EXTRATERRITORIAL PUNISHMENT

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Repatriation treaties permit noncitizens convicted of crimes in the United States to serve their sentences abroad. The reach of these treaties is vast: together, they provide for the transfer of tens of thousands of prisoners in American custody. In practice, however, repatriation is remarkably rare. This is not because people want to stay in American prisons. Instead, the critical feature of repatriation is resistance from prison bureaucrats, who often determine that prisoners are "too American," or that their crimes are too severe, to license punishment in a foreign jurisdiction.

This Article examines bureaucratic resistance to repatriation. Drawing on doctrine, legislative history, statistics, and prison policies, I argue that prison officials' reluctance to repatriate prisoners stems from a conflict between two theories of punishment: one in which the criminal sanction binds a person to the place whose laws he has offended, and one in which the location of punishment is severed from the authority to punish. Ultimately, resistance to repatriation reflects a concern about the legitimacy of extraterritorial punishment. Whether or not that concern should change repatriation law, its existence highlights a growing gap between the legal justifications for imprisonment and the actual practice of punishing people in the United States.

Keywords: *repatriation, prisons, punishment, immigration, citizenship, sentencing*

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INTRODUCTION

In recent years, politicians and academics have championed international prisoner transfers as a way to reduce the American prison population.[1] Prisons, they argue, could be less crowded, less expensive, and less violent if the United States repatriated the foreign nationals serving time on its soil. The legal system for this proposal is already in place. The United States is a party to treaties that govern repatriation among more than a hundred countries, and every American state has adopted legislation permitting international prisoner transfers.[2] These laws provide for the repatriation of tens of thousands of people in American custody.[3]

In practice, however, repatriation is remarkably rare. In 2010, federal prison officials agreed to transfer less than one percent of all prisoners from countries with repatriation agreements with the United States.[4] In the preceding decade, the fifty states—which imprisoned more than 70,000 noncitizens in 2014 alone—repatriated a total of 150 people.[5] These numbers are not driven by prisoners' desire to stay in the United States. Each year, thousands of prisoners apply to serve their sentences beyond United

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1. *See infra* notes 75 to 78.

2. *See* U.S. Dep't of Justice (DOJ), *International Prisoner Transfer Program* (June 4, 2016), https://www.justice.gov/criminal-oeo/list-participating-countries (listing countries that participate in international prisoner transfers with the United States); DOJ, *State Prisoner Contacts and Statutes* (June 3, 2015), https://www.justice.gov/criminal-oeo/state-prisoner-contacts-and-statutes (listing states that have enacted legislation permitting the repatriation of state prisoners).

3. Part I explores this figure in detail. To offer an initial sketch: there are approximately 191,000 people in federal prisons, and Sylvia Royce, who ran the DOJ International Prisoner Transfer Unit for five years, estimates that 4 to 10 percent of those prisoners are eligible for repatriation. Federal Bureau of Prisons (BOP), *Population Statistics* (Oct. 28, 2016), https://www.bop.gov/about/statistics/population_statistics.jsp (listing the federal prison population as 191,526); Sylvia Royce, *International Prisoner Transfer*, 21 FED. SENT'G REP. 186, 192 (2009). As explained in Part I, the numbers of imprisoned noncitizens in state custody are even higher, and thousands of state prisoners are likely eligible for repatriation as well.

4. DOJ, OFFICE OF THE INSPECTOR GENERAL, THE DEPARTMENT OF JUSTICE'S INTERNATIONAL PRISONER TRANSFER PROGRAM 13, fig. 2 (2011) [hereinafter OIG REPORT].

5. DOJ, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2014, tbl. 6 (Sept. 2015) [hereinafter PRISONERS IN 2014] (listing the numbers of noncitizens in state prisons); DOJ, *International Prisoner Transfer by States and Territories 2000–2010* (Mar. 15, 2011), https://edit.justice.gov/sites/default/files/criminal-oeo/legacy/2014/06/06/Statistics.pdf [hereinafter *Transfers by States*] (listing international prisoner transfers by state).

States borders, and nearly every application is denied.[6] Instead, the critical feature of repatriation is resistance from prison bureaucrats, who often determine that prisoners are "too American," or that their crimes are too severe, to license punishment abroad.

This Article examines bureaucratic resistance to repatriation. Drawing on doctrine, legislative history, statistics, and prison policy, I document the persistence of a territorial conception of punishment at work in the American criminal justice system. The reluctance to repatriate foreign national prisoners reveals tension between two theories of imprisonment: one in which punishment binds a person to the jurisdiction whose laws he has offended, and one in which the location of punishment is severed from the authority to punish. The first model of punishment emerges from the public character of criminal law.[7] In the classic liberal account of criminal law, crime is an offense against the polity, and punishment is the act of "serving time" to the bounded collective whose laws have been transgressed.[8] This conception of punishment is essentially territorial.[9] It conflicts with a second model of punishment—the dominant model in the United States—in which criminal sanctions may be enforced through agreements between two sovereigns, such as two different states, regardless of where a crime occurred. In the latter model, the practice of punishment is delegated to prison bureaucrats and the location of punishment is irrelevant to its legitimacy.

The tension between these theories converges in the repatriation program and contributes to its widespread nonuse. What looks like

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6. OIG REPORT, *supra* note 4, at ii.

7. *See* Lucia Zedner, *Is the Criminal Law Only for Citizens? A Problem at the Borders of Punishment*, in THE BORDERS OF PUNISHMENT: MIGRATION, CITIZENSHIP, AND SOCIAL EXCLUSION 42 (Katja Franko Aas & Mary Bosworth eds., 2013) (discussing the public nature of criminal law). Zedner writes in response to Anthony Duff, who argues for a "republican approach to criminal law" founded on the concept of citizenship. R.A. Duff, *A Criminal Law for Citizens*, 14 THEORETICAL CRIM. 293, 304 (2010). Zedner contends that Duff's approach, which aims to moderate harsh penal policies by reference to civic values, is predicated on an exclusive conception of the criminal law that fails to grapple with the treatment of noncitizens.

8. *See* R.A. DUFF, ANSWERING FOR CRIME: RESPONSIBILITY AND LIABILITY IN THE CRIMINAL LAW 141 (2007).

9. Zedner, *supra* note 7, at 45; *see also* Andrew Ashworth & Lucia Zedner, *Just Prevention and the Limits of the Criminal Law*, in PHILOSOPHICAL FOUNDATIONS OF THE CRIMINAL LAW (R.A. Duff & S.P. Green ed., 2011).

bureaucratic inefficiency or political opposition to foreign sentencing practices is thus a sign of deeper discontent. Ultimately, resistance to repatriation stems from a concern about the legitimacy of extraterritorial punishment. Whether or not that concern should prompt change in repatriation law, its existence highlights a growing gap between the legal justifications for imprisonment and the enforcement of criminal laws. Repatriation, in other words, raises serious questions about why prisoners can be punished thousands of miles from the polities whose laws they have contravened.

This Article proceeds as follows. Part I situates the international prisoner transfer program within contemporary efforts to use the criminal justice system to enforce immigration policy. This Part recounts the origins of prisoner transfer treaties and explains their current operation in the United States. It describes how treaties intended to aid Americans abroad—initially, United States citizens incarcerated in Mexico—transformed into a vehicle to export people out of American prisons.

Part II examines implementation of the treaty transfer program. This Part connects low repatriation rates to two trends: the development of state laws and policies restricting the use of prison transfer treaties; and prison bureaucrats' tendency to deny repatriation applications, a phenomenon that exists in both federal and state prison systems. These trends reflect the challenges of prison administration and treaty participation in a federal system of separated powers. Part II explores these structural dynamics.

Part III locates prison officials' resistance to repatriation in debates about the proper relationship between punishment and criminal law. This Part identifies the territorial conception of punishment underlying penal policies on repatriation and contrasts it with the de-territorialized understanding of punishment that defines contemporary prison law. I argue that the conflict between these theories is, at its core, about whether the violation of American criminal laws can ever authorize extraterritorial punishment. The Article concludes with reflections on the degree to which prisons are agencies, which ought to be studied as an outgrowth of the administrative state.

In documenting resistance to repatriation, this Article challenges prevailing accounts of the relationship between criminal and immigration law. In recent years, scholars have critiqued the growing convergence of criminal law and immigration enforcement.[10] These critiques have revealed

10. *See infra* notes 149–57; *see also* Jennifer M. Chacón, *Managing Migration Through Crime*, 109 COLUM. L. REV. 135, 137 (2009); Allegra McLeod, *The U.S. Criminal-Immigration*

concerning legal practices and generated a new field of study. They have also encouraged a streamlined—perhaps too neat—narrative of developments in the American criminal justice system. In practice, the integration of punishment and immigration policing is fraught and incomplete, not only because enforcement bureaucracies are inefficient, but also because using criminal justice institutions to facilitate migration control upends traditional theories of punishment. This Article highlights one site where "crimmigration" fails.[11] Through the example of repatriation, I demonstrate how the effort to remove prisoners from the United States has undermined the legitimacy of American punishment.

