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IMMIGRATION THREATS AND REWARDS: EFFECTIVE LAW ENFORCEMENT TOOLS IN THE "WAR" ON TERRORISM?

*Nora V. Demleitner**

Since September 11, 2001, the United States has witnessed the mass arrests of Arab and Muslim immigrants.[1] While none of these men have been charged with terrorism-related offenses,[2] most of them have been held in immigration detention.[3] Some have been deported because of immigration violations or prior criminal convictions which were not related to September 11.[4] These detentions and removals have highlighted the use of immigration law as a law enforcement tool.

Immigration law has become an adjunct to criminal law as it is being used to further punish criminal offenders and to reward those who cooperate in criminal investigations.[5] On the one hand, immigration law allows, and in

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[1] *See, e.g.*, Cindy Rodriguez, *INS Revives Sweeps—Initial Targets are from Nations with Links to Al Qaeda*, BOSTON GLOBE, Apr. 18, 2002, at B1.

[2] Individuals charged with terrorism-related offenses have been Zacharias Moussaoui, a French citizen, arrested in August 2001 in Minnesota, and Richard Reed, a British citizen, arrested in December 2001, while attempting to detonate a bomb on a transatlantic airliner. Shekhar Bhatia & Karen Rockett, *Shoe Bomb Terror on U.S. Jet; Fighter Jets Intercept*, SUNDAY MIRROR, Dec. 23, 2001, at 1. In September 2002, six U.S. citizens, arrested near Buffalo, New York, were charged with providing material support to Osama bin Laden and al-Queda. Criminal Complaint, United States v. Al-Bakri (W.D.N.Y 2002) (No. 02-M-108) *available at* http://news.corporate.findlaw.com/hdocs/docs/terrorism/usal-bakri091302cmp.pdf; Criminal Complaint, United States v. Goba (W.D.N.Y. 2002), *available at* http://news.corporate.findlaw.com/hdocs/docs/terrorism/usgoba091302cmp.pdf.

[3] Nadine Strossen, Testimony before Congressman John Conyers' Forum on National Security and the Constitution—Protecting Dr. King's Legacy: Justice and Liberty in the Wake of September 11th, Jan. 24, 2002, *at* http://www.aclu.org/congress/l012402a.html (last visited Feb. 19, 2002).

[4] *Id.*

[5] Some commentators have argued that criminal law is being used to address the problems of undocumented immigration. *See, e.g.*, Maria Isabel Medina, *The Criminalization of Immigration Law: Employer Sanctions and Marriage Fraud*, 5 GEO. MASON L. REV. 669, 670 (1997); Robert Pauw, *A New Look*

some cases mandates, the removal of immigration violators and individuals with criminal convictions from the United States.[6] On the other hand, it also holds out the promise of entry and stay rights in exchange for cooperation in criminal or terrorist cases. While the legal framework for such use of immigration law was largely in place prior to the attacks on the World Trade Center and the Pentagon, only since then has this function of the law become dramatically obvious.

This application of immigration law as an integral tool of criminal investigations is problematic because it proceeds on a reductionist understanding of crime and punishment theory and the lessons we have learned from the use of rewards such as financial incentives and plea-bargains in criminal cases. Because of the high stakes involved, noncitizens are more easily coerced and may be more likely to provide doubtful and unfounded information to law enforcement agencies to protect their tenuous status. Since immigration law, by definition, applies only to a vulnerable population group—noncitizens—the harshness and the limited venues for averting deportation make the only alternative provided—cooperation—even more rife with abuse.

Part I of the Article outlines the expanded use of deportation as a means to remove even minor criminal offenders and immigration violators from the United States, and to restrict their subsequent entry. Part II sets out the limited ways by which individuals can avert the denial of entry and deportation. It emphasizes the promises immigration law currently holds out to those cooperating in criminal prosecutions, promises that are magnified in light of the otherwise limited prospects of preventing removal. Part III details the problems arising from the use of immigration law as an adjunct to criminal law in light of the experiences in the criminal arena. Ultimately, the current use of immigration law as a law enforcement tool may reflect more about our beliefs about crime and punishment than present a fair and effective tool in the struggle against terrorists and criminals.

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at Deportation as Punishment: Why at Least Some of the Constitution's Criminal Procedure Protections Must Apply, 52 ADMIN. L. REV. 305, 334 (2000).

[6] This Article uses the terms "deportation" and "removal" interchangeably. The 1996 immigration legislation introduces the latter but "removal" appears often too surgical to convey the full meaning of being removed from the United States, which amounts effectively to banishment.

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I. IMMIGRATION LAW AS A TOOL OF THE CRIMINAL JUSTICE SYSTEM

Immigration law has traditionally allowed for the removal of noncitizens. Such removal may follow the infringement of one of any number of legal and social norms. One category of infringement is a violation of immigration law, such as overstaying a visa or working without permission. A second type of infringement is the commission of criminal offenses or moral failings, including drug addiction or pauperism. In recent years federal law has increased the scope of deportable offenses, and removed equitable grounds for allowing a deportable individual to stay in the United States. Nevertheless, deportation is not the only way in which immigration law can complement the criminal justice process. Removal has become a viable alternative to more cumbersome extraditions. Finally, the exclusion of potential offenders or safety risks at the border may serve the prevention of crime.

A. *The Scope of Removal*

For over a century, immigrants convicted of an array of criminal offenses have been deportable. However, since the 1988 Anti-Drug Abuse Act, the number of offenses that make even permanent resident aliens removable has increased dramatically.[7] Most importantly, many of these offenses mandate deportation, only allowing for very limited waiver.[8] The 1996 immigration acts also makes possible the swifter deportation of criminal noncitizens.[9]

After the bombing of the federal building in Oklahoma City and the arrests of Timothy McVeigh and Terry Nichols, Congress passed the Antiterrorism and Effective Death Penalty Act (AEDPA)[10] and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA).[11] Even though both of the men convicted in the Oklahoma City bombing were white, native-

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[7] Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 (1988); 8 U.S.C. § 1001(a)(43) (1997). *See, e.g.*, Lia R. Fine, *Preventing Miscarriages of Justice: Reinstating the Use of "Judicial Recommendations Against Deportation,"* 12 GEO. IMMIGR. L.J. 491, 499 (1998); Brent K. Newcomb, *Immigration Law and the Criminal Alien: A Comparison of Policies of Arbitrary Deportations of Legal Permanent Residents Convicted of Aggravated Felonies*, 51 OKLA. L. REV. 697 (1998).

[8] *See* THOMAS ALEXANDER ALEINIKOFF ET AL., IMMIGRATION AND CITIZENSHIP: PROCESS & POLICY 734 (4th ed. 1998); Newcomb, *supra* note 7, at 697.

[9] *See* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified as amended in scattered section of 28 U.S.C.); Illegal Immigration Reform Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (1996) (codified as amended in scattered sections of 8 U.S.C.).

[10] Pub. L. No. 104-132, 110 Stat. 1214.

[11] Pub. L. No. 104-208, 110 Stat. 3009.

born U.S. citizens, much of the anti-terrorism legislation passed in the wake of this event focused on noncitizen offenders.[12] However, this legislation was not even narrowly targeted at alien terrorists but instead juxtaposed noncitizen terrorists and criminals on the one hand with law-abiding citizens on the other.[13] Criminals and terrorists frequently were categorized together with no clearly discernible separation.[14]

In recent years, the two largest categories of crime-related removal grounds are based on immigration offenses and on other criminal convictions. Most of the noncitizens removed under the former category, which is often referred to as immigration control grounds, entered the United States without authorization.[15] Another large group of immigrants initially entered lawfully but then lost their immigration status, either by continuing to stay in the United States after their permission to do so had expired or by violating other conditions of their visas.[16] Document fraud, which occurs often as part of either unlawful entry or unlawful work, constitutes a separate deportation ground.

Because of the ebb and flow in public concern about immigration control, large-scale operations conducted to remove substantial numbers of undocumented aliens have often been more responsive to public or congressional pressure than legitimate immigration-enforcement concerns.[17] The recently announced program to deport undocumented aliens who have not responded to removal orders falls into this category. It comes in the wake of September 11 and aims initially to remove male noncitizens from countries associated with

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[12] Audrey Macklin refers to "the simplicity and emotive power of invoking the spectre of the foreigner as an intrinsic menace to national security." Audrey Macklin, *Borderline Security*, UNIV. TORONTO FAC. L. REV. 383, 384 (2002), *at* http://papers.ssrn.com/sol3/delivery.cfm/SSRN_ID294321_code020110630.pdf?abstractid=294321.

[13] The grouping of terrorists and criminals together also appears to have animated restrictions on the writ of habeas corpus in death penalty cases.

[14] *See, e.g.*, 142 CONG. REC. H3605 (statement of Rep. Buyer) (stating that international terror organizations "used to rely upon . . . carjackings, and now what they have done are these bombings that are in public places, that are cowardly acts of terror . . . ."). Representative Buyer seems to conflate urban crime and political terrorism.

[15] U.S. IMMIGR. AND NATURALIZATION SERV., 2000 STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE 247 tbl.65 (2002).

[16] *Id.*

[17] *See, e.g.*, Associated Press, *Airport Crackdown: Glance*, Apr. 28, 2002, *at* http://www.washingtonpost.com/wp-dyn/articles/A62933-2002Apr.28.html; Katherine Shaver & Allan Lengel, *Airport Workers Accused of Lying*, WASH. POST, Apr. 24, 2002, at A1; Aaron Karp, *33 Phoenix Airport Workers Indicted in "Operation Tarmac,"* AIR TRANSPORT INTELLIGENCE, Apr. 22, 2002, *at* http://www.rati.com.

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terrorism, such as the countries from which the hijackers hailed. This means that the targets of this operation are largely Muslim and Arab men.[18]

With the expansion of criminal deportation grounds, the number of noncitizen removals has increased dramatically. Between 1908 and 1980 about 48,000 aliens were deported for criminal violations, about 8,000 for narcotics violations, and almost 17,000 were removed for immoral activity.[19] In the 1980s, almost 31,000 removals occurred based on convictions for criminal or narcotics violations, and about 2,000 additional removals were related to such convictions.[20] In 1997 alone, about 34,000 aliens were deported for criminal convictions excluding immigration-related offenses.[21] That year the total number of removals, including large numbers of undocumented persons, exceeded 114,000.[22] By 1999 the total number of criminal removals had reached 63,000.[23] In 2001, it is likely that more than 70,000 aliens were removed based on criminal convictions.[24]

While immigration offenses, including illegal entry, can lead to criminal convictions, most of the noncitizens with criminal convictions have not been convicted of immigration-related offenses but rather fall into three large categories: convictions for "crimes of moral turpitude," for "aggravated felonies," and for drug offenses.

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[18] *See, e.g.*, Dan Eggen, *Deportee Sweep Will Start With Mideast Focus*, WASH. POST, Feb. 8, 2002, at A1; Rodriguez, *supra* note 1.

[19] U.S. IMMIGR. AND NATURALIZATION SERV., 1997 STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE 187, tbl.67 (1999).

[20] *Id.* at 187, tbl.68.

[21] 2000 STATISTICAL YEARBOOK, *supra* note 15, at 247 tbl.65.

[22] 1997 STATISTICAL YEARBOOK, *supra* note 19, at 178 tbl.63. Almost 51,000 were removed based on criminal convictions including immigration-related offenses. *See* David A. Martin, *Comment*, *in* EINWANDERUNGSKONTROLLE UND MENSCHENRECHTE—IMMIGRATION CONTROL AND HUMAN RIGHTS 183, 194 (Kay Hailbronner & Eckart Klein eds., 1999).

[23] Daniel Kanstroom, *Deportation, Social Control, and Punishment: Some Thoughts About Why Hard Laws Make Bad Cases*, 113 HARV. L. REV. 1889, 1889 n.2 (2000).

