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BLURRING THE BOUNDARIES BETWEEN IMMIGRATION AND CRIME CONTROL AFTER SEPTEMBER 11TH

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Abstract: Although the escalating criminalization of immigration law has been examined at length, the social control dimension of this phenomenon has gone relatively understudied. This Article attempts to remedy this deficiency by tracing the relationship between criminal punishment and immigration law, demonstrating that the War on Terror has further blurred these distinctions and exposing the social control function that pervades immigration law enforcement after September 11th prioritized counterterrorism. In doing so, the author draws upon the work of Daniel Kanstroom, Michael Welch, Jonathan Simon and Malcolm Feeley.

INTRODUCTION

The formal legal distinction between criminal punishment and civil regulation remains quite salient after the events of September 11, 2001, as does the distinction between citizens and noncitizens. In combination, however, these distinctions differentiate between the punishment of criminal offenders with the status and privileges of U.S. citizenship and those without. The line dividing citizens and noncitizens thus justifies the radically different treatment of criminal offenders and so-called criminal aliens under the law. Where these lines are drawn within immigration law and policy profoundly affects the manner in

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which the U.S. government may legally combat terrorism.¹ However, these lines did not wholly emerge—as one might suspect—from immigration laws passed by Congress in a flurry of lawmaking after 9/11. To the contrary, immigration legislation passed years before the attacks, embraced the criminal justice system’s severe treatment of drug offenders and the poor. As the criminal justice system created punishments that “got tough” on *all* convicted drug offenders,² immigration law adopted harsh consequences for convicted noncitizen drug offenders.³ Under immigration reforms enacted in 1996, these so-called “criminal aliens” could be detained and deported—often retroactively—and denied relief from either, regardless of particular mitigating circumstances.⁴ And because courts characterized these harsh measures

¹ See Daniel Kanstroom, *Criminalizing the Undocumented: Ironic Boundaries of the Post-September 11th “Pale of Law,”* 29 N.C. J. INT’L L. & COM. REG. 639, 660, 661 (2004) (asserting that traditional distinctions between citizens and noncitizens, as well as between civil regulation and criminal law enforcement are increasingly inadequate to account for post-September 11 law enforcement, and that “slippage” between the categories greatly expands federal law enforcement authority and subjects millions of noncitizens, especially undocumented workers, to criminal punishment) [hereinafter Kanstroom, *Criminalizing the Undocumented*]. This Article analyzes post-September 11 line-drawing as well, but focuses on the effect of citizen/noncitizen and civil/criminal lines on criminal aliens. In contrast to Kanstroom’s study of the criminalization of the undocumented, this Article examines how criminals—traditionally criminal aliens, but now illegal aliens as well—are being “managed” through the blurring of distinctions between aliens, criminals and terrorists.

² See, e.g., Anti-Drug Abuse Act of 1986 § 1002, 21 U.S.C. § 841(b)(1) (2000) (establishing drug quantity-based mandatory minimum sentences for drug crimes); Sentencing Reform Act of 1984, 18 U.S.C. §§ 3551–3586 (2000) (reducing judicial discretion in the sentencing process); Omnibus Anti-Drug Abuse Act of 1988 (ADAA), Pub. L. No. 100–690, §§ 7342–7349, 102 Stat. 4181, 4469–73 (1988) (codified as amended in scattered sections of 8 U.S.C.) (authorizing the eviction of public housing tenants and their household members and guests who have been arrested for engaging in drug-related or other criminal activity).

³ See, e.g., Immigration Act of 1990 (IMMACT), Pub. L. No. 101–649, § 501, 104 Stat. 4978, 5048 (codified as amended at 8 U.S.C. § 1101(a)(43)); Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA) § 441, 8 U.S.C. § 1326 (2000); Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) § 303, 8 U.S.C. § 1226 (2000); ADAA §§ 7342–7349.

⁴ Before 1996, a number of mitigating circumstances were available to “criminal aliens.” Immigration and Nationality Act (INA) § 244, 8 U.S.C. § 1254(a)(1), (2) (1994), *repealed by* IIRIRA § 304, 8 U.S.C. § 1226 (2000) (allowing aliens to apply for suspension of deportation by demonstrating that deportation would result in “extreme hardship”); INA § 212(h), 8 U.S.C. § 1182(h) (1994), *amended by* IIRIRA § 348, 8 U.S.C. § 1182(h) (2000) (allowing certain aliens who have been convicted of crimes of moral turpitude to waive deportation by showing “extreme hardship”); INA § 212(c), 8 U.S.C. § 1182(c) (2000), *repealed by* IIRIRA § 304, 8 U.S.C. 1226 (2000) (demonstrating social and humane considerations such as family ties allowed for waiver of deportation). The foundational immigration cases defining deportation as regulatory, and thereby distinguishing deportation from punishment include *Fong Yue Ting v. United States*, 149 U.S. 698, 670 (1893); *Chae Chan Ping v. United States* (the Chinese Exclusion Case), 130 U.S. 581, 605–06 (1889); and

as regulatory rather than punitive, the U.S. Constitution did not stand in their way.⁵

In the years between 1996 and 2001, the immigration system bought into the “severity revolution” occurring within the criminal justice system.⁶ Some describe it as the “criminalization” of immigration law,⁷ whereas others describe it as a convergence between the criminal justice and deportation systems.⁸ Under either characterization, the interaction of the two systems produced outcomes that were unprecedented, and even unintentional at times, in their harshness. For example, criminal sentencing enhancements for past offenses coalesced with immigration law’s enhanced “aggravated felony” designation to man-

Harisiades v. Shaughnessy, 342 U.S. 580, 594–95 (1952). See generally Mary M. Cheh, *Constitutional Limits on Using Civil Remedies To Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction*, 42 HASTINGS L.J. 1325, 1343–44 (1991) (“The Court has approved such regulatory measures as . . . detention of resident aliens pending deportation proceedings.”)

⁵ See *United States v. Yacoubian*, 24 F.3d 1, 10 (9th Cir. 1994) (dismissing an ex post facto challenge to deportation because the ex post facto clause is only applicable to “criminal laws”); *Fayemi v. Bureau of Immigration and Custom Enforcement*, No. CV-04-1935, 2004 WL 1161532, at *1–2, 4 (E.D.N.Y. May 24, 2004) (dismissing Eighth Amendment challenge to deportation of Nigerian national with aggravated felony conviction on the basis that deportation is not punishment, but a civil, regulatory procedure); *Lovell v. INS*, No. 01 CV 2295, 2003 WL 22282176, at *7 (E.D.N.Y. May 21, 2003) (dismissing Eighth Amendment challenge to denial of relief from removal on the basis that deportation is not punishment); *Saaka v. Reno*, No. 95C 3297, 1995 WL 765281, at *2 (N.D. Ill. Dec. 26, 1995) (dismissing double jeopardy and ex post facto clause challenges to deportation and detention of aggravated felon on the ground that deportation is not punishment).

⁶ See Jonathan Simon, *Sanctioning Government: Explaining America’s Severity Revolution*, 56 U. MIAMI L. REV. 217, 218–19 (2001). The severity revolution is a term coined by law professor Joseph Kennedy to describe a dramatic break in the mid-1970s with a relatively stable set of values and objectives that had endured within the field of criminal punishment for two centuries. *Id.* In contrast to the values of the “humanity revolution,” the continuing severity revolution “openly espouse[s] severity of punishment as an overarching good” and “abandon[s] the long tradition of minimizing pain and cruelty in the penal process”; it has produced incarceration rates “roughly five times their norm for the first three quarters of the twentieth century, and more than three times the next closest level among advanced liberal societies.” *Id.* at 219.

⁷ See, e.g., Laura S. Adams, *Divergence and the Dynamic Relationship Between Domestic and Immigration Law and International Human Rights*, 51 EMORY L.J. 983, 983 (2002); Bill Ong Hing, *The Immigrant as Criminal: Punishing Dreamers*, 9 HASTINGS WOMEN’S L.J. 79, 80–81 (1998); Maria Isabel Medina, *The Criminalization of Immigration Law: Employer Sanctions and Marriage Fraud*, 5 GEO. MASON L. REV. 669, 671 (1997); Helen Morris, *Zero Tolerance: The Increasing Criminalization of Immigration Law*, 74 INTERPRETER RELEASES 1317, 1317 (Aug. 29, 1997).

⁸ See, e.g., Daniel Kanstroom, *Deportation, Social Control and Punishment: Some Thoughts About Why Hard Laws Make Bad Cases*, 113 HARV. L. REV. 1889, 1891 (2000) [hereinafter Kanstroom, *Deportation, Social Control, and Punishment*].

date the incarceration⁹ and removal¹⁰ of noncitizens with mere misdemeanor convictions on their criminal records.¹¹ These outcomes aided the advance of not only the crime control agenda of the War on Drugs, but the social reform agenda of retrenching the welfare state as well.¹²

The most significant immigration reforms enacted by Congress during this era dramatically enhanced collateral civil penalties pertaining to noncitizens. Two major immigration laws enacted in 1996—the Anti-Terrorism and Effective Death Penalty Act (AEDPA) and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA)—subjected both noncitizens convicted of crimes and those with past criminal convictions to mandatory detention and deportation without the avenues of relief traditionally available to detainable and deportable aliens.¹³

Prior to these reforms, only certain serious felony convictions subjected noncitizens to detention and deportation, such as murder, drug and firearms trafficking.¹⁴ The 1996 legislation, however, greatly expanded the litany of crimes subjecting foreigners to detention and de-

⁹ Detention no longer does justice to the circumstances or conditions of confinement, so I use the word incarceration interchangeably.

¹⁰ This Article uses the terms “deportation” and “removal” interchangeably. The 1996 immigration legislation introduces the term “removal,” but “removal” does not convey the experience of what is effectively banishment with no prospect of *legal* reentry for an extended period of time.

¹¹ See ADAA § 7342, 8 U.S.C. § 1101(a)(43) (Supp. 1990) (defining “aggravated felon” to include crimes such as murder and drug trafficking); IMMACT § 501, 8 U.S.C. § 1101(a)(43) (1994) (amending the definition of “aggravated felon” to include violent offenses that could impose a five-year penalty); IIRIRA § 321, 8 U.S.C. § 1101(a)(43) (2000) (lowering the amount of time an alien needed to be potentially penalized before circumstances or conditions of confinement, so I use the word incarceration interchangeably, the violent crime constituted an “aggravated felony” to one year). Because some states will give a one-year sentence for a misdemeanor, these crimes are now elevated to felonies for immigration purposes. See, e.g., *Guerrero-Perez v. INS*, 242 F.3d 727, 736–37 (7th Cir.), *reh’g denied*, 256 F.3d 546 (7th Cir. 2001) (finding misdemeanor offense for sexual abuse of minor an aggravated felony in Illinois); *Matter of Small*, 23 I. & N. Dec. 448 (B.I.A. 2002) (conviction of misdemeanor sexual abuse can be considered an aggravated felony). See generally Dawn Marie Johnson, *AEDPA and the IIRIRA: Treating Misdemeanors as Felonies for Immigration Purposes*, 27 J. LEGIS. 477 (2001) [hereinafter Johnson, *AEDPA and the IIRIRA*].

¹² See generally Teresa A. Miller, *Citizenship & Severity: Recent Immigration Reforms and the New Penology*, 17 GEO. IMMIGR. L.J. 611 (2003).

¹³ See AEDPA § 441(e), 8 U.S.C. § 1101(a) (2000); IIRIRA §§ 303, 304, 321, 348, 8 U.S.C. §§ 1101(a), 1182(h), 1226 (2000).

¹⁴ See 8 U.S.C. § 1101(a) (1994). Although immigration law has long provided for the deportation of criminal aliens committing particularly serious crimes like murder, drug trafficking, and firearms trafficking, the range of deportable crimes has expanded exponentially in the last twenty years. See *supra* note 11.

portation.¹⁵ Today, a single misdemeanor conviction of one year or more for a crime as minor as shoplifting subjects a non-U.S. citizen to detention and deportation.¹⁶ This expansion of the types of crimes mandating detention and deportation applied to all categories of non-citizens, including lawful permanent residents (“LPRs” or “green card holders”), long privileged as aliens on the “fast track” to citizenship.¹⁷ It also applied retroactively, so that noncitizens convicted of crimes that would not have rendered them deportable before 1996 suddenly faced deportation after Congress passed AEDPA and IIRIRA.¹⁸

Thus, by the time of the tragic events of September 11, 2001, immigration law had already enhanced the collateral civil penalties to noncitizens convicted of crimes in the United States.¹⁹ The nation’s swift response to terrorism capitalized on immigration law’s utility as a mechanism for crime control and social control to confront the “hypercrime” of terrorism. Indeed, the scope of the War on Terror has expanded to encompass the incarceration and removal of noncitizens who have committed unrelated criminal offenses.

For example, in July 2003, the newly formed Department of Homeland Security (DHS) initiated “Operation Predator” to apprehend and purge noncitizens with past sex offenses from the nation’s

¹⁵ See AEDPA § 441(e), 8 U.S.C. § 1101(a) (2000) (expanding the “aggravated felony” definition to include gambling, alien smuggling, and passport fraud); IIRIRA § 321, 8 U.S.C. § 1101(a)(43) (2000) (adding crimes such as rape and sexual abuse of a minor, as well as lowering sentence requirements of violent crimes to one year to be deportable).

¹⁶ Kati L. Griffith, *Perfecting Public Immigration Legislation: Private Immigration Bills and Deportable Lawful Permanent Residents*, 18 GEO. IMMIGR. L.J. 273, 276 (2004) (“Since 1996, even if an LPR has lived in the United States since childhood, she can be subject to mandatory deportation for almost any criminal conviction—including misdemeanors, such as shoplifting or a bar fight.”); Johnson, *AEDPA and the IIRIRA*, *supra* note 11, at 477.

¹⁷ See Serena Hoy, *The Other Detainees*, LEGAL AFF. 58 (Oct. 2004).

¹⁸ See AEDPA § 441(e), 8 U.S.C. 1101(a) (2000); IIRIRA § 321(b), 8 U.S.C. § 1101(a) (2000). The original approach of the IIRIRA was even harsher, retroactively subjecting noncitizens convicted either by a plea bargain or a verdict pre-dating the legislation to mandatory detention and deportation. See IIRIRA § 321(b), 8 U.S.C. § 321(b) (2000). However, the Supreme Court intervened by limiting retroactivity to guilty verdicts rather than plea bargains. *INS v. St. Cyr*, 533 U.S. 289, 326 (2001). See generally Daniel Kanstroom, *St. Cyr or Insincere: The Strange Quality of Supreme Court Victory*, 16 GEO. IMMIGR. L.J. 413 (2002).

