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Criminalizing the Undocumented: Ironic Boundaries of the Post-September 11th "Pale of Law"

Daniel Kanstroom*

"The best criterion by which to decide whether someone has been forced outside the pale of law is to ask if he would benefit by committing a crime."

I. Introduction

When Hannah Arendt wrote of being outside the "pale of law" she was thinking about the terrible plight of stateless refugees in Europe in the era before the Second World War. These days, many different people find themselves in such rightless zones. Consider the recent, remarkably similar statement of attorney Javier Nart, following the decision of Spanish High Court Judge Baltasar Garzon to prosecute his client, who had been held by the U.S. military in Guantanamo: "In 32 years [as a lawyer] I never thought I would have to be pleased that a client of mine was accused of a serious offense . . . he has also been converted into a human being again." Such irony is not applicable only to "aliens" captured outside U.S. territory. Ask U.S. citizens Jose Padilla and Yaser Hamdi. However, the people who have long understood this irony most thoroughly are non-citizens facing deportation from the United States.

Prior to September 11th, 2001 one could have said that some legal categories were pretty clear. Immigration law was deemed to

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be civil, not criminal law. Non-citizens who were subject to formal
criminal process retained the same rights as citizens.\textsuperscript{4} If, however,
they were placed in deportation proceedings, their rights were
much more restricted.\textsuperscript{5} The legal fallout from September 11\textsuperscript{th} may
require serious re-thinking of such long-entrenched principles. The
reason for this is not only the so-called USA PATRIOT Act, to
which so much recent attention has been paid.\textsuperscript{6} It is also due in
large part to an increasing convergence between the criminal
justice and immigration control systems, part of a trend that has
been evident since the late 1980s.

This essay is a foray into deep and turbulent legal waters. My
general hypothesis is that well-accepted historical matrices are
increasingly inadequate to address the complex issues raised by
various U.S. government practices in the so-called “war on
terrorism.” The essay describes certain stresses that have recently
built up on two major legal dichotomies: the citizen/non-citizen
and criminal/civil lines. It will do this, first, by reviewing the use
of the first of these dichotomies as part of the post-September 11\textsuperscript{th}
enforcement regime. It will then move to consideration of the
increasing convergence between the immigration and criminal
justice systems, especially as it is exemplified by the proposed
CLEAR and HSEA Acts, which, among other things, seek to
criminalize unlawful presence in the United States.\textsuperscript{7} These
exemplars seem to pull in different directions: in the first the
government benefits from the civil nature of deportation while in
the second it may lose that advantage. When viewed together,
however, one can see the potential emergence of a disturbing new
system which contains the worst features of both models and
maximizes prosecutorial discretion as it minimizes individual
rights.

\section*{II. Post-September 11\textsuperscript{th} Enforcement: The Citizen/Non-citizen}

\textsuperscript{4} Wong Wing v. United States, 163 U.S. 228, 235-37 (1896).

\textsuperscript{5} See Fong Yue Ting v. United States, 149 U.S. 698, 724 (1893).

\textsuperscript{6} The full title of the USA PATRIOT Act is the Uniting and Strengthening
America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism

\textsuperscript{7} CLEAR Act, H.R. 2671, 108th Cong. (2003). See infra Sec. III. C.
Criminalizing the Undocumented

All non-citizens in the United States are continuously subject to a complex, ever-changing, relatively insular, flexible, and highly discretionary legal regime called immigration law. Immigration law, more than many other legal arenas, has long been a highly categorical enterprise. It is filled with bright-line dichotomies upon which cases turn and lives depend. Indeed, the very definition of an immigration law case depends upon a threshold categorization whether a person is a citizen or, as our statute still refers to people: an "alien." More specifically, rights-claims grounded in due process may also turn on whether a person is categorized as a lawful permanent resident, a non-immigrant, or undocumented. The basic constitutional rights available to a person in removal proceedings hinge upon the categorization of those proceeding as "civil." Thus, in immigration/deportation law, at least one major dichotomy is nested within another.

The citizen/non-citizen and criminal/civil lines have recently been used on a massive, indeed unprecedented, scale. The federal government had powerful tools for a response to the September 11th attacks that focused immediately on non-citizens. One month

8 Categorization is normatively neutral. Indeed, it is one of the defining attributes of a coherent rule of law. It is helpful for all sorts of reasons – practical, theoretical, and emotional – to know, more or less, where a particular issue "fits" in the grand scheme of things. Boundaries are never perfect and slippage is, of course, inevitable over time as many a Realist and critical legal theorist has noted. Acceptance of a basic categorical method of thought does not necessarily stamp one as a wooden formalist. We need some stable categories if we are to maintain any sense of continuity in our discourse. For example, one might criticize the categorization of a particular matter as "civil" without necessarily calling it "criminal," either. A more functional category of "punishment" might serve as categorical bridge and, over time, could create a new category.


11 Indeed, other dichotomies have powerful effects, too. The very availability of judicial habeas corpus review of immigration cases may depend upon whether an issue is framed as one of law or discretion. See Daniel Kanstroom, St. Cyr or Insincere: The Strange Quality of Supreme Court Victory, 16 Geo. IMMIGR. L.J. 413 (2002) [hereinafter Kanstroom, St. Cyr]; see also Daniel Kanstroom, Surrounding the Hole in the Doughnut: Discretion and Deference in U.S. Immigration Law, 71 Tul. L. Rev. 703, 731-34, 759-66 [hereinafter Kanstroom, Surrounding the Hole in the Doughnut].
after the attacks, Attorney General John Ashcroft, made the connection: "Let the terrorists among us be warned: If you overstay your visa even by one day we will arrest you. If you violate a local law, you will be put in jail and kept in custody as long as possible." The government focused its efforts on non-citizens for obvious reasons: it was apparently easy and efficient, and without immediate major political risk. These aspects of U.S. immigration law are among the most effective available enforcement tools in the government’s arsenal. The strongest power is that of deportation of non-citizens and the concomitant powers to arrest and incarcerate.

There are literally dozens of reasons why a non-citizen may be deported from the United States. They range from non-controversial grounds – such as terrorism – to the mind-numbingly technical. This complex system, which is the result of decades of growth, gives immigration prosecutors great flexibility and enormous power. Thus, as I often must warn my clients and my students, almost any non-citizen can be deported at almost anytime if an immigration agent wants to look closely enough at his or her case.

Thousands of non-citizens, some completely innocent of any wrongdoing, most others with minor immigration violations, have felt the power of this zero-tolerance policy. For example, Tarek Mohamed Fayad, an Egyptian dentist, came to the United States in 1998 as a student. He was arrested on September 13, 2001, at a gas station near his home in California. Four agents reportedly ordered him to lie on the ground. They told him that INS “thinks

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13 I write “apparently” because, to date, the strategy seems to have resulted in a very small number of prosecutions or even leads.


17 See id.
you’re illegal.” They proceeded to search his home, seize his passport and other papers, and to arrest him for alleged violation of his student visa status. Dr. Fayad was held in a Los Angeles jail, and when friends tried to post bond, they were told that his bond had been “rescinded.” One of his friends was himself detained and questioned for eight hours.

Dr. Fayad was then transferred to Brooklyn, New York’s high security Metropolitan Detention Center. Guards called him a terrorist. At night, he was awakened every half hour. He was held in the “Special Housing Unit,” where he was in a cell 23 hours a day. He had no access to newspapers, television or radio. It wasn’t until the end of October that he was allowed to go outside at 7 A.M. for an hour. His friends, family, attorney, and the Egyptian Embassy could not locate him until November.

