

Whose Community Shield?: Examining the Removal of the “Criminal Street Gang Member”

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Gangs have been a part of life in the United States for centuries.¹ Frederic Thrasher’s groundbreaking 1927 study defined the gang as “an interstitial group, originally formed spontaneously and integrated through conflict.”² Definitions of “gangs” now vary greatly,³ but many scholarly definitions focus on involvement in illegal activity as a core component of the definition.⁴ Thus defined, gangs have come to provide a quintessential

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¹ See, for example, Herbert Asbury, *The Gangs of New York* (Garden City 1928) (providing an account of gang activity account based loosely upon gang conflict in New York City in the mid-nineteenth century).

² Frederic Thrasher, *The Gang: A Study of 1,313 Gangs in Chicago* 46 (Chicago 1927) “Conflict” meant inter-gang fighting. Malcolm W. Klein and Cheryl L. Maxson, *Street Gang Patterns and Policies* at 6 (Oxford 2006).

³ See, for example, Kim Strosnider, *Anti-Gang Ordinances After City of Chicago v. Morales: The Intersection of Race, Vagueness Doctrine, and Equal Protection in the Criminal Law*, 39 Am Crim L Rev 101, 105–06 (2002) (noting the differing definitions and citing sources); Cordula Strocka, *Youth Gangs in Latin America*, 26 SAIS Rev 133, 134 (Summer–Fall 2006) (same); Finn-Aage Esbensen, et al, *Youth Gangs and Definitional Issues: When Is a Gang a Gang, and Why Does It Matter?*, 47 Crime & Delinquency 105 (2001) (same); Richard A. Ball and G. David Curry, *The Logic of Definition in Criminology: Purposes and Methods for Defining “Gangs”*, 33 Criminol 225 (1995) (same); See also John M. Hagedorn, *Gangs, Institutions, Race and Space: The Chicago School Revisited*, in John M. Hagedorn, ed, *Gangs in the Global City: Alternatives to Traditional Criminology* 13 (Illinois 2007) (proposing greater incorporation of “race” and “space” in the Chicago school’s framework); James F. Short, *The Challenges of Gangs in Global Context*, in Hagedorn, ed, *Gangs in the Global City* at 319 (discussing the difficulties of defining gangs).

⁴ See Klein and Maxson at 6–7 (cited in note 2). But see James F. Short, Jr., *Gangs and Adolescent Violence* 5 (Center for the Study and Prevention of Violence 1996). Regardless of the extent to which criminality is incorporated into the gang definition, defining gangs simply as “organized crime” is an oversimplification. See Hagedorn, *Gangs*,

example of group criminal activity, which is treated as a particular danger in contemporary criminal law.⁵

Throughout U.S. history, many commentators and scholars have ascribed gang activity to new immigrant groups.⁶ This linkage between gangs and immigrants in turn forms part of a broader social preoccupation with correlations between crime and immigration.⁷ Although the factual validity of the linkages between new immigrant groups and criminality is questionable, assumptions about migrant criminality are rampant in U.S. discourse.⁸ Along with vivid historical accounts of ethnic gangs in the United States, these flawed but lurid contemporary accounts of the criminality of the immigrant population and the general

Institutions, Race and Space at 23 (cited in note 3) (“Many of today’s gangs are an institutionalized bricolage of illicit enterprise, social athletic club, patron to the poor, employment agency for youth, substitute family, and nationalist, community, or militant organizations.”).

⁵ See, for example, Peter Buscemi, Notes, *Conspiracy: Statutory Reform Since the Model Penal Code*, 75 Colum L Rev 1122, 1122 n 5 (1975) (noting that conspiracy laws “combat the extraordinary dangers allegedly presented by multi-member criminal undertakings”). To be sure, scholars have debated the legitimacy of treating group criminality as inherently more dangerous than individual criminal acts. Compare *Developments in the Law – Criminal Conspiracy*, 72 Harv L Rev 920, 923–24 (1959) (explaining conspiracy laws as premised upon “the fact—or at least the assumption—that collective action . . . involves a greater risk to society than individual action toward the same end”), with Abraham S. Goldstein, *Conspiracy to Defraud the United States*, 68 Yale L J 405, 414 (1959) (challenging the notion that combination in crime is necessarily more dangerous than individual criminal activity). For further evidence of the unique legal treatment of group criminality, see the discussion of federal gang sentencing enhancements accompanying notes 70–76.

⁶ Geoff Thale and Elsa Falkenburger, *Youth Gangs in Central America: Issues in Human Rights, Effective Policing and Prevention*, A Washington Office on Latin America Special Report 2 (November 2006), available at <http://www.wola.org/gangs/gangs_report_final_nov_06.pdf> (last visited Feb 1, 2007) (“WOLA Report”); Rachel Rubin and Jeffrey Melnick, *Immigration and American Popular Culture: An Introduction* 24 (NYU 2007). For recent examples of such attributions, see Patrick Buchanan, *State of Emergency: The Third World Invasion and Conquest of America* 24 (St Martin’s 2006); Kevin J. Mullen, *Dangerous Strangers: Minority Newcomers and Criminal Violence in the Urban West, 1850–2000* 125 (Palgrave 2005); Heather MacDonald, *The Immigrant Gang Plague*, 14 City Journal 30, 30 (Summer 2004) (“Gang crime is exploding nationally—rising 50 percent from 1999 to 2002—driven by the march of Hispanic immigration east and north across the country.”).

⁷ See Jennifer M. Chacón, *Unsecured Borders: Immigration Restrictions, Crime Control and National Security*, 39 Conn L Rev 1827 (2007) (discussing generally the blurred boundaries between immigration control and crime control); Ramiro Martinez and Abel Valenzuela, *Immigration and Crime: Race, Ethnicity, and Violence* 1–15 (NYU 2006) (contrasting the public hysteria over immigrant crime with the existing data). See also Part II and text accompanying notes 158–159.

⁸ Consider Chacón, 39 Conn L Rev 1827 (cited in note 7). See also Rubén G. Rumbaut and Walter A. Ewing, *The Myth of Immigrant Criminality and the Paradox of Assimilation: Incarceration Rates among Native and Foreign-Born Men*, Immigration Policy Center (Spring 2007), available at <http://www.aif.org/ipc/special_report/sr_022107.pdf> (last visited Apr 14, 2007).

presumption of group dangerousness all serve to render the iconography of “alien gangs” extremely powerful.

When law enforcement officials report the successful apprehension and removal of “criminal aliens”⁹ from the borders of the United States, few protest.¹⁰ Perhaps unsurprisingly, noncitizens labeled as criminal street gang members meet the same fate as “criminal aliens”; they are consigned to the bottom of the social heap and characterized as “the worst of the worst” criminal offenders.¹¹ One consequence of the widespread enthusiasm for removing “criminal street gang members and their associates”¹² is that the policies focused on their removal receive virtually no public criticism.¹³ This essay seeks to round out the discourse regarding “alien gangs” by raising questions about the nature and consequences of U.S. laws and policies designed to effectuate

⁹ The Immigration and Nationality Act (“INA”) does not define the term “criminal alien,” but the INA does define the term indirectly in section 242(a)(2)(C), concerning “orders against criminal aliens.” The provision limits judicial review of final orders of removal against “an alien who is removable by reason of having committed an offense covered in section 212(a)(2) or 237(a)(2)(A)(iii), (B), (C), or (D), or any offense covered by section 237(a)(2)(A)(ii) for which both predicate offenses are, without regard to their date of commission, otherwise covered by section 237(a)(2)(A)(i).” In other words, the term “criminal alien” includes noncitizens—whether present with or without authorization—who have committed criminal offenses that render them excludable or deportable under the INA. The term does not encompass all noncitizens who are present without authorization, nor does it encompass all noncitizens who have committed crimes.

¹⁰ See, for example, Peter H. Schuck and John Williams, *Removing Criminal Aliens: The Pitfalls and Promises of Federalism*, 22 Harv J L & Pub Policy 367, 372 (1999) (“It is hard to think of any public policy that is less controversial than the removal of criminal aliens.”).

¹¹ See Bryon Okada, *Illegal immigrants arrested in ‘Operation Return to Sender’*, Fort Worth Star-Telegram (June 14, 2006) (quoting Immigration and Customs Enforcement head Julie L. Myers describing Operation Return to Sender, Operation Predator and Operation Community Shield as “focused on the worst of the worst”). See also Patrick O’Gilfoil Healy, *A Gang Sweep with a Difference*, NY Times 14LI 1 (Mar 27, 2005) (“They described their quarry as dangerous thugs who had committed drug and weapons crimes.”).

¹² The meaning of this phrase is explained in Part I.

¹³ Recent mainstream media accounts describing ICE’s gang removal activities generally raise no criticisms of the program, and many simply restate the content of ICE press releases. See, for example, *Agencies Report Gang Arrests*, Orlando Sentinel B3 (Aug 29, 2006); Rosalia Ahumada, *Team Effort Nets 50 Gang Members: Many Charges as Agencies Unite to Fight Violence in Stanislaus*, Modesto Bee B1 (June 15, 2006); *Feds target gangs in crackdown*, CNN.com (Mar 11, 2006), available at <<http://www.cnn.com/2006/US/03/10/gang.arrests/index.html?eref=sitesearch>> (last visited Apr 14, 2007); Chris Kraul, *Gang Crackdown Nets 650 Suspects*, LA Times A7 (Sept 9, 2005); Dan Eggen, *Customs Jails 1,000 Suspected Gang Members*, Wash Post A2 (Aug 2, 2005) (discussing arrests and raising no criticisms); Eric Lipton, *Hundreds of Gang Members Arrested*, NY Times A17 (Aug 2, 2005); Daniel Borunda, *582 Arrested in gang roundup, including three in El Paso area*, El Paso Times A1 (Aug 2, 2005); Nicole Gaouette, *Hundreds Held in Anti-Gang Crackdown*, LA Times A12 (Aug 2, 2005); Jennifer 8. Lee, *95 Arrested in Gang Sweep*, NY Times B6 (May 13, 2005).

the removal of noncitizen criminal street gang members and their associates.

Part I describes the government's efforts over the past decade to remove noncitizens identified as criminal street gang members, with a particular emphasis on current efforts. Immigration and Customs Enforcement ("ICE") and its predecessor agency, the Immigration and Naturalization Service ("INS") have removed large numbers of purported criminal street gang members over the course of the past decade. This Part describes the anti-gang activities of the immigration enforcement bureaucracy and outlines the legal changes that have facilitated these enforcement efforts. This Part concludes with a discussion of proposed federal legislation designed to expand such enforcement efforts.

Part II raises questions about the domestic consequences of these gang removal programs. The enforcement actions currently aimed at gang members raise significant legal and social concerns. No uniform legal standards govern the identification of criminal street gang members for purposes of ICE enforcement, and while the "associates" of criminal street gang members are often removed, there are no legal standards defining who constitutes an associate of a criminal street gang member. The task of identifying gang members and their associates falls to local law enforcement officials, who carry out this task in accordance with their own practices and without federal statutory constraints. The tremendous discretion vested in law enforcement in the process of identifying "gang members" and their "associates" encourages discriminatory law enforcement practices. Moreover, the proposed legislation described in Part I would codify overly broad definitions of gang membership, further fueling discriminatory investigation practices without providing any limitation on the kinds of enforcement efforts already underway.

Part III raises questions about the international effects of the U.S. gang removal policy. The U.S. policy of removing purported gang members and criminal aliens has helped to fuel crime in receiving countries. Perhaps more importantly, U.S. policy toward criminal street gang members and their associates has arguably provided legitimacy to repressive anti-gang activities in receiving states. The costs of U.S. gang removal policy cannot be properly assessed until policymakers take into full account the effects of the policy both outside and inside the United States.

This relatively brief essay does not advance broad empirical claims about the efficacy of ICE's anti-gang enforcement operations as a method of achieving crime control. Instead, this essay has two modest goals. First, it challenges the conventional wisdom that gang removal policies necessarily target the "worst of the worst" noncitizen criminal offenders. Second, it highlights the negative effects these policies have on law enforcement practices in the United States and abroad. Both of these issues, largely overlooked by the legal academy and policymakers, should be a part of the broader study and discussion of gang removal practices.

I. IDENTIFYING AND REMOVING "CRIMINAL STREET GANG MEMBERS AND THEIR ASSOCIATES"

The enforcement of immigration laws against purported criminal street gang members and their associates has been an important and well-publicized aspect of immigration law enforcement for over a decade. The agencies responsible for enforcing immigration laws—formerly the INS and now ICE—have carried out such efforts in collaboration with federal, state, and local law enforcement agencies. Working together, these agencies use immigration law as a means of disrupting gangs and gang-related crime. This Part describes these efforts and summarizes recent federal legislation designed to further such efforts.

A. The Past Decade of Deportations

Almost two decades ago, Congress made important changes to federal immigration law by expanding the number of offenses that would render a noncitizen eligible for removal. In the late 1980s, Congress revised immigration laws to respond to the growing national preoccupation with drug crimes.¹⁴ At that time, Congress added to the Immigration and Nationality Act ("INA") a list of crimes defined as "aggravated felonies." Noncitizens convicted of such crimes could be deported¹⁵ unless a judge granted

¹⁴ Anti-Drug Abuse Act of 1988 ("Drug Kingpin Act"), Pub L No 100-690, Title VII § 7342, 102 Stat 4469 (1988), codified as amended at 8 USC §§ 1101(a)(43), 1252(a) (2000); Jeff Yates, Todd A. Collins, and Gabriel J. Chin, *A War on Drugs or a War on Immigrants? Expanding the Definition of "Drug Trafficking" in Determining Aggravated Felony Status for Noncitizens*, 64 Md L Rev 875, 876 (2005) (discussing the birth of the war on drugs); Craig H. Feldman, Note, *The Immigration Act of 1990: Congress Continues to Aggravate the Criminal Alien*, 17 Seton Hall Leg J 201, 205–06 (1993) (recounting the 1988 creation of the aggravated felony category of deportable aliens).

¹⁵ See 8 USC § 1252(a) (1988).

discretionary relief.¹⁶ Congress defined “aggravated felonies” to include “any drug trafficking crime as defined in section 924(c)(2) of title 18, United States Code, or any illicit trafficking in any firearms or destructive devices as defined in section 921 of such title, or any attempt or conspiracy to commit any such act, committed within the United States.”¹⁷ Thus, certain drug crimes were put on par with murder as the basis for deportation of non-citizens.