¹⁹ Civil collateral penalties are disabilities and ineligibilities that inhere to a convicted felon not as part of the formal sentence, but as a result of holding the status of “convicted felon,” thus supplementing the criminal conviction. Such penalties have been adopted in a variety of regulatory domains, including housing law, voting law, family law, and employment law. See generally CIVIL PENALTIES, SOCIAL CONSEQUENCES (Christopher Mele & Teresa Miller eds., 2005).

borders.²⁰ According to Michael Garcia, the Assistant Secretary for Immigration and Customs Enforcement (ICE), taking these ex-offenders off the streets pursuant to this operation helped to safeguard America, one broad mission of the Department of Homeland Security.²¹ He indicated further that pooling government resources under the umbrella of Homeland Security aided the frequency and accuracy of these detentions.²² Pursuant to this program, ICE—fashioned from the investigative and intelligence arms of the former INS and the U.S. Customs Service, as well as the Federal Protective Service and the Federal Air Marshal Service—had arrested approximately 6,000 fugitives by March of 2004.²³ In analyzing legal line drawing after 9/11, it is more accurate to say that the preexisting distinctions setting “criminal aliens” apart from ordinary criminal offenders—lines drawn principally in efforts to achieve welfare and drug enforcement reform—gained renewed utility and significance after September 11, 2001.

Part I of this Article surveys several major developments in immigration law and policy since 9/11 that underlie the merger of the criminal and immigration systems. Part II examines three major theoretical responses to this ongoing merger. Finally, Part III illustrates how the “new penology” blurs distinctions between illegal aliens, criminal aliens, and terrorists.

I. THE DOMESTIC LEGAL RESPONSE TO THE 9/11 ATTACKS

In the months and years following September 11, 2001, much of the domestic response to the terror attacks was a legal one. Broad counterterrorism legislation, such as the USA PATRIOT Act,²⁴ the Homeland Security Act (HSA),²⁵ and the Enhanced Border Security

²⁰ Press Release, Department of Homeland Security, Secretary Ridge Announces “Operation Predator Initiative” (July 9, 2003), at <http://www.dhs.gov/dhspublic/display?content=1069>. Sex offenders became the object of harsh penal treatment during the “severity revolution” in crime control that “got tough” on criminals and rationalized the harsh treatment of drug offenders as well during the War on Drugs. See Simon, *supra* note 6, at 229, 233.

²¹ See generally *Statement of Michael J. Garcia, Assistant Secretary, U.S. Immigration and Customs Enforcement, Department of Homeland Security Before the House Comm. on Judiciary, Subcomm. on Immigration, Border Security and Claims*, 108th Cong. (2004), available at http://www.ice.gov/graphics/news/testimonies/oppredator_030404.pdf.

²² See *id.* at 4-5.

²³ See *id.* at 14.

²⁴ Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT Act) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001) (codified as amended in scattered sections of 8 U.S.C.).

²⁵ Homeland Security Act of 2002 (HSA), Pub. L. No. 107-296, §§ 442, 451, 6 U.S.C. §§ 252, 271 (2002).

and Visa Entry Reform Act (EBSVERA)²⁶ were passed to expand the exclusion, detention, and surveillance of noncitizens who could threaten national security, as well as to increase the flow of intelligence on these individuals across governmental agencies. To supplement these measures, presidential directives were issued, regulations promulgated, and policy initiatives undertaken to strengthen national security through stricter enforcement of immigration laws and greater coordination of governmental resources. Several such policies illustrate the accelerating criminalization of the immigration system.

A. *Zero-Tolerance Immigration Law Enforcement*

In response to the attacks, immigration officials and criminal law enforcement authorities took a zero-tolerance approach to non-compliance with immigration laws that disproportionately punished immigrant communities, targeting them for tough law enforcement measures only indirectly related to counterterrorism efforts. Zero-tolerance was a prominent aspect of pre-9/11 reforms that used immigration law as a tool of criminal law enforcement—particularly drug enforcement.²⁷ After the attacks, however, zero-tolerance enforcement of immigration law was extended to non-U.S. citizens who did not bear the taint of having been processed by the criminal justice system, such as asylum seekers and undocumented aliens.

1. Absconder Apprehension Initiative

Only three months after the attacks, the U.S. government responded to terrorism by prioritizing coordination between immigration and criminal law enforcement officials, as well as by demanding strict compliance with civil immigration orders. In January of 2002, Deputy Attorney General Larry Thompson announced a new initiative to “locate, apprehend, interview, and deport” approximately 314,000 noncitizens who had been ordered deported, but had failed to comply with their deportation orders.²⁸ Referring to these individuals as absconders, the Department of Justice (DOJ) focused on 6,000 of the estimated 314,000 total “absconder” population that came to the United States from countries “in which there ha[d] been Al Qaeda terrorist

²⁶ Enhanced Border Security and Visa Entry Reform Act of 2002 (EBSVERA), Pub. L. No. 107-173, 116 Stat. 553, §§ 201–203, 8 U.S.C. §§ 1721–1723 (2002).

²⁷ Morris, *supra* note 7, at 1322.

²⁸ Dan Eggen, *Deportee Sweep Will Start With Mideast Focus*, WASH. POST, Feb. 8, 2002, at A1 (discussing the Justice Department’s Absconder Apprehension Initiative).

presence or activity.”²⁹ In an internal memo dated January 25, 2002, to the INS, the Federal Bureau of Investigation (FBI), the U.S. Marshals Service, and U.S. Attorneys, Deputy Attorney General Thompson directed federal law enforcement agencies like the FBI and the U.S. Marshals Service to focus their efforts on apprehending these so-called “priority absconders.”³⁰ According to the memo, once apprehended, priority absconders would be interviewed by teams of immigration and federal law enforcement agents about their knowledge of terrorism, and then either criminally prosecuted for failing to depart or reentering illegally after removal, or deported pursuant to the existing removal order.³¹ Although the Absconder Apprehension Initiative was criticized roundly for involving local law enforcement officials in the enforcement of civil deportation orders and for singling out entire communities of individuals of Arab descent as potential terrorists,³² it jointly and effectively deployed crime and immigration control resources and led to the apprehension of 1,139 fugitives by May of 2003.³³

2. Enforcement of Address Change Reporting

In July, 2002, the DOJ announced its intention to begin strictly enforcing § 265 of the Immigration and Nationality Act³⁴—an obscure immigration law virtually ignored by immigration officials since 1952—which requires all noncitizens, whether in the country legally or illegally, to report address changes within ten days of changing their residence.³⁵ Most non-U.S. citizens, particularly longtime permanent resi-

²⁹ Deputy Attorney General Releases Internal Guidance for ‘Absconder’ Apprehensions, 79 INTERPRETER RELEASES 261, 261 (Feb. 18, 2002).

³⁰ *Id.* Law enforcement officials distilled a list of priority absconders to less than 1000, suspected of being convicted felons, who would be targeted first. *Id.*

³¹ *Id.*

³² See, e.g., Sameer M. Ashar, *Immigration Enforcement and Subordination: The Consequences of Racial Profiling after September 11*, 34 CONN. L. REV. 1185, 1193 (2002) (asserting that the Alien Absconder Initiative had “not resulted in any apparent progress in the war on terrorism. However, the DOJ, working on less-than-credible tips, has effectively disrupted individual lives, families, and communities”).

³³ *The War on Terrorism: Immigration Enforcement Since September 11, 2001: Hearing Before the House Subcomm. on Immigration, Border Security, and Claims of the House Committee on the Judiciary*, 108th Cong. 14 (2003) (statement of William T. Dougherty, Director of Operations, ICE).

³⁴ INA § 265, 8 U.S.C. § 1305 (1052), 8 C.F.R. § 265.1 (2004) (requiring all noncitizens remaining in the United States thirty days or more to report each change of address and new address to the USCIS within ten days on Form AR-11); see Daniel Kanstroom, *Deportation and Justice: A Constitutional Dialogue*, 41 B.C. L. REV. 771, 777 n.33 (2000) [hereinafter Kanstroom, *Deportation and Justice: A Constitutional Dialogue*].

³⁵ Jonathan Peterson, *Noncitizens Must Report If They Move*, L.A. TIMES, July 23, 2002, at A1.

dents who have likely moved numerous times over their extended residence, know nothing of the requirement since the rule had never been enforced prior to the 9/11 attacks.³⁶ Aliens who entered the United States illegally are likewise unlikely to divulge their whereabouts to the agency charged with apprehending and deporting them. Moreover, it seems unlikely that terrorists operating surreptitiously within the United States will comply with the rule. Even when aliens do comply with the reporting requirement, a dismal record of bureaucratic inefficiency and misplacement of documents cast doubt on the ability of the old INS—or the new U.S. Customs and Immigration Service (USCIS)—to process the forms.³⁷ Nevertheless, the newly strict enforcement of filing requirements is consistent with the government's interior counterterrorism strategy of tracking more closely the movements of aliens, thus blurring distinctions between criminal and non-criminal aliens.³⁸

B. *Immigration Detention*

In addition to strictly enforcing immigration regulations, the U.S. government has used both immigration detention and the threat of it against non-U.S. citizens to conduct its criminal investigation of the attacks. Indeed, zero-tolerance policing of immigration violations has led to numerous detentions of noncitizens as a direct result of the

³⁶ See Peterson, *supra* note 35. Following the announcement, a number of organizations commented. See Memorandum from the Illinois Coalition for Immigrant and Refugee Rights (ICIRR) to the INS (Aug. 2002), *available at* http://www.ilrc.org/la/INS_address_change_commentsI.doc; Memorandum from the National Asian Pacific American Legal Consortium to INS, (Aug. 26, 2002), *available at* http://www.napalc.org/files/Comments_67_Fed_Reg.pdf.

³⁷ See Alex Gourevitch, *Alien Nation: The Justice Department Takes on Immigrants, Ex, Terrorists*, 13 AM. PROSPECT 15, 16 (2003). Within six weeks of the Justice Department's announcement of its August 2002 policy change, the INS received 870,000 registration forms, compared to the 2,800 forms received in the preceding month. See Gourevitch, *supra*, at 15. Indeed, the U.S. General Accounting Office found that the INS lacked adequate processing procedures and controls to ensure that the alien address information received was complete integrated into automated databases. GENERAL ACCOUNTING OFFICE, REPORT TO CONGRESSIONAL REQUESTERS, HOMELAND SECURITY: INS CANNOT LOCATE MANY ALIENS BECAUSE IT LACKS RELIABLE ADDRESS INFORMATION 6–8 (2002), *available at* <http://frwebgate.access.gpo.gov/cgi-bin/useftp.cgi?IPAddress=162.140.64.88&filename=d03188.pdf&directory=/diskb/wais/data/gao>.

³⁸ See 8 C.F.R. § 265.1 (2004); see also Kevin Johnson & Laura Parker, *Ashcroft Plan to Track Aliens Hits Snag; Change-of-Address Cards Overwhelm INS*, USA TODAY, Sept. 6, 2002, at A1 (quoting a Justice Department spokesman as saying, “The [change of address] rule is essential for keeping track of aliens who might—I stress might—pose a national security risk.”).

heightened penalties for immigration violations, including mandatory detention, enacted in the decade prior to the attacks.³⁹

Immediately after the terrorist attacks, the Department of Justice detained noncitizens who were either suspected of having connections to the attacks or ties to terrorism pursuant to the FBI's investigation of the attacks.⁴⁰ Rather than arrest Arab and Muslim men as criminal suspects, law enforcement agents utilized the greater latitude and reduced accountability under federal immigration law to immobilize Arab and Muslim communities.⁴¹ Once individuals were detained, federal law enforcement officials could interrogate them as part of a criminal investigation, while checking their compliance with immigration regulations.⁴² In the eleven months after the attacks, 762 aliens were detained pursuant to the FBI terrorism investigation for various immigration offenses, including overstaying of visas and illegally entering the country.⁴³ The government claimed that further acts of terrorism could be prevented if terrorists and terrorist sympathizers were incapacitated, which rationalized the massive round-up of Arab and Muslim foreign nationals.⁴⁴

³⁹ See Morris, *supra* note 7, at 1317. Mandatory detention was enacted by both ADAA and the IIRIRA. ADAA § 1751, 8 U.S.C. § 1182 (2000); IIRIRA § 303, 8 U.S.C. § 1226 (2000).

⁴⁰ This mission was code-named "PENTTBOM," for Pentagon Twin Towers Bombing. OFFICE OF THE INSPECTOR GENERAL, U.S. DEP'T OF JUSTICE, *The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks* 17 (2003) (citing that the FBI in New York City should have made more of an effort to distinguish between aliens legitimately suspected under the PENTTBOM investigation and those who were not under suspicion), available at <http://www.usdoj.gov/oig/special/0306/full.pdf> [hereinafter *The September 11 Detainees*]; see David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953, 960–61 (2002).

⁴¹ See Immigrant Rights Clinic, *Indefinite Detention Without Probable Cause: A Comment on INS Interim Rule 8 C.F.R. § 287.3*, 26 N.Y.U. REV. L. & SOC. CHANGE 397, 397 (2001) (commenting on use of law enforcement in immigration investigation).

⁴² See Seth Stern, *Lawyers See Potential Abuse of Visa Laws to Hold Suspected Terrorists*, CHRISTIAN SCI. MONITOR, Oct. 18, 2001, at 18.

⁴³ Press Release, Department of Justice, Inspector General Issues Report on Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Terrorist Attacks (June 2, 2003), available at <http://www.usdoj.gov/oig/igspeccr1.htm>.

⁴⁴ *Oversight Hearing: Lessons Learned—The Inspector General's Report on the 9/11 Detainees: Hearing Before the Senate Committee on the Judiciary*, 108th Cong. ¶¶ 15, 19 (June 25, 2003), available at http://judiciary.senate.gov/testimony.cfm?id=817&wit_id_2316 (testimony of Michael Rolince, Assistant Director in Charge, Washington Field Office, Federal Bureau of Investigations). Assistant Director Rolince stated:

As this massive investigation unfolded, the concern of follow-on attacks was critical to our thinking and to our development of an investigative strategy. . . . [T]he Department of Justice, in conjunction with the FBI, determined that the best course of action to protect national security was to remove po-

Immediately after the attacks, and lacking express legal authority to detain terrorism suspects preventively, Attorney General John Ashcroft revised INS detention rules to expand the government's power to detain aliens.⁴⁵ The new rules doubled—from twenty-four to forty-eight hours—the time allotted to the INS to either release detained immigrants or charge them with a crime or visa violation.⁴⁶ Moreover, if the agency can claim emergency or extraordinary circumstances, the forty-eight-hour deadline is waived, and the alien can be held for an additional “reasonable period of time” without charges.⁴⁷

C. *Closer Cooperation with Local Law Enforcement*

Federal law enforcement officials have begun to work more closely with state and local law enforcement agents to police compliance with federal immigration laws.⁴⁸ Metropolitan areas with large populations of non-U.S. citizens—particularly illegal aliens—have traditionally opposed the deputizing of their police officers, believing that it would erode the trust local police seek to build over time with immigrant communities and discourage immigrants from reporting crimes, thereby rendering those communities less safe.⁴⁹ Nonetheless, in August of 2002, Florida became the first state to deputize law enforcement officers to assist federal INS agents in enforcing federal immigra-

tentially dangerous individuals from the country and ensure that they could not return. Charges may have been withheld in such situations if, for example, they could have compromised ongoing investigations or sensitive intelligence matters.

Id.

