme).

² This Dialogue is part of a larger project that critiques the current state of United States deportation law. It is designed to be read in conjunction with two other articles: Daniel Kanstroom, *Crying Wolf or a Dying Canary?*, 25 N.Y.U. REV. L. & SOC. CHANGE ____ (forthcoming 2000) [hereinafter Kanstroom, *Crying Wolf*]; and Daniel Kanstroom, *Deportation, Social Control, and Punishment: Some Thoughts About Why Hard Laws Make Bad Cases*, 113 HARV. L. REV. 1889 (2000) [hereinafter Kanstroom, *Deportation, Social Control*]. These articles have been made possible by support from Deans Aviam Soifer, James Rogers and John Garvey and a grant from Walter D. Wekstein, for which I am most grateful.

ment it has caused great harm. As a model upon which to base future enforcement systems, it is excessive and dangerous.

Critic: Thank you. That was simple and concise. Now, could you be just a bit more specific?

Author: Sure. One of the central features of U.S. immigration law during the past decade or so has been a dramatic increase in the numbers of noncitizens who are deported due to criminal conduct.³ Many politicians and commentators have supported this trend, which culminated in the package of laws enacted in 1996.⁴ Recently, however, concerns have been voiced about the harshness of this system,⁵ its inflexibility,⁶ the effect it has had on families and communities,⁷ and its meaning as an example of excessive government power directed against a relatively powerless minority.⁸ These concerns, which I think are well-founded, should lead us to question our approach to this whole subject.

First, and most basically, why should we deport noncitizens, particularly long-term legal residents who commit crimes, instead of just punishing them in the criminal justice system as we do citizens? Even though we have grown accustomed to this idea, it is far from self-evident that our current system makes sense. Indeed, it embodies a host of contestable assumptions about the meaning of "permanent" or other long-term residence in the United States. It also seems strongly to undervalue family unity and stability⁹ in the service of law enforcement goals. My secondary point, though, is that if we must do

³ See statistics cited in Kanstroom, *Deportation, Social Control*, *supra* note 2, at 1890 n.2.

⁴ See *id.* at 1890-91.

⁵ See, e.g., *Locked Away: Immigration Detainees in Jails in the United States*, in HUMAN RIGHTS WATCH REPORT, Sept. 1998.

⁶ See Robert Pauw, *A New Look at Deportation as Punishment: Why at Least Some of the Constitution's Criminal Procedure Protections Must Apply*, 52 ADMIN. L. REV. 305, 340-43 (2000) (suggesting need to return more discretion to immigration judges to grant waivers from deportation.). See generally Daniel Kanstroom, *Surrounding the Hole in the Doughnut: Discretion and Deference in U.S. Immigration Law*, 71 TUL. L. REV. 703 (1997) (analyzing discretion in immigration law and suggesting ways to structure it in the aftermath of 1996 changes to the Immigration and Nationality Act).

⁷ See Michael Fix & Wendy Zimmerman, *Urban Institute, All Under One Roof: Mixed Families in an Era of Reform* (last modified June 1999) <http://www.urban.org/immig/all_under.html>.

⁸ See Kanstroom, *Crying Wolf*, *supra* note 2, at ____.

⁹ See generally Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 HARV. L. REV. 1936, 1950-54 (2000) (discussing the impact of the 1996 immigration laws on families of legal permanent residents convicted of crimes) [hereinafter Morawetz, *Understanding the Impact*].

this, we should at least strive for consistency in our constitutional understanding of what seem clearly to be punitive sanctions.

Critic: Tell me more about why you think that deportation for crime is wrong. I have to say that it seems perfectly reasonable to me.

Author: Well, let me start with what I think is my strongest point and then we can move to more marginal issues. If proportionality is a fundamental component of justice, as I believe it is, then it is unfair and unjust to deport and banish for life a long-term legal permanent resident with family here and no contacts in her country of birth who commits a single minor crime.

Critic: Do we really do that?

Author: It's even worse than that. Imagine a person who has lived in the United States since early childhood as a lawful permanent resident, whose entire family is here, whose spouse and children are U.S. citizens, who speaks only English and knows no other culture but ours. Such a person can now be arrested by armed agents of the Immigration and Naturalization Service, will have no right to appointed counsel, may be subjected to mandatory detention with no right even to apply for release on bail, and may be deported and banished forever.¹⁰ All this for a minor criminal offense committed years ago, which may not even have been a ground for deportation when it was committed and may not have been considered a conviction under the law of the state where it occurred. Our current laws fail to provide an immigration judge with any discretion to provide humanitarian relief in such a situation. Finally, the deportee may well have no right to have an independent federal judge review the case.¹¹

Critic: You do make it sound pretty bad; but slow down. What do you mean by "a minor offense?"

Author: A conviction for petty larceny,¹² simple assault,¹³ or driving while intoxicated can be an aggravated felony.¹⁴ A noncitizen con-

¹⁰ Deportation for an aggravated felony results in a permanent bar against reentry into the United States. See INA § 212 (a) (9) (A) (ii) (II), 8 U.S.C. § 1182 (a) (9) (A) (ii) (II) (Supp. II 1996).

¹¹ See generally Gerald L. Neuman, *Jurisdiction and the Rule of Law after the 1996 Immigration Act*, 113 HARV. L. REV. 1963, 775-82 (2000) [hereinafter Neuman, *Jurisdiction*].