Many other non-citizens in the United States tell similar stories. Thousands have been held in detention, many for technical, apparently pretextual, violations of civil immigration laws. Detainees were subjected to a “hold until cleared by the FBI” policy, which resulted in the average length of time from arrest to clearance of eighty days, with considerable numbers of people being held for more than six months. A government report describes the case of, “[a] Muslim man in his 40s . . . [who] was arrested after an acquaintance wrote a letter to law enforcement officers stating that the man had made anti-American statements . . . [that were] very general and did not involve threats of violence or suggest any direct connection to terrorism.” This

18 See id.
19 See id.
20 See id.
21 See id.
22 See id.
23 See id.
24 See id.
25 The INS held some 762 persons in a scattered network of federal, local, private detention facilities throughout the country. Their detention was a direct result of the so-called PENTTBOM investigation, led by the FBI. June 2003 OIG Report, supra note 12, at 1-2.
26 Id. at 46.
27 Id. at 64.
man, according to the government report, was cleared of any terrorist links. Still, he was held in detention for more than four months before being deported.\textsuperscript{28}

The way in which these round-ups and detentions were conducted has also been subject to severe criticism. A report by the Office of the Inspector General has cited dozens of recent cases in which government employees were accused of serious civil rights and civil liberties violations involving enforcement of the USA PATRIOT Act.\textsuperscript{29} The report said that in the six-month period that ended on June 15, 2003, the inspector general’s office had received thirty-four “credible” complaints of civil rights and civil liberties violations by government employees, including allegations that Muslim and Arab immigrants in federal detention centers had been beaten.\textsuperscript{30} “Credible” accusations had been made against agents of the FBI, the Drug Enforcement Administration (“DEA”), and the INS.\textsuperscript{31}

Immigration law facilitates the surveillance, interrogation, arrest, and detention of non-citizens. The government has much more power in this setting than when it arrests of citizens, due to loose standards as to pre-hearing detention\textsuperscript{32} and judicial review.\textsuperscript{33}
Therefore, it was not surprising that unusually forceful steps were quickly taken pursuant to existing immigration law.\(^3\) Beginning in the immediate aftermath of the September 11\(^{th}\) attacks, the detention of hundreds of non-citizens proceeded amidst near complete secrecy as many detainees were held without access to counsel.\(^3\) Removal hearings, historically open to the public, were closed.\(^3\) Indeed, the Bush Administration publicly stated that neither the location nor the identities of post September 11\(^{th}\) detainees would be disclosed.\(^3\)

33 As the Supreme Court has recently reiterated, detention during deportation proceedings is a constitutionally legitimate feature of the deportation procedure. See *Kim*, 538 U.S. at 541. See also *Wong Wing*, 163 U.S. at 235 (explaining that deportation proceedings "would be vain if those accused could not be held in custody pending the inquiry into their true character.").

34 See generally Kanstroom, *Deportation and Social Control*, supra note 10. Less than two weeks after the attacks, Attorney General John Ashcroft also presented the rather gracelessly named Mobilization Against Terrorism Act (MATA) to Congress. The unfortunate association between this acronym and the Spanish verb *matar* (to kill) was noted by many observers. Press Release, Attorney General John Ashcroft (Sept. 24, 2001), at http://www.usdoj.gov/opa/pr/2001/September/492ag.html.n17. Among other provisions, the proposal sought to enhance the authority of the Immigration and Naturalization Service (INS) to arrest and remove alleged terrorists by expanding the definition of terrorists to include those who provide support to terrorist organizations. *Id.*

35 The Attorney General issued an internal memo on October 12, 2001, which stipulated:

[W]hen you consider FOIA [Freedom of Information Act] requests and make a decision to withhold records, in whole or in part, you can be confident that the Department of Justice will support your decisions unless they lack a sound legal basis or provide an unnecessary risk of unfavorable impact on the ability of other agencies to safeguard other valuable records.


36 See *id.* The Attorney General's memo instructed immigration judges to hold certain hearings separately, to close these hearings to the public, and to avoid discussing the case or otherwise disclosing any information about the case to anyone outside of the immigration court. Indeed, judges were instructed not to confirm or deny whether such a case was, or is, on the docket or scheduled for a hearing. *Id.*

37 On November 8, 2001, the Department of Justice announced it would no longer release the number of detentions. Although the Justice Department had subsequently released a list of the number of people charged with specific immigration violations and their countries of origin, many questions about the post-September 11 detainees remain unanswered, including the identities of all those detained, where they were held, etc.
Throughout 2002, the INS and its successor within the Department of Homeland Security, known as "ICE,"\(^{38}\) enforced technical aspects of immigration law with highly focused zeal. The "Absconder Apprehension Initiative" sought to locate 314,000 "absconders" from immigration proceedings, prioritizing young men of particular national origin.\(^{39}\) As with all other such initiatives, the absconder initiative has swept many innocent people into the enforcement net.\(^{40}\)

Professor Anatoly Bogudlov, a retired astrophysicist from Russia was reportedly "handcuffed, shackled, interrogated for nine hours and then locked up for two days when he returned from a recent trip to Moscow."\(^{41}\) His arrest was reportedly "based on bureaucratic errors that had been buried for years" in INS files.\(^{42}\) Professor Bogudlov legally obtained a Green Card in 1996.\(^{43}\) However, his 1992 application for political asylum as a Soviet Jew erroneously stayed on file, resulting in a 1999 hearing in Denver.\(^{44}\) Notice of the hearing was sent to the wrong address and when Professor Bogudlov did not show up, the case was automatically referred to an immigration judge who issued a "final order of

Heardings have also been veiled from public scrutiny. See Letter from U.S. Department of Justice, Office of Legislative Affairs to Senator Russell D. Feingold (Nov. 16, 2001).

\(^{38}\) The acronym stands for "Immigration and Customs Enforcement."

\(^{39}\) Office of Deputy Attorney General, Subject: Guidance for Absconder Apprehension Initiative (Jan. 25, 2002). On July 12, 2002, the INS stated that 758 persons were arrested as part of this program. See 79 Interpreter Releases 1044 (July 15, 2002). The period of stay for visitors to the United States was also shortened from its prior 3-6 months to 30 days or a "fair and reasonable period" and most changes of status from visitor to student were prohibited by a proposed regulation in April 2002. Limiting the Period of Admissions for B Nonimmigrant Aliens, 67 Fed. Reg. 18065 (proposed Apr. 12, 2002). See also 67 Fed. Reg. 71 at 18062 (prohibiting attendance in school while change of status is sought). New security checks and reporting and fingerprinting requirements for students were put into place in May 2002, and a plan authorizing the Attorney General to order certain designated non-citizens to provide fingerprints, photographs and other information was issued in June 2002. See id.

\(^{40}\) See Office of Deputy Attorney General, Subject: Guidance for Absconder Apprehension Initiative (Jan. 25, 2002).


\(^{42}\) Id.

\(^{43}\) Id.