⁴⁵ Custody Procedures, 66 Fed. Reg. 48,334–35 (Sept. 20, 2001) (to be codified at 8 C.F.R. pt. 287) (amending INA § 287.3(d) and enacting an interim rule under APA 5 U.S.C. § 553 [foreign affairs and good cause exception to notice and comment], which mandates only post-promulgation public comment); see Jess Bravin et al., *Justice Department Moves to Use New Authority in Detaining Aliens*, WALL ST. J., Sept. 26, 2001, at A6; William Glaberson, *Investigators Explore Boundaries Of Everything the Law Allows*, N.Y. TIMES, Sept. 17, 2001, at A2.

⁴⁶ 66 Fed. Reg. 48,334; Bravin et al., *supra* note 45.

⁴⁷ Bravin et al., *supra* note 45.

⁴⁸ April McKenzie, *A Nation of Immigrants or a Nation of Suspects? State and Local Enforcement of Federal Immigration Laws Since 9/11*, 55 ALA. L. REV. 1149, 1155–56 (2004); see also USA PATRIOT Act § 701, 42 U.S.C. § 3796(h) (2003). *But see* Susan N. Herman, *Our New Federalism? National Authority and Local Autonomy in the War on Terror*, 69 BROOK. L. REV. 1201, 1214–18 (2004) (citing cities that have passed ordinances banning their law enforcement from participating in the regulation of federal immigration laws).

⁴⁹ See Kanstroom, *Criminalizing the Undocumented*, *supra* note 1, at 659–60.

tion laws.⁵⁰ Thirty-five officers from across the state were deputized as part of a pilot program, responding to a DOJ finding that local officers have “inherent authority” to enforce federal immigration laws.⁵¹ Not long afterward, South Carolina Attorney General Charlie Condon initiated a similar plan to deputize a special unit of state law enforcement officers to investigate potential immigration violations.⁵²

A few federal lawmakers are seeking to carry these partnerships one step further. They hope to institutionalize the growing cooperation between federal, state, and local law enforcement through legislation. The Clear Law Enforcement for Criminal Alien Removal (CLEAR) Act, proposed by Republican representative Charlie Norwood of Georgia, would explicitly confirm the authority of local and state law enforcement officers to apprehend, arrest, detain and remove criminal and illegal aliens during the normal course of their duties; provide funding to state and local law enforcement agencies that participate in arresting undocumented immigrants; and withhold certain funding to state and local governments that refuse to allow law enforcement to enforce federal immigration laws.⁵³ Although the bill garnered 125 co-sponsors in the House, the CLEAR Act has stalled in committee while congressional representatives debate the enormous expense involved in implementing the Act nationwide,⁵⁴ and scores of

⁵⁰ *INS Signs Agreement with Florida to Authorize State, Local Officers to Perform Immigration Enforcement Functions*, 79 INTERPRETER RELEASES 1120, 1120 (July 29, 2002) (citing memorandum of understanding stating that INA § 287(g)(1) authorizes use of local authorities in immigration enforcement).

⁵¹ *Id.* at 1120. A Justice Department ruling that local officers have “inherent authority” to enforce federal immigration laws has not been publicly disclosed. Cindy Gonzalez, *Immigration Policing Shift Gets Mixed Reviews*, OMAHA WORLD-HERALD, Apr. 6, 2002, at B1; Eric Schmitt, *Administration Split on Local Rule on Terror Fight*, N.Y. TIMES, Apr. 29, 2002, at A1. A current lawsuit under the Freedom of Information Act seeks disclosure of the DOJ “Opinion of the Office of Legal Counsel” terms. *See* Complaint, Nat’l Council of La Raza v. Department of Justice (S.D.N.Y. filed Apr. 14, 2003), available at <http://www.aclu.org/Files/OpenFile.cfm?id=12356>.

⁵² *Immigration and Naturalization Services (INS) Interior Enforcement Strategy: Hearing Before the Subcomm. on Immigration, Border Security, and Claim of the Comm. on the Judiciary*, 107th Cong. 30 (2002) (testimony of Marisa Demeo, Regional Counsel, Mexican American Legal Defense Fund).

⁵³ *See* H.R. 2671, 108th Cong. (2003). In addition, the proposed legislation would assess fines on illegal aliens and permit forfeiture of their assets. *Id.* Companion legislation in the form of Senate Bill 1906 was introduced in the Senate by Senators Jeff Sessions (R-Ala.) and Zell Miller (D-Ga.), entitled “The Homeland Security Enhancement Act of 2003.” S. 1906, 108th Cong. (2003).

⁵⁴ Billy House, *Plan to Have Police Enforce Immigration Law Is Delayed*, ARIZ. REPUBLIC, Apr. 9, 2004, at A15. The Congressional Budget Office estimated that the House version of the bill would cost federal taxpayers a hefty \$9 billion over four years. *Id.*

police departments, immigrant advocacy groups, mayors, and city councils across the country speak out against the legislation.⁵⁵

D. *Criminalizing Asylum Seekers*

Asylum seekers are foreign nationals who seek to enter the United States based upon allegations of their persecution at the hands of the government of the country from which they are fleeing.⁵⁶ Unlike refugees, they arrive without prior State Department clearance, but are traditionally treated more sympathetically because of their claims of persecution.⁵⁷ Since 9/11, however, this favorable treatment has ended; their motives for seeking asylum are now suspect.⁵⁸ Moreover, the motives of some no longer receive individualized scrutiny, and all “[h]igh risk” asylum seekers are detained across the board.⁵⁹ Pursuant to the now-defunct Operation Liberty Shield, asylum applicants were automatically detained if they were from thirty-four countries where al-Qaeda or related terrorist groups operate.⁶⁰ The DHS reviewed the files of certain detained “Liberty Shield” asylum seekers to collect intelligence on potential national security threats.⁶¹ Indeed, in 2003, BICE interviewed 2,000 high-risk asylum seekers, resulting in only ninety-two arrests, over 90% of which were for immigration violations.⁶²

⁵⁵ See Rebecca McCarthy, *Immigration Status Not Local Matter: Police, Others Resist U.S. Legislation to Have Them Enforce Law*, ATLANTA J. CONST., May 17, 2004, at J1.

⁵⁶ INA § 208(a), 8 U.S.C. § 1158(a) (2000).

⁵⁷ INA § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42) (2000); see Karen C. Tumlin, *Suspect First: How Terrorism Policy Is Reshaping Immigration Policy*, 92 CAL. L. REV. 1173, 1190 (2004) (stating that asylum seekers have traditionally been one of the most protected groups under U.S. immigration policy).

⁵⁸ See Secretary of Department for Homeland Security Tom Ridge, Press Briefing on Operation Liberty Shield ¶ 13 (Mar. 18, 2003) (justifying detention of asylum seekers to ensure that they are not immigrating to cause “harm or bring destruction to our shores”), available at <http://www.dhs.gov/dhspublic/display?content=525>. There appears to be a presumption against the validity of asylum claims. See *id.*

⁵⁹ Nina Bernstein, *Out of Repression, Into Jail*, N.Y. TIMES, Jan. 15, 2004, at B1 (contrasting blanket detention of high risk asylum seekers with prior case-by-case review); Press Release, Department of Homeland Security, Operation Liberty Shield ¶ 9 (Mar. 17, 2003), available at http://www.dhs.gov/dhspublic/interapp/press_release/press_release_0115.xml [hereinafter Press Release, Operation Liberty Shield].

⁶⁰ See Lori Adams, *U.N. Reports Refugee Rights in the U.S. Scaled Back by Recent Anti-terrorism Legislation: Are We Violating the United Nations Refugee Convention?*, 19 N.Y.L. SCH. J. HUM. RTS. 807, 812 (2003); see also Press Release, Operation Liberty Shield, *supra* note 59, ¶ 9.

⁶¹ See EOIR, BICE, *Others Testify on Post-9/11 Adjudications, Closed Hearings, Special Registration, Civil Liberties, Other Issues*, 80 INTERPRETER RELEASES 692, 694 (May 12, 2003).

⁶² *Id.* at 694. Only eight arrests were made on criminal charges. *Id.*

The policies and initiatives discussed above are changes in immigration law and policy all draw upon the objectives, techniques, and discourses of a harshly punitive system of criminal justice to deal with noncitizens and the terrorist threat.⁶³ These post-9/11 reforms evidence an evolving symbiosis between criminal law enforcement and immigration regulation, continuing a process of convergence that began in the 1980s and 1990s during the crackdown on noncitizens with criminal convictions.⁶⁴ Thus, the domestic legal response to the 9/11 attacks has predictably and overwhelmingly relied upon strict enforcement of immigration law and policy to address the threat of terrorism.

Possible explanations for a domestic response focusing upon immigration law enforcement are numerous and varied. Justifications focus on the immigration status of the terrorists and the efficiency of exploiting an immigration system free of constitutional restraints. The nineteen hijackers responsible for the attacks were noncitizens, and fifteen had entered the United States legally on some form of temporary visa.⁶⁵ Although undocumented aliens and aliens with criminal convictions were long considered immigration “problems,” so-called “non-immigrant” visa holders were not.⁶⁶ And despite the increasingly punitive nature of U.S. immigration policy toward criminal and undocumented aliens, prevailing sentiment was that foreigners—particularly those lacking the intent to stay—came to the United States for economic advancement.⁶⁷ The 9/11 attacks shattered that presumption and directed attention to stricter controls of U.S. borders to prevent future terrorist attacks.⁶⁸

Moreover, the advantages of using immigration law to contain and expel problematic aliens were exploited in the campaign against criminal aliens, begun in the mid-1980s. Immigration authorities employed the immigration system to apprehend, arrest, detain, and de-

⁶³ See Kanstroom, *Criminalizing the Undocumented*, *supra* note 1, at 660; Malcolm Feeley & Jonathan Simon, *The New Penology: Notes on the Emerging Strategy of Corrections and Its Implications*, 30 *CRIMINOLOGY* 449, 449 (1992).

⁶⁴ See generally Kanstroom, *Criminalizing the Undocumented*, *supra* note 1; Miller, *supra* note 12.

⁶⁵ Mary Beth Sheridan, *Tougher Enforcement by INS Urged*, *WASH. POST*, Sept. 18, 2001, at A15.

⁶⁶ James H. Johnson, Jr., *U.S. Immigration Reform, Homeland Security, and Global Economic Competitiveness in the Aftermath of the September 11, 2001 Terrorist Attacks*, 27 *N.C. J. INT'L L. & COM. REG.* 419, 427–28 (2002) (emphasizing that non-immigrants were admitted in increasing numbers between 1981 and 1999 to contribute to economy and citing an “open door” policy).

⁶⁷ See *id.*

⁶⁸ See Sheridan, *supra* note 65.

port a wide variety of criminal aliens—non-U.S. citizens with post-entry criminal convictions—without the need for constitutional guarantees of due process (including public notice and full-blown judicial review) and free counsel for indigents that inure to aliens apprehended and detained through criminal law enforcement.⁶⁹

In addition, the U.S. government's deployment of immigration law to purge "criminal" populations in the 1980s and 1990s demonstrated both immigration law's procedural expediency, but its substantive ease as well. As law professor and immigration scholar David Martin commented shortly after the attacks, "There may not be evidence right now to hold someone on a criminal charge, [but it is] very easy to demonstrate a [n immigration] violation, allowing officials to deport or detain suspects."⁷⁰

These explanations provide practical reasons for the convergence of criminal control of terrorism and the use of immigration law to achieve it. Less obvious, however, is each system's use as a method of social control, the subject of the emerging research discussed in Part II.

II. ANALYZING THE MERGER OF CRIME AND IMMIGRATION CONTROL

One reason immigration and criminal law continue to converge after September 11 is immigration law's development as a more efficient mechanism for social control of noncitizens than the criminal justice system.⁷¹ Given the significance of this phenomenon, the social control dimension of this growing intimacy was, for many years, relatively understudied. Several reasons might account for this. First, the two areas of law are doctrinally distinct. To students of criminal law, immigration law is uncomfortably administrative. Criminal law scholars whose bread and butter are Fourth, Sixth, and Fourteenth Amendment challenges to various criminal procedures as written or applied are discomfited by the lack of judicial review or constitutional lawmaking.⁷² To

⁶⁹ See *Fong Yue Ting v. United States*, 149 U.S. 698, 730 (1893) (holding that an order of deportation is not punishment, but a method of enforcing a type of social contract between the government and aliens residing in the country; therefore, constitutional protections such as procedural due process, the right to trial by jury and the right to be free from cruel and unusual punishments do not apply); Teresa A. Miller, *By Any Means Necessary: Collateral Civil Penalties of Non-U.S. Citizens and the War on Terror*, in *CIVIL PENALTIES, SOCIAL CONSEQUENCES*, *supra* note 19, at 48.

⁷⁰ Bravin et al., *supra* note 45.

⁷¹ See, e.g., Kanstroom, *Deportation, Social Control and Punishment*, *supra* note 8, at 1893.

⁷² See IIRIRA §§ 304(a), 302(a)(2), 8 U.S.C. § 1226 (2000); INA § 242(g), 8 U.S.C. § 1252(g) (2000) (withdrawing judicial review from virtually all immigration decisions); Melissa Cook, Note, *Banished for Minor Crimes: The Aggravated Felony Provision of the Immigra-*

immigration scholars, the punitive aspects of criminal law are readily apparent, but the constraints of plenary power and administrative law render the broad critique of recent immigration reforms as “criminally punitive” irrelevant to many.⁷³

Second, the criminal justice system carries baggage that some immigration scholars may be reluctant to bear. Even in the face of harsh intolerance of noncitizens deemed undesirable by virtue of poverty, race, or criminal records, many immigration scholars may hesitate to link changes in immigration law to parallel techniques, goals, and objectives within the criminal justice system, as doing so could undermine the immigration system’s legitimacy.⁷⁴

Third, many immigration scholars feel as many criminal punishment scholars did in the late-1980s: overwhelmed with the pace of harsh reforms and focused most immediately on documenting the reforms before attempting to theorize them.⁷⁵

Nevertheless, the work of a few scholars spanning several disciplines lends analytic clarity to the coercive social engineering pervading the post-9/11 legal landscape. These analyses all demonstrate that the hybrid system of crime and immigration control created by their convergence functions to socially control non-U.S. citizens and their communities. Criminologists Jonathan Simon and Malcolm Feeley identify a “new penology” that socially controls high-risk criminal subjects through risk management, breaking with assumptions and prac-

tion and Nationality Act as a Human Rights Violation, 23 B.C. THIRD WORLD L.J. 293, 312 (2003) (discussing reduced judicial review).

⁷³ See *Fong Yue Ting*, 149 U.S. at 730.

⁷⁴ See Daniel Kanstroom, *Crying Wolf or a Dying Canary?*, 25 N.Y.U. REV. L. & SOC. CHANGE 435, 477 (1999) (arguing that a credible open immigration system is impossible while simultaneously sacrificing due process ideals) [hereinafter Kanstroom, *Crying Wolf or a Dying Canary?*]. Many who have studied or worked within the immigration system may feel that to link immigration reforms to the blatant racism, class bias, and overt social control facilitated by the criminal justice system would delegitimize immigration law. See generally MARC MAUER, *RACE TO INCARCERATE* (1999); MICHAEL TONRY, *MALIGN NEGLECT: RACE, CRIME AND PUNISHMENT IN AMERICA* (1995); RANDALL KENNEDY, *RACE, CRIME AND THE LAW* (1997); David C. Baldus & George Woodworth, *Race Discrimination and the Legitimacy of Capital Punishment: Reflections on the Interaction of Fact and Perception*, 53 DEPAUL L. REV. 1411 (2004); Kevin McNally, *Race and the Federal Death Penalty: A Non-Existent Problem Gets Worse*, 53 DEPAUL L. REV. 1615 (2004); Floyd Weatherspoon, *Ending Racial Profiling of African-Americans in the Selective Enforcement of Laws: In Search of Viable Remedies*, 65 U. PITT. L. REV. 721 (2004).