¹² See *United States v. Graham*, 169 F.3d 787, 791-93 (3d Cir.) (holding that misdemeanor petty theft with one year maximum sentence under New York law was an "aggravated felony"), cert. denied, ___ U.S. ___, 120 S. Ct. 116 (1999).

¹³ See INA § 101 (a) (43) (F), 8 U.S.C. § 1101 (a) (43) (F) (Supp. II 1996) ("crime of violence" as an "aggravated felony").

¹⁴ See, e.g., *In re Magallanes*, Int. Dec. 3341 (B.I.A. Mar. 19, 1998) (holding that Arizona conviction for aggravated driving under the influence of alcohol was a "crime of violence" and therefore an "aggravated felony").

victed of an aggravated felony is subject to removal from the United States with virtually no possibility of relief on humanitarian or other grounds. That person will also be banned for life from returning to the United States. Length of residence is irrelevant. Family ties here are meaningless. Hardship is immaterial.

Critic: But if the crime is a felony then it hardly qualifies as a minor crime, does it?

Author: Well, maybe not. But as it turns out, the definition of a felony is very complicated in this context. The INS has moved to deport people, and the Board of Immigration Appeals¹⁵ and some courts¹⁶ have affirmed deportation orders even if the state in which the conviction occurred does not consider it a felony.¹⁷ You'd be surprised how minor some of these cases are.

Critic: Hmm. Well, in any case, the defendant has been convicted, presumably after a trial or after a plea with counsel. So, it must have been serious or the case could have been disposed of in some other way to avoid deportation problems.

Author: Well, I'd like to think so, but when you get into the trenches a bit the picture is not so pretty. First, as you probably know, there is no Sixth Amendment right to appointed counsel in deportation proceedings.¹⁸ Nor is it generally required as a matter of due process.¹⁹ Second, although many defense lawyers, appointed or privately retained, may care about deportation consequences, many others may not.²⁰ It

¹⁵ See *In re L-G*, Int. Dec. 3254 (B.I.A. Sept. 27, 1995) (employing Davis/Barrett test where state drug offense can qualify as an "aggravated felony" under INA, regardless of state classification of the offense as a felony or misdemeanor, if offense is analogous to a felony under the federal drug statutes); cf. *In re K-V-D*, Int. Dec. 3422 (B.I.A. Dec. 10, 1999) (concluding that conviction that was a felony under state law but a misdemeanor under federal law was not an aggravated felony under the INA).

¹⁶ See *Graham*, 169 F.3d at 793.

¹⁷ See generally Morawetz, *Understanding the Impact*, *supra* note 9, at 1939-41 (discussing term "aggravated felony" under the 1996 immigration laws).

¹⁸ See *Bernal-Vallejo v. INS*, 195 F.3d 56, 63 (1st Cir. 1999); *Magallanes-Damian v. INS*, 783 F.2d 931, 933 (9th Cir. 1986). Some courts, however, have occasionally recognized a Fifth Amendment right to counsel under very specific circumstances. See, e.g., *Rios-Berrios v. INS*, 776 F.2d 859, 862 (9th Cir. 1985). For a more complete discussion of this issue, see Pauw, *supra* note 6, at 309-11.

¹⁹ See Kanstroom, *Deportation, Social Control*, *supra* note 2, at 1896 n.37.

²⁰ A need exists for an empirical study of this question. In the author's personal experience of more than fifteen years of practice and training lawyers about immigration consequences, however, the range of concern expressed by defense lawyers about immigration consequences has been very broad. The First Circuit Court of Appeals recently suggested that "[g]ood defense counsel in criminal cases often advise clients about immigration law consequences." *Mattis v. Reno*, 212 F.3d 31, 2000 U.S. App. LEXIS 9152, at *25 (1st Cir. May 8, 2000).

is far from settled that it is ineffective assistance for a defense lawyer to overlook or even misadvise about deportation. Indeed, the general rule is to the contrary.²¹ Courts are generally quite reluctant to allow a defendant to withdraw a plea, even if he was never warned that it would result in deportation.²²

Critic: But if a lawyer does do a good job and gets a dismissal or some sort of state diversionary disposition that will prevent deportation, right?

Author: No, it will not. The Board of Immigration Appeals has held that the federal definition of conviction,²³ passed by Congress in 1996, controls in all such cases.²⁴ As a result, even if the sentencing judge dismisses the case, it will not necessarily prevent deportation.

Critic: Well, that does seem harsh; though I suppose it is a natural consequence of the fact that immigration is a question of federal and not state law. But, rather than open that can of worms, answer this for me. Aren't there still ways to avoid deportation; like dragging the case out with years of appeals?

Author: Not really. Some think that this is the essence of deportation defense²⁵ but Congress has created a system of mandatory detention

²¹ See, e.g., *United States v. Yacoub*, 2000 U.S. App. LEXIS 11790, at *3 (7th Cir. May 22, 2000) (describing deportation as collateral consequence of a criminal conviction); *United States v. Gonzalez*, 202 F.3d 20, 24-28 (1st Cir. 2000) (rejecting the argument that recent amendments to the INA have so altered the relationship between conviction and deportation that revisitation of prior holdings on that relationship is required and barring ineffective assistance claims based on an attorney's failure to advise his client of the immigration consequences of his client's plea).