I. THE REPATRIATION REGIME

The international prisoner transfer program developed from concerns about the treatment of United States citizens in Mexican prisons. In the early 1970s, American journalists began to investigate complaints that U.S. citizens traveling in Mexico had been arrested, forced to sign confessions, and tortured in custody.[12] A series of congressional hearings followed,[13] and in June of 1976, Mexico's Foreign Minister proposed a bilateral treaty to permit citizens of each country to serve their sentences "in the penal institutions of their native land."[14] That treaty was signed in 1976 and ratified by Congress a year later.[15]

Convergence and its Possible Undoing, 49 AM. CRIM. L. REV. 108 (2012) (describing instances in which criminal law becomes "an immigration regulation proxy").

11. *See* Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367 (2006) (coining the now widely used term for the convergence of criminal and immigration law).

12. Rosado v. Civiletti, 621 F.2d 1179, 1186 (2d Cir. 1980); *see* Note, *Constitutional Problems in the Execution of Foreign Penal Sentences: The Mexican-American Prisoner Transfer Treaty*, 90 HARV. L. REV. 1500, 1501 nn. 1, 10–12 (1977); *America, Mexico Start Prisoner Exchange Talks*, COLORADO SPRINGS GAZETTE TELEGRAPH, Aug. 25, 1977 (on file) (describing protests in Mexican prisons by American citizens convicted of drug offenses).

13. *See, e.g.*, U.S. Citizens in Imprisoned in Mexico: Hearings before the Subcommittee on International, Political, and Military Affairs of the House Committee on International Relations (Part I), 94th Cong., 1st Sess. 5 (1975), and (Part II), 94th Cong., 2d Sess. 48 (1976).

14. *Rosado*, 621 F.2d at 1187.

15. Treaty on the Execution of Penal Sentences, Nov. 25, 1976, U.S.-Mex, 28 U.S.T. 7399 [hereinafter U.S.-Mexico Treaty].

Other treaties followed. In the five years after its agreement with Mexico, the United States signed bilateral prisoner transfer treaties with Canada,[16] Peru,[17] Bolivia,[18] and Thailand.[19] In 1983, the United States agreed to participate in the Council of Europe Convention on the Transfer of Sentenced Persons (COE Convention), a multilateral treaty governing the transfer of prisoners from and to European countries.[20] The COE Convention, which took effect in the United States in 1985, provides for repatriation to and from sixty-seven countries.[21] The United States has also signed and ratified an inter-American treaty that permits transfers among twenty-one countries[22] and a number of additional bilateral repatriation treaties.[23] Together, these agreements permit prisoner transfers among more than a hundred different countries and territories.[24]

Although these treaties differ in certain respects, they share a basic model. In general, to be eligible for transfer to or from the United States, a person must be sentenced to custody for at least six months.[25] The prisoner must also be a "citizen or national" of the country to which she seeks transfer, which means in practice—but not in principle—that

16. Treaty on the Execution of Penal Sentences, Mar. 2, 1977, U.S.-Can., 30 U.S.T. 6263.

17. Treaty on the Execution of Penal Sentences, July 6, 1979, U.S.-Peru, 32 U.S.T. 1471.

18. Treaty on the Execution of Penal Sentences, Feb. 10, 1978, U.S.- Bol., 30 U.S.T. 796.

19. Treaty on Cooperation in the Execution of Penal Sentences, Oct. 29, 1982, U.S.-Thai., 1982 U.S.T. LEXIS 226.

20. Council of Europe Convention on the Transfer of Sentenced Persons, Mar. 21, 1983, 35 U.S.T. 2867 [hereinafter COE Convention].

21. Council of Europe, *Chart of Signatures and Ratifications of Treaty* 112 (June 28, 2016), http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/112/signatures?p_auth=1sqhJdRv (listing signatories to the COE Convention).

22. Inter-American Convention on Serving Criminal Sentences Abroad, Jan. 10, 1995, S. Treaty Doc. No. 104-35 [hereinafter OAS Treaty].

23. *See, e.g.*, Treaty on the Execution of Penal Sentences, Jan. 11, 1979, U.S.-Pan., 32 U.S. T. 1565; Treaty on the Enforcement of Penal Judgments, June 7, 1979, U.S.-Turk., 32 U.S.T. 3187.

24. DOJ, *International Prisoner Transfer Program*, *supra* note 2.

25. The federal repatriation statute, *see* 18 U.S.C. § 4100, contains no minimum sentence requirement, and the COE Convention permits the transfer of prisoners with fewer than six months remaining on their sentences in "exceptional cases", COE Convention, *supra* note 20, Art. III, § 2; *but see* U.S.-Mexico Treaty, *supra* note 15, Art. II, § 5 (imposing a six-month sentence requirement); OAS Treaty, *supra* note 22, Art. III § 2 (same). Nonetheless, as a matter of policy, the BOP refuses to transfer prisoners with sentences shorter than six months. BOP Program Statement 5140.39, at 13 (Dec. 4, 2009), *in* OIG Report, *supra* note 4, at 86 [hereinafter BOP Program Statement 5140.39].

transfer treaties do not apply to permanent residents or others with strong ties to a particular country.[26] An individual cannot be transferred if she is challenging her conviction or sentence,[27] and her offense of conviction must be a crime under the laws of both countries.[28] With respect to the latter requirement, a prisoner satisfies the "dual criminality" rule if his crime of conviction is an offense under federal, state, or provincial law in the receiving country.[29] The United States thus defines "dual criminality" in its broadest sense, to permit transfers even where a country's federal government does not recognize conduct as criminal. Finally, and crucially, prisoner transfer is voluntary: for a prisoner to be repatriated, both the countries involved and the prisoner have to consent.[30]

To reassure itself that prisoners have consented to their transfers, the United States enacts a judicial process familiar from the plea bargain.[31] At

26. 18 U.S.C. § 4100(b). Michael Abbell, who negotiated many of the prisoner transfer treaties, notes that the COE Convention permits signatories to "define . . . the term 'national' for the purposes of this Convention" and thus allows countries to accept permanent residents as transferees. Michael Abbell, INTERNATIONAL PRISONER TRANSFER § 2-2 (2010) [hereinafter Abbell Treatise]; *see also* COE Convention, *supra* note 20, Art. III § 4. When debating the prisoner transfer treaty implementing legislation, the House Judiciary Committee recommended that the bill exclude permanent residents in order to enable prompt passage. H.R. Rep. No. 720, Providing Implementation of Treaties for Transfer of Offenders to or From Foreign Countries, Committee on the Judiciary, 95th Cong., 1st Sess., at 3151 (1977). Congress has not revisited this issue. Although it could, immigration statutes excluding noncitizens from re-admission after a felony conviction create barriers to a broader definition of the "nationals" eligible for repatriation to the United States. *See* Abbell Treatise § 2-2 (citing 8 U.S.C. §§ 1182(9) and 1192(23)).

27. 18 U.S.C. § 4100(c). This restriction is a creature of penal policy rather than treaty or statute. Of the repatriation treaties the United States has entered, only the U.S.-Mexico Treaty bars the transfer of prisoners with pending collateral attacks on their convictions. *Cf.* OIG REPORT, *supra* note 4, at 29; *see also* Part II (noting that some prison officials misinterpret the prohibition on collateral attacks to include not only challenges to a prisoner's conviction or sentence, but also prison conditions lawsuits).

28. 18 U.S.C. § 4100(b).

29. *Id.* at § 4101(a).

30. *Id.* at § 4100(b). While the consent requirement is mandatory in the United States, other countries have repealed or abandoned it. *See* Mary Bosworth, *Penal Humanitarianism? Sovereign Power in an Era of Mass Migration*, 20 NEW CRIM. L. REV. 39 (this volume) (discussing mandatory prisoner transfer agreements between United Kingdom and other nations).

31. I invoke plea-bargaining here to highlight concerns about the impossibility of consent in these circumstances. *See* John Langbein, *Torture and Plea Bargaining*, 46 U. CHI. L. REV. 3, 12 (1978) (arguing that "the breakdown of the formal system of the trial" gave rise to a plea

some point after a prisoner applies for repatriation, and typically after his application is approved, prison officials bring the prisoner to court for a "consent verification hearing" before a magistrate judge.[32] That judge engages in a colloquy with the prisoner in which she recites the prisoner's rights and obligations under the treaty and concludes on the record that the prisoner's consent is freely given.[33] Prisoners have a right to counsel at these hearings, but once verified, their consent cannot be revoked.[34]

After transfer, a prisoner is subject to the laws and conditions of incarceration in the receiving country.[35] Under the terms of repatriation treaties, the country that sentences a person retains the exclusive authority to modify his conviction and sentence.[36] The receiving country, however, determines the conditions under which that sentence is carried out and how much time a prisoner actually serves.[37] In other words, a person who is transferred cannot challenge his conviction or sentence in the courts of his home country after he arrives. But that country, not the sentencing country, has the power to determine how long and where he will be confined.