⁷⁵ Charlotte Stichter, *Homeland Security Meets Immigration: A Review of Recent Governmental Activity and Pending Legislation*, 2002 IMMIGRATION BRIEFINGS 1 (Oct.) (noting that in the midst of policy changes that unfolded in the months following the attacks, immigration practitioners have had to “reorient themselves to the altered legal landscape” and “catch their collective breath”).

tices shaping the modern, Enlightenment-influenced criminal justice system over two hundred years.⁷⁶ As crime and immigration control merge, the immigration system likewise socially controls high-risk noncitizens through actuarial and managerial processes, including detention, surveillance, and a host of related tools operating below the constitutional radar.⁷⁷

Moreover, immigration clinician and scholar Daniel Kanstroom's theory of the convergence of crime control and deportation law illustrates how post-9/11 immigration reforms have deviated from traditional deportation justifications and now conform more closely to traditional justifications for criminal punishment.⁷⁸ Kanstroom persuasively argues that deportation—stripped of its formalistic, contract-based, border control rationales, and examined functionally—is now a means to continually and perpetually control the behavior of noncitizens.⁷⁹

Finally, Michael Welch's work on immigration detention and its economic ties to the private prison industry sheds light on the entrepreneurial aspects of immigration law after September 11.⁸⁰ Welch perceives social control functions in the nexus between the heightened use of detention and the economic imperatives of the private prison industry.⁸¹ In other words, Welch sees the commodification of immigration detainees as a significant manifestation of socially controlling noncitizens.⁸² Taken together, these academics have mapped the contours of a theory of social control that links the convergence of immigration law and criminal punishment to the War on Terror.

A. *The New Penology*

Jonathan Simon and Malcolm Feeley pioneered a new understanding of contemporary criminal law enforcement, procedure, and punishment that accounts for an enormous shift in institutionalized practices that, over the past three decades, produced zero-tolerance law enforcement, draconian criminal sentences, and mass incarceration

⁷⁶ Feeley & Simon, *supra* note 63, at 455; Jonathan Simon, *The Ideological Effects of Actuarial Practices*, 22 LAW & SOC'Y REV. 771, 773–74 (1988).

⁷⁷ See discussion *infra* Part II.A. The new penology also explains how post-9/11 immigration reforms “govern through terror” by bringing the tools of counterterrorism to bear on problems of crime, surplus labor, and unpredictable demand for public subsidy. *Id.*

⁷⁸ See Kanstroom, *Deportation, Social Control, and Punishment*, *supra* note 8, at 1890–92.

⁷⁹ See *id.* at 1911–14; discussion *infra* Part II.B.

⁸⁰ Michael Welch, *The Role of the Immigration and Naturalization Service in the Prison-Industrial Complex*, 27 SOC. JUST. 73, 78 (2000).

⁸¹ *Id.*

⁸² *Id.* at 73–74.

vastly disproportionate to the crime rate.⁸³ These new practices break from traditional concerns for an individual offender—his fault or guilt, his rehabilitation, his post-confinement reintegration into society—and are instead concerned with identifying, classifying, and managing aggregates of risk.⁸⁴ In the process, concern for prevention of criminal deviance falls by the wayside, as a certain level of criminal offending is considered inevitable.⁸⁵ The issue instead has become simply how to manage it.⁸⁶ Thus, the new penology, at its core, is managerial, actuarial, and statistical—concerned not with individuals, but with managing subpopulations considered dangerous or risky.

Feeley and Simon demonstrate the managerialism and actuarialism of the new penology operating in several aspects of crime control. Law enforcement targets “high-risk” subjects,⁸⁷ and arrests suspects defined by “racial profiles.” Prisons no longer rehabilitate offenders through therapeutic, academic, and vocational programs, but incapacitate them based on risk classification.⁸⁸ High rates of recidivism no longer demonstrate failure of the parole system’s ability to reintegrate offenders, but rather success in efficiently restoring offenders to prisons that manage the risk of their inevitable reoffending.⁸⁹

The new penology’s focus is the maximization of social control and efficiency of the criminal justice system. In Feeley and Simon’s view, the new penology “manag[es] a permanently dangerous population while maintaining the system at a minimum cost.”⁹⁰ Through surveillance, classification, and containment, the system maintains control over specific populations that cannot be disaggregated from society or transformed.⁹¹

Such fundamental transformations in the goals of criminal punishment have parallels in deportation law, the most “criminalized” sec-

⁸³ Feeley & Simon, *supra* note 63, at 450.

⁸⁴ *See id.*

⁸⁵ *See id.* at 450; Welch, *supra* note 80, at 74–75.

⁸⁶ *See* Feeley & Simon, *supra* note 63, at 455. The new penology’s goal “is not to eliminate crime but to make it tolerable through systemic coordination.” *Id.*

⁸⁷ *See id.* at 459; Jonathan Simon, *Managing the Monstrous: Sex Offenders and the New Penology*, 4 PSYCHOL. PUB. POL’Y & L. 452, 453 (1998).

⁸⁸ *See* Feeley & Simon, *supra* note 63, at 459. Indeed, Feeley and Simon describe a “custodial continuum” from solitary confinement units to military-style boot camps to electronic monitoring/house arrest that responds not to the particular needs of individual offenders, but to the degree of risk posed by groups of offenders (and thus the degree of control warranted to respond to the risk). *Id.*

⁸⁹ *See id.* at 456.

⁹⁰ *Id.* at 463.

⁹¹ *See id.*

tor of immigration law.⁹² Consistent with the criminal justice system's abandonment of individualized treatment and rehabilitation for criminal offenders, and its simultaneous embrace of an actuarial approach that simply manages high-risk groups, the immigration system attains social control through the mass expulsion of undesirable non-U.S. citizens, while largely ignoring the significance of individualized, mitigating factors.⁹³ For the small percentage of deportable aliens the United States cannot expel, social control is exercised through indefinite detention or warehousing.⁹⁴

In the 1980s and 1990s, undocumented aliens were deemed undesirable, perceived as either taking scarce jobs away from Americans or adhering to the welfare magnet.⁹⁵ Criminal aliens, in turn, were undesirable for their criminal, often drug-related, conduct.⁹⁶ Immigration reforms have sought to expel both groups of deportable aliens retroactively and to contain individuals in immigration prisons and local jails to minimize the likelihood of evading deportation, all while drastically limiting avenues of relief.⁹⁷

Criminal aliens are particularly vulnerable to new social controls within immigration law. Prior to the immigration reforms of 1996, a criminal alien committing a single crime of moral turpitude was de-

⁹² See Miller, *supra* note 12, at 639.

⁹³ See discussion *supra* Part I.B.

⁹⁴ *Zadvydas v. Davis*, 533 U.S. 678, 701 (2001) (holding that 8 U.S.C. § 1231(a)(6) contained an implicit "reasonable time" limitation of six months, the application of which was subject to federal court review). Although *Zadvydas* restricted the government's authority to hold immigration detainees indefinitely, it did not overrule *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953), which authorized the indefinite detention of immigration detainees determined by Congress or the Executive to pose a threat to national security. See *id.* at 694; see also Gavin M. Montague, *Should Aliens Be Indefinitely Detained Under 8 U.S.C. § 1231? Suspect Doctrines and Legal Fictions Come Under Renewed Scrutiny*, 69 FORDHAM L. REV. 1439, 1444 (2001). See generally Michelle Carey, *You Don't Know If They'll Let You Out in One Day, One Year, or Ten Years. . . Indefinite Detention of Immigrants After Zadvydas v. Davis*, 24 CHICANO-LATINO L. REV. 12 (2003); Christina DeConcini, *Post September 11: Sea Change in Attitudes and Approach by Government Toward Immigrants*, 1390 PLI/CORP 109 (2003); Joshua W. Gardner, *Halfway There: Zadvydas v. Davis Reins in Indefinite Detentions, But Leaves Much Unanswered*, 36 CORNELL INT'L L.J. 177 (2003); Susan Marx, *Throwing Away the Key: The Constitutionality of the Indefinite Detention of Inadmissible Aliens*, 35 TEX. TECH L. REV. 1250 (2004).

⁹⁵ See Miller, *supra* note 12, at 650–51; see also Nora V. Demleitner, *The Fallacy of Social "Citizenship" or the Threat of Exclusion*, 12 GEO. IMMIGR. L.J. 35, 45–46 (1997); Peter H. Schuck, *Alien Ruminations*, 105 YALE L.J. 1963, 1985 (1996) (reviewing PETER BRIMELOW, ALIEN NATION: COMMON SENSE ABOUT AMERICA'S IMMIGRATION DISASTER (1995)).

⁹⁶ Ellis M. Johnston, *Once a Criminal, Always a Criminal?: Unconstitutional Presumptions for Mandatory Detention of Criminal Aliens*, 89 GEO. L.J. 2593, 2594 (2001).

⁹⁷ See *supra* note 4.

portable only if the crime was committed within five years of entry and a sentence of one year or more of confinement was *actually* imposed.⁹⁸ This condition thus associated criminal propensities with proximate cause: criminal offenses committed long after entry were considered unlikely to result from criminal propensities developed in a foreign country.⁹⁹ In other words, an alien's criminality would likely manifest within five years of entry.¹⁰⁰

⁹⁸ INA § 241(a)(4)(A), 8 U.S.C. § 1251 (2000); IRA KURZBAN, KURZBAN'S IMMIGRATION LAW SOURCEBOOK 49, 53 (8th ed. 2002). A crime of moral turpitude refers generally to:

[C]onduct 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. Moral turpitude has been defined as an act which is per se morally reprehensible and intrinsically wrong, or malum in se, so it is the nature of the act itself and not the statutory prohibition of it which renders a crime one of moral turpitude.

Id. at 53 (citing *Matter of Franklin*, 20 I. & N. Dec. 867, 868 (B.I.A. 1994), *aff'd* 72 F.3d 571, (8th Cir. 1995)). However, noncitizens with multiple convictions for crimes of moral turpitude (not arising out of the same criminal scheme) were *always* subject to deportation regardless of the length of time between entry and conviction or the length of the sentence imposed. *See* INA § 241(a)(4)(A), 8 U.S.C. § 1251 (2000); *Pacheco v. INS*, 546 F.2d 448, 452 (1st Cir. 1976); *Nason v. INS*, 394 F.2d 223, 227-28 (2d Cir. 1968); *Jeronimo v. Murff*, 157 F. Supp 808, 815 (S.D.N.Y. 1957).

⁹⁹ *See* INA § 241(a)(4), 8 U.S.C. § 1251 (2000); Susan Levine, *On the Verge of Exile: For Children Adopted From Abroad, Lawbreaking Brings Deportation*, WASH. POST, Mar. 5, 2000, at A1 (chronicling the deportation of Joao Herbert, a Brazilian child adopted by U.S. citizens, deported for a drug conviction, and later killed in Brazilian gang violence). The retroactive nature of deportation for aggravated felons after 1996 socially controls immigrant communities by expanding the screening of non-U.S. citizens for criminality from admissibility determinations made at the border to interior deportation proceedings. *See* Levine, *supra*. The old regime for criminal alien deportation focused on screening for criminal propensities at the border, and excluding those aliens with past criminal convictions or conduct. Under this regime, aliens admitted to the United States could be deported if they were convicted of a single crime of moral turpitude within five years of entry (where a sentence of one year or more is imposed). If a resident alien committed a crime of moral turpitude six years after admission, he or she would not be deportable. One explanation for this rule regime is that immigration officials screened for criminal propensities at the border, permitting deportation on the basis of some post-entry criminal conduct as a way of ensuring that criminal propensities acquired abroad, but not detected at the border, can be caught soon after admission and addressed through deportation. After 1996, retroactive deportation of aggravated felons is permitted, without regard to when the conviction occurs. *See* INA § 241(a)(4), 8 U.S.C. § 1251 (2000). Thus, long-term resident aliens who came to the United States at a young age are vulnerable to deportation even though their convictions occurred ten or twenty years after admission. *See* Levine, *supra*. The case of children adopted abroad and brought to the United States as infants illustrates the disregard for where criminal propensities develop. *Id.*

¹⁰⁰ Levine, *supra* note 99.

Since 1996, however, the length of time between entry and offense is irrelevant for most crimes.¹⁰¹ Moreover, crimes with no deportation consequences prior to 1996 were suddenly and retroactively deportable offenses.¹⁰² Conviction of a crime for which a sentence of one year or more *may* be imposed is sufficient to trigger deportation, and a lighter sentence nonetheless triggers harsh immigration consequences.¹⁰³

These measures reflect a broader transformation resulting largely from changes in perceptions of noncitizens and the risk they present to the U.S. economy, public safety, and—after September 11—homeland security.¹⁰⁴ Although noncitizens are being treated increasingly punitively, the causal relationship between the severity revolution in crime control and enhanced punitiveness within the deportation system remains subtle. The new penology explains a great deal about this relationship, particularly in the post-9/11 context. First, the government's use of immigration law as a tool in the War on Terror is managerial.¹⁰⁵ Despite great efforts to better secure U.S. borders, the likelihood that foreign terrorists will enter the United States is still considerable.¹⁰⁶ To manage that risk, the DHS subjects a broad spectrum of noncitizens to harsh immigration consequences that are often only indirectly related to terrorist conduct.¹⁰⁷

Second, the War on Terror is actuarial, relying upon statistical predictions of risk.¹⁰⁸ The apotheosis of this actuarialism is the terror threat warning system that identifies daily the risk of a terrorist at-

¹⁰¹ See IIRIRA § 321, 8 U.S.C. § 1101(a)(43) (2000); see also KURZBAN, *supra* note 98, at 158–59.

¹⁰² See IIRIRA § 321(b), 8 U.S.C. § 1101(a)(43) (2000). Under IIRIRA § 321(b), the effective date of the definition of aggravated felony is retroactive, covering all crimes within the definition irrespective of the date of commission. *Id.*

¹⁰³ See *id.* A light sentence may reflect mitigating circumstances surrounding the defendant's guilt. Furthermore, after 1996, a sentence refers to a time of incarceration or confinement ordered by a court, even if the time of confinement is *suspended* or the execution is *withheld*. KURZBAN, *supra* note 98, at 119–20.

¹⁰⁴ See discussion *supra* Part I.

¹⁰⁵ See Feeley & Simon, *supra* note 63, at 455.

¹⁰⁶ See generally NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES, 9/11 COMMISSION REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES (2004). Efforts to better secure U.S. borders include more aggressive law enforcement, greater documentation requirements, and technological innovations such as the US-VISIT program, NSEERS, and new biometric technologies. DHS officials employ the aphorism “safer, but not safe” extensively to emphasize the need for continued vigilance, while reassuring the public that security measures are justified.

