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**Politics as Usual:  
The Criminalization of Asylum Seekers  
in the United States**

Brett Story

brett@resist.ca

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Refugee Studies Centre  
Department of International Development  
University of Oxford  
Mansfield Road  
Oxford OX1 3BT  
United Kingdom

Tel +44 (0)1865 270722  
Fax +44 (0)1865 270721  
E-mail: [rsc@qeh.ox.ac.uk](mailto:rsc@qeh.ox.ac.uk)  
Web: [www.rsc.ox.ac.uk](http://www.rsc.ox.ac.uk)

The process of making the criminal, therefore, is a process of tagging, defining, identifying, segregating, describing, emphasizing, evoking the very traits that are complained of... the person becomes the thing he is described as being... The way out is a refusal to dramatize the evil.

– Frank Tannerbaum, *Crime and the Community*

In the West there was panic when the migrants multiplied on the highways. Men of property were terrified for their property. Men who had never been hungry saw the eyes of the hungry. Men who had never wanted anything very much saw the flare of want in the eyes of the migrants. And the mean of the towns and of the soft suburban country gathered to defend themselves; and they reassured themselves that they were good and the invaders bad, as a man must do before he fights. They said, Those goddamned Okies are dirty and ignorant. They're degenerate, sexual maniacs. Those goddamned Okies are thieves. They'll steal anything. They've got no sense of property rights.

– John Steinbeck, *The Grapes of Wrath*

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## 1. INTRODUCTION

Over the course of the late 1980s and the 1990s, anti-immigration sentiment reemerged from its relative dormancy in the post-World War II period as a salient lexicon in Western political debate. Alongside this discursive shift, a proliferation of obstructive asylum measures has come to dominate the landscape of Western immigration policies. Heightened conflict throughout the global south as well as innovations in telecommunications and modern transportation were deemed responsible for increased flows of immigrants and asylum seekers, especially from poorer countries to their industrialized counterparts. This period saw the emergence of amplified and institutionalized reluctance on the part of industrialized states to allow these arriving migrants into their communities (Castles and Miller 2003: 106-07). The United States, for its part, has since the early 1980s implemented numerous measures seemingly designed to deter or deflect asylum claimants. Examples include mandatory detention for asylum seekers without proper documentation, intense infrastructural build-up and increased policing along the Mexican border, and the interdiction of boats carrying (mostly Haitian) asylum seekers by the US Coast Guard. The political discourse accompanying these policies has reverberated, in turn, with a vocabulary of threat, danger, insecurity and crime, of which the undifferentiated categories of asylum seekers and unauthorized immigrants are considered the source (Teitelbaum and Weiner 1995).

Over a similar period a transformation in the field of crime and punishment has been occurring, most dramatically embodied by the US's booming prison population, which has increased at an unprecedented rate since 1980 and has no parallel in the modern history of liberal democratic societies (Sparks 2003: 30). By the late 1980s the US had surpassed the then authoritarian governments of the Soviet Union and South Africa in having the highest incarceration rates in the developed world (Simon 1998). More than just a skyrocketing prison population, the 'reconfigured field of crime and punishment' (Garland 1996) further comprises the growth of militarized policing, an emphasis on management, classification, and aggregate profiling, and a dramatic rise in law enforcement budgets despite economic downsizing in almost every other government domain (Simon and Feeley 1992; Garland 1996). An understudied population subject to the defining instruments of this trend is that of asylum seekers.

In this paper I explore the legislated, tactical, and discursive means by which asylum seekers and criminals have been cast analogously as both figures of putative threat and beings undeserving of the rights of citizenship. Much of the available literature rationalizes, in critical or supportive terms, recent trends in asylum policy as state efforts to restrict their borders, and explains the means used as endeavors towards that end. In contrast, I begin with an observation about the means themselves: that the actual technologies, tactics, and language through which power is deployed against the contemporary asylum seeker in the United States bear an uncanny resemblance to those which situate and construct the category of the criminal. I will argue that one cannot fully understand the politics of asylum and unauthorized migration in the United States without an analysis of the overwhelmingly *penal* and *criminalizing* mechanisms by which such politics are practiced. To make this argument, I will focus mainly on the past decade in US asylum and immigration politics, as this period has witnessed the most dramatic and punitive policy developments, while also observing that some of these contemporary practices were initiated in the early 1980s.

Two compelling theoretical frameworks through which an analysis of contemporary asylum politics may be made are compared in Section Two. The first, the framework of

security and securitization, has become popular within contemporary literature on the topic, and finds favour especially among those responding to the post-September 11<sup>th</sup> official rhetoric on national threats posed by unauthorized immigrants. I compare it by measure of appropriateness and analytic utility to what will instead be the approach this paper takes: that of critical criminology.

To justify the application of a criminological framework, I detail in Section Three the actual laws, practices and discourse by which asylum seekers have been effectively criminalized over the past decade. This *de facto* criminalization is the cumulative effect not just of a political discourse devoted to the amalgamation of migration, illegality, and criminality, but of the practices of immigration and asylum authorities, law enforcement officials, and state legislators. Such practices include: the enactment of zero tolerance immigration laws; increased border policing and tactical and infrastructural collaboration between the Immigration and Naturalization Service (INS), police, and federal law enforcement agencies; and widespread detention of immigrants and asylum seekers alike in prisons and detention centers. I argue that insofar as the mechanisms of migration management uphold the structural goals of contemporary crime control – namely, deterrence, punishment, and segregation – they encourage a public perception that asylum seekers occupy the same societal role of essentialized threat as ‘criminals’, therefore legitimizing and indeed engendering popular hostility towards asylum seekers.