[24] This number represents only a fraction of all noncitizens under supervision of the criminal justice system. Peter H. Schuck & John Williams, *Removing Criminal Aliens: The Pitfalls and Promises of Federalism*, 22 HARV. J.L. & PUB. POL'Y 367, 385 (1999).

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1. *Crimes of Moral Turpitude*

For the last century, crimes of moral turpitude have been the dominant deportation ground.[25] While the term has never been defined authoritatively, courts have looked at the "inherent nature" of offenses to categorize them.[26] Whenever an offense includes elements of fraud, for example, it has been found to constitute a crime of moral turpitude. The term also covers other crimes of dishonesty and most violent offenses.[27]

A conviction for a crime of moral turpitude that carries a potential sentence of more than one year in prison leads to deportation if the permanent resident has resided in the country less than five years.[28] After that point, multiple convictions for crimes of moral turpitude that carry a sentence of more than one year imprisonment lead to deportation.[29]

2. *Drug Offenses*

Drug offenses have constituted a deportation ground for about fifty years. Since the Anti-Drug Abuse Act of 1988, any conviction "relating to a controlled substance" constitutes grounds for deportation.[30] Any drug abuser or addict, independent of a conviction, is also deportable.[31] Because of the large number of narcotics convictions in the United States, many of which involve noncitizens, this deportation ground has become increasingly important. As much anti-drug law enforcement activity is directed at low-income neighborhoods, many of which are populated by recent immigrants, it can be expected that a disproportionately large number of first and second-

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[25] A single crime of moral turpitude makes a noncitizen potentially inadmissible at the border, Immigration and Nationality Act (INA) § 212(a)(2)(A)(i), 8 U.S.C. § 1182(a)(2)(A)(i), as well as deportable, INA § 237(a)(2)(A)(i), 8 U.S.C. § 1227(a)(2)(A)(i) (2000).

[26] *See In re* Fualaau, 21 I. & N. Dec. 475, 477 (B.I.A. 1996); *see also* Brian C. Harms, *Redefining "Crimes of Moral Turpitude": A Proposal to Congress*, 15 GEO. IMMIGR. L.J. 259, 264-69 (2001) (outlining tests courts have used to determine whether offense is a crime of moral turpitude).

[27] Stephen H. Legomsky, *Referat*, *in* EINWANDERUNGSKONTROLLE UND MENSCHENRECHTE—IMMIGRATION CONTROL AND HUMAN RIGHTS, *supra* note 22, at 163, 165; Nathalie A. Bleuzé, Matter of Roldan*: Expungement of Conviction and the Role of States in Immigration Matters*, 72 U. COLO. L. REV. 817, 824-25 (2001).

[28] INA § 237(a)(2)(A)(i), 8 U.S.C. § 1227(a)(2)(A)(i) (2000).

[29] INA § 237(a)(A)(2)(ii), 8 U.S.C. § 1227(a)(2)(A)(ii).

[30] INA § 237(a)(2)(B)(i), 8 U.S.C. § 1227(a)(2)(B)(i). The only exception is a conviction for a single offense involving possession of thirty grams or less of marijuana for one's own use.

[31] INA § 237(a)(B)(ii), 8 U.S.C. § 1227(a)(2)(B)(ii).

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generation immigrants will be convicted of drug offenses.[32] Drug offenders are ineligible for cancellation of removal and voluntary departure, meaning that they are deprived of any opportunity to stay in the United States or to opt to remove themselves, a step that carries a number of advantages.[33]

In 2002, the federal government began a powerful publicity campaign connecting the "war on drugs" with the "war on terrorism."[34] In this campaign, drug users are portrayed as funding terrorism. While the current focus of the campaign is on Colombia, terrorism and drugs have also been alleged to have close ties in the anti-terrorist campaign in the Middle East and the war in Afghanistan.[35] Whatever the extraterritorial focus of the campaign, domestic enforcement will aim at immigrants from the countries targeted in the war on terrorism, and is likely to lead to more convictions and more deportations of such offenders.

3. Aggravated Felonies

So-called "aggravated felonies" have begun to constitute an ever larger category of deportable offenses. Despite the term "aggravated felonies," not all of the offenses falling under this heading are felonies, nor would most people consider some of them aggravated. The term was initially introduced in the 1988 Anti-Drug Abuse Act where it aimed largely at offenders connected to the drug trade.[36] The most dramatic expansion of the category came with the 1996 legislation which added a large number of offenses and retroactively

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[32] Convictions lead to deportation only if the offender is not a citizen. Neither native-born nor naturalized citizens can be deported. Naturalized citizens could only be removed from the United States after denaturalization, which is possible if the individual obtained citizenship under false pretenses. *See* United States v. Demjanjuk, 518 F. Supp. 1362, 1363 (N.D. Ohio 1981), *aff'd*, 680 F.2d 32 (6th Cir. 1982), *cert. denied*, 459 U.S. 1036 (1982).

[33] Under current law, a conviction for drug trafficking or two misdemeanor convictions for drug possession amounts to an "aggravated felony." Aggravated felons cannot show "good moral character," which is necessary for cancellation of removal. *See, e.g.*, Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 HARV. L. REV. 1936, 1939-41 (2000) (critiquing the "aggravated felon" concept).

[34] The onset of this campaign coincided with the 2002 Super Bowl during which the first set of TV ads was aired. In the weeks following, major newspapers around the country carried print ads. Frank Ahrens, *Super Bowl Ads Target Terror*, WASH. POST, Jan. 31, 2002, at E3.

[35] *See* Tim Golden, *A War on Terror Meets a War on Drugs*, N.Y. TIMES, Nov. 25, 2001, § 4, at 4 (claiming that Osama bin Laden attempted to produce a super-heroin for the U.S. market); Barry Meier, *A Nation Challenged: Reports Say "Super" Heroin Was Planned by bin Laden*, N.Y. TIMES, Oct. 4, 2001, at B3. The term "narcoterrorism" has been coined to explain the financing of terrorist actions and the illegal arms trade through drug profits.

[36] Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 (1988); 8 U.S.C. § 1001(a)(43) (1997).

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defined them as aggravated felonies.[37] In subsequent years, the Immigration and Naturalization Service (INS) removed a substantial number of individuals for "aggravated felonies" committed long before the 1996 legislation went into effect. In 2001, however, the Supreme Court struck down the retroactive application of the legislation.[38]

The consequence of being labeled an aggravated felon is that the offender becomes subject to mandatory removal regardless of her ties to the United States, rehabilitative efforts, or other redeeming features.[39] A conviction for an aggravated felony, therefore, prohibits a court from considering outstanding equities.[40] IIRAIRA and AEDPA mandate even the deportation of permanent residents who have entered the United States as young children, have no ties to their homelands, have U.S. citizen spouses and children, and whose situs of life is in the United States.[41] A conviction for an offense other than an aggravated felony, on the other hand, may be waivable depending on the number of years the noncitizen has spent in the United States and a showing of

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[37] In a recent case before the Inter-American Commission on Human Rights, the representative of the U.S. government admitted that "the broad definition of aggravated felony under the legislation might not withstand constitutional scrutiny." Inter-Am. C.H.R., Report No. 19/02, Petition No. 12.379—Mario Alfredo Lares-Reyes, Vera Allen Frost and Samuel Segura, OEA/Ser.L/V/II.114, Doc. 26, at 18 (Feb. 27, 2002).

For an historical account of the tightening of deportation provisions, see David Martin, Testimony Before the Ad Hoc Committee on Irish Affairs Concerning the Deportation and Exclusion of Persons Who May Have Committed Criminal or Terrorist Acts, Feb. 6, 1997, *available at* http://www.ins.gov/graphics/aboutins/congress/testimonies/1997/970206.pdf.

[38] INS v. St. Cyr, 533 U.S. 289, 314-15 (2001). For a discussion of the ramifications of *St. Cyr* and issues left unresolved by the decision, see Chris Kilburn, St. Cyr *in Retrospect*, 14 FED. SENTENCING REP. 299 (Mar./Apr. 2002).

[39] INA § 240A(a)(3), 8 U.S.C. § 1229b(a)(3) (2000). This contrasts with pre-1996 days when immigration courts had wide discretion in preventing the deportation of criminal noncitizens. Martin, *supra* note 37, at 188.

The European Court of Justice (ECJ) held that in light of a European Union directive, national authorities must consider not only the prior conviction but surrounding circumstances in determining whether the offender constitutes a present threat, and therefore becomes deportable. Case 30/77, Regina v. Pierre Bouchereau 1977 E.C.R. 1999. The European Court of Human Rights and the Canadian Supreme Court both have considered the impact deportation following a criminal conviction has on an individual's family life. *See, e.g.*, Beldjoudi v. France, 234 Eur. Ct. H.R. (Ser. A) (1992); Baker v. Canada, No. 25823, 1999 Can. Sup. Ct. LEXIS 44 (July 9, 1999). *See also* Hélèn Lambert, *The European Court of Human Rights and the Right of Refugees and Other Persons in Need of Protection to Family Union*, 11 INT'L J. REFUGEE L. 427, 429 (1999).

[40] Since the abolition of the so-called Judicial Recommendation Against Deportation (JRAD) in 1990, which the INS treated as mandatory rather than mere recommendations, sentencing judges are no longer able to prevent deportations. Martin, *supra* note 22, at 187. For an in-depth discussion of JRADs, see Margaret H. Taylor & Ronald F. Wright, *The Sentencing Judge as Immigration Judge*, 51 EMORY L.J. 1131 (2002). For a call to consider all collateral sanctions, including deportation, at sentencing, see ABA CRIMINAL JUSTICE SECTION COUNCIL, AMERICAN BAR ASS'N, ABA CRIMINAL JUSTICE STANDARDS ON COLLATERAL SANCTIONS AND DISQUALIFICATION OF CONVICTED PERSONS (Draft May 2002).

[41] *See, e.g.*, Morawetz, *supra* note 33, at 1942-43.

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hardship to U.S. citizen family members. Aggravated felons are also permanently barred from reentering the United States unless the Attorney General grants special permission.[42]

Finally, deportation may occur upon conviction of a few offenses mentioned expressly by statute. Among those are domestic violence, child abuse, and sabotage. Even without a criminal conviction as long as there is sufficient likelihood that the noncitizen is involved in serious criminal or terrorist activity, she may be removed.[43]

Because of the harsh immigration consequences flowing from most criminal convictions, especially those for aggravated felonies, long-standing residents threatened by a criminal prosecution are susceptible to prosecutorial pressure to cooperate. This pressure is particularly likely for individuals whose offenses—and potential sentence exposure—are relatively minor but the consequence of deportation is dramatic. Such is the case when the offender's center of life is in the United States, or when she fears her life to be threatened upon return to her country of citizenship.

Though deportation has never been recognized as a criminal sanction, its impact resembles punishment. Even more importantly, the goals of deportation resemble those presently dominant with regard to other criminal justice penalties. This holds especially true in light of the dramatic expansion of deportation grounds and the rise in the number of executed deportations. As the purpose and impact of criminal and immigration sanctions become indistinguishable in public discourse, the pressures of the criminal justice system to cooperate have come to extend to the immigration system. However, the immigration system can promise not only the absence of a sanction—deportation—but the grant of an affirmative benefit—the right to live in the United States.[44]

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[42] INA § 276(a), (b)(2), 8 U.S.C. § 1326(a), (b)(2) (setting out penalty structure for aggravated felons who enter the United States without the Attorney General's permission).

[43] Drug users and addicts are also deportable without a conviction. INA § 237(a)(2)(B)(ii), 8 U.S.C. § 1227(a)(2)(B)(ii).

[44] *See generally* Kanstroom, *supra* note 23, at 1899 (critiquing civil paradigm of deportation and suggesting adoption of substantive constitutional protections in light of harsh deportation provisions which are designed to exert social control over noncitizens).

