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## Commentary

# Unsecured Borders: Immigration Restrictions, Crime Control and National Security

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*In this Article, I explore the origins and consequences of the blurred boundaries between immigration control, crime control and national security, specifically as related to the removal of non-citizens. Part II of this Article focuses on the question of how immigration control and crime control issues have come to be subsumed by national security rhetoric. Discussions about the removal of non-citizens have been treated as "national security" issues, when in fact the driving motivation is basic criminal law enforcement. Part III of this Article disentangles the use of removal for criminal and immigration law enforcement ends from national security removals. Non-citizens are seldom removed on national security grounds. At the same time, the government has relied upon "national security" justifications to explain the removals of thousands of non-citizens who pose no demonstrated security risk. This strategy does little to enhance national security, and undermines the important national security objective of protecting civil liberties. Part IV of this Article explains that the vast majority of removals effectuated each year are carried out on the basis of a non-citizen's violation of the immigration law or criminal law, there is little reason to believe that the recent expansion in the removal of non-citizens will serve as an effective or efficient means of decreasing domestic rime or preventing undocumented migration. The insistence on formulating immigration policy while gazing through a distorted lens of "national security" perversely ensures that the law is ill-suited to achieve either national security or other immigration policy goals.*

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# Unsecured Borders: Immigration Restrictions, Crime Control and National Security

JENNIFER M. CHACÓN*

## I. INTRODUCTION

Immigration reform loomed as one of the most important topics on the national legislative agenda in 2006.[1] Both houses of Congress passed bills that would have substantially altered the legal terrain of the immigration world. On May 25, 2006, the U.S. Senate passed a bill that included provisions to bolster immigration enforcement, to expand criminal removal provisions, to create a guest worker program, and to provide a limited path to legalization for certain non-citizens unlawfully present.[2] Aside from the enforcement provisions, the Senate bill bore little resemblance to the immigration reform bill passed by the U.S. House of Representatives. House Bill 4437, passed on December 16, 2005, contained no legalization or guest worker programs, and made unauthorized physical presence a felony.[3] Because of the wide gap between the bills and the sensitivity of the immigration issue in an election year, the two houses of Congress were unable to agree on compromise legislation.[4] Ultimately, Congress adjourned without passing any significant immigration provisions. The only immigration-related bill signed into law at the end of the session was

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* Assistant Professor, University of California, Davis, School of Law. jmchacon@ucdavis.edu. J.D., Yale Law School, 1998; A.B., Stanford University, 1994. I owe debts of gratitude to many for helping me with this project. First, I would like to thank Sarah Martinez and Ruby Marquez for tireless and enthusiastic research assistance. I thank all of the librarians at the U.C. Davis Law Library, particularly Elisabeth McKechnie, for their support and aid. I received amazingly helpful feedback on this Article from too many people to list, but I would like to offer special thanks to Bill Ong Hing, Kevin R. Johnson and the participants at the May 2005 Immigration Law Professors work-in-progress session who offered their comments on a preliminary draft of this Article. All of you made me think about this project with much greater precision. Also, thanks to Joel C. Dobris who reminded me to think expansively about the question of the "outsider." Finally, I would like to thank my patient husband, Jonathan D. Glater, a northeasterner who immigrated to California in support of my career. This Article is dedicated to him. Any mistakes are mine alone.

[1] As this Article goes to press, Congress is again debating various pieces of immigration legislation. Julia Preston, *Senators Reach Outline on Immigration Bill*, N.Y. TIMES, May 9, 2007, at A1, *available at* LEXIS, News Library, NYT File. While this Article does not focus on the 2007 legislative session, the general points made herein apply to the more recent immigration debate as well.

[2] Comprehensive Immigration Reform Act of 2006, S. 2611, 109th Cong.

[3] The Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005, H.R. 4437, 109th Cong. § 203.

[4] *See* Rachel L. Swarns, *Immigration Overhaul Takes a Back Seat as Campaign Season Begins*, N.Y. TIMES, Sept. 8, 2006, at A20, *available at* LEXIS, News Library, NYT File.

a provision calling for increased funding for the Border Patrol and the construction of a 700-mile border fence, and even that measure was not fully funded.[5] While the immigration debate made many headlines, it made virtually no headway. Nevertheless, the legislative debate revealed a great deal about the forces driving immigration reform in the United States.

One notable feature of the recent immigration debate is the degree to which the rhetoric of security has served as the touchstone of calls for immigration reform. The Immigration and Nationality Act (INA) defines "national security" as the "national defense, foreign relations, or economic interests of the United States."[6] As this definition suggests, the term "national security" is broad, encompassing protection from threats to vital national interests as well as economic and political interests.[7] The definition is not so broad that it sweeps in all elements of personal and national security. Yet, in the immigration discourse, overly broad concepts of security dominate discussion. In immigration discussions, the concept of security has become tremendously flexible.

At times, the term signifies traditional national security issues, including antiterrorism efforts. Immigration enforcement at the various points of entry and the surveillance of non-citizens in the interior are presented as a means to defend the nation's security. In this context, discussing immigration measures as a part of national security policy is both meaningful and necessary. This was clear to the members of the National Commission on Terrorist Attacks Upon the United States. The 9/11 Commission Report identified several immigration administration functions as important national security priorities. For example, the report proposed the use of biometric identifiers on entry documents to be used at all ports of entry, including points of entry along the land border.[8] That proposal was combined with a recommendation for an effective database to track the entering and exit of non-citizens holding various kinds of U.S.

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[5] Secure Fence Act of 2006, Pub. L. No. 109-367 § 3, 120 Stat. 2638, 2638–39; Carl Hulse & Rachel L. Swarns, *Senate Passes Bill on Building Border Fence*, N.Y. TIMES, Sept. 30, 2006, at A10, *available at* LEXIS, News Library, NYT File (noting that Congress only authorized funding for 370 miles of the fence).

[6] 8 U.S.C. § 1189(c)(2) (2000).

[7] DONALD KERWIN & MARGARET D. STOCK, NATIONAL SECURITY AND IMMIGRATION POLICY: RECLAIMING TERMS, MEASURING SUCCESS, AND SETTING PRIORITIES 6–7 (2006), *available at* http://www.ctc.usma.edu/research/National_Security_and_Immigration_Policy.pdf.

[8] NAT'L COMM'N ON TERRORIST ATTACKS UPON THE UNITED STATES, THE 9/11 COMMISSION REPORT 385–86 (2004), *available at* http://www.gpoaccess.gov/911/index.html [hereinafter 9/11 COMMISSION REPORT]; *see also* MUZAFFAR A. CHISHTI ET AL., MIGRATION POL'Y INST., AMERICA'S CHALLENGE: DOMESTIC SECURITY, CIVIL LIBERTY, AND NATIONAL UNITY AFTER SEPTEMBER 11, 156–58 (2003) [hereinafter AMERICA'S CHALLENGE] (recommending a unified travel watch list and better information sharing among the State Department, FBI and CIA; registration and entry-exit controls over non-citizens as part of a national security strategy).

visas.[9] These issues fall into the areas where immigration and core national security interests converge.

At other times, however, the language of national security has been invoked in discussions concerning more general immigration control and crime control measures, particularly those measures aimed at immigrants who have committed crimes. The borders between crime control, immigration control and national security measures have never been secure, but these borders have become much more permeable in the period following the terrorist attacks of September 11, 2001. Indeed, in the area of immigration law more than any other, these boundaries are melting away at a startling pace. While the U.S. government and populace are eager to police the borders of the United States, they are less interested in mapping out exactly where the "border" ends. The consequence is a general failure to acknowledge the distinct, and sometimes competing, goals of immigration policy, crime control initiatives and national security measures. Policy makers and pundits increasingly portray "border security" initiatives—characterized by border militarization, increasingly expansive grounds for deportation and relaxed procedural standards for immigration investigation—as effective means to secure ill-defined national security goals. Irregular migration, crime committed by non-citizens (or those perceived as non-citizens) and terrorist threats are all subsumed under the broad rubric of national security threats. The expanded and accelerated removal of non-citizens is presented, incorrectly, as an answer to all of these problems,[10] even while core security initiatives languish.[11]

In this Article, I explore the origins and consequences of the blurred boundaries between immigration control, crime control and national security specifically as related to the removal of non-citizens. Part II of this Article focuses on the question of how immigration control and crime control issues have come to be subsumed by national security rhetoric. Discussions about the removal of non-citizens have been treated as "national security" issues, when in fact the driving motivation is basic criminal law enforcement. Part III of this Article disentangles the use of removal for criminal and immigration law enforcement ends from national security removals. Non-citizens are seldom removed on national security

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[9] 9/11 COMMISSION REPORT, *supra* note 8, at 387–88; *see also* CHISHTI ET AL., *supra* note 8, at 156–58.

[10] Anomalously, questions about the United States's annual admission quotas and immigrant labor policy are treated as economic issues.

[11] It is beyond the scope of this Article to critique entry-exit databases and other such measures, but available evidence suggests that the government has failed to satisfactorily address the concerns of the 9/11 Commission and others with regard to immigration policy issues that actually implicate security. For deeper discussions of these problems, see KERWIN & STOCK, *supra* note 7, at 5–6; Bill Ong Hing, *Misusing Immigration Policies in the Name of Homeland Security*, 6 NEW CENTENNIAL REV. 195, 211 (2006).

grounds. At the same time, the government has relied upon "national security" justifications to explain the removals of thousands of non-citizens who pose no demonstrated security risk. This strategy does little to enhance national security, and undermines the important national security objective of protecting civil liberties.[12] Part IV of this Article explains that the vast majority of removals effectuated each year are carried out on the basis of a non-citizen's violation of the immigration law or criminal law, but unfortunately, there is little reason to believe that this expansion in the removal of non-citizens will serve as an effective or efficient means of decreasing domestic crime or preventing undocumented migration. The insistence on formulating immigration policy while gazing through a distorting lens of "national security" perversely ensures that the law is ill-suited to achieve either national security or other immigration policy goals.

## II. THE RHETORIC OF REMOVAL: OR HOW THE ALIEN BECAME A NATIONAL SECURITY THREAT

The rhetoric of national security has long been used by the courts to mask the most virulent aspects of U.S. immigration policy. A classic example can be found in the Chinese Exclusion Case. The Supreme Court upheld the application of the Chinese Exclusion Act of 1882 to a long-term resident of the United States, Chae Chan Ping.[13] Chae Chan Ping left the United States to visit China, and in accordance with the legal requirements of the time, obtained documentation that would permit him to return to the United States.[14] He was denied entry upon his return because an October 1, 1888, amendment to the Chinese Exclusion Act revoked his outstanding authorization for re-entry.[15] In enacting the Chinese Exclusion Act and subsequent amendments, Congress had been motivated by racism against the Chinese—racism that had been brought into sharp focus in a time of economic uncertainty.[16] But in rejecting Chae Chan Ping's challenge to

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[12] Professor Philip Heymann identifies three goals of national security policy: (1) reducing the likelihood and harm of terrorism; (2) diminishing public fear and anger; and (3) respecting civil liberties and national unity. KERWIN & STOCK, *supra* note 7, at 12 (citing PHILIP B. HEYMANN, TERRORISM, FREEDOM AND SECURITY: WINNING WITHOUT WAR 88 (2003)). Obviously, the question of what serves the interests of "national security" is a complicated one, however, as the various goals of national security may be as likely to compete with one another as to compliment each other. *See* HEYMANN, *supra*, at 89–90.

[13] Chae Chan Ping v. United States, 130 U.S. 581, 603–04 (1889).

[14] *Id.* at 582.

[15] *Id.*

[16] The Supreme Court said:

> [T]he competition steadily increased as the laborers came in crowds on each steamer that arrived from China, or Hong Kong, an adjacent English port. They were generally industrious and frugal. Not being accompanied by families, except in rare instances, their expenses were small; and they were content with the simplest fare, such as would not suffice for our laborers and artisans. The competition between them and our people was for this reason altogether in their favor, and the consequent

the law, the Supreme Court did not justify the exclusions expressly on economic grounds or on the basis of perceived racial superiority, although those factors clearly motivated the law and lurk behind the Court's decision. Instead, the Court disguised its rationale, upholding the law on grounds of national security:

> That the government of the United States, through the action of the legislative department, can exclude aliens from its territory is a proposition which we do not think open to controversy. Jurisdiction over its own territory to that extent is an incident of every independent nation. It is a part of its independence. If it could not exclude aliens it would be to that extent subject to the control of another power.[17]

The influx of "vast hordes" of Chinese citizens into the United States was, in the Court's view, a form of "aggression and encroachment" that justified congressional regulation of Chinese immigration, even in the absence of actual hostilities between the United States and China.[18] In this analysis, the Court relies upon the very racial stereotyping that makes the law so troubling in order to explain the link between Chinese exclusion and security. The Court reasoned that:

> If, therefore, the government of the United States, through its legislative department, considers the presence of foreigners of a different race in this country, who will not assimilate with us, to be dangerous to its peace and security, their exclusion is not to be stayed because at the time there are no actual hostilities with the nation of which the foreigners are subjects.[19]

As this statement reveals, the refusal of the Chinese to assimilate is both presumed and presumed dangerous.[20]

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> irritation, proportionately deep and bitter, was followed, in many cases, by open conflicts, to the great disturbance of the public peace.
>
> The differences of race added greatly to the difficulties of the situation. Notwithstanding the favorable provisions of the new articles of the treaty of 1868, by which all the privileges, immunities, and exemptions were extended to subjects of China in the United States which were accorded to citizens or subjects of the most favored nation, they remained strangers in the land, residing apart by themselves, and adhering to the customs and usages of their own country. It seemed impossible for them to assimilate with our people or to make any change in their habits or modes of living.

*Id.* at 594–95.

[17] *Id.* at 603–04.

[18] *Id.* at 606.

[19] *Id.*

[20] The Court also notes that policies to exclude "paupers, criminals and persons afflicted with incurable diseases" are justified on the same grounds. *Id.* at 608.

Almost 120 years have passed since the Supreme Court decided the Chinese Exclusion Case, but the underlying rationale of the decision still undergirds contemporary immigration law. Throughout the past century, courts and lawmakers have used the rhetoric of security to justify U.S. immigration restrictions and harsh U.S. removal policies. Such rhetoric is most common in times of crisis, when racialized assumptions about dangerousness prompt crisis responses aimed at certain groups of non-citizens and their communities.[21]

One such crisis moment undoubtedly began on September 11, 2001, when hijackers took control of four large passenger jets and used them as weapons to destroy the two towers of the World Trade Center in New York and to damage the Pentagon in Washington, D.C.[22] Since the attacks of September 11th, the language of security has once again come to dominate discussions of immigration policy. There is no doubt that the attacks of September 11th exposed vulnerabilities in U.S. intelligence, but the immigration debate soon took center stage. As in the past, the rhetoric of national security in these immigration discussions conceals complex assumptions about immigration, race, assimilability, and criminality. In contemporary discussions of policies aimed at removing "undesirable" non-citizens, distinctions between undocumented migrants, "criminal aliens," and individuals who pose threats to national security are often blurred. Although the three groups may have discrete areas of overlap, for the most part they are separate populations. Policies that seek to control one group will not necessarily ensure the control of another.[23] This raises the question of how we have reached the point where it is acceptable to conflate these three categories and to develop policy responses that are premised upon that conflation. In the remainder of this Part, I try to answer that question.[24] First, I explain how the migrant—particularly the

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[21] *See, e.g.*, DAVID COLE, ENEMY ALIENS: DOUBLE STANDARDS AND CONSTITUTIONAL FREEDOMS IN THE WAR ON TERRORISM 85–153 (2003) (discussing the use of the Sedition Act to punish perceived "enemy aliens" in the United States during World War I, the deportation of many so-called enemy aliens in response to the violent Palmer Raids of 1919–1920, and the internment of Japanese and Japanese-Americans in response to the Japanese attack on Pearl Harbor); KEVIN R. JOHNSON, THE "HUDDLED MASSES" MYTH: IMMIGRATION AND CIVIL RIGHTS 20–22, 62–69 (2004) (discussing the internment of Japanese and Japanese-Americans as a wrongheaded response to the Japanese attack on Pearl Harbor, the deportation of Eastern and Southern European immigrants in the wake of the Palmer Raids of 1919–1920, and the exclusion and deportation of politically undesirable foreigners during the 1950s "Red Scare").

[22] Serge Schmemann, *U.S. Attacked; President Vows to Exact Punishment for 'Evil*,*'* N.Y. TIMES, Sept. 12, 2001, at A1, *available at* LEXIS, News Library, NYT File.

[23] For example, the hijackers who carried out the attacks of September 11, 2001, were present in the United States on valid visas. They were not "illegal aliens," nor did they have a criminal record. The use of such clean operatives is actually a part of Al Qaeda's strategy. *See* CHISHTI ET AL., *supra* note 8, at 9.

[24] Other scholars have written effectively about this transformation in the discourse. *See, e.g.*, Daniel Kanstroom, *Criminalizing the Undocumented: Ironic Boundaries of the Post-September 11th*

irregular migrant—and the criminal have become conflated in national discourse and policy. Second, I explain how the criminalized migrant has been reframed as a national security threat.

### A. *Conflating Immigration Control With Crime Control*

The notion of the outsider as a threat is as old as human history and it transcends national boundaries.[25] The trope has played itself out in U.S. law and politics throughout the history of the nation.[26] Thus, it is hardly surprising that the immigrant outsider often emerges as the criminal in national lore. But in the United States, the law itself has played a central role in constructing the image of the immigrant as a criminal threat.

#### 1. *The Construction of the "Illegal Alien"*

For much of its early history, the United States was a land of relatively open borders—that is to say, the federal government did little to regulate

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*"Pale of Law,"* 29 N.C. J. INT'L L. & COM. REG. 639, 656–63 (2004) (discussing the linking of crime, immigration control, and the "War on Terror"); Teresa A. Miller, *Blurring the Boundaries Between Immigration and Crime Control After September 11th*, 25 B.C. THIRD WORLD L.J. 81, 112–22 (2005) (analyzing how the distinctions between illegal aliens, criminal aliens, and terrorists has been blurred in the aftermath of 9/11); Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. REV. 1575 (2002) (suggesting that September 11th facilitated a new identity category, the "Arab terrorist," and disidentified members as citizens). In this Part, I seek to supplement these discussions with new examples of government rhetoric and more extensive attention to accompanying media rhetoric. I also seek to extend the historical arch of the analysis by updating the discussion.

[25] There are a myriad of examples in literature and popular culture where the outsider is perceived as threatening. Sometimes that outsider is the member of an immigrant community or minority group. At other times, the outsider takes more metaphoric forms, like space aliens or mysterious drifters.

At times, these "outsiders" actually pose a threat to the host society. *See, e.g.*, ALIENS (20th Century Fox 1986); INDEPENDENCE DAY (20th Century Fox 1996); INVASION OF THE BODY SNATCHERS (Republic Pictures 1956); MARS NEEDS WOMEN (MGM 1967); PREDATOR (20th Century Fox 1987); WAR OF THE WORLDS (Paramount 1953).

At other times, the outsider is perceived or tarred as a threat, when in fact the outsider does not pose a threat at all. *See, e.g.*, JULIAN BARNES, ARTHUR AND GEORGE (2005) (son of Indian immigrant in rural England); CLOSE ENCOUNTERS OF THE THIRD KIND (Sony Pictures 1977) (space aliens); E.T. THE EXTRATERRESTRIAL (Universal Studios 1982) (space alien); LITTLE BIG MAN (Paramount 1970) (American Indians); *Star Trek: The Drumhead* (Paramount Apr. 29, 1991) (wrongly accused Romulan); THE DAY THE EARTH STOOD STILL (20th Century Fox 1951) (space alien); *The Fugitive* (ABC 1963–1967) (accused criminal drifter); *The Hulk* (CBS 1977–1982) (mutant outcast drifter); X-MEN (20th Century Fox 2000) (good mutants); and sometimes the outsider only becomes dangerous in response to the hostility of the host society. *See, e.g.*, MARY SHELLEY, FRANKENSTEIN (1818) (rejected, monstrous creation of Victor Frankenstein); RAMBO: FIRST BLOOD (Lion's Gate 1982) (Vietnam war veteran drifter).

[26] *See* COLE, *supra* note 21, at 17–82 (discussing the political aftermath of 9/11, including ethnic profiling, redefining terrorism, and targeting citizens); JOHNSON, *supra* note 21, at 20–22, 62–69 (analyzing the Japanese Internment, Palmer Raids, and "Communist Threat" during the McCarthy era); *see also* BILL ONG HING, TO BE AN AMERICAN: CULTURAL PLURALISM AND THE RHETORIC OF ASSIMILATION 146–51 (1997) (detailing the rhetoric of the cultural threat posed by immigrants); VICTOR C. ROMERO, ALIENATED: IMMIGRANT RIGHTS, THE CONSTITUTION, AND EQUALITY IN AMERICA 10–16 (2005) (exploring Supreme Court precedent in the context of the government attempting to expel or exclude non-citizens).

migration into the United States.[27] No federal mechanism of deportation existed until Congress enacted the Immigration Act of 1891, which permitted the deportation of people who entered the United States without authorization and created the Office of Immigration within the Department of Treasury.[28] These first-time efforts to regulate immigration on the national level went hand-in-hand with an effort to exclude a particular group of immigrants—the Chinese.[29] Laws enacted to regulate immigration resulted in a growing class of aliens[30] whose presence was not authorized by law and who could, therefore, be removed administratively.[31] However, few aliens were removed.[32] Between 1892 and 1907, only a few hundred non-citizens were deported. Between 1908 and 1920, an average of two or three thousand non-citizens were removed each year, most of those people were removed from "asylums, hospitals and jails."[33] Those who entered unlawfully but managed to avoid early detection soon found safe harbor, since the law included a one-year statute of limitations on deportation.[34]

The Immigration Act of May 26, 1924,[35] however, fundamentally altered the landscape of U.S. immigration law and policy. The Act

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[27] STEPHEN H. LEGOMSKY, IMMIGRATION AND REFUGEE LAW AND POLICY 105 & n.3 (4th ed. 2005); *cf*. Gerald L. Neuman, *The Lost Century of American Immigration Law (1776–1875)*, 93 COLUM. L. REV. 1833 (1993) (discussing immigration restrictions imposed by state governments during this period). *But see* ARISTIDE R. ZOLBERG, A NATION BY DESIGN: IMMIGRATION POLICY IN THE FASHIONING OF AMERICA (2006) (challenging the notion that U.S. immigration policy was laissez-faire until the late 19th century and explaining how national interests shaped state and local immigration restrictions).

[28] Immigration Act of 1891, ch. 551, §§ 7, 10, 11, 26 Stat. 1084, 1085–86.

[29] *See* Chae Chan Ping v. United States, 130 U.S. 581, 597 (1889) (noting the adoption of the Chinese Exclusion Act in 1882).

[30] According to U.S. immigration law, "any person not a citizen or national of the United States" is an "alien." 8 U.S.C. § 1101(a)(3) (2000). Although the division of the world into "citizens" and "aliens" is fairly standard practice in international law, the use of the term "alien" in the United States has come to be used in ways that "reinforce and strengthen nativist sentiment toward members of new immigrant groups, which in turn influences U.S. responses to immigration and human rights issues." Kevin R. Johnson, *"Aliens" and the U.S. Immigration Laws: The Social and Legal Construction of Nonpersons*, 28 U. MIAMI INTER-AM. L. REV. 263, 265 (1997). "It is no coincidence that we still refer to non-citizens as 'aliens,' a term that calls attention to their 'otherness,' and even associates them with nonhuman invaders from outer space." Gerald L. Neuman, *Aliens as Outlaws: Government Services, Proposition 187, and the Structure of Equal Protection Doctrine*, 42 UCLA L. REV. 1425, 1428 (1995). I occasionally use the term "alien" to signify non-citizens, particularly when the law expressly contains this designation, or when I intend to evoke this charged understanding of alien status.