On the American end of this process, when it receives transferred prisoners, the United States delegates the "resentencing" decision to the United States Parole Commission, a division within the Department of Justice. Generally, the Parole Commission sentences people transferred to the United States "as though [they] were convicted in a United States district court of a similar offense."[38] This means that prisoners transferred

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bargaining regime that parallels "in function and doctrine . . . the medieval European system of judicial torture"); *see also* ALISON LIEBLING, PRISONS AND THEIR MORAL PERFORMANCE: A STUDY OF VALUES, QUALITY, AND PRISON LIFE 462 (2004) (discussing the problem of consent inside penal institutions); Richard Sparks, *Can Prisons Be Legitimate?*, 34 BRIT. J. CRIMINOLOGY 14 (1994) (arguing that prisons, as inherently coercive institutions, face a basic legitimacy deficit).

32. 18 U.S.C. § 4108; *see also* OIG REPORT, *supra* note 4, at 82 n.117 (noting that transfers to Mexico or Canada need not be approved prior to the consent verification hearing).

33. 18 U.S.C. § 4108(b)–(d).

34. *Id.* at §§ 4108(b)(4) and (c).

35. *Id.* at § 4108(b)(1)–(2); *see also Rosado*, 621 F.2d at 1187–88.

36. 18 U.S.C. § 4108(b)(1).

37. *Id.* at §§ 4105(a) and 4108(b)(2).

38. 18 U.S.C. § 4106A(b)(1)(A); BOP PROGRAM STATEMENT 5140.39, *supra* note 25, at 4. In 1988, the House of Representatives noted that the transfer statute "puts the Parole Commission . . . in the position of a United States district court relative to a convicted defendant." Abbell Treatise, *supra* note 26, § 2-5 (quoting Cong. Rec., 100th Cong., 2d Sess. 33302 (Oct. 21, 1988)).

to the United States serve time under the American legal analogue to their foreign sentence, and that prisoners transferred out of American prisons serve the sentence the receiving country sees fit to impose.

This legal regime elides the distinctions between criminal codes and authorizes a federal agency—rather than a judge—to translate foreign law into domestic time. It also bifurcates the authority to convict and the power to punish. In the repatriation system, the country that sanctions a person for violating its laws has no control over the imposition of that sanction. Conversely, the country punishing a prisoner has no basis for that punishment other than an agreement to enforce the criminal laws of another nation. Punishment under a transfer treaty is, in this respect, a contract between sovereign states rather than a contractual or expressive exchange between a prisoner and the polity whose laws he has broken.

This model of punishment has stark consequences for those subject to it. Take Efran Caban, Raymond Velez, Pedro Rosado, and Felix Melendez, four United States citizens who were arrested at gunpoint in Mexico in 1975.[39] Upon being arrested, Caban and his fellow travelers were taken to isolated cells, where Mexican police officers tortured them with, among other devices, an electric prod.[40] After "seven or eight days of unceasing brutality," Mexican officials asked the prisoners to sign confessions; when they refused, they were bribed and beaten. Caban, Velez, Rosado, and Melendez were charged, convicted, and sentenced to nine years' imprisonment for importation of cocaine.[41] In 1977, after two years in custody, each prisoner "expressed an interest" in transfer and appeared for a consent verification hearing.[42] Once they arrived in the United States, the prisoners challenged their imprisonment on the grounds that their consent to transfer had been involuntary and their criminal convictions had been fundamentally unfair.[43]

The American court—in this case, the Second Circuit—held that, although the prisoners' convictions "were obtained under a criminal process devoid of even a scintilla of rudimentary fairness and decency," they had "agreed not to challenge their Mexican convictions in United States

39. *Rosado*, 621 F.2d at 1182.
40. *Id.* at 1184.
41. *Id.* at 1185.
42. *Id.* at 1188–89.
43. *Id.* at 1192.

courts."[44] The panel noted that it was "less than certain" that the prisoners' agreement to transfer was truly voluntary.[45] But, the court concluded, to hold otherwise would be to "scuttle the one certain opportunity open to Americans incarcerated abroad."[46] In the name of "the United States[']promise [to] Mexico that it [would] execute . . . Mexican conviction[s]," the court determined that the men could not challenge their imprisonment in the United States.[47]

As *Rosado* illustrates, prisoner transfer treaties sever the legality of a conviction from the act of imprisonment. In the repatriation regime, unlike other parts of the American criminal justice system, punishment does not require a conviction produced by a particular judicial process. The adjudicative model of determining guilt—which, in both theory and criminal law textbooks, legitimates the act of punishment—is irrelevant to the incarceration of repatriated United States citizens, as are the procedural protections of the Constitution.[48] This is a system in which punishment is an expression of comity between nations, and as a result, is disconnected from its traditional rationales.

Whether a prisoner is subject to this system is determined at almost every stage by prison bureaucrats. Congress first authorized the Attorney General to implement the repatriation program in 1977.[49] Since then, the Attorney General has delegated her power to the Federal Bureau of Prisons (BOP), federal prosecutors, and the International Prisoner Transfer Unit (IPTU), a branch of the DOJ Criminal Division.[50] Under current guidelines, the transfer process begins in penal institutions, where prison staff

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44. *Id.* at 1182, 1199

45. *Id.* at 1200.

46. *Id.*

47. *Id.* at 1199.

48. For one incisive account of "the conventional adjudicative model" of criminal justice, see Issa Kohler-Hausmann, *Managerial Justice and Mass Misdemeanors*, 66 STAN. L. REV. 611, 623–28 (2011). Kohler-Hausmann provides an intellectual history of the concept of adjudicative justice, which she describes as an idealized theory of criminal administration in which courts exist to determine guilt and mete out punishment based on that determination. *Id.* at 623. Kohler-Hausmann's nuanced critique of adjudicative justice merits fuller examination. I adopt her theory here to make the limited point that punishment under a repatriation treaty is not the product of a process aimed at determining guilt—and indeed, is altogether indifferent to the process by which a criminal conviction was produced.

49. 18 U.S.C. § 4102.

50. 28 C.F.R. § 0.64-2; OIG REPORT, *supra* note 4, at i.

members notify prisoners that they may be able leave the United States.[51] If a person wants to repatriate, he submits an application to his case manager, who makes an initial eligibility determination.[52] If the case manager approves the transfer, she sends it to BOP's Central Office, which determines whether the application should proceed to the IPTU.[53] The IPTU then communicates with, among others, federal prosecutors, who have the opportunity to take a position on whether the prisoner should be sent abroad.[54] If it approves the transfer, the IPTU arranges the consent verification hearing.[55] If a prisoner's transfer is denied at any stage, he must—as a matter of BOP policy—wait two years before he can reapply.[56]

This process is more complicated when state prisoners are involved. Every American state has enacted legislation authorizing repatriation upon the state's approval.[57] But those laws differ in how they structure state participation in the treaty transfer program. In Colorado and Connecticut, for example, the Governor delegates the authority to approve transfers to the Department of Corrections.[58] In California, the decision to approve a transfer is made by the head of the state's parole board.[59] Prisoners in the custody of the District of Columbia, which has not passed legislation authorizing prisoner transfers, are repatriated when "D.C. agree[s] to cede its decision-making authority to the U.S. Department of Justice."[60]

The distinctions among these laws matter because most foreign nationals in American prisons are in state custody. A strong word of caution is required when discussing statistics on the foreign national prisoner population. The definition of "citizen" varies dramatically across jurisdictions: Colorado, Maryland, Missouri, New York, Oklahoma, and Tennessee

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51. 28 C.F.R. § 527.43; BOP PROGRAM STATEMENT 5140.39, *supra* note 25, at 6.

52. BOP PROGRAM STATEMENT 5140.39, *supra* note 25, at 7.

53. OIG REPORT, *supra* note 4, at 3–5.

54. OFFICE OF THE UNITED STATES ATTORNEYS, CRIM. RESOURCE MANUAL tit. 9-35.100, § 737 (2012).

55. OIG REPORT, *supra* note 4, at 3–5.

56. BOP PROGRAM STATEMENT 5140.39, *supra* note 25, at 8.

57. *See* DOJ, *State Prisoner Contacts and Statutes*, *supra* note 2.

58. *See* Gandy v. Colorado Dep't of Corrections, 284 P.3d 898, 900 (Colo. Ct. App. 2012) (citing DOC Admin. Reg. 550-05(IV)(B)); CONN. GEN. STAT. ANN. § 18-91a.

59. CAL. ADMIN. CODE. tit. 15, §§ 2870, 4621.2.

60. DOJ, *International Prisoner Transfer Program: District of Columbia State Prisoner Statute* (May 26, 2015), https://www.justice.gov/criminal-oeo/district-columbia-state-prisoner-statute.

count any prisoner who is foreign-born as a noncitizen, regardless of his legal citizenship status;[61] Missouri relies on self-reported nationality statistics;[62] and Ohio does not keep statistics on noncitizens in privately operated prisons.[63] At one point, California defined noncitizens as "inmates held by Immigration and Customs Enforcement (ICE)."[64] Florida includes "both confirmed and suspected alien inmates" in its noncitizen population count.[65] There is tremendous variation in how prison officials understand, document, and produce the concept of citizenship.