\(^{44}\) Id.
removal *in absentia* against him."45 His case is not unusual as two-thirds of currently unenforced final removal orders were issued in absentia, according to the government's own study of the issue.46 INS files were infested with incorrect addresses and other faulty data which, when combined with years of backlog, resulted in a chronic problem of notification of hearings and of removal orders.47

The Administration has also developed new techniques of immigration law enforcement. In November, 2001, the Attorney General established a program of ostensibly voluntary interviews of some 5,000 men who had entered the United States since January 2000 from countries where Al Qaeda was said to have a "terrorist presence or activity." In June 2002, the INS published a proposed rule in the Federal Register entitled, *Registration and Monitoring of Certain Nonimmigrants*.48 The proposed rule sought to require certain non-immigrants to make specific reports to the INS at various times of their visit: upon arrival; approximately thirty days after arrival; every twelve months after arrival; upon certain events, such as a change of address, employment, or school; and at the time of departure from the United States.49

Affected people have been photographed and fingerprinted, and also must submit to an interview concerning a variety of topics such as opinions and associations. Indeed, one "Special Registration Worksheet" reportedly prepared by the INS for student visa-holders begins with two pages of rather innocuous questions, such as: "What is your family (last) name? What is your place of birth?" It then moves to more specific inquiries, including, "What courses are you enrolled in? What are the names of the class instructors? Are you currently enrolled in a full course of study?" But, at the very end, come two rather chilling questions: "What campus/social/religious/political groups are you a member of or associated with?" and: "Are you associated with

45 Id.
46 Id.
47 Id.
anyone who is *potentially* dangerous to the United States?"\(^{50}\)

Failure to comply with the rule, or the discovery of immigration violations while registering, could result in arrest, detention, or deportation.\(^{51}\) The registration process, divided into three distinct waves, ultimately has affected tens of thousands of non-citizens within the United States. According to news reports, hundreds of people were arrested or detained for suspected visa violations by the INS when they attempted to comply with the rule by registering during the first round.\(^{52}\) As a result, the second and third deadlines drew much greater attention from the media and human rights observers.\(^{53}\) It has been reported that some thirteen thousand of the Arab and Muslim men who voluntarily came forward to register with immigration authorities now face deportation proceedings, though virtually none of them have been linked to terrorism.\(^{54}\)

The USA PATRIOT Act\(^{55}\) also used the citizen/non-citizen distinction under immigration law.\(^{56}\) The Act authorizes the

\(^{50}\) See generally Kevin R. Johnson, *The End of “Civil Rights” as We Know It?: Immigration and Civil Rights in the New Millennium*, 49 UCLA L. REV. 1481 (2002).

\(^{51}\) The INS confirmed this practice in a subsequent memo, which stated that “officers conducting these interviews may discover information which leads them to suspect that specific aliens on the list are unlawfully present or in violation of their immigration status.” See Memorandum from Michael A. Pearson, INS Executive Associate Commissioner (Nov. 23, 2001). A Department of Justice (DOJ) report on the initial round of interviews, dated February 26, 2002, stated that more than 2000 men on the list were interviewed, approximately one percent of whom were found to be in violation of immigration laws. Three men were arrested on criminal charges. Final Report on Interview Project, Kenneth L. Wainstein, Director (Feb. 26, 2002). Despite this rather low success rate, the DOJ announced that a second round of interviews of some 3000 Arab/Muslim men would commence on March 20, 2002. Again, the interviewees were selected, not because of any particular individualized suspicion but apparently because of their nationality, ethnicity and religion. See generally Johnson, supra note 50, at 1481-1511.

\(^{52}\) See Final Report on Interview Project, Kenneth L. Wainstein, Director (Feb. 26, 2002).

\(^{53}\) Id.


\(^{56}\) Id.
Attorney General to incarcerate and detain non-citizens on the basis of mere suspicion. Title IV permits the detention of a non-citizen if the government has "reasonable grounds to believe" that the individual may be a threat to national security. Such a person may be held for seven days pending the commencement of criminal or removal proceedings.

One more use of the citizen/non-citizen line deserves mention here. On November 13, 2001, President Bush issued an executive order authorizing the creation of military tribunals to try those allegedly involved in international terrorism. The executive order, unlike a similar order issued by President Roosevelt during the Second World War, is expressly limited to certain non-citizens.

57 Id.
58 See id. § 412.

MANDATORY DETENTION OF SUSPECTED TERRORISTS; HABEAS CORPUS; JUDICIAL REVIEW

SEC. 236A. (a) DETENTION OF TERRORIST ALIENS- (1) CUSTODY- The Attorney General shall take into custody any alien who is certified under paragraph (3). . .

(3) CERTIFICATION- The Attorney General may certify an alien under this paragraph if the Attorney General has reasonable grounds to believe that the alien—

(A) is described in section 212(a)(3)(A)(i), 212(a)(3)(A)(iii), 212(a)(3)(B), 237(a)(4)(A)(i), 237(a)(4)(A)(iii), or 237(a)(4)(B); or

(B) is engaged in any other activity that endangers the national security of the United States. Id. (emphasis added).

59 See id. § 412:

(5) COMMENCEMENT OF PROCEEDINGS- The Attorney General shall place an alien detained under paragraph (1) in removal proceedings, or shall charge the alien with a criminal offense, not later than 7 days after the commencement of such detention. If the requirement of the preceding sentence is not satisfied, the Attorney General shall release the alien. The PATRIOT Act also bars non-citizens from re-entry into the United States for certain types of speech and organized activities that if engaged in by citizens, would likely be deemed protected by the First Amendment. See id. § 411. The Enhanced Border Security and Visa Entry Reform Act, signed by the President on May 14, 2002, also deals with a range of post 9/11 security issues, including closer monitoring of student visa entrants, and limits on visa-issuance to persons from certain countries, designated as state sponsors of terrorism. Enhanced Border Security and Visa Entry Reform Act, Pub. L. No. 107-173, 116 Stat. 543 (2002). See generally 79 Interpreter Releases 769 (May 20, 2002).

60 The term "individual subject to this order" shall mean any individual who is not a United States citizen with respect to whom I determine that:
III. Category Slippage: Criminalization and the CLEAR and HSEA Acts

"You don't shut down the borders. What you do is say we are going to apply the criminal laws more harshly."61

A. The Criminal/Civil Line

To reiterate: imagine a non-citizen about whom the government has some suspicion. He might be arrested by USICE as a suspected undocumented alien, an overstay, for failure to report an address change, etc. This might occur pursuant to a tip, during a workplace raid, or even on the street simply because he "looks" undocumented to an agent. What rights will such a person have? As to the arrest, his rights will be minimal. He will be very unlikely to argue for suppression of evidence that may have been seized in violation the Fourth Amendment.62 He will not be read Miranda rights.63 Indeed, he may not even be advised that he has the right to obtain a lawyer until after a government agent has interrogated him.64 He will never have the right to appointed counsel.65 He will, of course, never have a right to a jury trial.66 At

(1) there is reason to believe that such individual
(i) is or was a member of the organization known as al Qaida;
(ii) has engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation therefore, that have caused, threaten to cause or have as their aim to cause injury or adverse effects on the United States, its citizens, national security, foreign policy, or economy.

... any individual subject to this order ... shall ... forthwith be placed under the control of the Secretary of Defense.


64 8 C.F.R. § 287.3 (2004).

65 Id.; 8 C.F.R. § 1292.2 (2004).

his hearing before the immigration judge, he may even find that the burden of proof will be shifted to him, once the government has made a showing of "alienage." And that showing may be as minimal as a birth certificate from a foreign country with a name on it that is similar to his. If he seeks an appeal of the Immigration Judge's decision he may well face incarceration during the length of that appeal – which could easily be years. He may then receive a summary decision by a single member of the Board of Immigration Appeals that is the product of ten minutes of review of his case. If he seeks a further appeal to a federal court he may well find that court declining review of "discretionary" questions such as his potential eligibility for "relief" from removal.

The key to all of this as a constitutional matter is the "civil" nature of deportation proceedings, a categorization grounded in *Fong Yue Ting v. United States* and accepted ever since. There is, however, an obvious benefit to this categorization for the non-citizen who wishes to accept removal: he generally will not face formal criminal sanctions. This may be changing.