[31] Administrative deportation is not considered punishment for purposes of U.S. law, and courts have consequently granted fewer procedural protections in deportation proceedings than in criminal proceedings. *See* Wong Wing v. United States, 163 U.S. 228, 236 (1896) (holding that deportation is not punishment for a crime).

[32] MAE M. NGAI, IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA 59 (2004).

[33] *Id.*

[34] In 1917, the statute of limitations was extended to five years. *Id.*

[35] Immigration Act of 1924, Pub. L. No. 68–139, 43 Stat. 153.

mandated the creation of a quota system, completed in 1929, to parcel out the limited number of slots available to lawful immigrants each year.[36] The resulting system was clearly designed to favor the migration of northern Europeans, to disfavor southern Europeans, and to preclude Asian migration entirely.[37] Although no express racial quotas were imposed on the Western Hemisphere, immigration from Latin America, including Mexico, was increasingly restricted through new, vigorous enforcement of grounds for exclusion and deportation.[38] The Act also distinguished the "white" race from "colored" races, so that no matter what the country of origin, the "colored" races "lay outside the concept of nationality and, therefore, citizenship."[39] Colored races were not "even bona fide immigrants."[40]

As immigration law became a tool for controlling the racial makeup of the country, the government put new mechanisms into place to enforce the new policy. A 1929 law criminalized the act of illegal entry for the first time, providing a means to criminally punish the growing class of aliens present without authorization.[41] Congress enacted a law making it a misdemeanor to enter at a point not designated by the U.S. government, or by means of fraud or misrepresentation.[42] Reentry of a previously deported alien became a felony.[43] In other words, in 1929 the act of immigration itself, when performed outside of legal channels, became a violation of the criminal law for the fist time. "Positive law thus constituted undocumented immigrants as criminals, both fulfilling and fueling nativist discourse."[44]

To enforce the new restrictions, the law created a land Border Patrol, the principal function of which was to police the southern border.[45] The 1924 Act had facilitated the interior enforcement of immigration law through the elimination of the statute of limitations on deportation for nearly all forms of unlawful entry and entry without a valid visa.[46] This meant that those who had entered without authorization or who overstayed their visas were subject to administrative removal at any time.

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[36] *Id.* § 11.

[37] BILL ONG HING, MAKING AND REMAKING ASIAN AMERICA THROUGH IMMIGRATION POLICY 1850–1990, at 53, 55 (1993); NGAI, *supra* note 32, at 26–29.

[38] JOHNSON, *supra* note 21, at 25; *see also* NGAI, *supra* note 32, at 67–68, 70–71 (explaining how the literacy requirements and fee requirements that stood as barriers to many Mexican migrants were used to deny lawful entry).

[39] NGAI, *supra* note 32, at 27.

[40] *Id.*

[41] *Id.* at 60.

[42] Act of March 4, 1929, Pub. L. No. 70–1018 § 2, 45 Stat. 1551, 1551.

[43] *Id.* § 1.

[44] NGAI, *supra* note 32, at 61.

[45] *Id*. at 64–71.

[46] *Id*. at 60.

Popular characterizations of "irregular migrants"[47] followed these changes in law. Until the 1930s, immigrants were categorized in the national discourse as either "legitimate" immigrants on the one hand, or "illegitimate" or "ineligible" immigrants on the other.[48] Congress's criminalization of unauthorized migration created the "illegal alien." By the 1950s, the phrases "illegal immigrant" and "illegal alien" had become a staple of the popular lexicon.[49] Today, the press, politicians and individuals and organizations promoting restrictionist immigration laws commonly use the phrases "illegal alien" and "illegal immigrant" when describing unauthorized migrants in the United States.[50] Thus, in law and language, there is a clear link between irregular status and illegality. Care is not always used in how the "illegal immigrant" label is applied. With their entry and their labor criminalized, certain groups of migrants—most

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[47] The International Organization for Migration (IOM) defines an irregular migrant as "[s]omeone who, owing to illegal entry or the expiry of his or her visa, lacks legal status in a transit or host country. The term applies to migrants who infringe a country's admission rules and any other person not authorized to remain in the host country." INT'L ORG. FOR MIGRATION, GLOSSARY ON MIGRATION 34 (2004), *available at* http://www.iom.int/jahia/Jahia/cache/bypass/pid/8?entryId=12311.

[48] JOSEPH NEVINS, OPERATION GATEKEEPER: THE RISE OF THE "ILLEGAL ALIEN" AND THE MAKING OF THE U.S.-MEXICO BOUNDARY 95 (2002); Anna Marie Gallagher, *The Situation of Undocumented Migrants in the United States*, 05–06 IMMIGR. BRIEFINGS 1 (2005).

[49] Gallagher, *supra* note 48, at 1.

[50] *See, e.g.*, Randal C. Archibold, *Risky Measures by Smugglers Increase Toll on Immigrants*, N.Y. TIMES, Aug. 9, 2006, at A12, *available at* LEXIS, News Library, NYT File ("Arrests of illegal immigrants in the San Ysidro section of San Diego and the Otay Mesa section of Chula Vista, together the biggest ports of entry, have increased in recent years."); Nina Bernstein, *Invisible to Most, Women Line Up for Day Labor*, N.Y. TIMES, Aug. 15, 2005, at A1, *available at* LEXIS, News Library, NYT File ("[N]ationally men account for about two-thirds of labor migration among illegal immigrants . . . ."); David Brooks, *Two Steps Toward a Sensible Immigration Policy*, N.Y. TIMES, Aug. 14, 2005, § 4, at 12, *available at* LEXIS, News Library, NYT File ("What do you say to the working-class guy from the south side of San Antonio? He feels his wages are stagnating because he has to compete against illegal immigrants."); Gary Polakovic, *L.A. Gets 4th Team to Deport Fugitives*, L.A. TIMES, Aug. 10, 2006, at B3, *available at* LEXIS, News Library, LAT File ("[A]bout 52,000 illegal immigrants apprehended . . . ."); Tancredo for President, On the Issues, http://www.teamtancredo.com /tancredo_issues_index.asp) (last visited May 29, 2007) ("Illegal aliens threaten our economy and undermine our culture."); The Official Cite of Duncan Hunter for US President in '08, Securing Our Borders, http://www.gohunter08.com/inner.asp?z=19 (last visited May 29, 2007) ("What was once a porous border, susceptible to illegal aliens, drug trafficking and terrorism, is now the standard mode in preventing drug smugglers from bringing narcotics into our neighborhoods . . . ."). *See generally* PATRICK J. BUCHANAN, STATE OF EMERGENCY (2006) (referring throughout the book to "illegal" aliens); JIM GLICHRIST & JEROME R. CORSI, MINUTEMEN (2006) (same); Federation for American Immigration Reform, http://www.fairus.org/site/PageServer) (last visited May 29, 2007) ("Illegal Aliens Cost New Jersey More Than $2.1 Billion Annually!"). In the spring of 2006, the National Association of Hispanic Journalists issued a statement calling on the media to stop using "illegal" as a noun, arguing that "[s]hortening the term in this way also stereotypes undocumented people who are in the United States as having committed a crime. Under current U.S. immigration law, being an undocumented immigrant is not a crime, it is a civil violation." Press Release, National Association of Hispanic Journalists, NAHJ Urges News Media to Stop Using Dehumanizing Terms When Covering Immigration, *available at* http://www.nahj.org/nahjnews/articles/2006/March/immigrationcoverage.shtml. The organization also called upon journalists to curb the use of "illegal immigrant." *Id.*

commonly Mexicans[51]—increasingly bear the label "illegal aliens," whether or not that label applies to them.[52] In other words, the term "illegal alien" (which has no clear legal meaning)[53] is not only used to signify irregular migrants, but also often applied to those *perceived* as irregular migrants, regardless of actual immigration status.[54] These perceptions of undocumented status are heavily influenced by racial stereotypes.[55] The linkage between perceived alien status and illegal status is thus cemented in the public mind in racialized terms.

### 2. *The "Illegal Alien" as a Criminal Threat*

While law and the language that the law has engendered partially account for the attributed linkage between unauthorized migration and criminality, it does not explain the prevalent belief that non-citizens are generally more likely to commit crimes. Yet, the notion that immigrants

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[51] Today, it is estimated that about 56% of undocumented migrants in the United States are Mexican. JEFFREY S. PASSEL, PEW HISPANIC CTR., THE SIZE AND CHARACTERISTICS OF THE UNAUTHORIZED MIGRANT POPULATION IN THE U.S.: ESTIMATES BASED ON THE MARCH 2005 CURRENT POPULATION SURVEY, at i (2006), *available at* http://pewhispanic.org/reports/report.php?ReportID=61.

[52] NGAI, *supra* note 32, at 71 ("Mexicans emerged as the iconic illegal aliens."); *id.* at 71 ("The undocumented Mexican laborer who crossed the border to work in the burgeoning industry of commercial agriculture emerged as the prototypical illegal alien.").

[53] *See* LEGOMSKY, *supra* note 27, at 1192 ("From a lawyer's point of view, [the term 'illegal alien'] is both ambiguous and otherwise imprecise.").

[54] Determinations of immigration status are extremely complex. Even individuals who enter without inspection or whose entry permits have lapsed may have valid legal claims that would prevent their removal. It is impossible to tell, based on appearances, whether someone is in the country in violation of the law. Nevertheless, people frequently make assumptions about immigration status on the basis of indicators that are correlated with race and national origin, but not necessarily with immigration status. People may rely on English language proficiency, phenotypical appearance, or the absence of ready documentary evidence to make a judgment about whether someone is illegally present in the United States; however, none of these indicators are truly determinative of immigration status. *See*, *e.g.*, Carrie L. Arnold, *Racial Profiling in Immigration Enforcement: State and Local Agreements to Enforce Federal Immigration Law*, 49 ARIZ. L. REV. 113, 121 (2007) (citing a study of a joint INS/local police initiative which found that "[n]umerous legal permanent residents ("LPRs") and U.S. citizens were stopped and questioned on multiple occasions 'for no other apparent reason than their skin color or Mexican appearance or use of the Spanish language.'").

[55] *See* JOHNSON, *supra* note 21, at 29 ("In the fervor to locate and deport undocumented Mexican citizens, Mexican Americans, often stereotyped as 'foreigners' by the national community, can fall into the enforcement net."); *see also* NGAI, *supra* note 32, at 63–64 ("The process of defining and policing the border both encoded and generated racial ideas and practices which, in turn, produced different racialized spaces internal to the nation."); Volpp, *supra* note 24, at 1595 ("[R]ace and other markers appear and reappear to patrol the borders of belonging to political communities."); *infra* note 127 (discussing the "repatriation" of U.S. citizens of Mexican descent); *cf.* Keith Aoki, *"Foreign-Ness" & Asian American Identities: Yellowface, World War II Propaganda, and Bifurcated Racial Stereotypes*, 4 ASIAN PAC. AM. L.J. 1, 1–4 (1996) (explaining how the national identity of the United States is constructed in opposition to Asian and Asian immigrant identity); Neil Gotanda, *Race, Citizenship and the Search for Political Community Among "We the People,"* 76 OR. L. REV. 233, 253 (1997) (discussing how "popular understandings of 'foreignness' suggest that the concept is infused with a racial character"); Leti Volpp, "*Obnoxious to Their Very Nature": Asian Americans and Constitutional Citizenship*, 8 ASIAN L.J. 71, 71 (2001).

have a propensity toward general criminality has a surprising degree of currency in public discussion and policy debates, even though there is virtually no empirical data to support this conclusion.[56] For example, in 2000, the General Social Survey interviewed a nationally representative sample of adults to measure attitudes and perceptions toward immigration.[57] "Asked whether 'more immigrants cause higher crime rates,' 25 percent said this was 'very likely' and an additional 48 percent said this was 'somewhat likely' . . . that is, about three-fourths (73 percent) [of polled adults] believed that immigration was causally related to more crime."[58]

Certain vocal proponents of restrictionist immigration policies have been instrumental in cultivating this notion. In the 1990s, relying largely on unsupported assertions, advocates of restrictionist immigration policies touted the alleged link between unauthorized migrants—or "illegal aliens"—and criminality. In particular, efforts aimed at limiting the distribution of benefits to non-citizens present in the United States without legal authorization relied, at least in part, upon generating mental linkages between crime and immigration.

This strategy played successfully in California during the 1994 debate over California's Proposition 187. Proposition 187 was a ballot initiative designed to deny illegal immigrants social services, health care, and public education.[59] The measure was passed in California with the support of 59% of California voters.[60]

The apparent concern that motivated Proposition 187 was economic. Unlike proponents of Chinese Exclusion at the end of the 19th century, who were preoccupied with job competition, the advocates of Proposition 187 were purportedly preoccupied with competition for public benefits like education and health care.[61] In order to justify cutting off basic services

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[56] Indeed, a great deal of existing data actually refutes this assumption. *See infra* Part IV.A.1.

[57] Rubén G. Rumbaut et al., *Debunking the Myth of Immigrant Criminality: Imprisonment Among First- and Second-Generation Young Men*, MIGRATION INFO. SOURCE, June 1, 2006, http://www.migrationinformation.org/Feature/display.cfm?id=403 (last visited Feb. 25, 2007).

[58] *Id.*

[59] Stanley Mailman, *California's Proposition 187 and Its Lessons*, N.Y. L.J., Jan. 3, 1995, at 3.

[60] League of United Latin Am. Citizens v. Wilson, 908 F. Supp. 755, 763 (C.D. Cal. 1995) (memorandum of law). The public schools provision was declared unconstitutional on the basis of *Plyler v. Doe*, 457 U.S. 202 (1982), and the other significant substantive provisions of Proposition 187 were declared unconstitutional in a March 13, 1998 decision by U.S. District Court Judge Mariana R. Pfaelzer. League of United Latin Am. Citizens v. Wilson, No. 94-7569 MRP, 1998 WL 141325, at *1 (C.D. Cal. Mar. 13, 1998). A little over a year after Judge Pfaelzer issued her opinion, Governor Gray Davis dropped the State's appeal of that decision, effectively killing the initiative. Evelyn Nieves, *California Calls Off Effort to Carry Out Immigrant Measure*, N.Y. TIMES, July 30, 1999, at A1, *available at* LEXIS, News Library, NYT File.

[61] Kevin R. Johnson, *An Essay on Immigration Politics, Popular Democracy, and California's Proposition 187: The Political Relevance and Legal Irrelevance of Race*, 70 WASH. L. REV. 629, 639, 641–42 (1995).

like health care and education for undocumented migrants, advocates of Proposition 187 frequently attempted to depict those migrants as criminals.[62] Ron Prince, an advocate of Proposition 187, adopted this strategy.[63] "'The . . . mindset on the part of illegal aliens, is to commit crimes. The first law they break is to be here illegally. The attitude from then on is, I don't have to obey your laws.'"[64] Similarly, Proposition 187 drafter Barbara Coe claimed:

> You get illegal alien children, Third World children, out of our schools, and you will reduce the violence. That is a fact. . . . You're not dealing with a lot of shiny face, little kiddies. . . . You're dealing with Third World cultures who come in, they shoot, they beat, they stab and they spread their drugs around in our school system. And we're paying them to do it.[65]

Coe reiterated the theme in an op/ed piece, writing that "[v]iolent crime is rampant. Illegal-alien gangs roam our streets, dealing drugs and searching for innocent victims to rob, rape and, in many cases, murder those who dare violate their 'turf'. . . . [N]early 90% of all illicit drugs are brought here by illegals . . . ."[66] These statements were made without any data offered in support of her notion that illegal immigrants had a greater propensity to commit crime than citizens.[67] Coe continues to make unsupported statements linking migrants and criminals through the present day. In a speech in 2005, she referred to undocumented workers as "illegal barbarians who are cutting off [the] heads and appendages of blind, white disabled gringos."[68]

Although the California debate epitomized the efforts of certain anti-immigrant groups to fuel an image of "illegal aliens" as criminals, such efforts were not geographically or temporally isolated, nor were they confined to fringe organizations. On April 24, 1996, President Clinton signed the Antiterrorism and Effective Death Penalty Act (AEDPA).[69] This was followed by the enactment of the Illegal Immigration Reform and

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[62] *Id.* at 654–55, 657.

[63] *Id.* at 654.

[64] *Id.* (internal quotation omitted).

[65] *Id.* at 657 (internal quotation omitted).

[66] *Id.* at 658 (internal quotation omitted).

[67] *See infra* Part IV.A.1 (discussing empirical evidence refuting the link between migrant status and criminality).

[68] Daphne Eviatar, *Nightly Nativism*, THE NATION, Aug. 28, 2006, at 18, *available at* http://www.thenation.com/doc/20060828/eviatar.

[69] Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104–132, 110 Stat. 1214 (codified as amended in scattered sections of 8, 15, 18, 19, 21, 22, 25, 28, 40, 42, 49 U.S.C.).

Immigrant Responsibility Act of 1996 (IIRIRA),[70] signed by President Clinton on September 30, 1996. These two laws represented some of the most significant procedural and substantive changes in U.S. immigration law since the early 1920s. These laws, and the discussions surrounding their enactment, played a major role in linking migrants with crime in the national discourse.

The debate over IIRIRA centered in part on the same resource questions that were implicated in the Proposition 187 debate. IIRIRA contained a provision designed to limit the distribution of public benefits to unauthorized non-citizens.[71] The 1996 welfare reform act—the Personal Responsibility and Work Opportunity Reconciliation Act—also contained provisions designed to limit such benefits.[72] As a consequence of these laws, with limited exceptions,[73] undocumented migrants became ineligible for all federal public benefits, including loans, licenses, food and housing assistance, and post-secondary education.[74] IIRIRA also authorized states to restrict or prohibit cash public assistance to non-citizens to the extent allowed for comparable federal provisions.[75] "Much of the public anger

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[70] Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104–208, 110 Stat. 3009–546 (codified as amended in scattered sections of 3, 6, 7, 8, 13, 16, 26, 29, 30, 31, 32, 33, 40, 41, 42, 43, 44, 45, 46, 47, 48 U.S.C.).

[71] *See, e.g.*, IIRIRA § 553 (authorizing state and local governments to prohibit or otherwise limit or restrict the eligibility of non-citizens or classes of non-citizens for programs of general cash public assistance); *id.* § 503 (limiting social security payments); *id.* § 505 (limiting postsecondary education benefits); *id.* § 604(d)(2) (declaring asylum applicants ineligible for work authorization without a waiver from the Attorney General). IIRIRA also contained numerous provisions designed to address perceived document fraud by non-citizens seeking to access benefits. *See, e.g.*, §§ 401–05 (addressing employment authorization); *id.* § 507 (addressing documents required for social security and higher education benefits); *id.* § 574 (addressing housing benefits).

[72] Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105, 2260 (codified as amended in scattered sections of 8, 26, 42 U.S.C.).

[73] Exceptions include emergency medical care, limited forms of disaster relief and treatment for communicable diseases. *Id.* at § 401(b).

[74] *Id.* § 401(a), (c).

[75] IIRIRA § 553. Currently, there is pending and recently enacted legislation in many states that would revoke state welfare benefits for undocumented immigrants. *See*, *e.g.*, S. Con. Res. 1039, 47th Leg., 2d Reg. Sess. (Ariz. 2006), *available at* http://www.azleg.gov/DocumentsForBill.asp?Bill_Number=SCR1039 (follow "PDF" hyperlink) (proposed referendum to voters to limit state services to undocumented immigrants); S.B. 529, 2006 Leg., Reg. Sess. (Ga. 2006), *available at* http://www.legis.state.ga.us/legis/2005_06/sum/sb529.htm (follow "PDF Version" hyperlink) (among other things, denying state services to undocumented immigrants); H.B. 1485, 2007–2008 Leg., Reg. Sess. (N.C. 2007–2008), *available at* http://www.ncga.state.nc.us/gascript/billlookup/billlookup.pl?Session=2007&BillID=H1485/ (proposing same); H.B. 2761, 2006 Leg., Reg. Sess. (Pa. 2006), *available at* http://www.legis.state.pa.us/cfdocs/billinfo/billinfo.cfm?syear=2005&sind=0&body=H&type=B&BN=2761 (follow "As Printed (PDF)" hyperlink) (proposing same). In November, Arizona voters enacted three initiatives designed to limit benefits to undocumented immigrants. *See* Brady McCombs, *Anti-illegal Immigrant Propositions Pass Handily*, ARIZONA DAILY STAR, Nov. 8, 2006, *available at* http://www.azstarnet.com/sn/politics/154979.php.

toward immigrants center[ed] on a perception that they receive more in Government benefits than they pay in taxes."[76]

Although the articulated concerns were economic, as in the Proposition 187 debate, images of migrant criminality became an important justification for the legislation. Indeed, in the context of the IIRIRA debates, the notion of migrant criminality was even more important, since the legislation also contained provisions aimed at increasing the category of removable non-citizens and streamlining the removal process.[77] In an echo of the Proposition 187 debate, members of Congress made unsubstantiated statements about migrant criminality. For example, Representative Orrin Hatch (R-UT) stated, "We can no longer afford to allow our borders to be just overrun by illegal aliens. . . . Frankly, a lot of our criminality in this country today happens to be coming from criminal, illegal aliens who are ripping our country apart. A lot of the drugs are coming from these people."[78] The unsubstantiated linkage between migrants and criminality thus served as an important ingredient in the passage of major national immigration legislation in 1996.[79] Unfortunately, just as positive law constructed the "illegal alien" in the 20th century, positive law has increasingly operated to construct the "criminal alien"—or as Representative Hatch might say, "criminal, illegal aliens,"—in the 21st century.

### 3. *The Ever-Widening Category of "Criminal Aliens"*

The 1996 immigration laws were not only the product of a world view that conflated "illegal immigrants" with crime—the laws also operated to reify the links between all immigrants and criminality. The 1996 laws altered prior national policies by increasing penalties for violations of immigration laws,[80] expanding the class of non-citizens subject to removal

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[76] Eric Schmitt, *Senate Votes Bill to Reduce Influx of Illegal Aliens*, N.Y. TIMES, May 3, 1996, at A1, *available at* LEXIS, News Library, NYT File.

[77] *E.g.*, 8 U.S.C. § 1101(a)(43)(F)–(G) (2000) (amended by IIRIRA to lower the term of imprisonment for a removable crime of violence or theft offense from five years to one year). IIRIRA also included expansions of the removability provisions of 8 U.S.C. § 1101(a)(43)(A), (J), (M), (P), (R), and (S). Socheat Chea, *The Evolving Definition of Aggravated Felony*, *available at* http://library.findlaw.com/1999/Jun/1/126967.html (last visited Feb. 17, 2007).

[78] 142 CONG. REC. S11,505 (daily ed. Sept. 27, 1996) (statement of Sen. Hatch).