From that time forward, the “aggravated felony” category continued to expand. The Immigration Act of 1990¹⁸ added numerous offenses, including “any crime of violence” as defined in 18 USC § 16, which included any offense that “has as an element the use, attempted use, or threatened use of physical force against the person or property of another,” or a felony that “involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.”¹⁹ Other offenses that Congress lumped into the aggravated felony category included crimes related to money laundering under 18 USC § 1956 and “illicit trafficking in any controlled substances” identified in § 102 of the Controlled Substances Act.²⁰

Congress expanded the “aggravated felony” definition again in 1994.²¹ The term came to include certain theft and burglary offenses, receipt of stolen property, child pornography, racketeering crimes, prostitution-related crimes, espionage, treason, tax

¹⁶ At that time, a judge could grant relief from deportation to an individual eligible for removal as an aggravated felon. Immigration and Nationality Act (“INA”) § 212(c) (1988), codified at 8 USC § 1182 (1988). Relief under § 212(c) was granted in about half of all deportation proceedings. See *INS v St Cyr*, 533 US 289, 296 n 5, 326 (2001) (“51.5% of the applications for which a final decision was reached between 1989 and 1995 were granted”) (citation omitted). In 1996, however, Congress eliminated § 212(c) relief as well as discretionary relief provisions for individuals in the “aggravated felony” category. See INA § 240A(a)(3), Pub L No 104-208, Div C, Title III, § 304(a)(3), 110 Stat 3009-5887 (1996), codified as amended at 8 USC § 1229(a)(3) (2002); INA §§ 240B(a)(1), 240B(b)(1)(C), Pub L No 104-208, Div C, Title III, § 304(a)(3), 110 Stat 3009-596 (1996), codified as amended at 8 USC § 1229(c); Bill Ong Hing, *Deporting Our Souls: Values, Morality and Immigration Policy* 58–64 (Cambridge 2006) (discussing the rise and fall of the § 212(c) waiver).

¹⁷ Anti-Drug Abuse Act of 1988, 102 Stat at 4469.

¹⁸ Pub L No 101-649, 104 Stat 4978 (1990), codified as amended in various sections of title 8.

¹⁹ 18 USC § 16 (2000).

²⁰ Immigration Act of 1990 § 501(a)(2)–(3).

²¹ Immigration and Nationality Technical Corrections Act of 1994, Pub L No 103-416, § 222, 108 Stat 4320 (1994), codified as amended at 8 USC § 1101(a)(43) (2000).

fraud, tax evasion, “alien” smuggling, some document fraud, and failure to appear to serve a sentence.²²

In 1996, Congress again expanded the increasingly bloated aggravated felony definition with the passage of the Antiterrorism and Effective Death Penalty Act (“AEDPA”)²³ and the Illegal Immigration Reform and Immigrant Responsibility Act (“IIRIRA”).²⁴ The IIRIRA added rape and felony abuse of a minor to the list of offenses.²⁵ More significant changes to the definition were contained in AEDPA, which added commercial bribery, counterfeiting, forgery, trafficking in stolen vehicles, obstruction of justice, perjury, bribery of a witness, conducting an illegal gambling business, transporting persons for purposes of prostitution, failure to appear in court on felony charges, and unauthorized re-entry and other crimes committed by a previously deported noncitizen.²⁶

Even as the list of crimes in the “aggravated felony” category expanded, avenues for relief from removal contracted. The 1996 laws specified that anyone convicted²⁷ of an “aggravated felony” is no longer eligible for a determination of “good moral character.”²⁸ This nearly bars relief from removal, since a finding of “good moral character” is a prerequisite for almost every form of relief from removal.²⁹

²² Id. See also Yates, Collins, and Chin, 64 Md L Rev at 877 n 11 (cited in note 14) (discussing the details of the expanded aggravated felony definition).

²³ Pub L No 104-132, 110 Stat 1214 (1996), codified at 8 USC § 1101 (2000).

²⁴ Pub L No 104-208, Div C, 110 Stat 3009-546 (1996), codified at 8 USC 1101 notes (2000).

²⁵ IIRIRA § 321(a)(1), 110 Stat at 3009-627.

²⁶ AEDPA § 440(e), 110 Stat at 1277.

²⁷ 8 USC § 1101(a)(48) defines “conviction” as:

[A] formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where— (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien’s liberty to be imposed.

The term is broader than it might seem. Under the statute as interpreted by the Board of Immigration Appeals, the pendency of a direct appeal does not automatically relieve an immigrant of the consequences of “conviction.” See *Matter of Puna*, 22 I & N Dec 224, 228–29 (BIA 1998) (deciding Congress intended the meaning of the term “conviction” to not require judicial inquiry into the possibility of appeal). See also Anna Marie Gallagher, *Immigration Consequences of Criminal Convictions: Protecting Your Client’s Immigration Interests in Criminal Proceedings*, Immigration Briefings 1, 8–9 (Apr 2001) (discussing *Punu*, previous case law and stating, “The new statutory definition of conviction includes nearly any conviction regardless of type of sentence imposed”).

²⁸ 8 USC § 1101(f)(8) (2000).

²⁹ See, for example, INA § 240A(b) (cancellation of removal) and INA § 240B(b)(1)(B) (voluntary departure), 110 Stat at 3009-587, –594. See also note 16 (discussing the eli-

As each of these laws went into effect, the expanded legal definition increased the number of “criminal aliens.” But the enactment of the statutes also coincided with a growing wave of migration—both legal and illegal—that further swelled the ranks of noncitizens classifiable as “criminal aliens.”³⁰ The number of “criminal aliens” thus may have increased as much as tenfold between 1980 and 1999.³¹

With the rapidly increasing size of the immigrant population—which coincided with the increasing criminalization of that population—came a public outcry against the perceived dangers of the “criminal alien.”³² In policymaking spheres, as well as in the public discourse, migrants were linked with drug trafficking and other violent crimes, even in the absence of data to substantiate the link.³³ Seeking to respond to the public’s concern over a perceived surge in violent crime committed by immigrants, immigration enforcement agencies began to target those members of the migrant community most commonly associated with both drug crimes and violent crimes: the noncitizen criminal street gang member.

Serious efforts to combat gang crime through state and local enforcement began in the early 1990s, and included collaboration among state and local law enforcement, the Drug Enforcement Agency, and the Federal Bureau of Investigation.³⁴ Federal anti-

mination of discretionary relief from removal for aggravated felons under former INA Section 212(c).

³⁰ See Schuck and Williams, 22 Harv J L & Pub Pol at 368–69 (cited in note 10) (asserting immigration growth lead to increasing numbers of criminal immigrants residing in the United States).

³¹ *Id.* at 376.

³² See, for example, Stephen Legomsky, *Immigration and Refugee Law and Policy* 5 (Foundation 3d ed 2003) (noting “heightened public scrutiny and frenzied activity in Congress” over “criminal aliens”); Kevin R. Johnson, *Public Benefits and Immigration: The Intersection of Immigration Status, Ethnicity, Gender and Class*, 42 UCLA L Rev 1509, 1513 (1995) (“Public alarm about criminal aliens may have peaked in the 1990s when immigrants were implicated in some well-publicized criminal episodes.”); Kathleen M. Keller, Note, *A Comparative and International Law Perspective on the United States (Non)Compliance with Its Duty of Nonrefoulement*, 2 Yale Hum Rts & Dev L J 183, 183 (1999) (noting that the 1996 immigration amendments were “sold to the American public as a campaign to expel ‘undeserving aliens,’ chief among them the so-called ‘criminal aliens.’”).

³³ Consider Chacón, 39 Conn L Rev 1879–1880 (cited in note 7) (discussing the absence of an empirical link); Martinez and Valenzuela, *Immigration and Crime* at 9–10 (cited in note 7) (noting the disconnect between public discourse and data).

³⁴ See, for example, Bill Slocum, *New Weapons to Break Up Gangs*, NY Times A1 (July 30, 1995) (discussing inter-agency gang task forces in Connecticut and noting then-Attorney General Janet Reno’s admiration for the model).

racketeering laws were often used to prosecute gang members.³⁵ Although state and federal authorities conducted separate racketeering investigations, they began to share information and resources, seeking to overcome the inter-agency feuding common in the past.³⁶

During this time, the INS began to target street gang members for removal through participation in the state-federal task forces. In 1992, the INS formed the Violent Gang Task Force to collaborate with state and local law enforcement in anti-gang efforts.³⁷ Over the next few years, these task forces proliferated.³⁸ By 1997, the Task Force had worked with police departments in sixteen cities.³⁹ The Task Force focused the INS's attention not on general immigration enforcement, but on the use of immigration law as a means of assisting local anti-gang activity.⁴⁰ These efforts built on prior initiatives in which the INS sought to cooperate with state and local governments in apprehending, identifying, and detaining noncitizens who had committed crimes and were eligible for deportation, such as the Alien Criminal Apprehension Program of the early 1980s.⁴¹

³⁵ Id.

³⁶ Id.

³⁷ William Branigin, *INS Pursuing Aliens in Urban Gangs; New Immigration Law Aids Agents in Drive to Put Criminals Out of the Country*, Wash Post A3 (May 2, 1997) (describing some of the operating details of the INS's Violent Gang Task Force). See also Dan Kraut, *INS Hopes to Deport 200 N.J. Criminals: Gang Members in Passaic on List*, NJ Rec L01 (Apr 3, 1998) (describing one federal-local joint task force in New Jersey).

³⁸ United States General Accounting Office, *Illegal Aliens: INS Participation in Anti-gang Task Forces in Los Angeles* 6 (Oct 2000), available at <<http://www.gao.gov/new.items/d0178.pdf>> (last visited May 10, 2007) (describing INS cooperation with the Los Angeles Police Department in the late 1990s); Lisa Fernandez, *Felons Face Deportation, INS Moves Against Indian Gangs*, San Jose Mercury News 1B (July 29, 1999); Kraut, *INS Hopes to Deport 200*, NJ Rec at L01 (cited in note 37); Timothy D. May, *INS Pursues Illegal Alien Members of Violent Gangs*, NJ Rec A1 (Apr 2, 1998); Krystyna Slivisnki, *INS Partnership Anchors War on Gangs; Prospect Heights Police Laud Deportation Tool*, Chi Trib NW1 (Sept 2, 1997); Enrique Rivero, *Latinos Intimidated by INS Presence on Sweeps, Activists Say*, LA Daily News 1 (Mar 11, 1997) (discussing INS participation in Simi Valley police department gang sweeps).

³⁹ Branigin, *INS Pursuing Aliens*, Wash Post at A3 (cited in note 37).

⁴⁰ May, *INS Pursues Illegal Alien Members of Violent Gangs*, NJ Rec at A1 (cited in note 38) (“We now have agents whose sole mission is to locate criminal aliens and gang members throughout the state,” said Demetrios Georgakopoulos, assistant district director for investigations at the INS office in Newark.”)

⁴¹ The Anti-Drug Abuse Act of 1986 had directed the INS to form pilot programs to cooperate with local law enforcement agents in four cities to coordinate the removal of noncitizen drug offenders. Anti-Drug Abuse Act of 1986 (“ADAA”), Pub L No 99-570, 100 Stat 3207 (1986), codified at 8 USC § 1182 (2000). These early efforts were plagued with problems. See Schuck and Williams, 22 Harv J L & Pub Pol at 429–32 (cited in note 10) (discussing coordination problems).

In the 1996–1997 period, 4,400 immigrants—some legally present, some present without current lawful authorization—were arrested across the United States in connection with the INS Violent Gang Task Force activity.⁴² INS figures revealed that the vast majority of those arrested were from Mexico, followed by immigrants from the Dominican Republic, Jamaica, Vietnam, and El Salvador.⁴³

These sorts of task force operations occurred throughout the 1990s.⁴⁴ Although they were not always shining examples of inter-agency cooperation,⁴⁵ these coordinated efforts received a fair amount of positive media coverage.⁴⁶

At the same time the INS was stepping up its anti-gang activities, it was also removing many more individuals on the basis of their criminal convictions irrespective of whether they were gang members. The INS reported the removal of 34,000 noncitizens on the basis of criminal violations in 1997 alone.⁴⁷ By 1998, that number was near 61,000.⁴⁸

In the aftermath of September 11, 2001, efforts to coordinate state-federal cooperation in immigration enforcement only increased.⁴⁹ Moreover, efforts to improve national security increa-

⁴² Branigin, *INS Pursuing Aliens*, Wash Post at A3 (cited in note 37).

⁴³ *Id.*

⁴⁴ See, for example, Anne-Marie O'Connor, *Rampart Set Up Latinos To Be Deported*, *INS Says*, LA Times A1 (Feb 24, 2000); Tracy Wilkinson, *Gangs Find Fresh Turf In Salvador*, LA Times A1 (June 16, 1994); Debbi Wilgoren, *Task Force Raids South Arlington Pool Hall*, Wash Post E6 (Nov 17, 1992); Bill Billiter, *Agencies Arrest 60 In Crackdown On Asian Gangs; Crime: A Joint Federal, State And Local Task Force Spent 20 Months Tracking Members, And The Operation Continues*, LA Times B1 (Oct 23, 1992); Jack Houston, *Deportation Gaining As Gang-Fighting Tool, Critics Raise Civil Rights Questions*, Chi Trib C1 (July 6, 1992). See also notes 37 & 38.

⁴⁵ See, for example, Anne-Marie O'Connor, *FBI Pressured INS to AID L.A. Police Anti-Gang Effort*, LA Times A1 (Feb 29, 2000) ("Immigration and Naturalization Service agents ordered to deport immigrants detained by anti-gang officers in the Los Angeles Police Department's Rampart Division told investigators the assignment was 'rammed down our throats' over the objections of the U.S. attorney's office after pressure from the FBI, according to federal documents.")

⁴⁶ See, for example, Harvey Rice, *Applying pressure; Montgomery County winning gang fight—for now*, Houston Chron A 35 (Oct 24, 1999); Branigin, *INS Pursuing Aliens*, Wash Post at A3 (cited in note 37); Joan Treadway, *Task Force Targets Refugee Gangs*, Times-Picayune B1 (Mar 18, 1994). See also articles cited in note 37.

⁴⁷ Department of Homeland Security, *2005 Yearbook of Immigration Statistics* 96 (2006).

⁴⁸ *Id.* at 97.