²² See *Yacoub*, 2000 U.S. App. LEXIS 11790, at *3; *Gonzalez*, 202 F.3d at 23, 28. An exception to this rule may occur in states such as Massachusetts where judges are required by statute to warn defendants of immigration consequences to pleas. See MASS. GEN. LAWS ANN. ch.278, § 29D (West 1998); *Commonwealth v. Soto*, 727 N.E.2d 811, 812-13 (Mass. 2000) (entering order allowing defendant to withdraw guilty pleas where judge failed to provide full statutory warning during plea colloquy).

²³ See INA § 101(a)(48); 8 U.S.C. § 1101(a)(48) (Supp. II 1996) (defining "conviction").

²⁴ See *In re Roldan-Santoyo*, Int. Dec. 3377 (B.I.A. Mar. 3, 1999) (holding that under the statutory definition of "conviction" provided at INA § 101(a)(48)(A), 8 U.S.C. § 1101(a)(48)(A), no effect is to be given in immigration proceedings to a state action, which purports to expunge, dismiss, cancel, vacate, discharge, or otherwise remove a guilty plea or other record of guilt or conviction by operation of a state rehabilitative statute).

²⁵ See, e.g., *Reno v. American-Arab Anti-Discrimination Committee*, 525 U.S. 471, 490 (1999) ("Postponing justifiable deportation [in the hope that the alien's status will change—by, for example, marriage to an American citizen—or simply with the object of extending the alien's unlawful stay] is often the principal object of resistance to a deportation proceeding, and the additional obstacle of selective-enforcement suits could leave the INS hard pressed to enforce routine status requirements.").

of virtually all noncitizens who face deportation for crime.²⁶ This means that if a person wants to contest the case, she will likely remain incarcerated for however long such appeals last.²⁷ This is, to say the least, a very powerful inducement to give up. And as I, or anyone else who practices regularly in the field can tell you, many, many clients do simply give up even though they have powerful arguments against deportation.²⁸ Also, the 1996 laws severely restrict judicial review in removal cases that involve criminal conduct.²⁹

Critic: Well, doesn't that argue in favor of these laws as a legitimate disincentive to dilatory tactics and risk of flight?

Author: I suppose it might. But we ought to weigh the effects of the alleged disease against those of the cure. Surely there are better ways to speed cases along than mandatory detention and the complete elimination of judicial review.

Critic: What about discretion? You make it sound as if there is no hope for any of these people. I thought you could ask an immigration judge to forgive and forget a minor conviction?

Author: Well, under certain very limited circumstances you still can.³⁰ But not if there has been a conviction for an aggravated felony.³¹ And, as I explained before, many apparently minor crimes, including state misdemeanors and cases that have been disposed of under state diversionary procedures for minor offenders, are aggravated felonies.

Critic: So what remedy would you propose for all this?

Author: Well, I think the system of deporting legal permanent residents for criminal conduct should be scrapped entirely by the Congress. It is extremely harsh; it harms families who are left behind; it embodies a throw-away attitude about people that is a dangerous

²⁶ See INA § 236(c), 8 U.S.C. § 1226(c) (Supp. II 1996) ("Apprehension and detention of aliens").

²⁷ In fact, if a deportation order cannot be effected once appeals are all concluded, a person may still face years of detention with no right to release. See, e.g., *Ho v. Greene*, 204 F.3d 1045, 1057-60 (10th Cir. 2000) (concluding that no statutory or constitutional impediment to continuing detention of non-citizens following removal order, even if lawful permanent residents).

²⁸ See Morawetz, *Understanding the Impact*, *supra* note 9, at 1947.

²⁹ See Neuman, *Jurisdiction*, *supra* note 11, at 1976-82; see also David Cole, *Jurisdiction and Liberty: Habeas Corpus and Due Process as Limits on Congress's Control of Federal Jurisdiction*, 86 GEO. L.J. 2481, 2485-89 (1998); Richard H. Fallon, Jr. *Applying the Suspension Clause to Immigration Cases*, 98 COLUM. L. REV. 1068, 1068+ (1998); Daniel J. Meltzer, *Congress, Courts, and Constitutional Remedies*, 86 GEO. L.J. 2537, 2565-84 (1998); Gerald L. Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, 98 COLUM. L. REV. 961, 965-68 (1998).

³⁰ See, e.g., INA § 240A; 8 U.S.C. § 1229b (Supp. II 1996) ("cancellation of removal").

³¹ See *id.* (a) (3).

model; it is bad foreign policy because the countries to which people are sent then have to deal with an array of related social problems which they are often ill-equipped to handle. Also, it severely depreciates the status of lawful permanent residents and it seems to constitute double punishment.³²

Critic: But wouldn't that depreciate the value of citizenship? The essence of the citizen/alien dichotomy is that aliens are not full members of the nation-state. Isn't the risk of deportation one of the main components of that lack of full membership?

Author: I suppose in some abstract sense it is. But the harshness and social costs of certain types of deportations are more compelling. Furthermore, the risk of deportation is far from the only disadvantage facing noncitizens. After all, noncitizens are required to register with INS,³³ and to be very careful about how long they remain outside the U.S. on pain of losing their status.³⁴ They are not allowed to vote,³⁵ they are ineligible for certain social safety net protections³⁶ and ineligible for certain jobs.³⁷ Their ability to bring family members here is much more limited than that of citizens.³⁸ And so on. I really don't see how a much more limited deportation regime threatens to bring down the whole citizen/alien edifice.³⁹ There are still plenty of dis-

³² See generally Kanstroom *Deportation, Social Control* *supra* note 2.