[79] Ironically, many of the crime-related measures enacted into law in 1996 were aimed not at undocumented non-citizens, but at non-citizens who were lawfully present. These facts reveal the artificiality of claims that the legislation was aimed at the crimes of "illegal aliens." Those non-citizens unlawfully present were already subject to removal under the law before 1996. Although the laws did impact irregular migrants, and barred their access to some routes to legalization, one of the most important effects of the AEDPA and IIRIRA was the expansion of criminal grounds upon which lawful permanent residents and other lawful immigrants might be removed, and the significant reduction in the availability of discretionary relief from removal. *See infra* Part II.A.3.

[80] *See* Margaret H. Taylor, *The 1996 Immigration Act: Detention and Related Issues*, 74 INTERPRETER RELEASES 209, 209 (1997).

for the commission of crimes,[81] and imposing a system of tough penalties that favor removal even in cases involving relatively minor infractions or very old crimes.[82] For instance, removable offenses have included a narrow category of crimes classified as "aggravated felonies" since 1988.[83] The 1988 categories were expanded through subsequent legislation,[84] but AEDPA and IIRIRA played the largest role to date in expanding the definition of such felonies. "Aggravated felonies" now include not only things like "murder, rape, or sexual abuse of a minor,"[85] but also a crime of violence or a theft offense "for which the term of imprisonment is at least a year."[86] The changes applied retroactively, so even if an offense would not have rendered a non-citizen removable at the time of its commission, the non-citizen is subject to removal if the offense is a removable offense under the new law.[87] The offenses that render an "alien" removable sweeps much broader than the criminal law, and include status offenses such as drug addiction,[88] minor drug offenses,[89] constitutionally protected

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[81] *See, e.g.*, AEDPA § 440(e) (expanding the "aggravated felony" definition to include gambling, alien smuggling and passport fraud); IIRIRA § 321 (adding crimes and lowering the sentence requirement of removable violent crimes to one year).

[82] Dawn Marie Johnson, *The AEDPA and the IIRIRA: Treating Misdemeanors as Felonies for Immigration Purposes*, 27 J. LEGIS. 477, 477, 483 (2001). There are no statutes of limitations on removal for most criminal offenses. More crimes are now retroactively applied for purposes of removal due to the "expanded definition included in the immigration law reform of 1996." *Id*. at 483.

[83] The "aggravated felonies" created by the 1988 legislation were aimed at drug offenders, and are best understood as a part of the larger national "war on drugs." *See* Jeff Yates et al., *A War on Drugs or a War on Immigrants? Expanding the Definition of "Drug Trafficking" in Determining Aggravated Felon Status for Noncitizens*, 64 MD. L. REV. 875, 878–79 (2005); Craig H. Feldman, Note, *The Immigration Act of 1990: Congress Continues to Aggravate the Criminal Alien*, 17 SETON HALL LEGIS. J. 201, 205–06 (1993). The three specific crimes listed as "aggravated felonies" in the original 1988 Act were murder, drug trafficking (defined narrowly), and illegal trafficking in firearms and destructive devices. Anti-Drug Abuse Act of 1988, Pub. L. No, 100-690, § 7342, 102 Stat. 4181, 4469–70 (codified as amended at 8 U.S.C. §§ 1101(a)(43)(A)–(C), 1252(a)).

[84] *See* Immigration Act of 1990, Pub. Law 101-649, § 501(a), 104 Stat. 4978, 5048 (codified as amended at 8 U.S.C. § 1101(a)(43)) (expanding the aggravated felony to include a crime of violence, money laundering and drug trafficking offenses).

[85] 8 U.S.C. § 1101(a)(43)(A).

[86] *Id.* § 1101(a)(43)(F), (G).

[87] *See* AEDPA § 440(f); IIRIRA § 321(b). *But see* INS v. St. Cyr, 533 U.S. 289, 326 (2001) (barring retroactive application of the removal provisions for convictions based on certain plea agreements).

[88] *See* 8 U.S.C. § 1227(a)(2)(B)(ii) (2000) ("Any alien who is, or at any time after admission has been, a drug abuser or addict is deportable.").

[89] *Id.* § 1227(a)(2)(B)(i). Furthermore, drug trafficking convictions constitute "aggravated felonies," with all the harsh consequences that designation entails. *Id*. § 1101(a)(43)(B) .

associational conduct,[90] and failures to comply with technical special registration provisions.[91]

The new laws also eliminated many avenues of relief from removal that formerly would have been available to non-citizens removable for criminal offenses. During the period from 1989–1995, immigration judges and the Board of Immigration Appeals had collectively waived deportation in about 51% of the cases in which a non-citizen had committed a deportable offense.[92] To do so, they relied on the discretionary waiver of deportation permitted by section 212(c) of the Immigration and Nationality Act.[93] But the 1996 law eliminated relief under the former section 212(c).[94] In its place, the 1996 law provided for much more limited "cancellation of removal" under section 240A of the Immigration and Nationality Act.[95] Because "cancellation of removal" requires longer periods of physical presence in the United States and because it has so many more disqualifying provisions,[96] it is much more difficult to obtain than 212(c) relief. But the biggest problem is the many absolute bars to relief that the provision contains. Aggravated felons—a category of non-citizens greatly enlarged by the 1996 laws—are statutorily barred from seeking virtually any form of relief from removal[97] and they are permanently barred from reentering the United States.[98] Nor is cancellation of removal available for any non-citizen who commits two or more "crimes involving moral turpitude" if that person has not been a lawful permanent resident for at least five years.[99] The 1996 laws also vastly expanded the number of instances where a non-citizen would be

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[90] *See id.* § 1227(a)(4)(B) (including in the terrorism-related removal category aliens who provide "material support" to terrorist organizations). For a discussion of the breadth of this provision, see *infra* notes 168–77

[91] *See* 8 U.S.C. § 1227(a)(3)(B). By and large, these were ignored before September 11, 2001, but they are now selectively enforced. Moreover, on June 5, 2002, Attorney General John Ashcroft announced the National Security Entry-Exit Registration System (NSEERS), which required nearly all male non-immigrants who were at least fourteen years of age and the nationals of certain designated countries to be fingerprinted and photographed upon entry, to report periodically to DHS for stays longer than thirty days, and to appear at one of several specified ports upon departure, so the departure could be recorded. 8 C.F.R. § 264 (2006).

[92] *St. Cyr*, 533 U.S. at 295–96 & n.5.

[93] Julie K. Rannik, Comment, *The Anti-Terrorism and Effective Death Penalty Act of 1996: A Death Sentence for the 212(c) Waiver*, 28 U. MIAMI INTER-AM. L. REV. 123, 124 n.8 (1996) (citing 142 CONG. REC. S12,295 (daily ed. Oct. 3, 1996) (statement of Sen. Abraham)).

[94] Immigration and Nationality Act of 1952, Pub. L. No. 82-414, § 212(c), 66 Stat. 163, 187, *repealed by* IIRIRA § 304(b), Pub. L. No 104-208, 110 Stat. 3009-546, 3009-597 (2000).

[95] 8 U.S.C. § 1229b(a)–(b) (2000).

[96] *Id*.

[97] *See, e.g.*, *id*. (barring cancellation of removal for aggravated felons).

[98] *Id*. § 1182(a)(9)(A)(ii) (2000) (rendering aggravated felons inadmissible "at any time" after removal).

[99] *Id*. §§ 1229b(b)(1)(C), 1182(a)(2)(A)(i), 1227(a)(2)(A)(i)–(ii) (2000).

subject to mandatory detention during the course of removal proceedings.[100]

The government has frequently relied upon these expanded removal provisions to deport many lawful permanent residents, including those admitted to the country years ago as refugee children.[101] The expanded category of "criminal aliens" does not overlap neatly with the category of "illegal aliens." The more than 156,000 "aggravated felons" who have been removed from the United States since 1997 had been in the country an average of fifteen years prior to being put into removal proceedings, and 25% had been here over twenty years.[102] While some of these individuals were unlawfully present, many others were not.[103] The number of non-citizens subject to detention and removal as "criminal aliens" exploded after 1996 not because a flood of "criminal aliens" entered the country, but because the 1996 legal changes converted many lawfully present non-citizens into criminal aliens.

Trends in federal immigration prosecutions further buttress the popular conflation of the "illegal immigrant" and the "criminal alien." One of the most important developments fueling the growth in the class of removable "aliens" is the increasing prosecution of immigration crimes. In 2004, federal prosecutors filed charges in 37,854 cases on the basis of criminal immigration law violations.[104] This is a 125% increase since 2000, and it means that immigration violations that year made up the single largest category of federal crimes, surpassing even drug prosecutions.[105] Most people convicted of criminal immigration violations are non-citizens whose convictions render them removable.[106] Thus, increased criminal prosecution of immigration violations creates a new category of removable

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[100] *See* Taylor, *supra* note 80, at 216; *see also* Margaret H. Taylor, *Dangerous by Decree: Detention Without Bond in Immigration Proceedings*, 50 LOY. L. REV. 149, 149–50 (2004) (discussing problematic post-9/11 reliance on mandatory detention provisions).

[101] *See, e.g.*, BILL ONG HING, DEPORTING OUR SOULS: VALUES, MORALITY, AND IMMIGRATION POLICY 54–58 (2006); Bill Ong Hing, *Detention to Deportation—Rethinking the Removal of Cambodian Refugees*, 38 U.C. DAVIS L. REV. 891, 891 (2005).

[102] TRAC IMMIGRATION, HOW OFTEN IS THE AGGRAVATED FELONY STATUTE USED? (2006), http://trac.syr.edu/immigration/reports/158/.

[103] Indeed, lawful permanent residents may make up a significant portion of current "aggravated felony" removals, as Immigration and Customs Enforcement (ICE) may be relying on administrative removal orders issued by immigration courts rather than aggravated felony charges to remove those immigrants who are not lawfully present. *See id.*

[104] TRAC REPORT, TIMELY NEW JUSTICE DEPARTMENT DATA SHOW PROSECUTIONS CLIMB DURING BUSH YEARS (2005), http://trac.syr.edu/tracreports/crim/136.

[105] *Id.*

[106] *See, e.g.*, 8 U.S.C. § 1227(a)(3)(C)–(D) (2000) (rendering document fraud and false claims of citizenship removable offenses).

non-citizens, some of whom are formally categorized by law as "criminal aliens."[107]

This, in turn, has given rise to new enforcement actions that again feed and fuel the notion of dangerous classes of aliens—in this case, the "fugitive alien." Unauthorized reentry after removal actually made up 59% of the immigration prosecutions in federal district courts in 2004,[108] and the prosecutions of illegal re-entry after removal continued to be the largest category of federal immigration prosecutions in 2006.[109] Immigrations and Customs Enforcement (ICE) has deployed teams nationwide that "use intelligence-based information and leads to find, arrest, and place into removal proceedings aliens who have been [previously] ordered to leave by an immigration judge, but have failed to comply, thus making them fugitive aliens."[110] By the end of September 2006, ICE had established fifty-two such teams.[111] According to ICE, as of August 2006, these teams have apprehended more than 52,000 non-citizens since the creation of Fugitive Operations teams in 2003.[112] ICE indicated that 22,669 of those non-citizens had prior convictions for crimes,[113] but ICE did not provide information regarding the nature of those crimes. Although purporting to target "fugitives," ICE has used these enforcement efforts as a net with which to capture many non-fugitive migrants.[114] The

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[107] The aggravated felony definition encompasses trafficking in persons, alien smuggling and certain types of document fraud, as well as unauthorized reentry after removal. *See id.* § 1101(a)(43)(K)(iii), (N)–(P) (2000). Other immigration-related crimes, particularly those involving misrepresentations, may constitute removable "crimes involving moral turpitude." *Id.* §1227(a)(2)(A)(i)–(ii).

[108] TRAC REPORT, NEW FINDINGS (2005), http://trac.syr.edu/tracins/latest/131/.

[109] *See, e.g.*, TRAC REPORT, CRIMINAL IMMIGRATION PROSECUTIONS FOR MARCH 2006 (2006), http://trac.syr.edu/tracreports/bulletins/immigration/monthlymay06/.

[110] *Fugitive Operations Team Added to ICE*, 83 No. 31 INTERPRETER RELEASES 1754, 1755 (2006). In March 2007, the Department of Homeland Security's Office of the Inspector General issued a report critical of ICE's National Fugitive Operations Program. The report noted that ICE's Office of Detention and Removal had allocated $204 million to these fugitive operations teams, but that the apprehensions reported by the Office of Detention and Removal did not accurately reflect the efforts of these teams; that the backlog of "fugitives" had actually increased during the three years of their operation; that the rate of fugitive removal could not be determined, and that the fugitive operations teams were being used for duties unrelated to fugitive operations, contrary to their mandate. DEP'T OF HOMELAND SECURITY, OFFICE OF THE INSPECTOR GENERAL, AN ASSESSMENT OF UNITED STATES CUSTOMS AND ENFORCEMENT FUGITIVE OPERATIONS TEAMS 1 (2007), *available at* http://www.dhs.gov/xoig/assets/mgmtrpts/OIG_07-34_Mar07.pdf.

[111] *Fugitive Operations Team Added to* ICE, *supra* note 110.

[112] *Id.*

[113] *Id.*

[114] Daren Briscoe, *Return to Sender*, NEWSWEEK, July 24, 2006, at 34, *available at* LEXIS, News Library, NWEEK File (describing Operation Return to Sender, and noting "all too often, the ICE teams left without their man. In many of those cases . . . whoever was unlucky enough to answer the door would get hauled away instead.")

ominous label of "fugitive aliens" justifies the use of heavy-handed search tactics against countless immigrants, regardless of their legal status.[115]

In short, the 1996 laws have expanded the category of criminal aliens in a way that sweeps in many non-citizens formerly ineligible for removal or at least eligible for relief from removal. At the same time, the increased prosecution of immigration offenses has created a whole new class of immigrants legally constructed as criminals. Non-citizens whose only legal violation is unauthorized presence are increasingly caught in the web of immigration enforcement initiatives styles as anti-crime measures.

It is hardly surprising that these changes in the law have shored up the popular construction of immigrants as criminal threats. Over the past decade, images of migrant criminality have persisted and proliferated.

4. *The Modern Myth of Migrant Criminality*

Two years after the passage of AEDPA and IIRIRA, the Justice Department claimed that the massive increase in deportations of "illegal immigrants" over the past year helped to account for the decline in the national crime rates.[116] No efforts were made to substantiate the linkage between decreased crimes and the removal of non-citizens. Nationally, immigration enforcement officials also proclaimed the links between crime and immigration. In a press interview in 1997, Roger Piper, former head of the local Immigration and Naturalization Service Office in Indiana, stated:

> As the illegal-alien population increases, it brings other society problems. As you establish an enclave of illegal immigrants in a community, it establishes a beacon for people who don't have the same work ethic. In terms of illegal alien gang activity, it provides a cover for them to hide.[117]

This implicit acceptance of the link between criminality and alien status has only become more pronounced in recent years. In his address to the nation on May 15, 2006, President George W. Bush reasserted the link, with the claim that "[i]llegal immigration puts pressure on public schools

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[115] *See, e.g.*, Nina Bernstein, *U.S. Raid on Immigrant Household Deepens Anger and Mistrust on L.I.*, N.Y. TIMES, Apr. 10, 2007 at B1, *available at* LEXIS, News Library, NYT File.

[116] *See, e.g.*, Rick Orlov, *Deportations Cutting Crime, Authorities Say*, DAILY NEWS OF L.A., Oct. 31, 1997, at N3, *available at* LEXIS, News Library, LAD File (reporting that "[t]he Immigration and Naturalization Service deported 111,793 illegal immigrants last year, nearly half of them from California, in a move federal officials credited with cutting crime across the nation"); Jerry Seper, *Reno Claims Record for Yearly Deportations*, WASH. TIMES, Oct. 31, 1997, at A8, *available at* LEXIS, News Library, WTIMES File.

[117] Julie Goldsmith, *Indiana's Illegal Population Might Be Booming. Though Official Counts Often Miss Aliens, their Presence Can Be Felt in Seasonal Job Force, Social Programs*, INDIANAPOLIS STAR, Mar. 23, 1997.

and hospitals, it strains state and local budgets, *and brings crime to our communities*."[118] Comments by local law enforcement officers reinforce the linkage between crime and migration.[119]

This conflation of migrants and criminality is rampant in the media. Through commentator Lou Dobbs, CNN has become an important mouthpiece for the articulation of the view that migrants are criminals. In May 2006, on *The Situation Room*, he accused the Mexican government of "creating a crime wave in point of fact in certain parts of this country."[120] This terrain is not reserved for extremists. In an argument in favor of immigration reform, a *New York Times* columnist deployed the familiar, implicit argument. David Brooks wrote of a fictional working class (and presumably white) man in San Antonio:

> He's no racist. Many of his favorite neighbors are kind, neat and hard-working Latinos. But his neighborhood now has homes with five cars rotting in the front yard and 12 single men living in one house. Now there are loud parties until 2 a.m. and gang graffiti on the walls. He read in the local paper last week that Anglos are now a minority in Texas and wonders if anybody is in charge of this social experiment . . . .
>
> . . . [R]ight now immigration chaos is spreading a subculture of criminality across America. What we can do is re-establish law and order, so immigrants can bring their energy to this country without destroying the social fabric while they're here.[121]

Brooks would certainly see himself as "no racist,"[122] and his column was actually a call for thoughtful immigration reform. But his words

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[118] President George W. Bush, Address to the Nation on Immigration Reform (May 15, 2006), *available at* http://www.whitehouse.gov/news/releases/2006/05/20060515-8.html (emphasis added).

[119] *See*, *e.g.*, John Leland, *Meth Users, Attuned to Detail, Add Another Habit: ID Theft*, N.Y. TIMES, July 11, 2006, at A1, *available at* LEXIS, News Library, NYT File (quoting a prosecutor from Denver as saying "'[l]ook at the states that have the highest rates of identity theft—Arizona, Nevada, California, Texas and Colorado . . . . The two things they all have in common are illegal immigration and meth.'"). Although the prosecutor's comments were used in a story linking meth use to identity theft, the comment introduced a new, unrelated issue—illegal immigration—in a way that appears to link all three phenomena without hard data.

[120] *See* Eviatar, *supra* note 68, at 24–25. Daphne Evitiar's article provides a disturbing analysis of Dobbs's distortions of facts, his reliance on racist organizations for information, and his general failure to provide balanced coverage. *Id.*

[121] Brooks, *supra* note 50.

[122] In March 2006, he wrote in glowing terms about the morally sound lifestyles of immigrants from Mexico and Latin America, urging social conservatives to embrace the Latino immigrants whom he sees as sharing their values. *See* David Brooks, *Immigrants to be Proud of*, N.Y. TIMES, Mar. 30, 2006, at A25, *available at* LEXIS, News Library, NYT File (stating that "the immigrants themselves are like a booster shot of traditional morality injected into the body politic").

reveal how easily depictions of immigrants slide into depictions of criminals. Living in close quarters[123] and having boisterous parties does not a criminal make, and since it is unclear even in Brooks's fictionalized account which "walls" contain graffiti, and who was responsible for it, it is hard to know whether the graffiti in fact constitutes a crime committed by the fictitious non-citizens. Yet Brooks leaps effortlessly into declaring the rise of a "subculture of criminality" across America. His leap is no doubt assisted—perhaps unconsciously—by the relentless drum beat of rhetoric that equates immigrant status—and "illegal immigrant" status in particular—with criminality. This view logically presents immigration control as a means of controlling crime. But the underlying premise of migrant criminality is flawed, and efforts to control crime through accelerating deportations are unlikely to succeed in controlling either crime or undocumented migration.[124]

### B. *The Alien as National Security Threat*

Like the conflation of migrant status and criminality, the linkages between immigration status and national security threats have deep historical roots that have been reinforced through law.[125] In wartime and other times of national security crises, whether real or perceived, the nation's leaders have used the rhetoric of security to justify heightened immigration restrictions.[126] During times of peace, however, those favoring immigration restrictions have tended to focus on economic or cultural concerns.[127] September 11, 2001, signaled the beginning of a new era of crisis in the United States, and once again, national security became the touchstone of immigration reform rhetoric.

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[123] Many immigrants live in close quarters because the jobs created by their middle class customers for services like construction, domestic work, landscaping and the like draws them into areas where their wages will not otherwise allow them to pay the rent. *See, e.g.*, Christopher Caldwell, *A Family or a Crowd?*, N.Y. TIMES, Feb. 26, 2006, § 6 (Mag.) at 9, *available at* LEXIS, News Library, NYT File (Latino immigrants "crowd into these houses at least partly because they cannot afford to do anything else. There are now entire regions of the country—including parts of Northern Virginia—where there is no affordable traditional housing for those who work at, or near, the minimum wage."); Ford Fessendan, *The New Crossroad of the World*, N.Y. TIMES, Aug. 27, 2006, at 14CN, *available at* LEXIS, News Library, NYT File (noting same trend in suburbs of New York).

[124] *See infra* Part IV.A.1.

[125] *See supra* notes 13–20 and accompanying text (discussing the Chinese Exclusion Case).

[126] *See* COLE, *supra* note 21, at 85–129; JOHNSON, *supra* note 21, at 20–21.

[127] The "repatriation" of Mexicans, including U.S. citizens of Mexican descent, during the Great Depression provides a clear example of how "immigrants" become scapegoats in times of economic crisis. *See* Kevin R. Johnson, *The Forgotten "Repatriation" of Persons of Mexican Ancestry and Lessons for the War on Terror*, 26 PACE L. REV. 1, 2–3 (2005) ("In a time of severe national economic crisis, the deportation campaign sought to save jobs for true 'Americans' and reduce the welfare roles by encouraging Mexicans to 'voluntarily' leave the country . . . . A discrete and insular minority, the most available and vulnerable target, suffered from the government's policy choice."); *see also* NGAI, *supra* note 32, at 72–73 (discussing Mexican "repatriation").

The groundwork for the post-September 11th rhetorical shift was laid in the 1990s. In 1994, President William Jefferson Clinton made comments epitomizing the deliberate lack of precision that has come to characterize immigration "security" issues. He explained that the militarization of the southern border was an effort to stop the "terrorization" of American citizens by foreigners stating, "[t]he simple fact is that we must not and we will not surrender our borders to those who wish to exploit our history of compassion and justice. We cannot . . . allow our people to be endangered by those who would enter our country to terrorize Americans . . . ."[128] President Clinton's remarks prefigured two trends that have taken firm hold in the period following September 11, 2001. First, his comments equate border control with the anti-crime agenda, thus implicitly relying upon the link between migrant status and criminality. This tendency was already a distinct feature of the American political and legislative landscape by the mid-1990s, and has only gathered strength over the past decade. Second, his comments depict migrant criminality as a "terrorist" threat. In so doing, he demonstrated political prescience; statements like these have become the norm in the contemporary immigration debate. Such statements were less common, however, in the mid-1990s. This is evident in the debates surrounding the enactment of AEDPA and IIRIRA, two bills that significantly altered the legal terrain of immigration law.

AEDPA was passed on April 24, 1996 in response to a terrorist act: the Oklahoma City bombings. That act was, ironically, carried out entirely by citizens. Some of the legislation had been intended as a response to the 1992 World Trade Center bombings, but it was the horror of the Oklahoma City bombings that spurred the bill to passage. Consequently, the focus of the legislation was upon curbing future threats of terrorism. The legislation contained prohibitions on international terrorist fundraising,[129] special removal procedures for "terrorist aliens,"[130] and modifications to federal criminal law and procedure to facilitate the penalization of predatory acts of terrorism.[131] AEDPA also contained provisions abrogating federal habeas corpus review.[132] While this measure had an impact on citizens, it disproportionately impacted non-citizens in removal

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[128] NEVINS, *supra* note 48, at 88–89 (quoting President William Jefferson Clinton, Press Conference, July 27, 1993); *see also* Thomas L. Friedman, *Clinton Seeks More Power to Stem Illegal Immigration*, N.Y. TIMES, July 28, 1993, *available at* LEXIS, News Library, NYT File.