Notwithstanding this significant caveat, official statistics consistently indicate that states hold more foreign nationals than the federal government. As of December 31, 2014, federal prisons held 23,532 foreign nationals, as compared to 44,305 in state penal institutions.[66] These numbers are deflated by the absence of statistics from federal and some state contract prisons, and by the omission of statistics from California, which reported its foreign prisoner population most recently in December 2011.[67] At that time, California alone held 16,089 noncitizens (which again, it defined only as inmates in ICE custody); state systems held a collective 72,265 noncitizens; and the federal government imprisoned 30,544 foreign nationals.[68] Separate statistics from the same month put the noncitizen population in federal prisons, including those held in contract facilities, at "approximately 52,000," which is one in four federal prisoners.[69] To combine these numbers—which, however imprecise, offer some sense of the system as a whole—it appears that at least 125,000 people in federal and state prisons are categorized as noncitizens, and that of those prisoners, somewhere between 58 and 70 percent are held by states.[70]

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61. *See* PRISONERS IN 2014, *supra* note 5, tbl. 6.

62. *Id.*

63. *Id.* at 23.

64. DOJ, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2011 tbl. 16 (Dec. 2012) [hereinafter PRISONERS IN 2011].

65. *Id.*

66. PRISONERS IN 2014, *supra* note 5, tbl. 6. This is the most recent date for which comprehensive statistics are available.

67. PRISONERS IN 2011, *supra* note 64, tbl. 16; PRISONERS IN 2014, *supra* note 5, tbl. 6.

68. PRISONERS IN 2011, *supra* note 64, tbl. 16.

69. OIG REPORT, *supra* note 4, at 2.

70. *See* PRISONERS IN 2011, *supra* note 64, at 13 (stating that 30 percent of noncitizen prisoners are in federal prisons, but not including federal contract facilities in this number).

The pressure to repatriate these people is acute. Since the mid-1990s, the United States government has shown increasing interest in using repatriation treaties to send prisoners out of the country. An early sign of this shift was the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), which criminalized many immigration offenses and expanded the list of criminal convictions that give rise to deportation.[71] In less well-documented provisions, IIRIRA required the Secretary of State and the Attorney General to produce annual reports on the use of transfer treaties and to consult with state and local officials to improve the "effectiveness" of the repatriation program.[72] In a largely hortatory section, given the language of some treaties, IIRIRA also provided that "except as required by treaty" repatriation should not require a prisoner's consent.[73] States including California and Texas adopted parallel laws and policies "encouraging participation in the federal repatriation program" in the mid-1990s.[74] More recently, academics,[75] policy outfits,[76] DOJ officials,[77] and the DOJ Inspector General's Office[78] have called for increased use of the transfer program. These groups endorse repatriation on the grounds that it could relieve prison crowding, reduce state budgets, promote prisoners' rehabilitation, and as Peter Schuck puts it, serve as a form of "early deportation."[79]

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71. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546.

72. *Id.* at §§ 330(d) and 331(c).

73. *Id.* at § 330(c).

74. *See* WEST'S ANN. CAL. PENAL CODE § 2912(b)(2) (1994) (requiring the California Board of Prison Terms to "adopt the model program developed by the State of Texas" for encouraging repatriation).

75. *See, e.g.*, Peter Schuck, *Deportation Before Incarceration*, 171 POL'Y REV. 73 (2012); Stephen H. Joseph, *Note, Hasta la Vista?: An Assessment of the California Governor's Proposal to Send Undocumented Inmates to Mexico*, 34 BOSTON C. INT'L. & COMP. L. REV. 173 (2011).

76. *See, e.g.*, CITIZENS ALLIANCE ON PRISONS AND PUBLIC SPENDING, FOREIGN NATIONALS IN MICHIGAN PRISONS: AN EXAMINATION OF THE COSTS 5 (Apr. 2006), http://static.prisonpolicy.org/scans/cappsmi/Foreign%20nationals.pdf.

77. Royce, *supra* note 3, at 186; Abbell Treatise, *supra* note 26, § 8 -1.

78. OIG REPORT, *supra* note 4, at x–xii.

79. Schuck, *supra* note 75, at 73; *see also* notes 75–78 and sources cited therein. One other efficiency argument made in favor of repatriation is that transferring prisoners to their "home" countries during the pendency of their criminal sentences better prepares countries to receive prisoners who would otherwise arrive only after deportation. This rationale depends on the existence of immigration laws that subject almost all prisoners in federal and

A legal regime that emerged from concerns about the conditions of foreign prisons and the primacy of the American justice system has thus transformed into a vehicle for prisoner exportation. In the late 1970s and early 1980s, politicians and courts heralded the transfer program as an "exampl[e] of American compassion and concern for human rights,"[80] and as a "laudable" attempt "to permit an American citizen convicted of a crime in a foreign country to serve his sentence in a prison at home where conditions are much better."[81] In the early years after adoption of the transfer treaties, "the number of returning Americans . . . exceeded the number of foreign nationals that the United States transferred."[82] That dynamic changed, however, as American prison populations and the number of foreign nationals in United States custody grew. By 2012, 75 to 80 percent of prisoners transferred were those leaving the United States, and the rhetoric of repatriation was dominated by a desire to downsize and deport.[83] Today,

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state prisons to deportation in virtue of their criminal convictions. *See infra* Part II (discussing the immigration consequences of criminal convictions).

80. *Prisoner Swap Bill Signed by President*, VALLEY MORNING STAR (Harlingen, Tex.), Oct. 29, 1977 (on file) (quoting President Carter's description of the repatriation treaties with Canada and Mexico).

81. Kanasola v. Civiletti, 630 F.2d 472, 474 (6th Cir. 1980); *see also Rosado*, 621 F.2d at 1193 (describing repatriation treaties as "an opportunity for . . . better prison conditions and more positive means for rehabilitation" for American citizens). News outlets also described the repatriation regime as an opportunity for Americans incarcerated abroad. *See, e.g.*, *U.S. Inmates in Mexico Welcome Transfer Pact*, THE BRIDGEPORT POST, Nov. 26, 1976 (on file) (describing the U.S.-Mexico Treaty as a way to return American "convicts to their native culture, where they can be properly rehabilitated"); Robert B. Cullen, *Panel Approves Jail Treaty*, DEL RIO NEWS HERALD, Sept. 16, 1977 (on file) (listing, among the "advantages" provided by repatriation treaties, that Americans incarcerated in Mexico could be transferred and thus "held by a government whose laws and language they understand").

82. OFFICE OF THE UNITED STATES ATTORNEYS, CRIM. RESOURCE MANUAL tit. 9-35.100, § 731 (2012); *see also* Joseph, *supra* note 75, at 183 (2011) (noting that use of the prisoner transfer treaties began to decline fourteen years after the first treaty was adopted).

83. *See* OFFICE OF THE UNITED STATES ATTORNEYS, *supra* note 82. The trajectory of the repatriation narrative—which arose from reports about Americans imprisoned in Mexico and has since developed into a proxy for debates over deportation policy—raises questions about the relationship between prison policy and race. For accounts of the role that race plays in the enforcement of American immigration policy, see César Cuauhtémoc García Hernández, *Naturalizing Immigration Imprisonment*, 103 CAL. L. REV. 1449, 1491–92 (2015); and Michael J. Wishnie, *State and Local Police Enforcement of Immigration Laws*, 6 U. PA. J. CONST. L. 1084, 1102–15 (2004). For a discussion of the racialization of repatriation policy, see Bosworth, *supra* note 30.

a system that courts and lawmakers conceived as a way to extend the "benefits"[84] of American imprisonment to U.S citizens abroad has become a means to removing noncitizens from the American prison system.

II. RESISTANCE TO REPATRIATION

Despite the public pressure to repatriate foreign national prisoners, the treaty transfer program is rarely used. Statistics obtained from the Bureau of Prisons by the Inspector General reveal remarkable rejection rates. Between 2005 and 2010, for instance, the IPTU received nearly 75,000 transfer requests from federal prisoners.[85] It rejected 97 percent of those applications.[86] In 2010 alone, nearly 1,200 repatriation applications made it to the IPTU, which means they were approved by both a prison case manager and the Bureau of Prisons Central Office.[87] The IPTU denied nearly 75 percent of those requests.[88]

The statistics are even starker at the state level. As noted at the outset, in the decade between 2000 and 2010, the fifty states transferred a total of 150 prisoners.[89] California, at forty transfers, repatriated the highest number of prisoners in that time period.[90] Florida transferred twelve prisoners: four to Canada; two to Spain; and six to the United Kingdom.[91] Only twenty-eight states or territories—including the Northern Mariana Islands and the District of Columbia, which transferred one prisoner each—repatriated any prisoners at all.[92]

There are a variety of reasons these numbers are so low. Some prisoner transfer treaties contain restrictive provisions. The United States' agreement with Mexico, for example, precludes the transfer of prisoners convicted of immigration offenses and the repatriation of "domiciliaries" of the

84. *Rosado*, 621 F.2d at 1187–88 ("The potential benefits to a prisoner transferring under the Treaty are considerable.").