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B. Deportation: Fulfilling the Goals of Punishment

Rhetorically, the criminal alien is often contrasted with the law-abiding citizen.[45] This juxtaposition sets up a dramatic dichotomy that justifies limitations on immigration and harsh deportation laws as a benefit to United States citizens. Congressman Smith, for example, declared in the debates surrounding the 1996 legislation that "Americans should not have to tolerate the presence of those who abuse both our immigration and criminal laws."[46] Such statements raise the question of how deportation serves to protect U.S. citizens.[47] Even though considered a civil sanction,[48] removal from the United States fulfills at least two traditional purposes of punishment—incapacitation and deterrence.[49] While it tends not to be justified in retributive terms, one can argue that it also serves that function.[50]

1. Incapacitation

Deportation can be viewed as the ultimate form of incapacitation. Like imprisonment, it removes the offender permanently from the society the state tries to protect. However, imprisonment serves an incapacitative function only if one discounts offenses committed in prison. While it may prevent many types of crimes and limit the group of potential victims, it does not render all victimization impossible.[51] Quite to the contrary, interpersonal violence continues behind bars as do drug-related offenses. Even property crimes, albeit to a more limited extent, occur in prison.

Deportation similarly relocates potential offenders outside the state. It thrusts them upon their state of citizenship. This relocation does not remove the possibility of them committing offenses but instead enables them to

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[45] *See, e.g.*, 142 CONG. REC. H3605 (daily ed. Apr. 18, 1996) (statement of Rep. Smith) ("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 want to prey on them.").

[46] *Id.*

[47] *See, e.g.*, Legomsky, *supra* note 27, at 164 (discussing purposes of deportation).

[48] *See id.* Courts have refused to classify deportation as punishment. The traditional protections against unjust punishment—the prohibitions on ex post facto laws and against cruel and unusual punishment—therefore, do not apply.

[49] Deportation does not serve rehabilitative purposes. Rehabilitation, however, retreated as a primary or even substantial goal of punishment beginning in the mid-1970s.

[50] *Infra* Part I.B.3.

[51] Modern incapacitation theory holds that prison can "delay [the offender's] resumption of criminal activity *in society*." Malcolm Feeley & Jonathan Simon, *Actuarial Justice: The Emerging New Criminal Law, in* CRIME AND THE RISK SOCIETY 375, 376 (Pat O'Malley ed., 1998) (emphasis added).

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victimize another population.[52] In the prison context, the victimization of other offenders is frequently discounted precisely because they are offenders. This rationalization does not apply to deportation. The sole explanation why the victimization of another country's population appears acceptable must be because the United States does not feel it owes any obligation to that country's citizens. This explanation is tenable only in a nation-state system.

Despite its explanatory power in the international system, from an incapacitative perspective, deportation may not even fulfill the limited goal of protecting the U.S. population. Highly sophisticated computer offenses, international drug crimes, and international terrorism affecting U.S. territory can all be committed from abroad. Deportation may relocate rather than disturb or eliminate their structural components. This fact appears to account for recent attempts to hold some individuals allegedly involved in terrorist activities indefinitely rather than return them to their home countries.[53]

A cost-benefit analysis counsels that incapacitation is only cost-effective if the net benefit of removing the offender from our polity is greater than the net loss. If the offender no longer constitutes a threat to society, her deportation is not cost effective if she otherwise contributes positively. Under the 1996 immigration legislation, criminal offenses rendering a noncitizen deportable are premised on the sentence *possible* rather than the sentence imposed. This means that the criminal justice system might not have found incapacitation necessary—imposing a fine, suspending a sentence, or mandating probation instead of imprisonment—while immigration law demands removal. Here the two systems arrive at different conclusions, largely because the broad scope of the removal provisions will operate based on potential sentences.[54]

Deportation may be cost ineffective if the offender continues to engage abroad in activities that threaten the United States. Should she resume her criminal activities in her home country, U.S. law enforcement may be unable to investigate and prosecute her in the same way as if she had remained in the United States. Therefore, the extent to which the potential offender will be restricted in her criminal activity once abroad may determine whether her

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[52] *See, e.g.*, Kanstroom, *supra* note 23, at 1893.

[53] The Bush Administration's announcement that the government would continue to hold alleged members of the Al Qaeda terrorist network on Guantanamo even if a military tribunal acquitted them appears to be based on this rationale.

[54] Additional concerns surround the fact that federal immigration law relies on the definition of offenses and potential punishments in state criminal statutes, which still vary dramatically. *See* Morawetz, *supra* note 33, at 1956-57.

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deportation is cost-effective. Such analysis mandates that if incapacitation is the dominant deportation rationale, the category of offenses for which deportation is permitted must be drawn narrowly and individual fact-finding must occur for the goal to be accomplished.[55]

The European Court of Human Rights (EHCR) has adopted this model by engaging in individual proportionality review in the deportation of criminal offenders. The EHCR sanctions a deportation only if the offender's negative equities outweigh positive factors.[56] The court considers especially the ties of an individual to the countries of immigration and emigration, such as his language abilities, the locus of his education, his employment history, and his right to family unification, in making such a determination.[57] While incapacitation appears to be the most frequently cited reason for deportations—similar to the part incapacitation plays in the criminal justice system—deterrence and retribution are also being invoked.

2. *Deterrence*

Because of the immense negative consequences of deportation, deterrence theory assumes that a rational person would abstain from committing criminal acts that could lead to removal. Immigrants should therefore be more deterred than natives from committing criminal offenses.

Deterrence, however, will only be successful if the sanction is swift, predictable, widely publicized, and experienced as more detrimental than the potential advantages of breaking the law. Some individuals, especially those who break immigration laws in entering and remaining in the United States, may deem deportation a calculated risk when weighed against the potential benefits of living and working in the United States. For most offenders, however, the sanctions are too unpredictable and slow to factor into a rational analysis. This is the case when removal occurs years, maybe even decades,

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[55] The critique of mandatory sentencing laws rests on the same analysis. *See, e.g.*, Kevin R. Reiz, *The Disassembly and Reassembly of U.S. Sentencing Practices*, *in* SENTENCING AND SANCTIONS IN WESTERN COUNTRIES, 222, 228-30 (Michael Tonry & Richard S. Frase eds., 2001).

[56] *See, e.g.*, MARK JANIS ET AL., EUROPEAN HUMAN RIGHTS LAW 258-61 (2d ed. 2000); Mehemi v. France, App. No. 25017/94, 30 Eur. H.R. Rep. 739 (1997); Nasri v. France, App. No. 19465/92 21 Eur. H.R. Rep. 458 (1995); *cf.* Baker v. Canada, 1999 Can. Sup. Ct. LEXIS 44 (July 9, 1999).

[57] *See, e.g.*, C. v. Belgium, App. No. 21794/93, 32 Eur. H.R. Rep. 2 (1996); Boughanemi v. France, App. No. 22070/93, 22 Eur. H.R. Rep. 228 (1996); Moustaquim v. Belgium, App. No. 12313/86, 13 Eur. H.R. Rep. 802 (1991).

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after the initial violation.[58] Finally, because of the potentially confusing nature of criminal and immigration law, some noncitizens may be uniformed as to the possible immigration ramifications of their acts. For these reasons, the deterrent qualities of deportation are doubtful.[59]

3. Retribution

Retribution is used infrequently as a rationale for deportation. The reason may be twofold. First, retribution constitutes the most important justification for criminal punishment and should be sufficiently fulfilled through traditional criminal sanctions, such as a fine or imprisonment, rather than a collateral sanction. Second, retribution requires proportionate sanctions. While the Supreme Court appears to engage only in a perfunctory proportionality review, it has recognized retribution as a limit on criminal sanctions.[60] The mandatory nature of deportation, based on the large category of aggravated offenses, may run afoul of such proportionality review.

C. Making Trials Possible: Deportation Instead of Extradition

On the one hand, deportation is an extreme example of modern criminal justice approaches that promise the "efficient management of dangerous populations" rather than reintegration, which in the case of immigration law is denied through removal.[61] On the other hand, it is precisely its bluntness that may make it an effective law enforcement tool.[62] The threat of deportation may not only facilitate criminal investigations but also circumvent and short-

[58] Of course, at this point removal becomes substantially more painful for the immigrant than had she been caught entering the country without documentation.

[59] For a critique of the deterrence argument in the criminal justice literature, see Andrew Ashworth, *Deterrence*, *in* PRINCIPLED SENTENCING: READINGS ON THEORY AND POLICY 44, 46-51 (Andrew von Hirsch & Andrew Ashworth eds., 1998); Deryck Beyleveld, *Deterrence Research and Deterrence Policies*, *in* PRINCIPLED SENTENCING: READINGS ON THEORY AND POLICY, *supra*, at 66; Alan H. Goldman, *Deterrence Theory: Its Moral Problems*, *in* PRINCIPLED SENTENCING: READINGS ON THEORY AND POLICY, *supra*, at 80.

[60] *See generally* Harmelin v. Michigan, 501 U.S. 957 (1991); Solem v. Helm, 463 U.S. 277 (1983); Rummel v. Estelle, 445 U.S. 263 (1980). Last spring, the Supreme Court granted certiorari in a case arising under California's "three strikes" law. Its decision may clarify the Court's approach to proportionality analysis. Andrade v. Attorney General, 270 F.3d 743 (9th Cir. 2001), *cert. granted sub nom.* Lockyer v. Andrade, 122 S. Ct. 1434 (2002).

[61] Feeley & Simon, *supra* note 51, at 395.

[62] Many had thought the same of highly punitive mandatory sentences which were viewed as powerful bargaining chips for prosecutors.

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circuit restrictions often imposed on the extradition process.[63] Alleged criminals or terrorists who flee abroad may be extraditable to stand trial in the country in which the offense occurred. However, extraditions usually proceed subject to a bilateral or multilateral treaty, and the alleged offender enjoys a host of procedural protections.[64] For those reasons, some countries have found it easier to simply deport a non-national offender. If the crime occurred in the individual's country of citizenship, deportation accomplishes the same goal as extradition—to remove the offender to her country of origin. If the individual allegedly committed the crime in a third country, deportation allows the country to which he fled to rid itself of a potentially difficult political issue. It may ultimately even facilitate his extradition from his home country to a third country. Deportation, consequently, can accomplish the same goal as extradition as it allows for the removal of a non-national to her home state but may be attained faster and with less expense and publicity.

D. Exclusion: More Risk Containment

The removal and exclusion of noncitizens is "the ultimate prerogative of sovereignty."[65] Legislation allowing for the deportation of noncitizens of any legal status, often automatically upon the conviction of a wide variety of offenses, indicates an absolutist view of territorial sovereignty and the protection of borders. Sovereignty and security become intimately linked, as only the assertion of sovereign rights appears to guarantee safety from criminals and terrorists alike.

Since September 11 the threat of deportation has been used increasingly as a law enforcement tool. While deportation theoretically threatens all those who are in the United States without legal permission, especially those with criminal convictions that render them deportable, enforcement has focused on citizens of select countries.[66]

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[63] This is the case even if INS continues to experience difficulties in removing criminal aliens, many of which are due to problems with apprehending and identifying noncitizens as aliens. Schuck & Williams, *supra* note 24, at 399-409.

[64] *See, e.g.*, M. CHERIF BASSIOUNI, INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE 461-744 (4th ed. 2002).

[65] Macklin, *supra* note 12, at 389.

[66] This enforcement focus attempts to allay fears that so-called "sleeper cells" might be activated to commit further terrorist attacks on U.S. soil. Testimony of Nadine Strossen, *supra* note 3. The first phase of the so-called Absconder Apprehension Initiative aims to deport about 6,000 individuals from countries with ties to the Al Qaeda network, including Saudi Arabia, Indonesia, and Somalia. *See, e.g.*, Rodriguez, *supra* note 1; Kevin Johnson, *No Immigrants have Received Amnesty for Info*, USA TODAY, Jan. 9, 2002, at 3A.