[129] *See* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104–132, 110 Stat. 1215, at tit. III.

[130] *See id.* at tit. IV.

[131] *Id.* at tit. VII.

[132] *Id.* § 102 (a); *cf.* 142 CONG. REC. H3605, 3610 (1996) (statement of Representative Berman) ("Shame on those who invoke the names of innocents slaughtered in Oklahoma City and over the skies of Lockerbie in their quest to effectively abolish the writ of habeas corpus.").

proceedings because they lack procedural protections comparable to those in criminal proceedings.[133] In discussing the AEDPA legislation, enacted in April of 1996, lawmakers in Congress invoked the "terrorist" threats posed by non-citizens as a justification for the special removal provisions and expanded definitions of "terrorist aliens" contained in the legislation.[134] Speedier deportations thus figured as an anti-terrorism initiative.

In spite of the focus on terrorism, more general notions of the criminality of migrants did infect the AEDPA discussions. Abrogated removal procedures would apply not just to "terrorist aliens" but to "criminal aliens" more generally.[135] Members of Congress used crime and terrorism interchangeably in explaining the need for the expedite removal provisions.[136] Nevertheless, what is surprising is the degree to which broader immigration issues were not subsumed in the security legislation, but instead were debated and implemented under the rubric of separate legislation, primarily IIRIRA.

Given the fact that national security was the central concern of AEDPA, it is also striking that "border security" was not a part of that conversation. In fact, border militarization provisions were not a part of AEDPA at all. Instead, they were included as part of IIRIRA, legislation passed six months later, aimed primarily at redressing the perceived economic impact of migrants.[137] Furthermore, in the IIRIRA debates, members of Congress uniformly referred to these measures as "border control" rather than "border security" measures.[138]

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[133] *See infra* Part III.C.2 (contrasting criminal procedural protections with protections in removal proceedings).

[134] *See, e.g.*, 142 CONG. REC. H3605, 3608–09 (1996) (statement of Rep. Buyer) ("[M]embers of terrorist organizations can be denied entry into the United States; that is extremely important. An alien terrorist discovered in the United States can be deported expeditiously. Our silent proceedings will not be perverted to let international terrorists slip into our country, as happened with the mastermind of the World Trade Center bombing. Known terrorists [sic] organizations cannot take advantage of the generosity of American citizens to bankroll their heinous activities."); 142 CONG. REC. H3305, 3334 (1996) (Joint Explanatory Statement of the Committee of Conference) ("The need for special procedures to adjudicate deportation charges against alien terrorists is manifest.").

[135] *See* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104–132, § 442, 110 Stat. 1214, 1279–78.

[136] *See, e.g.*, 142 CONG. REC. H3605, H3617 (1996) (statement of Rep. Smith) ("Americans should not have to tolerate the presence of those who abuse both our immigration and criminal laws. S. 735 ensures that the forgotten Americans—the citizens who obey the law, pay their taxes, and seek to raise their children in safety—will be protected from the criminals and terrorists who prey on them."); *id.* at H3605–12 (statement of Rep. Hyde) (alternating discussions of the domestically-orchestrated Oklahoma City terrorist attack and "criminal aliens").

[137] Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104–208 §101, 110 Stat. 3009-553, 3009-553 through -54.

[138] *See, e.g.*, 142 CONG. REC. S11,503, S11,504–05 (1996) (statement of Sen. Hatch).

Similarly, aside from the "terrorist alien" provisions of AEDPA, the provisions expanding the categories of removable aliens were contained in the IIRIRA legislation, not in AEDPA. So while AEDPA focused on antiterrorism, IIRIRA and the welfare reform legislation passed in 1996 contained most of the immigration reform provisions focused upon general migration and crime issues.[139] IIRIRA expanded the "aggravated felony" definition to cover a number of low-level crimes,[140] increased penalties for a broad array of immigration-related offenses,[141] increased the bars to reentry,[142] mandated detention for certain non-citizens in removal proceedings,[143] and imposed restrictions on benefits available to non-citizens.[144] In short, general crime control and border control issues were sometimes interwoven with national security concerns in the AEDPA discussions, but were more generally subsumed by immigration policy debates that operated in a separate sphere from security discussions.[145]

Since September 11, 2001, the bulk of the immigration debate has centered itself around the term "national security." The term is deployed in a nebulous manner that blurs the boundary between freedom from crime—or personal "security"—and national security. As a consequence, the removals of non-citizens on the grounds of criminal violations can be, and frequently are, depicted as national security policy. With regard to border enforcement efforts, the phrase "border security" has become a ubiquitous descriptive term for immigration reform in 2006.[146] This is evidenced by the one piece of immigration legislation that Congress managed to pass in 2006: the Secure Fence Act.[147] In the 1996 debates, the notion of "border control" is not linked to discussions of national security, but of crime and immigration control. Retrospective descriptions of

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[139] Of course, some members of Congress still blurred issues of crime and terrorism. *See, e.g.*, 142 CONG. REC. H3605, H3608 (1996) (statement of Rep. Barr) ("[T]here is no clearer link, no stronger link, Mr. Speaker, between effective antiterrorism legislation and deterring criminal acts of violence in this country than habeas and death penalty reform."); *see also supra* note 136.

[140] IIRIRA § 321.

[141] *Id.* §§ 211–13.

[142] *Id.* §§ 301–08.

[143] *Id.* § 305 (a)(3).

[144] *Id.* §§ 501–10, 531, 551–53, 561–65, 571–77, 591–94.

[145] To be sure, IIRIRA did include some additional measures aimed at "terrorist aliens." These seem to be holdovers from the AEDPA discussion. *Id.* §§ 301(b), 342.

[146] A search of the *New York Times* database reveals that the term was never used in general discussions of immigration reform during the period from 1996–2001. In contrast, in the month of March 2006 alone, seventeen stories with references to "border security" appeared on the pages of the *New York Times*. A similar pattern unfolds in other major media outlets. In the *Los Angeles Times*, the term "border security" appears in twenty articles or editorials in March 2006. But between January 1996 and August 2001, the *Los Angeles Times* search engine turns up no story that contains both the terms "immigration" and "border security."

[147] Secure Fence Act of 2006, Pub. L. No. 109–367, 120 Stat. 2638.

IIRIRA refer to the bill as "border security" legislation,[148] using the term that has been the hallmark of the current immigration debate. Such descriptions are anachronistic; IIRIRA was an immigration and crime control measure, not a "border security" measure as that term has come to be understood. But these retrospective characterizations highlight the degree to which the separation between migration, crime, and national security issues has completely broken down over the past few years.

A quotation from CNN anchor Lou Dobbs, from his weekly commentary on May 17, 2006, illustrates the ways in which the contemporary immigration debate completely interweaves notions of alien criminality together with security concerns. Dobbs said

> Not only are millions of illegal aliens entering the United States each year across that border, but so are illegal drugs. More cocaine, heroin, methamphetamine and marijuana flood across the Mexican border than from any other place, more than three decades into the war on drugs. . . . If it is necessary to send 20,000 to 30,000 National Guard troops to the border with Mexico to preserve our national sovereignty and protect the American people from rampant drug trafficking, illegal immigration and the threat of terrorists, then I cannot imagine why this president and this Congress would hesitate to do so.[149]

The first part of Dobbs's statement shows remarkable continuity with the statements made by the supporters of Proposition 187 in the early 1990s.[150] Like those immigration restrictionists, he equates "illegal immigration" with crime, particularly drug crimes. He then does something that has become increasingly common in the post-September 11th era: he adds to the picture "the threat of terrorists."

The facile leap from criminality to terrorism is not confined to the media—it permeates the halls of Congress. When the House of Representatives held a hearing on the Senate proposal on July 27, 2006, that hearing was entitled "Whether the Attempted Implementation of Reid-Kennedy Will Result in an Administrative and National Security Nightmare."[151] At those hearings, Representative Hostettler (R-IN)

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[148] *See, e.g.*, Maura Reynolds, *Immigration Q&A*, L.A. TIMES, Mar. 31, 2006, at A9, *available at* LEXIS, News Library, LAT File ("The 1996 changes focused on enhancing border security, streamlining deportation procedures and decreasing social benefits to immigrants who entered illegally.").

[149] Lou Dobbs, *Bush Speech Satisfies Nobody*, CNN.COM, May 17, 2006, http://www.cnn.com/2006/US/05/17/dobbs.bushspeech/index.html (last visited May 31, 2007).

[150] *See supra* text accompanying notes 61–65.

[151] *House Judiciary Subcommittee Holds Second Hearing on Impact of S. 2611*, 83 INTERPRETER RELEASES 1688, 1688 (2006).

opposed the amnesty provisions of Senate Bill 2611 by noting that after the 1986 amnesty, 71,000 people with FBI rap sheets were naturalized and 10,800 of those individuals had prior felony arrests.[152] "Hostettler posited that because fraud is even more pervasive now and that the means to achieving it are much more sophisticated, then the amnesty process would be even more susceptible to letting terrorists legalize their status in the U.S."[153] While Hostettler's statement before the committee clearly made the leap from criminality to terrorism, that leap was highlighted even more pointedly in the testimony of Peter Gadiel. Gadiel testified in his capacity as a father of a victim of the September 11, 2001 terrorist attacks, not as an expert in immigration law and policy.[154] His presence and testimony underscore the blurring of crime and national security issues. Gadiel posited at the hearing that the passage of the Senate bill would result in "Americans being murdered and subjected to other horrific crimes committed by the dangerous illegal aliens who would be permitted to legally remain in the United States . . . ."[155] He also hypothesized that since a third of federal inmates are foreign born, U.S. citizens were already being victimized as a result of the last amnesty.[156]

On September 12, 2006, in his opening statements for the House Republican Border Security Forum, Speaker of the House Dennis Hastert (R-IL) also played up the link between immigrants, crime and terrorism. Hastert said

> The need for [border security] reforms should be obvious only a day removed from the fifth anniversary of September 11th, 2001, when 19 terrorists exploited and at least six violated our immigration laws to murder 3000 of our citizens. The war on terror and the porous state of our borders demand concrete action on behalf of homeland and national security. But this isn't just about grand schemes against us. Some of the illegals crossing our borders are gang members who cross to injure our citizens. This is a daily struggle in some towns.[157]

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[152] *Id.* at 1688–89.

[153] *Id.* at 1689.

[154] *Id.*

[155] *Id.*

[156] *Id.* Recent studies on crime and immigration call these graphic claims into doubt. *See infra* Part IV.A.1 (assessing evidence of migrant criminality); *see also* David Leonhardt, *Truth, Fiction and Lou Dobbs*, N.Y. TIMES, May 30, 2007, at C1, *available at* LEXIS, News Library, NYT File ("According to the Justice Department, 6 percent of prisoners in this country are noncitizens (compared with 7 percent of the population).").

[157] *Speaker Hastert's Opening Statement from House Republican Border Security Forum*, STATES NEWS SERV., Sept. 12, 2006, *available at* LEXIS, News Library, ALLNWS File.

Again, his words work merge concerns about general criminality and terrorism.

In each of these examples, the threat of terrorism becomes interchangeable with the threat of criminal activity as a justification for subjecting an increasing number of non-citizens to removal. This helps to explain why post-September 11th removal policy does not differ substantially from pre-September 11th removal policy. The removal of any and all immigrants is now seen as an adequate means of addressing "terrorism" because the rhetoric has evolved to conflate crime, terrorism and migrant status so completely. Unfortunately, this conflation plays out in policy as well as in rhetoric, and the consequences are troubling.

## III. RHETORIC V. REALITY: THE TRUTH ABOUT REMOVAL AND NATIONAL SECURITY

In 2004, ICE completed 202,842 removals of non-citizens from the United States.[158] Of those removed, 88,897 were classified as "criminal aliens."[159] A total of 1,241,089 foreign nationals were detained by the Department of Homeland Security (DHS) during the year 2004, although many of them "voluntarily departed" without further proceedings.[160] The year 2004 is not anomalous; it simply continues a significant upward trend in the detention and removal of non-citizens, which began in the mid-1990s and accelerated after 2001.[161] The removal of non-citizens has been the focus of a great deal of national attention and spending in post-September 11th efforts at achieving national security through immigration policy. In reality, however, current removal policies have almost nothing to do with national security.

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[158] MARY DOUGHERTY ET AL., U.S. DHS, IMMIGRATION ENFORCEMENT ACTIONS: 2004, at 1 (2005) *available at* http://www.uscis.gov/graphics/shared/statistics/publications/AnnualReportEnforcement 2004.pdf. The streamlined "expedited removal" process accounted for 41,752, or 21%, of these removals. *Id*. It is important to note that these statistics measure "events" not "individuals." *See id*. It is possible that some individuals are subject to removal proceedings or voluntary departure more than once in a given year.

[159] *Id.*

[160] *Id.* In the process of "voluntary departure," a non-citizen agrees that his or her entry was illegal, waives his or her right to a hearing and remains in custody until he or she is removed under supervision. *Id.* Many, but not all, of these voluntary departures occur shortly after entry. *Id.*

[161] By way of contrast, in 1993, only 42,452 non-citizens were removed. In 1996, this number was 69,317, after a series of relatively gradual increases. In 1997, the number ballooned to 114,060 removals. *See* U.S. DEP'T OF JUSTICE, IMMIGRATION AND NATURALIZATION SERVICE, 1997 STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE 166 (1999), *available at* http://www.dhs.gov/xlibrary/assets/statistics/yearbook/1997YB.pdf. The number has expanded steadily since that time. *See* OFFICE OF IMMIGRATION STATISTICS, U.S. DEP'T OF HOMELAND SECURITY, 2004 YEARBOOK OF IMMIGRATION STATISTICS 159 (2006), *available at* http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2004/Yearbook2004.pdf [hereinafter 2004 YEARBOOK OF IMMIGRATION STATISTICS].

### A. *Removal is Seldom a Security Tool*

U.S. law has long authorized the exclusion and deportation of non-citizens on security grounds,[162] and those exclusion and deportation provisions became a part of the Immigration and Nationality Act (INA) when it was enacted in 1952.[163] In 1990, Congress pruned these provisions,[164] which had become unwieldy, but the past decade has witnessed a remarkable expansion in the security-related exclusions of the INA. AEDPA, enacted in 1996, included a marked expansion in security-based removal provisions. Although the so-called "Antiterrorism and Effective Death Penalty Act" does not even reference immigration in its title, some of the most important "antiterrorism" provisions of the Act actually involved revisions to immigration law. AEDPA authorized the Secretary of State, in consultation with the Attorney General and the Secretary of the Treasury, to designate an organization as a "foreign terrorist organization . . . if the Secretary finds the following: (A) the organization is a foreign organization; (B) the organization engages in terrorist activity . . . ; and (C) the organization's terrorist activity threatens the security of United States nationals or the national security of the United States."[165] Members of such organizations are inadmissible[166] and deportable.[167]

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[162] The Alien Enemy Act of 1798 was the first such security provision, and it remains a part of the law today. 50 U.S.C. §§ 21–24 (2000); *see* Gregory Sidak, *War, Liberty, and Enemy Aliens*, 67 N.Y.U. L. REV. 1402, 1402 & n.2 (1992). The Act applies only where a formal declaration of war has occurred. *Id.* at 1405. But in such circumstances, it authorizes President "to arrest, detain, and deport enemy aliens according to rules of his own making—subject . . . to virtually no check from the courts through judicial review." *Id.* at 1408. The Alien Act of 1798 also bestowed the government with the power to penalize non-citizens for their political opinions, but that unpopular provision expired in 1800, two years after its enactment. An Act Concerning Aliens, ch. 58, 1 Stat. 570 (1798).

In 1903, Congress enacted a statute excluding anarchists and others who "believe in or advocate" the forceful overthrow of the U.S. government. An Act to Regulate the Immigration of Aliens into the United States, ch. 1012, §§ 2, 38, 32 Stat. 1213, 1214, 1221 (1903). Further political exclusions were enacted in 1920. *See* Act of June 5, 1920, ch. 251, 41 Stat. 1008, 1009 (allowing the removal of non-citizens who published advocacy of certain prohibited acts, or who joined organizations that engaged in such publications). Such exclusions were again enacted during the McCarthy era. Subversive Activities Control Act of 1950, ch. 1024, § 22, 64 Stat 987, 1006 (excluding Communist Party members).

[163] Immigration and Nationality Act of 1952, Pub. L. No. 82-414, §§ 212(a)(28)–(29), 66 Stat. 163 (containing a long list of prohibitions including anarchists, Communist Party members, and as well as those deemed likely to engage in espionage, sabotage or subversion); *see also* LEGOMSKY, *supra* note 27, at 427–28.

[164] The Immigration Act of 1990, Pub. L. No. 101-649, §602, 104 Stat. 4978, 5077–82; *see also* CHARLES GORDON ET AL., IMMIGRATION LAW AND PROCEDURE § 2.04[11] (2006) (discussing various provisions of the Act).

[165] 8 U.S.C. § 1189(a)(1) (2000).

[166] *Id.* § 1182(a)(3) (2000).

[167] *Id.* § 1225(c) (2000).

In the wake of September 11, 2001, Congress enacted several notable changes to the law governing the removal of those non-citizens identified as a threat to security. The USA PATRIOT Act[168] retroactively amended the INA, expanding the reach of the terrorism definition to render removable "aliens" who provided "material support" for terrorism.[169] This includes support to organizations that are not designated as terrorist organizations in the INA or through publication in the Federal Register, so long as the organization is deemed to have engaged in "terrorist activity."[170] "Terrorist activity," in turn, includes actions involving the use of any "dangerous device" (not just explosives and firearms) for anything other than "mere personal monetary gain."[171]

The REAL ID Act broadened the definition of "terrorist organization" to include "a group of two or more people, whether organized or not, which engages in, or has a subgroup which engages in," any form of terrorist activity.[172] Although these provisions are purportedly security related, their impact on security is dubious. The definitions sweep so broadly that they can clearly encompass not just "terrorism," but general criminal acts. These expanded provisions imbue immigration enforcement agencies with tremendous discretion, but they do not necessarily provide a more effective tool for identifying and removing people who might engage in acts of terrorism.

In addition, the expansive provisions have had a demonstrably negative effect on U.S. admission policy. First, they have resulted in a distortion of U.S. asylum policy. The United States currently is excluding thousands of refugees who are victims of terrorism because many refugees fled after being forced to give food, shelter or other support to armed or terrorist groups or authoritarian regimes that qualify as "terrorist organizations" under the law.[173] Ironically, the law bars them from admission for precisely the same reason that they are seeking refugee status.[174] Second, it appears that the "material support" exclusion is being

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[168] Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT Act), Pub. L. No. 107-56, 115 Stat. 272 (2001) (codified as amended in scattered sections of 5A, 8, 10, 12, 15, 18, 18A, 20, 22, 28, 42, 47, 49 U.S.C.).

[169] *Id.* § 376.

[170] *Id.* § 411.

[171] *Id.*

[172] REAL ID Act of 2005, Pub. L. No. 109-13, § 103, 119 Stat. 302, 308 (codified as amended at 8 U.S.C. § 1103).

[173] Susan Benesch & Devon Chaffee, *The Ever-Expanding Material Support Bar: An Unjust Obstacle for Refugees and Asylum Seekers*, 83 INTERPRETER RELEASES 465, 465–66 (2006).

[174] *Id.*; *see also* HUMAN RIGHTS FIRST, ABANDONING THE PERSECUTED: VICTIMS OF TERRORISM AND OPPRESSION BARRED FROM ASYLUM (2006), *available at* http://www.humanrightsfirst.info/pdf/06925-asy-abandon-persecuted.pdf; *Terrorist Support Exception Made For Karen Refugees*, 83 INTERPRETER RELEASES 921, 930–31 (2006) (discussing the expansion of the definitions of terrorist activity and terrorist organization under the REAL ID Act); THE IMMIGRATION AND REFUGEE CLINIC & INT'L HUMAN RIGHTS CLINIC, HUMAN RIGHTS PROGRAM, HARV. L. SCHOOL, PRELIMINARY

used as a justification for refusing entry on ideological grounds. According to documents released pursuant to a Freedom of Information Act request, anyone who is guilty of "irresponsible expressions of opinion" can be refused entry under this provision.[175]

> In this climate, the American Civil Liberties Union reports, the government has recently denied, delayed, or revoked visas to a group of seventy-five South Korean farmers and trade unionists opposed to a free-trade agreement; a Marxist Greek academic; a Sri Lankan hip-hop singer, whose lyrics were deemed sympathetic to the Tamil Tigers and the Palestine Liberation Organization; a Bolivian professor of Latin-American history who had been offered a position at the University of Nebraska; a Basque historian; a former Sandanista minister of health; and nine thousand five hundred Burmese refugees.[176]

Have these expanded bars made us more secure? A recent report from the Government Accounting Office suggests this is highly unlikely.[177]

While the government is zealously applying the terrorism bars to those seeking lawful admission, the same cannot be said for the government's use of the terrorism deportation provisions. The expanded terrorism bars apply to those who have already been admitted to the United States.[178] If

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FINDINGS AND CONCLUSIONS ON THE MATERIAL SUPPORT FOR TERRORISM BAR AS APPLIED TO THE OVERSEAS RESETTLEMENT OF REFUGEES FROM BURMA (2006), *available at* http://www.humanrightsfirst.org/pdf/06619-asy-mat-sup-terr-bar-study.pdf (criticizing the current U.S. policy towards refugees).

Shortly before this Article went to press, the Secretary of the Department of Homeland Security, Michael Chertoff, issued a regulation providing a duress exception to the material support bar. 72 Fed. Reg. 26,138–39 (May 8, 2007). It remains to be seen how this exception will be applied. The government has been far from generous in its application of previous categorical waivers of the material support provision. *See* Press Release, Human Rights First, HRF: Congress Must Fix "Material Support" Laws, Stop Treating Victims Like Terrorists (May 2, 2007), *available at* http://www.humanrightsfirst.org/media/asy/2007/statement/333/index.htm (responding to Secretary Chertoff's April 27, 2007 Memorandum).

[175] George Packer, *Comment: Keep Out*, THE NEW YORKER, Oct. 16, 2006, at 59, *available at* http://www.newyorker.com/printables/talk/061016ta_talk_packer (discussing the exclusion of Swiss-Egyptian scholar Tariq Ramadan, who had been offered a teaching position at Notre Dame, on the basis of his $770 in donations between 1998 and 2002 to a pro-Palestinian French charity that subsequently was added to the State Department's list of designated terrorist organizations in 2003 on suspicions that the organization channeled money to Hamas).

[176] *Id.* at 59–60.

[177] *Border Security: Continued Weaknesses in Screening Entrants into the United States, Testimony before the S. Comm. on Finance*, 109th Cong. 7–8 (2006) (statement of Gregory D. Kutz, Managing Director, Forensic Audits and Special Investigations), *available at* http://www.gao.gov/docdblite/summary.php?rptno=GAO-06-976T&accno=A57869 (concluding that CBP officials are unable to effectively screen entrants at border crossings, and that "[t]his vulnerability potentially allows terrorists or other individuals involved in criminal activity to pass freely into the United States from Canada or Mexico with little or no chance of being detected.").