85. OIG REPORT, *supra* note 4, at ii.

86. *Id.* This figure refers to transfers denied by the BOP and IPTU combined.

87. *Id.* at 13, fig. 2.

88. *Id.*

89. *Transfers by States*, *supra* note 5.

90. *Id.*

91. *Id.*

92. *Id.* Cf. Bosworth, *supra* note 30 (discussing prisoner transfers in and out of the British prison system).

United States, a term the treaty defines as five years' presence in a country.[93] In other cases, prisoner transfers stall because case managers misunderstand the repatriation program[94] or fail to inform prisoners about its existence,[95] and because receiving countries refuse to accept prisoners.[96] The United States also lacks repatriation treaties with several countries that are, as the United States government puts it, "well represented in the [federal] prison population," including Colombia, Cuba, and the Dominican Republic.[97]

The real breakdown in the repatriation system stems, however, from the exercise of discretion by prison officials. Although critiques of the repatriation program tend to emphasize the prisoner consent requirement and noncooperation from receiving countries,[98] there is considerable evidence that American prison bureaucrats interpret transfer treaties in ways that restrain their use. A number of state prison systems have adopted policies that limit eligibility for transfer to certain subsets of the prison population. Since the early 1980s, for instance, the Michigan Department of Corrections has prohibited the transfer of prisoners convicted of "military or immigration offense[s]," as well as those serving life sentences for first-degree murder or a drug offense.[99] Until recently, the Colorado Department of Corrections

93. Domiciliary status also requires intent to remain in the United States. U.S.-Mexico Treaty, *supra* note 15, Art. II § 3 and Art. IX § 4. *See infra* note 152 (defining the term "immigration offense").

94. OIG REPORT, *supra* note 4, at 29–32 (noting that prison staff disagreed about whether prisoners with outstanding fines were eligible for transfer, and that BOP policy fails to clarify that only an attack on a prisoner's conviction, and not a prison conditions lawsuit, precludes repatriation).

95. *Id.* at 27 (finding that four countries are missing from BOP's list of treaty nations, and that in 2010, more than 2,500 prisoners in BOP custody were citizens of those countries); *id.* at iv (noting that language barriers prevent some prisoners from understanding the repatriation program).

96. *Id.* at ii (describing "other countries' (especially Mexico's) reluctance to take back all of their nationals"); *id.* at vi n.7 ("In a 2001 letter to IPTU, Mexico established restrictive criteria that supplemented the criteria established in the bilateral treaty."); *id.* at 54 (noting that, between 2005 and 2010, "treaty nations took 288 days, on average, to approve the transfer of their nationals after IPTU had approved the inmates' requests").

97. *Id.* at 55.

98. *See, e.g.*, Peter H. Schuck, *Immigrants in Overcrowded Prisons: Rethinking an Anachronistic Policy*, 27 GEO. IMMIGR. L.J. 597, 654 (2013).

99. Walton v. Dep't of Corrections, 212 Mich. App. 455, 457–58 (Mich. Ct. App. 1995) (quoting DOC Policy OP-BCF-34.03); *see also* Jim Neubacher, *A Convict, the Law, and the Press*, DETROIT FREE PRESS, Feb. 28, 1982 (on file) (discussing Michigan's policy).

also barred the repatriation of prisoners with life sentences.[100] Other states have policies that discourage transfer and give prison officials broad latitude to deny repatriation requests.[101]

States also curtail repatriation through statute. In 1994, Ohio enacted a law prohibiting the repatriation of any person convicted of certain drug trafficking offenses and most first- and second-degree felonies.[102] The same year, Indiana passed legislation authorizing a prisoner's return to Indiana state prison if, after transfer, "the person has not completed [his] sentence" in the foreign jurisdiction.[103] Echoing this theme, in 2010, a California senator introduced an ultimately unsuccessful bill on behalf of the prison officers' union. If passed, it would have predicated repatriation on the receiving country's promise that the transferred prisoner would serve his full California sentence.[104]

These laws have given rise to legal disputes over whether—and how much—states may limit treaties. In 2012, for example, a Canadian national named Robert Gandy sued the Colorado Department of Corrections to challenge its refusal to repatriate prisoners serving life sentences.[105] Gandy argued that, in restricting the list of transfer-eligible inmates beyond the eligibility requirements in the treaty with Canada, the DOC's policy violated the Supremacy Clause.[106] A Colorado appellate court agreed and vacated the prison policy.[107] Five years earlier, however, an Ohio appellate court came to the opposite conclusion in a case involving nearly identical facts.[108] In that case, John Bragg, a Canadian prisoner serving a life sentence, argued that the state's transfer policy ran "afoul of the Supremacy

100. Gandy v. Colorado Dep't of Corrections, 284 P.3d 898, 900 (Colo. Ct. App. 2012) (citing DOF Admin. Reg. 550-05).

101. *See, e.g.*, Arizona Dep't of Corrections, Order No. 1004.04 (May 30, 2013) (permitting denial of applications "for sound correctional practice"); Oregon Dep't of Corrections, *Issue Brief: Criminal Aliens in Oregon Prisons* (Jan. 22, 2015) (listing the drawbacks of transfer treaties and noting that "Oregon has used the treaty in a very small number of cases").

102. Ohio Rev. Code. Ann. § 5120.53.

103. West's Ann. Ind. Code § 11-8-4.5-3.

104. S.B. 1070, California Senate Committee on Public Safety, 2009–2010 Reg. Sess. (introduced Feb. 17, 2010).

105. *Gandy*, 284 P.3d at 900.

106. *Id.* at 904.

107. *Id.*

108. Bragg v. Taft, No. 06AP-741, 2007 WL 611289 (Ohio. Ct. App. Mar. 1, 2007).

Clause."[109] The court rejected Bragg's argument on the ground that the treaty required state consent to prisoner transfers and therefore gave Ohio "unfettered discretion" to deny his application.[110] The Ninth Circuit adopted a position similar to Ohio's in 1990.[111]

These cases highlight an unsettled debate over states' authority to restrict agreements ratified by the federal government. But they fail to capture the degree to which, regardless of state statutes and prison regulations, prison bureaucrats retain the ability to determine where prisoners serve their time. Even in states without specific laws on repatriation, the numbers of prisoners approved for international transfer are remarkably low.[112] New York, for example, reported 5,988 noncitizens in its prison population in 2010.[113] Over the preceding decade, it approved a total of ten prisoners for repatriation.[114] Oregon imprisoned 1,752 non-citizens in 2010.[115] It repatriated only two prisoners—one to Mexico, one to Canada—between 2000 and that year.[116]

The structure of transfer treaties drives these statistics. Because state consent is required for transfer, and prison bureaucrats possess delegated authority to express or withhold that consent, prison officials determine whether an offense is too severe or another country's prison system is too lenient for repatriation to proceed. This enforcement regime allows prison bureaucrats—and in practice, individual case managers—to renegotiate repatriation treaties from day to day. It also turns repatriation into a tool of prison management.

Both of these dynamics were evident in the case of Christopher Rickard, a British citizen convicted of murder in Illinois.[117] Rickard received an

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109. *Id.* at *3.

110. *Id.*

111. *See, e.g.*, Hogan v. Koenig, 920 F.2d 6, 8 (9th Cir. 1990) ("California has decided to cause Hogan to serve his sentence where he committed his crime, and not in his native land. California has the power to make such a decision. . . . ").

112. *See Transfers by States*, *supra* note 5.

113. DOJ, Office of Justice Programs, Bureau of Justice Statistics, Prisoners in 2010, tbl. 25 (Dec. 2015) [hereinafter Prisoners in 2010]. New York classifies any "foreign-born" prisoner as a noncitizen when collecting and reporting statistics. *See* Prisoners in 2014, *supra* note 5, tbl. 6 (surveying how states define and collect alienage statistics).

114. *Transfers by States*, *supra* note 5.

115. Prisoners in 2010, *supra* note 113, tbl. 25.

116. *Transfers by States*, *supra* note 5.

117. U.S. *ex rel* Rickard v. Sternes, 149 F. Supp. 2d 437, 440 (N.D. Ill. 2001).

indeterminate forty- to eighty-year prison sentence in 1978. He first sought repatriation in 1985, just after the COE Convention took effect. The Illinois Department of Corrections (IDOC) never responded to his request.[118] Ten years later, when he learned that his stepmother was dying, Rickard again asked to be transferred to Britain.[119] This time, IDOC told Rickard that it would not approve his transfer until his two prison conditions lawsuits "were resolved."[120] When Rickard voluntarily dismissed his claims, the agency agreed to process his application.[121] IDOC thus used the prospect of repatriation to restrain prison litigation.

Prison officials also employ repatriation to evaluate "foreign" sentencing systems, and to affirm their own. In 1994, for example, a Canadian citizen named Tom Nguyen was convicted of kidnapping, burglary, and "aggravated mayhem" in California.[122] Nguyen received a sentence of life with the possibility of parole. In 2005, he applied for repatriation and the Correctional Service of Canada approved his transfer.[123] When Canadian officials informed California prison staff that Nguyen would serve fourteen years, however, the California Board of Prison Terms denied his request.[124] Ultimately, the Board concluded, Canada "could not administer" the sentence Nguyen had received.[125]

Other states share California's skepticism about "foreign" sentencing practices. In 2015, Oregon's Department of Corrections published an internal brief warning that repatriation treaties give "foreign government[s] . . . total control over the individual's disposition."[126] The brief counseled prison staff that foreign governments have the power to "arbitrarily releas[e] the inmate."[127] It noted that "many states have found this lack of control to be unacceptable."[128]

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118. *Id.* at 441.