⁴⁹ Huyen Pham, *The Constitutional Right not to Cooperate? Local Sovereignty and the Federal Immigration Power*, 74 U Cin L Rev 1373, 1374 (2006) ("After 9/11 . . . the federal government began a concerted push to get local authorities involved in the enforcement of immigration laws."); Kris W. Kobach, *The Quintessential Force Multiplier: The Inherent Authority of Local Police to Make Immigration Arrests*, 69 Albany L Rev 179, 180–81 (2005–06) (discussing the NSEERS program); Huyen Pham, *The Inherent Flaws in the*

singly became conflated in the national debate with issues of general crime control, particularly with regard to immigrant communities.⁵⁰ Therefore, even after the reorganization of the immigration enforcement bureaucracy in 2003, the newly-formed immigration enforcement agencies continued to find ways to use immigration regulations as a means of bolstering domestic crime control efforts. A recent and prominent example is “Operation Community Shield.”

B. Operation Community Shield

ICE initiated Operation Community Shield in March of 2005.⁵¹ The Operation entailed the coordination of efforts on the part of ICE, state and local law enforcement, and other federal agencies such as the Bureau of Alcohol, Tobacco, Firearms and Explosives.⁵² The Operation’s original stated goal was to disrupt the activities of the Mara Salvatrucha organization, also known as MS-13.⁵³

MS-13 is often described as an “alien gang” based in El Salvador,⁵⁴ but MS-13 is perhaps better understood as a product of

Inherent Authority Position: Why Inviting Local Enforcement of Immigration Laws Violates the Constitution, 31 Fla St U L Rev 965, 966 (2004) (discussing the questions raised by the idea that states have inherent authority to enforce immigration laws); Michael J. Wishnie, *State and Local Police Enforcement of Immigration Laws*, 6 U Pa J Const L 1084, 1085 (2004) (calling the enlistment of local authorities to enforce both civil and criminal immigration laws “dangerous”).

⁵⁰ See Chacón, 39 Conn L Rev 1832-1856 (cited in note 7) (discussing the blurring of lines between criminal law, immigration law and national security); Teresa A. Miller, *Blurring the Boundaries Between Immigration Control and Crime Control after September 11th*, 25 BC Third World L J 81, 81–83(2005) (stating some of the harsh laws affecting immigrant criminals preexisted the flurry of lawmaking after September 11, 2001). Consider Daniel Kanstroom, *Criminalizing the Undocumented: Ironic Boundaries of the Post-September 11th ‘Pale of Law’*, 29 NC J Intl L & Comm Reg 639, 640–43 (2004) (discussing the frequency with which the use of immigration tools against noncitizens are justified on the basis of the war on terror); Nora V. Demleitner, *Misguided Prevention: The War on Terrorism as a War on Immigrant Offenders and Immigration Violators*, 40 No 6 Crim L Bull 2 (2002) (arguing immigration laws are being used as general crime control measures under the guise of the war on terror).

⁵¹ ICE, *Fact Sheet: Operation Community Shield* (Revised May 22, 2007), available at <<http://www.ice.gov/pi/investigations/comshield/index.htm>> (last visited June 18, 2007) (listing agencies involved in these coordinated efforts).

⁵² *Id.*

⁵³ *Id.*

⁵⁴ See, for example, Michelle Malkin, *Gang Land*, Townhall.com (March 2, 2005), available at <http://www.townhall.com/columnists/MichelleMalkin/2005/03/02/gang_land> (last visited Feb 1, 2007) (“The most notorious criminal alien gang enterprise on the American landscape is Mara Salvatrucha, or MS-13, the Salvadoran-based syndicate engaged in murder, drug trafficking, and human smuggling across Central America and the United States.”); Shelly Feuer Domash, *Our Gangs: Wars and Warriors, Go Local*, NY Times

the United States. The group emerged in the Central American immigrant community in Los Angeles in the 1980s.⁵⁵ Many of the earliest members of MS-13 were refugees or children of refugees fleeing the civil wars in El Salvador.⁵⁶ They organized at least in part as a means of protection against existing gangs in the poorer neighborhoods of Los Angeles.⁵⁷ As these Central American youths were increasingly removed back to Central America in the 1990s, some of them brought U.S. gang culture with them.⁵⁸ Deported MS-13 members joined, and in important ways transformed, pre-existing gang culture in El Salvador.⁵⁹ In other

14LI (Nov 22, 1998) (“Members of the Mara Salvatrucha, which has its roots in the civil war in El Salvador, are considered knowledgeable in the use of heavy weaponry.”).

⁵⁵ WOLA Report at 2 (cited in note 6) (“youth gangs emerged in Los Angeles in the 1980s”). See also, Harold Sibaja, et al, *Central America and Mexico Gang Assessment: El Salvador Profile* 5 (USAID Apr 2006) (“USAID Report on El Salvador”); Victor J. Blue, *Gangs without Borders: Violent Central American Gangs Were Born in the USA, Returned to Their Homeland and Now Migrate Back and Forth between Here and There*, San Fran Chron’s SFGate.com (Apr 2, 2006), available at <<http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2006/04/02/INGGTI0B3I1.DTL>> (last visited Feb 2, 2007); Ana Arana, *How the Street Gangs Took Central America*, Foreign Aff 98, 100–01 (May/June 2005).

⁵⁶ USAID Report on El Salvador at 5 (cited in note 55); WOLA Report at 4 (cited in note 6). Professor Hing has noted that individuals who became involved in Cambodian gangs in the United States share similar stories: many were refugees from the Pol Pot regime who became involved in gangs because they were social outsiders in need of a support group and protection. See Hing, *Deporting Our Souls* at 78–97 (cited in note 16).

⁵⁷ WOLA Report at 3 (cited in note 6); Larry Rohter, *Deadly Exports: In U.S. Deportation Policy, a Pandora’s Box*, NY Times A1 (Aug 10, 1997) (describing Mara Salvatrucha and 18th Street gangs as “Los Angeles gangs” exported to El Salvador). Self-protection, of course, is only one of many, complex reasons for gang formation. The causes of gang formation are multiple and debatable. See, for example, John M. Hagedorn, *Introduction: Globalization, Gangs, and Traditional Criminology*, in Hagedorn, ed, *Gangs in the Global City* at 2–9 (cited in note 3) (summarizing various theories of gang formation).

⁵⁸ WOLA Report at 2 (cited in note 6). This process raises the specter of transnational gang activity, although at least one study has found no concrete evidence of the emergence of institutionalized, transnational gangs. Id. See also N.C. Aizenman, *Latino Gang Study Finds Few Links to Overseas Groups*, Wash Post B1 (Feb 8, 2007) (“A study of Latino gangs in the Washington area and five Central American nations debunks the popular belief that the gangs are engaged in a systematic, organized effort to spread their influence.”). Although the evidence is inconclusive, many commentators have suggested that there is a transnational gang problem. Some suggest that the transnational gang problem is the result of U.S. gang removal policy. See, for example, Mary Helen Johnson, *National Policies and the Rise of Transnational Gangs* (Migration Policy Institute Apr 1, 2006) available at <<http://www.migrationinformation.org/Feature/display.cfm?ID=394>> (last visited Apr 16, 2007). See also Robert J. Lopez, Rich Connell and Chris Kraul, *Gang Uses Deportation to its Advantage to Flourish in U.S.*, LA Times A1 (Oct 30, 2005). More often, however, claims about the power of transnational gangs are used not to critique the removal of gang members, but rather, to urge more resources for law enforcement officers in fighting transnational gangs. See, for example, Randal C. Archibold, *Officials See a Spread in Activity of Gangs*, NY Times A14 (Feb 8, 2007) (describing the meeting for the International Chiefs of Police Summit on Transnational Gangs, in which law enforcement officials “said that gangs with roots or ties to Los Angeles had spread to 40 states and seven countries.”).

⁵⁹ See Part III.

words, MS-13 is more a U.S. phenomenon than a Central American import.

In announcing Operation Community Shield, ICE gave a particularized rationale for targeting MS-13. By ICE's own account, the MS-13 gang was initially chosen as a target for enforcement after an ICE assessment concluded that "most of these gang members were foreign-born; in the United States illegally; had prior criminal convictions; and/or were involved in crimes that made them subject to ICE's broad immigration and customs authorities."⁶⁰

From these limited beginnings, however, ICE has expanded Operation Community Shield to include "all violent gang members nationwide."⁶¹ According to ICE's own account, Operation Community Shield was expanded "to include all criminal street gangs and prison gangs."⁶² The listed gangs targeted by the operation include not only MS-13, but also gangs such as "Sureños, 18th Street gang, Latin Kings, Vatos Locos, Mexican Mafia, Bloods, Crips, Spanish Gangster Disciples, La Raza gang, Border Brothers, Brown Pride, Norteños, Florencia 13, Tiny Rascal, Asian Boyz and Jamaican Posse."⁶³ ICE's public literature no longer provides any rationale for targeting these or any other "gangs," nor does it offer any explanation of the criteria that are applied to determine gang membership.

ICE does not develop the list of targeted gang members through its own investigation. State and local law enforcement officials develop their own lists of individuals identified as gang members.⁶⁴ These law enforcement agencies can then share the names with ICE.⁶⁵ If there are reasons to believe the individual

⁶⁰ ICE, News Releases, *ICE arrests 375 gang members & associates in two-week enforcement action; 20 arrested in San Antonio under ICE "Community Shield" anti-gang crackdown* (March 10, 2006), available at <<http://www.ice.gov/pi/news/newsreleases/articles/060310sanantonio.htm>> (last visited Feb 2, 2007).

⁶¹ *Id.*

⁶² See ICE, Public Information, *Operation Community Shield*, available at <<http://www.ice.gov/pi/investigations/comshield/index.htm>> (last visited Feb 2, 2007).

⁶³ *Id.*

⁶⁴ Remarks of Julie L. Myers, Assistant Secretary of Homeland Security for Immigration and Customs Enforcement, Keynote Speech, U Chi Legal F, Immigration Law and Policy Symposium (Oct 27, 2006).

⁶⁵ *Id.* See also Hong H. Tieu, *Picturing the Asian Gang Member Among Us*, 11 Asian Pac Am L J 41, 59–60 (2006) (noting that federal immigration enforcement agents have access to CalGang, the California gang database); Kobach, 69 Albany L Rev at 194 (cited in note 49) ("Local police officers and departments reported the names of suspected gang members to ICE, which then ran the lists of gang members against federal immigration databases to determine the immigration statuses of the individuals in question.").

may be subject to removal under federal immigration law, ICE can then assist local law enforcement in the apprehension, detention, and ultimately the removal of the targeted noncitizen on the basis of their immigration law violations.⁶⁶ Thus, methods for identifying criminal street gang members and their associates vary in accordance with state and local practice.

The practices used by local law enforcement officials to identify criminal street gang members are unconstrained by federal immigration law. The INA does not contain a definition of what constitutes a “criminal street gang.”⁶⁷ Nor does the INA provide that specific immigration consequences will follow from membership in a criminal street gang, much less “association” with a criminal street gang. Members of Congress have introduced legislative proposals that would incorporate criminal street gang membership into the INA;⁶⁸ but to date, Congress has not enacted any such legislation. Moreover, federal law does not criminalize criminal street gang membership or activity.⁶⁹

The federal criminal code does supply a definition of “criminal street gangs” because, while gang membership is not criminalized, the code does provide for sentence enhancements for members of “criminal street gangs.” A “criminal street gang” is defined as:

an ongoing group, club, organization, or association of 5 or more persons—

(A) that has as 1 of its primary purposes the commission of 1 or more of the criminal offenses described in subsection (c);

⁶⁶ See, for example, ICE, Press Releases, *ICE Arrests 582 Violent Gang Members and Associates in Two-Week Nationwide Enforcement Operation: More than 60 arrested in Mass. under ICE's ongoing "Community Shield" anti-gang initiative* (Aug 1, 2005), available at <<http://www.ice.gov/pi/news/newsreleases/articles/050801boston.htm>> (last visited February 28, 2007) (“ICE uses intelligence on gang organizations and leadership provided by state and local authorities. This information is then used whenever possible to arrest, prosecute, and/or deport individual gang members.”). Julie Myers, Department of Homeland Security, Assistant Secretary for Immigration and Customs Enforcement, also described the program in similar terms in her remarks at this Symposium.

⁶⁷ In the United States federal criminal law, criminal street gang membership is relevant solely for purposes of sentence enhancement. See 18 USC § 521 (2000). For a general discussion of this provision, see text accompanying note 70.

⁶⁸ See Part I C (discussing proposals to amend federal immigration law to incorporate penalties for criminal street gang membership).

⁶⁹ Several legislative proposals have been introduced to create federal crimes based on gang membership. See, for example, The Gang Deterrence and Community Protection Act of 2005, HR 1279, 109th Cong, 1st Sess (May 12, 2005); The Gang Prevention and Effective Deterrence Act of 2005, S 155, 109th Cong, 1st Sess (Jan 25, 2005).

(B) the members of which engage, or have engaged within the past 5 years, in a continuing series of offenses described in subsection (c); and

(C) the activities of which affect interstate or foreign commerce.⁷⁰

The “offenses described in subsection (c)” include federal felonies involving a controlled substance,⁷¹ a federal crime of violence involving the use of force against another person,⁷² or a conspiracy to commit such crimes.⁷³ Federal sentences can be increased up to ten years if those crimes are committed by a person who is a member of a criminal street gang⁷⁴ or who “intends to promote or further the felonious activities of the criminal street gang or maintain or increase his or her position in the gang,”⁷⁵ and who has certain enumerated prior state or federal convictions.⁷⁶

While some scholars have voiced concerns about the constitutionality and the efficacy of gang-related sentence enhancements,⁷⁷ the enhancements have the virtue of being limited and defined by law. No such circumscriptions apply to immigration enforcement efforts that target gangs. The law enforcement officials identifying individuals for removal are not bound by the federal definition of criminal street gang membership. To the

⁷⁰ 18 USC § 521(a) (2000). Congress has debated legislation that would broaden the definition of “criminal street gang” members and further enhance sentences. See David D. Kirkpatrick, *Congress Rekindles Battle on Mandatory Sentences*, NY Times A14 (May 11, 2005) (the legislation “would change the definition of a criminal street gang to three people who have committed at least two crimes together, at least one of them violent, from five”).

⁷¹ Pertinent controlled substance felonies are those defined in section 102 the Controlled Substances Act (“CSA”), Title II, § 102, 91 Pub L No 513, 84 Stat 1242 (1970), codified at 21 USC § 802 (2000), for which the maximum penalty is not less than 5 years. 18 USC § 521(c)(1) (2000).

⁷² 18 USC § 521(c)(2) (2000).

⁷³ *Id.* at § 521(c)(3).

⁷⁴ *Id.* at § 521(b), (d)(1).