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Even though the USA PATRIOT Act awarded law enforcement officials unprecedented powers, so far the Justice Department has not used them to certify or detain any noncitizens as terrorists.[67] Instead it has largely relied on immigration laws to hold suspected terrorists and their collaborators.

Because a number of the hijackers were legally in the country on September 11—and some of the others had violated visa conditions so recently that even in a vastly improved immigration-enforcement system it would have been unlikely that they could have been detained or deported by that date—much of the current enforcement efforts will focus on denying suspect individual visas to enter the United States.[68] Presumably these efforts will mean that the number of visa denials will increase dramatically. In the long run this might have a negative impact not only on the perception of the United States abroad but also on the United States' ability to engage in the exchange of knowledge and information and benefit from cultural enrichment and scientific advancement. Risk avoidance will dominate, and possibly even replace, other legitimate concerns. This development appears predictable based on developments in criminal law that have turned the United States into a "risk society."[69] Actuarial risk assessment—based on offender characteristics, for example—has replaced individualized risk assessment, to enhance the larger society's feelings of safety.[70]

II. IMMIGRATION BENEFITS AS A REWARD FOR COOPERATION

In addition to the use of immigration law as a means to remove or exclude offenders from one's territory, it can also be employed as an incentive or a reward for cooperation and information provided in criminal investigations. This reward function has grown in importance as other immigration benefits have been restricted or eliminated, including deportation waivers.

However, the only alleged "sleeper cell" on U.S. territory currently found has consisted almost entirely of U.S. citizens. *See supra* note 2.

[67] OFFICE OF THE ATTORNEY GENERAL, U.S. DEPARTMENT OF JUSTICE, FY 2001 PERFORMANCE REPORT & FY 2002 REVISED FINAL PERFORMANCE PLAN, FY 2003 PERFORMANCE PLAN (2002), *available at* http://www.usdoj.gov/ag/annualreports/pr2001/pdf/2001PerformanceReport.pdf.

[68] Alternatively, those admitted have to undergo special admission procedures. *See* Memorandum from Johnny N. Williams, Immigration & Naturalization Service, to INS Regional Directors et al., Identification of Nonimmigrant Aliens Subject to Special Registration, or the National Security Entry Exit Registration System (Sept. 5, 2002) (on file with author).

[69] Pat O'Malley, *Introduction*, *in* CRIME AND THE RISK SOCIETY, *supra* note 51, at xi-xii.

[70] *Id.*

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In the wake of the events of September 11, Attorney General Ashcroft announced the expansion of the so-called "responsible cooperator" program.[71] It allows the government to offer S-visas to individuals who cooperate in terrorist investigations. S-visa come with the opportunity to stay in the United States for a limited period of time, and ultimately permanently, in exchange for their assistance in the investigation and prosecution of alleged terrorists.

S-visas are only one example of the increasing use of immigration benefits in the context of criminal investigations.[72] The Department of Justice's Antitrust Section, for example, has arranged with the INS to permit the continued entry of convicted antitrust violators to the United States.[73] In exchange for their cooperation in antitrust investigations, INS will not use otherwise applicable legislation to bar their entry.

Congressional acts have also extended the S-visa program to T- and U-visas which grant long-term stays to the victims of criminal activity, in most cases in exchange for their assistance in the investigation and prosecution of the offenders.[74] Immigration benefits in exchange for cooperation have become increasingly more valuable as the number of deportable offenses has risen dramatically, and immigration judges have been deprived of much of

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[71] *DOJ Orders Incentives, 'Voluntary' Interviews of Aliens to Obtain Info on Terrorists; Foreign Students, Visa Processing Under State Dept. Scrutiny*, 78 INTERPRETER RELEASES 1816, 1816 (2001). The government has a wide variety of benefits at its disposal to reward the cooperation of witnesses and defendants in criminal cases. *See, e.g.*, 18 U.S.C. § 3071 (2000) (authorizing attorney general to pay rewards in terrorism cases); U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 (2001) (allowing courts to depart from guideline sentence upon motion of government indicating that defendant has provided substantial assistance in criminal investigation or prosecution); Ellen S. Podgor, *White-Collar Cooperators: The Government in Employer-Employee Relationships*, 23 CARDOZO L. REV. 795 (2002); Ellen Yaroshefsky, *Cooperation with Federal Prosecutors: Experiences of Truth Telling and Embellishment*, 68 FORDHAM L. REV. 917 (1999). For the new Rewards for Justice campaign issued after September 11, see http://www.rewardsforjustice.net.

[72] The reverse has occurred in federal court where sentencing discounts are granted in exchange for the defendant's stipulation to the charge in a plea agreement, which may be used to issue a final removal order. INA § 238(c)(5), 8 U.S.C. § 1228(c)(5) (2000); INA § 240(d), 8 U.S.C. 1229a(d). Based on the stipulation the prosecutors will make a substantial assistance motion, leading to a lesser criminal justice sentence. Martin, *supra* note 37, at 192-93. In many border districts, the practice has changed, however. The noncitizen now stipulates directly to a departure to save the government resources and time. E-mail from Jon M. Sands, Assistant Federal Public Defender, District of Arizona, to Nora V. Demleitner (June 13, 2002) (on file with author). For a slightly different view, see Taylor & Wright, *supra* note 40, at 1159-61.

[73] Memorandum of Understanding between the Antitrust Division United States Department of Justice and the Immigration and Naturalization Service United States Department of Justice, March 15, 1996 ("Memorandum of Understanding"), *at* http://www.usdoj.gov:80/atr/public/speeches/2275.wpd. *See infra* Part II.D.

[74] *See infra* Part II.B.

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their discretion to avert removal.[75] Before the present array of cooperation reward programs came into being, the federal government was able to obtain cooperation and keep noncitizens in the country through the Federal Witness Protection Program or discretionary INS action which postponed deportation indefinitely.

A. *The Witness Protection Program*

The Federal Witness Protection Program was created as part of organized crime legislation in the early 1970s.[76] While data on the program is limited, the targets of organized crime investigations—such as the Italian-American mafia—have necessitated the admission of noncitizens into the program.[77] Since successful organized crime prosecutions frequently rely on the co-

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[75] *Cf.* Podgor, *supra* note 71, at 798 ("The increased sentences and lack of extensive judicial discretion to modify . . . sentences [under the federal sentencing guidelines] . . . provide strong incentives for individuals who are actual or potential defendants to cooperate with the government in criminal investigations.").

[76] 18 U.S.C. §§ 3521-3528 (2000). The program was authorized by the Organized Crime Control Act of 1970 and later amended through the Comprehensive Crime Control Act of 1984. *See generally* ROBERT SABAG, TOO TOUGH TO DIE: DOWN AND DANGEROUS WITH THE U.S. MARSHALS (1992) (describing role of U.S. Marshals in Witness Protection Program).

For a discussion of short-term victim/witness protection efforts, see PETER FINN & KERRY MURPHY HEALEY, NATIONAL INSTITUTE OF JUSTICE, PREVENTING GANG-AND DRUG-RELATED WITNESS INTIMIDATION 24-32 (1996); OFFICE FOR VICTIMS OF CRIME, U.S. DEPARTMENT OF JUSTICE, VICTIMS OF GANG VIOLENCE: A NEW FRONTIER IN VICTIM SERVICES (1996); Nora V. Demleitner, *Witness Protection in Criminal Cases: Anonymity, Disguise or Other Options?*, 46 (Supp.) AM. J. COMP. L. 641 (1998); Jürgen Meyer, *Zeugenschutz im Spannungsfeld von Wahrheitsermittlung und Beschuldigtenrechten*, *in* GRENZÜBERSCHREITUNGEN 95 (Jörg Arnold et al. eds., 1995) (discussing witness protection measures and their shortcomings in German law); Michael Soiné & Hans-Georg Engelke, *Das Gesetz zur Harmonisierung des Schutzes gefährdeter Zeugen (Zeugenschutz-Harmonisierungsgesetz-ZSHG)*, 55 NEUE JURISTISCHE WOCHENSCHRIFT 470 (2002) (detaling recent changes in the German witness protection program). Victim/witness protection measures are also prominent in international tribunals. *See, e.g.*, Christina Moeller, *Die besonderen Beweisregeln für Sexualdelikte für das Kriegsverbrecher-Tribunal in Den Haag—Alternative zum djb-Entwurf?*, 16 STREIT 91, 92 (1998); Mercedeh Momeni, Note, *Balancing the Procedural Rights of the Accused Against a Mandate to Protect Victims and Witnesses: An Examination of the Anonymity Rules of the International Criminal Tribunal for the Former Yugoslavia*, 41 HOW. L.J.155 (1997).

[77] H.R. REP. NO. 101-676, at 4, 7 (1990) (stating that between 1987 and 1990, the Marshals Service "had a 92-percent increase of foreign witnesses over the previous three years;" between 1983 and 1990 129 out of 844 protected witnesses in narcotics cases were foreign nationals); *see also* Louise Shelley, *Keynote Address: Victim Participation in Criminal Trials*, 27 SYRACUSE J. INT'L L. & COM., 45, 52 (2000) ("[M]embers of the Cosa Nostra and the Cali Cartel who were needed to provide essential testimony are now living in the United States under new identities."). The same holds true for other Western countries. *See, e.g.*, Michael Soiné & Otmar Soukup, *"Identitätsänderung," Anfertigung und Verwendung von "Tarnpapieren"*, 27 ZEITSCHRIFT FÜR RECHTSPOLITIK 466 (1994) (noting that in the early 1990s, more than 40% of endangered witnesses in German drug and terrorist prosecutions were foreign nationals).

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operation of insiders,[78] most of these cooperators were convicted of criminal offenses committed in connection with their work for such criminal organizations.[79] Those admitted to the Federal Witness Protection Program serve any prison time in protective custody.[80] Upon their release, they are provided with new identities and resettled in a different part of the country.[81] Those who are not permanent residents must receive appropriate documentation from the INS.[82] However, most have remained in a tenuous immigration status as they are only paroled into the country and must appear annually to extend their permission to stay; they cannot adjust their status or naturalize.[83] The integration of noncitizens was not a publicized feature of the program, but immigration officials understood it to occur, albeit without any input from their side.[84]

In 1998, the FBI considered accepting citizens of Central and Eastern European countries who assisted in the investigation of organized crime groups there into the Witness Protection Program.[85] This would have been a novel development as the program, for the first time, would have accepted individuals without any direct connections to the United States. The rationale was twofold: First, organized crime in Central and Eastern Europe has a

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78 According to the U.S. Department of Justice, the testimony of protected witnesses led to convictions in 89% of the cases in which they were involved. U.S. Marshals Service, *Witness Security, at* http://www.usdoj.gov/marshals/witsec.html (last visited Jan. 2, 2002).

79 "[E]very protected witness who was relocated in 1992 through 1994 had a prior criminal record." *Oversight of the Department of Justice Witness Security Program: Hearing Before the Senate Committee on the Judiciary*, 104th Cong. 104-873, at 2 (1996) (opening statement of Sen. Orin Hatch). *See also id.* at 41-42 (statement of John C. Keeney); Shelley, *supra* note 77, at 52; Robert Sabbag *The Invisible Family*, N.Y. TIMES, Feb. 11, 1996, § 6 (magazine) at 33. A number of individuals in the Witness Protection Program may, however, be the victims of criminal activity, rather than active participants in it. *Witness Protection Programs in America Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 104th Cong. 6-11 (1996) (statement of Miguel Gierbolini).

80 104th Cong. 104-873 at 46-47; Shelley, *supra* note 77, at 54. Since 1993 approximately 65 individuals annually have been placed in protective custody. About the same number will be relocated under the Witness Protection Program.