119. *Id.*

120. *Id.*

121. Rickard's efforts to repatriate ultimately proved unsuccessful because Her Majesty's Prison Service would not accept a prisoner with an indeterminate sentence, IDOC could not convert his indeterminate sentence to a determinate one absent court order, and a criminal court in Cook County denied his resentencing request. *Id.* at 442.

122. Nguyen v. Gonzalez, No. 11-cv-311, 2011 WL 3808120, at *1 (C.D. Cal. Jul. 20, 2011).

123. *Id.* at *1.

124. *Id.*

125. *Id.*

126. *See* Oregon Dep't of Corrections, *supra* note 101, at 2.

127. *Id.*

128. *Id.*

The breadth of prison bureaucrats' discretion has prompted pushback from lawmakers. In 2003, a California senator introduced a bill intended to increase the state's repatriation rates.[129] The bill cautioned that the "dearth of transfers [was] of concern to important trading partners of California and critical partners of the United States in the International Coalition Against Terrorism, including, but not limited to, Canada and Member States of the European Union."[130] It observed that prison officials often denied prisoners' transfer applications because their foreign sentences would be shorter than those issued by California courts.[131] "This situation is anticipated in the convention," the bill lamented, yet "state bureaucrats have refused to take advantage of the chance to save millions of dollars."[132] The bill ultimately died in committee.

This narrative of unrestrained discretion plays out in the federal prison system as well. While state prison officials have been more explicit in their resistance to international transfers, federal prison bureaucrats also deny repatriation applications with remarkable frequency—as much as 97 percent of the time.[133] They do so on the basis of what the IPTU calls the "suitability guidelines."[134] Pursuant to these guidelines, whether a prisoner should be repatriated depends, among other things, on the seriousness of her offense, her "family and social ties," the length of time she has spent in the United States, and whether she has "accept[ed] . . . responsibility" for her crime.[135] IPTU policy also permits consideration of whether a prisoner's return to a foreign country would "outrage public sensibilities."[136] The policy instructs staff that "the more serious the offense, the more important the certainty of incarceration in the place it was committed. . . ."[137] Prison policy thus builds a determination about culpability—and a theory of its relationship to the location of punishment—into the repatriation regime.

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129. S.B. 300, California Senate Committee on Public Safety, 2003–2004 Reg. Sess. (introduced Feb. 19, 2003).

130. *Id.* at 5.

131. *Id.*

132. *Id.* at 6, 8.

133. OIG REPORT, *supra* note 4, at ii.

134. *Id.* at III.

135. *Id.* at III–14.

136. *Id.* at 114.

137. *Id.*

In practice, these determinations are individualized and, according to the Inspector General, arbitrary. In 2011, after a lengthy review, the Inspector General concluded that IPTU officials apply repatriation guidelines inconsistently.[138] In one case, for instance, the IPTU denied a prisoner's transfer because he had lived in the United States for eleven years, which qualified as "a long time."[139] In another, a staff member approved repatriation of a man who had spent fifteen years in the United States because he could "receive visits from his parents" in his home country.[140] The IPTU also permitted the repatriation of a prisoner with seven siblings in the United States, but prohibited the transfer of another with five siblings in the country.[141] The Inspector General's report is filled with such examples of "disparate treatment . . . in similar circumstances."[142] Most applications, moreover, never make it to the IPTU. Roughly 90 percent of repatriation applications are denied by BOP, which means they never reach DOJ.[143] Prison officers, in other words, are the bureaucrats actually regulating repatriation.

Their decisions depend at least in part on judgments about how American a prisoner seems. Only one repatriation agreement, the treaty with Mexico, conditions transfer on the amount of time a prisoner has been in the United States.[144] As a matter of policy, however, the Bureau of Prisons applies a "domiciliary rule" to all prisoners who seek repatriation.[145] Under prevailing guidelines, if a prison official decides that a prisoner has spent a "lengthy time" in the United States, that prisoner will not be transferred, regardless of his citizenship status, crime, or family ties.[146] Prison bureaucrats therefore determine when a prisoner's relationship to the United States is deep enough to warrant American punishment.

The domiciliary rule has perverse consequences for foreign national prisoners. Since the passage of IIRIRA in 1996, the number of criminal

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138. *Id.* at 38. The Inspector General's review was based on ten months of fieldwork and a review of more than 600 prisoner case files. *Id.* at 126–28.

139. *Id.* at 39.

140. *Id.*

141. *Id.*

142. *Id.* at 38.

143. *Id.* at 24.

144. U.S.-Mexico Treaty, *supra* note 15, Art. II § 3, Art. IX § 4; Royce, *supra* note 3, at 190.

145. Royce, *supra* note 3, at 190.

146. *Id.*

convictions that trigger deportation has dramatically expanded.[147] Under current laws, both permanent residents and some prisoners who fear persecution in their home countries can be deported because of a criminal conviction.[148] As a result, immigration statutes subject almost all prisoners seeking repatriation to deportation at the end of their prison terms. Prison policies, on the other hand, encourage individualized decisions about when prisoners should serve their sentences in the United States. The interaction between these bodies of law creates a class of people who are, in effect, too American to be punished abroad, but too foreign to avoid deportation upon release.

To cast this conflict in slightly different terms: although the immigration consequences of a criminal conviction depend on a person's legal citizenship status, prison policies adopt and propagate a conception of national belonging that divorces punishment from alienage. Repatriation law assumes that bureaucrats can and should make functional assessments about a prisoner's national identity. This assumption empowers prison officials to define "American" for the purpose of punishment, as distinct from the purposes of immigration law. It also legitimates the practice of imprisoning people who will, almost without exception, be detained and deported after their prison sentences conclude.

Prison bureaucrats thus exercise enormous practical control over the relationship between citizenship and punishment. Inside state prison

147. IIRIRA amended existing immigration statutes to subject noncitizens who commit crimes of "moral turpitude," firearm offenses, and almost all drug offenses to deportation. 8 U.S.C. § 1227(a). The law renders noncitizens eligible for deportation on the basis of both felony and misdemeanor drug convictions, and exempts only noncitizens with a single conviction for simple possession of 30 grams or less of marijuana. 8 U.S.C. § 1227(a)(2)(B)(i). IIRIRA also requires the deportation of any noncitizen convicted of an "aggravated felony," a term of art in immigration law that can include misdemeanors and nonviolent felonies such as tax fraud and passing bad checks. 8 U.S.C. § 1227(a)(2)(A)(iii). The Supreme Court has recognized that these and other recent "changes to [American] immigration law have dramatically raised the stakes of a noncitizen's criminal conviction." Padilla v. Kentucky, 559 U.S 356, 364 (2010).

148. Prisoners who fear persecution in their home countries can apply for "withholding of removal" and for relief from deportation under the Convention Against Torture (CAT). 8 U.S.C. § 1231(b)(3); 8 C.F.R. § 208.18; 8 C.F.R. §§ 1208.16–17. The bar for obtaining such relief is high, however, and prisoners are ineligible for withholding of removal if they have committed a "particularly serious crime," a term courts have construed to include drug and other offenses. *See, e.g.*, Konou v. Holder, 750 F.3d 1120, 1126 (9th Cir. 2014); Perez-Palafox v. Holder, 744 F.3d 1138, 1144 (9th Cir. 2014).

systems, prison officials resist and reinterpret transfer treaties in ways that limit their scope, and in some views, contravene federal law. In the federal prison system, prison staff members make ad hoc determinations about prisoners' national identities, the relative harshness of foreign legal systems, and the severity of particular crimes. These interlocking enforcement regimes result in a treaty transfer program characterized by discretion and nonuse.

III. THE TERRITORIALITY OF PUNISHMENT

The prisoner repatriation regime confounds dominant accounts of the relationship between criminal justice and migration control. Over the past decade, scholars have documented the growing interdependence of criminal law and immigration enforcement. Today, citizenship status is salient at every stage of the criminal justice process. At the front end of the system, legislatures have criminalized immigration;[149] police act as de facto border patrol agents;[150] and prosecutors are charging immigration offenses at rates not seen since Prohibition.[151] In the courts, immigration crimes constitute roughly 30 percent of the federal criminal docket;[152] immigration status

149. David A. Sklanksy, *Crime, Immigration, and* Ad Hoc *Instrumentalism*, 15 NEW CRIM. L. REV. 157, 164 (2012) (documenting the sharp increase in "criminal statutes aimed at illegal immigration" in the 1980s).

