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# CRIMINAL RECORDS AND IMMIGRATION: COMPARING THE UNITED STATES AND THE EUROPEAN UNION

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ARTICLE

CRIMINAL RECORDS AND IMMIGRATION:  
COMPARING THE UNITED STATES AND THE  
EUROPEAN UNION

*Dimitra Blitsa,\* Lauryn P. Gouldin,\*\* James B. Jacobs\*\*\* & Elena  
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### INTRODUCTION

Because the revolution in information technology has made individual criminal history records more comprehensive, efficient, and retrievable, an individual's criminal history has become an ever more crucial marker of character and public identity.<sup>1</sup> The broad range of collateral consequences of criminal convictions has become a very salient issue for criminal justice scholars and reformers.<sup>2</sup> A single criminal conviction can trigger thousands of potentially applicable restrictions, penalties, or other civil disabilities.<sup>3</sup>

There is no better example of this phenomenon than immigration law and policy, where developments in data storage and retrieval converge with opposition to immigration, especially to immigrants who bear a criminal stigma. In debates in the United States over

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1. See generally JAMES B. JACOBS, *THE ETERNAL CRIMINAL RECORD* (2015) (describing the criminal record as a government-generated CV that attaches to an individual for life and triggers thousands of employment, immigration and other social consequences).

2. See *id.*; see also MARGARET C. LOVE, JENNY ROBERTS & CECELIA KLINGELE, *COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTIONS: LAW, POLICY AND PRACTICE* (2013); Joy Radice, *Administering Justice: Removing Statutory Barriers to Reentry*, 83 U. COLO. L. REV. 715 (2012); Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 160 U. PA. L. REV. 1789 (2012); Michael Pinard, *Collateral Consequences of Criminal Convictions: Confronting Issues of Race and Dignity*, 85 N.Y.U. L. REV. 457 (2010); James B. Jacobs & Tamara Crepet, *The Expanding Scope, Use and Availability of Criminal Records*, 11 N.Y.U. J. LEGIS. & PUB. POL'Y 177 (2007–2008); Michael Pinard, *An Integrated Perspective on the Collateral Consequences of Criminal Convictions and Reentry Issues Faced by Formerly Incarcerated Individuals*, 86 B.U. L. REV. 623 (2006); JEREMY TRAVIS, *BUT THEY ALL COME BACK: FACING THE CHALLENGES OF PRISONER REENTRY* (2005) Gabriel Chin & Richard W. Holmes, *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 CORNELL L. REV. 697 (2002).

3. See *supra* notes 1-2 and accompanying text.

immigration reforms, even those politicians and legislators who advocate more liberal immigration policies generally concede the desirability of excluding those with serious criminal records from eligibility for new benefits or status. In the European Union, by contrast, although a criminal record may impact an individual's ability to travel to or reside in an European Union country, it is not as readily dispositive of immigration outcomes. As immigration policy evolves on both sides of the Atlantic, a key question for policymakers is whether excluding persons with criminal convictions is justifiable on grounds of public safety or as a criterion for preferring some visitors and immigrants over others. Aliens seek entrance to a foreign country for three (legal) purposes: permanent residency and citizenship (immigrants); temporary visiting (persons traveling for family reasons, tourism, educational purposes, or temporary work); and refugee status (persons fleeing persecution). For the United States, at least, criminality in a foreigner's home country is relevant to obtaining a visa to enter this country. In both the United States and the European Union, a foreigner's criminality in the host country can have fateful consequences for being allowed to remain.<sup>4</sup>

This Article compares the ways that the United States and the European Union use criminal records (including both conviction records and, in the United States, some arrest records) for immigration purposes. Toward this end, because US immigration policies are exclusively governed by federal laws, regulations, and executive orders, the United States is treated as a single entity. The European situation is more complicated. Understanding the effect of criminal records on immigration requires attention to the laws and policies of both the European Union and individual Member States. Part I documents the ways that criminal records are used in making immigration determinations in the United States. Part II analyzes the role that criminal records play in regulating immigration into (and within) the European Union. Part III concludes with guidance for policymakers in both jurisdictions.

### I. *CRIMINAL RECORD AND UNITED STATES IMMIGRATION*

In the United States, even among the plethora of so-called collateral consequences of conviction, the negative immigration

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4. IMMIGRATION CONSEQUENCES OF CRIMINAL ACTIVITY, CRS REPORT FOR CONGRESS, RL32480, at 2 (2006).

consequences of a criminal conviction stand out. There may be no other area of US law where a criminal record is more readily and irreversibly accepted as a proxy for the criminal record subject's dangerousness, immorality and unreliability.<sup>5</sup> These consequences have steadily expanded over the past few decades as the product of (i) intentionally severe immigration policy choices, (ii) general increases in the numbers of crimes that qualify as felonies, and (iii) technological developments that have greatly facilitated the collection, maintenance and dissemination of both immigration records and criminal records. In other words, the United States has steadily increased the immigration penalties for having criminal records, broadened the categories of crimes that trigger those penalties, and improved exponentially the ability to identify and track individuals with criminal histories. Indeed, a criminal record has become the most important screening criterion for US immigration determinations.<sup>6</sup> First, US law makes a criminal record a barrier to entering the United States. Tourists, asylum seekers and businessmen with disqualifying convictions in their home countries or elsewhere are not eligible ("inadmissible") to enter the United States.<sup>7</sup> (As used in the statute, the term "inadmissibility" can be confusing; it applies both to individuals who lack permission to enter the United States and to individuals who are unlawfully present in the United States.) Second, a US criminal conviction (or even just an arrest) may alert immigration authorities to an undocumented person's true identity and whereabouts, leading to detention and removal.<sup>8</sup> Third, new criminal convictions may precipitate removal or deportation of non-citizen permanent residents.

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5. Juliet Stumpf, *Fitting Punishment*, 66 WASH. & LEE L. REV. 1683, 1684 (2009) ("Neither the gravity of the violation nor the harm that results governs whether deportation is the consequence for an immigration violation. Immigration law stands alone in the legal landscape in this respect.").

6. Alina Das, *The Immigration Penalties of Criminal Convictions: Resurrecting Categorical Analysis in Immigration Law*, 86 N.Y.U. L. REV. 1669, 1681-82 (2010).

7. See Immigration and Nationality Act, 8 U.S.C. § 1227(a)(1)(A) (2008); see also MARGARET COLGATE LOVE, JENNY ROBERTS & CECILIA KLINGELE, *COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTIONS: LAW, POLICY AND PRACTICE* 121 (2013) (noting that a finding of inadmissibility bars foreign nationals from entering the United States and may also bar noncitizens lawfully present in the United States from upgrading their status, from re-entering the United States after travel abroad and could result in removal).

8. As currently used in immigration statutes, "removal" includes both "deportation" of those with legal status and expulsion of "inadmissible" aliens. In this Article, we use "removal" and "deportation" interchangeably.

### A. *Criminal Record as a Barrier to Entering the United States*

#### 1. Historical Origins

Efforts to close United States borders to convicted criminals date back to the colonial era. Colonists protested the British practice of transporting convicted criminals to the colonies. From 1718 to 1775, one quarter of British emigrants to the colonies, approximately 50,000 people, were convicts sentenced to banishment (transportation) to the New World.<sup>9</sup> After the Revolutionary War, US states prohibited foreigners who had been convicted in their home countries from taking up residency. The first federal immigration statute (1875) barred convicts and prostitutes from entering the United States.<sup>10</sup> A person with a disqualifying criminal record who successfully entered the country (in spite of this bar) was subject to deportation.<sup>11</sup> An 1882 statute instructed state officials that “a convict, lunatic, idiot, or [potential] public charge. . .” arriving at a United States port “shall not be permitted to land.”<sup>12</sup>

The 1891 Immigration Act first defined which previously convicted persons were barred from entering the United States. The Act “required inspection officers and their assistants to prevent the landing of aliens . . . who have been convicted of a felony or other infamous crime or misdemeanor involving moral turpitude.” Political offenses were not disqualifying.<sup>13</sup> Immigration officials could have only found out about past criminal record by questioning new arrivals. There was no—and still is not an—international system for sharing individual criminal history records, nor any US requirement that immigrants present to border personnel official documents attesting to a clean criminal record in their home country.

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9. Peter Markowitz, *Straddling the Civil-Criminal Divide: A Bifurcated Approach to Understanding the Nature of Immigration Removal Proceedings*, 43 HARV. C.R.-C.L. L. REV. 289, 323 (2009).

10. Page Act, ch. 141, § 5, 18 Stat. 477 (1875) (“[I]t shall be unlawful for aliens of the following classes to immigrate into the United States, namely persons who are undergoing a sentence for conviction in their own country of felonious crimes other than political or growing out of or the result of such political offenses, or whose sentence has been remitted on condition of their emigration, and women imported ‘for the purposes of prostitution.’”).

11. DANIEL KANSTROOM, *DEPORTATION NATION: OUTSIDERS IN AMERICAN HISTORY* 124-25 (2007) (explaining that the early model of deportation was one of “extended border control”); see also EDWARD P. HUTCHINSON, *LEGISLATIVE HISTORY OF AMERICAN IMMIGRATION POLICY: 1798-1965* (1981).

12. Act of Aug. 3, 1882, ch. 376, § 2, 22 Stat. 214.

13. Act of March 3, 1891, ch. 551, § 1, 26 Stat. 1084.

During World War I and after 1924 pursuant to statute, the federal government required aliens wishing to enter the United States to obtain visas from US consular offices in their home countries. Immigration officers at US ports of entry conducted a second screening.<sup>14</sup> Embassies and consulates could require the visa applicant to present an official document indicating criminal convictions or, preferably, certifying no criminal convictions. The reliability of such documents varied from country to country.

## 2. Modern Restrictions on Immigrants with Criminal Records

The policy of preventing entry into the US on the basis of some categories of prior conviction was not controversial. Congress probably feared that people who demonstrated dangerousness or dishonesty in their home country posed similar risks in the United States.

A 1950 Senate Judiciary Committee report emphasized that “[i]f a double check was essential 25 years ago to protect the United States against criminals or other undesirables, . . . it is even more necessary in the present critical condition of the world to use the double check to screen aliens seeking to enter the United States.”<sup>15</sup> The Immigration and Nationality Act (“INA”) of 1952 prohibited persons ever convicted of crimes involving “moral turpitude” from entering the country,<sup>16</sup> but left the definition of “moral turpitude” to federal administrative and judicial interpretations. The Board of Immigration Appeals<sup>17</sup> has opined that “moral turpitude refers generally to conduct which is inherently base, vile, or depraved, and contrary to the accepted rules of morality and the duties owed between persons or to society in general.”<sup>18</sup> Not surprisingly, courts

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14. Immigration Act of 1924, ch. 190, § 2, 43 Stat. 153.

15. Staff of S. COMM ON THE JUDICIARY, 81st Cong., *THE IMMIGRATION AND NATURALIZATION SYSTEMS OF THE UNITED STATES* 327 (Comm. Print 1950).

16. 8 U.S.C. § 1182(a)(2)(A)(i)(I) (2013).

17. See *Board of Immigration Appeals*, U.S. DEP’T OF JUSTICE, <http://www.justice.gov/eoir/board-of-immigration-appeals> (last updated Feb. 6, 2015) (“The Board of Immigration Appeals (BIA) is the highest administrative body for interpreting and applying immigration laws . . . BIA decisions are binding on Department of Homeland Security officers and immigration judges unless modified or overruled by the U.S. Attorney General or a federal court.”).

18. *In re L-V-C*, 22 I. & N. Dec. 594, 603 (BIA 1999); see also *Matter of Danesh*, 19 I. & N. Dec. 669 (BIA 1988). For an effort to create comprehensive lists of offenses that are and are not crimes of moral turpitude, see Patrick T. McDermott & Judith G. Patterson, *Crimes*

have held that, in addition to fraud-based crimes, sexual assault, rape, and breaking and entering with the intent to commit larceny qualify as crimes involving moral turpitude,<sup>19</sup> but there has been disagreement about many other convictions (e.g., domestic violence).<sup>20</sup>

Congress has periodically amended the INA to prohibit persons who have been convicted of designated offenses, including drug crimes, prostitution, human trafficking, money laundering and terrorism, from entering the United States.<sup>21</sup> A person who admits ever having *committed* one of these offenses, even if not convicted, is ineligible for temporary and non-immigrant visas, refugee status, and lawful permanent resident (“LPR”) status.<sup>22</sup> With narrow exceptions, consular officials’ decisions are final.<sup>23</sup>

A visa applicant who applies for a *waiver of inadmissibility* bears the burden of proving either that the disqualifying conviction (a) involved only prostitution; or (b) is at least fifteen years old; or (c) would cause a US citizen or Legal Permanent Resident extreme hardship, or that the waiver is authorized by the Violence Against Women Act.<sup>24</sup> For (a) and (b), the petitioner must prove that she is

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*Involving Moral Turpitude* (2004), <https://docs.google.com/viewerng/viewer?url=http://shusterman.com/pdf/cmt04.pdf>.