81 *See* U.S. Marshals Service, *Witness Security, at* http://www.usdoj.gov/marshals/witsec.html (last visited Jan. 2, 2002). As of 1996, approximately 6,500 witnesses and 9,000 dependents had entered the program. Shelley, *supra* note 77, at 53.

82 U.S. DEPARTMENT OF JUSTICE, U.S. ATTORNEYS' MANUAL § 9-21.410 (1997).

83 H.R. REP. NO. 101-676, at 6 (1990).

84 *Id.*

85 Susan Milligan, *U.S. Weighs Asylum for Hungary Mob Cases*, BOSTON GLOBE, Nov. 29, 1998, at A1. Numerous foreign Witness Protection Programs have been modeled after the federal program. 104th Cong. 104-873, at 42-43 (statement of John C. Keeney).

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substantial, albeit indirect,[86] negative impact on the United States, and it was in the interest of the United States to assist these countries in prosecutions against organized crime figures. As the lives of witnesses had been frequently threatened in such prosecutions, guaranteeing their safety through relocation and identity changes became a paramount concern, but was difficult in relatively small countries.[87] Second, these countries do not have functioning witness protection programs, and, in light of the geographic and societal make-up, may have difficulties creating effective programs, the United States has considered it in its interest to offer admission into its witness protection program to turncoat witnesses crucial to the prosecution of organized crime cases in Hungary and other Central and Eastern European countries.[88] A similar rationale has governed the admission of those cooperating in other non-domestic prosecutions into the program.[89]

While the Federal Witness Protection Program presents an opportunity to grant noncitizens the right to live and work in the United States, it is numerically restricted, expensive, and may not suit the needs of many individuals who cooperate with law enforcement. More attractive for the government and noncitizens may be three recently created visa categories designed to benefit those assisting law enforcement. While the number of these visas issued has been relatively small so far, they may come to play a more dominant role as the department of justice advertises their existence more widely.

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[86] In some cases the impact may be direct as European organized crime has gained a foothold in the United States or developed tight relationships with domestic crime families.

[87] *See, e.g.*, Shoshanah V. Asnis, Comment, *Controlling the Russian Mafia: Russian Legal Confusion and U.S. Jurisdictional Powerplay*, 11 CONN. J. INT'L L. 299, 308 (1996); Duncan DeVille, Essay, *Combating Russian Organized Crime*, 32 GEO. WASH. J. INT'L L. & ECON. 73 (1999).

[88] Some Western European countries, including Italy, Sweden, and Germany, have developed mechanisms to create identity changes for endangered witnesses. Soiné & Engelke, *supra* note 77, at 470 (describing German witness protection law that went into effect Dec. 31, 2001); Soiné & Soukoup, *supra* note 77, at 466 (describing laws in Italy and Sweden). *See also* Bruce Zagaris, *Trinidad Government Leads Witness Protection Initiative*, 12 INT'L ENFORCEMENT L. REP. 266 (July 1996) (describing the witness protection program of Trinidad & Tobago).

[89] *See infra* note 154 and accompanying text.

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B. S-, T-, and U-Visas

S-visas were created in the Violent Crime Control and Law Enforcement Act of 1994.[90] They are limited to 250 per year,[91] and allow a noncitizen to stay in the United States for three years if the person possesses information critical to an investigation into a criminal enterprise and is willing to testify on behalf of the prosecution.[92] If she provides information on a terrorist organization, she must "ha[ve] been placed in danger as a result of providing such information" to be eligible for an S-visa.[93] In 2000, about 100 S-visas were issued.[94] Once the alien has provided information that has "substantially contributed to the success of an authorized criminal investigation or the prosecution of an individual," the Attorney General may adjust her status to that of a permanent resident alien.[95] S-visas, therefore, promise the right to stay permanently in the United States.[96]

Despite their existence for a number of years, the Department of Justice began to advertise the availability of S-visas widely in the wake of the events

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[90] Pub. L. No. 103-322, 108 Stat. 1796 (1994). The Violent Crime Control and Law Enforcement Act of 1994 has been codified in several sections of the U.S. Code. *See* 8 U.S.C. § 1101(a)(15)(S) (2000) (defining the "S" non-immigrant classification); 8 U.S.C. § 1182(d) (describing waivers for exclusion grounds); 8 U.S.C. § 1184 (setting out numerical limits, periods, and conditions for admission of immigrants and reports to Congress); 8 U.S.C. § 1255 (defining conditions and requirements for adjustment of status); 18 U.S.C. § 3076 (2000) (authorizing placement in the witness security program). Implementing regulations are found at 8 C.F.R. § 212.14 (2002). *See also* 4 DEPARTMENT OF JUSTICE MANUAL 9-2380 – 9-2386 (2d ed. 2000). Originally, S-visas sun-setted in 1999. A subsequent bill extended their existence for two more years. Pub. L. No. 106-104, 113 Stat. 1483 (1999) (expressing Congress's desire that S-visas be used more frequently in alien smuggling cases). In 2001, Congress made S-visas permanent. Admission of "S" Visa Nonimmigrants, Pub. L. No. 107-45, 115 Stat. 258 (2001).

Often these visas are referred to as the "snitch" visas. Lori A. Nessel, *Undocumented Immigrants in the Workplace: The Fallacy of Labor Protection and the Need for Reform*, 36 HARV. C.R.-C.L. L. REV. 345, 392 n.204 (2001); Constance Emerson Crooker, *The "S" Stands for Snitch*, THE CHAMPION, Nov. 1997, at 29.

[91] 8 U.S.C. § 1184(k)(1) (limiting admission of noncitizen witnesses and informants in criminal investigations and prosecutions to 200 per year; 50 additional slots are set aside for admission under the anti-terrorist reward program). Only principal noncitizens, but not other admissible family members, count against the numerical limits.

[92] INA § 101(a)(15)(S), 8 U.S.C. § 1101(a)(15)(S); INA § 214(k)(3), 8 U.S.C. § 1184(k)(3). *See also* Christina M. Ceballos, Comment, *Adjustment of Status for Alien Material Witnesses: Is It Coming Three Years Too Late?*, 54 U. MIAMI L. REV. 75, 82 (1999); Crooker, *supra* note 90, at 29.

[93] INA § 101(a)(15)(S)(ii)(III), 8 U.S.C. § 1101(a)(15)(S)(ii)(III).

[94] Observers of the allocation process note that political choices appear to drive the allocation of many S-visas. Telephone Interview with Mike Wishnie, Assistant Professor of Clinical Law, New York University, Cooperating Attorney, ACLU Immigrants' Rights Project (Sept. 1998).

[95] INA § 245(j), 8 U.S.C. § 1255(j). Generally, the sponsoring agency can apply for adjustment after two years if the S-visa holder does not have a criminal record, and after three years if the person has a criminal record. Interview with Mike Wishnie, *supra* note 94.

[96] 8 U.S.C. § 1255(i). For a critique of the regulation, see Ceballos, *supra* note 92.

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of September 11. Noncitizens were promised S-visas in exchange for information on terrorism.[97] Individuals detained in the weeks after September 11 apparently were told specifically about these visas to entice them to cooperate with law enforcement.[98] A recent memo by Deputy Attorney General Larry Thompson issued in connection with the Absconder Apprehension Initiative, which aims to deport noncitizens who have fled law enforcement even though they are under deportation orders, encourages investigators explicitly to mention S-visas to induce absconders to cooperate.[99] The U.S. approach parallels Canada's, where noncitizens were promised "the prospect of secure immigration status in exchange for becoming co-operative intelligence sources."[100]

The promise of an S-visa, however, does not guarantee the cooperating individual that he will receive one.[101] To ensure eligibility, the person must waive his right to a removal hearing and the right to contest any removal action, including detention.[102] Furthermore, whether the pivotal requirement of a successful investigation or prosecution can be fulfilled rests with law enforcement authorities. Ultimately, the grant of an S-visa remains in their unreviewable discretion.[103] Nevertheless, the Federal Witness Protection Program set the standard for the state protecting even unsavory witnesses in exchange for their cooperation. It is unlikely that Congress would not have considered a comparable scenario in the context of S-visas.

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[97] For criticism of the program, see Press Release, Arab-American Anti-Discrimination Committee, ADC Extremely Concerned by Ashcroft's Latest Plan (Nov. 28, 2000) (on file with author).

[98] Michael Ratner, *Moving Toward A Police State or Have We Arrived?* (2001), *at* http://www.humanrightsnow.org/policestate.htm. To date, no S-visas seem to have been granted in connection with the terrorism investigation surrounding September 11. Johnson, *supra* note 66. Some have argued that the promise of such visas in connection with terrorism investigations is useless because outsiders are unlikely to be able to provide insightful information. *Id.*

[99] Memorandum from Larry Thompson, Deputy Attorney General, Guidance for Absconder Apprehension Initiative 4-5 (Jan. 25, 2002) (on file with author). The memo also encourages law enforcement and immigration officials to inform absconders about the availability of reward money for the capture of Osama bin Laden and other members of Al Qaeda. *Id.*

[100] Macklin, *supra* note 12, at 397.

[101] The memorandum issued by the Deputy Attorney General in connection with the Absconder Apprehension Initiative painstakingly reminds prosecutors to inform detained absconders that they are not guaranteed S-visas even upon cooperation. Thompson, *supra* note 99.

[102] 4 DEPARTMENT OF JUSTICE MANUAL, *supra* note 90, at 9-2382.

[103] Both INS and US Attorney's offices have been accused of breaking their promises of applying for stay rights for witnesses upon their cooperation in criminal prosecutions. *See, e.g.*, H.R. REP. NO. 101-676, at 7 (1990) (describing the difficulty of immigrant witnesses); Taylor & Wright, *supra* note 40, at 130.

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Understandably, prosecutors may be reluctant to grant S-visas to individuals who are substantially involved in criminal or terrorist activities.[104] Most of the individuals who have received S-visas in the past were crime victims who would have been subject to deportation but not criminal prosecution.[105]

T-visas have been introduced more recently, as a response to the growing problem of human trafficking.[106] They allow up to 5,000 trafficking victims to stay in the United States if they cooperate in the prosecution of their smugglers and show "extreme hardship involving unusual and severe harm" if they were returned to their countries of origin.[107] The victims of human trafficking may have been duped or forced either into crossing an international border and/or into working under sub-human, exploitative conditions. After three years on a T-visa, victims may be able to stay in the United States permanently and bring their spouses and children with them if they have exhibited good moral character since the grant of the T-visa and either assisted in the investigation or prosecution of traffickers, or would suffer extreme hardship upon removal.[108]

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[104] The Attorney General can waive grounds of inadmissibility, including those based on national security concerns. INA § 212(A)(3)(b), 8 U.S.C. § 1182(a)(3)(B), (D) (2000); INA § 212(d), 8 U.S.C. § 1182. *See also* ALEINIKOFF ET AL., *supra* note 8, at 428.

[105] Among the better known examples are the blind Mexicans in New York and Chicago who were forced to beg and the garment workers in El Monte, California, who were virtually imprisoned and enslaved. *See, e.g.*, Ceballos, *supra* note 92, at 77-82; Mirta Ojito, *U.S. Permits Deaf Mexicans, Forced to Peddle, to Remain*, N.Y. TIMES, June 20, 1998, at A1. While criminal prosecutions for violations of immigration law may have been technically possible in these cases, because of the conditions in which they were found, these individuals engendered sympathy rather than triggering the wrath of the criminal justice system.

[106] *See* Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 107(e)(1), 114 Stat. 1464, 1477. Regulations for T-visas were issued on January 24, 2002. *See also* Lisa Raffonelli, *INS Final Rule to Assist Victims of Trafficking*, REFUGEE REP., Apr. 2002, at 1, 2.

To be eligible for a visa, the applicant must be the victim of "severe" trafficking. 8 U.S.C. § 1101(a)(15)(T)(i)(I) (2000). This means that she must have been trafficked (1) into sex trafficking, involuntary servitude, peonage, debt bondage, or slavery, and (2) she must have been forced, defrauded, or coerced. 22 U.S.C. § 7102(8) (2000).