³³ See INA § 262, 8 U.S.C. § 1302 (requiring every alien to register and be fingerprinted if remaining in the U.S. for 30 days or more); 266(a), 8 U.S.C. § 1306(a) (failing to register results in charge of misdemeanor and fine of \$1000 and/or six months imprisonment).

³⁴ See INA § 101(a)(13)(c) (prescribing limits on rights of entry by lawful permanent residents); see also 8 C.F.R. § 211.1(b)(1)(A) (stating INS presumption that legal residency is abandoned after one year outside the United States).

³⁵ See U.S. CONST. amends. XV, XIX, XXVI. See generally Gerald M. Rosberg, *Aliens and Equal Protection: Why Not the Right to Vote?*, 75 MICH. L. REV. 1092 (1977).

³⁶ See, e.g., INA § 237(a)(5), 8 U.S.C. § 1227(a)(5) (prescribing deportation for becoming a "public charge").

³⁷ See generally Linda S. Bosniak, *Membership, Equality, and the Difference that Alienage Makes*, 69 N.Y.U. L. REV. 1047, 1110-15 (1994) (discussing "political function" exception).

³⁸ See, e.g., INA § 201, 8 U.S.C. § 1151 (differentiating system of immigration for relatives of citizens from that for relatives of permanent resident aliens).

³⁹ See generally *Developments in the Law—Immigration Policy and the Rights of Aliens*, 96 HARV. L. REV. 1286, 1304 (1983). One commentator asserted:

The new functional style of inquiry that the Court adopted led it to abandon the approach to aliens' rights that had rested upon the formal categories of "citizen" and "alien." In place of the formal approach, the Court evolved a model of analysis attuned to the alien's real participation in society, one recognizing that the alien, as her identification with the community deepened, came increasingly to resemble the citizen. This participation model, reflecting the Court's new interest in the promotion of substantive fairness in

tinctions and inducements to naturalize. I doubt, in any case, that Congress will agree with me, so my other idea is simply that courts should apply specific constitutional protections to such cases, analogous to those granted to criminal defendants. I think the current system is basically unconstitutional.

Critic: Well, if our duly elected representatives want to get tough on criminal aliens⁴⁰ you may not like it, but I hardly see why it's unconstitutional. After all, aliens who come to the United States know that they are, in effect, on probation until they become citizens. If they violate their terms, they face the consequence they always knew was there: deportation. What's unconstitutional about that?

Author: Your argument proves too much. It is one thing to say to a person, "you are on probation." It is quite another to say, "you may be deported at any time for any reason, even if it's a single drug offense, and you've lived here for fifty years, have no family elsewhere, etc. Even the fact that you complied with every term we placed on your residence at the time it was placed is irrelevant. You are now retroactively deemed in violation." There have to be limits beyond which the probation metaphor breaks down. What if we were to say to people, "you may enter the U.S. and live here, but if you litter you will be shot?" It is hardly a sufficient justification of such a law to say that it's just part of their "probation" as noncitizens.

Critic: That's an absurd hypothetical, of course. But leaving the death penalty out of it for the moment, I'm not convinced that anything is constitutionally wrong with a harsh deportation law. If a citizen can

the "private sphere," accords the alien "a generous and ascending scale of rights as he increases his identity with our society." The alien enters the United States, finds employment, settles down, and has a family; with each successive step her assimilation into society becomes more complete. The participation model recognizes this process and bases on it the gradual grant of rights to the alien.

See id. (footnotes omitted).

⁴⁰ Within the past fifteen years, Congress has often addressed the issue of deportation for crime. *See, e.g.*, Pub. L. No. 105-141, 111 Stat. 2647 (1997); Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214 (1996); Immigration and Nationality Technical Corrections Act of 1994, Pub. L. No. 103-416, 108 Stat. 4305 (1994); Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (1994); Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, Pub. L. No. 102-232, 105 Stat. 1733 (1991); Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (1990); Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 (1988); Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (1986); Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (1986).

get life in prison for petty larceny in a "three strikes" jurisdiction why couldn't we deport someone for littering?

Author: Your point is well-taken. And I suppose it's obvious that I'm not a big fan of "three strikes" laws either. Much of the argument boils down to the question whether there is an implicit constitutional right to proportionality in penal laws. The Supreme Court, at the moment, seems clearly inclined to answer this general question negatively,⁴¹ though the Court has been somewhat more receptive to such claims in the past.⁴² But traditional deportation doctrine doesn't ever address this issue because of the formalism that deportation of any type is *never* punishment for constitutional purposes.⁴³ I think we should change at least that so that we could more directly grapple with the proportionality problem in the deportation context.⁴⁴

⁴¹ See, e.g., *Riggs v. California*, 525 U.S. 1114, 1114 (1999) (denying certiorari in case raising issue whether California "three strikes" law is disproportionate when applied to a misdemeanor conviction); *Harmelin v. Michigan*, 501 U.S. 957, 1001-09 (1991) (holding that mandatory sentence of life without parole for drug possession did not violate Eighth Amendment); cf. *United States v. Bajakajian*, 524 U.S. 321, 334-44 (1998) (applying proportionality analysis under Excessive Fines Clause).