19. *Jordan v. De George*, 341 U.S. 223, 227 (1951) (explaining that “moral turpitude” had “deep roots in the law” and had been consistently interpreted by federal and state courts to include “crime(s) in which fraud is an ingredient”).

20. The Foreign Affairs Manual digests court decisions and offers guidance to consular officials who issue visas. *See* U.S. DEP’T OF STATE FOREIGN AFFAIRS MANUAL, 9 FAM 40.21(a) (2014).

21. *See* 8 U.S.C. § 1182(a)(2); 8 U.S.C. § 1182(a)(2)(D)(i) (prostitution and commercialized vice); 8 U.S.C. § 1182(a)(6)(E)(i) (alien smuggling); 8 U.S.C. § 1182(a)(2)(E) (aliens asserting immunity from prosecution); 8 U.S.C. § 1182(a)(2)(H) (trafficking in persons); 8 U.S.C. § 1182(a)(2)(I) (money laundering).

22. 8 U.S.C. § 1182(a)(2)(A)(i). For visa applicants, determinations about admissibility are made initially by consular officials employed by the Department of State based on the application and background checks, <http://www.travel.state.gov/content/visas/en/general/ineligibilities.html>.

23. *See, e.g., Saavedra Bruno v. Albright*, 197 F.3d 1153, 1159-60 (D.C. Cir. 1999) (applying the “doctrine of consular non-reviewability” in a case challenging visa denial based on alleged narcotics trafficking; “the doctrine holds that a consular official’s decision to issue or withhold a visa is not subject to judicial review, at least unless Congress says otherwise”); *see also* Stephen H. Legomsky, *Fear and Loathing in Congress and the Courts: Immigration and Judicial Review*, 78 TEX. L. REV. 1615, 1619-23 (2000) (describing “principle of consular absolutism”). *But see* *American Academy of Religion v. Napolitano*, 573 F.3d 115, 125 (2d Cir. 2009) (conducting “limited review” of visa denial challenged on First Amendment grounds).

24. The 1994 Violence Against Women Act (“VAWA”) permits victims of domestic violence to petition for legal status without sponsorship from a citizen or legal permanent

“rehabilitated” and that admission would not be contrary to the “national welfare, safety, or security of the United States.”<sup>25</sup> With narrow exceptions, visa and visa waiver denials cannot be appealed.

### 3. Identifying Foreign Convictions

The process for obtaining a visa varies by visa type and the visa applicant’s home country. Applicants for immigrant and some non-immigrant visas must provide criminal record certificates from the relevant authority (usually local police) in their country of residence (and any other countries where they have lived for more than one year).<sup>26</sup> United States embassies and consulates may request from the visa applicant, and from government authorities, additional criminal background information.<sup>27</sup> Many, but by no means all, countries now have fairly efficient national conviction records. However, in some countries, records may be haphazard and corruption may be a significant problem.

Most *non-immigrant* visa applicants must apply at a US embassy or consulate, provide fingerprints and photo and submit to an interview.<sup>28</sup> The applicant must disclose *all* relevant criminal conduct, whether or not she has been charged or convicted for it.<sup>29</sup> (As explained below, even would-be visitors from countries covered by the Visa Waiver Program must disclose whether they have ever been arrested or convicted of certain criminal offenses.) The list of convictions warranting exclusion has expanded beyond crimes of moral turpitude to include unlawful possession or sale of a controlled

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resident who allegedly battered them. 42 U.S.C. § 13981 (1994); *see also Instructions for Application for Waiver of Grounds of Inadmissibility*, U.S. DEP’T OF HOMELAND SECURITY (2015), <http://www.uscis.gov/files/form/i-601instr.pdf> [hereinafter *Application for Waiver*].

25. *See Application for Waiver*, *supra* note 24.

26. *See* U.S. DEP’T OF STATE FOREIGN AFFAIRS MANUAL, 9 FAM 42.65 (2008).

27. Obtaining criminal records may be difficult for some visa applicants, especially for those who need to provide records from multiple jurisdictions. Some countries lack effective procedures for issuing criminal record extracts and certificates of no criminal record. *See id.*

28. After the al Qaeda attacks on the World Trade Center and the Pentagon on September 11, 2001 (“9/11”), Congress assigned the Department of Homeland Security (“DHS”) responsibility for overseeing the issuance of visas. However, in most cases, the decision to issue a visa is made by a State Department consular officer. *See Bureau of Consular Affairs: About Us*, U.S. DEP’T OF STATE, <http://travel.state.gov/content/visas/en/about.html> (last visited Nov. 9, 2015) (“The different roles and responsibilities of the Department of Homeland Security and the Department of State can be confusing.”).

29. *U.S. Customs and Border Protection, Fact Sheet: Electronic System for Travel Authorization, Modernizing the Visa Waiver Program*, U.S. DEP’T OF HOMELAND SECURITY, [http://www.cbp.gov/sites/default/files/documents/fact\\_sheet\\_esta\\_4.pdf](http://www.cbp.gov/sites/default/files/documents/fact_sheet_esta_4.pdf).

substance, or any two or more offenses that carry a maximum aggregate sentence of five or more years of imprisonment.<sup>30</sup> Immigration officials at the border may independently question would-be entrants about past criminality.<sup>31</sup> Unless admitted, non-conviction information will rarely be discovered.

Consular and border control personnel have electronic access to a number of criminal and terrorist databases and lookout lists.<sup>32</sup> Consular officials consult the Department of State's Consular Consolidated Database ("CCD") which provides consular officers with access to ". . . over 100 million visa and passport records and 75 million photographs from 25 different DOS systems."<sup>33</sup> CCD connects automatically to the DOS automated Consular Lookout and Support System ("CLASS"), which includes the names of persons who were found ineligible for visas, persons whose visa applications require a Department of State opinion prior to issuance, and persons who might be ineligible for a visa should they apply for one.<sup>34</sup> CLASS contains 27 million records (an over 400 percent increase since 2001), including data gathered by diverse federal agencies and Interpol.<sup>35</sup> Under the United States Visitor and Immigrant Status Indicator Technology ("US-VISIT"), immigration officers check digital fingerprints and photographs of people entering the country against more than 108 million—predominantly US—records accessible to the Department of Homeland Security through Automated Biometric Identification System ("IDENT").<sup>36</sup> An IDENT

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30. 8 U.S.C. § 1227 (2011).

31. 8 U.S.C. § 1182(a) (2013).

32. See *Consular Lookout and Support System (CLASS) Privacy Impact Assessment*, U.S. DEP'T OF STATE (Aug. 6, 2015), [https://foia.state.gov/\\_docs/PIA/ConsularLookoutSupSystem\\_CLASS.pdf](https://foia.state.gov/_docs/PIA/ConsularLookoutSupSystem_CLASS.pdf); see also *Hearing on Securing the U.S. Border, B1/B2 Visas and Border Crossing Cards Before the H. Comm. on Oversight and Gov't Reform and Sub. Comm. on Nat'l Security*, 114th Cong. 11 (2013) (statement of Edward J. Ramotowski, Deputy Assistant Secretary for Visa Services, Dept. of State) [hereinafter *Hearing on Securing the U.S. Border*] (explaining that screening occurs during the course of visa interviews or as part of the Interview Waiver Pilot Program).

33. BORDER SECURITY: IMMIGRATION INSPECTIONS AT PORT OF ENTRY, CRS REPORT FOR CONGRESS, R43356, at 2 (2014) (citing Department of State Privacy Coordinator, "Consular Consolidated Databases (CCD), and Privacy Impact Assessment (PIA)" (Mar. 22, 2010)).

34. VISA WAIVER PROGRAM, CRS REPORT FOR CONGRESS, RL32221 (2014); see also *Hearing on Securing the U.S. Border*, *supra* note 32.

35. See VISA WAIVER PROGRAM, *supra* note 34, at 12-13.

36. *Biometric Standards Requirements for US-VISIT*, U.S. DEP'T OF HOMELAND SECURITY (Mar. 15, 2010), [http://www.dhs.gov/xlibrary/assets/usvisit/usvisit\\_biometric\\_standards.pdf](http://www.dhs.gov/xlibrary/assets/usvisit/usvisit_biometric_standards.pdf); see also *Fact Sheet: Expansion of US-VISIT Procedures to Additional*

search (i) confirms identity (preventing fraud), (ii) reveals prior immigration violations that would render the alien inadmissible, and (iii) checks 6.2 million watchlist records for “known or suspected terrorists, individuals with outstanding warrants and lookouts.”<sup>37</sup> Because IDENT exchanges information with the FBI’s Automated Fingerprint Identification System (“IAFIS”), State Department and Homeland Security officials can search more than 70 million IAFIS records.<sup>38</sup>

With very few exceptions, Canada most prominently, US officials do not have access to foreign countries’ criminal records databases. The F.B.I. and the Royal Canadian Mounted Police (“RCMP”) have shared criminal records information for decades.<sup>39</sup> After the September 11th al Qaeda terrorist attacks, the United States and Canada agreed to a Smart Border Plan that provides both countries’ immigration and border control officials with real-time access to each other’s criminal history databases.<sup>40</sup> United States border control and immigration officials also can access some Central

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*Travelers*, U.S. DEP’T OF HOMELAND SECURITY (Mar. 15, 2010), [http://www.dhs.gov/files/programs/gc\\_1231972592442.shtm](http://www.dhs.gov/files/programs/gc_1231972592442.shtm); Notice of Updated Privacy Act System of Records Notice, 72 Fed. Reg. 107 (June 5, 2007).

37. 8 C.F.R. § 235.1(f)(1)(ii) (2013) (purpose of biometric check is “to determine the alien’s identity and whether he or she has properly maintained his or her status while in the United States and/or whether he or she is admissible”); 8 C.F.R. § 235.1(f)(1)(iv) (2013) (outlining exceptions to biometric requirements including age, visa type, and special exceptions granted by DHS, State Dept. or CIA); *see also Ten Years after 9/11: Can Terrorists Still Exploit our Visa System? Before the H. Subcomm. on Border and Maritime Security of the H. Homeland Security Comm.* (2011) (statement of John Cohen, Principal Deputy Coordinator for Counterterrorism), <http://www.dhs.gov/ynews/testimony/20110913-cohen-ten-years-after-911-visa-system.shtm> (describing IDENT watch list).

38. Statutory authority for sharing criminal history information between federal agencies and departments is contained in the 2001 USA PATRIOT Act (U.S. H.R. 3162, Public Law 107-56, Sec. 403(a), amending 8 U.S.C. § 1105(b)(1) (Oct. 26, 2001) (providing the INS and the Department of State with ready access to NCIC extracts).

39. James B. Jacobs & Dimitra Blitsa, *Sharing Criminal Records: The United States, the European Union, and Interpol Compared*, 30 *LOY. L.A. INT’L & COMP. L. REV.* 101, 152 (2008); *see also* KENNETH C. LAUDON, *DOSSIER SOCIETY: VALUE CHOICES IN THE DESIGN OF NATIONAL INFORMATION SYSTEMS*, 85 (1986).

40. FOREIGN AFFAIRS AND INT’L TRADE CANADA, 5<sup>TH</sup> SMART BORDER ACTION PLAN STATUS REPORT (Dec. 17, 2004), <https://migration.ucdavis.edu/rs/more.php?id=170>; *see also* HIROSHI MOTOMURA, *AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES* 174-76, 186 (2006) (noting increase in investigation and deportation resources of the United States Government with regards to noncitizens from Arab and Muslim countries after 9/11).

American gang-related criminal records via the Central American Fingerprint Exploitation initiative (“CAFÉ”).<sup>41</sup>

In June 2009, the governments of the United Kingdom, Canada, the United States, Australia and New Zealand (the Five Country Conference) signed a joint agreement to pursue biometric data sharing for immigration purposes.<sup>42</sup> Under the agreement, known as the high value data sharing protocol, the countries will share a limited number of immigration fingerprint records (approximately 3,000 per country per year) for matching against the other countries’ immigration databases.<sup>43</sup> If a match is found, further biographical information will be shared on a bilateral basis.<sup>44</sup>

The Visa Waiver Program (“VWP”) permits nationals of (so far) 38 approved countries (accounting for 40 percent of foreign visitors to the United States) to visit the United States for up to 90 days without a consular interview or visa.<sup>45</sup> In recent years, the United States has negotiated Preventing and Combating Serious Crime (“PCSC”) agreements to share fingerprint information with 35 of the 38 countries participating in the Visa Waiver Program (and two non-VWP countries).<sup>46</sup>

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41. See *Going Global on Gangs*, FBI (Oct. 10, 2007), [http://www.fbi.gov/news/stories/2007/october/ms13tag\\_101007](http://www.fbi.gov/news/stories/2007/october/ms13tag_101007) (describing how consular officials and border control officers have access to these records via IDENT, CLASS and TECS databases); National Crime Prevention and Privacy Compact, FBI, Topic #18 (May 14-15, 2008), <https://www2.fbi.gov/hq/cjisd/web%20page/may2008minutes.htm>; see also Jacobs & Blitsa, *supra* note 39, at 102.