¹⁰⁷ See discussion *supra* Part I. Chief among these consequences is apprehension, arrest, and confinement in conditions of custody resembling criminal incarceration.

¹⁰⁸ See Feeley & Simon, *supra* note 63, at 450 (discussing the use of probability in the new penology).

tack.¹⁰⁹ Furthermore, immigration law enforcement relies heavily upon religious and ethnic “profiles” of potential terrorists that are both under- and over-inclusive.¹¹⁰ Targeting Muslim and Middle Eastern men of foreign nationality not only neglects Arab women and U.S. citizens, but also affects adversely a range of immigrant communities, particularly Mexican immigrants with brown skin and dark hair.¹¹¹

Third, the War on Terror relies on surveillance, classification, and containment to maximize control over populations that can be neither disaggregated from the United States nor transformed.¹¹² Even before 9/11, immigration authorities surrendered the traditional goal of assimilating all foreigners.¹¹³ The national insecurity fostered by the attacks enhanced the perception that immigrants—particularly those from Arab or Muslim countries—were inassimilable.¹¹⁴ Conceived of not as individuals, but as aggregates of risk, these foreigners are monitored, classified,¹¹⁵ and controlled through a variety of government initiatives.

Racial profiling and expanded reporting requirements exemplify the new penology at work in the War on Terror. Racial profiling assumes guilt or validates suspicion according to group-based character-

¹⁰⁹ See Department of Homeland Security Color-Coded Threat Level System, at www.dhs.gov (last visited Nov. 22, 2004). The Color-Coded Threat Level System is prominent on the DHS homepage and is an important component of the Homeland Security Advisory System. See *id.* It has five color-coded warning levels to classify the degree of risk of a terrorist attack, ranging from green or “low,” to blue or “guarded,” to yellow or “elevated,” to orange or “high,” to red or “severe.” *Id.*

¹¹⁰ Michael J. Whidden, *Unequal Justice: Arabs in America and United States Antiterrorism Legislation*, 69 *FORDHAM L. REV.* 2825, 2861–62, 2872–74 (2001).

¹¹¹ See Kevin R. Johnson, *September 11 and Mexican Immigrants: Collateral Damage Comes Home*, 52 *DEPAUL L. REV.* 849, 850–51 (2003) (examining the negative impact of the government’s response to the 9/11 attacks on the Mexican immigrant community in the United States) [hereinafter Johnson, *September 11 and Mexican Immigrants*].

¹¹² See Feeley & Simon, *supra* note 63, at 455.

¹¹³ DAVID SIMCOX, *U.S. IMMIGRATION IN THE 1980S: REAPPRAISALS AND REFORM* 3 (1988). The success of cultural movements of the 1960s, 1970s, and 1980s in favor of bilingual education and multiculturalism contributed to the demise of the notion that the immigration process transforms “foreigners” into true “Americans” through a melting pot process. Miller, *supra* note 12, at 626 (referencing “compassion fatigue”).

¹¹⁴ Whidden, *supra* note 110, at 2865.

¹¹⁵ See Feeley & Simon, *supra* note 63, at 455. A good example of a risk classification system is the way the DHS has conducted the Alien Absconder Initiative. The DHS has strictly enforced pre-9/11 deportation orders against an estimated 320,000 foreign nationals remaining in the United States, but has prioritized an estimated 6000 absconders on the list from Arab and other Muslim countries. See Susan Sachs, *U.S. Begins Crackdown On Muslims Who Defy Orders to Leave Country*, *N.Y. TIMES*, Apr. 2, 2002, at A13. Within this category, the DHS focused first on those estimated 1000 priority absconders with past criminal convictions. *Id.*

istics rather than individual culpability. Governmental reliance upon statistical probabilities forms the core of racial profiling.¹¹⁶ Thus, the racial profiling of Middle Eastern men since September 11 is both managerial and actuarial, less about prevention than risk management.¹¹⁷

Prior to September 11, racial profiling of African-American men was publicly condemned at the highest levels of the federal government.¹¹⁸ Even within immigration law enforcement, where noncitizen targets of racial profiling lacked standing to challenge the practice, race-based enforcement of immigration law was being questioned.¹¹⁹ Immediately after the attacks, however, racial profiling of individuals of Arab and Muslim appearance commenced with a vengeance, enjoying wide public support and official sanction.¹²⁰ Indeed close to two full years after the attacks, the White House, in an unprecedented announcement, issued guidelines barring federal agents from using race or ethnicity in routine investigations, but expressly exempted investigations involving terrorism or national security.¹²¹

Similar efforts in the War on Terror have subjected noncitizens to broad reporting requirements that increase their visibility to homeland security and criminal law enforcement authorities. Based on immigration status and nationality, male visa holders from designated “al Qaeda” countries were selected for scrutiny, a tactic that Karen Tumlin has termed “immigration plus” profiling.¹²² In October of 2003, the INS¹²³ initiated the National Security Entry-Exit Registration System

¹¹⁶ See Johnson, *September 11 and Mexican Immigrants*, *supra* note 111, at 868.

¹¹⁷ See Feeley & Simon, *supra* note 63, at 450–55.

¹¹⁸ *Attorney General Seeks to End Racial Profiling*, N.Y. TIMES, Mar. 2, 2001, at A20. Both President George W. Bush and Attorney General John Ashcroft condemned the practice of considering a person’s race or ethnicity in making traffic stops and conducting criminal investigations. *Id.* During his 2000 presidential campaign and later, in a “State of the Union-style” address in February 2001, President Bush condemned racial profiling, saying, “It’s wrong, and we will end it in America.” Eric Lichtblau, *Bush Issues Racial Profiling Ban But Exempts Security Inquiries*, N.Y. TIMES, June 18, 2003, at A1.

¹¹⁹ Johnson, *September 11 and Mexican Immigrants*, *supra* note 111, at 868.

¹²⁰ See *id.* at 868–69, 69 n.22–26. Johnson cites a litany of articles and media reports expressing support for racial profiling in investigating and combating terrorism. See *id.* at 869.

¹²¹ See Lichtblau, *supra* note 118.

¹²² Karen Tumlin, *Suspect First: How Terrorism Policy is Reshaping Immigration Policy*, 92 CAL. L. REV. 1173, 1184 (2004).

¹²³ The INS was subsumed by the DHS in March 2003.

(NSEERS)—commonly referred to as “special registration”¹²⁴—at all ports of entry.¹²⁵ Initially limited to male visa holders age sixteen and over from mostly Arab and Muslim countries,¹²⁶ special registration required non-immigrant visa holders to report to local district immigration offices to be photographed, fingerprinted, and questioned under oath, all under penalty of deportation.¹²⁷ They were required to present any requested documentation, including that of employment, their lawful admission to the United States, place of residence, title to land, or lease and rental agreements.¹²⁸ Before its phase-out in April of 2003, and absorption into the comprehensive, biometrically-based U.S. VISIT system,¹²⁹ special registration procedures processed 60,822 non-immigrants.¹³⁰ The program effectively flushed out thousands of non-immigrants for technical immigration violations, but discovered few terrorists.¹³¹

¹²⁴ 67 Fed. Reg. 52,584 (Aug. 12, 2002); *INS Publishes Final Rule on Special Registration, Monitoring in Light of Ongoing Terrorism Concerns*, 79 INTERPRETER RELEASES 1230, 1230 (Aug. 19, 2002).

¹²⁵ See *INS Publishes Final Rule on Special Registration*, *supra* note 124, at 1230.

¹²⁶ See *Saudis, Pakistanis Added to Special Registration List, Armenians Deleted, Advocates Organize*, 80 INTERPRETER RELEASES 2, 3 (Jan. 6, 2003). Although the list of countries whose nationals were required to register was amended several times, when discontinued, the list included the following: Iran, Iraq, Libya, Sudan, Syria, Afghanistan, Algeria, Bahrain, Eritrea, Lebanon, Morocco, North Korea, Oman, Qatar, Somalia, Tunisia, United Arab Emirates, Yemen, Pakistan, Saudi Arabia, Bangladesh, Egypt, Indonesia, Jordan, and Kuwait. *Id.* at 2 n.6.

¹²⁷ See *INS Publishes Final Rule on Special Registration*, *supra* note 124, at 1230. Non-immigrants subject to special registration were required to report to INS (now DHS) authorities upon entry, or, if they had already entered, to call in their registration. *Id.*

¹²⁸ *Saudis, Pakistanis Added to Special Registration List*, *supra* note 126, at 3.

¹²⁹ See *Special Registration to End, Be Replaced by Upcoming U.S. Visit Monitoring Program for All Visitors*, 80 INTERPRETER RELEASES 690, 690 (May 12, 2003) [hereinafter *Special Registration to End*]. At a National Press Club function in April 2003, Secretary of Homeland Security Tom Ridge remarked that the launch of the U.S. Visitor and Immigration Status Indication Technology System (US-VISIT) would provide DHS with “the crucial biometric information needed to end the domestic registration of people from certain countries.” *Id.*

¹³⁰ Maia Jachimowicz & Ramah McKay, “Special Registration” Program, MIGRATION INFORMATION SOURCE, MIGRATION POLICY INSTITUTE ¶ 5 (Apr. 1, 2003), at <http://www.migrationinformation.org/feature/display.cfm?i=116>. According to one authority on migration trends, as of March 25, 2003, a total of 60,822 men had registered through special registration. *Id.* Some 2034 male foreign visitors have been detained temporarily through the Special Registration Program for various violations of immigration law. *Id.* ¶ 8.

¹³¹ Rachel L. Swarns, *Thousands of Arabs, Muslims Could Be Deported, Officials Say*, N.Y. TIMES, June 7, 2003, at A1. Ironically, those who failed to register but were subject to removal were not caught. Another example of enhanced reporting requirements rendering noncitizens more visible is the Student and Exchange Visitor Information System (SEVIS) through which educational institutions and exchange programs report and update information regarding the enrollment status and progress of foreign and exchange students

The 8,000 men sought for voluntary interviews by DOJ officials were also chosen based on a combination of ethnicity, nationality, and race.¹³² Shortly after the attacks, many Arab and Muslim noncitizens living in the United States, with no known ties to terrorism were required to report to law enforcement officials for interviews related to terrorist activities, simply by virtue of nationality or religious affiliation.¹³³ The voluntary interview process not only makes certain aliens more conspicuous, it simultaneously demonstrates how law enforcement officials target certain immigrant communities on the arbitrary bases of nationality or religion rather than on actual knowledge of terrorism. Indeed, the process has been criticized for spreading fear among immigrant communities while producing few leads on terrorism.¹³⁴

Taken together, these initiatives illustrate the government's post-9/11 homeland security strategy, specifically to cast a wide net for terrorists using the regulatory discretion of immigration law enforcement and harsh criminal law consequences to noncitizens to purge society of noncitizens considered risks due to nationality, religion, or race.¹³⁵ Immigration law thus functions to detain vast numbers of noncitizens until their potential dangerousness can be assessed.¹³⁶

Furthermore, the narrow avenues of relief from detention and deportation encourage those noncitizens caught in the counterterrorism dragnet to cooperate with homeland security officials and, in effect, to work for the department. The DHS's use of the S-visa clearly

within the United States. See *Special Registration System to End*, *supra* note 129, at 690 n.82. The change of address requirement is yet another example of the War on Terror maximizing social control of immigrant communities through surveillance and greater visibility. See discussion *supra* Part I. Out of the pool of special registrants, 13,434 were found to be out of technical compliance with immigration regulations and consequently processed for deportation.

¹³² Rebecca Carr & Tasgola K. Bruner, *3,000 Foreigners Sought for Terror Questioning*, ATLANTA J. CONST., Mar. 21, 2002, at A3.

¹³³ See Registration and Monitoring of Certain Non-immigrants, 67 Fed. Reg. 40,581 (June 13, 2002). The rule became final on August 12, 2002 and effective on September 11, 2002. 67 Fed. Reg. 52, 584 (Aug. 12, 2002).

¹³⁴ See *Encourage Cooperation Not Fear*, MIAMI HERALD, Sept. 15, 2002, at 4L. Even the approximately 6000 noncitizens chosen for removal as "priority" absconders under the Alien Absconder Initiative were selected from a pool of some 320,000 individuals with final orders of deportation based on Middle Eastern heritage or Muslim religion. Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. REV. 1575, 1579-80, 1580 n.12 (2002). Furthermore, the Bush administration's policy of automatically detaining asylum seekers from thirty-three Middle Eastern and South Asian countries has been criticized as prejudging guilt on the basis of country of origin. See Christopher Drew & Adam Liptak, *Immigration Groups Fault Rule on Automatic Detention of Some Asylum Seekers*, N.Y. TIMES, Mar. 31, 2003, at B15.

¹³⁵ See Kanstroom, *Criminalizing the Undocumented*, *supra* note 1, 647-48.

¹³⁶ See *id.* at 642, 648-49.

illustrates this social control dynamic.¹³⁷ S-visas have become increasingly attractive to noncitizens in the strict, zero-tolerance immigration law enforcement regime after 9/11, because they allow those aliens cooperating with terror investigations and prosecutions to remain in the United States.¹³⁸ As criminal and immigration law scholar Nora Demleitner notes, “[Such]immigration benefits in exchange for cooperation have become increasingly more valuable as the number of deportable offenses has risen dramatically, and immigration judges have been deprived of much of their discretion to avert [deportation].”¹³⁹ Demleitner questions the wisdom of using immigration benefits in this manner, however, citing the grave potential for abuse:

Because of the high stakes involved, noncitizens are more easily coerced and may be more likely to provide doubtful and unfounded information to law enforcement agencies to protect their tenuous status. . . . [T]he harshness [of immigration law] and the limited venues for averting deportation make the only alternative provided—cooperation—even more rife with abuse.¹⁴⁰

Significantly, immigration law and policy—as it converges with criminal law and punishment—has embraced the severity revolution occurring in crime control over the past three decades, and its attendant features of risk management, containment, and control.¹⁴¹ The DHS’s social control mechanisms after 9/11—detention, racial profiling, and harsh, zero-tolerance immigration law enforcement with very narrow avenues of relief—raise the question whether these initiatives improve or impede counterterrorism efforts. Zero-tolerance law enforcement breeds fear of the government in communities best-situated to investigate and report suspicious activity sponsored by Islamic fundamentalists.¹⁴² Instead of cooperation, however, these policies also breed resentment in those communities that might otherwise denounce terrorism.

¹³⁷ INA § 101(a)(15)(s), 8 U.S.C. § 1101(a)(15)(s) (2000); see also KURZBAN, *supra* note 98, at 590 (explaining adjustment of S-1 and S-2 visa holders for family and spouse).

¹³⁸ See Nora V. Demleitner, *Immigration Threats and Rewards: Effective Law Enforcement Tools in the “War” on Terrorism?*, 51 EMORY L.J. 1059, 1074–75 (2002).

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 1060.

¹⁴¹ See Feeley & Simon, *supra* note 63, at 457–58; see also Simon, *supra* note 6, at 220–22.

¹⁴² See Farced Zakaria, *Freedom vs. Security: Delicate Balance: The Case for ‘Smart Profiling’ as a Weapon in the War on Terror*, NEWSWEEK, July 8, 2002, at 31.