⁷⁵ *Id.* at § 521(d)(2).

⁷⁶ 18 USC at § 521(d)(3)(A)–(D) (2000).

⁷⁷ See, for example, Adrien K. Wing and Christine A. Willis, *From Theory to Praxis: Black Women, Gangs and Critical Race Feminism*, 11 La Raza L J 1, 12–13 (1999) (arguing that state and federal gang sentencing enhancements and other such “efforts to suppress gang activity have had limited success at combating gang violence”); David R. Truman, *The Jets and Sharks are Dead: State Statutory Responses to Criminal Street Gangs*, 73 Wash U L Q 683, 688–89 (1995) (noting that gang sentencing enhancement statutes in Florida, South Dakota and Illinois may run afoul of constitutional protections of the right of association); Susan L. Burrell, *Gang Evidence: Issues for Criminal Defense*, 30 Santa Clara L Rev 739, 778–783 (1990) (questioning the efficacy of California’s gang sentence enhancements).

extent that state law does provide guidance as to the definition of gang membership,⁷⁸ these definitions need not constrain state officials in their decision to provide certain names to ICE. ICE is able to use immigration law to remove immigration violators identified as suspected associates of a street gang even where state law provides no possible basis for criminally prosecuting those individuals. Indeed, 70 percent of the people removed under Operation Community Shield have not been charged with crimes and are deported on the grounds of immigration violations alone.⁷⁹

The language of ICE press releases, which routinely contain headcounts that include the undefined associates of (undefined) criminal street gang members, reflects the absence of legal limitations regarding purported gang membership. As of the end of August 2006, ICE reported “more than 3,450 street gang members and associates arrested nationwide” in connection with Operation Community Shield.⁸⁰ There are no statistics on how many of these deportees were actually criminal street gang members and how many were mere associates, perhaps because there is no applicable legal definition for either term.

With no law to limit the discretion of state and local officials, Operation Community Shield relies upon the discretion of state and local law enforcement for investigative purposes. Purported

⁷⁸ See, for example, Cal Pen Code § 186.22(f) (2006), defining “criminal street gang” as:

any ongoing organization, association, or group of three or more persons, whether formal or informal, having as one of its primary activities the commission of one or more of the criminal acts [enumerated in this section], having a common name or common identifying sign or symbol, and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity.

See also Tex Pen Code § 71.01(d) (2006) (defining “criminal street gang” as “three or more persons having a common identifying sign or symbol or an identifiable leadership who continuously or regularly associate in the commission of criminal activities”); 740 ILCS 147/10 (2006) (“criminal street gang” “means any combination, confederation, alliance, network, conspiracy, understanding, or other similar conjoining, in law or in fact, of 3 or more persons with an established hierarchy that, through its membership or through the agency of any member engages in a course or pattern of criminal activity”); Laura Urias, *Homegrown in the Streets of the United States and Exported to the Barrios of El Salvador: The Deportation of Gang Members*, 8:2 Howard Scroll: Soc Just L Rev 1, 11 (2006) (discussing synergies between immigration law and state criminal gang laws).

⁷⁹ Johnson, *National Policies* (cited in note 58).

⁸⁰ ICE, News Releases, *12 SUR 13 gang members and associates netted in weekend operation by ICE, Orange County Sheriff's Office, and City of Apopka Police Department* (Aug 28, 2006), available at <<http://www.ice.gov/pi/news/newsreleases/articles/060828miami.htm>> (last visited Feb 2, 2007) (emphasis added).

gang members and their associates are identified without any governing legal standards. While this might be viewed as an effective form of preventative prosecution, it also creates a greater risk of abuse than do the law enforcement efforts more clearly constrained by the parameters of the criminal law.⁸¹

C. Additional Legislative Proposals

There are several proposals in Congress aimed at bolstering gang removal through changes to the immigration laws.⁸² Proposed legislation would provide for specific immigration consequences that would flow from criminal street gang membership. In fact, both of the major immigration bills introduced in Congress in 2006 contained provisions to facilitate the exclusion and deportation of criminal street gang members.

House Report 4437, the immigration bill passed by the House on December 16, 2005, contained provisions that would render criminal street gang members inadmissible and deportable. A noncitizen seeking admission to the United States would be inadmissible in any case where “the consular officer or the Secretary of Homeland Security knows or ‘has reasonable ground to believe’ that the alien is a member of a criminal street gang,”⁸³ and where such an individual “threatened to commit, or seek[s] to enter the United States to engage solely, principally, or incidentally in a gang crime or any other unlawful activity.”⁸⁴ For purposes of this provision, a criminal street gang is defined as “a formal or informal group or association of 3 or more individuals who commit a gang crime (one of which is a crime of violence . . .) in 2 or more separate criminal episodes in relation to the group or association.”⁸⁵ The drafters defined “gang crimes” with some breadth, to include crimes of violence, dealing in controlled substances, the use of explosives, and the harboring of certain aliens. The proposed definition of criminal street gang thus takes in a broader swath of individuals than would be encompassed by the current federal definition used for sentencing purposed. An

⁸¹ See Part II.

⁸² As this article goes to press in the summer of 2007, Congress is again debating immigration reform bills that contain anti-gang enforcement provisions. Because these provisions are still under discussion, this Article does not seek to address the most recent legislative developments.

⁸³ The Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005, HR 4437 § 608(a), 109th Cong. 1st Sess (2005).

⁸⁴ *Id.* at § 608(a).

⁸⁵ *Id.*

individual would also be inadmissible if the Department of Homeland Security (“DHS”) knows or “has reasonable ground to believe” that the individual is a member of a criminal street gang so designated by the Attorney General.⁸⁶

Similarly, noncitizens already admitted to the United States would be deportable if they were “member[s] of a criminal street gang and [were] convicted of committing, conspiring, threatening, or attempting to commit, a gang crime; or [were] determined by the Secretary of Homeland Security to be a member of a criminal street gang designated [by the Attorney General].”⁸⁷ The bill would require the mandatory detention of gang members throughout removal proceedings⁸⁸ and would render gang members ineligible for withholding of removal or asylum.⁸⁹

The immigration bill that passed the Senate in 2006—S. 2611—was generally considered the more moderate of the two bills, because (in contrast to the House bill) it provided for the legalization of certain undocumented workers and established a guestworker program.⁹⁰ The gang-related provisions of the Senate bill were less sweeping than those of H.R. 4437, but they were still quite broad. Rejecting the House bill’s broad definition of criminal street gangs, the Senate bill made use of the existing federal definition. The Senate bill would render inadmissible and deportable any individual who:

the Secretary of Homeland Security or the Attorney General knows or has reason to believe: (i) is or at any time after admission has been a member of a criminal street gang (as defined in Section 521(a) of Title 18, United States Code) or (ii) has participated in the activities of a criminal street gang, knowing or having reason to know that such activities promoted, furthered, aided or supported the illegal activities of the criminal gang.⁹¹

The Senate bill also included several provisions designed to increase international cooperation toward the reduction of gang-

⁸⁶ Id at § 608(c) (“Designation of Criminal Street Gangs”).

⁸⁷ HR 4437 at § 608(b) (cited in note 83).

⁸⁸ Id at § 608(d).

⁸⁹ Id at § 608(e).

⁹⁰ Rachel L. Swarns, *Immigration Bill Backed in Senate, Setting up Clash*, NY Times A1 (May 25, 2006) (describing the House and Senate bills).

⁹¹ The Comprehensive Immigration Reform Act of 2006, S 2611 § 205, 109th Cong, 2d Sess (May 25, 2006).

related crime.⁹² Other bills introduced in the House and Senate in the 2005–2006 legislative session included similar gang-related provisions.⁹³

Critics of such proposals contend that this legislation will result in the deportation of foreign nationals who have never committed any crimes.⁹⁴ Individuals who are convicted of one of the many crimes enumerated in the INA are already removable, whether they commit these crimes as part of a gang or individually.⁹⁵ Undocumented noncitizens—whether or not they have committed crimes—generally are already removable whether or not they are in a gang.⁹⁶ The only legal effect of the proposed legislation would be to increase the number of noncitizens lawfully present who would be subject to removal on the basis of their purported associations with individuals involved in group criminal activity.⁹⁷ The proposed legislation thus increases the odds that innocent people, including people lawfully present, will be

⁹² S 2611 § 409 (cited in note 91) requires countries participating in bilateral agreements with the U.S. to identify, track and reduce gang membership. S 2611 § 114(c) requires the Secretary of State and the Federal Bureau of Investigation to work with the governments of Central American countries to assess the impact of criminal aliens, track gang members, develop notification mechanisms to warn receiving countries of gang-related deportees, and share information on individuals connected with gangs. It is rather surprising that Congress still has yet to legislate for cooperation between the U.S. and receiving states when deporting individuals treated as criminally dangerous by the U.S. government.

⁹³ See The Community Protection Against International Gangs Act, S 3946, 109th Cong, 2d Sess (Sept 27, 2006); The Border Security and Interior Enforcement Improvement Act of 2006, S 2377, 109th Cong, 2d Sess (Mar 7, 2006); The Border Security and Interior Enforcement Improvement Act of 2005, S 2061, 109th Cong, 1st Sess (Dec 13, 2005); The Agricultural Employment and Workforce Protection Act of 2005, S 2087, 109th Cong, 1st Sess (Dec 13, 2005); The TRUE Enforcement Border Security Act, HR 4313, 109th Cong, 1st Sess (Nov 14, 2005); The Strengthening America's Security Act of 2005, S 1916, 109th Cong, 1st Sess (Oct 25, 2005); The Enforcement First Immigration Reform Act of 2005, HR 3938, 109th Cong, 1st Sess (Sept 29, 2005); The Comprehensive Enforcement and Immigration Reform Act of 2005, S 1438, 109th Cong, 1st Sess (July 20, 2005); The Alien Gang Removal Act of 2005, HR 2933, 109th Cong, 1st Sess (June 16, 2005); The Border Security Act of 2006, S 2394, 109th Cong, 2d Sess (Mar 9, 2006); and The North American Cooperative Security Act, S 853, 109th Cong, 1st Sess (Apr 20, 2005).

⁹⁴ See, for example, David Cole, *Testimony Before the United States House of Representatives Subcommittee on Immigration, Border Security, and Claims of the House Committee on the Judiciary, Hearing on H.R. 2933, the "Alien Gang Removal Act of 2005"* 2 (June 28, 2005), available at <<http://judiciary.house.gov/media/pdfs/cole062805.pdf>> (last visited on Feb 7, 2007) ("What this bill does is empower the DHS to deport foreign nationals who have *never committed any crimes whatsoever*, and who have obeyed all of our laws, simply by claiming that the DHS has determined that they are members of designated street gangs.") (emphasis in original).

⁹⁵ See 8 USC § 1182(a)(2) (2000); 8 USC § 1227(a)(2) (2000).

⁹⁶ See 8 USC §§ 1182(a)(6), (7) and (9) (2000); 8 USC § 1227(a)(1) (2000).

⁹⁷ Cole, *Testimony Before the United States House* (cited in note 94).

removed.⁹⁸ Ironically, if a compromise bill like that proposed in the Senate last year were to pass, the “legalization” of many immigrants would be paralleled by a “delegalization” of many lawfully present migrants, even in the absence of criminal convictions

II. EFFECTS OF GANG-TARGETED REMOVAL EFFORTS ON DOMESTIC CRIME CONTROL

The removal of noncitizens labeled criminal street gang members (or associates) is part of a larger trend toward the criminalization of migration. The criminalization of migration encompasses both an expanded application of criminal punishment to immigration law violators, and the use of immigration law remedies—specifically, civil detention and removal—to achieve the objective of punishing violations of the criminal law.⁹⁹ The depor-

⁹⁸ Id. As previously noted, 70 percent of the individuals now deported under Operation Community Shield are not charged with substantive crimes. Presumably, this trend would also occur in the removal of lawful permanent residents if the law were expanded to allow their removal on the basis of their associations.

One might conclude that the problems would be limited to noncitizens, since citizens cannot legally be removed. See, for example, Stephen H. Legomsky, *Immigration and Refugee Law and Policy* 1350 (Foundation 4th ed 2005) (“In the United States, the most practically significant legal consequence of citizenship is freedom from the immigration laws.”). But this does not mean there would be no costs to citizens. In addition to possibility of increased targeting based on racial profiling (see Section II), expanding the net of removable people expands the possibilities for mistakes. Citizens have been mistakenly removed in the past, see, for example, *Perez v United States*, 2006 WL 2355868 (NDNY). Indeed, the Brennan Center recently concluded that as many as thirteen million U.S. citizens may not have ready access to documents establishing their citizenship. *Citizens without Proof: A Survey of Americans’ Possession of Documentary Proof of Citizenship and Photo Identification*, Brennan Center for Justice 2 (Nov 2006) available at <http://www.brennancenter.org/dynamic/subpages/download_file_39242.pdf> (last visited June 2, 2007). For examples of widespread removal of citizens see Kevin R. Johnson, *The Forgotten “Repatriation” of Persons of Mexican Ancestry and Lessons for the “War on Terror”*, 26 Pace L Rev 1, 2 (2005).

⁹⁹ For a general discussion of the blending of criminal and immigration law see Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 Am U L Rev 367, 379–386 (discussing convergence of criminal and immigration law); Miller, 25 BC Third World L J 81 (cited in note 50); Teresa A. Miller, *Citizenship & Severity: Recent Immigration Reforms and the New Penology*, 17 Georgetown Immig L J 611, 613 (2003) (pointing out the immigration law’s adoption of criminal law norms); Robert Pauw, *A New Look at Deportation as Punishment: Why at Least Some of the Constitution’s Criminal Procedure Protections Must Apply*, 52 Admin L Rev 305, 333–336 (2000) (arguing that some uses of deportation amount to criminal punishment rather than civil sanction); Bill Ong Hing, *The Immigrant as Criminal: Punishing Dreamers*, 9 Hastings Women’s L J 79, 80–81 (1998) (reviewing the history of U.S. racial exclusion as related to the criminalization of entry); Maria Isabel Medina, *The Criminalization of Immigration Law: Employer Sanctions and Marriage Fraud*, 5 Geo Mason L Rev 669, 691 (1997) (discussing the criminalization of knowingly hiring an unauthorized worker); Helen Morris, *Zero Tolerance: The Increasing Criminalization of Immigration Law*, 74 Interpreter Releases 1317, 1317

tation of purported gang members and affiliates neatly fits within the latter category. Operation Community Shield and its predecessor enforcement initiatives rely upon immigration detention and removal—rather than traditional means of criminal punishment—to incapacitate or punish individuals who present the appearance of criminality by virtue of their real or perceived ties to criminal street gangs. These policies have at least two troubling law enforcement consequences. First, these enforcement techniques encourage a system of law enforcement that relies excessively on stereotyping and profiling as the basis for identifying suspects. Second, initiatives such as Operation Community Shield result in the effective criminalization of migrants who are not actually “criminal aliens.” This fuels the flawed but growing public perception of links between crime and migration, and may spur further racial profiling in law enforcement activities outside the sphere of immigration enforcement.