42. *Privacy Impact Assessment for the US-VISIT Five Country Joint Enrollment and Information-Sharing Project (FCC)*, U.S. DEP’T OF HOMELAND SECURITY (Nov. 2, 2009), [http://www.dhs.gov/xlibrary/assets/privacy/privacy\\_pia\\_usvisit\\_fcc.pdf](http://www.dhs.gov/xlibrary/assets/privacy/privacy_pia_usvisit_fcc.pdf); see also *Privacy Impact Assessment, Immigration New Zealand Identity and Biometrics Programme* (Nov. 2010), [http://www.immigration.govt.nz/NR/rdonlyres/E03723F9-5568-42E1-9AFF-1D1E7D1124CF/0/DOL11587\\_PIA\\_USNZ\\_FINAL.pdf](http://www.immigration.govt.nz/NR/rdonlyres/E03723F9-5568-42E1-9AFF-1D1E7D1124CF/0/DOL11587_PIA_USNZ_FINAL.pdf).

43. *Privacy Impact Assessment*, *supra* note 42.

44. *Id.*

45. *Oversight of the Department of Homeland Security, Before the Senate Comm. on the Judiciary* (2012) (written testimony of Department of Homeland Security Secretary Janet Napolitano), <http://www.dhs.gov/ynews/testimony/20120425-s1-dhs-oversight-sjc.shtm>.

46. *Id.*; see also *International Engagement Results*, U.S. DEP’T OF HOMELAND SECURITY, <http://www.dhs.gov/international-engagement-results> (last visited Nov. 9, 2015) (providing updated numbers); *Visa Waiver Program: Implications for U.S. National Security* (2015) (written testimony of PLCY Office of International Affairs Deputy Assistant Secretary Mark Koumans and CBP Office of Field Operations National Targeting Center Deputy Executive Director Maureen Dugan for a Senate Committee on Homeland Security and Governmental Affairs hearing), <http://www.dhs.gov/news/2015/03/12/written-testimony-plyc-and-cbp-senate-committee-homeland-security-and-governmental> (explaining that “[a]ll VWP countries have signed a PCSC Agreement or its equivalent”); Marc Frey, *International*

Every traveler to the United States from a VWP country must be pre-screened through the Electronic System for Travel Authorization (“ESTA”). ESTA data is checked against multiple databases including Customs and Border Protection’s (“CBP”) Automating Targeting System (“ATS”) and TECS system. The ATS is run by the National Targeting Center and checks a variety of databases including the Terrorist Screening Database (“TSDB”) and Interpol’s data on lost and stolen passports. The ATS gives each individual a risk-based score that determines whether or not the individual should receive additional scrutiny or inspection. TECS queries various databases for information about the person’s eligibility for travel to the United States and whether he or she is a known security risk.<sup>47</sup> This vetting is more focused on potential terrorists than “ordinary criminals.”<sup>48</sup>

#### B. *Criminal Records-Based Removal of Lawful Permanent Residents*

For nearly a century, even legal permanent residents have been vulnerable to removal if they are convicted of a disqualifying crime. In 1911, the “Dillingham Commission,” established by Congress to study immigration issues, concluded that it was “inexcusable” for Congress not to have passed legislation to deport immigrants who commit crimes after coming to the United States.<sup>49</sup>

In 1917, Congress authorized deportation of lawful immigrants convicted of a state or federal crimes involving moral turpitude.<sup>50</sup> From that point on, Congress periodically added to the list of moral turpitude offenses. The impact of the 1917 law was softened,

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*Criminal Information Sharing*, HOMELAND SECURITY POLICY INSTITUTE (July 7, 2010), <http://securitydebrief.com/2010/07/07/international-criminal-information-sharing> (“A PCSC agreement provides for the reciprocal exchange of biometric and biographic data and any relevant underlying information for law enforcement purposes . . . [.] The parties provide each other automated access to their fingerprint (and potentially DNA databases) on a hit/no hit basis. Each party can query the other’s database and, if a match is found, can request identity and other information about the individual through established, informal police-to-police channels. The parties may also “spontaneously” share terrorism or criminal information with each other, even without a query being made.”).

47. *Oversight of the Department of Homeland Security*, *supra* note 45.

48. *Visa Waiver Program Improves Security, Before the Subcomm. on Border and Maritime Security of the H. Comm. on the Judiciary* (2015) (testimony of Department of Heritage Foundation Director Steven P. Bucci), <http://www.heritage.org/research/testimony/2015/visa-waiver-program-improves-security>.

49. S Doc. No. 61-783, at 34 (1911).

50. *See* Immigration Act of 1917 ch. 29, § 19, 39 Stat. 889 (1917).

however, by giving sentencing judges, within 30 days following sentencing, authority to make a judicial recommendation against deportation (“JRAD”).<sup>51</sup>

Political pressure to deport non-citizens who commit crimes has been a powerful theme in US immigration law for the last three decades.<sup>52</sup> A provision of the Immigration Reform and Control Act of 1986 (“IRCA”), known as the MacKay amendment, permitted the initiation of deportation proceedings against any immigrant convicted of a deportable offense.<sup>53</sup> The 1988 Anti-Drug Abuse Act significantly expanded the number of deportable offenses by introducing the *aggravated felony* category into immigration law.<sup>54</sup> At the time, “aggravated felony” included only murder and trafficking in drugs or firearms. Subsequently, Congress designated dozens more offenses as aggravated felonies, e.g. rape, sexual abuse of a minor, money laundering, unlawfully possessing explosive materials offenses, diverse crimes of violence, certain theft offenses, child pornography, racketeering offenses, prostitution, human trafficking, treason, offenses relating to the transmission of classified information, fraud, tax evasion, alien smuggling, passport fraud, various obstruction of justice offenses, certain absconding offenses, and

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51. See INA § 241(b)(2), 8 U.S.C. § 1251(b)(2) (1982); see also Peter Schuck, *Immigrant Criminals in Overcrowded Prisons: Rethinking an Anachronistic Policy*, 27 GEO. IMMIGR. L. J. 597, 636 (2013). That binding JRAD authority was later eliminated. See Brown, *infra* note 63 and accompanying text.

52. See Peter Schuck & John Williams, *Removing Criminal Aliens: The Pitfalls and Promises of Federalism*, 22 HARV. J.L. & PUB. POL’Y 367, 369, 426 (2000); see also MOTOMURA, *supra* note 40, at 55 (noting “the most dramatic developments have taken place since 1988, with Congress making it steadily easier for the government to deport noncitizens convicted of crimes”); Margaret Taylor & Ronald Wright, *The Sentencing Judge as Immigration Judge*, 51 EMORY L.J. 1131 (2002); Ryan D. King, Michael Massoglia & Christopher Uggen, *Employment and Exile: U.S. Criminal Deportations, 1908-2005*, 117(6) AM. J. SOCIOLOGY 1786, 1797-90 (May 2012).

53. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359. (1986); see also King, *supra* note 52, 1801-03 (offering empirical evidence showing a drastic increase in criminal deportations after IRCA).

54. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 (1988); see also Stephen Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469, 483 (2007); Juliet P. Stumpf, *Doing Time: Crimmigration Law and the Perils of Haste*, 58 UCLA L. REV. 1705, 1734 (2011) (“The ‘aggravated felony’ has become an infamous misnomer, encompassing crimes that are neither severe nor felonies, and existing as a category apart from criminal law with no counterpart to any term or definition in criminal law.”).

certain attempt or conspiracy offenses.<sup>55</sup> It even designated some state misdemeanor convictions (e.g. theft, burglary, perjury and obstruction of justice) as aggravated felonies if the value of stolen property reaches a certain threshold (US \$10,000) or the judge imposes a sentence of at least one year's imprisonment.<sup>56</sup> Sentencing judges' JRAD authority was eliminated from immigration law in 1990.<sup>57</sup>

These changes have made LPRs more vulnerable to deportation. Indeed, about 10 percent of deportees annually (approximately 40,000 individuals) are LPRs. Consider the case of Jose Padilla, an LPR who was arrested for transporting marijuana. Padilla had been a lawful permanent resident for over forty years.<sup>58</sup> Relying on his defense lawyer's assurance that he did not have to worry about removal or deportation because he had been residing in the United States for so long, Padilla pleaded guilty to three state aggravated felonies (including trafficking over five pounds of marijuana).<sup>59</sup> Unfortunately for Padilla, his lawyer's advice was erroneous; the guilty plea made it "virtually inevitable" that Immigration and Customs Enforcement ("ICE") would deport him.<sup>60</sup>

On appeal, Padilla argued that his conviction should be reversed because his Sixth Amendment right to effective assistance of counsel was violated by his attorney's blatantly mistaken advice. The Supreme Court agreed that Padilla's defense counsel's legal representation was constitutionally deficient.<sup>61</sup> Writing for the majority, Justice John Paul Stevens explained that "as a matter of federal law, deportation is an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on

55. 8 C.F.R. § 208.13(c)(2)(D) (2013); Immigration and Nationality Act, 8 U.S.C. § 1101(a)(43) (2014).

56. Omnibus Consolidated Appropriations Act, Pub. L. No. 104-208 §321(a) (1996); 8 U.S.C. § 1101(a)(43) (defining "aggravated felony").

57. See *Padilla v. Kentucky*, 559 U.S. 356, 359 (2010) (explaining the history of the JRAD provisions).

58. *Id.*

59. *Id.*; see also *Commonwealth v. Padilla*, 253 S.W.3d 482, 484-85 (Ky. 2008).

60. *Padilla*, 559 U.S. at 360; see also Gabriel Chin & Richard W. Holmes, *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 CORNELL L. REV. 697, 700, 706 (2002); Jenny Roberts, *Proving Prejudice, Post-Padilla*, 54 HOWARD L. J. 693 (2011).

61. See *Strickland v. Washington*, 466 U.S. 668, 682 (1984). The Supreme Court of Kentucky, as well as other federal and state courts, had previously held that the immigration consequences of a conviction were "collateral consequences" and therefore "outside the scope" of the Sixth Amendment. *Padilla*, 559 U.S. at n.9 (collecting state and federal authorities that held that immigration consequences were collateral).

noncitizen defendants who plead guilty to specified crimes.”<sup>62</sup> Therefore, the Sixth Amendment right to effective assistance of counsel requires that a noncitizen defendant be apprised of the immigration consequences of a guilty plea.<sup>63</sup>

The 1996 Illegal Immigration Reform and Immigrant Responsibility Act (“IIRIRA”) provided that an LPR with a prior conviction involving moral turpitude, who returns to the United States after foreign travel, “may be removed from the United States.”<sup>64</sup> Thus, when Panagis Vartelas, who had been living in the United States since 1989, returned from a routine trip to Greece in 2003, an immigration officer determined that Vartelas’ 1994 conviction for conspiracy to make counterfeit traveler’s checks rendered him inadmissible and initiated removal proceedings. Eventually, the Supreme Court held that Vartelas was not removable because the IIRIRA does not apply to convictions rendered before passage of the Act. LPRs convicted *after* 1996, however, may be removed.<sup>65</sup>

An LPR can petition for relief from removal by demonstrating “good moral character” for a specified period of time before the notice of removal was issued.<sup>66</sup> Good moral character is also a prerequisite for eligibility for “voluntary departure,” which allows an LPR to leave the country without a formal removal order.<sup>67</sup> Having any criminal record significantly reduces the likelihood that an individual will be found to have “good moral character.”

An individual convicted of a *particularly serious crime*, who “constitutes a danger to the community,” is not eligible for relief from removal.<sup>68</sup> There are three ways that a crime qualifies as “particularly serious.” First, all aggravated felonies are particularly serious.<sup>69</sup> Second, the Attorney General designates certain other offenses as

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62. *Padilla*, 559 U.S. at 364.

63. Darryl Brown, *Why Padilla Doesn’t Matter (Much)*, 58 UCLA L. REV. 1393, 1399-407 (2011) (describing the difficulty of actually bargaining around deportation).

64. *Vartelas v. Holder*, 132 S.Ct. 1479, 1486 (2012); see HIROSHI MOTOMURA, IMMIGRATION OUTSIDE THE LAW 46 (2014) (stating this legislation “suggest[ed] a continuing shift away from the traditional tolerance or acquiescence that prevailed over much of the twentieth century”).

65. *Id.* at 1492.

66. 8 U.S.C. §1229b(a) (cancellation for Lawful Permanent Residents); 8 U.S.C. §1229b(b) (cancellation for non-permanent residents); 8 U.S.C. §1229b(b)(2) (VAWA cancellation for domestic violence victims).