B. *Deportation as Social Control*

By casting for terrorists using every tool at its disposal—most notably immigration and criminal law enforcement—and then selectively detaining and deporting non-U.S. citizens for typically minor immigration or criminal law violations, immigration law socially controls immigrant communities through the deportation threat. Imposing this threat, or that of detention pending deportation with no consideration of individual merits, is a highly effective instrument of social control.¹⁴³ So effective, in fact, that significant numbers of foreign nationals from Arab countries residing in the United States legally and illegally—even lawful permanent residents on the track to naturalization—have departed voluntarily rather than risk quasi-criminal confinement in an immigration detention facility or jail.¹⁴⁴

A trilogy of articles by Professor Daniel Kanstroom investigates the use of deportation as a means of social control.¹⁴⁵ Kanstroom posits that deportation is a vehicle of social control when disconnected from the traditional rationalities of immigration law—specifically, the conception of deportation as a “civil,” regulatory, contractual process by which noncitizens who violate a condition of entry are “returned” outside the territorial limits of the United States.¹⁴⁶ Kanstroom emphasizes that deportation is used to “cleanse” society of its least desirable members, including criminal and illegal aliens, noting that the United States is simultaneously admitting and expelling more noncitizens than ever before.¹⁴⁷ Thus, deportation’s rigid application to long-term permanent residents nearly amounts to criminal punishment, but lacks the constitutional protections afforded U.S. citizens who are criminally tried or punished.¹⁴⁸

An immigration clinician and scholar, Kanstroom has chronicled the social control dynamic as it has developed within immigration law over centuries.¹⁴⁹ As an advocate for immigrants, Kanstroom describes

¹⁴³ Kanstroom, *Criminalizing the Undocumented*, *supra* note 1, at 660–61.

¹⁴⁴ Merle English, *Pakistanis Flee INS Registry*, *NEWSDAY*, Jan. 10, 2003, at A29 (“Fear of being detained and deported is driving some Pakistani nationals to flee the United States [pursuant to an upcoming deadline], when some undocumented immigrant males 16 and older must begin to register with the Immigration and Naturalization Service.”).

¹⁴⁵ See generally Kanstroom, *Crying Wolf or Dying Canary?*, *supra* note 74; Kanstroom, *Deportation, Social Control, and Punishment*, *supra* note 8; Kanstroom, *Deportation and Justice: A Constitutional Dialogue*, *supra* note 34, at 771.

¹⁴⁶ See Kanstroom, *Deportation, Social Control, and Punishment*, *supra* note 8, at 1897–98.

¹⁴⁷ See *id.* at 1891–92.

¹⁴⁸ See *id.* at 1894.

¹⁴⁹ See, e.g., *id.* at 1891.

the increasing prevalence of crime control to justify increasingly harsh deportation laws, identifies “the ascendancy of the crime control justification” within deportation law as a “rather complete convergence,” and criticizes the use of criminal punishment within the civil, regulatory system of immigration control as constitutionally illegitimate, if perhaps efficient.¹⁵⁰ In commenting on the efficiency of deportation in crime control, Kanstroom indirectly acknowledges the social control apparatus of the new penology at work in immigration reforms targeting the post-entry criminal conduct of noncitizens, particularly long-term permanent residents.¹⁵¹

That deportation and criminal punishment function jointly to exercise social control is pertinent to U.S. counterterrorism after September 11 in several respects. It is relevant because the government used immigration laws to pursue their criminal investigation of the attacks. Nearly 1,200 men of Arab or Middle Eastern descent were arrested, detained, investigated and interrogated in immigration prisons, private detention facilities, and county jails across the country.¹⁵² Some were arrested as terrorism suspects pursuant to the PENTTBOM investigation, while others were picked up through tips or other leads in the FBI investigation.¹⁵³ Little attempt was made to distinguish between immigration and criminal detainees.¹⁵⁴ Justice Department officials, aware of the constitutional protections that apply to individuals criminally apprehended, regardless of citizenship status, chose to arrest and detain foreign men of Middle Eastern descent on immigration violations, thereby evading the greater level of due process guaranteed to criminal arrestees.¹⁵⁵

Moreover, the government’s response to September 11 derailed attempts to ameliorate the consequences of this joint social control; the zero-tolerance regime for minor immigration offenders gained renewed strength. Before the attacks, noncitizens were subject to

¹⁵⁰ See *id.* at 1891–92, 1921–26.

¹⁵¹ See Kanstroom, *Deportation, Social Control, and Punishment*, *supra* note 8, at 1891–92, 1921–26. The notion of efficiency reflects Feeley and Simon’s actuarial analysis of crime control. See generally Feeley & Simon, *supra* note 63.

¹⁵² MARK DOW, AMERICAN GULAG: INSIDE U.S. IMMIGRATION PRISONS 25–26 (2004).

¹⁵³ OFFICE OF THE INSPECTOR GENERAL, U.S. DEP’T OF JUSTICE, THE SEPTEMBER 11 DE-TAINEES: A REVIEW OF THE TREATMENT OF ALIENS HELD ON IMMIGRATION CHARGES IN CONNECTION WITH THE INVESTIGATION OF THE SEPTEMBER 11 ATTACKS 15-16 (2003), available at <http://www.usdoj.gov/oig/special/0306/full.pdf>.

¹⁵⁴ *Id.* at 17–18 (citing that the FBI in New York City should have made more of an effort to distinguish between aliens legitimately suspected under the PENTTBOM investigation and those who were not under suspicion).

¹⁵⁵ *Id.*

harsh immigration consequences—most notably, deportation—for a ever-increasing number of minor criminal transgressions.¹⁵⁶ As a penalty, deportation was criticized as vastly disproportionate given the expansive scope of deportation-triggering offenses. After the attacks, any deviation from full compliance with the letter of the law became viewed by criminal law enforcement officers as suspicious.¹⁵⁷

C. *Detention as Social Control*

Detention is another aspect of the hybrid crime/immigration system of social control.¹⁵⁸ Michael Welch's scholarship on the expanding detention industry within the immigration system documents the government's heavy reliance on incarceration and the economic incentives for expanding this reliance.¹⁵⁹ In the context of the War on Terror, those incentives have only grown.

Astute observers have seen that the zero-tolerance law enforcement policy of thirty years of the War on Drugs has increased criminal convictions for less serious offenses, created demand for greater prison capacity, and fueled a corrections industry whose economic imperatives, in turn, accentuated such net-widening tendencies.¹⁶⁰ Michael Welch draws upon this history, the organizational links between immigration and crime control, and the new penology in describing an "economic-punishment nexus" operating within immigration law enforcement.¹⁶¹ Welch asserts that the INS (now the DHS) does not merely imitate the criminal justice system, but responds to market forces that legitimate and elevate the zero-tolerance approach to immigration control, to operate under the same social control canopy.¹⁶² Simply stated, he claims that immigration authorities are responding to economic cues from the corrections industry.¹⁶³ Although his analysis was generated prior to the attacks and pertains primarily to immigration policies developed to fight the War on Drugs, Welch's observation that zero-tolerance immigration law enforcement—a hallmark of the War on Terror—fuels an industry

¹⁵⁶ See discussion *supra* Part II.

¹⁵⁷ See Kanstroom, *Criminalizing the Undocumented*, *supra* note 1, at 642–43. Sheela Murthy, *Impact of September 11, 2001 on U.S. Immigration*, 37 Md. B.J. 3, 4 (Mar./Apr. 2004).

¹⁵⁸ Miller, *supra* note 12, at 616–20.

¹⁵⁹ MICHAEL WELCH, *DETAINED: IMMIGRATION LAWS AND THE EXPANDING INS JAIL COMPLEX* 156 (2002).

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at 152–155.

¹⁶² *Id.* at 151.

¹⁶³ *Id.* at 159–166.

that influences immigration policy, highlights a fairly overlooked aspect of the social control of non-U.S. citizens in this Age of Terror: the commodification of high-risk aliens.¹⁶⁴

The temporal relationship between the Wars on Drugs and Terror is important in understanding the more entrepreneurial aspects of post-9/11 detention policies. The War on Terror was declared on the heels of the War on Drugs.¹⁶⁵ The timing is significant for two reasons. Despite assurances from INS officials immediately after the attacks that raids and roundups reminiscent of those during World War II would not occur,¹⁶⁶ the punitive immigration laws already in place provided a ready and extensive detention infrastructure.¹⁶⁷ Furthermore, the counterterrorism measures taken after 9/11 through immigration law enforcement were implemented when the criminal incarceration rate had begun to slow for the first time after nearly twenty years.¹⁶⁸ Due to vacancies, states such as Wisconsin and Colorado had begun to recall prisoners they eagerly exported just a few years earlier,¹⁶⁹ while other states failed to renew contracts with private prison companies with whom they were now in competition. Strapped for contracts, private prisons turned to the flourishing federal prison system for business.¹⁷⁰ In 2002, record low increases in overall prison population were offset by tremendous growth in the federal prison population.¹⁷¹ This growth initially resulted from the crackdown on illegal immigrants and crimi-

¹⁶⁴ See WELCH, *supra* note 159, at 74, 106–109.

¹⁶⁵ See generally Eric E. Sterling, *The Sentencing Boomerang: Drug Prohibition Politics and Reform*, 40 VILL. L. REV. 383 (1995). The War on Drugs is aided substantially by the War on Terror. And by all accounts, the War on Terror has been far more successful at advancing the drug war (through the mass deportation of a criminal aliens with drug convictions and the expulsion of economically marginal undocumented aliens either consuming drugs or selling drugs for subsistence) than in detecting and expelling terrorists. *See id.*

¹⁶⁶ Somini Sengupta & Christopher Drew, *Effort to Discover Terrorists Among Illegal Aliens Makes Glacial Progress, Critics Say*, N.Y. TIMES, Nov. 12, 2001, at B8.

¹⁶⁷ Dow, *supra* note 152, at 25. In part, the heavy use of detention in combating terrorism was driven by detention capacity created under the War on Drugs and the demonstrated willingness to make use of it.

¹⁶⁸ See *Immigrant Exploitation and Incarceration: Frequently Asked Questions*, NOT WITH OUR MONEY ¶ 1, at www.notwithourmoney.org/03_prisons/immigrants02.html (last visited Dec. 4, 2004). Budget deficits, a growing prison reform movement and changing public attitudes about long sentences for non-violent, low-level drug offenders have brought state incarceration rates down to 0.3%, the lowest level in decades. *See id.*

¹⁶⁹ Nicholas Kulish, *Homeward Bound: States That Exported Inmates in 1990s Have Second Thoughts Now*, WALL ST. J., Dec. 20, 2001, at A1.

¹⁷⁰ See Fox Butterfield, *Number of People in State Prisons Declines Slightly*, N.Y. TIMES, Aug. 13, 2001, at A1.

¹⁷¹ Fox Butterfield, *1% Increase in U.S. Inmates is Lowest Rate in 3 Decades*, N.Y. TIMES, July 31, 2002, at A12.

nal aliens preceding the 9/11 attacks. Continued growth results largely from the detention of illegal and criminal immigrants nabbed in counterterrorism's heightened enforcement of immigration law.¹⁷² Indeed, the relationship between heightened immigration law enforcement and the failing private prison industry after September 11 has been characterized as a "bailout."¹⁷³ For example, in May 2002, the Corrections Corporation of America (CCA) won a three-year contract worth \$109 million to house federal immigration detainees in an empty CCA prison in Georgia.¹⁷⁴

The Absconder Apprehension Initiative typifies the economic boost to private prisons produced by counterterrorism after 9/11.¹⁷⁵ Seeking to deport within five years an estimated 400,000 noncitizens ordered deported but still present, in December 2003, the DHS undertook an 8,000 bed expansion of its detention capacity, bringing the number of beds up to 30,000.¹⁷⁶ Private prison firms Wackenhut and Corrections Corporation of America were both awarded contracts to meet the demand.¹⁷⁷ And although beyond the scope of this Article, it is important to note the leading role of private prison companies in detaining immigrants, including terror suspects, abroad.¹⁷⁸

¹⁷² For an informative and detailed explanation of the conditions that led to the government's heavy reliance upon the private sector for the housing of immigration detainees, see Joseph Summerill, *Reforming Prison Contracting: An examination of Federal Private Prison Contracts*, 64 CORRECTIONS TODAY 100 (Dec. 1, 2002).

¹⁷³ See *Liberating the Voices: Fighting Immigrant Prisons in the Southwest*, Border Action Network, at 1 (2003) ("With the passage of the USA PATRIOT Act, the Border Security Bill and other counterterrorism measures in 2002, . . . one industry in particular, the private prison industry, was gearing up to fulfill the newest demand: incarceration of immigrants."), available at <http://www.borderaction.org/PDFs/BAN-Immigrant%20Prison%20Report.pdf>; see also *Federal Bail Out for Private Prison Industry Continues*, 59 PRISON PRIVATISATION REP. INT'L ¶ 1 (Dec. 2003), at <http://www.psiru.org/justice/ppri59.htm#United States>.

¹⁷⁴ *OCSEA Members Protest Private Prison Bailout: Groups Plan to Hold Federal Government, Lehman Brothers Accountable*, Ohio Civil Service Employees Association (OCSEA) ¶ 7 (May 17, 2002), at http://www.ocsea.org/drc_051702.html. Correctional officers' unions have been particularly outraged about the role of private firms in the rapidly growing federal immigration detention market. See *id.*

¹⁷⁵ See Eggen, *supra* note 28.

¹⁷⁶ See Bruce Finley, *U.S. Expanding Prisons to Detain More Immigrants*, HOUSTON CHRON., Dec. 7, 2003, at A3.

¹⁷⁷ See *id.* So-called "profiteering" on the shirtnails of the rapidly expanding federal immigration detention industry is not limited to the private sector. Many county and municipalities across the United States are vying for contracts with the Department of Homeland Security to house its burgeoning detainee population.

¹⁷⁸ See Tim Lemke, *U.S. Firm Pioneers Prisons Industry with Global Reach: Wackenhut Runs 36 U.S. Facilities and 19 Overseas*, WASH. TIMES, Feb. 25, 2002, at A1. Recent revelations of torture and sexual abuse of prisoners held in the Abu Ghraib facility in Iraq underscore links between private prison entrepreneurs in the United States and the operation of mili-

In sum, scholars of both criminal punishment and immigration have discerned elements of social control that are present in post-September 11th counterterrorism policies. The managerialism that Feeley and Simon discern in a criminal justice system that is no longer founded upon transformation and individualized justice is embedded in counterterrorism policies that manage the risk of further attacks through the profiling and identification of “risky” foreigners, zero tolerance law enforcement and heavy reliance upon detention. Kanstroom identifies the intensification of immigration screening in the interior of the United States, far from the border (to which deportation was traditionally linked) as a prominent element of social control within post-September 11th immigration policy. Finally, Welch detects social control in the “economic-punishment” nexus fueling the immigration detention industry.