⁴² See, e.g., *Solem v. Helm*, 463 U.S. 277, 290 (1983) (holding that Eighth Amendment prohibits grossly disproportionate sentences); *Furman v. Georgia*, 408 U.S. 238, 279-80 (1972) (Brennan, J., concurring) (quoting *O'Neil v. Vermont*, 144 U.S. 323, 339-40 (1892) (Field, J., dissenting)) (stating that punishment is excessive if length or severity is disproportionate to offense); *Trop v. Dulles*, 356 U.S. 86, 99 (1958) (reasoning implicitly that proportionality analysis required under Eighth Amendment).

⁴³ See generally Kanstroom, *Deportation, Social Control*, *supra* note 2, at 1899-1915.

⁴⁴ Peter Schuck stated the issue well:

In view of what is inevitably and personally at stake, then, it is undeniable that deportation punishes the alien and punishes her severely. . . . To maintain, as classical immigration law consistently has done, that deportation resembles a sanction like being ejected from a national park rather than that of being banished or sentenced to jail, suggests that something deeply symbolic, not dryly logical, has been at work in the shaping of the doctrine. In condoning the deportation of the alien without the safeguards that government must ordinarily afford before it can impose grave punishment . . . the law affirms the contingent nature of her claims on the community. . . . The government's obligations to the alien are viewed as resting upon her formal status rather than upon her actual relationship to the society. Since under the classical order the alien's entry was conceived of as a privilege whose continued enjoyment was conditional upon her compliance with the formal terms that the government prescribed, deportation was simply the revocation of her license, a reversion to the status quo ante. No special procedural safeguards for this reversion were thought to be necessary.

Critic: Well, maybe more consistency between deportation law and other legal questions would be a good thing. I'm not sure yet. Still, it seems that you want consistency on the theory of punishment side, but you don't like the basic citizen/alien distinction as it has evolved. You may not like the plenary power doctrine and its implications for deportation law, but it's not necessarily *inconsistent*, is it?

Author: Well, the current state of the law: a flexible procedural calculus in deportation proceedings derived from *Yamataya v. Fisher*⁴⁵ and *Mathews v. Eldridge*⁴⁶ combined with a complex system of equal protection rights for noncitizens in other contexts, does have some inconsistencies. For example, a noncitizen in removal proceedings may have a right to appointed counsel but only if a reviewing court, on the basis of a record created *without* counsel, determines that counsel was required.⁴⁷ And too heavy a reliance on the citizen/alien line raises substantial equal protection problems. It is, after all, not so easy to reconcile *Yick Wo v. Hopkins*⁴⁸ with *Fong Yue Ting v. United States*.⁴⁹

Critic: Okay, but I still don't see why deportation should be seen as punishment. Aliens may be punished by the criminal justice system if their violation is criminal; but the deportation itself is no more punishment than any other collateral consequence of criminal activity, like being evicted from public housing, for example. It's part of the regulation of our immigration system. Your approach throws a lot of other well-settled doctrine into question.

Author: Maybe. Or perhaps what I mean to say is: "good." I think that each ostensibly civil or collateral consequence should be considered on the merits to determine whether—under the circumstances in which it is imposed—it is punishment or not. It is hardly sufficient to say, as Justice Frankfurter once did, that it's not punishment because the Court has not historically considered it to be punishment.⁵⁰

Critic: So, precedent doesn't matter to you, either?

Author: Precedent matters, of course but circumstances change, too. This system is uniquely punitive, even in a time of strict and harsh criminal laws such as the present.

⁴⁵ 189 U.S. 86 (1903).

⁴⁶ 424 U.S. 319 (1976).

⁴⁷ See *supra* note 18 (discussing right to counsel in deportation hearings).

⁴⁸ 118 U.S. 356, 369, 373-74 (1886) (holding that Chinese noncitizens have rights to equal protection).

⁴⁹ 149 U.S. 698, 707 (1893) (concluding that deportation power was as "absolute and unqualified" as the power to exclude noncitizens from entering the U.S.).

⁵⁰ See *Galvan v. Press*, 347 U.S. 522, 531-32 (1954).

Critic: Isn't there a real distinction between regulation and punishment? The Court has certainly found this line workable for many years, in a wide variety of contexts.

Author: Let me answer this question with a question: what if Congress were to refer to the death penalty not as punishment but simply as the "temporal regulation of mortality?"

Critic: That would obviously be different. I think you are overstating the Court's reliance on Congressional intent and formal categorization. Many factors go into these decisions. The Court understands the danger of formalistic reasoning.

Author: But what factors count, then?

Critic: Well, as I understand it the Court will consider the nature of the sanction, its history, and the reason why it is imposed.⁵¹

Author: Aha!

Critic: Aha?

Author: Yes. "Aha," because you have now accepted my basic premise: that the label of punishment should be applied, if appropriate, to deportation as the *product* of a functional, historical, and intentional analysis. It should not be used to preclude that sort of inquiry.

The deportation of long-term, legal permanent residents for post-entry conduct is imposed as a direct consequence of a prior "bad" act. Its purpose can hardly be said to be compensatory. Congress was pretty clearly aiming at retribution or deterrence. These are indicia of punishment, not regulation. Even though the harshness of these laws is probably my main concern, it's not just the harshness that matters.⁵²

Critic: All right, I do see that a certain inevitably functional-type of argument emerges here, but I'm still not convinced that deportation itself rises to that level.

But let's move on. What is it that really bothers you so much about the current system. Is it the retroactivity? I agree that that seems quite severe and if I were a judge I'd probably hold the government to a very high burden of clear drafting to accomplish this end, as I understand some judges have.⁵³ I'd also probably extend every right to discretionary relief from deportation that I could think of, as other

⁵¹ See Kanstroom, *Deportation, Social Control*, *supra* note 2, at 1914-26.