67. 8 U.S.C. § 1229c (2006).

68. 8 U.S.C. § 1158(b)(2)(A)(ii); 8 C.F.R. § 208.13(c)(2)(A) (2013).

69. 8 U.S.C. § 1158(b)(2)(B)(i) (2009).

particularly serious.<sup>70</sup> Third, and controversially, the Attorney General may decide that the facts of a particular case qualify it as particularly serious, although that general crime category has not been designated as particularly serious.<sup>71</sup>

The Supreme Court's *Padilla* decision highlighted what had long been clear to prosecutors and criminal defense attorneys. Noncitizen defendants often regard the immigration consequences of an arrest and conviction as much more important than the criminal sentence itself, even a sentence that includes incarceration.<sup>72</sup> The Supreme Court observed that the prospect of the defendant being deported can and does affect the prosecutor's charging and plea bargaining decisions.

By bringing deportation consequences into this [plea bargaining] process, the defense and prosecution may well be able to reach agreements that better satisfy the interests of both parties . . . Counsel who possess the most rudimentary understanding of the deportation consequences of a particular criminal offense may be able to plea bargain creatively with the prosecutor in order to craft a conviction and sentence that reduce the likelihood of deportation, by avoiding a conviction for an offense that automatically triggers the removal consequence. At the same time, the threat of deportation may provide the defendant with a powerful incentive to plead guilty to an offense that does not mandate that penalty in exchange for a dismissal of a charge that does.<sup>73</sup>

While federal prosecutors are prohibited from promising non-deportation in a plea agreement without Department of Homeland Security authorization,<sup>74</sup> county prosecutors in communities sympathetic to the plight of permanent resident aliens and

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70. 8 U.S.C. § 1158(b)(2)(B)(ii) (2009); *see also* Delgado v. Holder, 563 F.3d 863, 867 (9th Cir. 2009), reh'g en banc, 648 F.3d 1095 (9th Cir. 2011).

71. At least three federal circuit courts have held upheld the attorney general's authority.

72. *I.N.S. v. St. Cyr*, 533 U.S. 289, 323 (2001) (explaining that the protection against deportation is "one of the principal benefits sought by defendants deciding whether to accept a plea offer or instead to proceed to trial").

73. *Padilla v. Kentucky*, 559 U.S. 356, 373 (2010).

74. Memorandum From the Attorney General to All Federal Prosecutors on Deportation of Criminal Aliens (Apr. 28, 1995), <http://www.justice.gov/ag/attorney-general-april-28-1995-memorandum-deportation-criminal-aliens>; *see also* UNITED STATES ATTORNEYS' MANUAL § 9-73.510 (2010), <http://www.justice.gov/usam/usam-9-73000-immigrant-violations-passport-and-visa#9-73.510>.

undocumented aliens may choose to divert the case from the criminal justice system in order to prevent automatic deportation.<sup>75</sup> When the defendant is an alien, the prosecutor knows that charging and plea bargaining decisions, in effect, determine whether the defendant can continue living in the United States. The prosecutor who wants to dispose expeditiously of a case against a deportable alien may need to offer that defendant a guilty plea option that does not result in deportation. Moreover, judges who are sympathetic to immigrants urge prosecutors to reduce or dismiss aggravated felony charges in order to avoid deportation.<sup>76</sup>

### C. Removal of Undocumented Aliens

There are approximately 11 million immigrants living in the United States unlawfully. Because immigration enforcement authorities have insufficient resources to remove all apprehended undocumented aliens, the government assigns priority to removing “criminal aliens,”<sup>77</sup> i.e. those undocumented individuals who have been convicted. To a significant extent, a criminal record has become the most important determinant of whether an apprehended illegal alien remains in the country or is removed.<sup>78</sup>

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75. Daniel Richman, *The Right Fight*, BOSTON REVIEW, Dec. 1, 2004, <http://bostonreview.net/forum/right-fight>.

76. Robert A. Mikos, *Enforcing State Law in Congress's Shadow*, 90 CORNELL L. REV. 1411, 1444-56 (2005); see also *Escoto-Castillo v. Napolitano*, 658 F.3d 864 (8th Cir. 2011) (describing state court judge's post-removal attempt to restructure the defendant/petitioner's sentence to avoid the one-year threshold that made the conviction an aggravated felony; because petitioner had already been removed, the amended sentence did not alter the outcome).

77. For example, ICE's Director has explained that “ICE . . . only has resources to remove approximately 400,000 aliens per year, less than 4 percent of the estimated illegal alien population in the United States.” Memorandum from John Morton, Director, U.S. Immigration and Customs Enforcement to All ICE Employees, March 2, 2011; see also MOTOMURA, *supra* note 64, at 192 (noting that “even when a conviction is not a formal ground for the removal of an unauthorized migrant, a conviction can prompt federal immigration agencies to prioritize enforcement against him”).

78. JACOBS, *supra* note 1, at 255 (“[A]s a matter of federal law, 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.”); see also MARGARET COLGATE LOVE, JENNY ROBERTS & CECILIA KLINGELE, *COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTIONS: LAW, POLICY AND PRACTICE* 147 (2013) (noting even a connection with the criminal justice system can have negative effects on a noncitizens' prospects in the immigration system in that (1) immigrants who are arrested are at high risk for local law enforcement discovering their lack of status and turning them over to federal authorities

United States Immigration authorities have long given top priority to removing violent and/or repeat offenders.<sup>79</sup> The Criminal Alien Program (“CAP”) was created in the wake of the 1986 Immigration Reform and Control Act (“IRCA”) and “in 2006, ICE consolidated several preexisting programs into CAP. The core goal of CAP is the removal of noncitizens who are incarcerated in jails and prisons, and the initiation of removal proceedings against them.”<sup>80</sup> CAP operates in all state and federal prisons, as well as more than 300 local jails throughout the country.<sup>81</sup>

In 2008, ICE and the FBI launched “Secure Communities” to identify removable arrestees.<sup>82</sup> The FBI agreed to give ICE access to the national criminal database of individual criminal history records (“Triple I”) to check arrestees suspected of being removable.<sup>83</sup> When ICE identified a removable alien in federal, state or local custody, it issued a “detainer” requesting the holding agency not to release the individual without notifying and giving ICE an opportunity to take the arrestee into custody and initiate removal proceedings.<sup>84</sup> If ICE personnel believe that an arrestee, who is not being held in custody, is a removable alien, ICE can authorize a 48-hour “ICE hold.” Thus, while removal was once a *possibility* after an undocumented alien was arrested, it has now become much more likely. In 2010, CAP officials filed 223,217 charging documents (the first step in the removal process).<sup>85</sup> In 2011, more than 396,000 aliens with criminal

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regardless of whether there is ever a criminal conviction and (2) discretion is less likely to be exercised in favour of those in contact with the criminal justice system generally).

79. *The Criminal Alien Program (CAP): Immigration Enforcement in Prisons and Jails*, AMERICAN IMMIGR. COUNCIL (Aug. 1, 2013), <http://www.immigrationpolicy.org/just-facts/criminal-alien-program-cap-immigration-enforcement-prisons-and-jails>.

80. See generally Schuck, *supra* note 51, at 636.

81. *The Criminal Alien Program (CAP): Immigration Enforcement in Prisons and Jails*, *supra* note 79.

82. See *Secure Communities: A Fact Sheet*, AMERICAN IMMIGR. COUNCIL (Nov. 29, 2011), <http://www.immigrationpolicy.org/just-facts/secure-communities-fact-sheet> (describing how transformative this technology has been); see Schuck & Williams, *supra* note 52 (describing state of technology and information-sharing in 1999; anticipating modern reforms).

83. *Secure Communities: A Fact Sheet*, *supra* note 82.

84. Center for Constitutional Rights, *Briefing Guide to “Secure Communities” – ICE’s Controversial Immigration Enforcement Program*, CARDOZO CENTER FOR CONSTITUTIONAL RIGHTS (2010), <http://ccrjustice.org/sites/default/files/assets/files/Secure%20Communities%20Fact%20Sheet%20Briefing%20guide%208-2-2010%20Production.pdf>.

85. *Immigration Enforcement Actions: 2010*, U.S. DEP’T OF HOMELAND SECURITY (June 2011), <http://www.dhs.gov/xlibrary/assets/statistics/publications/enforcement-ar-2010.pdf>.

convictions were removed from the United States, many of whom were identified via Secure Communities.<sup>86</sup>

CAP and Secure Communities generated much controversy. Critics charged that these programs resulted in removal of undocumented aliens who were convicted, or just arrested, for non-serious crimes.<sup>87</sup> In 2010, about 169,000 (44 percent) of 387,242 alien removals were based on a criminal conviction. Among those, 25 percent involved “illegal drug activity,” including manufacture, distribution, sale and possession of illegal drugs; 19 percent had committed immigration-related offenses, e.g. “[unlawful] entry and reentry, false claims to citizenship, and alien smuggling”; 18 percent were based on criminal traffic offenses.<sup>88</sup>

Some state and local officials resisted cooperation with ICE, arguing that their participation and even perceived participation would jeopardize the trust and cooperation of immigrant communities. Immigrants who equate local police with ICE officers are likely to be unwilling to cooperate with police, even when it comes to reporting their own victimization.<sup>89</sup> In November 2011, a New York City Council ordinance authorized the City’s jail officials to honor ICE detainers only for individuals with a prior criminal record or those listed in gang and terrorist databases.<sup>90</sup>

In April 2012, ICE agreed that enforcement action based solely on minor traffic offense *charges* is generally not an efficient use of government resources. Therefore, the agency would only issue detainers after *conviction* for individuals arrested solely for minor traffic offenses, who had not previously been convicted and did not

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86. *FY 2011: ICE Announces Year-End Removal Numbers, Highlights Focus on Key Priorities*, U.S. DEP’T OF HOMELAND SECURITY (Oct. 17, 2011), <http://www.ice.gov/news/releases/fy-2011-ice-announces-year-end-removal-numbers-highlights-focus-key-priorities> [hereinafter *Immigr. and Customs Enforcement*].

87. *See Secure Communities Program Presentations*, U.S. IMMIGR. AND CUSTOMS ENFORCEMENT, [http://www.ice.gov/doclib/foia/secure\\_communities/securecommunitiespresentations.pdf](http://www.ice.gov/doclib/foia/secure_communities/securecommunitiespresentations.pdf) (last visited October 10, 2015).

88. *See Immigration Enforcement Actions: 2010*, DEP’T OF HOMELAND SECURITY 2010 ANN. REP. 1, 4 (2011), <http://www.dhs.gov/xlibrary/assets/statistics/publications/enforcement-ar-2010.pdf> (noting that over 476,000 foreign nationals were “returned” to their home countries without formal removal orders; also noting that the number of those returnees who had criminal convictions was not identified).

89. Daniel Richman, *Police Don’t Fight Wars*, BOSTON REVIEW, July 3, 2012, <http://bostonreview.net/forum/right-fight/police-dont-fight-wars>.

90. NEW YORK CITY, N.Y., Local Law No. 62 Int. No. 656-A (2011).

fall within any other ICE priority category.<sup>91</sup> This policy did not apply to persons arrested for drunk driving.<sup>92</sup>

United States President Barack Obama terminated Secure Communities in November 2014.<sup>93</sup> He ordered immigration enforcement authorities to cease initiating removal proceedings against some categories of unlawful immigrants, but this did not include unlawful immigrants convicted of, or even charged with, crimes. In fact, in launching his new initiative, the Priority Enforcement Program (“PEP”), Obama directed officials to focus on deporting “felons, not families.”<sup>94</sup> PEP should target only “those who have been convicted of serious crimes or who pose a danger to national security.”<sup>95</sup> How much PEP will differ from Secure Communities remains to be seen.

#### D. *Criminal Convictions as an Obstacle to Naturalization*

Since 1790, “in order to assure a virtuous polity,” naturalization statutes have required applicants to demonstrate good moral character.<sup>96</sup> For naturalization purposes, some prior convictions have always rebutted good moral character. In recent decades, however, the number of disqualifying convictions has steadily expanded.<sup>97</sup> Currently, an alien who has *ever* been convicted of an *aggravated felony* lacks good moral character.<sup>98</sup> In addition, an applicant who has

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91. *ICE Responses to the Task Force on Secure Communities Findings and Recommendations*, U.S. DEP’T. OF HOMELAND SEC. 1, 14 (2012), <http://www.dhs.gov/xlibrary/assets/hsac/ice-response-to-task-force-on-secure-communities.pdf> (emphasis added).

92. *Id.*

93. Memorandum from Jeh Charles Johnson, Secretary, to Thomas S. Winkowski, Acting Director of U.S. Immigration and Customs Enforcement, Megan Mack, Officer, Office of Civil Rights and Civil Liberties, and Philip A. McNamara, assistant Secretary for Intergovernmental (Nov. 20, 2014), [http://www.dhs.gov/sites/default/files/publications/14\\_1120\\_memo\\_secure\\_communities.pdf](http://www.dhs.gov/sites/default/files/publications/14_1120_memo_secure_communities.pdf) (explaining that the discontinuance of Secure Communities was driven, in part, by “[g]overnors, mayors, and state and local law enforcement officials around the country [who] have increasingly refused to cooperate with the program”).