III. BLURRING DISTINCTIONS BETWEEN ILLEGAL ALIENS, CRIMINAL ALIENS, AND TERRORISTS

The emphasis on apprehending, detaining, and removing non-U.S. citizens deportable because of past criminal conduct has blurred traditional distinctions between categories of deportable aliens. Although much legislation passed in the aftermath of the 9/11 attacks increases information-sharing among government agencies, creates new grounds for refusing admission to aliens, and increases the surveillance and tracking of visa holders and other visitors, much attention has focused on removing foreigners who are undesirable for a wide variety of reasons. The broad objective of strengthening national security has justified the detention and removal of illegal aliens, criminal aliens, and even asylum seekers, despite the absence of a clear nexus between these aliens and terrorism. That counterterrorism now encompasses so many broad and divergent crime control and social welfare reform agendas suggests that purging the country

tary facilities for the detention of terror suspects in Iraq, including the employment of American private prison entrepreneurs as consultants on military prison operations and members of Justice Department’s Iraqi “criminal justice reconstruction team”. Sasha Abramsky, *Incarceration, Inc: Private Prisons Thrive on Cheap Labor and the Hunger of Job-Starved Towns*, 279 NATION 22, 23 (July 19, 2004) (“Abu Ghraib was controlled in the early days by one Lane McCotter; to spend time in Iraq, McCotter, who returned to the United States in September, took a leave of absence from his job as director of business development for corrections at Management and Training Corporation, a Centerville, Utah-based private prison company that hired him after he resigned as head of Utah’s department of corrections”); *Iraq: More Cashing In*, 58 PRISON PRIVATISATION REP. INT’L ¶ 66 (Oct. 2003), at <http://www.psiru.org/justice/PPRI58.asp#IRAQ>.

of unwanted convicts and impoverished, low-wage workers is more achievable and more demonstrably successful than capturing Osama bin Laden, discovering weapons of mass destruction in Iraq, or preventing future terrorist attacks.

If traditional legal categories and the lines drawn between them presumably distinguish clearly between categories of aliens for the purpose of combating terrorism, the criminal/civil line and the citizen/noncitizen line have achieved this goal only in the most superficial sense. Criminal aliens (deportable for their post-entry criminal conduct), illegal aliens (deportable for their surreptitious crossing of the U.S. border), and terrorists (deportable for the grave risk they pose to national security) are all deemed dangerous foreigners for whom criminally punitive treatment and removal are uniformly appropriate and urgently necessary.

A. *Governing Through Terror? Criminal and Illegal Aliens in the War on Terror*

Jonathan Simon coined the phrase “governing through crime” to describe the process by which advanced industrial societies like the United States have prioritized crime and punishment to guide and direct the actions of others or, expressed differently, for “governing.”¹⁷⁹ Simon rejects the notion that the United States is experiencing a crime “crisis,” suggesting instead that the crisis is one of governance, both at a formal/public/political level (e.g., electoral campaigns and political rhetoric) as well as an informal/private/social level (e.g., schools and family life).¹⁸⁰ Simon suggests that this crisis of governance was precipitated not by an increase in crime, but by the failure of traditional institutions of governance, such as the social liberal welfare state and a prosperous industrial economy, to regulate the conduct of urban youth,

¹⁷⁹ Jonathan Simon, *Governing Through Crime*, in *THE CRIME CONUNDRUM: ESSAYS ON CRIMINAL JUSTICE* 174 (Lawrence Friedman & George Fisher eds., 1997).

¹⁸⁰ *Id.* Jonathan Simon asserts that:

It has been obvious for some time that crime was casting a disproportionate shadow over what we primarily identify with governance, i.e., politicians and the electoral process of democracy. . . . Less obvious are the ways in which crime has become a linchpin of governance within the less celebrated but more primary settings of governance. In schools, prevention of crime and drug use has arguably been the most significant agenda item for the last two decades.

contain the mentally ill, depress the contraband drug market, and otherwise provide social and economic security.¹⁸¹

Many of the reforms enacted after 9/11 challenge us to consider the extent to which counterterrorism has become an organizing strategy for a nation in crisis or has, at least, exacerbated the insecurity that crime control-centered governance was intended to alleviate through superior risk management. On the one hand, because the impact—indeed, the central purpose—of terrorism is the creation of extreme insecurity, the 9/11 attacks appear to have reinforced the primacy of harsh criminal punitiveness and aggressive law enforcement toward noncitizens as tools of governance. This is consistent with the criminalization of asylum seekers, zero-tolerance of a broad spectrum of immigration violations mostly unrelated to terrorism, the heavy utilization of immigration detention, and other forms of custody discussed above. It also explains the aggressive deportation of noncitizens with criminal backgrounds through DHS initiatives such as Operation Predator and the Alien Absconder Initiative.

On the other hand, several trends suggest that terrorism—perceived as a hypercrime justifying the most repressive interventions, including the sacrifice of noncitizens' civil rights and civil liberties—has the potential to become a new avenue for governance. Previously, the punishment of crime seemed to be subsuming the priorities of other systems of social regulation like immigration, juvenile justice, education, and child welfare.¹⁸² Now the prevention of terrorism and the strengthening of national security are setting the priorities for the immigration and prison systems. Like fighting crime, counterterrorism has become an all-encompassing goal, with which other systems of regulations are realigning themselves. After 9/11, this realignment is evident both structurally and substantively. On a structural level, the DHS, charged with defending the United States against terrorism, subsumed the immigration system when a large portion of the federal government was reorganized under the Homeland Security Act of 2002.¹⁸³

In the twenty years before the attacks, crime control monopolized social services systems such as the juvenile justice system, the child welfare system, and the deportation system.¹⁸⁴ Since the attacks, however, counterterrorism has caused or justified many reforms and policy re-

¹⁸¹ *Id.* at 176–77.

¹⁸² See Simon, *supra* note 6, at 246.

¹⁸³ HSA, Pub. L. No. 107-296, 116 Stat. 2135 (2002) (codified as amended in scattered sections of U.S.C.).

¹⁸⁴ See Simon, *supra* note 6, at 217, 246.

versals within the immigration and criminal justice systems.¹⁸⁵ Once excused on the basis of necessity, document fraud by asylum seekers is referred to federal prosecutors for criminal prosecution. And matters of religious practice in U.S. prisons—arguably the most constitutionally protected freedom in prison after decades of judicial assault on prisoner rights—are scrutinized through the lens of counterterrorism. After 9/11, many Muslim religious leaders, or *imams*, ministering in New York State prisons were targeted for expulsion for adhering to an Islamic sect characterized as extreme and anti-American.¹⁸⁶

The War on Terror has a pronounced crime control agenda for several reasons. From the outset, the White House treated terrorist attacks—the 1993 bombing of the World Trade Center, the 2000 bombing of the U.S.S. Cole, and the 1998 bombing of two U.S. Embassies in East Africa—as criminal matters, rather than acts of war, in efforts to “depoliticize” and “delegitimate” the acts.¹⁸⁷ Moreover, after the 2001 attacks, the White House emphasized the linkages between drug trafficking and terrorism in a campaign against narco-terrorism. The White House Office of National Drug Control Policy officially stepped into the War on Terror on February 3, 2002, when two of its commercials, aired during Super Bowl XXXVI, appeared during the game’s broadcast.¹⁸⁸ Although the White House’s narco-terrorism campaign has since been repealed, the USA PATRIOT Act casts law enforcement resources in the direction of financial crimes, including drug money laundering, in support of terrorist activities.¹⁸⁹

Finally, crime control has been incorporated into the mission of the DHS. The mission of the DHS is defined statutorily as preventing

¹⁸⁵ See Kanstroom, *Criminalizing the Undocumented*, *supra* note 1, at 641–42. See generally Lichtblau, *supra* note 118 (discussing racial profiling policies before and after 9/11).

¹⁸⁶ See Thomas Frank, *Schumer Takes On Saudi State Religion: Wahhabi Stance Draws Criticism*, NEWSDAY, Aug. 13, 2003, at A12; Dan Mihalopoulos, *U.S. Probes Jail Ministry for Muslims: Critics Say Some Chaplains Spread Extremist Views*, CHI. TRIB., Aug. 10, 2003, at A1.

¹⁸⁷ Gary Dempsey, *Crime or Act of War?*, CATO INST. ¶¶ 2–3 (Sept. 25, 2001), at <http://www.cato.org/current/terrorism/pubs/dempsey-010925.html>.

¹⁸⁸ See Frank Ahrens, *New Pitch in Anti-Drug Ads: Anti-Terrorism*, WASH. POST, Feb. 4, 2002, at A3. The two Super Bowl ads cost nearly \$3.5 million to run. *Id.* They claimed that money to purchase drugs likely ends up in the hands of terrorists and narco-criminals. *Id.* The ads kicked off a four-to-six-week nationwide campaign, which included ads on radio and in 293 newspapers. *Id.*

¹⁸⁹ See, e.g., USA PATRIOT Act § 352, 31 U.S.C. § 5318(h) (2003) (mandating that all financial institutions establish anti-money laundering programs). Title III of the PATRIOT Act, the International Money Laundering Abatement and Anti-Terrorist Financing Act of 2001, has been characterized as the most significant U.S. anti-money laundering legislation in thirty years. Robert G. Bagnall, *Anti-Money Laundering*, SJ095 ALI-ABA 222, 222 (June 17-19, 2004).

and responding to terrorism within the United States and reducing the United States' vulnerability to terrorism.¹⁹⁰ This mission, however, has had broad implications for crime control. The DHS has become involved in a broad spectrum of criminal investigations and crime control initiatives that were the traditional domain of criminal law enforcement. For example, the Arizona Border Control Initiative (investigating and combating human smuggling)¹⁹¹ and Operation Cornerstone (investigating and prosecuting money laundering crimes)¹⁹² bear clear relations to immigration control or counterterrorism. Others, however, employ the broad resources of homeland security to perform functions more akin to police work. Through Operation Predator, for instance, the DHS identifies, prosecutes, and (in the case of noncitizens) deports child pornographers, rescues children depicted in pornography, and assists in the prosecution of child pornography distributors.¹⁹³

The War on Terror is, furthermore, the primary justification for the proposed Clear Law Enforcement for Criminal Alien Removal (CLEAR) Act.¹⁹⁴ The CLEAR Act blurs distinctions between illegal aliens, criminal aliens, and terrorists by giving state and local law enforcement officers the authority to arrest and detain criminal and illegal aliens in the normal course of their duties, and requires that the names of individuals violating civil immigration orders be added to the National Criminal Information Center (NCIC) database accessible from patrol cars.¹⁹⁵ The bill's original sponsor, Representative Charlie Norwood, has characterized the proposed legislation as a significant step toward combating America's criminal alien crisis and apprehending dangerous potential terrorists.¹⁹⁶

¹⁹⁰ HSA § 101, 116 Stat. 2135, 6 U.S.C. § 111 (2003).

¹⁹¹ Asa Hutchinson, Congressional Testimony, DHS Fact Sheet: Arizona Border Control Initiative, (June 17, 2004), available at <http://www.dhs.gov/dhspublic/display?theme=43&content=3356>.

¹⁹² Press Release, U.S. Department of Homeland Security Press Release, Secretary Ridge Announces New Financial Investigations Initiatives: Unveils Comprehensive New Programs to Protect U.S. Financial Systems from Criminal Exploitation (July 8, 2003), available at http://www.dhs.gov/interweb/assetlibrary/Financial_Crimes_Press_Kit.doc.

¹⁹³ U.S. Department of Homeland Security, Fact Sheet: Operation Predator (July 9, 2003), available at <http://www.dhs.gov/dhspublic/display?theme=43&contentU.S.=1067&print=true>.

¹⁹⁴ See H.R. 2671, 108th Cong. (2004).

¹⁹⁵ *House Subcommittee Debates Local Law Enforcement of Immigration Laws under Proposed CLEAR Act*, 80 INTERPRETER RELEASES 1407, 1407 (2003); Michael J. Wishnic, *State and Local Police Enforcement of Immigration Laws*, 6 U. PA. J. CONST. L. 1084, 1086-87 (2004).

¹⁹⁶ News Release, CLEAR Act Hits 125 (Oct. 13, 2004), at http://www.house.gov/apps/list/press/ga09_norwood/CLEARAct125.html [hereinafter CLEAR Act Hits 125]. The proposed legislation has sparked nationwide controversy. Many local law enforcement

In addition to its crime control functions, the War on Terror rationalizes the governance of noncitizens in other contexts. As the case of one refugee illustrates, even a tenuous connection to the War on Terror can justify the punitive treatment of immigrants with no criminal history. David Joseph was neither a criminal nor a terrorist; he was a Haitian refugee who sought asylum in the United States and ended up in detention for nearly two years.¹⁹⁷ Although both an immigration judge and the Board of Immigration Appeals ruled that Joseph should be released on bond pending a final determination of his asylum petition, Attorney General John Ashcroft blocked his release, thus drastically expanding government detention authority.¹⁹⁸ The grounds for Ashcroft's decision were completely unrelated to any danger Joseph might pose as either a terrorist or a criminal. Instead, his intervention was based on the belief that releasing Joseph would encourage a refugee flow from Haiti that might, in turn, jeopardize U.S. national security, should terrorists from Pakistan or other Arab or Muslim countries choose Haiti as a staging ground for infiltrating the United States undetected.¹⁹⁹ Ultimately, Joseph was deported back to Haiti, just three weeks shy of a full two years in detention.²⁰⁰

agencies and communities have openly opposed the CLEAR Act because it contravenes a long-standing tradition in many communities of separating crime control and immigration control functions. For example, the City of Houston rejected local enforcement of immigration law. See *Clear Law Enforcement for Criminal Alien Removal Act of 2003 (CLEAR Act), Hearing on H.R. 2671*, 38 (Oct. 1, 2003) (statement of Gordon Quan, Member, City Council, Houston, Texas), available at <http://www.house.gov/judiciary/89636.PDF>. New York City Mayor Michael Bloomberg initiated a policy which prohibited law enforcement officers in his city from inquiring about a person's immigration status, unless they are suspected of a crime. See Maurize Pinzon, *New York City Still Eager to Integrate Immigrants*, N.Y. NEWS NETWORK ¶¶ 23–25 (Oct. 17 2004), available at <http://www.nynewsnetwork.com/Article.php?article=nyc+still+eager+to+integrate+immigrants.xml>. As of October 13, 2004, the CLEAR Act had 125 sponsors from both sides of the aisle. CLEAR Act Hits 125, *supra*.

¹⁹⁷ Frank James, *U.S. Expands Right to Detain; Ashcroft Invokes National Security*, CHI. TRIB., Apr. 25, 2003, at 1; Rachel Swarns, *Illegal Aliens Can be Held Indefinitely, Ashcroft Says*, N.Y. TIMES, Apr. 26, 2003 at A14 [hereinafter Swarns, *Illegal Aliens Can be Held*].

¹⁹⁸ D-J, 23 I. & N. Dec. 572, 573–74 (B.I.A. 2003).

¹⁹⁹ See Bob Egelko, *Many Illegals Can Be Jailed Indefinitely: Ashcroft Rules That Granting Bail Could Threaten National Security*, S.F. CHRON., Apr. 25, 2003, at A3. According to Ashcroft: "In light of the terrorist attacks of Sept. 11, 2001, there is increased necessity in preventing undocumented aliens from entering the country without the screening of the immigration inspections process." *Id.*; see also Margaret Taylor, *Dangerous by Decree: Detention Without Bond in Immigration Proceedings*, 9 BENDER'S IMMIGRATION BULLETIN 906, 915 (2004).