**B. Convergence**

There has been an increasing convergence between the criminal justice and immigration control systems. Indeed, it remains clear – as it has been for nearly a decade – that we live in a time of extreme "vigor, efficiency, and strictness" as to deportation of non-citizens convicted of crimes, due to nearly

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71 149 U.S. 698 (1893).

72 See Kanstroom, *Deportation and Social Control*, supra note 10. In fiscal year 1999, the I.N.S. removed 180,101 non-citizens from the United States; 69, 409 of the
two decades of sustained attention to this issue. We continue to reap the bitter harvest of two exceptionally harsh laws: the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)\(^7\) and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA).\(^7\) Deportation is now often a virtually automatic consequence of a non-citizen's criminal conviction for even a minor state misdemeanor.\(^7\)

This convergence, supported by those who seek more expeditious deportation of non-citizen criminals,\(^7\) has been the

removals were due to criminal convictions. In fiscal year 1998, the INS removed 172,887 non-citizens; 60,479 of the removals were due to criminal convictions. In fiscal year 1997, the INS removed 114,432 non-citizens; 53,214 of the removals were due to criminal convictions. 1999 IMMIGR. AND NATURALIZATION SERVICE STAT. Y.B., 23, available at http://uscis.gov/graphics/shared/aboutus/statistics/enf99.pdf (last visited Mar. 20, 2004). During the past few years, an array of initiatives has been developed to facilitate and to speed such deportations. These programs have included the so-called Institutional Hearing Programs, through which final orders of deportation are secured while non-citizens serve their criminal sentences; the “State Criminal Alien Assistance Program,” which was authorized by the 1986 Immigration Reform and Control Act and which provides reimbursement to the states for the cost of incarcerating certain non-citizens convicted of crimes; streamlined administrative deportation processes for certain aggravated felons; authority for U.S. District Court judges to order deportation at the time of sentencing, with INS consent; the so-called “Criminal Alien Identification Programs,” which seek to identify and to remove previously deported criminal non-citizens; and a wide variety of strike forces, task forces, and state and local initiatives. See generally Removal of Criminal and Illegal Aliens: Hearing Before the Subcomm. on Immigration and Claims of the House Comm. on the Judiciary, 104th Cong. 4-15 (1995) (statement of T. Alexander Aleinikoff, General Counsel, Immigration and Naturalization Service); Peter H. Schuck & John Williams, Removing Criminal Aliens: The Pitfalls and Promises of Federalism, 22 HARv. J.L. & PUB. POL’Y 367, 373 n.24 (1999) (noting that “including IIRIRA, ten laws since 1986 have included significant measures affecting criminal aliens”).


\(^7\) Pub. L. No. 104-208, div. C, 110 Stat. 3009-546 (codified in scattered sections of 8 and 18 U.S.C.). Among many other provisions, these laws sought to eliminate judicial review of certain types of criminal deportation (removal) orders, dramatically and retroactively expanded many grounds of inadmissibility and deportation, eliminated some and limited other discretionary waivers of deportability, developed a system of mandatory detention for many classes of non-citizens, created expedited removal procedures for certain types of cases, and authorized vastly increased state and local law enforcement involvement with immigration matters.

\(^7\) See 8 U.S.C. § 1101(a)(43).

\(^7\) 8 U.S.C. § 1228 (1996); United States v. Rangel de Aguilar, 308 F.3d 1134, 1137-38 (10th Cir. 2002).
subject of widespread critique. For one thing, as Margaret Taylor and Ronald F. Wright have explained it:

Neither of these bureaucracies wins plaudits for its efficiency or its humane treatment of the people caught up in the cases. One system is profoundly troubled; the other is a disaster. Criminal defense lawyers and immigration attorneys might disagree about which system deserves which label.\(^7\)

Beyond the well-known flaws inherent in each system, and the unlikelihood that two wrongs can either make or protect a right, the combination of the two has not resulted in much apparent gain.\(^7\)

Convergence takes place in two different ways, however, and both challenge the criminal/civil dichotomy. First, as noted, some unfortunate non-citizens are subject to state or federal criminal prosecution for "regular" (i.e., non-immigration-related) offenses, such as drug crimes. After the criminal justice system has completed its work, the removal system begins. It is in this venerable setting\(^7\) that problems of inefficiency, lack of coordination, and resource duplication are most acute. The numbers are not small. In 2001 the federal government prosecuted some seventy-five thousand offenders, of whom some thirty-three percent were non-citizens. State systems also prosecute many millions of cases, but the citizen/non-citizen breakdown is not definitively calculated.\(^8\) We do know, however, that tens of thousands of people are deported each year due to criminal


\(^7\) See id. ("However badly these two systems operate by themselves, they work even more poorly when they are haphazardly combined. The two systems duplicate many tasks, gathering many of the same facts about the non-citizen and employing two distinct sets of investigators and judges.").

\(^7\) See Wong Wing v. United States, 163 U.S. 228 (1896).

convictions, many of which took place in state courts.\textsuperscript{81} Cases of this type may also raise claims of double punishment. Indeed, there is both illogic and injustice deeply ingrained in this system. As a matter of basic criminal law theory, deportation of non-citizens, particularly of long-term lawful permanent residents for post-entry criminal conduct is punishment.\textsuperscript{82} Thus, strong arguments can be made that persons subject to these types of removal proceedings deserve the basic constitutional rights accorded to criminal defendants.\textsuperscript{83} This argument is buttressed by the facts that the proceedings are initiated by a government enforcement agency, are directly based on criminal conduct, involve incarceration and forced movement of persons, and may result in lifetime banishment.\textsuperscript{84} Still, that is not the law of the United States.\textsuperscript{85}

There is also another type of convergence: the criminalization of "civil" immigration law violations. If, as I have argued, removal is a more flexible and efficient enforcement tool, one might well ask why the federal government would bother to criminalize immigration law violations? The obvious reason was to provide a stronger potential sanction. Thus, in the late nineteenth century, a Chinese deportee could be sentenced to a year at hard labor for violating immigration laws. Then he would be deported.\textsuperscript{86} Another reason is that certain types of immigration law violations seem more logically to implicate the criminal law. Document fraud and smuggling people across the border seem to

\textsuperscript{81} Also, between 1984 and 1994, the number of non-citizens serving a sentence of imprisonment in a federal prison increased an average of 15\% annually from 4,088 to 18,929; the overall federal prison population, by contrast, increased an average 10\% annually from 31,105 to 87,437. Fifty-five percent of the non-citizens prosecuted in Federal court during 1994 were in the United States legally. U.S. Department of Justice, Bureau of Justice Statistics, \textit{at} http://www.ojp.usdoj.gov/bjs/fed.htm.

\textsuperscript{82} \textit{See} Fong Yue Ting v. United States, 149 U.S. 698, 733 (1893) (Brewer, J., dissenting) (arguing that deportation is punishment).

\textsuperscript{83} \textit{Id}.

\textsuperscript{84} \textit{See} Kanstroom, \textit{Deportation and Social Control}, supra, note 10.

\textsuperscript{85} \textit{See}, e.g., Reno v. American-Arab Anti-Discrimination Committee, 883 F. Supp. 1365, (9th Cir. 1995) ("[W]hile the consequences of deportation may assuredly be grave, they are not imposed as a punishment.").