94. Kate Linthicum, *Obama Ends Secure Communities Program as Part of Immigration Action*, L.A. TIMES, Nov. 21, 2014, <http://www.latimes.com/local/california/la-me-1121-immigration-justice-20141121-story.html>.

95. *Id.*

96. 8 U.S.C. § 1427(a) (naturalization requirements).

97. See Kevin Lapp, *Reforming the Good Moral Character Requirement for U.S. Citizenship*, 87 IND. L.J. 1571 (2012).

98. 8 U.S.C. § 1101(f)(8) (a person who has been convicted of an aggravated felony at any time cannot be “regarded as . . . a person of good moral character”).

been incarcerated for more than 180 days (aggregate) during the required residency period (usually five years) is ineligible for naturalization.<sup>99</sup> A conviction more than five years old is relevant to assessing good moral character, but not automatically disqualifying.

#### E. Conclusion: Looking Forward

Perhaps immigration law is the most dramatic example in US law of a criminal record being treated as an indelible mark of bad character or unsuitability.<sup>100</sup> It has become the most important determinant of who is admitted to the country, who is removed, and who is offered the privileges of citizenship.<sup>101</sup>

Immigration reform continues to be hotly debated, but demographic changes suggest that some immigration reform is inevitable. As groups traditionally targeted by immigration policies have grown in number (and in political power), the debates about immigration policy have shifted.<sup>102</sup> Even with efforts to accommodate those in the country illegally, though, a person's criminal history will likely be an important, probably decisive, factor in his or her fate. However, while there is consensus that noncitizens who are *dangerous* criminals should be removed from the country (or barred from entering in the first place),<sup>103</sup> the question of what other convictions should be disqualifying (i.e., where to draw the line) is contested.<sup>104</sup> ICE's policies under the Obama administration reflect a desire to focus on removing serious criminals: "ICE's highest

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99. 8 U.S.C. § 1101(f)(7).

100. Cf. Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 26 (1984) (explaining that "[d]eportation . . . serves as an important adjunct and supplement to criminal law enforcement, and it reflects judgments, essentially indistinguishable from those that the criminal law routinely makes, concerning the moral worth of individual conduct.").

101. See JACOBS, *supra* note 1, at 255.

102. Mary Fan, *The Case for Cimmigration Reform*, 92 N.C. L. REV. 75, 89-92 (2013) (documenting growth of Hispanic and Asian voting populations); see MOTOMURA, *supra* note 64, at 50 (noting that "enforcement inside the United States will rise and fall with its value as political currency"). But see King, *supra* note 52, 1788-89, 1819 (noting that political divisions have led to disjointed legislation and "[t]o the extent that immigration laws are the result of political compromises entailing both lenient and punitive provisions, it is difficult to identify partisan control as the driving force behind deportations.").

103. Stumpf, *supra* note 54, at 1743 (explaining that "one could conceive of drawing lines that impose per se immigration consequences on new arrivals who have committed violent crimes or crimes that are otherwise particularly egregious."); see also Juliet Stumpf, *The Cimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U.L. REV. 367 (2006) (coining the term "cimmigration").

104. See JACOBS, *supra* note 1, at 256.

[enforcement] priority is aliens who pose a danger to national security or a risk to public safety, including aliens convicted of crimes, with particular emphasis on violent criminals, felons, and repeat offenders.”<sup>105</sup>

The preference of politicians, regardless of political party, to focus enforcement dollars on the most serious risks to public safety may further encourage prioritization based on criminal record.<sup>106</sup> There is also solid bipartisan support for proposals for investment in tracking and screening technologies that reveal aliens’ criminal histories.<sup>107</sup>

## II. *CRIMINAL RECORD AND EUROPEAN UNION IMMIGRATION*

Unlike the United States, the European Union is not a single country. United States citizens and lawful residents have an absolute right to travel from state to state and to reside wherever they wish; “immigration” does not apply to movement between states. Moreover, all US immigration law is federal. The states have no authority to make rules related to immigration, permanent residence, deportation, etc. By contrast, the European Union is an economic and political union comprised of 28 independent States. Each European nation has a long history of immigration law and policy applicable to other countries’ nationals. The Member States have ceded some of that authority to the European Union in order to regulate: i) the movement of people within the European Union and ii) the crossing of EU’s external borders from a non-EU country.

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105. Immigr. and Customs Enforcement, *supra* note 86, at 5-6.

106. Fan, *supra* note 102, at 114 (proposing focusing criminalization priorities on “significant criminal history.” Numerous scholars, judges and policymakers have criticized the governments’ arguably illogical decisions to pay to prosecute and incarcerate illegal immigrants for immigration offenses instead of simply deporting them. But those decisions are really beyond the scope of this article) (emphasis added); see MOTOMURA, *supra* note 40, 195-96 (noting that “[i]mmigration as transition would mean abandoning the current practice of applying the same criminal deportability grounds to all noncitizens in the United States . . . and rethinking deportability grounds that are not based on crimes . . . [and] prompt rethinking the traditional rule that deportation is a civil rather than a criminal matter.”).

107. See, e.g., *Transcript: Bipartisan Framework for Comprehensive Immigration Reform*, ABC NEWS, Jan. 28, 2013, [http://abcnews.go.com/ABC\\_Univision/News/transcript-bipartisan-framework-comprehensive-immigration-reform/story?id=18330912](http://abcnews.go.com/ABC_Univision/News/transcript-bipartisan-framework-comprehensive-immigration-reform/story?id=18330912) (committing to provide Border Patrol with “the latest technology”).

The 1985 Schengen Agreement permitted free movement of citizens between European signatory nations.<sup>108</sup> Over time, the number of signatories has grown to include 22 of the 28 EU Member States, plus four non-EU countries.<sup>109</sup> Once inside the Schengen Area, EU citizens as well as third-country nationals can move freely and without border checks from one country to another.<sup>110</sup> Today, this

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108. The "Schengen Area" takes its name from the Luxemburg town where the first agreement was signed by five of the, at the time, 10 EU Member States. The 1985 Schengen Agreement involving the gradual abolition of checks at common borders, was followed by the signing of the 1990 Convention implementing that agreement. See *Schengen Area*, EUR. COMM'N (last visited Oct. 10, 2015), [http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/borders-and-visas/schengen/index\\_en.htm](http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/borders-and-visas/schengen/index_en.htm). Eventually, after more States joined the Schengen Area, it was incorporated into the EU legal framework by the 1997 Treaty of Amsterdam. See *The Schengen Area and Cooperation*, EUR-LEX (2009) <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:l33020>; see also Council Regulation 610/2013, 2013 (L 182) 1, 1 (EU) (amending Regulation (EC) 562/2006 of Mar. 15, 2006 of the European Parliament and of the Council establishing a Community Code on the Rules governing the Movement of Persons across Borders, Convention Implementing the Schengen Agreement, Jun. 14, 1985), Council Regulation (EC) 1683/95 of May 29, 1995, laying down a Uniform Format for Visas (L 164), Council Regulation (EC) 539/2001 of Mar. 15, 2001, Listing the Third Countries whose Nationals Must be in Possession of Visas When Crossing the External Borders (L 81/1), Council Regulation (EC) 767/2008 of July 9, 2008, Concerning the Visa Information System (VIS) and the Exchange of Data Between Member States on Short Stay Visas (VIS Regulation) (L218/60), Council Regulation (EC) 810/2009 of July 13, 2009, establishing a Community Code on Visas (L 243/1).

109. The four associated countries are Norway, Liechtenstein, Iceland and Switzerland. In addition, Bulgaria, Cyprus, and Romania are committed to joining the Schengen Area. Croatia began the application process to accede to the Schengen Area on July 1<sup>st</sup>, 2015. See *Free Movement of Persons*, EUR. PARL. (September 2015), [http://www.europarl.europa.eu/a-boutparliament/en/displayFtu.html?ftuId=FTU\\_2.1.3.html](http://www.europarl.europa.eu/a-boutparliament/en/displayFtu.html?ftuId=FTU_2.1.3.html). The United Kingdom and Ireland are not part of the Schengen Area and continue to operate border controls. See Foreign & Commonwealth Office, *Visa-Free access to EU Schengen Area*, GOV.UK (2014), <https://www.gov.uk/government/news/visa-free-access-to-eu-schengen-area>. Indeed, the United Kingdom has recently announced plans to introduce more thorough background checks for third country nationals. David Barrett, *Foreigners must disclose criminal records to come to UK - but European Union is exempt*, THE TELEGRAPH (July 20, 2015), <http://www.telegraph.co.uk/news/uknews/immigration/11751773/Foreigners-must-disclose-criminal-records-to-come-to-UK-but-European-Union-is-exempt.html>.

110. Although internal border controls have been abolished, competent national authorities can carry out police checks at the internal borders and in border areas, provided that such checks do not amount to border checks. Under such circumstances, the police may ask a non-national for identification and for the reason of her visit. If there is a serious threat to public policy or internal security, a Schengen country may exceptionally reintroduce internal border controls for a strictly limited period of time. See *Schengen Area*, *supra* note 108; Council Regulation (EU) 1051/2013 of 22 Oct. 2013, Amending Regulation (EC) 562/2006 in order to provide for Common Rules on the Temporary Reintroduction of Border Control at Internal Borders in Exceptional Circumstances (L 295/1). In the fall of 2015, due to the current migrant crisis, Germany introduced temporary border controls on its borders with Austria. See *Migrant Crisis: Germany Starts Temporary Border Controls*, BBC NEWS (Sep. 14, 2015),

border-free area guarantees the free movement of more than 400 million persons.<sup>111</sup> However, while Schengen signatories have abolished “internal” borders, they have strengthened “external” border controls, which are governed by a single set of common rules.<sup>112</sup> Regulation of border-crossers from a third country has been tightened in order to ensure the safety of those individuals legally present in the EU territory.

EU immigration law treats nationals of Member States preferentially compared to nationals of non-EU countries. Although unhindered travel within the Schengen Area is ensured, third-country nationals face restrictions when crossing the EU’s external borders and when obtaining permission to reside in a Member State. Thus, in order to understand the role that criminal records play in EU immigration law, it is necessary to distinguish between EU nationals and third-country nationals.

#### A. *EU Common Borders: Entering and Residing in the EU Territory.*

##### 1. EU Nationals

Free movement of European nationals is the cornerstone of EU citizenship, as introduced by the 1992 Treaty of Maastricht.<sup>113</sup>

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<http://www.bbc.com/news/world-europe-34239674>. Hungary closed its borders with Croatia. *See Migrant Crisis: Thousands Enter Slovenia after Hungary Closes Border*, BBC NEWS (Oct. 18, 2015), <http://www.bbc.com/news/world-europe-34564830>. Following the November 2015 terrorist attacks in Paris, France declared a state of emergency and increased border controls. *See Border Controls Imposed after ‘Terrorist Attacks of an Unprecedented Scale’*, The New York Times (Nov. 13, 2015), <http://www.nytimes.com/live/paris-attacks-live-updates/borders-closed-after-terrorist-attacks-of-an-unprecedented-scale/>.

111. *See Schengen Area*, *supra* note 108.

112. For the Schengen Borders Code, *see Borders: Adopted Legislation*, EUR. COMM’N, [http://ec.europa.eu/dgs/home-affairs/e-library/documents/policies/borders-and-visas/schengen/index\\_en.htm](http://ec.europa.eu/dgs/home-affairs/e-library/documents/policies/borders-and-visas/schengen/index_en.htm) (last visited Oct. 10, 2015); *see also Border Crossing*, EUR. COMM’N, [http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/borders-and-visas/border-crossing/index\\_en.htm](http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/borders-and-visas/border-crossing/index_en.htm) (last visited Oct. 10, 2015). The European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex) was established by Council Regulation (EC) 2007/2004 in order to reinforce and streamline cooperation between national border authorities securing EU’s external borders. *See Mission and Tasks*, FRONTEX, <http://frontex.europa.eu/about-frontex/mission-and-tasks/> (last visited Nov. 15, 2015).