A more limited program is currently being debated in the European Union. It would allow unauthorized migrants who assist law enforcement authorities to receive six-month residence permits. Individual European countries already grant temporary residence to individuals who cooperate in the investigation and prosecution of traffickers. Foreign Information Division, Ministry of Justice, *Dutch Policy on Prostitution: Questions and Answers*, 7 (2000), *at* http://www.minbuza.nl/OriginalDocuments/c_3543.pdf; *see also* Nora V. Demleitner, *The Law at a Cross-Roads: The Construction of Migrant Women Trafficked into Prostitution*, *in* GLOBAL HUMAN SMUGGLING: COMPARATIVE PERSPECTIVES 257, 277 (David Kyle & Rey Koslowski eds., 2001).

[107] INA § 101(a)(15)(T), 8 U.S.C. § 1101(a)(15)(T); 8 U.S.C. § 1184(n)(2). There is no cooperation requirement if the victim is younger than fifteen. 8 U.S.C. § 1101(a)(15)(T)(i)(III)(bb).

[108] 8 U.S.C. § 1255(l)(1). *See also* Nessel, *supra* note 90, at 393-94 (calling for extension of S- and T-visas to cover undocumented workers who "assist in prosecuting employers for civil, labor, or employment law violations . . . .").

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Applicants under age twenty-one may also have their parents join them.[109] Without a T-visa, trafficking victims are considered undocumented, and therefore deport-able. The visa, consequently, provides an incentive for trafficking victims to cooperate with law enforcement if they fear return to their home country or desire to stay in the United States.[110] Since T-visas are relatively new, it is not clear yet how generously law enforcement and INS officials will grant them.[111]

Finally, U-visas are available to victims cooperating in the investigation of a number of statutorily enumerated offenses, most of which are connected to human trafficking, sexual abuse, violent crimes, and offenses against the criminal justice system.[112] If the victim has suffered physical or mental abuse because of such criminal activity, she may be admitted as a non-immigrant.[113] The primary requirement is that she "'has been helpful, is being helpful, or is likely to be helpful' in the investigation or prosecution of [such] criminal activity . . . ."[114] U-visas are numerically limited to 10,000 annually.[115] After three years of residence in the United States, the crime victim may be able to adjust her status to that of permanent resident.[116]

The governing assumption behind all these visas is that the cooperating witness is interested in staying in the United States—largely because of fear of abuse at home.[117] S-, T-, and U-visas give authorities the opportunity to exploit this desire in exchange for receiving cooperation in the criminal

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[109] INA § 101(a)(15)(T)(ii)(I), 8 U.S.C. § 1101(a)(15)(T)(ii)(I).

[110] H.R. CONF. REP. NO. 106-939, at 94-95 (2000). The degree to which a trafficked individual is motivated to assist law enforcement may depend on her original goals regarding emigration, her fear of the traffickers, and her assumptions about life in the United States and her home country.

[111] The first T-visa was issued in May 2002. The recipient was a four-year-old Thai boy who is HIV-positive. He was brought to the United States by a couple claiming to be his parents. *U.S. to Grant Thai Boy Special Immigrant Status*, CHICAGO TRIB., May 13, 2002, at 11.

[112] INA § 101(a)(15)(U), 8 U.S.C. § 1101(a)(15)(U). Most of the offenses focus around the activities of human trafficking and forced prostitution. No implementing regulations have yet been issued for U-visas.

[113] INA § 101(a)(15)(U), 8 U.S.C. § 1101(a)(15)(U).

[114] 8 U.S.C. § 1184(o)(1) (2000) (describing language required in certification by law enforcement officials or other authority).

[115] 8 U.S.C. § 1184(o)(2)(A).

[116] 8 U.S.C. § 1255(l)(1) (2000). If the "investigation or prosecution would be harmed without the assistance of the spouse, the child, or, in the case of an alien child, the parent of the alien," they may be granted legal status as long as such status is necessary for them to avoid extreme hardship. INA § 101(a)(15)(T)(ii), 8 U.S.C. § (a)(15)(T)(ii).

[117] Should that not be the case, under certain circumstances law enforcement authorities have the right to require noncitizens to stay in the United States until their cooperation is no longer needed in an ongoing prosecution. 8 C.F.R. § 215.3(g) (2002); Raffonelli, *supra* note 106, at 4.

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investigations. These visas, therefore, highlight the growing trend of using immigration law for another exterior purpose.

C. Discretionary INS Action

In addition to these statutory means of granting cooperating individuals rights to stay in the United States, in some cases immigration benefits may flow from discretionary INS action. The INS has sole discretion to admit individuals into the United States and to institute removal proceedings.[118]

Law enforcement or intelligence agencies may view applications for entry into the United States as an opportunity to recruit informers to obtain information about groups and individuals with whom they may be involved or whom they may join. This process is particularly likely in the refugee or asylum setting because of the vulnerability of the applicant to governmental pressure. In exchange for cooperation, the agency may facilitate or hinder the acceptance of the individual for admission or the grant of stay rights. On the other hand, rejection of such an offer can lead to denial of the right to enter or stay.[119]

In certain situations the Attorney General is empowered to grant discretionary relief from removal.[120] In the refugee context, the applicable statutory provision allows the Attorney General to provide relief from deportation "for humanitarian reasons, to assure family unity, or when it is otherwise in the public interest."[121] The standard, which has traditionally been difficult to meet, was tightened yet more in *In re Jean*.[122] There, the Attorney General determined that he would only grant stay rights to "violent or dangerous individuals . . . in extraordinary circumstances, such as those involving national security or foreign policy considerations, or cases in which an alien clearly demonstrates that the denial of status adjustment would result

[118] *See, e.g.*, Letter from Robert Raben, Assistant Attorney General, Office of Legislative Affairs, to Congressman Barney Frank (Jan. 19, 2000), *reprinted in* 77 INTERPRETER RELEASES 217, 219 (2000). *See also* Nessel, *supra* note 90, at 381-382.

The Attorney General may also grant parole in the public interest, which allows immigrants to stay in the United States. However, parole is not generally used to benefit those cooperating in criminal investigations. INA § 212(d)(5)(A), 8 U.S.C. § 1182(d)(5)(A). For a historical account and background on the parole provisions, see ALEINIKOFF ET AL., *supra* note 8, at 507-10.

[119] For a discussion of this process in Canada, see Reg Whitaker, *Refugees: The Security Dimension*, CITIZENSHIP STUD., Nov. 1998, at 413, 427-28 (1998).

[120] INA § 237, 8 U.S.C. § 1227.

[121] 8 U.S.C. § 209(c).

[122] *In re* Jean, 23 I. & N. Dec. 373, 383 (B.I.A. 2002).

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in exceptional and extremely unusual hardship."[123] While the decision restricts the hardship exception, it specifically indicates the availability of waivers when national security or foreign policy determinations make them desirable.[124] Therefore, cooperators may be granted stay rights as long as the gravity of the offense does not preclude the exercise of such favorable discretion.[125]

In addition to the discretionary power to grant stay rights, discretion to remove individuals allows the INS to defer action on placing noncitizens into removal proceedings.[126] While such delay merely postpones deportation, such postponement may satisfy the needs of particular noncitizens, or, with changed circumstances, may ultimately even result in a permanent stay on deportation. This procedure does not constitute a legal solution but merely provides a temporary reprieve, entirely at the discretion of the INS. It has been used in the past to permit aliens needed in criminal prosecutions to remain in the country.[127] Since no statute of limitation exists, the INS can, however, restart deportation proceedings at any point.[128] Therefore, more formalized agreements that allow noncitizens to enter or stay in the United States are preferable from the noncitizens' perspective.

D. The Antitrust Enforcement Program

In 1996, the Department of Justice's Antitrust Division and the INS entered into a Memorandum of Understanding (MOU) that waives entry restrictions

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[123] *Id.*

[124] Large numbers of criminal deportations can have a negative impact on foreign relations, as criminal deportees may continue their criminal activities in their home countries. *See, e.g.*, Margaret H. Taylor & T. Alexander Aleinikoff, *Deportation of Criminal Aliens: A Geopolitical Perspective*, *at* http://www.thedialogue.org/publications/taylor_criminal.htm (1998).

[125] *Jean*, 23 I. & N. Dec. at 383. The Attorney General applies the same analysis to adjustment of refugee status and to asylum.

[126] *See* Nessel, *supra* note 90, at 386-87.

[127] *See id.* at 386-90. Immigrants who are in the United States on a time-limited visa or who entered or stayed without legal permission will lack work authorization during the time in which they are merely tolerated in the United States. Nessel, *supra* note 90, at 386-90 (calling for deferred action and employment authorization for undocumented workers pursuing labor rights).

[128] *See* Morawetz, *supra* note 33, at 1942-43 (detailing the devastating effect of the absence of statutes of limitation on families).

The absence of a statute of limitations distinguishes immigration from the criminal arena where non-prosecution ultimately leads to the government's inability—for practical reasons or because of statutes of limitation—to institute proceedings in many cases. Immigration cases often hinge on legal documentation rather than factual accounts, crucial in most criminal cases. The latter are often time-sensitive, as the ability of witnesses to remember events declines, and potential defendants, victims, and witnesses die.

for foreign nationals in exchange for their cooperation in antitrust investigations.[129] Many of those violating U.S. antitrust laws are foreign business persons, operating abroad. Because of their employment, however, many travel frequently to the United States, and therefore value the right to come to the United States. A conviction for an antitrust violation would bar them from entering the United States for at least fifteen years.[130]

The MOU empowers the Antitrust Division to promise the violators that, in exchange for assistance in the antitrust investigation and a guilty plea, they continue to be admissible to the United States even if they are not eligible for an S-visa.[131] This incentive has been created to entice foreign businesspeople who are minor players in antitrust violations and consider the ability to travel to the United States crucial to their careers to provide information on more culpable participants.[132] The MOU is used in virtually every case in which a noncitizen cooperates in a criminal antitrust investigation.[133]

Again an immigration benefit is employed as an incentive for full and continued cooperation in a criminal investigation. In contrast to S-, T-, and U-visas, the MOU does not grant residency rights but rather permits continued admission to the United States even after a conviction (and a possible prison sentence) for violation of the antitrust laws.[134] The advantage of benefits under the MOU is that the INS will issue its decision on immigration benefits prior to the finalization of the plea agreement.[135]

III. IS IMMIGRATION LAW THE KEY TO SUCCESSFUL CRIMINAL PROSECUTIONS?

In the wake of September 11, the sanctions and rewards of immigration law have been employed as an integral part of the ongoing terrorist investigations. As long as much of the terrorist and some of the current criminal threats appear

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[129] Memorandum of Understanding, *supra* note 73.

[130] Gary Spratling, Negotiating the Waters of International Cartel Prosecutions: Antitrust Division Policies Relating To Plea Agreements in International Cases, Presentation at the Thirteenth Annual National Institute on White Collar Crime 18 (Mar. 4, 1999), *at* http://www.usdoj.gov:80/atr/public/speeches/2275.wpd.

[131] For model language on the immigration relief, see *id.* at 16-18.

[132] *Id.* at 18.

[133] E-mail from Yee Wah Chin, Co-chair, International Antitrust Law Committee, ABA Section of International Law and Practice (Dec. 10, 2001) (on file with author).

[134] Between 1996 and 1999 the INS accepted all petitions for immigration requests filed by the Antitrust Division under the MOU. *See* Spratling, *supra* note 130, at 18.

[135] *Id.* at 15.

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to emanate from outside the United States, immigration law may hold the key to successful law enforcement operations. After all, the information obtained through cooperation of potential defendants and removable noncitizens allows the government to investigate and successfully prosecute terrorist and criminal activities.[136] Such assistance may also demonstrate the cooperator's remorse and acceptance of responsibility.[137] Nevertheless, there is a substantial downside in the use of immigration rewards for cooperation.