\textsuperscript{86} \textit{See} Wong Wing, 163 U.S. at 237-38.
fit well in this category.87

The total number of prosecutions for immigration offenses has risen dramatically in the past decade from 14,854 in 1994 to 23,852 in 2002. The "referral rate" on such cases is also unusually high compared to non-immigration related crimes. Of the 118,978 suspects in all criminal matters concluded during 2001, 73% were referred for prosecution either before a U.S. district court judge (61%) or a U.S. magistrate (12%). Nearly all (97%) of those investigated for immigration offenses were referred for prosecution.88 The number of convictions has also increased, from 10,210 in 1994 to 21,044 in 2002, largely as a result of many fewer dismissals.89 Statistically, the most dramatic increase has been convictions for illegal re-entry – 803 in 1994 to 4,696 in 2002.90 There has also been an increased use of the criminal justice system against asylum-seekers – a practice that seems especially harsh and mean-spirited to many, as well as a possible violation of international human rights law. Nevertheless, the U.S. Attorney offices in Miami and elsewhere have prosecuted some asylum-seekers for arriving in the United States with false documents.91


89 Id.

90 Id.

91 See Donald Kerwin, Counterterrorism and Immigrant Rights Two Years Later, 80 INTERPRETER RELEASES 39, Oct. 13, 2003, at 1403 (citing letter from Wendy Young to John Ashcroft). See also United States of America v. Abdelhafid Bradaiaka Guillanumie Granier, 2004 U.S. Dist. LEXIS 3085 (MN 2004) (Defendant’s Motion for Revocation of Detention Order granted but defendant, an asylum-seeker, still faces three-count indictment, for using and attempting to use a false, forged, altered, and
C. Linking Crime, Immigration Control, and the "War on Terror": CLEAR and HSEA

The convergence between immigration control and criminal prosecution will receive a major boost if two pending bills, the so-called CLEAR Act and Homeland Security Enforcement Act, are enacted into law. These bills could cause some doctrinal upheaval by their criminalization of mere presence in the United States. On July 9, 2003, Representative Charles Norwood, a Georgia Republican, introduced the Clear Law Enforcement for Criminal Alien Removal (CLEAR) Act, H.R. 2671. The CLEAR Act, in brief, would:

(1) authorize state and local law enforcement personnel to investigate, arrest, detain, and participate in the removal of non-citizens in the United States;

(2) provide that a State that does not have a statute permitting enforcement of Federal immigration laws within two years of enactment of this Act shall not receive certain Federal incarceration assistance;

(3) amend the Immigration and Nationality Act with respect to "illegal aliens" to:

(a) establish criminal penalties and forfeiture for aliens unlawfully present in the United States;

(b) increase specified criminal and civil penalties for illegal entry and failure to depart violations; and

(c) direct the Attorney General to make grants to local police agencies for equipment and facilities related to housing and processing illegal aliens.


92 HSEA Act, S. 1906, 108th Cong. (2003); see infra Part III.
95 The CLEAR Act also would: provide for payment of funds from certain civil penalties to State and local law enforcement agencies for apprehension of such non-citizens; require States and localities to provide the Department of Homeland Security
4) provide for the listing of immigration violators in the National Crime Information Center database;

(5) amend the Immigration and Nationality Act to provide for Federal custody and State or local compensation of State or locally apprehended illegal aliens.

In short, the law would seek to resolve any lingering legal doubts about state authority to enforce federal immigration laws by making Congressional authorization explicit. It would also effect a nearly complete merger between the criminal and civil immigration control systems due to its criminalization of mere presence in the United States, a status-based crime that would apparently continue indefinitely.

In November of 2003, Senators Jeff Sessions (R-AL), and Zell Miller (D-GA) introduced a largely identical measure (the Homeland Security Enhancement Act, S. 1906 [HSEA]). The major difference is that the CLEAR Act seeks to require state and local law authorities to enforce federal immigration with the threat of withholding federal funds if they decline. The HSEA would simply deny funding to states and localities that have in place practices or policies against such enforcement. Neither bill requires training in immigration law for the state and local police.

Some of the arguments in favor of these laws seem compelling. Senator Sessions advocates a "culture of cooperation" among federal, state, and local law enforcement authorities as to


96 HSEA, S. 1906, 108th Cong. (2003). The Senate bill also states that the Department of Homeland Security shall continue to operate the Institutional Removal Program, which shall be expanded to all States. It further amends the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 to prohibit a Federal agency from accepting for any identification-related purpose a State driver’s license unless, if the driver’s license is issued to an alien who is in lawful status but who is not an alien lawfully admitted for permanent residence, the license expires on the date on which the alien’s U.S. residency authorization expires. Finally, it states that in the issuance of any Federal public benefit that requires recipient identification, no Federal entity may accept any identification document unless: (1) the document was issued by a Federal or State authority and is subject to verification by a Federal law enforcement, intelligence, or homeland security agency; or (2) the recipient is lawfully present in the United States, is in possession of a passport; and is a citizen of a country for which the visa requirement for U.S. entry is waived if the alien possesses a passport from such country. See id.
immigration matters.\textsuperscript{97} He suggests, not implausibly if a bit excitedly, that 

[i]n the world of immigration laws, a facade of enforcement that holds no real consequences for law breakers is both dangerous and irresponsible. If the only real consequence of coming to this country illegally is a social label, then our immigration laws are but a brightly painted sepulcher full of dead bones, for it is impossible to be a Nation governed by the rule of law, if our laws have no real effect on the lives of the people they govern.\textsuperscript{98}

What is most intriguing about Senator Sessions's statement, however, is its linkage of crime control, immigration control, and September 11\textsuperscript{th}. Thus, after describing large number of "illegal aliens" in the United States, a link to September 11\textsuperscript{th} provides the coup de grace for Senator Sessions:

The next number is perhaps the most concerning – 3,000 of the ‘alien absconders’ within our borders are from one of the countries that the State Department has designated to be a ‘state sponsor of terrorism.’\textsuperscript{99}

Representative Norwood began a public statement\textsuperscript{100} in support of the CLEAR Act with a rather terrifying vignette:

Miguel Angelo Gordoba is a child molester and illegally in our country. In August 2001, he finished a four-year sentence at Rivers State Prison for molesting a 2-year old girl in Alma, Georgia. On the day he finished his sentence you would think he would be picked up and deported. As unbelievable as it sounds,

\textsuperscript{98} Id. These somewhat abstract arguments are buttressed by some contestable, but roughly accurate statistics:

The lack of immigration enforcement in our country’s interior has resulted in 8-10 million illegal aliens living in the U.S. with another estimated 800,000 illegal aliens joining them every year—that is on top of the more than 1 million that legally immigrate each year. . . . [T]he Department of Homeland Security has estimated that 450,000 are ‘alien absconders’ people that have been issued final deportation orders but have not shown up for their hearings. . . . An estimated 86,000 of them are criminal illegal aliens people convicted of crimes they committed in the U.S. who should have been deported, but have slipped through the cracks and are still here.
\textsuperscript{99} Id.
the INS, now the Bureau of Immigration and Customs Enforcement, didn’t have his paperwork done. Subsequently, Mr. Gordoba registered as a sex offender, but when the county sheriff went to the listed address to check in on him, all he found was a vacant lot.

In addition to roving alien child molesters, Representative Norwood, like Senator Sessions, then also alleges an additional number of “those people with final deportation orders are from countries with a known Al-Qaeda presence.” (His total, however, is 3,800). Against this public threat, Representative Norwood sees an undermanned protective force:

[T]here is no way the 2,000 agents they have assigned to find some 400,000 people can get the job done. They need help from the folks who come across these people everyday during routine traffic stops and during other activities in the course of their regular duty police officers . . .