A. Profiling in Law Enforcement

Racial profiling occurs when law enforcement officers rely upon race as a “mark of increased risk of criminality.”¹⁰⁰ In the late 1990s, the use of racial profiling in law enforcement came under heavy criticism. 81% percent of respondents in a national poll in late 1999 responded that they disapproved of “racial profiling.”¹⁰¹ In a debate at the Apollo Theater in Harlem in early 2000, Democratic presidential candidates Al Gore and Bill Bradley both spoke out in opposition to the practice of racial profiling.¹⁰² In January 2001, during his Attorney General confirmation hearing, John Ashcroft told the Senate that “[t]here should be no loopholes or safe harbors for racial profiling. Official discrimination of this sort is wrong and unconstitutional no matter

(1997) (“Immigration law violations are being prosecuted at a higher rate and noncitizens with criminal histories are being apprehended and deported at record rates.”). See also Daniel Kanstroom, *Deportation, Social Control and Punishment: Some Thoughts about Why Hard Laws Make Bad Cases*, 113 Harv L Rev 1890, 1891 (2000) (describing the ongoing convergence between the criminal justice and deportation systems).

¹⁰⁰ Randall Kennedy, *Race, Crime, and the Law* 136 (Pantheon 1997).

¹⁰¹ Samuel L. Gross and Debra Livingston, *Racial Profiling Under Attack*, 102 Colum L Rev 1413, 1413 (2002). In the cited poll, racial profiling was defined as “the practice by some police officers of stopping ‘motorists of certain racial or ethnic groups because the officers believe that these groups are more likely than others to commit certain types of crimes.’” *Id.*

¹⁰² Kevin R. Johnson, *Racial Profiling after September 11: The Department of Justice’s 2003 Guidelines*, 50 Loyola L Rev 67, 70 (2004). See also Erik Luna, *Foreword: The New Face of Racial Profiling*, 2004 Utah L Rev 905, 905–06 (discussing the political consensus in opposition to racial profiling at this time).

what the context.”¹⁰³ President Bush also announced in February of 2001 that the practice of racial profiling “was wrong and we will end it in America.”¹⁰⁴

The widespread condemnation of racial profiling prompted changes in law enforcement practices. Many state legislatures enacted laws to monitor and punish the use of racially biased law enforcement practices, especially traffic stops.¹⁰⁵ Similarly, a number of police departments enacted internal guidelines to require the recording of data on traffic stops in an effort to monitor racial profiling.¹⁰⁶ Federal guidelines now also prohibit the use of racial profiling by federal law enforcement officers in carrying out “traditional law enforcement activities.”¹⁰⁷ Finally, many courts have held that race is insufficient to justify an investigative stop by law enforcement officers.¹⁰⁸

In contrast to criminal law enforcement, in the immigration enforcement context, “racial profiling has been condoned to a certain extent, even by the Supreme Court.”¹⁰⁹ In 1974, the Court concluded that “Mexican appearance” could be one factor in an immigration stop, although it could not be the exclusive factor.¹¹⁰ While at least one court has declared the reliance on race is no longer justifiable “at this point in our nation’s history,”¹¹¹ as a practical matter, race appears to continue to play an important role in many border stops.¹¹² If nothing else, the Supreme Court’s

¹⁰³ Nomination of Senator John Ashcroft to the Office of Attorney General: Hearings before the Senate Committee on the Judiciary, 107th Cong (Jan 22, 2001) (answer from Senator Ashcroft, to written question submitted by Senator Russell D. Feingold) (cited in Gross and Livingston, 102 Colum L Rev at 1420 & n 26 (cited in note 101)).

¹⁰⁴ Johnson, 50 Loyola L Rev at 70 (cited in note 102).

¹⁰⁵ David A. Harris, *Addressing Racial Profiling in the States: A Case Study of the “New Federalism” in Constitutional Criminal Procedure*, 3 U Pa J Const L 367, 386–87 (2001).

¹⁰⁶ Marc L. Miller and Ronald F. Wright, *Criminal Procedures: Cases, Statutes and Executive Materials* at 95 (Aspen 2003).

¹⁰⁷ US Department of Justice, Civil Rights Division, *Guidance Regarding the Use of Race by Federal Law Enforcement Agencies* (June 2003), available at <http://www.usdoj.gov/crt/split/documents/guidance_on_race.htm> (last visited Apr 15, 2007).

¹⁰⁸ Richard Banks, *Racial Profiling and Antiterrorism Efforts*, 89 Cornell L Rev 1201, 1204 & n 14 (2004) (citing cases).

¹⁰⁹ Johnson, 50 Loyola L Rev at 74–75 (cited in note 102) (citing *United States v Brignoni-Ponce*, 422 US 873 (1975)).

¹¹⁰ 422 US 873 (1975).

¹¹¹ *United States v Montero-Camargo*, 208 F3d 1122, 1135 (9th Cir 2000) (en banc) (holding that “Mexican appearance” could not be relied upon as a factor by the Border Patrol in immigration stops).

¹¹² Alfredo Mirandé, *Is there a Mexican Exception to the Exclusionary Rule*, 55 Fla L Rev 365, 381–85 (2003) (discussing cases overturned on appeal due to impermissible

authorization of suspicionless stops at border checkpoints makes it all but certain race will continue to be an important factor in border patrol activities.¹¹³ The reasoning of the Court in *United States v Martinez-Fuerte*¹¹⁴ leaves the door open for immigration detentions based on race in the absence of particularized suspicion.¹¹⁵

Significantly, reliance on racial profiling in immigration investigations is also permissible under the 2003 Department of Justice (“DOJ”) Guidelines on racial profiling.¹¹⁶ In the Guidelines, the Civil Rights Division distinguished between “traditional law enforcement activities” in which race cannot be considered as a factor, and “national security and border integrity” activities in which race can be considered to the full extent permitted by the Constitution and federal laws.¹¹⁷ While the DOJ explained the distinction as an anti-terrorist measure,¹¹⁸ the plain language of the measure clearly extends to immigration enforcement. Thus, race has been and continues to be a factor in immigration investigations and prosecutions in a way that is impermissible in other forms of federal law enforcement.

Operation Community Shield operates at the nexus of criminal law enforcement and immigration law enforcement. ICE is enforcing the immigration laws when they remove individuals on the basis of their criminal records or immigration violations. At the same time, however, the law enforcement officials responsible for providing names to ICE are carrying out their investigations as part of traditional law enforcement operations. They are

reliance on race in border stops).

¹¹³ *United States v Martinez-Fuerte*, 428 US 543, 572 (1976) (Brennan dissenting):

Since the objective is almost entirely the Mexican illegally in the country, checkpoint officials, uninhibited by any objective standards and therefore free to stop any or all motorists without explanation or excuse, wholly on whim, will perforce target motorists of Mexican appearance. The process with then inescapably discriminate against citizens of Mexican ancestry and Mexican aliens lawfully in this country for not other reason than that they unavoidably possess the same “suspicious” physical and grooming characteristics of illegal Mexican aliens.

Id.

¹¹⁴ 428 US 543 (1976).

¹¹⁵ Id at 571.

¹¹⁶ Johnson, 50 Loyola L Rev at 82 (cited in note 102).

¹¹⁷ US DOJ, *Guidance Regarding the Use of Race* (cited in note 107).

¹¹⁸ US DOJ, *Fact Sheet: Racial Profiling* (June 17, 2003), available at <http://www.usdoj.gov/opa/pr/2003/June/racial_profiling_fact_sheet.pdf> (last visited Feb 2, 2007) (providing DOJ’s explanation of the guidelines).

not enforcing the immigration laws; indeed, they may be legally prohibited from doing so.¹¹⁹

This raises an important question: which set of investigative guidelines ought to govern the conduct of law enforcement officers participating in programs like Operation Community Shield? Since these officers are engaged in criminal law enforcement, standard criminal procedural protections—including guidelines on the use of racial profiling—ought to apply. But with no legal definition of criminal street gang membership to constrain them, law enforcement officers have tremendous discretion in making determinations as to whom they classify as a gang member when they share information with ICE.¹²⁰ They can designate a gang member without reasonable suspicion,¹²¹ let alone probable cause,¹²² that the individual has committed a crime. The danger of this unconstrained discretion is that it increases the possibility that law enforcement officers will rely upon racial profiling as they work to identify gang members for purposes of removal.¹²³ Historically, the use of racial and ethnic profiling in immigration enforcement has been documented,¹²⁴ and these dangers may be

¹¹⁹ See Pham, 31 Fla St U L Rev at 965 (cited in note 49); Wishnie, 6 U Pa J Const L at 1084 (cited in note 49). But see Kobach, 69 Albany L Rev at 228–33 (cited in note 49) (rebutting arguments made by Pham and Wishnie).

¹²⁰ See Tieu, 11 Asian Pac Am L J at 47–56 (cited in note 65) (discussing the lack of sufficient procedural protections and reliance on racial profiling in the compilation of the CalGang database).

¹²¹ Compare *Terry v Ohio*, 392 US 1 (1968) (requiring state police to have “reasonable suspicion” to conduct an investigative stop).

¹²² Compare *Brinegar v United States*, 338 US 160 (1949) (allowing automobile search without a warrant but requiring “probable cause”).

¹²³ Commentators have observed that insufficiently regulated discretion in law enforcement increase the risk of racial profiling. See *Atwater v City of Lago Vista*, 532 US 318, 372 (2001) (O’Connor dissenting) (noting relationship between excessive discretion and abuse of police power, including racial profiling). See also Sheri Lynn Johnson, *Race and the Decision to Detain a Suspect*, 93 Yale L J 214 (1983); Tracy Maclin, *Race and the Fourth Amendment*, 51 Vand L Rev 333, 344–54 (1998).

Moreover, in the realm of anti-gang initiatives, the racial identity of the targeted individuals may actually increase the chance that their voluntary associations will be labeled a gang. See Evelyn Nieves, *Group? Gang? It’s a matter of perspective*, NY Times L35 (Mar 8, 1998) (chronicling the efforts of the group “Salvadorans with Pride” to distance themselves from the gang label); Slocum, *New Weapons*, NY Times at A1 (cited in note 34) (noting criticism of state-federal anti-gang enforcement efforts as profiling the “young and dark-skinned”); Tieu, 11 Asian Pac Am L J at 47–56 (cited in note 65).

¹²⁴ See Wishnie, 6 U Pa J Const L at 1113 (cited in note 49) (concluding that racial and ethnic profiling and selective enforcement tainted INS workplace raids in the period from 1997–1999); Carrie L. Arnold, *Racial Profiling in Immigration Enforcement: State and Local Agreements to Enforce Federal Immigration Law*, Arizona L Rev 113, 119 (Spring 2007) (noting that “[t]here is evidence of racial profiling when state and local officers have teamed up with federal officers to investigate immigration violations” and discussing examples).

particularly acute when state and local officials are involved in these enforcement efforts.¹²⁵

Moreover, although criminal law enforcement officers may be engaging in race-based identification of suspected gang members, ICE is responsible for the detention and removal of noncitizens identified as removable. Since ICE needs only reasonable suspicion of an immigration violation to detain an individual,¹²⁶ the standards for arrest and detention provided by the Constitution in criminal investigations are essentially undercut.¹²⁷

Furthermore, there is no effective legal means to challenge these ICE investigations, even decisions based solely or primarily on race. While equal protection claims might be used to challenge egregious instances of racial profiling outside of the immigration context,¹²⁸ the availability of such remedies within the immigration context is far less clear. The Supreme Court has virtually

¹²⁵ Orde F. Kittrie, *Federalism, Deportation and Crime Victims Afraid to Call the Police*, 91 Iowa L Rev 1449, 1487 & n 211 (2006) (quoting former INS General Counsel David Crosland, who noted “there is a high risk that state or local officers, who are untrained in immigration law, may violate persons’ constitutional or civil rights in attempting to enforce provisions of immigration laws”); Arnold, *Arizona L. Rev.* at 119–121 (cited in note 124); O’Connor, *Rampart Set Up*, LA Times at A1 (cited in note 44) (reporting that Los Angeles Police Department gang task force working with INS indiscriminately rounded up Latinos, prompting one “senior INS agent” to say “I told my boss that was just ludicrous. They were targeting a whole race of people.”). A host of organizations have voiced their opposition to local enforcement of immigration laws because of dangers of racial profiling. See Organizations Opposed to Local Enforcement of Immigration Laws, Natl Immig Forum (2004), available at <<http://www.immigrationforum.org/documents/TheDebate/EnforcementLocalPolice/OppositiontoSLEnforcement.pdf>> (last visited Apr 16, 2007).

¹²⁶ 8 USC § 1356(a)(2) (2000) (giving immigration enforcement officers the power to “arrest any alien in the United States, if he has reason to believe that the alien so arrested is in the United States in violation of any such law or regulation and is likely to escape before a warrant can be obtained for his arrest”). See also 8 USC § 1356(a)(4) (giving immigration enforcement officers the power to make arrests for felony violations of immigration law “if he has reason to believe that the person so arrested is guilty of such felony and if there is a likelihood of the person escaping before a warrant can be obtained for his arrest”).

¹²⁷ Healy, *A Gang Sweep*, NY Times at 14LI 1 (cited in note 11) (“Immigration lawyers said that federal officials were ducking the criminal justice system’s high burdens of proof by arresting gang suspects on immigration charges.”).