²⁰⁰ Alva James-Johnson, *U.S. Departs Haitian Amid Anger*, FORT LAUD. SUN-SENTINEL, Dec. 1, 2004, at A29.

Although harsh immigration legislation passed in 1996 gave Attorney General Ashcroft broad authority to deny bond to noncitizens in deportation and asylum proceedings with little judicial review, this was the first time he denied bond to an immigrant with no link to terrorism by invoking broader security concerns.²⁰¹ Attorney General Ashcroft not only directed immigration judges to deny bond to all Haitian boat people seeking asylum, but also directed immigration judges to give credence to any executive branch assertions of “significant national security interests” in future bond proceedings.²⁰² Notwithstanding the government’s actual knowledge that Joseph was neither a criminal nor a terrorist, he refused to individually assess risk in this case, preferring a blanket policy of denying bond to all Haitian boat people by citing national security concerns.²⁰³ Factoring in the historical reluctance of the United States to absorb refugees from Haiti when refugees from other Caribbean countries—particularly Cuba—have been greeted with open arms,²⁰⁴ counterterrorism as a rationale for Joseph’s detention justifies a governing policy that punishes Haitians who dare to seek refuge in the United States and sends a message to those who might follow.

B. *Advancing Homeland Security by Apprehending Criminal Aliens:
Homeland Security as Crime Control*

In the War on Drugs, illegal aliens became criminal aliens. Criminal aliens became uniformly perceived as a threat to public safety. After the attacks of September 11, public safety became national security. And national security has become homeland security.

1. Illegal Aliens Became Criminal Aliens

Prior to the criminalization of immigration law under the War on Drugs and welfare reform (and now under the War on Terror), illegal immigration was commonly analyzed as a problem of labor regulation rather than crime control.²⁰⁵ Illegal immigrants traditionally faced hostility in border states where they placed greater demands on welfare and other social benefit systems.²⁰⁶ At a national level, however, the

²⁰¹ See Swarns, *Illegal Aliens Can be Held*, *supra* note 197.

²⁰² Taylor, *supra* note 199, at 915 (citing D-J-, 23 I. & N. Dec. 572 (Atty. Gen. 2003)).

²⁰³ *Id.*

²⁰⁴ D-J-, 23 I. & N. Dec. at 580.

²⁰⁵ Simcox, *supra* note 113, at 31–36.

²⁰⁶ *Id.* at 37–42.

country was fairly sympathetic to the plight of Mexicans who crossed the border illegally to work.²⁰⁷ They were perceived as poor but decent people doing what was necessary to secure a brighter future for their families.²⁰⁸ However, during the 1980s and 1990s, immigration restrictionists such as Peter Brimelow, Wayne Lutton, and John Taunton worked to link the crime crisis that was transforming America's urban areas to the presence of illegal immigrants. Lutton and Taunton characterized illegal aliens as inherently criminal. To them, "all illegal aliens show at least some propensity for crime by the very presence, possible only through the violation of at least one law."²⁰⁹ As perceptions of illegal immigrants shifted from undocumented workers to dangerous criminals, illegal immigrants became equated with criminal aliens.

2. Criminal Aliens Became a Present Threat to Public Safety

Immigration reforms enacted in the late 1980s and 90s mandated deportation and detention for most criminal aliens with few avenues for relief from either deportation or detention based upon individual equities. By eliminating traditional avenues of relief from deportation and mandating the imprisonment of criminal aliens pending deportation, Congress mandated zero-tolerance of most categories of criminal aliens. Detained criminal aliens are now subject to disciplinary treatment on par with those in criminal detention.²¹⁰ To support mandatory detention, the U.S. government cites its duty to protect the public from the risk of future criminal activity by aliens.²¹¹ But by

²⁰⁷ See MICHAEL C. LEMAY, *FROM OPEN DOOR TO DUTCH DOOR: AN ANALYSIS OF U.S. IMMIGRATION POLICY SINCE 1820*, 111, 114–15 (1987); PETER H. SCHUCK, *CITIZENS, STRANGERS AND IN-BETWEENS* 12 (1998). Several scholars, particularly those critical of expansive rights for immigrants, have characterized the 1950s, 1960s, and 1970s as a time of liberal immigration policies that in addition to granting illegal immigrants limited due process rights, also generally favored family reunification for naturalized citizens and resident aliens, and broader admission of refugees accompanied by public subsidy and resettlement benefits. See, e.g., LEMAY, *supra*, SCHUCK, *supra*.

²⁰⁸ See LEMAY, *supra* note 207, at 111, 114–15; SCHUCK, *supra* note 207, at 12.

²⁰⁹ WAYNE LUTTON & JOHN TANTON, *THE IMMIGRATION INVASION* 61 (1994).

²¹⁰ They are held in local jails or federal immigration prisons, both of which house criminal suspects. Additionally, the must wear prison garb, are subjected to searches on a daily basis, and are disciplined for failing to follow the rules.

²¹¹ *Department of Homeland Security Transition: Bureau of Immigration and Customs Enforcement, Hearing before the House Subcommittee on Immigration, Border Security and Claims of the House Judiciary Committee*, 108th Cong. 7-9 (Apr. 10, 2003) (statement of Asa Hutchinson, DHS Undersecretary for Border and Transportation Security, describing ICE's interior immigration law enforcement strategy as identifying, apprehending and removing criminal aliens who threaten the safety and security of the nation), available at <http://frwebgate.access.gpo>.

narrowly restricting individualized judicial inquiry into detention and deportation circumstances—such as questions of rehabilitation, incentive (or lack thereof) to commit a crime—deportable criminal aliens are uniformly assumed to be predisposed to re-offend, thereby constituting a present threat to public safety.²¹²

3. Public Safety Is National Security

The White House asserts that the Department of Homeland Security was created with one single overriding responsibility: to make America more secure by “unifying once-fragmented Federal functions in a single agency dedicated to protecting America from terrorism.”²¹³ Consolidating the law enforcement arm of immigration control, customs, border control, and other resources under the umbrella of the DHS, both acknowledged the reality of the convergence of crime and immigration control and created a situation in which traditional distinctions between crime and immigration control would be blurred in advancing the War on Terror. ICE, the largest investigative arm of the DHS’s Border and Transportation Security Directorate (BTS), employs over 20,000 individuals.²¹⁴ Homeland Security officials openly acknowledge that the job of deporting noncitizen criminal offenders is easier when accomplished with the vast array of law enforcement resources

gov/cgi-bin/useftp.cgi?IPAddress=162.140.64.128&filename=86409.pdf&directory=/disk5/wais/data/108_house_hearings.

²¹² See, e.g., Dalton Police Department, Criminal Alien Task Force ¶¶ 1–3, at <http://police.citydalton.net/insTaskForce.htm> (last visited Nov. 21, 2004). For example, a joint task force venture between the police department in the small town of Dalton, Georgia and the local INS office, characterizes the mission of the task force as “the investigation and prosecution of criminal aliens in the Dalton area.” *Id.* ¶ 1. Agreeing to conceal the identities of those reporting illegal aliens and criminal aliens, the Dalton officials reassure residents that “the Criminal Alien Task Force appreciates your assistance *in the fight against crime involving aliens.*” *Id.* ¶ 3. From this language, one gets no sense of the noncitizen with a criminal conviction in her past, but instead gets a very keen sense of the criminal alien as an ongoing threat to the safety of the community in Dalton, Georgia. The text on their website also fails to distinguish illegal aliens from criminal aliens, thus implying that all are subject to deportation when, in fact, only some criminal aliens are deportable. See generally *id.* So, in effect, the term “criminal alien” categorizes a broad population as a present law enforcement risk despite the fact that (1) a past conviction does not predict to present dangerousness, and (2) that some aliens with past convictions, mostly misdemeanants, are not subject to deportation.

²¹³ *Improving Homeland Security*, Department of Homeland Security Homepage ¶ 1, at <http://www.whitehouse.gov/homeland/> (last visited Dec. 4, 2004).

²¹⁴ U.S. Immigration and Customs Enforcement, Organization ¶ 2, at <http://www.ice.gov/graphics/about/organization/index.htm> (last visited Nov. 21, 2004).

available under the DHS.²¹⁵ Ridding the country of foreign nationals with criminal convictions and preventing terrorism has become a unified, seamless enterprise: both criminal aliens and terrorists threaten the security of the homeland. As ICE Acting Assistant Secretary Michael J. Garcia stated, “As a new agency under the Department of Homeland Security, ICE is committed to ensuring the safety of the American public. Reducing the number of dangerous criminal aliens hiding in this country is a crucial part of that mission.”²¹⁶ That the War on Terror has advanced the interdependence of the crime control and immigration control systems is evident in the expansive scope of the department’s mission.

The War on Terrorism has broadly recast the War on Drugs in a light favorable to anti-terrorist initiatives through the rehabilitation and defense of drug war legal enforcement procedures that have become useful in combating terrorism. In *United States v. Alvarez-Machain*—recently argued before the U.S. Supreme Court—the U.S. government sought to rehabilitate law enforcement methods that the Court of Appeals for the Ninth Circuit found to have constituted torts and violated basic human rights, and therefore exposed the government to liability.²¹⁷ The Bush administration fought to overturn this holding and a subsequent damages award against the government by arguing that the case “has the potential to dramatically limit [the government’s] power to fight the war on terror.”²¹⁸

The case emerged out of the U.S. government’s indictment of Humberto Alvarez-Machain, a Mexican physician, for his alleged role in the murder and torture of a U.S. drug enforcement agent in Mexico. When Mexico refused to extradite the defendant, the U.S. government kidnapped him and brought him to the United States with the aid of hired bounty hunters and a U.S. Mexican agent.²¹⁹ The case was tried in 1992, after the defendant had spent two years in pretrial

²¹⁵ *Most Wanted List of Criminal Immigrants Released*, MILWAUKEE J. & SENTINEL, May 16, 2003, at 16A (“Homeland Security officials argued that the renewed effort would be more successful, since their newly consolidated department has the combined personnel, databases, and expertise of the Customs Service and the INS, which no longer exists on its own.”).

²¹⁶ Press Release, U.S. Department of Homeland Security, Bureau of Customs and Immigration Enforcement, Local ICE Officers Arrest ‘Most Wanted Criminal Alien’ ¶ 3 (May 14, 2003), available at http://USCIS.gov/graphics/fieldoffices/chicago/most_wanted.pdf.

²¹⁷ *Alvarez-Machain v. United States*, 331 F.3d 604, 608–09 (9th Cir. 2003), *rev’d*, *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739 (2004), *vacated*, *Alvarez-Machain v. United States*, 374 F.3d 1384 (9th Cir. 2004).

²¹⁸ Nina Totenberg, *Alien Tort Act* (National Public Radio broadcast, Mar. 30, 2004).

²¹⁹ *Alvarez-Machain*, 331 F.3d at 609.

detention.²²⁰ At the close of the prosecution's case, the judge acquitted Alvarez-Machain of all charges, finding the government's case founded in "wild speculation."²²¹ Alvarez-Machain returned to Mexico a free man, and promptly sued both the United States under the Federal Tort Claims Act²²² (claiming that DEA agents have no authority to carry out arrests on foreign soil) and the Mexican agent of the United States under the Alien Tort Statute²²³ (claiming that his arrest was arbitrary and therefore violated international human rights law). The United States appealed Alvarez-Machain's Ninth Circuit victory and modest \$25,000 award. As the news media observed, "What started out as a drug case for the U.S. government in 1990 . . . has been transformed into a terrorism case in 2004."²²⁴ In June 2004, the Supreme Court reversed the Ninth Circuit's decision,²²⁵ thereby insulating the federal government from liability for exercising an arrest power likely to be employed again within the context of counterterrorism.

Traditional distinctions between illegal aliens, criminal aliens and terrorists have been blurred by counterterrorism policies that seek to strengthen national security by embracing varied and broad crime control and social welfare reform agendas, including drug control, zero tolerance crime prevention and the purging of an illegal immigrant population perceived as undeserving and costly. The lumping together of these varied categories of aliens, and removing them based on their precarious citizenship status has not only reconfigured the immigration system, but also altered the criminal justice system in ways that will not be understood fully for many years.

CONCLUSION

The INA has been compared to the tax code in technicality and complexity.²²⁶ Since the 1920s, the U.S. government employed non-traditional approaches to controlling organized crime that included

²²⁰ See *id.* at 604–05.

²²¹ Jonathan Bush, *How Did We Get Here? Foreign Abduction After Alvarez-Machain*, 45 STAN. L. REV. 939, 941 n.9 (1993).

²²² 28 U.S.C. § 1346(b)(1) (1997).

²²³ 28 U.S.C. §1350 (2000).

²²⁴ Totenberg, *supra* note 218.

²²⁵ *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739, 2769 (2004).

²²⁶ Stephen Yale-Loehr, *U.S. Immigration Law Overview*, in BASIC IMMIGRATION LAW 2003: PLI CORPORATE LAW AND PRACTICE COURSE HANDBOOK SERIES 37 (2003) ("[I]mmigration law is one of the most complicated areas of U.S. law, second perhaps only to tax law in complexity.").

vigorous enforcement of tax laws.²²⁷ High-ranking Mafia leaders who had insulated themselves so effectively as to evade prosecution for criminal acts committed by their organizations, were nabbed by Treasury officials for violations of the federal tax code.²²⁸ These prosecutions for tax evasion underscored the efficacy of a primarily regulatory, administrative legal apparatus to achieve significant penological objectives.²²⁹ Likewise, after September 11, immigration law functions as a powerful adjunct to the criminal justice system in its pursuit not only of terrorists, but of a host of objectives, including the apprehension, incarceration, and expulsion of undocumented workers and noncitizens with criminal convictions, some of whom are long-term permanent residents with remote criminal convictions. Clearly, the INA's ability to achieve similarly punitive outcomes among disparate immigrant populations makes it possible to argue that the United States is more secure simply because more members of a population perceived as threatening have been apprehended, detained, and deported.

Should the success of counterterrorism measures be judged by the number of noncitizens being incarcerated and deported? Does the availability of narrow avenues of relief from harsh immigration consequences for informants produce credible intelligence? To what extent does the resurgence of racial profiling in immigration law enforcement merely reinforce harmful stereotypes with no clear added security benefit? To what extent is the nation made more secure when its alien population is subject to harsh, criminally punitive sanctions for relatively minor criminal or immigration transgressions? These are emergent questions whose contours have yet to be sharply defined.

²²⁷ Earl Johnson, Jr., *Organized Crime Challenge to the American Legal System, Part II: The Legal Weapons: Their Actual and Potential Usefulness in Law Enforcement*, 54 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 1, 16 (1963) ("Tax fraud has been the charge most generally employed by the federal government in seeking to send management-level organization members to federal prisons.").

²²⁸ *Id.*

²²⁹ *Id.* ("[S]uch jurisdiction as the federal government does enjoy in the area of organized crime is exercised primarily through prosecuting the men of organized crime for violations of federal criminal laws not directly related to the organization's activities.").