Opponents of these proposals, though lacking equally compelling horror stories, have also grappled with the law enforcement issues. Thus, the National Immigration Forum suggests:

Not only will this shift in priorities mean local police have less time for their main missions (crime-solving and prevention), but it will actually make their job much harder. Experience tells them that when immigrants begin to see local police as agents of the federal government, with the power to deport them or their family members, they are less likely to approach local law enforcement with tips on crimes or suspicious activity . . . No police officer wants to know that criminals are on the loose simply because their victims are afraid to speak up and report the crimes.

Indeed, some law enforcement officers, such as Arlington,

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101 Id.
102 Id.
104 Human Rights First (formerly the Lawyers Committee for Human Rights) notes that:

Local law enforcement officials from across the country - including the California Police Chiefs Association, the Federal Hispanic Law Enforcement Officers Association (FHLEOA), Chief Charles H. Ramsey of the Metropolitan
Texas, Police Chief Theron Bowman, have been particularly piquant in their opposition to these initiatives:

We can’t and won’t throw our scarce resources at quasi-political, vaguely criminal, constitutionally questionable, nor any other evolving issues or unfunded mandates that aren’t high priorities with our citizenry . . . . Our policing authority and professional mission is derived from the citizens.\textsuperscript{105}

Others have noted the potential problems raised by delegation of authority to enforce complex federal laws to state and local police.\textsuperscript{106} The American Immigration Lawyers Association notes that “[f]ederal immigration law is an extremely complicated body of law that requires extensive training and expertise to understand and properly enforce.”\textsuperscript{107} Some have also pointed out that the criminalization of the undocumented could violate international law regarding the rights of asylum-seekers.\textsuperscript{108}

The proposed CLEAR and HSEA Acts exemplify tectonic frictions on the criminal/civil and citizen/non-citizen lines. These proposals could result in a massive enlargement of federal enforcement capacities and the criminalization of millions of people. They ought to be taken very seriously.

The proposals highlight the need for more thorough consideration of the confusion engendered by a government that desires to be: open to immigration, tough on “criminal aliens,” tough on immigration law violators, and engaged in a “war” on terrorism against, for the most part, foreign enemies. In light of those complex \textit{desiderata}, we ought to wonder about the wisdom

\textsuperscript{105} Jennifer Emily, \textit{Two Chiefs Oppose Immigration Role}, DALLAS MORN. NEWS, Apr. 5, 2002, at 27A.


\textsuperscript{108} Refo, \textit{supra} note 106.
of a law that would criminalize millions of people, many of whom have been living among us as otherwise law-abiding members of the community for many years. Moreover, the empowerment of state and local police to enforce such federal criminal laws portends a highly intrusive system that could easily affect many citizens too. Also, a major potential irony of the CLEAR and HSEA Acts should now be apparent: a non-citizen prosecuted for the new crime of "unlawful presence" will have vastly more procedural rights than one who is simply placed in removal proceedings.\textsuperscript{109} Thus, Hannah Arendt's observation about the "pale of law" could well be played out in local police stations and courts throughout the country, as potential defendants might oddly seek to be prosecuted in order to obtain appointed counsel and other constitutional protections afforded to criminal defendants.

\textit{D. Undocumented Workers as Permanent Criminals?}

Of course, the proponents of the CLEAR and HSEA Acts are not motivated by a desire to grant more rights to the undocumented.\textsuperscript{110} They want to get tough. They also may want to resolve an ambiguity illustrated by an exchange that took place at the Supreme Court nearly twenty years ago. Justice O'Connor, writing for the majority in \textit{INS v. Lopez-Mendoza},\textsuperscript{111} stated that one of the respondents, Sandoval-Sanchez, was a criminal: "Sandoval-Sanchez is a person whose unregistered presence in this country, without more, constitutes a crime."\textsuperscript{112} If one considers this statement in its simplest sense: that "unregistered" or unlawful presence in the United States is a crime, it was – and remains – plainly wrong.\textsuperscript{113} Nor did the Sandoval's failure to register

\textsuperscript{109} \textit{Id.}

\textsuperscript{110} \textit{See} Arendt, \textit{supra} note 1, at 286

\textsuperscript{111} 468 U.S. 1032 (1984).

\textsuperscript{112} 468 U.S. at 1047.

\textsuperscript{113} Indeed, Justice O'Connor's footnote admits as much:

Sandoval-Sanchez was arrested on June 23, 1977. His deportation hearing was held on October 7, 1977. By that time he was under a duty to apply for registration as an alien. A failure to do so plainly constituted a continuing crime. 8 U. S. C. §§ 1302, 1306. Sandoval-Sanchez was also not prosecuted for his initial illegal entry into this country, an independent crime under 8 U. S. C. § 1325. We need not decide whether or not remaining in this country following an illegal entry is a continuing or a completed crime under § 1325. . . .
necessarily render him subject to criminal sanction. Failure to register is not a strict liability offense. Indeed, the statute that makes it a crime not to register is entitled, “Willful failure to register.” It states in relevant part that “[a]ny alien required to apply for registration and to be fingerprinted in the United States who willfully fails or refuses to make such application . . . shall be guilty of a misdemeanor.”

It is true that INA Sec. 1326, which criminalizes re-entry after deportation, has been considered to describe a continuing offense. As the Ninth Circuit put it in United States v. Ruelas-Arreguin:

Under § 1326, a deported alien may be convicted for either entering, attempting to enter, or being “found in” the United States. They are three distinct offenses. . . . The crime of being “found in” the United States is completed when the “alien is discovered and identified by the immigration authorities.” However, the crime does not begin and end there.

An “entry” into the United States is required before a person is “found in” the United States . . . . Thus, the crime of being “found in” the United States commences with the illegal entry, but is not completed until discovery. In that sense, we have held that it is a “continuing offense,” even though the crime does not crystallize until official discovery and identification. To paraphrase T.S. Elliot, the crime’s beginning is in its end, and its end in its beginning.

But 8 U.S.C. § 1325, which criminalizes any improper entry, has not been so construed to date. Thus, many current undocumented people in the United States might well be outside the federal statute of limitations for such prosecution. Again, it

Justice O’Connor also noted that “[t]he question is academic, of course, since in either event the unlawful entry remains both punishable and continuing grounds for deportation.” Id. at 1047. If by “academic” Justice O’Connor meant “irrelevant,” it now seems perhaps not to be so.

115 Id.
116 Id. (emphasis added).
117 See United States v. Reulas-Arreguin, 219 F.3d 1056, 1061 (9th Cir. 2000).
118 Id. (citations omitted)
119 See 468 U.S. at 1056-57.
120 See id.
is not their status that is criminalized, but their prior entry. The new proposals seek to change that, thereby rendering such persons in effect permanently criminal simply by virtue of their existence in the United States.

E. State and Local Enforcement

A major goal of the current proposals seems to be the empowerment of state and local police to enforce immigration law. One can easily see the potential benefits of collaboration in an era of such fears. Indeed, the trend has been developing for some time. The Immigration and Nationality Act was amended in 1996 to authorize voluntary agreements between the INS and state and local law enforcement officers. The 1996, INA §103(a)(8), law allowed such state and local officers to be trained in basic immigration law and then given the authority to arrest and detain individuals for immigration violations.

Collaborative enforcement efforts since then have been episodic, controversial, and highly problematic. In 1997, local authorities in Chandler, Arizona participated in immigration round-ups with the Border Patrol. Pervasive complaints resulted, including some from U.S. citizens and at least one local elected representative. A subsequent investigation by the Arizona Attorney General found numerous irregularities, and, in 1999, the

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121 Id.