⁵² For an insightful analysis of this general issue see Pauw, *supra* note 6, at 330-31.

⁵³ See, e.g., *Ma v. Reno*, 208 F.3d 815, 821-22 (9th Cir. 2000) (applying strict reading of detention statute).

judges have.⁵⁴ But do we really need to upset more than a century of settled constitutional doctrine to do this?

Author: I think so, and here's why. First, although some judges have tried to do so, strict statutory interpretation⁵⁵ will not work well in most cases because Congress has been quite clear about the retroactivity of these laws. The substitution of exceedingly nice statutory interpretation for forthright constitutional analysis may be justified and pragmatic in a given case, but it also risks delegitimizing the whole judicial enterprise.⁵⁶ Ultimately, you will either have to invoke the *ex post facto* clause⁵⁷ or perhaps rely on substantive due process or analogies from cases like *In re Gault*.⁵⁸

More fundamentally, though, it's not just the retroactivity that concerns me. To extend potentially arbitrary, retroactive, unreviewable government power over legal permanent residents renders their status unacceptably precarious. Indeed, it calls into question their status itself, as ostensibly "permanent" residents. Moreover, apart from their rights as individuals, we ought to be concerned, as I have argued elsewhere,⁵⁹ and Jefferson and Madison long ago argued even more forcefully and eloquently, whenever government seeks such power. It is a dangerous experiment, to say the least, and it ought to be constitutionally resisted.

Critic: Well, maybe. You, Jefferson, and Madison might be right about the French who I suppose I could learn to tolerate. But why should I

⁵⁴ For example, consider a recent series of First Circuit decisions involving the extent to which so-called INA § 212(c) relief remains available. See *Mattis*, 2000 U.S. App. LEXIS 9152, at *22-*30; *Wallace v. Reno*, 194 F.3d 279, 285 (1st Cir. 1999); *Goncalves v. Reno*, 144 F.3d 110, 133-34 (1st Cir. 1998), *cert. denied*, 526 U.S. 1004 (1999).

⁵⁵ See *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948) (prescribing strict rule of statutory construction for deportation cases).

⁵⁶ As Hiroshi Motomura has noted, the disinclination of the Court to revisit substantive due process arguments has led to a "curious evolution" of immigration law. See Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 COLUM. L. REV. 1625, 1625 (1992) [hereinafter *Motomura, The Curious Evolution*]. As part of this evolution, judges, who for a variety of reasons are reluctant to apply some "mainstream constitutional norms" to immigration cases, sometimes use statutory interpretation methods to achieve the same end. See Hiroshi Motomura, *Immigration Law after a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 547-48, 564 (1990). Also, in some areas of immigration law, procedural due process has occasionally served as a surrogate for substantive constitutional review. See Motomura, *The Curious Evolution*, *supra*, at 1627-28.

⁵⁷ See Kanstroom, *Deportation, Social Control*, *supra* note 2, at 1917-20.

⁵⁸ See 387 U.S. 1, 34-38 (1967); Kanstroom, *Deportation, Social Control*, *supra* note 2, at 1927-33. See generally Nancy Morawetz, *Rethinking Retroactive Deportation Laws and the Due Process Clause*, 73 N.Y.U. L. REV. 97 (1998); Pauw, *supra* note 6.

⁵⁹ See generally Kanstroom, *Crying Wolf*, *supra* note 2.

be so concerned about criminal aliens? Although the precise details of their "probation" might vary they surely know they shouldn't be committing crimes. If they are convicted, the revocation of their residence here is not necessarily punishment for that crime and it doesn't seem so unreasonable in any case. I'm not even sure it's really retroactive. After all, they must have known that *some* crimes result in deportation. It's just the details that have changed.

Author: Well, I have a couple of answers to this. The easiest might be to suggest re-reading *Calder v. Bull*.⁶⁰ If a new law inflicts a greater punishment on a prior crime, it violates the *ex post facto* clause.⁶¹ As the Court put it more recently:

[A]lmost from the outset, we have recognized that central to the *ex post facto* prohibition is a concern for "the lack of fair notice and governmental restraint when the legislature increases punishment beyond what was prescribed when the crime was consummated."⁶²

Of course, you will undoubtedly note that I have now drifted into a somewhat circular reasoning process, myself—assuming the conclusion you are asking me to prove—that deportation is punishment. Since your question is really more one of fairness than settled doctrine, let me respond in that vein.

First, I do not plan to run for public office so perhaps I feel more comfortable than some parsing the appellation "criminal aliens" closely. There is a lot of variation among members of this group. For example, how does your no-punishment approach fit with people who may have come here as babies or young children? In our clinical immigration program at Boston College Law School we've encountered significant numbers of young people who actually thought they were U.S. citizens, right up to the point where they ended up in INS deten-

⁶⁰ 3 U.S. (3 Dall.) 386, 390-97 (1798).