¹²⁸ See, for example, Stephen R. Wolfson, *Racial Profiling in Texas Department of Public Safety Traffic Stops: Race Aware or Race Benign*, 8 Scholar: St Mary’s L Rev on Minority Issues 117, 148–151 (2006) (describing settlements in various states in racial profiling cases). Even in the criminal law context, legal challenges to racial discrimination in investigations are difficult to mount in light of cases like *Whren v United States*, 517 US 806 (1996). In *Whren*, the Supreme Court declined to examine the possibility that the law enforcement officer illegitimately took race into account making a stop where the officer “could have” legitimately made the stop on account of a traffic violation. *Id.* Based on *Whren* and related cases, most courts have rejected civil lawsuits based on claims that officers have stopped certain individuals on account of race. See Tracey Maclin, *The Fourth Amendment on the Freeway*, 3 Rutgers Race & L Rev 117, 117–128 (2001).

closed the door on claims of selective prosecution for immigration violations.¹²⁹ In *Reno v American-Arab Anti-Discrimination Committee*,¹³⁰ Justice Scalia wrote for the Court that in bringing deportation proceedings, “[t]he Executive should not have to disclose its ‘real’ reasons for deeming nationals of a particular country a special threat—or indeed for simply wishing to antagonize a particular foreign country by focusing on that country’s nationals.”¹³¹ He noted that where “deportation is necessary to bring to an end an ongoing violation of United States law,” the “contention that a violation must be allowed to continue because it has been improperly selected is not powerfully appealing.”¹³² The Supreme Court left open the possibility that a claim of “outrageous” discrimination might prevail,¹³³ but did not clarify what would meet that high standard. Thus, a constitutional claim that enforcement actions such as Operation Community Shield impermissibly target certain racial groups for removal would likely be unavailing.

In short, Operation Community Shield allows investigators to shut down gang activities—actual or perceived—without any evidence of criminal wrongdoing. Criminal law enforcement officials can investigate and regulate the activities of individuals who do not fit within even the broad parameters of state anti-gang laws.¹³⁴ Once ICE finds a basis for removal, marginal gang members, nominal gang members and non-gang members can be

¹²⁹ See *Reno v American-Arab Anti-Discrimination Committee*, 525 US 471, 491 (1999).

¹³⁰ 525 US 471 (1000).

¹³¹ *Id.* at 491.

¹³² *Id.*

¹³³ *Id.*

¹³⁴ The “limits” of anti-gang ordinances are not particularly constraining. Courts have upheld the constitutionality of very broad anti-gang injunctions. See, among others, *Gallo v Acuna*, 929 P2d 596, 608 (Cal 1997) (holding an injunction banning members from gathering is not a first amendment violation).

Justice Mosk’s dissenting opinion in that case warned that:

The majority would permit our cities to close off entire neighborhoods to Latino youths who have done nothing more than dress in blue or black clothing or associate with others who do so; they would authorize criminal penalties for ordinary, nondisruptive acts of walking or driving through a residential neighborhood with a relative or a friend.

Id. at 633. But see *City of Chicago v Morales*, 527 US 41, 51 (1999) (plurality) (striking down a Chicago City Council ordinance that prohibited “criminal street gang members” from “loitering” with one another or with any other person in any public place). Broad anti-gang ordinances have become a common feature of the state law criminal legal landscape despite the Morales decision. Consider Strosnider, 39 Am Crim L Rev at 101 (cited in note 3).

subjected to the harsh sanction of deportation. The resulting deportations can have significant negative consequences for families and communities.¹³⁵ And although individuals may be targeted and even removed on the basis of their race or national origin, legal remedies are in short supply.¹³⁶

Ultimately, one might argue that the harms of profiling are largely spectral because removal only takes place if the individual is removable under immigration law. In other words, while law enforcement officers may identify an overly broad group of individuals for investigation and detention, no removals should occur unless the individual actually has violated immigration law.¹³⁷ This does not alleviate profiling concerns for at least three reasons.

First, as previously noted, past experience has shown that state and local law enforcement involvement in immigration enforcement measures like Operation Community Shield can result in impermissible investigations and detentions of citizens and others not eligible for deportation.¹³⁸ Second, given the abysmal lack of access to counsel in removal proceedings, there is a strong likelihood that at least some individuals with colorable claims for relief from removal are unable to raise their claims due to a lack of adequate counsel.¹³⁹ Because they bear the label of criminal street gang member, one might assume they are ineligible for relief from removal. But since the targeted criminal street gang members and associates are an undefined group, in some cases, arrested individuals have no criminal records.¹⁴⁰ The relentless

¹³⁵ Consider Hing, *Deporting Our Souls* at 70–77, 87, 116 (cited in note 16) (discussing with specific examples the harsh effects of the removal on the families and communities of deportees). See also Healy, *A Gang Sweep*, NY Times at 14L1 1 (cited in note 11) (“Relatives said their loved ones had been wrongly detained.”).

¹³⁶ See discussion accompanying notes 128–133; Arnold, Arizona L Rev 135–136 (cited in note 124).

¹³⁷ Noncitizens who are convicted of certain state or federal crimes are subject to removal under the INA, whether or not they are otherwise lawfully present, and noncitizens who have not been convicted of criminal violations, but who are present in the United States in violation of the immigration laws are also subject to removal. See notes 95–96 and accompanying text.

¹³⁸ See notes 124–125.

¹³⁹ Donald Kerwin, *Revisiting the Need for Appointed Counsel*, Migration Policy Institute No. 4, 5–6 (April 2005) (“Increased representation would lead to more bona fide applications for relief and better-prepared applications”).

¹⁴⁰ See, for example, Jennifer 8. Lee and Julia C. Mead, *2,100 Are Arrested on Immigration Violations*, NY Times B7 (June 15, 2006) (of those arrested DHS Secretary reported that those arrested fell into three categories “convicted criminals, members of gangs, and fugitives who had violated deportation orders”); Eggen, *Customs Jails 1,000*, Wash Post at A2 (cited in note 13) (of the eleven alleged gang members arrested in D.C. area, three were being charged with immigration crimes, eight were held for deportation

cry to deport criminal aliens redounds to the disadvantage of individuals who are not criminals at all. Some of these individuals may well be eligible for relief from removal. Given the increasing likelihood they will suffer persecution in their home countries, sometimes at the hands of their home government,¹⁴¹ ICE ought to be particularly sensitive to viable claims for relief from removal in the case of individuals identified through Operation Community Shield.

This highlights a third problem created by these anti-gang investigations, notwithstanding the legal limits on removal. The rhetoric surrounding Operation Community Shield and other gang task force initiatives creates an inflated perception of the number of noncitizens engaging in criminal activity, and exaggerates the severity of the violent criminal activity of noncitizens. ICE press releases exemplify this tendency, and therefore so do the media reports that merely echo ICE's claims.¹⁴² This helps to fuel the questionable but increasingly popular assumption that the criminal law system provides an appropriate means for dealing with migration issues.

B. Criminalizing Migrants

ICE, along with its predecessor agency, the INS, has initiated a number of task forces targeting certain populations for removal. These include Operation Last Call,¹⁴³ Operation Preda-

proceedings, and ICE indicated "several" had criminal convictions such as robbery and assault); J. Harry Jones, *41 Illegal Immigrants with Gang Ties Held*, San Diego Trib B1 (Mar 11, 2006) (Forty-one immigrants with "ties" to violent gangs now facing deportation after their arrest, "many" had criminal records. "Our message is, if you are a foreign-born street gang member, we're determined to find you," said Serge Duarte, acting special agent in charge of the San Diego ICE office.).

Indeed, most of the ICE press releases on Operation Community Shield (and press accounts that mirror them) contain very specific numbers as to how many noncitizens have been arrested, but when reporting on the number of arrestees who have committed crimes or have criminal convictions, they use vague words like "several" or "many" in what appears to be a deliberate effort to taint all of the arrestees with the whiff of criminality.

¹⁴¹ See Part III.

¹⁴² See note 140, and notes 151–159 and accompanying text.

¹⁴³ This initiative was introduced by the INS in Texas in 1998 to target noncitizens for removal on the basis of their DUI convictions, which the INS treated as "aggravated felonies." Over five hundred individuals were detained by the INS in the course of this "operation." William Branigin, *INS Reviews DWI Deportation Orders*, Wash Post A21 (Dec 22, 1998). Six years later, after many individuals had been deported for DUI offenses, the Supreme Court decided that the term "aggravated felony" did not include driving under the influence. *Leocal v Ashcroft*, 543 US 1, 10–12 (2004). A subset of DUI offenses still give rise to removal when courts classify them as "crimes of violence." See Maria-Teresa Davenport, *Deportation and Driving: Felony DUI and Reckless Driving as*

tor,¹⁴⁴ Operation Absconder,¹⁴⁵ the National Fugitive Operations Program,¹⁴⁶ Operation ICE Storm,¹⁴⁷ and Operation Return to Sender.¹⁴⁸ In each of these other operations, an individual is targeted for removal on the basis of a prior adjudication—in either criminal or immigration court—that provides probable cause of

Crimes of Violence following *Leocal v. Ashcroft*, 96 J Crim L & Criminol 849, 849–75 (2006) (counseling exclusion of both DUI and felony reckless driving from the “crime of violence” category).

¹⁴⁴ Operation Predator, which is currently underway, was designed to apprehend and remove noncitizens with past sex offenses. For a general discussion see Department of Homeland Security, *Secretary Ridge Announces “Operation Predator”*, (July 9, 2003), available at <http://www.dhs.gov/xnews/releases/press_release_0211.shtm> (last visited Feb 2, 2007).

¹⁴⁵ This operation purported to focus on noncitizens with outstanding orders of removal. In fact, the government focused not on “absconders” broadly defined, but on selective “absconders” from nations that “harbored” terrorists. With the exception of North Korea, the designated countries were all predominantly Arab and Muslim countries, leading to criticisms that the Absconder program functioned as a means of racial profiling, with dubious security benefits. See Kevin R. Johnson and Bernhard Trujillo, *Immigration Reform, National Security after September 11th, and the Future of North American Integration*, 91 U Minn L J (forthcoming 2007) (copy on file with U Chi Legal F); Banks, 89 Cornell L Rev at 1207–08 (cited in note 108); Sharon L. Davies, *Profiling Terror*, 1 Ohio St J Crim L 45 (2003); Muzaffar A. Chishti, et al, *America’s Challenge: Domestic Security, Civil Liberties, and National Unity after September 11* 40, 161 (Migration Policy Institute 2003).

¹⁴⁶ This program, currently still underway, aims at identifying, apprehending, and removing noncitizens with criminal records. ICE, *Public Information: National Fugitive Operations Program* (Revised Sept 22, 2006), available at <<http://www.ice.gov/pi/dro/nfop.htm>> (last visited June 20, 2007).

¹⁴⁷ This initiative was aimed at identifying and removing noncitizens involved in human smuggling, and included the creation of a “tip” line, so that concerned individuals could report suspicions of smuggling activity. See White House Press Release, *Homeland Security Launches Operation Ice Storm*, (November 10, 2003), available at <<http://www.whitehouse.gov/news/releases/2003/11/20031110-3.html>> (last visited Feb 2, 2007).

¹⁴⁸ Operation Return to Sender was unveiled by ICE as part of the broader “Secure Border Initiative” of 2006. The ongoing Return to Sender initiative involves the coordination of ICE efforts with state and local law enforcement agencies, U.S. Customs and Border Protection (“CPB”), which, like ICE, is also a subdivision within the Department of Homeland Security. ICE, News Releases, *163 criminal aliens, fugitives and other immigration violators arrested by ICE, Collier County Sheriff’s Office and Lee County Sheriff’s Office: Feds team up with locals to make record-breaking number of arrests in Florida* (September 25, 2006), available at <<http://www.ice.gov/pi/news/newsreleases/articles/060925naples.htm>> (last visited Feb 2, 2007). The goal of the program is to remove noncitizens characterized as “immigrant fugitives.” See ICE, News Releases, *New Jersey operation nets 111 fugitive alien and other immigration status violators: Arrests are result of Operation Return to Sender* (October 19, 2006), available at <<http://www.ice.gov/pi/news/newsreleases/articles/061019newark.htm>> (last visited Feb 2, 2007). These “fugitives” are foreign nationals who either failed to appear for scheduled immigration hearings or violated removal orders. Daren Briscoe, *Return to Sender*, Newsweek (July 24, 2006), available at <<http://www.msnbc.msn.com/id/13880173/site/newsweek/>> (last visited Feb 5, 2005). ICE estimates that there are about 590,000 such people in the United States. *Id.* Only about 10 percent of those individuals are believed to have criminal records. *Id.* (noting ICE estimates that 50,000 to 75,000 “fugitive aliens” have criminal records).

their removability. Significant due process problems still exist in connection with these other initiatives.¹⁴⁹ Nevertheless, most of these operations purport to target for investigation and detention only individuals who have already had at least some sort of prior opportunity to be heard on the underlying basis for their likely removal. They have either been criminally convicted (as in Operations Last Call and Predator) or they have previously been ordered removed or failed to attend a removal proceeding (as in Operations Absconder and Return to Sender).¹⁵⁰

In contrast, Operation Community Shield targets individuals on the basis of their purported—and undefined—criminal street gang membership or affiliation. Individuals who have no criminal records can easily become direct targets of law enforcement investigations. ICE’s own press releases demonstrate the fact that individuals with no criminal records or pending criminal charges are frequently arrested and detained as part of Operation Community Shield. For example, an August 28, 2006 ICE press release announced the arrest of thirteen members of the Mexican SUR 13 gang, but did not specify how many of the arrestees had criminal records, indicating only that “[s]ome of

¹⁴⁹ In spite of their clearly articulated goals, these “operations” do raise potential issues of overbreadth. For example, an article describing Operation Return to Sender, which targets previously-deported noncitizens, illustrated the degree to which other noncitizens can be caught up in the dragnet of such enforcement efforts.

[T]he ICE team wasn’t there to round up undocumented immigrants en masse. Instead, they were after one man: a 30-year-old Mexican national—a known felon who was considered armed and dangerous. The startled teenager who answered the knock hesitantly agreed to let the visitors in. . . . But their target wasn’t home. Pilat [the ICE agent] turned to the nervous youngster, grilling him in Spanish. . . . Pilat determined that the young man was in the country illegally. A ‘collateral’ catch, he was cuffed and locked in a caged van outside. Within 48 hours . . . he was bused across the border and turned over to the Mexican authorities.

Id.

Moreover, Operation Predator has been enforced in a way that raises questions of overbreadth, since it sweeps in noncitizens accused of crimes that may have occurred under circumstances that suggest the individuals in question are far from the “sexual predators” that are the purported targets of the legislation.