A. *Cooperation: Ripe for Abuse*

Any situation in which a law enforcement agency holds substantial power over an individual can lead to abuses. The immigration context is no exception.

First, individuals who reject cooperation offers in exchange for assistance with entry or stay rights may be subject to retaliatory actions.[138] The INS may not only deny them immigration benefits—such as asylum—but also detain them until deportation.[139] The use of detention as a threat or sanction is more feasible when INS holds enhanced detention powers, as it does presently. Most serious is the situation for detainees who cannot be removed to their country of origin. They may be held indefinitely upon orders of the Attorney General if their "release is likely to have serious adverse foreign policy consequences" or "presents a significant threat to the national security or a significant risk of terrorism."[140] In all of theses cases, law enforcement

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[136] Podgor, *supra* note 71, at 800; Ian Weinstein, *Regulating the Market for Snitches*, 47 BUFF. L. REV. 563, 595 (1999).

[137] Podgor, *supra* note 71, at 800.

[138] This scenario assumes that the prospective immigrant is "innocent," that is, no criminal actions can be brought against her. However, it also applies when no criminal charges would be brought except for the refusal to cooperate. This may happen, for example, when the individual violated immigration rules that are not usually being prosecuted. Nasser Ahmed, who worked as a court-appointed translator for Sheik Omar Abdel Rahman during his trial for seditious conspiracy, was arrested and detained on immigration violations upon his refusal to cooperate with the FBI and INS against the cleric. JAMES X. DEMPSEY & DAVID COLE, TERRORISM & THE CONSTITUTION 129 (1999).

[139] Congress requires the detention of criminal aliens throughout removal proceedings. Martin, *supra* note 37, at 193; Morawetz, *supra* note 33, at 1946-47 (describing costs of detention to permanent residents). For a case study of official pressure in the Canadian context, see Whitaker, *supra* note 119, at 428.

[140] Human Rights Watch, *Principal Concerns of Human Rights Watch for the 58th Session of the United Nations Commission on Human Rights*, *at* http://www.hrw.org/un/unchr58.htm (last visited May 2, 2002).

In the wake of September 11, some individuals remained in immigration detention to allow the government enough time to clear them of terrorism charges before returning them to their home countries. Lawyers Committee for Human Rights, A Year of Loss: Reexamining Civil Liberties Since September 11, 25-35 (2002), *available at* http://www.lchr.org/us_law/loss/loss_report.pdf.

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officials' promise of release from detention as a reward for cooperation, past or future, exerts a powerful pressure on a detainee.

Second, immigration rewards entail many of the same concerns that have been voiced in the criminal context. The determination of whether cooperation is sufficient to obtain an immigration benefit rests solely within the unreviewable discretion of law enforcement officials,[141] who then convey their decision to immigration officials for a second level of review. Ultimately in many cases, individual prosecutors make the initial determination to request an immigration benefit, although coordination occurs at the Justice Department level.[142] Even if such a review process guarantees some national uniformity, at least in cases of federal prosecutions, it excludes the judiciary from independently assessing the amount and value of the cooperation provided. Such an alternative venue is important in cases where prosecutors refuse to request immigration benefits.[143]

Under the Federal Sentencing Guidelines, prosecutors can motion the trial judge to impose sentences below the otherwise prescribed guideline level to reward cooperation.[144] As in the award of immigration benefits, prosecutors alone determine what constitutes "substantial assistance."[145] If the government decides not to petition the court, the defendant is left without recourse. This situation is identical to the immigration context where a judge is unable to award the right to stay to a noncitizen even if she considered that person's assistance substantial enough to merit such a reward. The use of substantial

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[141] *Cf.* Cynthia K.Y. Lee, *From Gatekeeper to Concierge: Reigning in the Federal Prosecutor's Expanding Power over Substantial Assistance Departures*, 50 RUTGERS L. REV. 199, 204 (1997); Weinstein, *supra* note 136, at 590.

[142] The U.S. Attorney's Manual outlines the criteria under which federal prosecutors can determine not to prosecute a potential defendant who provides information. U.S. ATTORNEYS' MANUAL, *supra* note 82, at 9.27-620. Only in some of these cases is review by an assistant attorney general required. *Id.* at 9.27-640.

The Office of Enforcement Operations alone controls admission to the Federal Witness Protection Program. *Oversight of the Department of Justice Witness Security Program: Hearing Before the Senate Committee on the Judiciary*, 104th Cong. 104-873, at 43-44 (1996) (statement of John C. Keeney).

[143] *Cf.* Wade v. United States, 504 U.S. 181, 185 (1992) (noting that federal prosecutors have exclusive authority to file for substantial assistance motion, unless they employ impermissible selection criteria, such as race or religion).

[144] U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 (2001). In addition, such motions allow a court to sentence the defendant below any otherwise required mandatory minimum sentence. 18 U.S.C. § 3553(e). For a description of the pressure the guidelines exert on potential defendants to cooperate, see Steven M. Cohen, *What is True? Perspectives of a Former Prosecutor*, 23 CARDOZO L. REV. 817, 818-20 (2002).

[145] Courts may reject such motions and sentence the defendant within the applicable guideline range. This is unusual, however. For a discussion of judicial discretion in this context, see Bruce M. Selya & John C. Massaro, *The Illustrative Role of Substantial Assistance Departures in Combatting Ultra-Uniformity*, 35 B.C. L. REV. 799 (1994).

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assistance motions may also tell another cautionary tale. In fiscal year 2001, seventeen percent of all federal offenders received a departure based on substantial assistance grounds. Local diversity was startling: Only .5% of offenders in Utah had departures on that ground, but 40.5% in the Central District of Illinois did.[146] Similar disparities can be expected with regard to immigration benefits. While some of them may depend on legitimate differences in caseload, others are likely driven by the local U.S. Attorney's interest in working with the INS and her ability to get approval for such visas, as well as her assessment of when the noncitizen meets the cooperation requirement.

Also disturbing in this context is data indicating that downward departures based on substantial assistance motions "contribut[e] to ethnic disparity."[147] The existing data in the immigration area is too sparse to determine whether racial, ethnic, or gender differences exist, and whether they indicate unwarranted distinctions. The current disenchantment with the analogous cooperation provision under the Federal Sentencing Guidelines arising from perceived and actual inequities, however, highlights the necessity for a review mechanism independent of law enforcement authorities.

Furthermore, as in the criminal setting, more culpable individuals may be more likely beneficiaries of immigration rewards because they can provide more material information.[148] There are allegations that this situation has occurred in the Witness Protection Program.[149] In other cases, cooperation by minor players might not prove substantial enough for the award of immigration

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[146] U.S. SENTENCING COMM'N., 2001 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS app. B, *available at* http://www.ussc.gov/ANNRPT/2001/SBTOC01.htm.

[147] Stephen Demuth, *The Effect of Citizenship Status on Sentencing Outcomes in Drug Cases*, 14 FED. SENTENCING REP. 271, 274 (Mar./Apr. 2002). *See also* LINDA DRAZGA MAXFIELD & JOHN H. KRAMER, SUBSTANTIAL ASSISTANCE: AN EMPIRICAL YARDSTICK GAUGING EQUITY IN CURRENT FEDERAL POLICY AND PRACTICE 20-21(1998) (documenting problems with equity and proportionality in substantial assistance motions), *available at* http://www.ussc.gov/publicat/5kreport.pdf.

[148] *See, e.g.*, Cynthia Kwei Yung Lee, *Prosecutorial Discretion, Substantial Assistance, and the Federal Sentencing Guidelines*, 42 UCLA L. REV. 105 (1994); Daniel C. Richman, *Cooperating Defendants: The Costs and Benefits of Purchasing Information from Scoundrels*, 8 FED. SENTENCING REP. 292, 292 (1996).

A similar argument has been made with regard to organizational offenses. John C. Coffee, Jr., *Corporate Criminal Responsibility*, *in* ENCYCLOPEDIA OF CRIME AND JUSTICE 253, 260 (Sanford H. Kadish ed., 1983) ("Moreover, an insistence on finding a responsible individual decision-maker might produce a scapegoat system of criminal justice, in which lower-echelon operating officials would probably bear the primary responsibility and risk of exposure.").

[149] *Oversight of the Department of Justice Witness Security Program: Hearing Before the Senate Committee on the Judiciary*, 104th Cong. 104-873, at 10, 13 (1996) (testimony of James Peter Basile); *id. at* 15-17 (testimony of George Taylor).

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benefits as it does not lead to successful prosecutions. Individuals who had expected to receive stay rights, for example, would be disappointed and become disenchanted with the criminal justice system.[150] In the long run, publicity of such disappointed expectations may curtail the cooperation of potential informants.

Third, cooperation achieved in a coercive setting carries substantial disadvantages for government officials.[151] Noncitizens, even those entirely innocent, may be concerned about the possibility of deportation.[152] This concern becomes magnified when individuals are held in immigration detention without access to lawyers or knowledge of the charges against them.[153] Ultimately such pressure might become unbearable, and the individuals may exaggerate or misinform, intentionally or unintentionally, to be released from detention or to prevent their deportation.[154] Such faulty

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[150] The Federal Witness Protection Program currently accepts only about half of the applications filed for admission. *Id.* at 49 (statement of John C. Keeney); *id.* at 55 (chart of applications and admissions to the Program). While the decisions are likely based on a careful weighing of public security concerns and the value of the applicants' testimony, presumably a substantial number of the rejected applicants feel betrayed by the government.

[151] Any inducements, including plea bargains, "create motivations to lie." Eli Paul Mazur, Note, *Rational Expectations of Leniency: Implicit Plea Agreements and the Prosecutor's Role as a Minister of Justice*, 51 DUKE L.J. 1333, 1333-35 (2002) (discussing need for protections not only for explicit but also for implicit agreements between incriminating witnesses and the prosecution). For judicial recognitions of this danger, see *Hoffa v. United States*, 385 U.S. 293, 311 (1966).

[152] Macklin argues that this difference between citizens and noncitizens will "reinscribe the border" dividing the two groups. Macklin, *supra* note 12, at 397.

[153] Under guidelines issued by the Attorney General, foreign nationals may now be held for up to seven days until prosecutors determine whether to bring immigration or criminal charges against them. *See also* Ratner, *supra* note 98.

[154] Under certain circumstances, promises made in exchange for cooperation may constitute an "invitation to perjury." United States v. Waterman, 732 F.2d 1527, 1531 (8th Cir. 1984), *cert. denied*, 471 U.S. 1065 (1985). *See also* 104th Cong. 104-873, at 7; Yaroshefsky, *supra* note 71, at 921. For accounts of the danger cooperators present to the criminal justice system, see Joel Cohen, *When Prosecutors Prepare Cooperators*, 23 CARDOZO L. REV. 865, 865-70 (2002) (relating a personal account of cooperator-prosecutor relationship); Bennet L. Gershman, *Witness Coaching by Prosecutors*, 23 CARDOZO L. REV. 829, 848 (2002).

Majid Giaka, one of the pivotal witnesses in the Lockerbie prosecution of two Libyan nationals, was in the U.S. Witness Protection Program. He was vigorously cross-examined by defense counsel on the advantages he had gained from providing information to the Central Intelligence Agency (CIA). They implied that he lied in exchange for resettlement in the United States. Clare Connelly, *Giaka Denies Promise of $4 Million Reward and Is Asked if He Is Familiar with Walter Mitty*, Sept. 28, 2000, *at* http://www.ltb.org.uk/displaynews.cfm?nc=24&theyear=2000 (last visited Feb. 9, 2002); Clare Connelly, *Vigorous Cross Examination of Majid Giaka Continues*, Sept. 27, 2000, *at* http://www.ltb.org.uk/displaynews.cfm?nc=25&theyear=2000 (last visited Feb. 9, 2000); *Giaka Testifies*, *at* http://www.thelockerbietrial.com/trial_news_giaka_testifies.htm (last visited Feb. 11, 2002). *See also* Jacob Katz Cogan, *International Criminal Courts and Fair Trials: Difficulties and Prospects*, 27 YALE J. INT'L L. 111, 127-128 (2002).