⁶¹ See *Miller v. Florida*, 482 U.S. 423, 435-36 (1987) (application of Florida sentencing statute to defendant for crimes committed before statute's effective date violated the Ex Post Facto Clause); *Weaver v. Graham*, 450 U.S. 24, 33-36 (1981) (state statute reducing amount of "gain time" deductible from convicted prisoner's sentence was an unconstitutional *ex post facto* law as applied to a person whose crime was committed before statute's enactment); *Lindsey v. Washington*, 301 U.S. 397, 401-02 (1937) (application of state statute providing that a sentence shall be fixed by court at maximum term and for possible earlier release through parole, which amended statute authorizing maximum and minimum sentences, violated Ex Post Facto Clause as it provided a technical "increase in punishment" because accused were denied possibility of sentence of less than the maximum without tutelage of parole).

⁶² *Miller*, 482 U.S. at 430 (citations omitted).

tion facing deportation. Others wanted to become citizens but couldn't even start to do so until they turned eighteen, after which, in many INS districts, the process can take years, due to administrative delay (which, in turn, has been caused by increasing INS emphasis on enforcement as opposed to service).

Second, to reiterate, what of proportionality? Doesn't it trouble you to see deportation based increasingly frequently on ever more minor crimes, like petty larceny or simple assault, that may have resulted in no jail time or even been dismissed by state court judges?

Third, what do you think about the problem of ineffective assistance of counsel where a person is not advised or wrongly advised about the deportation consequences of a plea? And what of a person who might have been *rightly* advised to take an *Alford*⁶³ plea, maintaining innocence but accepting a sanction for any number of personal reasons? What would you do, as a judge, when such a person discovers that, due to a retroactive change in the law, he will be deported 20 years later?

Finally, and, perhaps most importantly, is it not also right to distinguish retroactive civil from criminal lawmaking at least in part on the basis of the ability of the political process to protect against government over-reaching?⁶⁴ Who has less such ability than noncitizens?

Critic: Whew! Well, I see where some doctrinal maneuvering might be warranted but I still think you've put too much weight on this punishment aspect. As a matter of fact, I was worried at the very beginning of your *Deportation, Social Control* Essay⁶⁵ by the way you slid right past the most basic justification for these laws—that Congress wanted to maintain credibility and legitimacy by crafting deportation systems that were tough and efficient, for a change. This is not an intent to punish, just to maintain respect for the rule-of-law.

Author: The strength of this point seems to depend on the extent to which we want to rely on the supposed intent of Congress. I am not a big believer in this particular fiction except, perhaps, in the context of a bill of attainder claim.⁶⁶ But, even assuming that we could figure out

⁶³ See *North Carolina v. Alford*, 400 U.S. 25, 37-38 (1970) (no constitutional error in accepting a guilty plea containing a protestation of innocence when the defendant intelligently concluded that his interests required entry of a guilty plea and the record before the judge contained strong evidence of actual guilt).

⁶⁴ See Harold J. Krent, *The Puzzling Boundary Between Criminal and Civil Retroactive Lawmaking*, 84 GEO. L.J. 2143, 2167 (1996).

⁶⁵ See Kanstroom, *Deportation, Social Control*, *supra* note 2, at 1893.

⁶⁶ See, e.g., *Flemming v. Nestor*, 363 U.S. 603, 628-30, 634 n.4 (1960) (Douglas, J., dissenting) (discussing history of concept of punishment in bill of attainder analysis).

what hundreds of representatives, senators and a president intended, I suppose I also have a Kantian sort of problem here. I just do not understand how we can avoid consideration of the actual effects of laws without sacrificing individuals as means to a very amorphous end. After all, one could say the same thing to any death-row inmate: we're not doing this to punish you, just to vindicate our criminal justice system.⁶⁷ In any event, I'd bet that most legislators who thought about these laws thought about them as punishment for crime anyway.⁶⁸

Critic: Well, I'm not so sure, but let me raise a couple of more specific problems I have with your line of reasoning. First of all, I don't see what it really gains you anyway. If, as you say, the convergence between the two systems often makes the deportation consequence automatic, then I don't see what all the fuss about procedural rights would be about. There's no live issue anyway, is there?

Author: I don't think this is right. First, of course, my approach would impart substantive rights as well as procedural. Second, as to procedural rights, you have to remember that I am not suggesting necessarily that *all* of the procedures of a criminal trial should be available in deportation cases. I do not, for example, think a jury trial necessarily would be required. It seems to me that a quasi-criminal model could reasonably impart some rights and not others, as has been done in the past from *Boyd v. United States*⁶⁹ to *Kennedy v. Mendoza-Martinez*⁷⁰ to *Gault*⁷¹ to *United States v. Halper*.⁷²

The strongest claim may be the right to appointed counsel and a recognition by courts that failure to consider deportation consequences is ineffective assistance of counsel. This is both because of my punishment argument and because of the increasing convergence between the criminal and deportation systems. It is increasingly reasonable to ask public defenders and other appointed counsel to take immigration consequences into effect. Training is better; materials

⁶⁷ As Oliver Wendell Holmes, Jr. once stated:

If I were having a philosophical talk with a man I was going to have hanged (or electrocuted) I should say, I don't doubt that your act was inevitable for you but to make it more avoidable by others we propose to sacrifice you to the common good. You may regard yourself as a soldier dying for your country if you like.

HOLMES-LASKI LETTERS 806 (Mark DeWolfe Howe ed., 1953).

⁶⁸ See Kanstroom, *Deportation, Social Control*, *supra* note 2, at 1894 n.20.

⁶⁹ 116 U.S. 616, 633-35 (1886).

⁷⁰ 372 U.S. 144, 164-67, 186 (1963).

⁷¹ 387 U.S. at 1.