113. *See Treaty on European Union*, art. 3.2, Oct. 26, 2012, C 326/15 [hereinafter TEU]; *Treaty on the Functioning of the European Union*, art. 21, Titles IV, V, Oct. 26, 2012, C 326/49 [hereinafter TFEU]; *see also Free Movement of Persons*, EUR. PARL. (September

Citizens of EU Member States have the right to travel, work and reside in any Member State without special formalities.<sup>114</sup> A valid national ID or passport is sufficient to enter the Schengen Area or to travel from one Schengen country to another.<sup>115</sup> EU Directive 2004/38/EC of 29 April 2004 on the Right of Citizens of the Union and their Family Members to Move and Reside Freely within the Territory of the Member States further regulates EU nationals' right of movement and residence within the territory of Member States. EU citizens can take up residence in any EU Member State for up to three months, and for more than three, if they are engaged in economic activity, are enrolled at an educational institution, have substantial means of support or are a member of an EU national's family who satisfies the above conditions.<sup>116</sup> Subject to certain exceptions, all Union citizens residing on the basis of this Directive in the territory of another EU Member State are entitled to equal treatment with the nationals of that Member State.<sup>117</sup> If an EU national resides for five consecutive years in another EU Member State, she has the right to permanent residence.<sup>118</sup>

It is only under exceptional circumstances that an EU Member State will conduct a criminal background check on a national of another Member State who wishes to reside in its territory.<sup>119</sup> As the European Union affords its nationals the right to move and reside freely within the European Union, Member States have to adjust to any problems associated with such movement. European Union

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2015), [http://www.europarl.europa.eu/aboutparliament/en/displayFtu.html?ftuId=FTU\\_2.1.3.html](http://www.europarl.europa.eu/aboutparliament/en/displayFtu.html?ftuId=FTU_2.1.3.html).

114. See *Schengen Area*, *supra* note 108; see also *EU Citizenship*, EUR. COMM'N (July 10, 2015), <http://ec.europa.eu/justice/citizen/>.

115. See *Free Movement of Persons*, *supra* note 113; see also Council Directive 2004/38, arts. 4, 5, 2004 (L 158) 77, 90-91 (EC).

116. See Council Directive 2004/38/EC, arts. 6, 7, 92-94; see also *Baumbast and R v. Secretary of State for the Home Department* [2002] UKIAT C-413/99.

117. Council Directive 2004/38/EC, *supra* note 116, art. 24, 112; see also TFEU, *supra* note 113, art. 18.

118. The right of permanent residence can be forfeited if the foreign national is absent from the host member state for more than two consecutive years. See Council Directive 2004/38/EC, *supra* note 116, art. 16, 105.

119. EU countries treat individual criminal history information as a "special category of personal data" and restrict its disclosure and dissemination. See Directive 95/46/EC of the Council on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of such Data, 1995 O.J. L 281; Jacobs & Blitsa, *supra* note 39, at 136-44; James B. Jacobs & Elena Lurrari, *Are Criminal Convictions a Public Matter? The USA and Spain*, 14(1) PUNISHMENT & SOCIETY 3-28 (2012); JACOBS, *supra* note 1, at 163-93.

Member States cannot bar another Member State's national from entering or residing, except on "grounds of public policy, public security or public health." To this end, "previous criminal convictions shall not in themselves constitute grounds for taking such measures;" but rather "the personal conduct of the individual concerned must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society."<sup>120</sup> In order to determine whether an alien poses a threat to public security, the host Member State may request the would-be immigrant's home country (and, if need be, other Member States) "to provide information concerning any previous police record the person concerned may have." Such inquiries, though, "shall not be made as a matter of routine."<sup>121</sup> Despite the fact, therefore, that a US ex-offender poses the same risk as a Dutch ex-offender, Spain is required to admit an EU convicted criminal, unless Spanish authorities have imperative public security grounds for barring the Dutch citizen.<sup>122</sup>

## 2. Non-EU Nationals Entering the Schengen Area for up to 90 Days

Schengen states have implemented a large-scale information system, the *Schengen Information System* ("SIS"), to support external border controls.<sup>123</sup> The second generation of the system ("SIS II") is populated with information on foreign nationals' past arrests and/or convictions for serious crimes *in the Schengen Area*.<sup>124</sup> Schengen

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120. Council Directive 2004/38/EC, *supra* note 116, art. 27, at 113.

121. *Id.* art. 27, at 113-14; *see also id.* art. 28, and Preamble ¶ 24.

122. In the past few years, some European leaders have called for restrictions on the free movement of citizens and have asked for the introduction of cap numbers of EU migrants. In its resolution of Jan. 16, 2014 on respect for the fundamental right of free movement in the EU (P7 TA-PROV(2014)0037), the European Parliament strongly contested these proposals and called on the Member States to uphold the principles of equality and the fundamental right of freedom of movement. *See Respect for the Fundamental Right of Free Movement in the EU*, EUR. PARL. DOC. P7\_TA(2014)0037 (2014). EU law does not allow an expulsion decision to be taken on economic grounds. *See Free Movement of Persons*, *supra* note 113.

123. *See Schengen Information System*, EUR. COMM'N (May 29, 2015), [http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/borders-and-visas/schengen-information-system/index\\_en.htm](http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/borders-and-visas/schengen-information-system/index_en.htm).

124. There is no direct link between the SIS II and the 28 Member States' national criminal registers. The Schengen state that enters an alert is responsible for its content. The European Data Protection Supervisor and national data protection authorities monitor the application of EU data protection rules. A person has a right to know that her name has been added to the SIS II database and to request correction or deletion of erroneous information. *See Migration and Home Affairs: Access Rights and Data Protection*, EUR. COMM'N (Aug. 19, 2015), <http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/borders-and-visas/schengen->

countries may issue an “alert” for refusal of entry or stay, for arrest, surrender or extradition purposes on persons sought for a judicial procedure.<sup>125</sup> The “alert” is transferred in real time to the Central System. It then becomes available to authorized users of all Schengen states.<sup>126</sup>

Some countries (e.g. United States, Brazil) have agreements with Schengen States allowing their nationals to visit for up to 90 days *without a Schengen visa*.<sup>127</sup> These third-country nationals entering the Schengen Area are not asked about and need not disclose criminal convictions. However, an individual named in the SIS II “blacklist” may be barred from entering or remaining in the Schengen Area.

Citizens from non-EU countries that do not have a visa reciprocity agreement (e.g. China, Russia) must obtain a Schengen visa if they wish to visit for business or pleasure for up to 90 days. While there is no central EU visa office, the Schengen Visa Code provides common rules and procedures for harmonizing the Member States’ issuance of short-stay visas.<sup>128</sup> The Visa Information System (“VIS”) allows Schengen States to exchange visa data with each other. Visitors from countries without a no-visa agreement must apply for a visa in their home country at the embassy of the Schengen country of their destination; that visa is valid for the entire Schengen

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information-system/access-rights-and-data-protection/index\_en.htm. According to Article 96 ¶ 2 of the Schengen Acquis, inclusion in the SIS II “may be based on a threat to public policy or public security or to national security which the presence of an alien in national territory may pose.” Such threats may be posed by “(a) an alien who has been *convicted of an offen[s]e carrying a penalty involving deprivation of liberty of at least one year*; (b) an alien in respect of whom there are *serious grounds for believing that he has committed serious criminal offen[s]es*,” including offenses related to narcotic drugs and psychotropic substances, “or in respect of whom there is clear evidence of an *intention to commit such offen[s]es in the territory of a Contracting Party*.” See Convention Implementing the Schengen Agreement, 2000 O.J. L 239, 43 [hereinafter Schengen Acquis]; see also Commission Implementing Decision 2011/406 of July 1, 2011 amending the SIRENE Manual, 2011 O.J. (L 186) 1 (EU).

125. The most recent version of the system contains “alerts” on missing persons and information on certain stolen property, including banknotes, cars, firearms and identity documents. See Press Release, European Commission, *Questions and Answers: Schengen Information System (SIS II)* (Apr. 9, 2013).

126. See *Migration and Home Affairs: Alerts and Data in the SIS*, EUR. COMM’N (June 23, 2015), [http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/borders-and-visas/schengen-information-system/alerts-and-data-in-the-sis/index\\_en.htm](http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/borders-and-visas/schengen-information-system/alerts-and-data-in-the-sis/index_en.htm).

127. See *Migration and Home Affairs: Visa Policy*, EUR. COMM’N (Aug. 19, 2015), [http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/borders-and-visas/visa-policy/index\\_en.htm](http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/borders-and-visas/visa-policy/index_en.htm).

128. See Regulation 810/2009, 2009 O.J. (L 243/1) (EC).

Area.<sup>129</sup> The applicant must provide a full set of fingerprints and a digital photograph which is recorded in a central IT system. Consulates and border officials connected to the central IT system can verify the identity of a person presenting a visa.<sup>130</sup>

In contrast to US immigration law, short-term visitors to the Schengen Area are not vetted with respect to prior criminal record; the visa application does not require submission of a criminal record extract as a supporting document.<sup>131</sup> Embassy and consular officials as well as personnel at Schengen States' airports and ports consult the SIS II. Unless it relates to inclusion on the SIS II blacklist, a previous conviction or arrest is not a bar to visiting the Schengen Area for touristic or business purposes.<sup>132</sup> Apparently, Schengen countries do not assume that persons who have been convicted of crimes *in non-Schengen countries* pose a significant risk.

### 3. Non-EU Nationals Seeking to Reside for More than 90 days

A third-country national who wants to stay more than 90 days in the Schengen Area must obtain, from the relevant Schengen State's embassy or consulate in her home country, a long-term visa (stage 1). Upon entering the destination country, the non-EU national must apply to the competent national administrative authority for a residence permit related to work, studies, humanitarian reasons, the purchase and ownership of real estate, etc. (stage 2).

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129. See *Migration and Home Affairs: Visa Information System (VIS)*, EUR. COMM'N (June 23, 2015), [http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/borders-and-visas/visa-information-system/index\\_en.htm](http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/borders-and-visas/visa-information-system/index_en.htm).

130. *Id.*

131. See, e.g., *Migration and Home Affairs: Required Documents*, EUR. COMM'N (Apr. 2, 2015), [http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/borders-and-visas/visa-policy/required\\_documents/index\\_en.htm](http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/borders-and-visas/visa-policy/required_documents/index_en.htm); *Visa*, MINISTRY FOR FOREIGN AFF. OF FIN. (Aug. 24, 2015), [http://finland.org/public/default.aspx?nodeid=40963&contentlan=2&culture=en-US#leaving\\_the\\_application](http://finland.org/public/default.aspx?nodeid=40963&contentlan=2&culture=en-US#leaving_the_application); *Visas, GOV'T OF THE NETH.*, <http://www.government.nl/issues/visa-for-the-netherlands-and-the-caribbean-parts-of-the-kingdom/short-stay-visas-for-the-netherlands/applying-for-a-schengen-visa> (last visited Oct. 12, 2015); *Harmonized Visa Application Form*, HELLENIC REPUBLIC, MINISTRY OF FOREIGN AFF. (Mar. 26, 2013), <http://www.mfa.gr/theoriseis-eisodou-visas/theoriseis-schengen/enarmonismeno-entupo-aitisis-theorisis.html>.

132. Schengen border officials may also consult several Interpol databases containing identification data (names, fingerprints, DNA etc.) and criminal history information on persons subject to Interpol red notices. See Jacobs & Blitsa, *supra* note 39, at 198-203; *Databases*, INTERPOL, <http://www.interpol.int/INTERPOL-expertise/Databases> (last visited Oct. 12, 2015).

Historically, each Member State had discretion to establish visa criteria. However, with the elimination of internal borders, each country's policies with respect to admitting third-country nationals affects all Member States. Consequently, the European Union has pressed for implementation of common measures relating to admission and residence for non-EU immigrants.<sup>133</sup> Among other initiatives, the European Union itself introduced a uniform format, with biometric identifiers, for third-country nationals' residence permits.<sup>134</sup> It also promulgated specific rules for admitting third-country nationals for the purposes of study, pupil exchange, unremunerated training or voluntary service and family reunion.<sup>135</sup> In 2011, it adopted a single application procedure for third-country nationals wishing to reside and work in a Member State and a common set of rights for such aliens.<sup>136</sup>

European Union directives state that aliens wishing to acquire a residence permit for one of the reasons stated in the previous paragraph "must not be regarded as a threat to public policy, public security or public health."<sup>137</sup> Member States have discretion, within the framework of EU law, to interpret and apply this standard. Greek law requires an alien seeking a residence permit to submit to a Greek embassy a criminal record certificate ("extract") issued by the home country's police or other competent authority.<sup>138</sup> If the applicant is included on the national police database of "unwanted aliens,"<sup>139</sup> if

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133. See *EU Immigration Portal: Explaining the Rules*, EUR. COMM'N (Aug. 16, 2011), [http://ec.europa.eu/immigration/who-does-what/more-information/explaining-the-rules-why-are-there-eu-rules-and-national-rules\\_en](http://ec.europa.eu/immigration/who-does-what/more-information/explaining-the-rules-why-are-there-eu-rules-and-national-rules_en) (indicating that Denmark does not apply EU-wide immigration and visa rules, while Ireland and the United Kingdom apply them on a case-by-case basis).