[178] *See* 8 U.S.C. § 1227(a)(4)(B).

the deportation of non-citizens is functioning as a security measure in the post-September 11th era, one would expect the number of non-citizens deported on security grounds to be increasing. Paradoxically, the number of immigrants removed on security and terrorism grounds has contracted over the past decade, even as the categories of individuals subject to security-related removal were expanding. In the early 1990s, removals on security grounds numbered approximately fifty or more each year.[179] After the enactment of AEDPA and IIRIRA, these numbers dropped drastically, so by 1999, there were only ten.[180] This seems counterintuitive, given the significant expansion of these provisions. Furthermore, given the rhetoric linking non-citizens with security threats in the wake of September 11, 2001, it seems almost intuitive that after September 11th, there would be a spike in security-related removals. But there is no such spike.

Of the 208,521 people removed in 2005,[181] only ten were removed on security grounds.[182] This is consistent with the pattern of the past five years.[183] In spite of the fact that security-based removals have decreased since September 11, 2001, ICE persists in presenting ever-widening deportation initiatives as directly related to national security.[184] As a

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[179] OFFICE OF IMMIGRATION STATISTICS, U.S. DEP'T OF HOMELAND SECURITY 2003 YEARBOOK OF IMMIGRATION STATISTICS 160 (2004), *available at* http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2003/2003Yearbook.pdf [hereinafter 2003 YEARBOOK OF IMMIGRATION STATISTICS].

[180] *Id.*

[181] OFFICE OF IMMIGRATION STATISTICS, U.S. DEP'T OF HOMELAND SECURITY, 2005 YEARBOOK OF IMMIGRATION STATISTICS 95 (2006), *available at* http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2005/OIS_2005_Yearbook.pdf [hereinafter 2005 YEARBOOK OF IMMIGRATION STATISTICS].

[182] *Id.* at 96.

[183] *Id.* at 95, 96.

[184] *See, e.g.*, *Priorities in Enforcing Immigration Laws and Temporary Worker Program: Hearing Before the Subcomm. on Homeland Security of the H. Appropriations Comm.*, 109th Cong. 12–13 (2007) (statement of Julie L. Meyers, Asst. Sec., U.S. Customs and Immigration Enforcement), *available at* http://www.ice.gov/doclib/pi/news/testimonies/070327budget.pdf (discussing the CAP program, aimed at removing non-citizens with criminal convictions, as "play[ing] a key role in protecting national security by identifying and removing security threats within the incarcerated alien population"); U.S. Immigration & Customs Enforcement, Public Information: National Fugitive Operations Program (Sept. 26, 2006), http://www.ice.gov/pi/dro/nfop.htm (explaining the initiative to deport non-citizens with outstanding removal orders as undertaken "pursuant to the war on terrorism"); U.S. Immigration & Customs Enforcement, Public Information: Operation Community Shield (May 1, 2006), http://www.ice.gov/pi/investigations/comshield/index.htm) (discussing the removal of street gang members who pose "a concern to national security"); U.S. Immigration & Customs Enforcement, Public Information: Secure Border Initiative (Apr. 17, 2006), http://www.ice.gov/pi/topics/immref/index.htm (discussing, inter alia, worksite immigration enforcement as part of "an effort to tackle the serious threat to national security posed when illegal immigrants cross our borders"). The tendency to characterize all removal as a "national security" measure is captured nicely in many of ICE's press releases. *See, e.g.*, News Releases, ICE, ICE Fugitive Operations Teams arrest 217 immigration violators—37 criminal aliens apprehended during statewide enforcement operation, (May 1, 2007), *available at* http://www.ice.gov/pi/news/newsreleases/articles/070501newark.htm ("For ICE, removing criminal and fugitive aliens from our streets and neighborhoods is a agency-wide initiative that improves our national security . . . ."). As ICE has characterized the matter, removal in and of itself

factual matter, in cases where the government actually has evidence that non-citizens—including undocumented non-citizens—pose a genuine security risk to the United States, the government generally prosecutes these non-citizens in criminal proceedings rather than remove them on the grounds of their immigration violations.[185] Removal, on the other hand, is primarily used by the government in cases involving non-citizens who have committed immigration violations or removable criminal offenses.[186] In other words, removal is a tool reserved for those who do *not* pose serious national security risks. Consequently, there is little alignment between the government rhetoric surrounding removal and the government's actual policies. The remainder of this section explores some of the consequences of the misalignment of rhetoric and reality.

### B. *Security as Pretext for Removals: Some Examples*

Before examining the legal consequences that follow when the rhetoric of security is offered as a blanket justification for all immigration enforcement efforts, it is worth examining some instances where the government has actually characterized its immigration enforcement efforts as relating to national security. A recent example unfolded during the investigation and prosecution of Hamid and Umer Hayat of Lodi, California. The government brought to trial Hamid Hayat, a U.S. citizen, for providing material support to terrorists based on his allegedly having attending an al Qaeda training camp. Both he and his citizen father, Umer Hayat, were tried on charges of lying to the FBI about Hamid Hayat's activities. Long before his trial began, however, three non-citizens—Ahmed Khan, Mohammed Adil Khan and Sabbir Ahmed—were detained on the basis of technical violations of their visas and were subsequently

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constitutes a national security measure, regardless of whether any of the individuals removed pose a risk to "national security."

[185] *See, e.g.*, United States v. Dritan Duka, No. 07-M-2046 (D.N.J. filed May 7, 2007) (charging non-citizen in plot to attack Fort Dix); United States v. Eljvir Duka, No. 07-M-2047 (JS) (D.N.J. filed May 7, 2007) (same); United States v. Shain Duka, No. 07-M-2048 (JS) (D.N.J. filed May 7, 2007) (same); *Foiled Plots in U.S. Since Sept. 11*, May 8, 2007, ASSOCIATED PRESS, *available at* http://www.nytimes.com/aponline/us/AP-Fort-Dix-Other-Plots.html (discussing, inter alia, the criminal prosecution of Shahawar Matin Siraj, a Pakistani citizen, in connection with an alleged plot to blow up a New York City subway station); Jerry Markon & Mary Beth Sheridan, *Indictment Expands "Virginia Jihad" Charges*, WASH. POST, Sept. 26, 2003 at B1, *available at* LEXIS, News Library, WPOST File (discussing criminal indictment of eleven men—including two non-citizens—for alleged terrorist designs); Scott Shane & Andrea Zarate, *F.B.I. Killed Plot in Talking Stages, A Top Aid Says*, N.Y. TIMES, June 24, 2006 at A1, *available at* LEXIS, News Library, NYT File (discussing criminal indictment of seven men—including one documented and one undocumented immigrant—in a plot to attack the Sears tower and attack FBI headquarters in Miami).

[186] *See infra* notes 263–69 and accompanying text.

allowed to "voluntarily" return to their home country, Pakistan.[187] Voluntary departure in such cases is often a coerced choice, and the degree to which these particular departures were truly voluntary is certainly questionable. As Professor Kevin R. Johnson noted in commenting on Sabbir Ahmed's departure, "to call it 'voluntary' deportation is a stretch . . . . The alternative is indefinite detention until you exhaust your appeals, and that could take years."[188]

The trial of Umer and Hamid Hayat only highlighted the question of whether the voluntary departure of their compatriots served security goals. The government's case against Umer and Hamid Hayat was assessed to have been weaker than expected.[189] A jury ultimately did convict Hamid Hayat of providing material support to terrorists by participating in training at an al Qaeda training facility, but a jury deadlocked on the question of Umer Hayat's guilt.[190] But more importantly, over time, the facts contradicted the government's premature but pervasive descriptions of a widespread ring of terrorists in Lodi. Indeed, the Mayor of Lodi, Susan Hitchcock, recently stated: "I think people have gone, '[o]h, it turned out not to be a big deal. It turned out not to be a terrorist cell'. . . . I think as people have learned more about it, they've figured out it's not another 9-11 here in our midst."[191]

Mayor Hitchcock's words starkly contrast with the government's earlier characterization of what was happening in Lodi. As an initial matter, the government had characterized the investigation leading to the Hayat case as a "wide-ranging investigation into terrorism activities at the center of the Lodi area."[192] President Bush said the arrests made in connection with that investigation were part of the government's effort to

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[187] Dorothy Korber, *Lodi Man Agrees to be Deported in Terror Probe*, SACRAMENTO BEE, at A1 (Aug. 16, 2005), *available at* http://www.rantburg.com/poparticle.php?ID=126943&D=2005-08-16&SO=&HC=1; *see also* Dorothy Korber, *Deportation Strategy is Questioned*, SACRAMENTO BEE, at A1 (Aug. 21, 2005), *available at* http://www.lodi411.com/al-qaeda05.htm; Miriam Jordon, *New Rules at the Border*, WALL STREET J., Feb. 21, 2006, at B1, *available at* LEXIS, News Library, WSJNL File (discussing voluntary departure as an important component of the government's expanded expedited removal strategy, and noting that many people so removed make an effort to return).

[188] Korber, *Deportation Strategy is Questioned*, *supra* note 187.

[189] Associated Press, *California Residents: No Sign of Terror Cell*, CBSNEWS.COM, Apr. 15, 2006, *available at* http://www.cbsnews.com/stories/2006/04/15/ap/national/printableD8H0J8Q00.shtml.

[190] Denny Walsh, *A New Hayat Jury Issue: The Foreman Contacted an Alternate Juror During a Dispute in Hamit Hayat's Terror Trial, the Judge Reveals*, SACRAMENTO BEE, May 4, 2006, at B1, *available at* 2006 WLNR 7693431. As the title of the article indicates, even Hamid Hayat's conviction is now under scrutiny as the result of alleged jury misconduct. *Id.*

[191] Associated Press, *supra* note 189. Neither President Bush nor other high-ranking officials have made statements to counteract the suspicion and fear created by their initial reaction to the Lodi investigation. *Id.* For a recent discussion of the negative impact the case has had on the Lodi Pakistani community see Neil MacFarquhar, *Echoes of Terror Case Haunt California Pakistanis*, N.Y. TIMES, Apr. 27, 2007, at A1, *available at* LEXIS, News Library, NYT File.

[192] Rone Tempest, *Lodi Man Indicted in Alleged Terrorism*, L.A. TIMES, Sept. 23, 2005, at B3, *available at* LEXIS, News Library, LAT File.

"bust up these terrorist networks."[193] This language, and the fact that the neighborhood in question has a significant Pakistani immigrant community, fed popular notions that the security threat posed by this community was rampant. Yet the FBI has acknowledged that their investigative effort to connect the Hayats to a broader scheme in the Lodi Muslim community to send money to terrorist groups abroad has yielded no evidence of such a scheme.[194]

Thus, while government officials sought to characterize the security threat posed by the immigrant community in Lodi as substantial and "wide-ranging," only one citizen actor was ultimately convicted on terrorism related charges, for actions that in no way implicated other members of his community. Meanwhile, the principal means of dealing with non-citizens who allegedly presented related security threats was to negotiate their "voluntary departure."[195] This allowed the government to avoid proving that the departing men were a threat. The government was able to achieve its goal of taking action against purported security threats much more quickly in immigration proceedings: thus, three individuals were subject to the possibility of detention for an indefinite length, and ultimately agreed to leave the country, before the criminal trial for the Hayats had even begun. The fact that the government was willing to allow these men out of U.S. government control seems to belie the severity of the threat they posed.[196]

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[193] Associated Press, *supra* note 189.

[194] *Id*.

[195] The Hayat case recently took another strange turn, with the government denying reentry to two U.S. citizen relatives of Umer and Hamid Hayat when those relatives sought to return from a lengthy trip to Pakistan. *See* Randal C. Archibold, *U.S. Blocks Men's Return to California from Pakistan*, N.Y. TIMES, Aug. 29, 2006, at A17, *available at* LEXIS, News Library, NYT File. The men were ultimately admitted, after an inexplicable five month delay. Randal C. Archibold, *Wait Ends for Father and Son Exiled by F.B.I. Terror Inquiry*, N.Y. TIMES, Oct. 2, 2006, at A10, *available at* LEXIS, News Library, NYT File.

[196] Since "voluntary departure" assumes that the non-citizen will depart on their own accord, there is no blanket policy for coordination between the U.S. government and the receiving state when an individual voluntarily departs. ICE's own releases illustrate that individuals granted "voluntary departure" sometimes do not even leave the country. *See*, *e.g.*, News Release, U.S. Immigration and Customs Enforcement, DHS Agents Arrest Two More Suspected MS-13 Gang Members (Aug. 23, 2005), *available at* http://www.ice.gov/pi/news/newsreleases/articles/050823corpuschristi.htm (noting that one of the arrestees had been granted voluntary departure on July 17, 2005 but was arrested in the United States on Aug. 23, 2005). Although the U.S. government may be more vigilant in monitoring the voluntary departures of those non-citizens that they treat as security risks, the lack of a coordinated policy makes voluntary departure a questionable means of dealing with anyone who genuinely poses a national security threat. *See also* U.S. DEP'T OF JUSTICE, OFFICE OF THE INSPECTOR GENERAL, VOLUNTARY DEPARTURE: INEFFECTIVE ENFORCEMENT AND LACK OF SUFFICIENT CONTROLS HAMPER THE PROCESS (1999), *available at* http://www.usdoj.gov/oig/reports/INS/e9909/index.htm (criticizing the inefficacies of the voluntary departure program under ICE's predecessor agency, the Immigration and Naturalization Service (INS)). No more recent reports exist to suggest that the situation has improved.

The Hayat case provides a good example of how the government relies on immigration detention and enforcement to effectuate removal or "voluntary deportation" where no actual threat to security has been demonstrated. It is not an isolated example. The themes from the Lodi case have unfolded time and again in the wake of September 11, 2001.[197] In the weeks that followed the September 11th attacks, the government initiated a broad investigation that led to the arrest and detention of more than 760 people, mostly of Middle Eastern and South Asian origin.[198] Rather than initiating criminal prosecutions against these individuals—painted as potential terrorists—the government held the detainees (and ultimately expelled several hundred of them) on immigration violations.[199] The government took advantage of expansive powers to detain non-citizens. Many decried the use of massive preventative detention in these cases, where there was apparently no evidence that the vast majority of detainees had anything to do with the events of September 11th.[200]

Some government officials rejected the term "preventative detention" in describing these cases, characterizing them instead as "preventative prosecutions."[201] In other words, government officials suggested that they were actively "prosecuting" these immigrants, at least on immigration violations.[202] Their incarceration was not "preventative detention," the government argued, it was a valid, non-punitive, and administrative component of their removal proceedings.[203] Obviously, however, immigration-based detentions are not "prosecutions" in the traditional sense of U.S. criminal law. Non-citizen in removal proceedings are subject

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[197] *See* Nora V. Demleitner, *Misguided Prevention: The War on Terrorism as a War on Immigrant Offenders and Immigration Violators*, 40 CRIM. L. BULL. 2 (2004).

[198] HEINRICH BOLL FOUNDATION, THE AFTERMATH OF SEPTEMBER 11: NEW CHALLENGES FOR A EUROPEAN COMMON FOREIGN AND SECURITY POLICY 21 (2003), *available at* http://www.boell.de/downloads/europa/11_sept_aftermath_Brussels.pdf; Donald Kerwin, *Revisiting the Need for Appointed Counsel*, 4 MPI INSIGHT 1, 3 (2004), *available at* http://www.migrationpolicy.org/insight/Insight_Kerwin.pdf.

[199] Kerwin, *supra* note 198, at 3.

[200] *See* CHISHTI ET AL., *supra* note 8, at 153–55; COLE, *supra* note 21, at 22–47; HING, *supra* note 101, at 140–63; JOHNSON, *supra* note 21, at 82–85; Susan M. Akram & Kevin R. Johnson, *Race, Civil Rights, and Immigration Law After September 11, 2001: The Targeting of Arabs and Muslims*, 58 N.Y.U. ANN. SURV. AM. L. 295, 327–41 (2002); Raquel Aldana, *The September 11 Immigration Detentions and Unconstitutional Executive Legislation*, 29 S. ILL. U.L.J. 5, 11–13 (2004); Kerwin, *supra* note 198, at 3.

[201] *See* Kerwin, *supra* note 198, at 4 n.19 (citing Viet Dinh, former Associate Deputy Attorney General, Presentation at the Migration Policy Institute, Georgetown University Law Center, Catholic Legal Immigration Network, Inc., Annual Immigration Policy Conference (May 18, 2004)).

[202] *Id.*

[203] *Id.*; *see also* Demore v. Hyung Joon Kim, 538 U.S. 510, 539 (2003) (upholding the constitutionality of the INA's mandatory detention provision); Zadvydas v. Davis, 533 U.S. 678, 671 (2001) (also authorizing administrative detention that is incident to removal but placing limits on length of detention in cases where removal appears impossible); Wong Wing v. United States, 163 U.S. 228, 235 (1896) (authorizing administrative detention that is incident to removal).

to detention on a much lower standard of proof than would be required to detain an individual in connection with a criminal proceeding. While a valid arrest in a criminal proceeding frequently requires a valid warrant and always requires probable cause, "reasonable suspicion" is sufficient to allow for detention for suspected immigration violations.[204] Once subject to detention, those in removal proceedings do not have the same guarantee of access to judicial review or access to counsel provided to those in criminal proceedings.[205]

To the extent that "charges" were ever brought in any of these "prosecutions," they were charges of immigration violations—lapsed visas, failure to take the proper number of classes while on a student visa, or even failure to register a change of address—but not terrorism and not security threats.[206] The supposed wrongdoing used to publicly justify their detentions never translated into charges of terrorism. Many individuals "voluntarily" departed simply to get out of detention.[207] And "[a]lthough DOJ *explicitly* used removal proceedings as a proxy for terrorism prosecutions, the detainees, typically in closed proceedings, had no right to counsel."[208]

### C. *The Costs of the Security Pretext*

One might attempt to justify these "preventative prosecutions" in much the way that Robert F. Kennedy justified the use of tax violations to prosecute criminal syndicates who could not be caught in any other way.[209]

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[204] *See infra* Part III.C.2.

[205] *See* Kerwin, *supra* note 198, at 4.

[206] Teresa A. Miller, *Blurring the Boundaries Between Immigration and Crime Control After September 11th*, 25 B.C. THIRD WORLD L.J. 81, 88 (2005). One provision commonly used to remove non citizens is INA § 265, 8 U.S.C. § 1305 (2000) (amended by 8 C.F.R. § 265.1) (requiring all non-citizens remaining in the United States thirty days or more to report each change of address and new address to U.S. Citizenship and Immigration Services within ten days). Prior to September 11, 2001, this provision was largely ignored, but in the wake of September 11th, it became a common tool for detaining non-citizens.

[207] *See infra* note 188 and accompanying text (discussing voluntary departure); *see also* Richard J. Wilson & Jan Perlin, *The Inter-American Human Rights System: Activities from Late 2000 through October 2002*, 18 AM. U. INT'L L. REV. 651, 731–32 (noting petition filed with the Inter-American Human Court of Human Rights on behalf of individuals who had "voluntarily departed" after detention by the INS).

[208] Kerwin, *supra* note 198, at 4.

[209] Attorney General John Ashcroft at one time said, "[l]et the terrorists among us be warned: If you overstay your visa—even by one day—we will arrest you. If you violate a local law, you will be put in jail and kept in custody as long as possible." John Ashcroft, Attorney Gen., Prepared Remarks for the U.S. Mayors Conference (Oct. 25, 2001), *available at* http://www.usdoj.gov/archive/ag/speeches/2001/agcrisisremarks10_25.htm. David Cole has analogized Ashcroft's statement of his Department's intention to pretextually remove non-citizens to Robert F. Kennedy's threat to arrest mobsters for "spitting on the sidewalk." *See* COLE, *supra* note 21, at 22. My thanks to Professor Bruce Wolk for encouraging me to think more deeply about these parallels.

But the situations are not comparable for several reasons. First, in the case of criminal syndicates, the government had identified potential suspects based on apparent patterns of criminal activity prior to initiating investigation and prosecution of tax violations.[210] In the case of many individuals removed in the aftermath of September 11th, the primary means of identifying the targets of immigration investigation and detention were country of origin, race, ethnicity, and religion.[211] Thus, post-9/11 investigations presented a more invidious and wide-ranging exercise of prosecutorial discretion. Second, in tax evasion prosecutions, all of the standard criminal procedural protections applied. In the case of the "immigration violator," the individual is effectively accused of constituting a security threat, and is treated as such, but is subject to the much less protective standards of administrative removal.[212] Finally, in the case of criminal syndicates, the ultimate sanction—incarceration—achieved the same incapacitation effects as would have been achieved through prosecutions for other crimes. The same cannot be said in the case of those removed by the U.S. government or those who voluntarily depart because of immigration violations. Those individuals who pose security threats prior to removal are not prevented from future acts that pose a threat to security—their sphere of activity simply shifts.[213]

### 1. *Race, Religion and National Origin: Proxies for Danger*

In the wake of the September 11th attacks, Attorney General John Ashcroft used the power of his office to strengthen the ability of the government to rely on the crudest forms of criminal profiling. He issued Justice Department guidelines on racial profiling expressly authorizing ICE officials to engage in racial and ethnic profiling, which is formally prohibited in other federal law enforcement endeavors.[214] Even before

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[210] *See* Sam Nunn, *The Impact of the Senate Permanent Subcommittee on Investigations on Federal Policy*, 21 GA. L. REV. 17, 29–31 (1986) (describing the government's investigation into criminal syndicates and the subsequent use of tax violations to prosecute them).

[211] *See* Natsu Taylor Saito, *Asserting Plenary Power over the "Other:" Indians, Immigrants, Colonial Subjects, and Why U.S. Jurisprudence Needs to Incorporate International Law*, 20 YALE L. & POL'Y REV. 427, 447 (2002) (explaining how race, ethnicity, national origin, and religion continue to be used in immigration law to exclude "those perceived as "Other"); *see also infra* Part III.C.1.

[212] Tautologically, these protections have been cut back in order to confront security threats in the post-9/11 era. The need to cut back on such protections is fueled by the notion that non-citizens threaten security, yet the absence of those protections make non-citizens the most likely target group for security law enforcement, even if they do not necessarily pose the greatest threat. *See generally* COLE, *supra* note 21; *see also* discussion *infra* Part III.C.2.

[213] *See infra* Part III.C.3.

[214] U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., GUIDANCE REGARDING THE USE OF RACE BY FEDERAL LAW ENFORCEMENT AGENCIES (2003), *available at* http://www.usdoj.gov/crt/split/documents/guidance_on_race.htm. As Kevin R. Johnson observed, under the guidelines, "traditional law enforcement activities" cannot involve reliance on race, unless in response to actual reports that the perpetrator is of a particular race, whereas race can be considered to the full extent permitted by the

those regulatory changes, racial profiling had become an important component of the law enforcement response to September 11th.[215] However, in June 2003, with the passage of new guidelines on racial profiling, the Justice Department formally sanctioned the use of race in the context of "national security" investigations.[216]

As a legal matter, race-based immigration enforcement is sanctioned in a way that would never be permissible in the criminal context. The Supreme Court has often ratified the use of suspect classifications in the drafting and enforcement of immigration law.[217] Similarly, courts have long declined to examine the reasons that the government chooses to charge certain immigration violators and not others.[218] This trend has been reaffirmed in the post-September 11, 2001 era.[219] Consequently, non-citizens have had little recourse when race and ethnicity came to be treated as a proxy for danger.