⁷² 490 U.S. 435, 447-49 (1989).

are available, etc. Public Defender offices, at least in New York and Massachusetts, have recognized this responsibility. Others are doing the same. And private attorneys have no excuse, in my view, for ignoring these issues.

Critic: But what could a lawyer do in such a case? If the convergence is so complete and if the sanction is so automatic, a lawyer seems more like an ornament than a real protector.

Author: Good question. As a matter of fact, a similar question on this point was raised in *Mendoza-Martinez*.⁷³ It's a real problem for my argument but not conclusive and here's the basic reason why: automatic does not necessarily mean inevitable. Inevitable does not necessarily mean constitutional. And constitutional does not mean eternally so.⁷⁴

Put more pragmatically, there is always some play in the joints for a good lawyer to find. So a right to counsel can make a major difference, even in an apparently open and shut case. This is especially true if it means, as I believe it should, a right to a lawyer who is competent in both immigration and criminal law and who recognizes the constitutional issues at stake in such cases. We have not yet done enough studies to see how those who can afford such counsel fare as compared to those who cannot. In my experience, however, the difference is often profound.

Critic: Any other rights you think are especially important?

Author: Substantively, I'd suggest that the most significant claims are anti-retroactivity, and a right to bail both pending a final determination and after an order has entered if it cannot be enforced in a reasonable period of time. And if proportionality is going to be a part of our constitutional discourse in areas like fines,⁷⁵ then I'd suggest it should also play a role in our analysis of deportation laws. I recognize, of course, that I'm swimming against a powerful stream on this latter point.

⁷³ See 372 U.S. at 164-67.

⁷⁴ As Henry Hart once put it so well:

[T]he judges who sit for the time being on the court have no authority to remake by fiat alone the fabric of principle by which future cases are to be decided. They are only the custodians of the law and not the owners of it. The law belongs to the people of the country, and to the hundreds of thousands of lawyers and judges who through the years have struggled, in their behalf, to make it coherent and intelligible and responsive to the people's sense of justice.

Henry Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1396 (1953).

⁷⁵ See *Bajakajian*, 524 U.S. at 334-44.

Critic: Well, since you brought up proportionality again, I have another problem with your approach. Doesn't your use of the extended border control/social control dichotomy⁷⁶ create a strange anomaly? Why should long-term resident aliens who face deportation for, say, paperwork infractions, end up with fewer or less substantial protections than criminals?

Author: That is a conceptual problem, but I'm not sure that it's *my* problem. It is often the case that civil sanctions can be more onerous than criminal ones. This is exactly why I do not suggest that we rely on the formal civil/criminal line so much as the more flexible and functional idea of punishment. And that's why the Supreme Court, for more than a century, has repeatedly found itself drawn back to this functional approach in various contexts.⁷⁷ I'd analyze "civil" deportation cases more or less as the Court dealt with the "civil" fines at issue in *Halper*.⁷⁸ Indeed, I detect a trend of this type in the way some courts are approaching retroactivity analysis in recent deportation cases. The First Circuit, for example, recently held that Section 212(c) relief will continue to be available for persons whose convictions predated AEDPA⁷⁹ if the noncitizen "reasonably relied" on the availability of such relief at the time of a guilty plea or at the time it was decided not to contest the charges.⁸⁰ My point has simply been that such an approach is even more justifiable in the criminal deportation context because of the additional elements of social control, legislative intent (however amorphous), and systemic convergence.

Critic: You know, one other thing bothers me about this. Your approach depreciates the importance of the criminal system. Don't you think it's important to maintain a distinction that vindicates the shaming and other critical functions of the criminal sanction?⁸¹ If you keep blurring the line, pretty soon a criminal conviction will lose its meaning. Isn't it important to keep criminal sanctions distinct from non-punitive consequences of criminal action?

Author: This is a nice point, but I think it's rather abstract and academic. My first goals are fairness and consistency in the real treatment

⁷⁶ See Kanstroom, *Deportation, Social Control*, *supra* note 2, at 1899–1914.

⁷⁷ See *id.* at 1914–26.

⁷⁸ See 490 U.S. at 447–50.

⁷⁹ Pub. Law No. 104–132, 110 Stat. 1214 (1996) (eliminated INA § 212(c) relief for many types of cases); see also INA § 212(c), 8 U.S.C. § 1182(c) (1994) (repealed in 1996).

⁸⁰ See *Mattis*, 2000 U.S. App. LEXIS 9152, at *19.

⁸¹ See generally Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 Va. L. REV. 349 (1997).

of real people to the maximum extent possible consistent with realistic cost and the maintenance of basic legitimacy. I am prepared to say that those should be the goals of our legal system in general. The best way to accomplish those goals is to understand constitutional rights of all persons functionally, not formalistically, and not too symbolically. Moreover, the obviously punitive intent of these laws strongly supports my doctrinal claim that deportation of this type is punishment. As Holmes once put it, "even a dog distinguishes between being stumbled over and being kicked."⁸² I'd suggest that this also applies to being kicked out of the country for having done something wrong.

If you want to have a symbolic aspect of the criminal justice system focus on the people you really want to condemn, then you can certainly have that. But it seems wrong to me to deprive people of the right to counsel or subject them to retroactive sanctions or incarcerate them with no right to bail simply because you are afraid of some abstract symbolic consequence that might flow from recognizing the reality of what's being done to them.

⁸² OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 3 (Dover Publications, Inc. 1991) (1881).