134. Council Regulation 1030/2002/EC, 2002 O.J. (L 157) 1, 1; Council Regulation 380/2008/EC, 2008 O.J. (L 115) 1, 1.

135. Council Directive 2004/114/EC, 2004 O.J. (L 375) 12, 13 (EC); Council Directive 2003/86/EC, 2003 O.J. (L 251) 12, 13; see also Council Directive 2005/71/EC, 2005 O.J. (L 289) 15, 17; Council Directive 2004/81/EC, 2004 O.J. (L 261) 19, 20 (EC); Council Directive 2009/50/EC, 2009 O.J. (L 155) 17, 20.

136. Council Directive 2011/98/EU, 2011 O.J. (L 343).

137. See, e.g., Council Directive 2004/114/EC, *supra* note 135, art.6, at 15; Council Directive 2003/86/EC, *supra* note 135, art.6, at 15.

138. See Ministry Decision Φ3497.3/ΑΠ24245; *Visa Section*, HELLENIC REPUBLIC, MINISTRY OF FOREIGN AFF. (Aug. 25, 2015), <http://www.mfa.gr/usa/en/services/services-for-non-greeks/visa-section.html>.

139. The Ministry of Public Order keeps a list of "unwanted aliens" ("EKANA" in Greek). Aliens on the list include: a) those against whom a *deportation decision* has been issued and have not complied with it; b) those whose presence in the country constitutes a *threat to public security or public order*. That is particularly true if there are *serious grounds*

she has been convicted by means of a non-appealable conviction of a felony or misdemeanor and sentenced to at least one year in prison, or if other extraordinary reasons that raise concern for national security exist, the competent administrative authorities may deny the issuance of the permit.<sup>140</sup>

Council Directive 2003/109/EC of 25 November 2003 concerning the Status of Third-Country Nationals who are Long-Term Residents is another important step toward harmonizing the Member States' immigration policies. It requires Member States to grant *long-term residence status* to third-country nationals who have legally resided continuously within their territory for five years, if they have stable, regular resources and health insurance.<sup>141</sup> Importantly for our purposes, Member States retain the right to reject or terminate long-term resident status on grounds of public policy or security, which may cover "a conviction for committing a serious crime."<sup>142</sup> In doing so, they "shall consider the severity or type of offence against public policy or public security, or the danger that emanates from the person concerned, while also having proper regard to the duration of residence and to the existence of links with the country of residence."<sup>143</sup>

### B. *Expulsions on Account of a Criminal Record*

Both EU and third-country nationals can be expelled from an EU country because of criminal conduct. Again, there is a crucial distinction between EU and non-EU nationals.

#### 1. EU Nationals

Not surprisingly, EU nationals convicted of crimes in their host country are much better protected than non-EU nationals. Directive 2004/38/EC makes this crystal clear:

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*for believing that the foreign national has committed a serious criminal offence, or there is clear evidence of an intention to commit such an offence; and c) when public health reasons exist. Those on the "EKANA" list may be included in the SIS II database. See Ministry Decision 400//2012, art. 1; see also Schengen Acquis, supra note 124, art. 96.*

140. Nomos (2014:4251) Immigration and Social Integration Code and Other Provisions, 2014, A:6, A:92 (Greece).

141. See Council Directive 2011/51/EU, Amending Council Directive 2003/109/EC, art. 4-5, 2003 O.J. (L 16) 23 (EC).

142. See Council Directive 2003/109/EC, at Preamble ¶ 8.

143. See *id.* arts. 6, 17.

Before taking an expulsion decision on grounds of public policy or public security, the host Member State shall take account of considerations such as how long the individual concerned has resided on its territory, his/her age, state of health, family and economic situation, social and cultural integration into the host Member State and the extent of his/her links with the country of origin. The host Member State may not take an expulsion decision against Union citizens or their family members, irrespective of nationality, who have the right of permanent residence on its territory, except on serious grounds of public policy or public security.<sup>144</sup>

The Directive explicitly cabins the role that criminal convictions can play: measures taken on grounds of public policy or public security shall comply with the principle of proportionality and shall be based exclusively on the personal conduct of the individual concerned. *Previous criminal convictions shall not in themselves constitute grounds for taking such measures.*<sup>145</sup>

In practice, expulsions of EU nationals are rare. For example, in 2009, out of the 63,427 aliens expelled from Greece, just 578 were EU nationals.<sup>146</sup>

## 2. Non-EU Nationals

An alien's criminal record plays a role if: i) she has unlawfully entered the EU, and ii) she is convicted of a crime in an EU country.

The vast majority of foreigners expelled from EU Member States are "irregular migrants," i.e. non-EU nationals who reside in a Member State without fulfilling, or no longer fulfilling "the conditions of entry of the Schengen Borders Code or other conditions of entry, stay or residence in that member state."<sup>147</sup> (In the United States such persons are often referred to as "illegal" or "undocumented aliens."): The European Union has set common

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144. See Council Directive 2004/38/EC, *supra* note 116, art. 28 ("An expulsion decision may not be taken against Union citizens, except if the decision is based on imperative grounds of public security, as defined by Member States, if they: a) have resided in the host member state for the previous ten years; or b) are a minor, except if the expulsion is necessary for the best interests of the child. . .").

145. *Id.* art. 27 (emphasis added); see also *id.* art. 33 (making clear that expulsions must conform to the requirements of Articles 27, 28 and 29).

146. See GREEK POLICE, *Statistical Data on Expelled and Returned Aliens for the Year 2009*, <http://www.astynomia.gr/images/stories/2010/synolo%20apelathentvn%202009%20neo.pdf> (last visited Nov. 17, 2015) (*in Greek*).

147. See Council Directive 2008/115/EC, 2008 O.J. (L 348) 98, 101.

standards and procedures for “returning” these irregular migrants.<sup>148</sup> It is estimated that EU national authorities apprehend more than 500,000 irregular migrants annually; about 40 percent of them are sent home or to a third (non-EU) country.<sup>149</sup> Member States have also adopted a common penal framework to combat the aiding of illegal immigration (e.g. human smuggling).<sup>150</sup> However, EU legislation does not require Member States to penalize illegal immigration, i.e. punish irregular migrants themselves; this is left to Member States’

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148. *Id.* (“Return” means the process of a third-country national going back—whether in voluntary compliance with an obligation to return or enforced to i) his or her country of origin; ii) a country of transit; or iii) another third country. The United Kingdom and Ireland are not bound by the Directive). It should be noted that the European Union has been working to create a Common European Asylum System (“CEAS”). See *Migration and Home Affairs: Common European Asylum System*, EUR. COMM’N (June 26, 2015), [http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/asylum/index\\_en.htm](http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/asylum/index_en.htm).

149. See Council Paper, *An Effective E.U. Return Policy: Presidency’s Food for Thought Paper for the Lunch Discussion*, 7007/14 (Feb. 26, 2014), <http://www.statewatch.org/news/2014/mar/eu-council-returns-policy-discussion-paper-7007-14.pdf>. The European Union is currently facing a migration crisis. Syrians, Afghans, Eritreans and other nationalities are fleeing civil war, poverty and human rights abuses. At least 350,000 migrants crossed the EU’s borders in January-August 2015, compared to the 280,000 during the whole of 2014. See *Why is EU Struggling with Migrants and Asylum?*, BBC NEWS (Sept. 21, 2015), <http://www.bbc.com/news/world-europe-24583286>. How EU countries are coping with the unprecedented wave of irregular migrants and asylum seekers across European borders is beyond the scope of this article. It should be noted, though, that the ongoing influx of these aliens is considered to be leading to a ‘Europeanisation of border management’. The Commission has pledged to come forward with proposals by the end of 2015 on strengthening Frontex’s mandate and on the creation of a European Border and Coast Guard. In the meantime, Migration Management Support Teams bring together the European Asylum Support Office, Europol and Frontex – in partnership with national authorities – to identify, screen, fingerprint and register migrants on entry to the EU, as well as to organize return operations. See *Management of the External Borders*, EUR. PARL. (September 2015), [http://www.europarl.europa.eu/aboutparliament/en/displayFtu.html?ftuId=FTU\\_5.12.4.html](http://www.europarl.europa.eu/aboutparliament/en/displayFtu.html?ftuId=FTU_5.12.4.html); *Frontex Asks for Additional 269 Officers for Registering Migrants*, FRONTEX (Nov. 12, 2015), <http://frontex.europa.eu/news/frontex-asks-for-additional-269-officers-for-registering-migrants-TEddm5>; see also Cyrille Fijnaut, *The Refugee Crisis: The End of Schengen?*, Editorial, *EJCCL & CJ* 23, 313-332 (2015). Proper identification of these migrants and asylum seekers is difficult and time-consuming as many lack documentation. See Laurence Peter, *Migrant Crisis: Who Does the EU Send Back?*, BBC NEWS (Sept. 9, 2015), <http://www.bbc.com/news/world-europe-34190359>. Conducting criminal background checks would involve huge logistical and political obstacles. See *Migration and Home Affairs: Common European Asylum System*, *supra* note 148.

150. See Council Directive 2001/51 (2001) (L 187) 45 (EC) (supplementing the provisions of Article 26 of the Convention implementing the Schengen Agreement of 14 June 1985, Directive 2002/90/EC of 28 Nov. 2002 defining the Facilitation of Unauthorized Entry, Transit and Residence and Council Framework Decision 2002/946/JHA of 28 Nov. 2002 on the Strengthening of the Penal Framework to Prevent the Facilitation of Unauthorized Entry, Transit and Residence).

discretion.<sup>151</sup> (Being in the United States illegally is not a crime, but it is punishable by administrative removal from the country). In countries where illegal entry is criminal (e.g. Greece),<sup>152</sup> expulsion of illegal aliens is related to criminal conduct. By contrast, entering Spain without permission is not a criminal offense.

Furthermore, with the exception of long-term residents,<sup>153</sup> Member States may establish their own criteria and procedures for expelling third-country nationals charged and/or convicted of criminal offenses committed in their own territory. In Spain, expulsion is authorized for an alien convicted of a crime punishable by at least one year imprisonment.<sup>154</sup> In 2012, of 10,130 expulsions, 87 percent were for criminal conduct.<sup>155</sup> In Greece, there are two routes to deportation: 1) immigration authorities may order an alien's expulsion or 2) a criminal court may order expulsion. Under the first route, immigration authorities may order the expulsion in a case where i) she was sentenced to at least one year in prison on a non-appealable conviction, or she was convicted of certain offenses, regardless of the actual sentence imposed,<sup>156</sup> ii) she violated immigration laws (e.g. unlawful entry), or iii) her presence in Greece endangers public order or safety.<sup>157</sup> Statistically, the majority of expulsions result from unlawful entry.<sup>158</sup> Under the second route, a criminal court may order

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151. NIKOLAOS D. CHATZINIKOLAOU, *THE PENAL REPRESSION OF ILLEGAL MIGRATION* 81 (L. Margaritis (ed.), Nomiki Vivliothiki 2009).

152. However, a Greek prosecutor may decide not to charge the illegal migrant, and rely on the administrative expulsion to take place. *See* Nomos (2005:3386), Codification of Legislation on the Entry, Residence and Social Integration of Third-Country Nationals on Greek Territory, 2005, A:83. Notably, there are some calls for the depenalization of the said behavior. CHATZINIKOLAOU, *supra* note 151, at 36-41.

153. *See* Council Directive 2003/109/EC, *supra* note 142, art. 6.1.

154. *See* Rights and Freedoms of Foreigners in Spain and Social Integration, art. 57.1 (B.O.E. 2012) (Spain).

155. Deportation is much more frequently ordered than actually carried out. For example, from 2002 to 2004, Spanish authorities issued 117,768 deportation orders, but carried out only 32,759.

156. For example: treason, crimes related to illegal substances, money laundering, kidnapping, sexual offences, theft, fraud, embezzlement, extortion, forgery, defamation, crimes related to guns, trafficking of illegal immigrants, etc.

157. *See* Nomos (2014:4251), *supra* note 140, A:139; *see also* Nomos (2005:3386), *supra* note 152, A:76.

158. *See Table of Apprehended Illegal Immigrants*, GREEK POLICE, 2006-2009 <http://www.astynomia.gr/images/stories/2010/300110meta1.pdf> (in Greek); *see also* KEPE, Konstantinos Kanellopoulos and Maria Gregou, ΕΠΙΣΤΡΟΦΗ ΜΕΤΑΝΑΣΤΩΝ ΑΠΟ ΤΗΝ ΕΛΛΑΔΑ: Η ελληνική συμβολή στην 3η Ερευνητική Μελέτη του EMN για την Επιστροφή Μεταναστών, [http://ec.europa.eu/dgs/home-affairs/what-we-do/networks/european\\_migration\\_](http://ec.europa.eu/dgs/home-affairs/what-we-do/networks/european_migration_)

expulsion as a security measure following a felony conviction, provided that “*the alien’s presence in the country does not comport with the terms of social cohabitation.*”<sup>159</sup> Oddly, although a felony conviction is required for judicial expulsion, a misdemeanor conviction or even an arrest is sufficient to trigger an administrative expulsion order.