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information may implicate innocent individuals in criminal activity, as some courts and many commentators have recognized.[155]

If the cooperation helps the government infiltrate a criminal or terrorist organization, the personal price an individual cooperator pays is potentially very high. It may lead to debilitating psychological cost and even endanger the individual's life.[156]

While all rewards predicated on cooperation carry difficulties, the use of immigration penalties and benefits is particularly misleading as their promise of security for all of us is merely ephemeral.

B. Immigration Penalties and Rewards—Based on False Premises?

The promises deportation holds as a law enforcement tool convey an inaccurate impression of the causation of crime and provide a false sense of security.

1. Deportation and the Causation of Crime

The use of deportation as a means to rid the country of offenders reflects a reductionist view of the causes of crime. For many decades criminal law scholars, psychologists, criminologists, and others have hotly debated the causation of crime. The question has traditionally been whether "nature or nurture" is responsible for the creation of an offender.

Deportation of permanent residents, including those who come to the United States as children, seems to resolve the dispute: "nature" is responsible for crime. If environmental circumstances had any impact on crime, the

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[155] "'[P]romises of immunity or leniency premised on cooperation . . . may provide a strong inducement to falsify . . . .'" United States v. Singleton, 144 F.3d 1343, 1350 (10th Cir. 1998) (quoting United States v. Meinster, 619 F.2d 1041, 1045 (4th Cir. 1980)), *rev'd en banc*, 165 F.3d 1297 (10th Cir. 1999). *See also* Saul M. Kassin, *Human Judges of Truth, Deception and Credibility: Confident But Erroneous*, 23 CARDOZO L. REV. 809 (2002) (describing difficulties in distinguishing lies from truth); Barry Scheck, *Closing Remarks*, 23 CARDOZO L. REV. 899, 900 (2002) (discussing lack of data on false convictions based on informants' testimony but indicating that limited existing data pool indicates substantial problem); Steven Skurka, *A Canadian Perspective on the Role of Cooperators and Informants*, 23 CARDOZO L. REV. 759, 761 (2002) (recounting story of a Canadian's release upon finding of innocence when conviction had been based on testimony of jailhouse informant).

[156] *See, e.g.*, Whitaker, *supra* note 119, at 427-28. Most of the recent criticism of the Federal Witness Protection Program has focused on the actual or potential commission of crimes by individuals in the program. *See, e.g.*, 104th Cong. 104-873, at 6-7 (finding that the recidivism rate, while substantially lower than for the general prison population, is around 25%).

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United States would have to take some responsibility—graduated based on the length of time the offender has spent in the United States and depending on how formative those years were—rather than reflexively deporting the offender to her "home" country. Through removal, the United States absolves itself of responsibility for these offenders. Their nationality, that is, their home country, rather than acculturation in the United States is blamed for their offense.[157] Criminality becomes an integral part of alienage, and both become unalterable.

The assertion about the causation of crime implicit in the current approach to deportations, however, is contradicted by studies indicating that the first generation of immigrants is less crime-prone than the indigenous population, while their children are more likely to commit criminal offenses.[158] If those findings are accurate, American society must bear more responsibility for these crimes than previously admitted. A Presidential Commission charged with reviewing the deportation laws in the early 1950s acknowledged as much. After recounting the stories of several long-term permanent residents who were convicted and deported, the Commission stated "[e]ach of the aliens is a product of our society. . . . The countries of their origin which they left—in two cases during infancy, in another, at the age of 5 years—certainly are not responsible for their criminal ways."[159]

This view no longer predominates, however. In many respects, immigration law appears to track the developments in the criminal arena, albeit time delayed. Starting in the late 1970s, guideline sentencing began to limit the discretion of sentencers by focusing them on the offense committed and the offender's criminal record. In the 1980s, state legislatures, but especially Congress, added mandatory sentences that did not allow for the individualization of sentences but required the imposition of a specific prison sentence following the commission of a specific offense, generally a drug or weapons

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[157] The domestic cost of writing off noncitizen offenders is relatively limited. On the one hand, the development tracks the broad expansion of collateral sentencing consequences which makes it impossible even for citizen offenders to re-enter society as full members. *See, e.g.*, Nora V. Demleitner, *Preventing Internal Exile: The Need for Restrictions on Collateral Sentencing Consequences*, 11 STANFORD L. & POL'Y REV. 153, 158 (1999); Jeremy Travis, *Invisible Punishment: An Instrument of Social Exclusion*, *in* INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT 15 (Marc Mauer & Meda Chesney-Lind eds., 2002). On the other hand, to keep their political clout, many immigrant groups tend to focus on more "deserving" constituents than serious offenders.

[158] Offenders born in the United States and those who have been naturalized cannot be deported; many of those who are deportable spent their formative years in the United States. For anecdotal accounts, see Morawetz, *supra* note 33, at 1952-53.

[159] PRESIDENT'S COMM'N ON IMMIGR. & NATURALIZATION, WHOM WE SHALL WELCOME 202 (1953).

crime. The 1996 immigration acts replicate this development by requiring deportation following a specific conviction, independent of the offender's background.[160] Reducing an individual merely to his criminal record assumes that he entered the United States to commit crimes and has lived here without any attachments to family, the community, or society. While some individuals may meet this description, most do not. Therefore, the premises on which immigration reform were based are flawed and reflect stereotyped views of a "typical" offender.

Data indicating that second-generation immigrants have higher crime rates than the native born population (and their parents) show that alienage may not be responsible for criminality. Nevertheless, they have buttressed claims for immigration restrictions. Since second-generation immigrants, that is, those born in the United States, are not deportable, the only conceivable way by which the crime rate can be lowered is through immigration restrictions on their parent(s).[161] This argument limits societal responsibility to potential victims of crime. On the other hand, society takes no responsibility for potential offenders. In accord with the current overall approach to criminal justice and social policies, such as anti-poverty measures, targeting potential offender groups proactively to provide them with benefits—such as education—that would prevent crime remains inconceivable. In many respects, therefore, deportation and suggested immigration restrictions are desperate acts on part of a state that concedes its inability (and unwillingness) to reintegrate offenders.[162]

2. A False Sense of Security

With the portrayal of terrorism and crime as largely foreign imports, an increased number of border guards and enhanced deportation powers appear to promise greater security. This impression, however, is misleading. In a relatively open society it may be impossible to keep individuals, such as the men involved in September 11 and others who enter the United States with criminal intent, out of the country regardless of how well thought out and developed entry restrictions are. While enhanced border controls may reduce

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[160] In contrast to sentencing reform, however, the expansion of mandatory deportation grounds was not justified on equity grounds but was touted largely as a crime-fighting mechanism.

[161] *See, e.g.*, Carl F. Horowitz, *An Examination of U.S. Immigration Policy and Serious Crime*, 24-25 (2001), *at* http://www.cis.org/articles/2001/crime/crime.pdf.

[162] This declaration of bankruptcy also has devastating effects on citizen offenders where long-term imprisonment and collateral consequences are hailed as panaceas.

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the number of criminals entering, they surely cannot prevent offenses committed by immigrants who do not become involved in terrorist or criminal activities until after they come to live in the United States. Finally, immigration restrictions do not preclude native-born or naturalized citizens from committing criminal offenses.

The current focus on increased scrutiny at points of entry[163] and heightened removals through the Absconder program is designed to enhance national security, or at least its perception. While the individuals targeted have violated immigration laws and disobeyed court orders, most of them are not likely engaged in other criminal, let alone terrorist, activities. Even though the arrest and deportation of these absconders are praised as successful law enforcement activities that decrease the threat to public safety, it is not clear to what extent this is the case. The current focus of the program seems to be solely based on nationality and religion—Middle Eastern and Muslim—irrespective of any other relevant criteria.[164] As the 1993 World Trade Center and the Oklahoma City bombings indicated, however, U.S. citizenship—or that of other Western, democratic nations—does not magically protect against extremist thoughts and actions. The only individuals currently under indictment for activities connected to September 11 or Al Qaeda are citizens of France, Great Britain, and the United States. The current efforts at deporting "dangerous classes" of residents are, therefore, misleading and may create a false impression of security.

As law enforcement resources are limited, presumably other non-Middle Eastern and non-Muslim immigration violators and criminal offenders are not being found and removed in the current drive. This re-allocation of resources may in the long run increase rather than lessen the danger to domestic security.[165]

The sense of false security created by the initiative may be compared to that engendered by the sex offender notification and registration statutes which

[163] Press Release, U.S. Dep't of Justice, Attorney General Ashcroft Announces Implementation of the First Phase of the National Security Entry-Exit Registration System (Aug. 12, 2002), *available at* http://www.usdoj.gov/opa/pr/2002/August/02_ag_466.htm.

[164] *See, e.g.*, Rodriguez, *supra* note 1; Eggen, *supra* note 18.

[165] Despite a decrease in crime in New York City immediately following the attack on the World Trade Center, as police continued to focus on lower Manhattan in the days after September 11 concerns rose that the crime rate in surrounding areas would increase. Sean Gardiner, *City's Puzzling Crime Picture*, NEWSDAY, Dec. 2, 2001, at A6; Phillip Lutz, *Nassau Police Budget Fight Hears an Echo of Sept. 11*, N.Y. TIMES, Apr. 21, 2002, § 14 (Long Island), at 1LI.

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alert the public to potential offenders in their midst based on an individual's prior record. These databases rely on comparable past offenses to predict future crime, and are comparatively even more restrictive than the current Absconder initiative. Nevertheless, they create a similar problem: While some convicted offenders may pose a continued risk, individuals without a criminal record may be equally dangerous, albeit they are not suspected of offending as quickly. The same holds true for immigration absconders, but the criteria used are even less predictive of terrorist or serious criminal activity.

It appears naive to assume that the deportation of even those criminals or terrorists who constitute a future risk provides a solution to crime.[166] Terrorist activities, drug offenses, and white-collar crime may all be committed by U.S. citizens or be run from abroad. In cases where deportation merely relocates the problem without creating greater long-term safety,[167] it is ineffectual. In cases where offenders may be able to operate more freely in the countries to which they are deported, deportation defeats its own goal: greater domestic security.

In sum, deportation does not provide us with greater security. It merely presents a quick, almost automatic reaction to an external threat, grounded in an outdated territorial concept which has traditionally provided the backdrop for all immigration law.

CONCLUSION

The frequent invocation of immigration law in the investigation surrounding the events of September 11 has highlighted its use as a law enforcement tool. However, this reality also indicates that immigration law is both too powerful and not powerful enough to provide us with security.

As long as immigration law provides for extreme sanctions—detention and deportation—while holding great promise—the right to live and work in the United States legally—the dangers of abuse and coercion are magnified in a system that mandates only limited protections for the individual. We must come to understand that with territorial sovereignty and the resultant immigration power comes responsibility. Safeguards must be built into the im-

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166 Assessing who is likely commit future crimes is notoriously unreliable.

167 Macklin, *supra* note 12, at 398 (calling deportation of the guilty "singularly parochial and ineffectual" and comparing it to "the Not in My Back Yard phenomenon in zoning disputes, transposed to the global realm").

migration system which otherwise becomes subject to easy abuse. Protections in the criminal arena become ephemeral if sanctions can be moved into the immigration setting where individual protections are substantially weaker.

Equally important, the deportation power is of limited effectiveness in fighting crime and terrorism. Its seductive promise of cleansing our territory and rewarding those who help us provides no solution to the existing problems but merely relocates them in an ever more connected world.

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