¹⁵⁰ Of course, removal proceedings provide far fewer procedural protections than a criminal proceeding because deportation is not considered punishment. *Fong Yue Ting v United States*, 149 US 698, 730 (1893) (holding that deportation is not punishment); *Wong Wing v United States*, 163 US 228, 236–37 (1896) (reaffirming that deportation is not punishment and holding that criminal procedural protections do not apply in deportation proceedings unless the government seeks other punishment in addition to deportation); *INS v Lopez-Mendoza*, 468 US 1032 (1984) (declaring Fourth Amendment exclusionary rule inapplicable in deportation proceedings). But see Pauw, 52 Admin L R at 313 (cited in note 99) (explaining why some deportations should merit the enhanced procedural protections of criminal proceedings).

those arrested have a history of criminal activity including arrests for attempted murder, aggravated assault and possession of marijuana.”¹⁵¹ A March 23, 2006 release notes that “fourteen foreign nationals with *ties* to violent street gangs are in custody” following a three week ICE operation, but discloses in the next paragraph that only three of those individuals had criminal records.¹⁵²

ICE’s continuing tallies of the impact of Operation Community Shield demonstrate the above press releases are not isolated examples, but are instead illustrative of all public communications on the subject. On March 10, 2006, for example, ICE announced:

In the past year, ICE has conducted several targeted enforcement actions under Operation Community Shield, including the latest one. In total, these efforts have resulted in the arrest of 2,388 members of 239 different gangs and the seizure of 117 firearms. Fifty-one of those arrested were gang leaders. Roughly 922 of those arrested were from the street gang Mara Salvatrucha (MS-13). Those arrested under Operation Community Shield are prosecuted criminally or removed from the United States through immigration proceedings. To date, 533 have been charged criminally, while 1,855 have been hit with administrative immigration charges.¹⁵³

Even if it is assumed that there is no overlap between those charged with immigration violations and those who have been charged with crimes, this data shows that the government was interested in criminally prosecuting fewer than 25 percent of the arrestees, notwithstanding the surrounding rhetoric that these individuals were “violent” and “lawless.”¹⁵⁴ In many cases, the criminal charges that have been brought in connection with Operation Community Shield apprehensions are, in fact, immigration-related. Specifically, the press release notes that some of the

¹⁵¹ ICE, News Releases, *12 SUR 13 gang members* (cited in note 80).

¹⁵² ICE, News Releases, *ICE and Local Law Enforcement Arrest 14 Gang Members and Associates: Actions are part of Operation Community Shield, anti-gang effort credited with more than 2,300 arrests nationwide* (Mar 23, 2006), available at <<http://www.ice.gov/pi/news/newsreleases/articles/060323saltlakecity.htm>> (last visited Feb 2, 2007) (emphasis added).

¹⁵³ ICE, News Releases, *ICE arrests 375 gang members* (cited in note 60).

¹⁵⁴ *Id.* (quoting Homeland Security Secretary Michael Chertoff as saying, “[t]he lawlessness that these violent gangs propagate presents a grave threat to public safety.”).

noncitizens facing criminal charges are actually being charged with reentry after removal. The vast majority of these criminal street gang members and associates are being removed not on the basis of any convictions for violent crimes, but rather on “administrative immigration charges” or nonviolent immigration-related felonies.¹⁵⁵

As of January 2007, ICE claimed to have arrested 4,302 gang members and associates. The ICE report indicates these include 998 criminal arrests.¹⁵⁶ The arrests also included 3,304 administrative immigration arrests of which more than 1,972 had “violent criminal histories.”¹⁵⁷ This information suggests that over one thousand individuals caught in the net of Operation Community Shield were not detained for violations of the criminal law, and did not have criminal records.

The misalignment between the rhetoric surrounding anti-gang enforcement efforts and their actual effects undoubtedly fuels already widespread societal assumptions that migrants are prone to commit violent crimes.¹⁵⁸ In fact, empirical analysis yields a conclusion starkly at odds with popular perceptions of migrant criminality.¹⁵⁹ Yet the perception of migrant groups as criminal has strengthened support for the very laws that now countenance the widespread and streamlined removal of noncitizens while allowing few avenues for discretionary relief.

¹⁵⁵ See, for example, Johnson, *National Policies* (cited in note 58) (“ICE . . . confirms that approximately 70 percent of foreign gang members who are apprehended cannot be charged with a crime and are therefore deported on immigration violations rather than on criminal grounds.”).

¹⁵⁶ ICE, *Fact Sheets: Operation Community Shield*, (cited in note 51).

¹⁵⁷ *Id.*

¹⁵⁸ See Chacón, 39 Conn L Rev at 1848-1850 (cited in note 7) (discussing pervasive misperceptions of migrant criminality).

¹⁵⁹ Rubén G. Rumbaut, et al, *Debunking the Myth of Immigrant Criminality: Imprisonment Among First- and Second-Generation Young Men* (Migration Policy Institute June 1, 2006), available at <<http://www.migrationinformation.org/Feature/print.cfm?ID=403>> (last visited Feb 7, 2007) (discussing the conflation of immigration and crime). See also Erin O'Donnell, *Latinos Nix Violence*, Harv Mag 15, 15 (Sept–Oct 2006) (summarizing study by Robert Sampson concluding that “[f]irst-generation immigrants are more likely to be law-abiding than third-generation Americans of similar socioeconomic status.”) A spike in criminality tends to occur among second-generation immigrants. See Alejandro Portes & Rubén G. Rumbaut, *Immigrant America: A Portrait* 245–80 (California 3d ed 2006). Many factors may contribute to this spike in criminality including racial discrimination that stymies integration, as well as gang and drug cultures that thrive in the economically depressed neighborhoods where many of these children are raised. *Id.* at 255–64. These problems suggest the need for concerted social solutions to facilitate integration and provide economic opportunity, *id.* at 283–84, rather than a continuation of a cycle of discriminatory policing and aggressive removal in certain immigrant communities.

Whatever the practical merit of ICE's enforcement efforts against gangs, ICE's press releases present conclusory claims about the criminality and violence of at least some of the individuals they detain and remove in connection with Operation Community Shield. These press releases, and the media accounts that adopt their language, feed a national preoccupation with migrant criminality that is already far out of balance.

III. GLOBAL EFFECTS OF GANG REMOVAL EFFORTS

The countries that have become the primary recipients of United States deportees have been Mexico and the Central American states of El Salvador, Guatemala and Honduras.¹⁶⁰ One of the under-examined consequences of the U.S. policy of crime control through immigration removals is the negative effect that the widespread use of such removals has on receiving states. Mounting evidence suggests that rather than eliminating the U.S. gang problem, reliance on removal as a tool for achieving domestic crime control has instead helped to fuel existing crime problems in receiving states.

More significantly, U.S. policy has also contributed to the enactment of repressive anti-crime laws and policies in many receiving states that raise serious concerns about the effect of our policies on the rule of law abroad. Partly as a consequence of U.S. removal policy, receiving states have become increasingly ineffective in addressing their own domestic crime issues and increasingly abusive of individuals perceived as gang members. Because the United States government continues to systematically deport purported gang members to countries with documented practices of abusing and failing to protect individuals presumed to be gang members, U.S. policies directly contribute to the growing extralegal abuses and executions of purported gang members.

A. U.S. Policy Fuels Crime Abroad

The crime problems in countries like El Salvador, Guatemala, Honduras, and Mexico are severe.¹⁶¹ The reasons for the crime

¹⁶⁰ 2005 Yearbook of Immigration Statistics at Table 35 (cited in note 47).

¹⁶¹ Honduras is one of the most violent countries in Latin America. In 1999, the homicide rate reached 154 per 100,000 inhabitants. Harold Sibaja, et al, *Central America and Mexico Gang Assessment: Honduras Profile 4* (USAID Apr 2006) ("USAID Report on Honduras"). United Nations Development Programme, *Democracy in Latin America: Towards a Citizens' Democracy* 112 (UN Dev Program 2004). More recent levels are lower, but still

wave in Central America and Mexico are numerous and complex, but U.S. immigration policies have contributed to the problem.¹⁶²

There are several ways in which U.S. removal policy has fueled crime in primary receiving countries. First, and most obviously, it is a simple fact that removal does not solve crime. Removal shifts the sphere in which crime takes place.¹⁶³ While it is far from the case that everyone removed under the INA's criminal alien provision is a career criminal, anyone with the intention of committing criminal acts will not be prevented from committing future crimes by removal. Instead, the locus of their criminal activity will simply shift.

Moreover, the displacement caused by removal may render some individuals more likely to engage in criminal acts after removal. Many of the individuals removed by the U.S. in connection with Operation Community Shield were not career criminals. Indeed, some had no criminal records whatsoever.¹⁶⁴ Those individuals may not engage in criminal activity once removed. However, for many of these individuals, the displacement associated with their removal may well create circumstances that encourage—rather than discourage—their participation in criminal activity.

The extreme poverty and high unemployment rates in primary receiving states ensure many of those removed from the United States may continue to engage in criminal activity or be-

higher than other countries in the region. This high homicide rate is coupled with high rates of other violent crime and property crime. *USAID Report on Honduras* at 4.

Guatemala also faces serious problems. The homicide rate in Guatemala in 2004 was 35 homicides per 100,000 people, compared with 5.7 per 100,000 in the United States. Richard Loudis, et al, *Central American and Mexico Gang Assessment: Guatemala Profile 1* (USAID Apr 2006) (“USAID Report on Guatemala”). See also Ginger Thompson, *Guatemala Bleeds in Vise of Gangs and Vengeance*, NY Times A10 (Jan 1, 2006) (“Nearly a decade after the end of a civil war left 200,000 people dead or missing in this country of 14 million people, a new wave of violence has hit Guatemala and it looks a lot like the old one—some say worse.”).

Violent crime is also an issue in Mexico, where the homicide rate varies between 11 and 14 per 100,000 people. This places Mexico slightly above the 10 homicides per 100,000 that the World Health Organization considers “epidemic.” Harold Sibaja, et al, *Central America and Mexico Gang Assessment: Southern and Northern Border of Mexico Profile 4* (USAID April 2006) (“USAID Report on Mexico”).

El Salvador suffers from a homicide rate of approximately 40 per 100,000. *USAID Report on El Salvador* at 4 (cited in note 55). As many as 40 percent of all homicides in the country involve a gang member as a victim or perpetrator. *Id.*

¹⁶² Executive Summary: *Central American and Mexico Gang Assessment 20–21* (USAID Apr 2006)

¹⁶³ This phenomenon was noted, for example, by Rusche and Kirchheimer in their criminological assessment of British transportation policy. Georg Rusche and Otto Kirchheimer, *Punishment and Social Structure* 66 (Columbia 1939).

¹⁶⁴ See discussion in Part II.

gin to participate in criminal activity simply because there are few legitimate sources of income.¹⁶⁵ After all, these same factors of poverty and unemployment help to account for the relative ease with which gangs are able to recruit new members among children born in countries like Guatemala, El Salvador, and Honduras.¹⁶⁶ Deported individuals—particularly those with perceived ties to gangs—might also become targets of recruitment efforts by gangs in the receiving states, furthering the likelihood that they will participate in criminal activity.¹⁶⁷

¹⁶⁵ See, for example, *USAID Report on Guatemala* at 6 (cited in note 161) (describing deportees who are jobless and often cannot speak Spanish as likely to replicate gang activity they saw before deportation from the U.S.).

¹⁶⁶ *Id.* at 15–17; *USAID Report on Honduras* at 8–9 (cited in note 161) (listing lack of opportunity as a prime risk factor for gang activity); Clare Ribando, *CRS Report for Congress: Gangs in Central America* CR2–3 (May 10, 2005), available at <<http://www.au.af.mil/au/awc/awcgate/crs/rs22141.pdf>> (last visited Feb 5, 2007) (discussing the same phenomenon in El Salvador).

¹⁶⁷ The aggressive nature of gang recruitment efforts have been discussed elsewhere. See, for example, Michele A. Voss, *Young and Marked for Death: Expanding the Definition of “Particular Social Group” in Asylum Law to Include Youth Victims of Gang Persecution*, 37 Rutgers L J 235, 237–41 (2005). Indeed, somewhat ironically, gang recruitment has become the basis for a few successful claims for asylum in the United States. See, for example, *In the Matter of Sandra [redacted]*, Executive Office of Immigration Review, Baltimore, Md, Memorandum and Order of Immigration Judge Jill H. Dufresne (Nov 8, 2006) (granting asylum on the basis of membership in social group of young women who refuse to be victims of violent sexual predation of gang members); *In the Matter of D_ V_*, Executive Office of Immigration Review, San Antonio, Tex, Decision of Immigration Judge Susan E. Castro (Sept 9, 2004) (granting asylum on the basis of membership in the social group of “young boys who have been actively recruited by the street gangs in Honduras, but who have refused to join because they oppose gangs based upon their moral beliefs and values”); *In the Matter of [Redacted]*, File No. [redacted], Executive Office of Immigration Review, Arlington, Va, Decision and Order of Immigration Judge Wayne R. Iskra (July 22, 2004) (granting asylum to Salvadoran applicant who faced gang persecution for his refusal to join a gang); *In the Matter of Hector Gonzalo Calderon-Medina*, Executive Office of Immigration Review, Los Angeles, Cal, Decision and Order of Immigration Judge Gilbert T. Gembacz (May 1, 2002) (granting asylum because Honduran petitioner’s political opinion opposing gangs subjected him to persecution of gang members attempting to recruit him); *In the Matter of Edwin Jovani Enamorado*, File No. A 77-530-541, Executive Office of Immigration Review, Harlingen, Tex, Decision of Immigration Judge Margaret D. Burkhart (Nov 22, 1999) (granting asylum on the basis of forced gang recruitment and persecution of former Honduran gang affiliate); *In the Matter of Hessmir Sharon Orozco-Polanca*, File No. A75-244-012, Executive Office of Immigration Review, El Paso, Tex, Decision of Immigration Judge Bertha A. Zuniga (Dec 18, 1997) (granting asylum on the basis of gang persecution due to his social group of “young, poor, male Guatemalans who believe in the rule of law, in earning an honest living, and in not participating in illegal activity”), all available at <<http://www.refugees.org/article.aspx?id=1651&subm=75&area=Participate&ssm=118>> (last visited Feb 27, 2007).

In a number of cases, courts have acknowledged the problem of gang violence, but have declined to grant asylum because of the petitioners’ failures to comport with the legal standards for asylum. See, for example, *Serat-Ajanel v Gonzalez*, 2006 WL 3456289 (5th Cir Nov 30, 2006) (denying asylum to Guatemalan applicant alleging forced recruitment because young Guatemalan males were not a “particular social group”); *Argueta v Gonzalez*, 202 Fed Appx 222, 2006 WL 2683635 (9th Cir Sept 11, 2006) (denying asylum

B. Receiving State Responses

Generally, the U.S. policy of returning many noncitizens—some with criminal records—to their home countries may be fueling crime in the receiving states for a variety of reasons. But gang removal policy in particular has had a unique and significant unintended consequence. The United States's well-publicized policy of deporting gang members has spurred some receiving states to enact harsh anti-gang legislation and enforcement practices that threaten nascent criminal procedural reform while at the same time offering inadequate means of combating some of the more prevalent forms of criminal violence.