### 2. *The Procedural Price of Pretextual Removal*

In spite of the breadth of power consigned to Congress to regulate immigration matters, courts have recognized that certain protections of the United States Constitution do apply to non-citizens in the United States. The Supreme Court's 1886 decision in *Yick Wo v. Hopkins*[220] marked the Court's first explicit ruling that some constitutional rights apply not only to citizens but to "aliens" physically present in the United States. The Court found that a city ordinance to prevent the operation of certain commercial laundries had been drafted and enforced to prevent non-citizens of Chinese descent from operating commercial laundries.[221] The Court therefore struck down the provision for violating the Equal Protection Clause and Due Process Clause of the Fourteenth Amendment, and in so doing, held

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U.S. Constitution and other federal laws for "national security and border integrity" activities. Kevin R. Johnson, *Racial Profiling after September 11: The Department of Justice's 2003 Guidelines*, 50 LOY. L. REV. 67, 82 (2004).

[215] *See* Akram & Johnson, *supra* note 200, at 351–55 (describing increased use of racial profiling by federal and state law enforcement agencies in response to the September 11th attacks).

[216] U.S. DEP'T OF JUSTICE, *supra* note 196.

[217] *See*, *e.g.*, *supra* notes 13–19 and accompanying text (discussing the Court's sanctioning the use of racial profiling of Chinese people in the name of national security in *Chae Chan Ping v. United States*, 130 U.S. 581 (1889)).

[218] *See*, *e.g.*, Reno v. Am.-Arab Anti-Discrimination Comm., 525 U.S. 471, 491–92 (1999) (determining that federal courts generally lack jurisdiction to decide claims of selective enforcement of immigration law, except in cases of "outrageous" discrimination).

[219] *See*, *e.g.*, Roudnahal v. Ridge, 310 F. Supp. 2d. 884, 891–92, 896 (N.D. Ohio 2003) (dismissing a lawsuit challenging "special registration" provisions of immigration law that applied only to Arabs and Muslims). *But see* CHISHTI ET AL., *supra* note 8, at 48–52 (2003) (noting that courts may now be more willing to apply heightened scrutiny where immigration laws and law enforcement discriminate against suspect classifications).

[220] Yick Wo v. Hopkins, 118 U.S. 356 (1886).

[221] *Id.* at 373–74.

that the protections of the Fourteenth Amendment applied to non-citizens within the borders of the United States.[222]

In cases decided after *Yick Wo*, the Supreme Court continued to apply not just the equal protection doctrine, but also the constitutional protections of due process to non-citizens.[223] In *Yamataya v. Fisher*,[224] the Supreme Court modulated the far-reaching terms of the holding in *Fong Yue Ting v. United States*,[225] which had ceded virtually boundless authority to Congress in the regulation of immigration.[226] Rather than concluding that Congress had unchecked authority to deport a non-citizen, the Supreme Court in *Yamataya* concluded that a non-citizen was entitled to due process in deportation proceedings.[227] However, Congress's plenary power to regulate immigration frequently comes into conflict with the due process rights of non-citizens, resulting in the abridgement of those rights.[228] In this regard, the holding in *Yamataya* is instructive. Yamataya claimed that she received only informal notice of her deportation hearing, that the results of the investigation of her case were "pretended," and that she understood neither the language of the proceeding nor the nature of the charges against her.[229] The Supreme Court accepted all of these claims but still found that the hearing had satisfied her right to due process.[230] The holding of the *Yamataya* case established the relevance of a due process

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[222] *Id.* at 369, 374. This is not to suggest that *Yick Wo* signaled a meaningful civil rights breakthrough for racial minorities. Professor Thomas Wuil Joo has persuasively argued that "the Chinese rights jurisprudence culminating in *Yick Wo* was possible only because the interests of Chinese aliens in fighting state discrimination converged with the interests of the federal judiciary in extending the Fourteenth Amendment to protect economic interests from state interference." Thomas Wuil Joo, *New "Conspiracy Theory" of the Fourteenth Amendment: Nineteenth Century Chinese Civil Rights Cases and the Development of Substantive Due Process Jurisprudence*, 29 U.S.F. L. REV. 353, 355 (1995).

[223] Nevertheless, the Court has been somewhat stingy in expanding due process rights for non-citizens. For examples of unsuccessful due process challenges, see *United States ex rel. Bilokumsky v. Tod*, 263 U.S. 149, 153–55 (1923) (holding that in a deportation hearing an inference could be draw from alien's silence that he was not a citizen despite government's burden to prove alienage and that no presumption of innocence applied); *Zakonaite v. Wolf*, 226 U.S. 272, 275 (1912) (finding that aliens were not guaranteed Fifth and Sixth Amendment protections in deportation proceedings); and *Low Wah Suey v. Backus*, 225 U.S. 460, 470–71 (1912) (rejecting claim that absence of power to compel witnesses to testify on behalf of alien in deportation hearing was a violation of due process).

[224] Yamataya v. Fischer (*The Japanese Immigrant Case*), 189 U.S. 86 (1903).

[225] Fong Yue Ting v. United States, 149 U.S. 698 (1893).

[226] *Id.* at 713–14, 730 (holding that Congress had unlimited power to expel or exclude aliens and due process and constitutional criminal protections did not apply).

[227] *The Japanese Immigrant Case*, 189 U.S. at 100–01.

[228] *See* Saito, *supra* note 211, at 434–37, 447–51 (arguing that the plenary powers doctrine denies sufficient constitutional protections to non-citizens).

[229] *The Japanese Immigrant Case*, 189 U.S. at 101–02.

[230] *Id.*

inquiry in deportation proceedings even as it illustrates how minimal those protections can be.[231]

In addition to the somewhat malleable due process protections that apply to non-citizens in removal proceedings, the Court has also acknowledged the application of more clearly defined procedural protections for non-citizens in criminal proceedings. The Court's 1896 decision in *Wong Wing* rested on the premise that non-citizens are entitled to the same procedural rights as citizens where the imposition of "infamous" punishment is concerned.[232] Thus, the citizen and the non-citizen are entitled to the Fifth Amendment protection against self-incrimination and double jeopardy as well as a right to due process of law in criminal proceedings.[233] The Court has also found that non-citizens accused in criminal proceedings in the United States are entitled to a right to trial by jury and the right to counsel in those proceedings, in accordance with the Sixth Amendment.[234]

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[231] These protections were limited to those who were present in the United States and subject to deportation, like the petitioner in the *Yamataya* case. Those non-citizens seeking to enter the country were subject to "exclusion," a legal term of art that applied even when the non-citizen was actually physically present—or detained—in the United States. Non-citizens subject to exclusion generally have been much less successful than deportees in obtaining meaningful court scrutiny for their due process challenges. *See* Shaughnessy v. U.S. *ex rel* Mezei, 345 U.S. 206, 213, 216 (1953) ("Neither respondent's harborage on Ellis Island nor his prior residence here transforms this into something other than an exclusion proceeding . . . . [R]espondent's right to enter the United States depends on the congressional will, and courts cannot substitute their judgment for the legislative mandate."); U.S. *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 544 (1950) ("Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned."); Nishimura Eiku v. United States, 142 U.S. 651, 660 (1892) ("It is not within the province of the judiciary to order that foreigners who have never been naturalized, nor acquired any domicile or residence within the United States, nor even been admitted into the country pursuant to law, shall be permitted to enter . . . . As to such persons, the decisions of executive or administrative officers, acting within the powers expressly conferred by Congress, are due process of law."); *see also* Aldana, *supra* note 200, at 18–19 (noting the superior rights enjoyed by foreign nationals already present in the United States as opposed to foreign nationals seeking entry into the United States). With the enactment of IIRIRA in 1996, Congress collapsed the legal concepts of "deportation" and "exclusion" into the single category of "removal," although the law still draws procedural distinctions between those who have been admitted to the United States and those who have not. LEGOMSKY, *supra* note 27, at 496.

[232] *See* Wong Wing v. United States, 163 U.S. 228, 238 (1896). Of course, removal (at that time known as deportation) does not constitute "infamous" punishment in the Court's view. *See id.* at 236.

[233] *See* United States v. Verdugo-Urquidez, 494 U.S. 259, 264–65 (1990); *see also* U.S. CONST. amend. V ("No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . . .").

[234] *See Verdugo-Urquidez*, 494 U.S. at 265; *see also* U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be

While recognizing certain constitutional protections for non-citizens in criminal proceedings, the Court has also imposed significant limitations upon these protections. The Court has sometimes recognized the non-citizen's right to the Fourth Amendment protections against unreasonable searches and seizures,[235] but has also indicated that the right only applies to "a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community."[236] This language leaves open the possibility that non-citizens can be searched and detained without Fourth Amendment protections, even in criminal proceedings.[237] Nevertheless, until recently, when state and federal government officials have subjected a non-citizen to the criminal law, they have provided those non-citizens with many of the same protections due to citizens, in spite of their citizenship status.

The increasing reliance on immigration enforcement to achieve security objectives undercuts these protections. The due process rights available to non-citizens in criminal proceedings do not extend to removal proceedings. It is true that some form of due process is required in removal proceedings,[238] but the process is not as protective as the process

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confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.").

[235] The Fourth Amendment provides that:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV. The provision deliberately encompasses not just citizens, but "the people." Nevertheless, the Supreme Court has seized upon "the people" as an indication that the founders meant only to include members of the polity, contrasting "the people" to the generic "person" in the Fifth and Sixth Amendments. *Verdugo-Urquidez*, 494 U.S. at 265.

[236] *Verdugo-Urquidez*, 494 U.S. at 265. Thus, in *Verdugo-Urquidez*, the Court held that a non-citizen in a U.S. prison is not entitled to the Fourth Amendment's exclusionary rule protection for a search conducted in Mexico. *Id.* at 274–75. *See also* United States v. Alvarez-Machain, 504 U.S. 655, 662 (1992) (holding that the trial of a Mexican national seized in Mexico and brought to the United States by U.S. government agents for trial is lawful if the trial is conducted "in accordance with constitutional procedural safeguards").

[237] In *United States v. Esparza-Mendoza*, 265 F. Supp. 2d 1254 (N.D. Utah 2003), U.S. District Court Judge Paul Casell ruled that a previously deported, unauthorized migrant was not protected by the Fourth Amendment's prohibition against unreasonable searches. *Id.* at 1273*; see also* ROMERO, *supra* note 26, at 69–91 (critiquing the *Esparza-Mendoza* decision); Gerald L. Neuman, *Whose Constitution?*, 100 YALE L.J. 909, 912 (1991) (discussing *Verdugo-Urquidez*); Michael Scaperlanda, *The Domestic Fourth Amendment Rights of Aliens: To What Extent Do They Survive* United States v. Verdugo-Urquidez*?*, 56 MO. L. REV. 213, 224 (1991) (discussing *Verdugo-Urquidez*).

[238] *See* Yamataya v. Fisher (*The Japanese Immigrant Case*), 189 U.S. 86, 100 (1903); *see also* Landon v. Plasencia, 459 U.S. 21, 34 (1982) (the government conceded that the defendant had a right to due process); Kevin R. Johnson, *Maria and Joseph Plasencia's Lost Weekend: The Case of* Landon v. Plasencia, *in* IMMIGRATION STORIES 221–244 (Peter Schuck & David A. Martin eds., 2005) (discussing the history and significance of the *Plasencia* case).

guaranteed by the U.S. Constitution to those in criminal proceedings.[239] This is true despite the apparently punitive nature of certain removal proceedings because the courts have long maintained a legal distinction between removal and criminal punishment.[240]

Under immigration law, the federal government's power to remove carries with it broad administrative discretion to investigate non-citizens and to detain them during removal proceedings.[241] These powers extend well beyond those available in traditional criminal investigations and prosecutions. Whereas criminal arrests must be predicated on a governmental showing of probable cause to justify the detention, arrests for immigration violations can be effectuated upon reasonable suspicion of an immigration violation.[242] Whereas criminal detention is closely regulated and of limited duration, the detention of individuals in removal proceedings is often lengthy and subject to far fewer legal restrictions.[243]

In response to the events of September 11th, government officials modified immigration laws and implementing regulations in ways that further diminish procedural protections in immigration-related detentions when compared to criminal punishment. Title IV of the USA PATRIOT Act permits the detention of a non-citizen if there are "reasonable grounds to believe" that the individual may be a threat to national security—in other words, it countenances arrest on the basis of reasonable suspicion.[244]

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[239] *See, e.g.*, 8 U.S.C. § 1362 (2000) (statutory right to counsel in removal proceedings only "at no expense to the Government"); United States v. Encarnacion, 239 F.3d 395, 399 (1st Cir. 2001) (judicial hearing not required until criminal charges filed against alien arrested for immigration violations); 8 C.F.R. § 287.8(c)(2) (2006) (allowing arrest when officer "has reason to believe" a person violated immigration laws); 8 C.F.R. § 287.5(e)(2) (2006) (listing titles of immigration officers empowered to issue and execute arrest warrants). These powers were expanded with the passage of the USA PATRIOT Act. *See infra* note 244 and accompanying text.

[240] *See* Wong Wing v. United States, 163 U.S. 228, 236 (1896) (differentiating between criminal punishment and deportation—including imprisonment incident to deportation); *see also* Daniel Kanstroom, *Deportation, Social Control, and Punishment: Some Thoughts about Why Hard Laws Make Bad Cases*, 113 HARV. L. REV. 1890, 1901–02 (2000) (critiquing the continued legal vitality of the punishment-removal distinction in light of the increasing criminalization of immigration); Robert Pauw, *A New Look at Deportation as Punishment: Why at Least Some of the Constitution's Criminal Procedure Protections Must Apply*, 52 ADMIN. L. REV. 305, 307 (2000) (arguing that deportation is punishment and "at least some of the constitutional safeguards that traditionally apply in the context of criminal prosecutions must apply").

[241] *See Wong Wing*, 163 U.S. at 235–37 (finding that a grant of power to deport non-citizens "would be in vain if those accused could not be held in custody pending the inquiry into their true character"); *see also* Demore v. Kim, 538 U.S. 510, 523 (2003) (reaffirming that "detention during deportation proceedings [is] a constitutionally valid aspect of the deportation process").

[242] INA § 287(a)(2), 8 U.S.C. § 1357(a)(2) (2000) (authorizing immigration officers to arrest "any alien" if he "has reason to believe that the alien so arrested is in the United States in violation of" the immigration laws); *see also* 8 C.F.R. § 287.8(c)(2)(i)–(ii) (2006) (together authorizing warrentless arrests "when the designated immigration officer has reason to believe that the person to be arrested has committed an offense against the United States or is an alien illegally in the United States.").

[243] *See supra* notes 201–04, *infra* notes 244–48 and accompanying text.

[244] USA PATRIOT Act § 412, 8 U.S.C. §1226(a) (2000).

Such individuals can be held for seven days prior to the commencement of criminal or removal proceedings,[245] in contrast to the usual requirement that a person be charged within forty-eight hours of arrest. Significantly, these procedural shortcuts are not limited to those non-citizens who are under suspicion of posing a security threat, because arrests can be effectuated by ICE based solely on reasonable suspicion that an individual is present in violation of the immigration laws.[246] The law sanctions detentions in such cases for forty-eight hours without charges, longer in "emergency or other extraordinary circumstances."[247] It also authorizes ICE to conduct random inspections of public transportation to search for immigration law violators.[248] As previously noted, profiling on the basis of race, religion and national origin also became an acceptable method of targeting suspects.[249] Furthermore, immediately after September 11, 2001, individuals detained on immigration related grounds were subject to a "hold until cleared by the FBI" policy that resulted in lengthy detentions,[250] although the legal authority for such detentions was unclear.

The combination of expansive removal authority and diminished procedural protections for non-citizens in immigration detention and removal applies only to non-citizens. However, the effects of these provisions extend to citizens as well. Immigration law, after all, has played a fundamental role in how race is defined in the United States.[251] One consequence is that certain groups are viewed as perpetual outsiders. For some, race ensures their vulnerability to "reasonable suspicions" about

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[245] *Id.*

[246] *See supra* note 242.

[247] 8 C.F.R. 287.3(d) (2006) (in cases involving "aliens" arrested without a warrant, "[u]nless voluntary departure has been granted pursuant to subpart C of 8 CFR part 240, a determination will be made within 48 hours of the arrest, except in the event of an emergency or other extraordinary circumstance in which case a determination will be made within an additional reasonable period of time, whether the alien will be continued in custody or released on bond or recognizance and whether a notice to appear and warrant of arrest as prescribed in 8 CFR parts 236 and 239 will be issued").

[248] 8 U.S.C. § 1357(a)(3) (2000) (listing the inspection powers of immigration officers, including the power, "within a reasonable distance from any external boundary of the United States, to board and search for aliens any vessel . . . and any railway car, aircraft, conveyance, or vehicle"); *see also* 8 C.F.R. § 287.1(a)(2) (2006) (defining "reasonable distance" as 100 miles from the border); Sasha Abramsky, *Terror on the Inner Border*, THE NATION, Sept. 8, 2005 *available at* http://www.thenation.com/doc/20050926/abramsky ("Amtrak trains stopping in the old Havre [Montana] train station are now routinely boarded by Border Patrol officers looking for non-citizens who lack the paperwork needed to stay in the country legally.")

[249] *See supra* Part III.C.1.

[250] OFFICE OF THE INSPECTOR GEN., SEPTEMBER 11 DETAINEES: A REVIEW OF THE TREATMENT OF ALIENS HELD ON IMMIGRATION CHARGES IN CONNECTION WITH THE INVESTIGATION OF SEPTEMBER 11 ATTACKS (2003), *available at* http://www.usdoj.gov/oig/special/0306/chapter10.htm.

[251] IAN HANEY-LÓPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE ch. 2 (2006); NGAI, *supra* note 32, at 1–15 (charting the ways in which U.S. immigration laws created racial categories and resulted in the marginalization of certain racial and ethnic groups in the period from 1924–1965); Kevin R. Johnson, *The End of "Civil Rights" As We Know It?: Immigration and Civil Rights in the New Millennium*, 49 UCLA L. REV. 1481, 1485–90 (2002); *see also supra* note 55.

their immigration status, no matter what their actual citizenship status might be. Historically contingent notions of who is really a "citizen" and who is an "alien" ensure that many Latinos, Asian Americans, Arabs and Muslims—citizens as well as lawful permanent residences, other authorized non-citizens, and the undocumented—have been and will continue to be subjected to the racial profiling that is legally sanctioned in the border control context.[252]

The asymmetric protections applied in the criminal and immigration settings, combined with the increasing reliance on immigration law to enforce the government's purported security goals, have resulted in the evolution of a two-tier justice system. One set of criminal investigatory and procedural methods are governed by strict laws and regulations; another is subject to looser constraints.[253] While we have seen this two-tiered mechanism in place before during crisis moments, the contemporary manifestation of the bifurcated system of justice is distinct by virtue of its increasing institutionalization as reliance on deportation expands.[254]

3. *The Absence of Incapacitation*

There is at least one additional reason we should worry about the characterization of the ongoing, mass deportations from the United States as a "security" measure: there is no reason to believe that removal will be an effective security tool. In their 1930 assessment of British transportation policy, George Rusche and Otto Kircheimer concluded that, as a penological matter, transportation policy had been a failure. In particular, they noted that criminals who were transported merely shifted the locus of their criminal activity.[255] To the extent that any non-citizen deported is actually prone to commit future harms, there is no reason to believe that removal will alter her willingness to do so. Removal shifts the locus of the activity, but does nothing to remedy it.

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[252] *See supra* note 55 (discussing U.S. citizenship and "foreign" status as a racialized concept).

[253] The deterioration of domestic protections extends beyond the racial profiling issue. The case of Jose Padilla, a U.S. citizen who was detained (apparently erroneously) for years without charges provides another example of the ways in which "war on terrorism" exceptionalism can erode traditional procedural protections. Rumsfeld v. Padilla, 542 U.S. 426, 433 (2004) (noting that Padilla was not detained for federal criminal violations, which would include charges of terrorism). The blurring of boundaries is also implicated in the context of the National Security Administration's circumvention of statutory and constitutional procedural protections in pursuing unwarranted wiretaps of U.S. citizens. Since PATRIOT Act provisions allow the sharing of information acquired as "intelligence," even when such intelligence is indistinguishable in form from domestic "crime control," it is inevitable that unconstitutional methods of criminal investigation will infect general criminal procedure.

[254] *See generally supra* Part III.C (discussing the differences between the stringent and less protective standards of administrative removal and the less stringent and protective guidelines for some criminal activities, such as tax evasion).

[255] *See* GEORGE RUSCHE & OTTO KIRCHHEIMER, PUNISHMENT AND SOCIAL STRUCTURE 66 (1939).

When a person who poses a "national security" risk to the United States shifts the locus of their criminal activity, this does not necessarily increase U.S. security. Such a person can also engage in acts outside of the United States that threaten U.S. interests. Removing people who pose security threats to the United States ensures that the government has no further control over them, but it does not ensure that they are disabled from harming U.S. interests overseas or domestically.

History has illustrated that serious domestic attacks can be carried out by people who are lawfully present in the United States.[256] These attacks can also be carried out by citizens.[257] Moreover, attacks can be carried out on U.S. citizens and facilities outside of the territory of the United States.[258] There is no way to prevent such attacks by pressuring some non-citizens into leaving the country, or by removing them on the basis of visa violations. Security problems may be aggravated when the United States achieves the removal of alleged security threats by detaining them on immigration violations in order to secure their "voluntary departure;" when individuals agree to voluntarily depart, their exit from the country does not necessarily require that the United States undertake any additional steps with regard to the terms and conditions of the departure.[259]

The best way to prevent acts of terrorism against the United States by people present on U.S. soil is through criminal investigations and detentions of both citizens and non-citizens alike. Such investigations and detentions are necessarily governed by constitutional criminal procedural constraints. Of course, such investigations require resources, and many of those resources are currently allocated to fund the investigation, detention and removal of non-citizens who have run afoul of the immigration laws in any one of dozens of ways.[260]

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[256] The World Trade Center attacks provide a case in point, as the al Qaeda operatives responsible for that incident had valid visas. Steven A. Camarota, *How the Terrorists Get In*, CTR. IMMIGR. STUD., Fall 2002, http://www.cis.org/articles/2002/sacpiarticle.html.

[257] One obvious example of a "terrorist" attack orchestrated by U.S. citizens includes the bombing of the Alfred P. Murrah Federal Building in Oklahoma City, Oklahoma on April 19, 1995. *See* Ralph Blumenthal, *Release of Oklahoma City Bombing Figure Kindles Fears*, N.Y. TIMES, Jan. 19, 2006, at A16, *available at* LEXIS, News Library, NYT File (discussing the anxiety over the release of one of the participants behind the Oklahoma City bombing); *The Oklahoma Indictments*, N.Y. TIMES, Aug. 12, 1995, at 20, *available at* LEXIS, News Library, NYT File (noting that Oklahoma City bombing was a "home-grown" plot).

[258] Examples of attacks on U.S. interests abroad include the August 7, 1998 attacks on the U.S. Embassies in Dar es Salaam, Tanzania and Nairobi, Kenya, as well as the October 12, 2000 attack on the U.S.S. Cole. U.S. Dept. of State Int'l Info. Programs, *Attack on USS Cole*, http://usinfo.state.gov/is/international_security/terrorism/uss_cole.html (last visited Mar. 1, 2007); U.S. Dept. of State Int'l Info. Programs, *U.S. Embassy Bombings*, http://usinfo.state.gov/is/international_security/terrorism/embassy_bombings.html (last visited Mar. 1, 2007).