### C. *Criminal Records and Naturalization*

The European Union has not attempted to legislate on how foreigners from EU and non-EU countries can become citizens of an EU Member State. Each Member State establishes its own criteria and procedures.<sup>160</sup>

In Spain, a person is eligible to apply for citizenship after ten years of residency. The applicant must have demonstrated “good conduct.”<sup>161</sup> There is no explicit criminal record disqualification. Some individuals have obtained citizenship despite domestic violence convictions. Greece requires seven years of continuous residence to qualify for citizenship. The applicant must not have an irrevocable<sup>162</sup> conviction for an offense committed with intent, nor have been sentenced to prison for one year or more within the previous 10 years. In addition, the citizenship applicant must not have been irrevocably sentenced to six months or more imprisonment for designated offenses (e.g. treason, homicide with intent, dangerous bodily harm, offenses related to illegal substances, money laundering, sexual offenses, kidnapping, theft, fraud, embezzlement, extortion, trafficking of illegal migrants, etc.). Finally, the citizenship application can be rejected if the authority finds that the applicant poses a threat to public or national security.<sup>163</sup> In making that determination, the authority can consider both convictions and police

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network/reports/docs/emn-studies/return-migration/5b\_gr\_emn\_ncp\_return\_country\_study\_final\_sept2006gr\_version\_el.pdf.

159. Poinikos Kodikas, [P.K.] [Criminal Code] P.K. Art. 74.

160. See *Justice: EU Citizenship*, EUR. COMM’N (Oct. 7, 2015), <http://ec.europa.eu/justice/citizen/>.

161. See S.T.S., Oct. 9, 2002 (R.J., No. 19484, p. 35638) (Spain).

162. An irrevocable decision is a decision which cannot be appealed nor challenged before the Greek Supreme Court.

163. See Nomos (2004:3284) Greek Citizenship Code, European Union Democracy Observatory on Citizenship, A: 5, A: 5B.

information.<sup>164</sup> Interestingly, the applicant need not submit, and the national authority need not examine, the applicant's criminal record in her home country.

#### D. Summary of EU Legal Framework

European immigration law consists of both national and EU legislation, but there is a clear trend toward greater EU authority. A criminal record in itself is no exception to the *EU citizen's* right to travel, work and reside in any EU Member State. In this regard, the European Union is looking more like the United States where there are no barriers to people moving, working, residing and claiming citizenship in any state they choose. Previous criminal convictions are not grounds for denying entry and residence, except when "*the personal conduct of the individual concerned presents a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society.*"<sup>165</sup> Similarly, a criminal conviction in the host State cannot automatically trigger termination of legal status. Expulsion for reason of safety and security has to be treated as exceptional, and even then the duration of the individual's residence in the host State, her personal and economic situation, and her social and cultural integration in the host country as well as the extent of her links with the country of origin must be balanced against the risk posed.<sup>166</sup>

A criminal background check is not required for *third-country individuals* wishing to visit the Schengen Area for up to 90 days. However, a prior criminal conviction in the Schengen Area, serious suspicions of having committed a serious criminal offense, or clear evidence of an intention to commit certain crimes in the Area, which are recorded in the SIS II, may prevent a third-country national from entering the Schengen Area.<sup>167</sup>

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164. Dimitra Blitsa, *Conviction-Based Employment Discrimination in Greece*, 7 POINIKI DIKAIOSINI 626, 626-28 (2014) (in Greek) (a Greek criminal record contains only irrevocable decisions (Article 574 of the Greek Code of Criminal Procedure). Police records contain arrest information as well as conviction information on persons fleeing the execution of their sentence. They may also record revocable decisions).

165. See Council Directive 2004/38/EC, *supra* note 116, art. 27, ¶ 2.

166. *Id.* art. 28.

167. See *Schengen Acquis*, *supra* note 124.

Each Member State retains discretion to set the terms by which a *non-EU national* can reside between 91 days and five years.<sup>168</sup> Commission of a crime in the host country may lead to expulsion. However, for an alien who has been resident in a Member State for five years, only a threat to public policy or security, including a conviction of a serious crime, can justify rejection or termination of a long-term resident status.<sup>169</sup> This sharply contrasts with US immigration law which allows, and in many instances requires, deportation of permanent residents who are convicted of a wide range of offenses. As for naturalization, Member States are free to decide which convictions render the alien ineligible for citizenship.

In the EU, immigration cases are among the very few types of cases where government agencies are permitted to see and use *police records*. Police records are rarely considered a reliable basis for administrative action. However, for the purposes of immigration, EU immigration authorities may take into account not only conviction, but also arrest and other “soft” information in order to determine an alien’s right to enter, stay and reside.<sup>170</sup>

### CONCLUSION

While a criminal record has always been a factor in US immigration law, it has become steadily more important with the proliferation of convictions that automatically trigger a negative decision on admission, asylum, right to remain and naturalization. A criminal record has become one of the most important determinants of who is permitted to enter the country as a visitor, who is eligible for permanent residency, who is removable, and who is eligible for naturalized citizenship. It has also become the most important criterion for prioritizing removal and deportation of undocumented aliens.

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168. For an up to 90 day stay, EU visa policy rules apply. *See Migration and Home Affairs: Visa Policy*, EUR. COMM’N (Aug. 19, 2015), [http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/borders-and-visas/visa-policy/index\\_en.htm](http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/borders-and-visas/visa-policy/index_en.htm). For the rights of those third country nationals who have legally resided within the territory of an EU state for five years, *see* Council Directive 2003/109/EC, *supra* note 142.

169. *See* Council Directive 2003/109/EC, *supra* note 142, art. 8.

170. There is no central European criminal record register. Almost all EU countries base their national criminal registers on convictions rather than arrests. Most EU countries’ registers operate under the jurisdiction of the Ministry of Justice, but in a few countries the Ministry of Interior or the police maintain the national criminal register. The police also keep their own intelligence files. *See* Jacobs & Blitsa, *supra* note 39, at 136-40.

Decisions about admissibility to the United States turn on access to, interpretation and validity of foreign convictions. United States authorities do not have direct access to foreign criminal record databases, except for Canada's. Even if such access did exist, some countries' criminal records cannot be easily interpreted or even trusted as a reliable indication of criminality.<sup>171</sup> Immigration to the United States has always included people fleeing oppressive governments. Requiring a certificate of good citizenship to be submitted to US consular officials abroad poses verification and interpretation problems and consumes time and resources.

Even if all convictions were accessible and reliable, there would remain the profound question of their relevance for approving a work, study, tourist or immigration visa. Does a person with a previous conviction in her home country or a third country pose a non-trivial risk of committing a crime in the United States during a week, two week or month-long visit? The clear intent of US immigration legislation is to protect US society from those who pose such risks. This policy assumes both that foreign convictions are accurately and fairly rendered and that those convictions indicate a non-trivial risk of future offending in the US. Those assumptions are surely over-inclusive; many (perhaps most) persons who have convictions in their home country will not pose a threat as tourists, students or workers on US soil. Some ex-offenders have aged out of criminality. Prior conviction and punishment may have persuaded some ex-offenders not to reoffend. Some whose criminal predilections are still strong may lack knowledge, opportunity or desire to reoffend while temporarily in the United States. Whether the United States is better off with a bright-line rule that bars people with a documented criminal history from entering the country is debatable. A bright-line rule could dampen tourism, student exchanges and business, and could lead to retaliatory restrictions on Americans wishing to travel abroad.

Admittedly, visiting is one thing, and long-term or permanent residency is another. In theory, all people who want to visit the United States for sightseeing and tourism could be accommodated; indeed this is economically desirable. Immigration is a different matter.

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171. See *Small v. United States*, 544 U.S. 385, 385 (2004) (“[F]oreign convictions may include convictions for conduct that domestic laws would permit. . . .” or be inconsistent with American understanding of fairness in either process or in the severity of punishment for various offenses).

There are far more people wanting to immigrate to the United States and Europe than these countries want to accommodate for reasons of population control, job opportunities, cost, and national identity. In choosing which prospective immigrants to accept, the host country is not simply screening out bad risks, it is attempting to identify those individuals who will make the best contributions to the host society. European Union countries do not require third-country nationals to disclose criminal background information except for the purposes of a residence permit. Unless the would-be visitor discloses the prior conviction, however, there is little likelihood of it being discovered.

Criminal history information created in the host country is obviously much easier to obtain, interpret and use than foreign criminal history information. Indeed, the availability of such information invites its use. However, whether to rely on criminal convictions as a key, even decisive, determinant of a long-term resident's right to remain in the country remains a crucial question. EU law provides "reinforced protection" against expulsion to long-term residents and requires Member States to provide for "effective legal redress."<sup>172</sup>

In the United States, when a permanent resident's removal or deportation was triggered only by conviction for a very serious felony, it was relatively uncontroversial. However, the definition of "aggravated felony" now includes a wide range of crimes, including some misdemeanors. Should disorderly conduct justify termination of the right to remain in the United States? (In some cases, it does.) What about drunk driving or shoplifting? (In some cases, they do.<sup>173</sup>) Should it matter how long the permanent resident has lived in the United States? (It does not.<sup>174</sup>) While a person denied a tourist visa to the United States hardly has a human rights abuse claim, a permanent resident who is removed or deported suffers an extremely serious punishment. Because being uprooted from home, community and employment is so drastic, the number of criminal offenses that require automatic deportation should be limited. Mandatory or automatic deportation should be avoided just as mandatory prison terms should be avoided. Removal on account of conviction should be thought of

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172. See Council Directive 2003/109/EC, *supra* note 143, at Preamble ¶ 16.

173. See *Leocal v. Ashcroft*, 543 U.S. 1 (2004)(DWI is not an aggravated felony if statute contained no mens rea element).

174. Nancy Morawetz, *Rethinking Drug Inadmissibility*, 50 WM. & MARY L. REV. 163, 166 (2008).

as a sentencing matter. The relevant question should be whether the permanent resident alien presents such a significant threat of future criminality that deportation is necessary to protect the community.

The use of criminal record to remove or deport undocumented aliens presents a less difficult problem. The undocumented alien, being in the United States or in the European Union illegally, has no right to remain. People who support deporting all illegal aliens are likely to see the Secure Communities, CAP and PEP programs as appropriate and desirable steps toward the larger goal.<sup>175</sup> If one thinks that all illegal aliens should be removed, assigning priority to removal of those who have been charged with or convicted of criminal conduct is not problematic. Violation of federal or state criminal laws is certainly a rational reason to activate removal procedures for a person in the country illegally. Indeed, it might deter other undocumented aliens from committing crimes. People sympathetic to the plight of illegal aliens oppose practically all deportations, especially of persons with substantial ties in the United States. They argue that Secure Communities and CAP result in deporting many individuals who are just as trustworthy as the vast majority of illegal aliens who are, de facto, being permitted to remain in the United States.

Decisions on who should be admitted and, once admitted, allowed to remain, could be determined: 1) conclusively by criminal record; 2) by consideration of criminal record as one of several factors; or 3) without consideration of criminal record. There are problems with all three decision rules. The advantage of a bright-line rule—no felons admitted—is ease of administration, but the disadvantage is arbitrariness. Whichever convictions dictate rejection of a would-be visitor, permanent resident or citizen will be over-inclusive. Several moderately serious prior convictions might be considered as disqualifying as a single serious conviction. Moreover, should it matter how long in the past these convictions occurred? A 10-year-old conviction should be considered less relevant than a one-

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175. Peter H. Schuck, *The Morality of Immigration Policy*, 45 SAN DIEGO L. REV. 865, 883-84 (2008) (Yale Law School Professor Peter Schuck points out that “crimes committed by aliens drive much public hostility to immigration.” Schuck notes, however, that relevant statistics do not show that “immigrants are more prone to crime.” Noncitizen men aged 18 to 39 are incarcerated at “much lower” rates than their citizen counterparts).

year-old conviction, although perhaps not if the person convicted ten years ago has been incarcerated until last week.

Considering criminal record as just one factor and “taking everything into account” raises the risk of a different kind of arbitrariness, that decision makers will follow their presuppositions, prejudices and gut instincts. Taking everything into account is no law at all. The number of prior convictions should be relevant. The third decision rule, not taking criminal record into account, has some appeal. It would recognize that a criminal conviction depends, to some extent, on the fortuity of apprehension and prosecution. It would also recognize that people can and do change, especially from adolescence and young adulthood to middle age. However, the third decision rule ignores the inescapable fact that adjudicated criminality, especially multiple convictions, does tell us something about character and future conduct. Social life would be intolerable if we could not count on past conduct as predictive of future conduct.

Immigration policymakers in both the United States and the European Union continue to wrestle with questions about the role that criminal records ought to play in regulating immigration. As criminal records continue to be created, maintained, and shared more efficiently, these questions will become even more important.