Although there are documented examples of youth gangs in Central America and Mexico, even before the large-scale removals of the past decade,¹⁶⁸ observers have noted a change in the nature of gang activity in certain receiving states in the wake of this wave of removals. In 1997, one reporter noted that in “Mexico and Central America [] the new [U.S. immigration laws were] making life hell for peasant migrants and authorities alike.”¹⁶⁹ Although there historically had been a gang presence in many receiving states, in the late 1990s many of these receiving states were “blam[ing] the deportations for increases in American-style violent crime and the emergence of gangs.”¹⁷⁰

By late 1997, press accounts were reporting heightened violence in Tecun Uman, Guatemala, as individuals who had been deported from the United States flocked to this town en route back to the U.S.—the place they had called “home” for most of their lives.¹⁷¹ During the same period, the impact of U.S. policy was also noted in El Salvador. Five years after a peace accord ended El Salvador's long and brutal civil war, Salvadoran officials began to attribute a new rise in violence and murders to the gangs they believed to be the product of recruitment efforts by

to Salvadoran petitioner alleging persecution by gangs because of lack of evidence that persecution was on account of a protected characteristic); *Castellano-Chacon v INS*, 341 F3d 533 (6th Cir 2003) (denying asylum to Honduran applicant subject to persecution by gangs because tattooed youth did not constitute a “social group”).

¹⁶⁸ *WOLA Report* at 1 (cited in note 6).

¹⁶⁹ Tod Robberson, *Staking Out New Turf: Members of gangs deported by United States terrorize migrants*, Dallas Morning News 1J (Dec 7, 1997).

¹⁷⁰ Deborah Sontag, *Deadly Exports: U.S. Deports Felons but Can't Keep Them Out*, NY Times A1 (Aug 11, 1997). See also *USAID Report on Honduras* at 5 (cited in note 161) (noting spike in gang-related crime in 1995).

¹⁷¹ Robberson, *Staking Out New Turf*, Dallas Morning News at 1J (cited in note 169).

U.S. deportees.¹⁷² Officials in receiving states in Central America and the Caribbean contended that U.S. gang habits—and branches of the gangs themselves—were being exported to El Salvador and other Central American and Caribbean countries, where weak police forces were forced to contend with slick, organized and well-armed young criminals.¹⁷³ Both government officials in these countries and more disinterested observers have thus blamed U.S. deportation policy for the worsening crime problem.¹⁷⁴

By the late 1990s, officials in receiving countries began to complain that they were at the mercy of the new, powerful gangs. Police contended that gangs often had them outmaneuvered and outgunned.¹⁷⁵ “If you keep sending these guys back, we’re going to have another civil war on our hands,” said one Salvadoran police investigator.¹⁷⁶ “People will arm themselves again, and this new police force will be nullified. We are very worried.”¹⁷⁷ Unfortunately, concerns that the rise in gang violence would lead to repressive solutions have borne themselves out.

While street gangs certainly contribute to crime and instability in receiving states like Honduras, Guatemala, El Salvador, and Mexico,¹⁷⁸ available evidence also suggests that the focus on gangs and gang crimes in these countries has distorted crime control efforts. According to one report, “Organized crime, narco-trafficking, common crime, and family violence are widespread and threaten citizen security everywhere in the region. Gangs are often used as scapegoats for various other security problems and criminal activity for which they are not responsible.”¹⁷⁹ Per-

¹⁷² Larry Rohter, *U.S. deportations leave southern neighbors to face an alien force*, Austin Am-Statesman H1 (Aug 17, 1997).

¹⁷³ *Id.*

¹⁷⁴ See *USAID Report on Honduras* at 5 (cited in note 161). For a general discussion, see also Urias, 8:2 Howard Scroll: Soc Just L Rev at 1 (cited in note 78).

¹⁷⁵ *USAID Report on Honduras* at 7–8 (cited in note 161).

¹⁷⁶ Rohter, *Deadly Exports*, NY Times at 1 (cited in note 57).

¹⁷⁷ *Id.*

¹⁷⁸ See Robberson, *Staking Out New Turf*, Dallas Morning News at 1J (cited in note 169). See also Part III.

¹⁷⁹ *WOLA Report* at 5 (cited in note 6). See also *USAID Report on Honduras* at 9 (cited in note 161) (“Massive government campaigns against gang activity and the media’s tendency to over-exaggerate the problem have created a misinformed perception that youths in gangs are to blame for the majority of crimes in the country.”); *USAID Report on Guatemala* at 13 (cited in note 160) (“The more visible crimes, such as gang violence, receive significantly more media attention than less visible violence such as intra-familial violence including child and/or sexual abuse. Organized crime, which arguably has much higher-scale and more damaging effects on the country, is also given much less attention than gang violence. . . .”); *USAID Report on El Salvador* at 8 (cited in note 55) (“gangs are

ceiving a flood of criminal gang members from the United States, some citizens in receiving countries have also embraced law-and-order responses that result in widespread detention and harsh sanctions for gang members.¹⁸⁰

In contrast to their responses to many other forms of domestic crime, the central governments in several countries have invested tremendous resources and attention to anti-gang activities. A number of these countries have adopted extremely broad and harsh anti-gang legislation. In 2001, the Honduran government enacted its *Ley Anti-Mara* (its anti-gang law), codified in article 332 of the Honduran penal code. The law allows the police to arrest people on the basis of “illicit associations,” and roundups generally tend to include youths with tattoos on their bodies.¹⁸¹ Thus, the new law endorses guilt by association in the gang context. El Salvador has also enacted two major pieces of anti-gang legislation—the *Ley Mano Dura* (literally translated, the “strong hand” law) in 2003 and the *Ley Super Mano Dura* (the “super strong hand” law) on August 30, 2004.¹⁸² This legislation “allows officers to randomly apprehend and book gang members,” a practice that has flooded the criminal justice system and overwhelmed the nation’s prisons.¹⁸³ Some Salvadoran judges have expressed their opposition to the law, which allows youths to be tried as adults, treats gang members with disproportionate severity for substantive offenses, and applies retroactively.¹⁸⁴ Finally, while Mexico has not enacted any specific anti-gang legislation, observers have speculated that “the *mara*-phobia generated by the press . . . could pave the way for this type of hard line law enforcement approach.”¹⁸⁵

The anti-gang laws of Honduras and El Salvador are overbroad, punishing individuals for merely looking like gang members—having tattoos, for example. Indeed, some evidence suggests street gangs are modifying their activities to render themselves less visible in order to escape the broad provisions, raising

often the scapegoats for all social ills, which limits the public’s deeper understanding of gangs and other issues affecting the country.”)

¹⁸⁰ *USAID Report on El Salvador* at 9–10 (cited in note 55).

¹⁸¹ *USAID Report on Honduras* at 9 (cited in note 161).

¹⁸² *USAID Report on El Salvador* at 12 (cited in note 55).

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 12–13.

¹⁸⁵ *USAID Report on Mexico* at 12–13 (cited in note 161).

questions about whether the laws are effective, or are merely driving gangs underground.¹⁸⁶

Even more troubling than these authoritarian laws, however, are the evolving extralegal mechanisms for dealing with gangs. For example, the Guatemalan government has not enacted *mano duro* anti-gang legislation, and has thus managed to escape a fair amount of criticism from the international human rights community.¹⁸⁷ However, the Guatemalan response to gangs is still troubling. In particular, the government has created joint police-military forces to fight crime in high crime areas. The merger of police and military functions is disturbing in light of the country's long history of state-sponsored, military-led violence.¹⁸⁸ Reports of extrajudicial killings—"social cleansing" killings aimed at gang members—are increasing.¹⁸⁹ Similarly, in Honduras, various human rights organizations have observed extralegal "social cleansing" policies, whereby the government turns a blind eye to death squads targeting gang members and other socially "undesirable" citizens.¹⁹⁰ In many Central American countries, gang members run an extremely high risk of inter-gang violence and death while in prison.¹⁹¹

¹⁸⁶ WOLA Report at 5 (cited in note 6).

¹⁸⁷ USAID Report on Guatemala at 20–21 (cited in note 161). In lieu of legislation, Guatemala has launched an anti-gang initiative called *Plan Escobada* (Plan Broom). See Johnson, *National Policies* (cited in note 58).

¹⁸⁸ USAID Report on Guatemala at 21 (cited in note 161).

¹⁸⁹ Id. See also Thompson, *Guatemala Bleeds*, NY Times at A10 (cited in note 161) ("human rights investigators have raised concerns about a clandestine 'social cleansing campaign,' led by rogue police officers and vigilante mobs"); Jill Repogle, *In Guatemala, a rise in vigilante justice: Citizens and police target violent gangs in what some charge is a 'social cleansing' policy*, Christian Sci Monitor 6, 6 (Oct 6, 2005) ("Police and media have attributed most of the brutal killings to gang violence. But some experts point to evidence of more sophisticated involvement as well. 'The use of certain strategies or tactics . . . is worrisome,' says Sergio Morales, a government human rights ombudsman, noting signs of torture.").

¹⁹⁰ Heather Berkman, *The Politicization of the Judicial System in Honduras and the Proliferation of Las Maras*, 4 J of Intl Pol Solutions 5, 8–9 (Winter 2006), available at <<http://irps.ucsd.edu/assets/004/5370.pdf>> (last visited Feb 5, 2007). See also *Honduras: Zero Tolerance . . . For Impunity: Extrajudicial Executions of Children and Youths since 1998* (Amnesty Intl Feb 25, 2003), available at <<http://web.amnesty.org/library/index/ENGAMR370012003>> (last visited Feb 7, 2007) (discussing the problem of death-squads in Honduras); *Honduras' Response to Violence Has Made a Bad Situation Worse* (Council on Hemispheric Affairs, Sept 9, 2004), available at <<http://www.coha.org/2004/09/09/honduras-response-to-violence-has-made-a-bad-situation-worse>> (last visited Feb 7, 2007) (noting deaths of gang members and street children at the hands of vigilante groups that included members of the security forces and other officials).

¹⁹¹ Many gang members have died in prison in Honduras. USAID Report on Honduras at 10 (cited in note 161). A 2003 fire in a gang-designated prison cellblock killed sixty-eight individuals identified as members of Mara 18. Independent investigations into the fire found that at least fifty-nine of those prisoners had been stabbed, shot, or burned to

Some commentators have lamented that these legal and extralegal anti-gang measures have undercut police reform in the region by “blurring the line between the police and the military; [] giving arbitrary authority to police to carry out raids and detentions of suspected gang members; and [] creating a climate in which police abuse and extra-judicial action by police is tolerated.”¹⁹²

Obviously, such laws and policies have had harsh effects on individuals who arrive in these countries after deportation from the United States. Some bear physical markers—like tattoos—that were used to identify them as gang members for removal, and that continue to mark them for purposes of anti-gang law enforcement in receiving states. They are targets for gang recruitment, rival gang violence, harsh criminal enforcement provisions, and even state-sponsored violence. All of this is well-documented, yet the United States continues to send people—criminals, gang members, suspected gang members, associates of gangs—into this environment.

The U.S. Government has not turned a completely blind eye to the transnational problems created by its removal policies. The State Department is involved in efforts to improve policing in Central America, for example.¹⁹³ But these efforts can only hope to put a band-aid on the injuries that U.S. policy has wrought throughout the region.

Nor do current legislative proposals address the roots of the growing crisis. Although the 2006 Senate¹⁹⁴ and House¹⁹⁵ legislation on immigration reform included calls for greater coordination with receiving states—particularly Central American states—in the process of removing criminal aliens, these proposals are designed primarily to address U.S. concerns that gang members are returning to the United States after removal. Congress has not engaged in any serious or systematic effort to appraise the costs of U.S. policy to receiving countries.

death by guards and soldiers. Ginger Thompson, *Gunmen Kill 28 on Bus in Honduras; Street Gangs Blamed*, NY Times, A4 (Dec 25, 2004). See also *USAID Report on Guatemala* at 15 (cited in note 161) (discussing Guatemalan prison violence); Blue, *Gangs without Borders* (cited in note 55) (describing prison violence in Guatemala).

¹⁹² *WOLA Report* at 10–11 (cited in note 6).

¹⁹³ See, for example, *USAID Report on Guatemala* at 25 (cited in note 161).

¹⁹⁴ S 2611 § 114(c) (cited in note 91).

¹⁹⁵ HR 4437 § 114 (cited in note 83).

CONCLUSIONS

Operation Community Shield purports to make communities safe through the removal of gang members. As the title of this essay suggests, however, it is difficult to say with certainty whose community is being shielded. It is not the community of immigrants who are captured in the overly broad dragnet used to identify street gang members. It may not be the wider group of immigrants with shared ethnic backgrounds who bear the brunt of the legally-sanctioned discrimination in law enforcement that occurs in their communities in the process of immigration law enforcement. It is certainly not the citizens of El Salvador, Guatemala, Honduras, Mexico, or the other nations who are on the receiving end of U.S. removal policies. Who, then, is shielded?

Although ICE—and the INS before it—has claimed that the removal of criminal street gang members helps to fight crime, there are no statistics to support this claim. This would be tolerable if the effects of the policy were not so severe, but there is evidence to suggest that these policies do have serious negative repercussions. Current U.S. policies designed to achieve the removal of criminal street gang members carry a number of high social costs that have not been properly weighed in the formulation of law and law enforcement initiatives. These policies undercut standard criminal procedural protections, encourage discriminatory laws and law enforcement, and subvert human rights norms outside of the United States. At the same time, we have no hard proof of the efficacy of these programs in achieving crime control goals.

The American public has eagerly embraced gang removal policies like Operation Community Shield. In the face of such support, it is often difficult for legislators to change policies or to put the brakes on discretionary law enforcement activities. But the collateral effects of our “Community Shield” are documented and troubling. The problems that have been caused by Operation Community Shield and its predecessors suggest the need for more clearly defined procedural protections for those subject to immigration investigations and detention, an end to the removal noncitizens who pose no serious criminal threat (particularly when they are removed to countries where their lives and freedom are threatened), and a need to engage in systematic efforts to assist receiving states in addressing the social problems to which our removal policies have contributed. Rather than reflexively providing more tools for gang removal, perhaps it is time for policymakers to look more carefully behind the shield.