125 8 U.S.C. 1103 (a)(8) (current version at 8 U.S.C. § 1103(a)(10) (2004)) (authorizing state or local law enforcement officers to perform the duties of INS officers under certain circumstances); INA § 287, 8 U.S.C. 1357 (allowing the Attorney General to enter into agreements with state or local police department to allow such officers to perform the duties of INS agents including "the investigation, apprehension, or detention of aliens in the United States").

126 See Taylor, supra note 122, at 92-93.

Chandler City Council approved $400,000 to settle legal claims.\textsuperscript{128} In 1998, the Salt Lake City police department allegedly sought such an agreement but the plan fizzled following deep-seated resistance.\textsuperscript{129} More recently, Florida state law enforcement officials have reportedly submitted a plan to the Justice Department to train and then deputize state police officers to work with the state’s Anti-terrorism Task Forces.\textsuperscript{130} These officers would have authority to stop, interrogate, and arrest individuals for immigration law violations.\textsuperscript{131}

The Department of Justice had until recently long advised that, “local police should refrain from detaining any person not suspected of a crime, solely on the ground that they may be deportable aliens.”\textsuperscript{132} A formal DOJ opinion, issued just before the passage of INA §103(a)(8), stated: “State police lack recognized legal authority to arrest or detain aliens solely for purposes of civil immigration proceedings, as opposed to criminal prosecution.”\textsuperscript{133}

Such initiatives have clearly been reinvigorated in the wake of September 11\textsuperscript{th}. In April 2002, reports emerged that the Department of Justice intended to issue a legal opinion that state localities had “inherent authority” to enforce all federal immigration laws, civil or criminal.\textsuperscript{134} A firestorm of criticism resulted, and the opinion has not been publicly released to date.\textsuperscript{135}

\begin{footnotesize}
\begin{enumerate}
  \item 128 Id.
  \item 130 Taylor, supra note 122, at 93 (citing August Gribbin, Florida Asks to Arrest Illegals, WASH. TIMES, Mar. 8, 2002, at A1).
  \item 131 Id.
  \item 133 Memorandum from Theresa Wynn Roseborough, Deputy Assistant Attorney General, Office of Legal Counsel, Assistance by State and Local Police in Apprehending Illegal Aliens, for the U.S. Att’y for the S.D. Cal. (Feb. 5, 1996), available at http://www.usdoj.gov/olc/immtstopol.ahtm.
  \item 134 See Letter from Alberto R. Gonzales, Counsel to the President, to Demetrius G. Papademetriou (June 24, 2002) (reprinted in 7 BENDER’S IMMIGR. BULL. 964 (Aug. 1, 2002)) (“[T]he Justice Department’s Office of Legal Counsel has concluded that state and local police have inherent authority to arrest and detain persons who are in violation of immigration laws . . . .”). \textit{See also} Schmitt, supra note 129.
  \item 135 State and Local Enforcement of Federal Immigration Law, AILA ISSUE PAPER
\end{enumerate}
\end{footnotesize}
The Administration has, however, confirmed that the reports accurately reflect its position on the issue. The INS and Department of Homeland Security have also undertaken regulatory changes pursuant to INA §103(a)(8) to facilitate the use of state and local law enforcement personnel for immigration law purposes.

Two circuits have considered some of the complexities of state/federal immigration enforcement, albeit long before the passage of INA §103(a)(8). Their analyses may shed some light on the "inherent authority" question and the potential effects of the CLEAR and HSEA Acts. In 1983, the Ninth Circuit, in Gonzales v. City of Peoria, held that federal law does not preclude the police from enforcing the criminal provisions of the Immigration and Naturalization Act. The Ninth Circuit implied, however, that the pervasive federal civil immigration law enforcement scheme might preclude the states from civil enforcement.

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136 See id.

137 See Powers of the Attorney General to Authorize State or Local Law Enforcement Officers To Exercise Federal Immigration Enforcement Authority During a Mass Influx of Aliens, 67 Fed. Reg. 48,354 (July 24, 2002) (effective Aug. 23, 2002) (final rule that implements INA 103(a)(8), allowing the Attorney General to authorize any state or local law enforcement officer to exercise and enforce immigration laws during the period of a declared "mass influx of aliens"). See also Abbreviation or Waiver of Training for State or Local Law Enforcement Officers Authorized to Enforce Immigration Law During a Mass Influx of Aliens, 68 Fed. Reg. 8820 (Feb. 26, 2003) (interim rule, effective February 26, 2003, to amend the Department of Justice regulations to authorize the Attorney General to waive normally required training requirements in the event that the number of state or local law enforcement officers available to respond in an expeditious manner to urgent and quickly developing events during a declared mass influx of aliens is insufficient to protect public safety, public health, or national security).

138 722 F.2d 468 (9th Cir. 1983) overruled in part on other grounds, Hodgers-Durgin v. De La Vina, 199 F.3d 1037 (9th Cir. 1999).

139 Gonzales v. City of Peoria, 722 F.2d. 468, 475 (9th Cir. 1983) overruled in part on other grounds, Hodgers-Durgin v. De La Vina, 199 F.3d 1037 (9th Cir. 1999).

140 Although the regulation of immigration is unquestionably an exclusive federal power, it is clear that this power does not preempt every state activity... The City's claim of authority is limited. It asserts only the power to enforce the criminal provisions of the federal immigration laws. There is nothing inherent in that specific enforcement activity that conflicts with federal regulatory interests.
The Court noted that local police are not generally precluded from enforcing federal criminal statutes. One test had been whether state enforcement activities impaired federal regulatory interests. Where they did not, concurrent enforcement activity is authorized. Therefore, per the Supreme Court's decision in De Canas v. Bica, federal regulation of a particular field does not presumptively preempt state enforcement activity "in the absence of persuasive reasons – either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained."

The plaintiffs in Gonzalez had contended that the structure of the Immigration and Naturalization Act evidenced an intent to preclude local enforcement of the Act's criminal provisions. The Court disagreed, finding no support for the idea that a "complete ouster of state power" was "the clear and manifest purpose of Congress." As to the civil scheme, however, the Court's conclusions were quite different:

Plaintiffs correctly assert that an intent to preclude local enforcement may be inferred where the system of federal regulation is so pervasive that no opportunity for state activity remains. We assume that the civil provisions of the Act regulating authorized entry, length of stay, residence status, and deportation, constitute such a pervasive regulatory scheme, as would be consistent with the exclusive federal power over

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141 Id. at 474 (citing Ker v. California, 374 U.S. 23 (1963); Miller v. United States, 357 U.S. 301 (1958); Johnson v. United States, 333 U.S. 10 (1948); United States v. DiRe, 332 U.S. 581 (1948)).
142 Id.
143 Id. at 474 (citing Florida Avocado Growers v. Paul, 373 U.S. 132 (1963)).
146 Gonzalez v. City of Peoria, 722 F.2d 468, 474 (9th Cir. 1983) overruled in part on other grounds, Hodgers-Durgin v. De La Vina, 199 F.3d 1037 (9th Cir. 1999).
147 Gonzalez, 722 F.2d at 474 (citing De Canas, 424 U.S. at 357 (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947))).
immigration.\textsuperscript{148}

The Court then expressly distinguished the criminal aspects of the INA from the civil ones, referring to the criminal provisions as "a narrow and distinct element of [the broader] immigration scheme."\textsuperscript{149} The criminal provisions were said to be, "few in number and relatively simple in their terms.\textsuperscript{150} They are not, and could not be, supported by a complex administrative structure."\textsuperscript{151} The current proposed legislation arguably might change this calculus. But its explicit affirmation of state and local enforcement would seem to trump, in any event.\textsuperscript{152}