[259] *See supra* note 195 and accompanying text.

[260] *See infra* Part IV.

### D. *The Security Question*

The changes in law and law enforcement strategies in favor of the rapid detention and removal of non-citizens arguably provide a disincentive for charging someone with removability on security grounds. It has become so easy to detain and remove non-citizens by other means that there is no need in most cases for the government to demonstrate that a non-citizen is removable on terrorism grounds or other security grounds.[261] Unfortunately, it does little to improve security and much to undermine procedural protections for the citizen and the non-citizen alike. Moreover, it does little to achieve other purported goals of immigration policy: crime and immigration control.

## IV. REMOVAL POLICIES ALSO FAIL AS CRIME AND IMMIGRATION CONTROL

Even if deportation is not a commonly used or effective mechanism for addressing genuine national security concerns such as terrorism, it is still worth asking whether it serves as a tool for promoting immigration control and crime control. After all, the government officials responsible for overseeing the rapidly increasing use of deportation have defined "national security" in such a way that it encompasses not just terrorist threats, but also street crime and simple immigration violations.[262]

In the past decade, the United States has experienced a massive expansion in the grounds for criminal deportability combined with increased enforcement of these deportation provisions through removal.

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[261] In this regard, it is notable that section 412 of the USA PATRIOT Act actually established specific procedures for the removal of non-citizens suspected of terrorist activity. USA PATRIOT Act § 412(a), 8 U.S.C. § 1226(a). These provisions, which include limitations on indefinite detention and provisions for habeas review, have never been used. David Martin, Statement to the National Commission on Terrorist Attacks Upon The United States (Dec. 8, 2003), *available at* http://www.9-11commission.gov/hearings/hearing6/witness_martin.htm) (noting that "INA § 236A has apparently never been invoked" and hypothesizing that this is a result of the insufficient flexibility of the provision).

Instead, the government has been able to use the indefinite (and often mandatory) detention associated with ordinary immigration proceedings to pressure non-citizens into voluntary departure or to effectuate their removal on immigration grounds. *See* Muzaffar A. Chrishti et al., *America's Challenge: Domestic Security, Civil Liberties, and National Unity After September 11*, 80 INTERPRETER RELEASES 1193, 1194–95 (2003) (explaining that a few citizens detained after September 11th were classified as terrorist, but most were actually charged for routine immigration violations); Thomas M. McDonnell, *Targeting the Foreign Born by Race and Nationality: Counter-Productive In the "War on Terrorism?,"* 16 PACE INT'L L. REV. 19, 26–28, 32 (2004) (describing that an estimated 1200 persons arrested after September 11th were held for weeks or months without charge, that ultimately 752 were deported for visa violations, and that not one of them was charged with a terrorism related crime); *see also* Adam Liptak, *The Pursuit of Immigrants in America After Sept. 11*, N.Y. TIMES, June 8, 2003, at 14, *available at* LEXIS, News Library, NYT File ("None of the detainees . . . were charged with engaging in or aiding terrorism, though nearly all were guilty of overstaying visas, entering the country illegally or other immigration violations. Most have been deported, some after long periods of unwarranted detention.").

[262] *See supra* note 184, *infra* notes 269–72 and accompanying text.

The increase in the overall number of removals since September 11, 2001, has been almost entirely caused by the increase in the removal of non-citizens on grounds of immigration violations. Removals for failure to maintain status have grown slightly from 708 in 1996 to 1240 in 2003.[263] Removals for being present without authorization have ballooned up from 23,522 in 1996 to 73,609 in 2003.[264] Removals for "other" immigration violations have increased from 49 in 1996 to 1442 in 2003.[265] And these numbers do not even take into account the hundreds of thousands of "voluntary departures" of individuals detained near the border or desperate to leave detention.[266] On top of this, removal on criminal grounds has ballooned from 14,475 in 1991 to 42,510 in 2004.[267]

In discussions pertaining to immigration policy, insufficient effort is made to distinguish between, on one hand, removals relating to national security, and on the other, immigration and crime control removals, let alone to disaggregating crime and immigration removals.[268] Thus, the upsurge in the overall number of removals erroneously fills the void created by the almost complete absence of security-based removals. This, in turn, frames the accelerated removal policies as an enhancement in national security policy, even when they are not related to national security at all.

The blurring of the line between national security measures and crime and immigration control measures is so complete that the immigration enforcement bureaucracy no longer bothers to distinguish between them. ICE recently unveiled a "comprehensive immigration enforcement strategy for the nation's interior."[269] ICE's report on the program states that one goal is to "[t]arget and remove aliens that pose criminal / national security threats."[270] The report elaborates:

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[263] 2003 YEARBOOK OF IMMIGRATION STATISTICS, *supra* note 179, at 160 tbl.42.

[264] As previously discussed, removals of those who are inadmissible for having been previously removed have risen from 2005 in 1996 to 17,630 in 2003. *Id.*

[265] *Id.*

[266] *See supra* notes 160, 187–88, 207–08 and accompanying text (discussing more fully and providing statistics on voluntary departure).

[267] *See* 2004 YEARBOOK OF IMMIGRATION STATISTICS, *supra* note 161, at 161 tbl.42; 2003 YEARBOOK OF IMMIGRATION STATISTICS, *supra* note 179, at 160 tbl.42. Interestingly, the number of non-citizens deported on criminal grounds actually decreased in the period immediately leading up to September 11th, and they did not rebound in the years immediately following those events. The rates were down to 37,723 by 2002. 2003 YEARBOOK OF IMMIGRATION STATISTICS, *supra* note 179, at 161 tbl.42.

[268] Because unauthorized immigration is criminal, the control of immigration is often constructed as crime control in and of itself. *See supra* Part II.

[269] *See* Press Release, Dep't of Homeland Security, Department of Homeland Security Unveils Comprehensive Immigration Enforcement Strategy for the Nation's Interior (Apr. 20, 2006), *available at* http://www.dhs.gov/xnews/releases/press_release_0890.shtm.

[270] *Id.*

> There are numerous illegal aliens at large in this country that pose criminal and/or national security threats. ICE has created several programs to combat this problem. ICE's Operation Community Shield targets foreign-born gang members and has resulted in the arrest of 2,400 gang members since its inception in 2005. ICE has requested 322 position enhancements for Operation Community Shield in Fiscal Year 2007. ICE also launched Operation Predator in 2003 to target, among others, illegal alien child sex offenders. This effort has resulted in more than 7,500 arrests, most of whom were alien child sex offenders. ICE also has more than 200 agents assigned to the nation's Joint Terrorism Task Forces. Last year, these agents made roughly 270 arrests for criminal or administrative immigration charges.[271]

In this description, national security and personal security have become an intertwined enforcement goal. Only one of the enumerated programs in this national/personal security strategy is specifically aimed at national security threats: the Joint Terrorism Task Force (JTTF). Yet even the JTTF statistics include immigration detentions and convictions among its successes on the "national security" front, when these immigration enforcement actions are by no means guaranteed to correlate with security measures. Although DHS statistics track the arrests made by the JTTF—arrests that are easily effectuated for "administrative immigration charges"—the report does not elaborate on the number or nature of convictions.[272]

The "immigration reform" proposals explored in the House of Representatives and the Senate in 2006 would have facilitated this blurring of boundaries. The proposals expanded the scope of removable non-citizens in the name of "national security," and again would have increased the resources available for their removal. The proposed House legislation, H.R. 4437, went furthest, because it would have rendered illegal presence itself a felony.[273] The Senate proposal was less sweeping, but it also would have significantly increased the number of "criminal aliens" subject to removal. S. 2611 contained provisions that would have further expanded the definition of an "aggravated felony,"[274] rendered "members" of

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[271] *Id.*

[272] It is also worth noting that the previous year, 130 arrests were made by the JTTF, but these resulted in only forty criminal indictments and only thirty-six criminal convictions. It is unclear how many of those indictments and convictions were for immigration violations. OFFICE OF IMMIGRATION STATISTICS, *supra* note 161, at 158 tbl.39.

[273] Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005, H.R. 4437, 109th Cong. § 203.

[274] Comprehensive Immigration Reform Act of 2006, S. 2611, 109th Cong. § 203.

"criminal street gangs" inadmissible and removable,[275] and mandated the removal of any non-citizen after a third drunk driving conviction.[276] These provisions were clearly aimed at crime control.[277]

While it is no doubt true that some immigration policy decisions are related to national security, proposals like these—proposals that are aimed at reducing crime and immigration (and not at national security) by expanding the categories of deportable non-citizens—are not. They are designed to achieve crime and immigration control goals. The questions that ought to be examined are whether the policies will achieve immigration and crime control goals, and whether the goals themselves are worthwhile. The lack of attention to these issues demonstrates that the rhetoric of "national security" masks a more complex and underanalyzed set of policy questions. The remainder of this section explores the likely effect of our explosive deportation policy on crime and immigration.

### A. *The Wave of Removals Does Not Improve Personal Security*

In the period leading up to the 1996 legislation, most of the discussions of "security" in the immigration context involved not national security, but the personal security of citizens in the form of freedom from crime. In the period since September 11, 2001, the rhetoric of national security has been deployed even when the substance of the discussion rotates around personal security concerns. It is therefore important to ask whether the massive increase in the removal of non-citizens serves legitimate criminal law enforcement goals, regardless of its efficacy (or lack thereof) as a national security strategy.

Unfortunately, it seems unlikely that the present strategy of broadening the categories of "criminal aliens" and increasing law enforcement and immigration enforcement measures aimed at detaining and removing these "criminal aliens" has had much of an impact on crime. It is important to point out as an initial matter that no empirical studies have been done to substantiate the links between the increasing criminalization of immigration and decreasing crime. Interestingly, as deportation is on the rise, violent crime is increasing, not decreasing.[278] The drive to expand the

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[275] *Id.* § 205.

[276] *Id.* § 225.

[277] Although it is possible that an immigration reform provision will be enacted in Summer 2007, this Article goes to press before it is clear what form any such measure will take. I therefore focus on legislation from 2006. However, I suspect that much of this discussion will apply to any upcoming legislative proposals. If a bill is enacted, undoubtedly it will contain a number of anti-crime measures wrapped up in a broader "border security" package.

[278] *See, e.g.*, Kate Zernike, *Violent Crime in Cities Shows Sharp Surge, Reversing Trend*, N.Y. TIMES, Mar. 9, 2007, at A14, *available at* LEXIS, News Library, NYT File. While this does not establish an inverse correlation, it does establish the need to question the relationship between deportation and crime.

scope and enforcement of removal laws has been justified on the basis of many questionable assumptions. In this section, I challenge some of the assumptions regarding migrant criminality, question the overbreadth of removal provisions, and suggest that removal is not an effective means of achieving either deterrence or incapacitation in the crime control context.

1. *Migrant Criminality is Overstated*

In spite of the persistent belief that immigrant groups are more likely to commit crime than the native born, the available evidence suggests that the belief is unfounded. Using data from the 2000 census, a team of sociologists at U.C. Irvine recently compiled statistics that demonstrate the significant degree to which reality fails to square with the myth of migrant criminality.[279] The study found that the incarceration rate of the U.S.-born was 3.51%, while the incarceration rate of the foreign born was a mere quarter of that, at a rate of 0.86%.[280] Non-Hispanic, white, native-born U.S. citizens are twice as likely as the foreign born to be incarcerated, with an incarceration rate of 1.71%.[281] These facts are particularly striking when one takes into account the upsurge in criminal prosecutions for immigration violations,[282] which almost always involve the prosecutions of non-citizens. Another striking finding of the study was that "the lowest incarceration rates among Latin American immigrants are seen for the least educated groups: Salvadorans and Guatemalans (0.52%) and Mexicans (0.70%)."[283] "These are precisely the groups most stigmatized as 'illegals' in the public perception and outcry about immigration."[284] The study highlights the dangerous gaps between public perception and reality, and it is not an outlier. It confirms earlier research conducted by Robert J. Samspon and colleagues revealing that increased immigration is actually a major factor associated with lower crime rates, and that Latin American immigrants were less violent and less likely than second and third generations to commit crimes even when they lived in dense communities with high poverty rates.[285] Other studies have reached similar conclusions.[286]

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[279] Rumbaut et al., *supra* note 57.

[280] *Id.*

[281] *Id.*

[282] *See supra* notes 104–07 and accompanying text.

[283] Rumbaut et al., *supra* note 57.

[284] *Id.*

[285] Robert J. Sampson, *Open Doors Don't Invite Criminals*, N.Y. TIMES, Mar. 11, 2006, at 15, *available at* LEXIS, News Library, NYT File.

[286] Matthew T. Lee et al., *Does Immigration Increase Homicide? Negative Evidence from Three Border Cities*, 42 SOC. Q. 559, 560, 572–74 (2001) (suggesting that there is no correlation between recent immigration and higher crime rates); Kristen F. Butcher & Anne Morrison Piehl, *Recent Immigrants: Unexpected Implications for Crime and Incarceration* 4–11 (Nat'l Bureau of Econ. Research, Working Paper No. 6067, 1997), *available at* http://www.nber.org/papers/W6067

An irony revealed in the Rumbaut study is that incarceration rates increase for U.S.-born coethnics in every ethnic group studied. In other words, "while incarceration rates are found to be extraordinarily low among immigrants, they are also seen to rise rapidly by the second generation."[287] Even so, at least some data suggests that "second-generation immigrants are doing better, on the whole, than [other] native born" when it comes to having lower crime rates.[288] This data suggests that the focus of anti-crime strategies really ought to be on citizens, not non-citizens.[289]

*2. Removal Policy is Overbroad*

Vast resources are now expended on removing non-citizens, whether they are security threats, "criminal aliens" or immigration violators. From fiscal year 1993 to fiscal year 2005, the Border Patrol budget quadrupled from $362 million to $1.4 billion, with the largest annual increase taking place after the events of September 11, 2001.[290] Since the creation of ICE in 2003, the budget for that agency has grown each year, and in fiscal year 2006, ICE's budget will total $3.9 billion in direct appropriations and fees.[291] The expanded "aggravated felony" provisions and related removal provisions, along with the broadened criminal consequences of immigration violations, also ensure that the federal courts are humming with criminal immigration cases. Indeed, federal courts are swamped with

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(suggesting reasons why immigrant institutionalization rates lag behind native institutionalization rates); *see also* Eyal Press, *Do Immigrants Make Us Safer?*, N.Y. TIMES, Dec. 3, 2006, § 6 (Mag.), at 20–24, *available at* LEXIS, News Library, NYT File (describing the existing scholarship addressing this topic).

[287] Rumbaut et al., *supra* note 57.

[288] *See* Press, *supra* note 286, at 24 (quoting John Mollenkopf, political scientist and professor of political science and sociology at the CUNY Graduate Center).

[289] Rumbaut et al., *supra* note 57; *see also* Hoan N. Bui & Ornuma Thingniramol, *Immigration and Self-Reported Delinquency: The Interplay of Immigrant Generations, Gender, Race, and Ethnicity,* 28 J. CRIME & JUST. 2 (2005); Kathleen Mullan Harris, *The Health Status and Risk Behavior of Adolescents in Immigrant Families*, *in* CHILDREN OF IMMIGRANTS: HEALTH, ADJUSTMENT, AND PUBLIC ASSISTANCE (Donald D. Hernandez ed., 1999).

One might also speculate that law enforcement crackdown on immigrant communities, which is driven by and helps to generate anti-immigrant sentiment, may actually lead to social conditions that spur criminal behavior among the second and third generation in immigrant communities. *Cf.* T. Alexander Aleinikoff & Ruben G. Rumbaut, *Terms of Belonging: Are Models of Membership Self-Fulfilling Prophecies?* 13 GEO. IMMIGR. L. J. 1, 6–9 (1998) (suggesting that anti-immigrant initiatives such as California's Proposition 187, which deny social membership benefits to immigrants, may generate cultural conflict). This would suggest a completely different crime control strategy than the removal-centered initiatives currently under expansion.

[290] WALTER A. EWING, BORDER INSECURITY: U.S. BORDER-ENFORCEMENT POLICIES AND NATIONAL SECURITY, IMMIGR. POL'Y CENTER 4 (2006), *available at* http://www.ailf.org/ipc/border_insecurity_spring06.pdf.

[291] U.S. Immigration & Customs Enforcement, *ICE Budget Gains 6.3 Percent In FY 06 DHS Spending Bill*, 2 INSIDE ICE (2006), http://www.ice.gov/pi/news/insideice/articles/insideice_111405_Web3.htm.

immigration cases. Federal appeals courts have seen huge spikes in immigration cases: the circuit courts of appeals witnessed an increase of 515% between fiscal year 2001 and fiscal year 2004.[292] Administrative agency appeals to the federal courts grew 12% in fiscal year 2005 to 13,713.[293] The vast majority of those cases involved challenges to Bureau of Immigration Appeals (BIA) decisions, which increased 14% last year to 12,349.[294] Most of the BIA appeals were filed in the Ninth Circuit (53%) and the Second Circuit (21%).[295] And of course, most immigration matters never reach the courts.

The expansive efforts to remove certain non-citizens do not necessarily mean that the government is now prudently choosing to target the most serious criminal offenders for removal. A close look at the categories of non-citizens who have been removed raise questions about the degree to which the enforcement of these laws are actually improving personal security. First, the massive increase in the category of removable aliens, and the decreased discretion that judges can exercise in these cases, ensures that governmental resources are expended on expelling non-citizens who almost certainly do not pose any kind of a threat to the United States.

The nebulous and expansive definition of "aggravated felony" provides a good example of the overly-inclusive sweep of the removal provisions that have been enacted into law over the past decade.[296] Because the aggravated felony definition is so broad, non-citizens are removed for relatively minor offenses, and suffer harsh consequences, such as life-long bars to reentry. Non-citizens have been removed as "aggravated felons" for misdemeanor shoplifting[297] and petit larceny.[298] Indeed, prior to the Supreme Court's decision in *Leocal v. Ashcroft*, in which the court found that driving under the influence was not an aggravated felony,[299] the then-INS rounded up 530 non-citizens in Texas with old "driving while intoxicated" convictions, and deported many of whom on this basis.[300] While driving under the influence is a serious social

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[292] Kerwin, *supra* note 198, at 4.

[293] Supreme Court, 2005 Year-End Report on the Federal Judiciary, Jan. 1 2006, at 8 n.2, http://www.supremecourtus.gov/publicinfo/year-end/2005year-endreport.pdf.

[294] News Release, Federal Judiciary, Legal Decisions, Legislation & Forces of Nature Influence Federal Court Caseload in FY 2005 (Mar. 14, 2006), *available at* http://www.uscourts.gov/Press_Releases/judbus031406.print.html.

[295] *Id.*

[296] 8 U.S.C. § 1101(a)(43) (2000).

[297] Erewele v. Reno, No. 98 C 5454, 2000 WL 1141430 (N.D. Ill. Aug. 11, 2000).

[298] Jaafar v. INS, 77 F. Supp. 2d 360, 365 (W.D.N.Y. 1999).

[299] Leocal v. Ashcroft, 543 U.S. 1, 3–4 (2004).

[300] *See* Charles Lane, *Justices Rule in Immigrant's Favor: Drunken Driving Not a Reason for Deportation, Court Says*, WASH. POST, Nov. 10, 2004, at A4, *available at* LEXIS, News Library,

problem, it is not clear that in all cases the offense, without more, warrants the expulsion of individuals who have lived in the United States for years.[301] Rather than focusing the INA's removal provisions on high-priority criminal offenders—a move that might ensure more effective use of the government's scarce resources in removing people who pose genuine threats to personal safety—current proposals in Congress seek to further broaden the scope of the "aggravated felony" provisions and again expand the scope of removable offenses.[302]

If the executive branch demonstrated a capacity to exercise prosecutorial discretion, the rapid expansion of removable offenses would pose less of a threat to the sensible allocation of scarce resources. But the Departments of Justice and Homeland Security have demonstrated a perverse inability to exercise rational discretion in removal cases.[303] One pointed example involved a case in which Judge Lawrence E. Kahn of the Northern District of New York granted a writ of habeas corpus to petitioner Duarnis Perez, who was in prison for a conviction of illegal reentry.[304] Although the government had discovered during the course of the prosecution that Perez was a citizen, they continued to prosecute him for illegal reentry, even though his citizenship rendered his initial removal void. Furthermore, the government actually opposed Perez's motion for a writ of habeas corpus.[305]

A second reason to question whether criminal removals are optimized to increase personal security is that, as in the case of the criminal law, the immigration law has almost absurdly severe consequences for certain crimes.[306] This becomes even more true as the number of deportable offenses increases with each immigration bill. A good example is the category of deportable drug offenses. The non-citizen faces deportation

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WPOST File; *INS: Sanctions, Detentions, Fees*, 5 MIGRATION NEWS, Nov. 1998, http://migration.ucdavis.edu/mn/more.php?id=1666_0_2_0.

[301] The Senate's Comprehensive Immigration Reform legislation would have reinvigorated pre-*Leocal* practices with its three-strike provision for driving under the influence. *See supra* note 276 and accompanying text. Additionally, some circuits still classify certain DUI offenses as "crimes of violence" for removal purposes; others do not. *See*, *e.g.*, Maria-Teresa Davenport, Note, *Deportation and Driving: Felony DUI and Reckless Driving as Crimes of Violence Following* Leocal v. Ashcroft, 96 J. CRIM. L. & CRIMINOLOGY 849, 872–75 (2006) (counseling for exclusion of both DUI and felony reckless driving from the "crime of violence" category).

[302] *See supra* notes 274–76 and accompanying text.

[303] John T. Noonan, *Immigration Law 2006*, 55 CATH. U. L. REV. 905, 913 (2006) ("Eighteen years ago, one of my senior colleagues remarked to me, 'The INS is the only agency in Washington that doesn't exercise discretion.' I have found the comment in general to hold true.").

[304] Perez v. United States, No. 1:05-CV-1294 (LEK), 2006 WL 2355868, at *1 (N.D.N.Y. Aug. 15, 2006).

[305] *Id.* at *2; *see also* Noonan, *supra* note 303, at 913–16 (arguing for greater exercise of discretion in the prosecution of immigration cases).

[306] *See* Robert James McWhirter, *Hell Just Got Hotter: The Rings of Immigration Hell and the Immigration Consequences to Aliens Convicted of Crimes Revisited*, 11 GEO. IMMIGR. L.J. 507, 512–13 (1997).

for any crime, misdemeanor or felony, relating to possession, manufacture, transportation, or importation of almost any drug, including marijuana, regardless of the sentence imposed or where the drug conviction occurred.[307] Proof of mere addiction to a narcotic is ground for deportation or exclusion.[308] If any drug conviction constitutes "drug trafficking," the non-citizen who commits that crime is an "aggravated felon" with virtually no hope of relief from deportation.[309] In 2004, drug charges served as the basis for removal in 37.5% (or 33,367) of the cases where non-citizens were removed as "criminal aliens."[310] The more than 33,300 non-citizens deported on narcotics grounds contrasts greatly with the 310 non-citizens deported on narcotics *and* other criminal grounds in 1981.[311] No studies have been performed to determine whether this 1000% increase in removals for narcotics violations have had any measurable impact on drug consumption, drug crime, or personal safety.