150. Ingrid V. Eagly, *Prosecuting Immigration*, 104 NORTHWESTERN UNIV. L. REV. 1281, 1282 (2010) (documenting how "local police act[] as immigration enforcers"); Judith Resnik, *Bordering by Law: The Migration of Crimes, Sovereignty, and the Mail*, in NOMOS: IMMIGRATION AND EMIGRATION 23 (Jack Knight ed., forthcoming 2016) (surveying programs in which the Department of Homeland Security (DHS) encourages local law enforcement participation in the effort to identify potentially deportable individuals). Resnik notes that, in 2012, DHS reported a 97 percent rate of "activated jurisdictions, which meant that law enforcement offices in most counties" had the ability to participate in federal immigration enforcement programs; *id.*; Christina Rodríguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567, 591 (2008) (describing agreements entered pursuant to § 287(g) of the Immigration and Nationality Act, which "authorizes state and local officials to arrest and detain individuals for immigration violations and to investigate immigration cases"); *see also* U.S. Customs and Immigration Enforcement, *Priority Enforcement Program* (June 1, 2016), https://www.ice.gov/pep (describing "PEP," a cooperative program that replaced the "Secure Communities" initiative in 2015).

151. Eagly, *supra* note 150, at 1281–82; Sklanksy, *supra* note 149, at 158 and 166 fig. 1.

152. U.S. SENTENCING COMMISSION, OVERVIEW OF FEDERAL CRIMINAL CASES, FISCAL YEAR 2014 7 (2015) (noting that immigration offenses represent 29.3 percent of criminal

affects plea-bargaining and sentencing;[153] and defense lawyers have a constitutional duty to warn their clients about the immigration consequences of a criminal conviction.[154] In the post-conviction justice system, prisons have become sites for the identification of noncitizens;[155] immigration courts are built into prisons;[156] and a growing number of federal penal institutions are classified by alienage.[157] These developments reflect what David Sklansky calls "the new reality" in which immigration regulation and criminal justice are "so thoroughly entangled it is impossible to say where one starts and the other leaves off."[158]

The repatriation program is a departure from this reality. In theory, prisoner transfer treaties enable the same convergence of criminal and immigration law that is apparent elsewhere in the justice system. These agreements tie the location of punishment to citizenship status and encourage the harmonization of penal policy across state, federal, and international borders. But, in the face of pressure to incorporate alienage into punishment practices, there is significant resistance from those who implement transfer treaties. When it comes to repatriation, immigration enforcement and criminal justice remain unusually distinct.

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cases reported to the Sentencing Commission). The Commission defines an immigration offense as any case in which "at least one of the statutes of conviction involved trafficking in passports or entry documents; failure to surrender naturalization certificates; fraudulently acquiring passports; alien smuggling; unlawful presence in the United States; or fraudulently acquiring entry documents." *Id.* at 7 n.10.

153. Ingrid Eagly, *Criminal Justice for Noncitizens: An Analysis of Variation in Local Enforcement*, 88 NYU L. REV. 1126, 1154–56 (2013). As Eagly notes, citizenship status can aggravate sentences—it does so, for example, in jurisdictions with sentencing enhancements for undocumented defendants. *Id.* at 1134. Alienage can also mitigate sentencing where, for example, judges give shorter sentences to avoid triggering deportation. *Id.* at 1167.

154. Padilla v. Kentucky, 559 U.S. 356, 374 (2010).

155. AMERICAN IMMIGRATION COUNCIL, THE CRIMINAL ALIEN PROGRAM (CAP): IMMIGRATION ENFORCEMENT IN PRISONS AND JAILS (2013) (noting that the Criminal Alien Program, a federal initiative that sends immigration agents into jails and prisons, is "responsible for . . . more [immigrant apprehensions] than the 287(g) program, Fugitive Operations, and the Office of Field Operations combined."); *see also* García Hernández, *supra* note 83, at 1481–90.

156. Ingrid Eagly, *Remote Adjudication in Immigration*, 109 NW. L. REV. 933, 944 (2015).

157. Emma Kaufman, *The Rise of the All-Foreign Prison* (on file) (describing the creation of "all-foreign" federal prisons); *see also* DOJ, OFFICE OF THE INSPECTOR GENERAL, AUDIT OF THE FEDERAL BUREAU OF PRISONS CONTRACT NO. DJB1PC007 (April 2015) (reviewing the first contract for a "criminal alien requirement" prison).

158. Sklanksy, *supra* note 149, at 159.

This is in some respects a familiar story about state and local officials' capacity to frustrate federal initiatives.[159] State statutes and prison regulations restricting repatriation treaties are akin to resistance from local law enforcers who refuse to participate in federal immigration policies.[160] Prison officials' reluctance to repatriate prisoners also reflects the power that bureaucrats wield in the administrative state. As a matter of administrative law, it is unsurprising that those who implement the repatriation program enjoy the discretion to shape its meaning and effectiveness.

Although it echoes these common themes, however, the nonuse of repatriation treaties is remarkable in its scope: this is a case of almost wholesale rejection of a program from within. The dearth of international transfers in both state and federal prison systems begs a question about how repatriation differs from other sites of intersection between criminal and immigration law, such as the criminalization of immigration offenses or the practice of taking alienage into account during sentencing. The puzzle, in other words, is how to understand the reluctance to punish a person abroad in the context of a system in which criminal and immigration enforcement practices are increasingly aligned.

One answer is that repatriation tests the territoriality of punishment in ways that other instances of criminal-immigration convergence may not. The implementation of the treaty transfer program reveals and exacerbates the tension between two theories of imprisonment, both of which are embedded in American law. In the first theory, the criminal sanction binds a prisoner to the jurisdiction whose laws he has broken. In the second, the enforcement of criminal law is unmoored from the authority to punish.

To begin with the second theory, one view of punishment is that, although criminal laws authorize courts to sentence people to prison, the

159. *See* Rodríguez, *supra* note 150 (documenting state and local efforts to resist federal immigration enforcement programs).

160. *See* Christina Rodríguez, *Law and Borders*, DEMOCRACY JOURNAL 52, 61 (2014) (situating state and local resistance to recent federal enforcement efforts within "a tradition that dates back to the 1980s sanctuary movement. . . . "); Jerry Markon, *DHS Deportation Program Meets with Resistance*, WASH. POST, August 3, 2015. Prison officials' reluctance to repatriate prisoners is analogous to state and local resistance to immigration policy insofar as both reflect the power that nonfederal actors wield in a federal system. These examples differ, however, in that resistance to repatriation often arises from skepticism about "foreign" prison practices and a belief in harsh punishment rather than an objection to federal immigration policy.

power to enforce criminal sanctions is properly delegated to prison bureaucrats. In this view, the demands of operating a prison system—and the realities of governance in the administrative state—require a legal regime in which prison officials have discretion to determine the conditions, length, and location of a prison sentence. This administrative model of punishment emphasizes the needs of prison managers and their expertise in running prisons. It finds nothing problematic about a prisoner serving time far from the jurisdiction where her sentence was imposed.

In the alternate view, punishment is a communicative act aimed at and authorized by a person's relationship to the criminal laws of a particular place. This theory of punishment develops from the idea that criminal law is public in nature, which is to say, distinct from private law because its violation "is a wrong against the polity as a whole, not just against the individual victim."[161] In the dominant liberal account of criminal law, the criminal code expresses the shared values of a polity, which, as Lucia Zedner notes, is an implicitly bounded legal space.[162] Violations of the criminal law are understood as an offense against that polity, and imprisonment is how the criminal "serves time" to the collective whose criminal code he has contravened. This theory of punishment is essentially territorial: in it, the power to sanction derives from the criminal laws of a given jurisdiction, whose borders, in turn, limit where punishment may occur. In this view, imprisonment outside the jurisdiction (defined as territory) whose laws have been broken is illegitimate because it exceeds the reciprocal agreement between sovereign and subject on which the authority to punish depends.

Both of these theories of punishment surface in American prison law. The administrative model is consistent with doctrine on prison transfers and with practice in many American prison systems. Since the 1970s, when American courts first recognized a right to due process inside prisons,[163]

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161. Zedner, *supra* note 7, at 40–54.

162. *Id.* Zedner distinguishes liberal and communitarian theories of criminal law and considers how each addresses "the problem of the outsider." *Id.* at 45. As she notes, criminal law is predicated on conceptions of communal membership and obligation that raise deep questions about both noncitizens' rights and a given sovereignty's standing "to call noncitizens to account." *Id.* at 47; *see also* notes 7–9.