The Tenth Circuit approached the matter differently, holding, in 1984, in \textit{United States v. Salinas-Calderon}\textsuperscript{153} that a "[s]tate trooper has general investigatory authority to inquire into possible immigration violations." In fact, the Tenth Circuit, in later cases, has described a "preexisting general authority of State or local police officers to investigate and make arrests for violations of federal law, including immigration laws."\textsuperscript{155} Its decisions did not draw any clear line between criminal violations of the INA and civil provisions that render an alien deportable, however, and the analysis of the issues is skimpy. Indeed, \textit{Salinas-Calderon} was primarily a Fourth Amendment criminal case that involved the question whether the officer had probable cause to arrest after having stopped a car for possible criminal law violations.\textsuperscript{156}

\textsuperscript{148} \textit{Id.} at 474-75.
\textsuperscript{149} \textit{Id.} at 475.
\textsuperscript{150} \textit{Id.}
\textsuperscript{151} \textit{Id.}
\textsuperscript{152} \textit{See} CLEAR Act, H.R. 2671, 108\textsuperscript{th} Cong. (2003).
\textsuperscript{153} 728 F.2d 1298 (10th Cir. 1984).
\textsuperscript{154} \textit{See} United States v. Salinas-Calderon, 728 F.2d 1298, 1301 n.3 (10th Cir. 1984).
\textsuperscript{155} United States v. Vasquez-Alvares, 176 F.3d 1294, 1295 (10th Cir. 1999).
\textsuperscript{156} \textit{Salinas-Calderon}, 728 F.2d at 1300. As to the immigration law issue, the court merely stated that, "Appellee argues that the state trooper did not have the authority to detain the passengers while he inquired into federal immigration matters, and further, his question about the defendant's green card was based on a mere hunch. These arguments are without merit. A state trooper has general investigatory authority to inquire into possible immigration violations. Moreover, the trooper's question about the green card was reasonable under the circumstances, and thus lawful." \textit{Id.} at 1301 n.3 (10th Cir. 1984). More recently, in \textit{United States v. Favela-Favels}, 41 Fed. Appx. 185 (10th Cir. 2002), the court cited \textit{Salinas-Calderon} for the general investigatory authority of a state officer to inquire into possible immigration violations. \textit{See also} United States v.
In March 2000, the New York Attorney General reached similar conclusions to those of the Ninth Circuit.\textsuperscript{157} "[T]he INA does not preempt the authority of state and local officials to make warrantless arrests for criminal violations of the INA, insofar as such activity is authorized by state and local law."\textsuperscript{158} Regarding the distinction between civil and criminal enforcement, the New York Attorney General noted that the INA provides the criminal penalties of fines and/or imprisonment for violation of some of its substantive provisions, such as willfully disobeying a removal order;\textsuperscript{159} willfully failing to register\textsuperscript{160} transporting "illegal aliens"\textsuperscript{161} engaging in a pattern or practice of hiring undocumented non-citizens,\textsuperscript{162} and illegally entering the country.\textsuperscript{163} However, the AG pointed out that the INA also provides that violations of some provisions are punishable by civil penalties.\textsuperscript{164} And, of course, some violations may result in no sanction other than deportation.\textsuperscript{165}

\textsuperscript{157} Hernandez-Dominguez, 1 Fed. Appx. 827 (10th Cir. 2001) (holding that further detention of a defendant stopped for a traffic violation was justified when defendant revealed he was an "illegal alien" while police checked his license and registration); United States v. Santana-Garcia, 264 F.3d 1188, 1193 (10th Cir. 2001) (quoting Vasquez-Alvarese for the proposition that state law enforcement officers "'have the general authority to investigate and make arrests for violations of federal immigration laws,' and that federal law as currently written does nothing 'to displace ... state or local authority to arrest individuals violating federal immigration laws.'").

\textsuperscript{158} Id.

\textsuperscript{159} See, e.g., 8 U.S.C. § 1253(a).

\textsuperscript{160} 8 U.S.C. §1306(a).

\textsuperscript{161} 8 U.S.C. §1324(a).

\textsuperscript{162} 8 U.S.C. §1324a(f).

\textsuperscript{163} 8 U.S.C. § 1325(a).


\textsuperscript{165} Id. (citing 8 U.S.C. § 1227 (defining who is a deportable alien)). The authority for state and local officers in New York to enforce the INA comes from the state's Criminal Procedure Law, which permits a warrantless arrest for an "offense." Id. Offense is defined as conduct punishable by a sentence of imprisonment or a fine. See Penal Law § 10.00(1) (2003). Thus, the New York AG concluded that "it necessarily follows that state and local officers have no authority to arrest an individual under the INA unless the officers have probable cause to believe that the individual has violated
The New York Attorney General found no authority in the INA for state law enforcement officers to enforce the civil provisions of the Act.\textsuperscript{166} Although federal law, as noted above, allows the United States Attorney General to enter an agreement in emergency situations with a state whereby state officers are delegated the powers of a federal immigration agent, there is no such agreement in place in New York.\textsuperscript{167}

IV. Conclusion

When Attorney General Ashcroft warned "the terrorists among us" of his zero-tolerance policy he was consciously echoing statements made by Attorney General Robert F. Kennedy to the effect that his Justice Department would arrest a mobster for "spitting on the sidewalk." Among the many problems with this rhetorical analogy, however, is the fact that no one in the Kennedy Administration or since has ever suggested that spitting on the sidewalk should be a federal crime. Part of the reason for that – the limitations on federal power to deal with certain types of offenses – is not applicable to the CLEAR and HSEA Acts, which criminalize conduct that is already at least subject to federal control. But the trivialization of federal criminal law is a concern, as is the increasing usurpation of state and local law enforcement personnel to serve federal interests. To follow the metaphor perhaps further than good taste would counsel, the proposed laws could leave us with fewer undocumented people, but considerably more spit on our sidewalks.


\textsuperscript{167} 2000 Op. Att’y Gen. N.Y. No. 1001 (Mar. 21, 2000). In the New York case of \textit{People v. Alvarez}, the defendant, an admitted “illegal alien,” was arrested by New York City police detectives. The court held that the defendant’s status did not provide the officers with probable cause to arrest him stating:

In the absence of knowledge of any facts which detail the specific circumstances by which the defendant . . . became an illegal alien, it is impossible to find that a felony or even an offense was the basis of the arrest . . . . Status as an illegal alien does not \textit{per se} constitute an offense or a crime for which a sentence to a term of imprisonment or a fine is provided as defined in [Penal Law § 10.00(1)].

84 Misc. 2d 897, 900 (N.Y. Sup. 1975).

More seriously, the number of potential new criminals is bigger than one might suspect. The U.S. Census Bureau in March 2002 estimated that more than 32.5 million people were foreign-born. More than 20 million of these foreign-born people were counted as non-citizens. This number is probably low, however, due to undercounting of the undocumented population. By the best estimates, between 7 and 10 million people now live in the United States without legal status. Also, the contemporary foreign-born population of the United States is mostly non-European, and mostly people of color, factors that surely also call into question proposals seeking to criminalize some 10 million of them and to allow their arrest by state and local law enforcement personnel. The formally civil deportation system, a most peculiar "pale of law," has long been in need of major reform. But the CLEAR and HSEA Acts will create many more problems than they will solve.


170 Id. at 2.