A third reason to question the linkage between removal and personal security is that non-citizens deported on criminal grounds are increasingly being deported for criminal violations of immigration laws. As previously noted, immigration violations now make up the single largest category of federal crimes, surpassing even drug prosecutions.[312] These numbers suggest that immigration control has replaced the "war on drugs" at the center of the federal government's anti-crime agenda, and the government is using both criminal prosecutions and administrative detention and removal to effectuate this agenda. Statistics released by the Department of Justice reveal that while white collar and drug prosecutions are falling, two kinds of criminal prosecutions have kept the overall number of prosecutions on the rise: immigration and—a very distant second—weapons violations.[313] This means that substantial federal prosecutorial resources are consumed with charging immigration crimes. And while some of these cases, such as human trafficking cases, might look like the sorts of things that warrant criminal prosecution, the vast majority of these

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[307] 8 U.S.C. § 1227(a)(2)(B)(i) (2000); *see also* Bronsztejn v. INS, 526 F.2d 1290, 1291 (2d Cir. 1975) (upholding deportation based on a conviction for attempted possession of marijuana); Brice v. Pickett, 515 F.2d 153, 153–54 (9th Cir. 1975) (upholding deportation based on a foreign narcotics conviction); Van Dijk v. INS, 440 F.2d 798, 799 (9th Cir. 1971) (upholding deportation based on a conviction for the sale of a single marijuana cigarette).

[308] 8 U.S.C. §§ 1227(a)(2)(B)(ii), 1182(a)(1)(A)(iv) (2000).

[309] *See* McWhirter, *supra* note 306, at 515–19.

[310] DOUGHERTY ET AL., *supra* note 158, at 6.

[311] Yates et al., *supra* note 83, at 880–81.

[312] *See supra* note 105.

[313] *See* TRAC REPORT, TIMELY NEW JUSTICE DEPARTMENT DATA SHOW PROSECUTIONS CLIMB DURING BUSH YEARS: IMMIGRATION AND WEAPONS ENFORCEMENT UP, WHITE COLLAR AND DRUG PROSECUTIONS SLIDE (2005), *available at* http://trac.syr.edu/tracreports/crim/136 (last visited Feb. 23, 2007).

prosecutions are much more mundane in nature.[314] Non-citizens convicted of immigration crimes can then be targeted for removal and barred from re-entry.

Immigration crimes, in turn, are the second-largest category of "criminal alien" removals, with 14,929 "criminal aliens" removed on the basis of immigration crimes in 2004.[315] Together with drug crimes, these removals account for 54.3% of all "criminal alien" removals.[316] From 1998–2003, about 20,000 criminal removals occurred each year based on criminal convictions for immigration violations; mostly for illegal entry, reentry by those previously deported, and the use of fraudulent documents.[317] Prior to the 1997 effective dates of IIRIRA and AEDPA, the annual nationwide number was about fifteen thousand.[318] As the overall number of individuals removed from the country increases, and as more people are legally barred from reentry by the 1996 laws, this category could continue to grow.[319] Increasing immigration prosecutions will contribute to the trend.

In short, the expanded removal provisions and the enlarged immigration enforcement bureaucracies do not ensure that the best decisions are made regarding which non-citizens ought to be removed. Moreover, in disrupting family ties through removal, such policies may encourage a cycle of illegal re-entries and criminal prosecutions.

### 3. *No Evidence of Deterrence*

Even if the link between immigration and criminality is overstated, it is still possible to maintain that harsh and broad removal policies are effective at curbing crime among non-citizens with a propensity toward

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[314] Ninety-six percent of all cases handled by magistrate judges involve convictions under 8 U.S.C. § 1325 for improper entry. These cases also comprise 13.7% of the cases handled by Article III judges, while another 59% of cases handled by Article III judges are prosecutions for unlawful reentry of a previously removed non-citizen under 8 U.S.C. § 1326. *See* TRAC DHS, IMMIGRATION ENFORCEMENT, GRAPHICAL HIGHLIGHTS, OFFENSES DIFFER BY COURT (2005), *available at* http://trac.syr.edu/tracins/highlights/v04/dhsoffcourtG.html; *id.* (follow "FY2004 Convictions = 15,546" hyperlink).

[315] DOUGHERTY ET AL., *supra* note 158, at 6.

[316] *Id.*

[317] 2003 YEARBOOK OF IMMIGRATION STATISTICS, *supra* note 179, at 181.

[318] *Id.*

[319] *See* James F. Smith, *United States Immigration Law as We Know It*: El Clandestino*, The American Gulag, Rounding Up the Usual Suspects*, 38 U.C. DAVIS L. REV. 747, 781–84 (2005). Unauthorized reentries of previously removed non-citizens constitute 59% of immigration crime convictions in federal district courts. Transactional Records Access Clearinghouse, Offenses Differ by Court, http://trac.syr.edu/tracins/highlights/v04/dhsoffcourtG.html) (last visited Mar. 5, 2007); *see also supra* notes 112–15 and accompanying text (describing the 52,000 non-citizen, "fugitive aliens" who have been removed since 2003 through the efforts of ICE).

criminality.[320] After all, the government has styled its massive expansion of detention and removal policy not only as a "preventive prosecution" of national security threats, but also as an enhancement of criminal sanctions for "criminal aliens," and as such, it ought to be evaluated as an anti-crime initiative.[321]

The immigration law's removal provisions are poorly designed to achieve deterrence. The retroactivity of these provisions ensures that, in many cases, the laws serve no deterrent function whatsoever.[322] For those who have already committed "aggravated felonies," and who are therefore subject to removal without the possibility of discretionary relief in addition to permanent bars to reentry, the law provides no incentives whatsoever to avoid future criminal activity. In contrast, when 212(c) relief was available for many otherwise deportable non-citizens,[323] "immigration judges who granted [such] relief routinely warned respondents that if they recidivated, the exercise of favorable discretion in the future was unlikely . . . ."[324] These warnings, coupled with lenience, provided tremendously effective deterrents.[325] But this tool is no longer available to immigration judges in most cases.

Moreover, the current state of the law actually guarantees that unauthorized migrants will need to commit other crimes in order to function in U.S. society. Changes in the law have made it all but impossible for unauthorized migrants to live normal lives in the formal economy, and have stripped down provisions designed to allow certain people to regularize their status in this country. For irregular migrants, jobs are available, but obtaining those jobs frequently involves obtaining and using false documents.[326] Laws preventing unauthorized non-citizens

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[320] This Part addresses the crime-control effects of removal policy, but the focus is on crimes other than undocumented migration and related immigration offenses. Part II.C examines the impact of a broad removal policy on undocumented migration, and such offenses are considered more fully in that Part.

[321] *See* Kerwin, *supra* note 198, at 1, 4.

[322] *See supra* note 87 and accompanying text.

[323] *See supra* notes 93–98 and accompanying text.

[324] HING, *supra* note 101, at 109.

[325] Professor Bill Ong Hing writes:

> In fact, of the 25 to 30 212(c) cases that I handled beginning in 1976 through 1996 (through immigration clinics at Golden Gate and Stanford) none of those clients ever recidivated after relief was granted. My anecdotal conversation with other practitioners disclosed similar experiences.

E-mail from Bill Ong Hing, Director of Clinical Legal Education, U.C. Davis School of Law, Professor of Law and Asian American Studies, U.C. Davis School of Law, to Jennifer Chacón, Professor of Law, U.C. Davis School of Law (Nov. 1, 2006, 8:04 AM).

[326] *See*, *e.g.*, John Leland, *Some ID Theft is Not for Profit, But to Get a Job*, N.Y. TIMES, Sept. 4, 2006, at A1, *available at* LEXIS, News Library, NYT File (explaining that undocumented workers use stolen social security numbers to obtain work and to carry out other basic economic functions). Systemically allowing undocumented workers to use taxpayer identification numbers to perform basic

from obtaining drivers' licenses mean that these non-citizens must either drive without a license or, again, rely upon fraudulent documents.[327] Perversely, unauthorized migrants commit many violations of the law because the law is so harsh, not because it is not harsh enough.[328] The outcome is that it is even harder to distinguish between those who pose a genuine threat to personal security and those who are merely trying to survive.

Another way in which harsh immigration laws may actually perpetuate crime, particularly in immigrant communities, is that many non-citizens are reluctant to report crime because of their own fear of removal.[329] Non-citizens from Guatemala, Honduras, Nicaragua, Haiti, El Salvador and Mexico have become frequent targets of criminal activity in places like Palm Beach, Florida.[330] Although Congress has passed legislation aimed at alleviating the understandable concerns that domestic violence victims and trafficking victims have about reporting crime,[331] these laws have offered only limited protections for their intended beneficiaries.[332] Furthermore, a

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life functions could curb a growing market for identity theft. The use of false identification numbers is also a removable offense—again, perpetuating the cycle of migrant criminality. *See* Kerwin, *supra* note 198, at 1, 4.

[327] *See* Kevin R. Johnson, *Driver's Licenses and Undocumented Immigrants: the Future of Civil Rights Law*, 5 NEV. L.J. 213, 224–25, 228 (2004); María Pabón López, *More Than a License to Drive: State Restrictions on the Use of Driver Licenses by Non-citizens*, 29 S. ILL. U. L.J. 91, 95, 98, 106 (2004). The driver's license policy may also have negative repercussions for national security. *See* Margaret D. Stock, *Driver's Licenses and National Security: Myths and Reality*, 10 BENDER'S IMMIGR. BULL. 422 (2005).

[328] Providing further evidence of the very complex relationship between crime rates and immigration enforcement—this time in the context of border enforcement, not interior removal—at least one study suggests that the increased border enforcement of the 1990s is correlated with lower property crime rates but significantly higher rates of violent crime. Pia Orrenias & Roberto Coronado, *The Effect of Illegal Immigration and Border Enforcement on Crime Rates Along the U.S.-Mexico Border* (Center for Comparative Immigration Studies Working Paper 131, 2005), *available at* http://www.ccis-ucsd.org/PUBLICATIONS/wrkg131.pdf.

[329] Sherizaan Minwalla, *The U Nonimmigrant Visa: A Pracitioner's Guide*, IMMIGR. BRIEFINGS, July 2006; *see also* Riki Altman & Terry Aguayo, *Here Illegally, Guatemalans Are Prime Targets of Crime*, N.Y. TIMES, Aug. 27, 2006, § 1, at 12, *available at* LEXIS, News Library, NYT File (reporting that crimes against Guatemalan immigrants have become common enough to earn a street name: "Guat-bashing," and that such crimes often go unreported).

[330] Altman & Aguayo, *supra* note 329.

[331] *See* Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (codified as amended in scattered sections of 8, 18, 20, 22, 27, 28, 42 U.S.C.); Civil Rights Remedies for Gender-Motivated Violence Act, Pub. L. No. 103-322, § 40304, 108 Stat. 1941, 1942 (1994) (codified as amended in scattered sections of 42 U.S.C.). These laws provide nonimmigrant visa status for victims of crime, thereby protecting them from removal. *See* 8 U.S.C. §§ 101(a)(15)(T)–(U), 214(o)–(p) (2000).

[332] *See*, *e.g.*, Jennifer M. Chacón, *Misery and Myopia: Understanding the Failures of U.S. Efforts to Stop Human Trafficking*, 74 FORDHAM L. REV. 2977, 3017–19 (2006) (discussing the small number of victims who have been found eligible for assistance under the Trafficking Victims Protection Act); Minwalla, *supra* note 329 (noting that Congress created the U visa to protect certain victims of crime from removal, but that "not one U visa has been issued due to the failure of the Department of

large number of non-citizen victims of crime are not protected by these laws at all.

As for authorized migrants and lawful permanent residents—those who have committed no violations of the INA and are therefore not subject to removal in the absence of some future violation—it is possible that the harsh immigration consequences attached to certain crimes might in fact deter them from committing security or crime-related violations of the INA. On the other hand, this "use of immigration law may have shown itself counterproductive, as deportations have torn families apart and decimated communities, both often precedent conditions for crime and alienation from government."[333]

There is certainly no concrete evidence to support the claim that the INA deters non-citizens from committing crime, nor do there appear to be any serious efforts underway to substantiate these claims. Given the complex interaction between crime and immigration enforcement, this harsh policy ought to be supported with something more than mere intuition.

4. *Removal Does Not Incapacitate*

A second justification for the accelerated removal of non-citizens is the one that is frequently invoked: removal incapacitates criminals. Even if the removal of non-citizens in the name of increasing personal security serves no other goal, one might at least fall back on the argument that removal incapacitates that narrow band of non-citizens who are criminally dangerous. And while this may not be the case with regard to terrorists or other threats to national security,[334] it might be the case with regard to street criminals.

This argument is troubling for several reasons. First, this rationale obviously signals a complete abdication of the notion that the criminal justice system is properly calibrated to achieve appropriate incapacitation, at least as concerns the non-citizens. Undergirding the rationale for removal policies is a misguided belief that non-citizens require extra incapacitation in the form of criminal removal. This notion is rooted in the myth of migrant criminality that pervades the national discourse.[335] The reliance on removal to achieve optimal incapacitation raises questions about why the criminal law is deemed to provide sufficient punishment for citizens, but not for non-citizens.

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Homeland Security ("DHS") to promulgate U visa regulations in the nearly six years since VAWA II was signed into law").

[333] Demleitner, *supra* note 197, at 574.

[334] *See supra* Part II.

[335] *See supra* Part II.A.

Furthermore, just as with the removal of security threats, the removal of "criminal aliens" does absolutely nothing to prevent future criminal threats. The small amount of removed non-citizens who actually do engage in criminal conduct are not likely to cease such conduct simply because they have been removed. Instead, the locus of their criminal activity simply shifts.[336] The people who bear the brunt of this policy are the citizens in the countries that receive deported "criminal aliens."[337] Perhaps it is not surprising that U.S. removal policy does not trouble itself with these consequences. But there are domestic consequences as well, because when criminal offenders are moved beyond the borders of the United States they are not necessarily prevented from causing continued problems within the United States.[338] A focus on rehabilitation seems more likely to produce social benefits than does removal.[339]

Finally, the removal policies underway—and under expansion—are overbroad with regard to the class of non-citizens they seek to incapacitate.[340] This overbreadth is largely attributable to the myth of migrant criminality that taints all non-citizens with a brush of criminal dangerousness. But the overbreadth of removal efforts are also attributable to the desire to combat irregular migration. Decoupled from criminality, these broad efforts to remove non-citizens might be seen as justifiable efforts to curb irregular migration. Unfortunately, current policies are a failure in this regard as well.

### B. *Questioning Removal as Immigration Strategy*

Perhaps the most ironic aspect of the massive surge in the removal of criminal aliens and the prosecution of immigration related crimes is that it does not seem to be a very successful strategy for deterring unauthorized migration. While advocates of the current efforts to ramp up removals on immigration and crime grounds have posited that such policies will deal

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[336] *See* RUSCHE & KIRCHHEIMER, *supra* note 255, at 66.

[337] *See* Jennifer M. Chacón, *Whose Community Shield?: Examining the Removal of the "Criminal Street Gang" Member*, U. CHI. LEGAL F. (forthcoming 2007) (manuscript on file with Connecticut Law Review); *see also* Juan J. Fogelback, Comment, *Mara Salvatrucha (MS-13) and Ley Anti Mara: El Salvador's Struggle to Reclaim Social Order*, 7 SAN DIEGO INT'L L.J. 223, 224–25, 252 (2005) (noting that the MS-13 gang had its origin in the United States, but that deportation creates an opportunity for gang members to grow and acquire arms abroad).

[338] *See* Chris Kraul et al., *L.A. Violence Crosses the Line*, L.A. TIMES, May 15, 2005, at A1, *available at* LEXIS, News Library, LAT File (observing the cycle by which gang members deported from the United States fuel gang membership abroad and fuel transnational criminal activity that impacts the United States).

[339] *See generally* HING, *supra* note 101, at 52–118 (recounting stories of Cambodian youths targeted for removal, and suggesting that rehabilitation is highly effective and infinitely preferable to removal).

[340] *See supra* Part III.A.2.

with the problem of undocumented migration through attrition,[341] the strategy does not appear to be working. A recently released study from the Pew Hispanic Foundation reveals that after the enactment of the tough 1996 laws and the wave of removals that followed, the number of immigrants coming into the United States actually soared, with the number of undocumented migrants growing faster than other segments of the immigrant population.[342] Thus, even as the policy fails as a matter of national security and crime control, it does not seem to do much to increase immigration control either.

A variety of factors push migrants to leave behind the security they know in their homelands, risk death in dangerous border crossings and risk imprisonment and other penalties through working and living in the United States without proper documentation.[343] Removal policy does not address those factors. Indeed, in some cases, it may aggravate them.[344] Nor does removal policy do anything to target the primary pull factor that draws migrants to the United States: jobs. U.S. employers have been largely unaffected by the increasing criminal penalties for immigration violations because the law is seldom enforced against them.[345]

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[341] *See*, *e.g.*, JESSICA M. VAUGHN, CTR. FOR IMMIGRATION STUDIES, ATTRITION THROUGH ENFORCEMENT: A COST EFFECTIVE STRATEGY TO SHRINK THE ILLEGAL POPULATION (2006), *available at* http://www.cis.org/articles/2006/back406.pdf (arguing that "attrition through enforcement [of immigration laws], in combination with a stronger border security effort such as the administration's Secure Border Initiative (SBI), will significantly reduce the size of the illegal alien population at a reasonable cost").

[342] PASSEL, *supra* note 51, at i, 1–2; *see also* WAYNE A. CORNELIUS, SOC. SCI. RESEARCH COUNSEL, IMPACTS OF BORDER ENFORCEMENT ON UNAUTHORIZED MEXICAN MIGRATION TO THE UNITED STATES (2006), *available at* http://borderbattles.ssrc.org/Cornelius/ ("Tightened border enforcement since 1993 has not stopped nor even discouraged unauthorized migrants from entering the United States."); *The Need for Comprehensive Immigration Reform: Serving Our National Economy: Testimony Before the Subcomm. on Immigration of the S. Comm. on the Judiciary*, 109th Cong. (2005) (statement of Douglas Massey, Professor of Sociology and Public Affairs, Princeton University), *available at* http://judiciary.senate.gov/testimony.cfm?id=1517&wit_id=4379 ("[A]ll we have to show for two decades of contradictory policies towards Mexico is a negligible deterrent effect, a growing pile of corpses, record low probabilities of apprehension at the border, falling rates of return migration, accelerating undocumented population growth, downward pressure on U.S. wages and working conditions, and billions of dollars in wasted money."); Douglas Massey, *The Wall that Keeps Illegal Workers In*, N.Y. TIMES, Apr. 4, 2006, at A23, *available at* LEXIS, News Library, NYT File ("Although border militarization had little effect on the probability of Mexicans migrating illegally, it did reduce the likelihood that they would return to their homeland.").

[343] Miriam Jordon, *New Rules at the Border: 'Catch and Return' Policy Eliminates Court Hearings for More Illegal Immigrants*, WALL STREET J., Feb. 21, 2006 at B1, *available at* LEXIS, News Library, WSJNL File (discussing factors such as 40% unemployment rates as a cause of attempted illegal entry).

[344] Our removal policies exacerbate security problems in some countries such as El Salvador and Guatemala, ironically causing people to seek safety in the United States. *See* Chacón, *supra* note 337.

[345] *See* Jennifer Gordon, *We Make the Road by Walking: Immigrant Workers, the Workplace Project, and the Struggle for Social Change*, 30 HARV. C.R.-C.L. L. REV. 407, 417 (1995) (noting that government agencies responsible for enforcing labor laws are and will likely continue to be vastly underfunded); Lori A. Nessel, *Undocumented Immigrants in the Workplace: The Fallacy of Labor*

Perhaps over time, a sustained policy of removing non-citizens through workplace and neighborhood raids, or after convictions, will decrease the number of undocumented migrants. But the costs to civil rights will be high. The dollar cost will be tremendous. The historical failures of removal as a cure for irregular migration counsel a search for more effective and less costly solutions.

### C. *The Retributive Agenda of Immigration Policy*

Retribution concerns itself with fitting the crime to the punishment. Removal policy, on its face, has no such concern. First, there is no effort to fit the punishment to the crime. Removal is used as a blanket policy that covers everyone from an individual who entered without inspection to a person who sells drugs to a person who plots terrorist acts against our cities. To a greater degree than criminal detention, removal may be more punitive in some cases than in others. Removal is less of a penalty for the person who entered the United States three weeks ago on a visitor's visa and has a stable home and job awaiting him than it is for the person who entered the country forty years ago at age two, and who knows no other home, or for the person who will face discrimination, persecution or starvation in their home country. Because of changes in the immigration laws, such equities play no role in the determination of whether removal constitutes an appropriate "civil sanction" in the cases of individual non-citizens. Thus, the notion of proportionality, a classic retributive notion, is plainly absent.[346]

At base, however, U.S. removal policies are retributive in the more primitive sense of the word.[347] The crime is not the underlying offense so much as it is the act of committing any transgression, whether great or small, while being present in the United States as a non-citizen. The hidden retributive agenda of immigration policy is rooted in mythologies

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*Protection and the Need for Reform*, 36 HARV. C.R.-C.L. L. REV. 345, 359–61 (2001) (noting a consistent lack of enforcement of employer sanctions); Peter H. Schuck, *Good Cop, Bad Cop*, AM. LAW., Aug. 2006, at 69, 70 ("Americans will never view employers who hire willing workers as serious criminals; tough sanctions will rarely be imposed. (Last year saw a grand total of three notices of intent to fine.)"); Michael J. Wishnie, *Emerging Issues for Undocumented Workers*, 6 U. PA. J. LAB. & EMP. L. 497, 500 n.15 (2004) (arguing that in reality INS enforcement of such laws is largely insufficient); *see also* Eduardo Porter, *Immigrants Wanted: Legal Would Be Nice, but Illegal Will Suffice*, N.Y. TIMES, Mar. 22, 2006 at C1, *available at* LEXIS, News Library, NYT File ("'We would rather use legal workers,' said Ms. Whitaker, who grows tobacco, tomatoes and other crops on the 500-acre farm she and her husband own in the Piedmont region of North Carolina. But 'if we don't get a reasonable guest worker program we are going to hire illegals.'").

[346] Because deportation is not "punishment," of course, Eighth Amendment proportionality principles are not even considered in the context of removal. *See supra* note 240 and accompanying text (explaining that deportation is not legal punishment).

[347] For a discussion of the parallels between the retributivist trend in criminal law and immigration policy, see Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime and Sovereign Power*, 56 AM. U. L. REV. 367, 403–13 (2006).

of migrant criminality and fueled by fears of terrorism. In dispelling the underlying myths and misconceptions that drive the retributive agenda of removal, we can better assess the flaws of current policies.

## V. CONCLUSIONS

Like the effort to tackle crime through the so-called "war on drugs," current immigration policy relies upon a military metaphor—that of "border security." And like the effort to tackle crime through the "war on drugs," waging a security war within our borders poses challenges to traditional criminal procedural protections. But security metaphors have more potency in the context of immigration than in the context of the war on drugs precisely because the courts long have analogized congressional and executive power over immigration with foreign policy and war powers, rather than with domestic social control. The conflation of immigration enforcement, crime control initiatives and security measures thus pose an even greater threat to our constitutional order and to human rights.

Few measured benefits have come in exchange for these costs. More troublingly, policy makers and the general citizenry seem to be content to guess, rather than assess, the costs and benefits of our immigration policies. In this Article, I have tried to raise some questions that deserve to be answered before immigration "reform" takes us further down a very questionable path.