163. Wolff v. McDonnell, 418 U.S. 539 (1974). *Wolff* broke with earlier prison jurisprudence in which prisoners could challenge neither prison conditions nor penal policies under the Due Process Clause. For an account of that earlier history, see MALCOLM M. FEELEY & EDWARD L. RUBIN, JUDICIAL POLICYMAKING AND THE MODERN STATE: HOW

the Supreme Court has developed a narrow due process jurisprudence in which prisoners have no right to confinement in any particular place, and thus, no right to avoid transfer between prisons.[164] Under prevailing law, "even when . . . [a prison] transfer involves long distances and an ocean crossing, the confinement remains within constitutional limits."[165] Alongside this doctrine—which permits, for instance, Hawaii's prisoners to be held in California—state prison officials have expanded their use of out-of-state private prisons and interstate prisoner transfer compacts.[166] Together, these doctrines and policies have de-territorialized punishment. As a result, it is neither unusual nor unconstitutional (as a matter of federal law) for a prisoner convicted in one jurisdiction to serve time in another.[167]

The territorial model of punishment is equally entrenched in American law. This conception of punishment arises most explicitly in cases involving the "penal law rule," which directs that "the Courts of no country execute the penal laws of another."[168] This rule, which was first articulated by Justice Marshall in 1825, continues to be invoked in cases concerning the execution of foreign judgments.[169] The territorial theory of punishment is also evident in the seven state constitutions that expressly prohibit "banishment" or "transportation" punishment.[170] Although some courts have

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THE COURTS REFORMED AMERICA'S PRISONS 30–34 (1998) (describing the "hands-off era" of prison jurisprudence).

164. *See* Olim v. Wakinekona, 461 U.S. 238, 247 (1983); Meachum v. Fano, 427 U.S. 215, 224–25 (1976).

165. *Olim*, 461 U.S. at 247.

166. *See* NATIONAL INSTITUTE OF CORRECTIONS, INTERSTATE TRANSFER OF PRISON INMATES IN THE UNITED STATES 2–3 (2006) (surveying interstate compacts that govern prisoner transfer); RANDALL G. SHELDON & SELENA TEJI, COLLATERAL CONSEQUENCES OF INTERSTATE TRANSFER OF PRISONERS, CENTER ON JUVENILE AND CRIMINAL JUSTICE RESEARCH BRIEF (2012) (tracing the use out-of-state private prisons since the 1970s).

167. *See infra* notes 170–71 (discussing state constitutional bans on transportation punishment).

168. U.S. v. Federative Rep. of Brazil, 748 F.3d 86, 91 (2d Cir. 2014) (quoting *The Antelope*, 23 U.S. (10 Wheat.) 66, 123 (1825)). Courts recognize exceptions to the penal law rule where sovereigns agree to enforce one another's judgments. *Id.* The point here is not that the penal law rule bars repatriation, but rather that this rule, which assumes territorial punishment, has both deep roots and a current presence in American law.

169. *Id.* at 91–92 (collecting cases); Rep. of Colombia v. Diageo N. Am. Inc., 531 F. Supp. 2d 365, 399 (E.D.N.Y. 2007).

170. *See* Arkansas Const. art. II, § 21; Georgia Const. art. I, § 1, ¶ XXI; Illinois Const. art. I, § 11; Nebraska Const. art. I, § 15; Ohio Const. art. I, § 12; Oklahoma Const. art. II, § 29;

interpreted these bans to exclude prisoner transfers, others have held that banishment clauses bar incarceration beyond state lines.[171] These cases underscore the ongoing link between punishment and territory. The statutory rationales for federal sentencing—which include deterrence, public protection, and promoting the rule of law—are also distinctly concerned with how punishment might benefit a polity and, in this respect, are consistent with a territorial conception of the power to punish.[172]

These two lines of thought converge in prisoner repatriation. On one hand, the repatriation program depends on the distinction between imposing and enforcing criminal sanctions. In cases where prisoners have challenged the denial of their repatriation applications, courts have consistently upheld prison officers' discretion to determine where prisoners serve their time.[173] On the other hand, the territorial understanding of punishment animates repatriation policy and practice. Prison bureaucrats' reluctance to repatriate prisoners who are "too American" reflects the view that punishment derives from a person's relationship to the polity. The territorial theory also informs the "suitability guidelines," which instruct bureaucrats to consider prisoners' culpability when reviewing transfer applications.[174] These guidelines posit a causal link between the seriousness of a crime and the necessity of punishment in the place it was committed. They assume, in other words, that when a transgression is sufficiently offensive to a polity, punishment ought to occur within that polity's borders.

Texas Const. art., I § 20. Two of these Constitutions exempt interstate prison transfers from the definition of banishment. *See* Oklahoma Const. art. II, § 29; Texas Const. art. I, § 20. Texas amended its Constitution to add this exemption in 1985. S.R.J. 6, 69th Leg., Reg. Sess. (1985).

171. *Compare* U.S. ex rel Hoover v. Elsea, 558 F. Supp. 974, 979 (N.D.Ill. 1983) ("[T]he transportation clause does not prohibit all conveyances of convicts across state lines, but instead proscribes a particular type of punishment."), *with* Ray v. McCoy, 321 S.E. 2d 90, 90 (W.Va. 1984) (holding that the state constitution's transportation clause "prevents a prisoner convicted under West Virginia law from involuntarily serving any portion of a state sentence beyond the West Virginia borders").

172. *See* 18 U.S.C. § 3553(a).

173. Courts have repeatedly held that prisoners have no right to repatriate, and thus, no legal basis to seek review of a transfer denial. *See, e.g.*, Toor v. Holder, 717 F. Supp. 2d 100, 107 (D.D.C. 2010); Yosef v. Killian, 646 F. Supp. 2d 499, 507 (S.D.N.Y. 2009) (collecting cases); Gecetchkori v. Annucci, 77 A.D. 3d 1003, 1004 (N.Y. App. Div. 2010).

174. *See supra* notes 134–37.

To bring these threads together: punishment appears to be territorial when prison bureaucrats evaluate repatriation, but de-territorial when prisoners seek to leave the United States. This is one of the pathologies of punishment in a system with wide bureaucratic discretion and narrow constitutional rights.[175] Ultimately, the repatriation system embodies two conflicting theories of punishment. The result is a legal regime in which people may be imprisoned abroad, but almost never are.

CONCLUSION

This analysis of the repatriation program demonstrates the degree to which prisons are agencies. American penal institutions are professionalized places where bureaucrats with delegated authority implement broad legal mandates. Prison managers create and apply policies that have immediate effects on people's lives. When their discretion is challenged, it is often upheld on the ground that prison officials have a kind of technocratic expertise in the enforcement of penal sanctions.[176]

Yet prisons are not typically conceived as an outgrowth of the administrative state. Prison case law tends to focus on prisoners' rights rather than prison officials' structural relationship to the sanctions they impose. This is in part because prison litigation is dominated by conditions lawsuits, and in particular, by cases concerning prison healthcare and the use of force.[177] The tone of prison law may also result from statutes exempting prisons from state administrative procedure acts.[178] Because many state prisoners

175. *See* William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505 (2001).

176. *See* Sharon Dolovich, *Forms of Deference in Prison Law*, 24 FED. SENT'G REP. 245, 249 (2012). Dolovich describes courts' tendency to defer to penal officials as a transsubstantive doctrine of prison law.

177. For one account of the rise of conditions litigation, see FEELEY & RUBIN, *supra* note 163, at 30–34. For a critical analysis, see Heather Schoenfeld, *Mass Incarceration and the Paradox of Prison Conditions Litigation*, 44 LAW & SOC'Y REV. 731 (2010) (arguing that prison conditions litigation has "inadvertently contributed to the rise of mass incarceration in the United States").

178. Giovanna Shay, *Ad Law Incarcerated*, 14 BERKLEY J. CRIM. L. 329, 344–50 (2009). As Shay notes, 28 states "expressly exempt some rules affecting prisoners" from state administrative procedure acts, and the 1981 revision to the Model APA "expressly excluded from rulemaking requirements rules 'concerning only inmates of a correctional or detention facility.'" *Id.* at 347–48.

cannot challenge prison practices through administrative law, prisons appear less bureaucratic in case law than they are in practice. Whatever the cause, the cumulative effect is a body of law driven by analysis of constitutional rights. With notable exceptions, legal scholarship on prisons tends to mirror this emphasis on the rights that people have or lack behind bars.[179]

While the critique of rights has advanced prison studies and ameliorated harsh prison conditions, this conceptual framework can obscure the fact that imprisonment is a set of contested bureaucratic practices. In the twenty-first century United States, imprisonment is determined by bureaucrats and almost wholly disconnected from the site of sentencing. This system of punishment poses a challenge to classic liberal theories of why punishment is justified and how punishment relates to the criminal law.

The nonuse of repatriation treaties arises from this basic tension between administrative and liberal conceptions of punishment. Prison officials' reluctance to repatriate prisoners is thus more than an instance of uncooperative federalism[180] or zeal for an American brand of harsh sentencing.[181] Though it is both of those things, resistance to repatriation is also evidence of a serious and unsettled dispute about the legitimacy of extraterritorial punishment—which is to say, the legitimacy of punishment in an era of mass migration and administrative governance. In a period of increasing pressure to integrate criminal and immigration enforcement practices, and to export prisoners out of the United States, the question is how de-territorialized punishment may become. The instinct driving resistance to repatriation is that the dislocation of punishment may undermine the authority to punish at all.

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179. For examples of such exceptions, see Shay, *supra* note 178, and Dolovich, *supra* note 176.

180. Jessica Bulman-Pozen & Heather Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256, 1262–63 (2009).

181. *See* JONATHAN SIMON, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR 100 (2007) (describing the rise of a legal culture in which politicians must advocate harsh criminal justice policies to get elected and retain their jobs).