In Section Four I come to what is perhaps the crux of my argument, which is that contemporary immigration and asylum measures serve a variety of political and social functions domestically, distinct from the goal of restricting entry. I argue that conventional explanations of asylum policy are limited by their disengagement from an analysis of the instruments deployed towards managing unauthorized immigrants, and by their common assumption that such policies aim primarily to keep some or all asylum seekers out. By critically assessing the particularly penal character of asylum management technologies I derive three alternative functions which contemporary asylum practices serve in the contemporary US context: bolstering state legitimacy; facilitating the regulation and exploitation of labour; and containing social and political unrest.

One important qualification should be made. Throughout this paper I often refer simultaneously to both the treatment of asylum seekers and the treatment of unauthorized migrants. While my focus is ostensibly on asylum seekers, I contend that the numerous ways in which the distinction between these categories is blurred and arbitrary render it disingenuous and analytically unproductive to write as if they were entirely distinct ‘types’ of migrants. These categories overlap for two reasons. The first is that US asylum law and policy fit within an expansive framework of immigration regulation and border control, which means that “in weighing the balance of priorities in the treatment of asylum seekers, the desire for enforcement of immigration laws will almost always win” (Fredricksson 2000: 758). At the level of policy practice and in the deployment of enforcement technologies, therefore, the distinction between these two types of migrants often fails to be made. The second reason is, quite simply, that asylum seekers for a variety of reasons often spend some time as unauthorized immigrants either before or after making their asylum claim, and therefore embody both categories simultaneously.

## **2. SECURITIZATION, CRIMINOLOGY, AND PENOLOGY: LAYING THE THEORETICAL GROUNDWORK**

The recently formed Department of Homeland Security, now the body responsible for asylum and immigration enforcement, announced on March 17, 2003 that asylum seekers from an undisclosed list of targeted nations “where al-Qaeda, al-Qaeda sympathizers, and other terrorist groups are known to have operated” (Department of Homeland Security 2003) would be detained for the duration of their asylum proceedings. Under the banner of national security, even those asylum seekers who met the relevant parole criteria and, according to their individualized assessments, presented no risk to the public, were to be held in detention facilities (*Ibid*). As explained by then Secretary of Homeland Security Tom Ridge, “We just want to make sure that those who are seeking asylum, number one, are who they say they are and, two, are legitimately seeking refuge in our country because of political repression at home, not because they choose to cause us harm or bring destruction to our shores” (Secretary Ridge 2003).

Operation Liberty, as this policy was called, only lasted a handful of months, but the rhetorical premise upon which it was implemented is that which characterizes post-September 11<sup>th</sup> immigration and asylum legislation generally: in the new political epoch ushered in by the September 11<sup>th</sup> attacks on the Pentagon and the World Trade Centre, national security concerns take priority over every other responsibility and policy priority, including many civil liberties and adherence to international law. As the US government clamped down on migration across the nation’s borders and called on American citizens to gear up for a ‘war on terrorism’ at home and around the world, the containment of asylum seekers became virtually synonymous with national security. Both the administration’s own rhetoric and much of the work by scholars explaining US asylum and immigration policy since the attacks uphold that ‘security logic’ (Huysmans 1995: 54) has become the defining feature of the state’s treatment of non-citizens.

The asylum-security nexus has commanded the attention a number of security scholars (Waever et al. 1993; Huysmans 1995; Bigo 2002), as have the implications of addressing refugee issues in security terms (Loescher 1992; Chimni 1998; Newman and van Selm 2003). Much of this work incorporates key principles of both traditional and revisionist security studies and expands upon the theoretical groundwork laid by the so-called Copenhagen School on the discursive activity of ‘securitization’ (Buzan et al. 1998; Waever 1995). This Section will argue that the ‘securitization’ literature relies on a flawed characterization of asylum practices, and that these practices can be much more accurately understood within a criminological framework.

### **2.1 Assessing the Framework of Security**

Security is in many ways what Steve Smith (2002), borrowing from W. B. Gallie, has called an ‘essentially contested concept’,<sup>1</sup> meaning that it can be used to describe a whole gamut of survival concerns, from the physical integrity of territory and the safety of individuals, to the existential coherence of societies and polities. The concept of security in international law and international relations has, however, traditionally denoted the security of states, and the orthodox definition of international security is premised on the military

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<sup>1</sup> The notion of ‘essentially contested’ social science concepts, i.e. concepts whose meaning are an inherent matter of dispute because of the impossibility of a neutral definition, was first suggested by W.B. Gallie (1955-1956).

defense of territory. Within the global order as perceived by the structural realist stream of international relations – an order defined as an anarchic system in which states are perpetually competing for military power – national security is viewed as the imperative of defending territory against external military threats. This perspective is articulated most explicitly by Waltz, who believes that because the collective security of citizens depends on state survival in an inherently competitive and self-interested international system, the security of the state demands privileging above the security of any domestic political group (Waltz 1979: 128).

Despite the end of the Cold War and the reduction of warfare among Western states, aspects of this traditional understanding of conflict and security remain salient to contemporary understanding of national and international politics. Security is still closely connected to the traditional Clausewitzian view of war, specifically the prerogative of the state to wage war, and is thus closely related to the concepts of ‘emergency,’ ‘the exceptional,’ and the legitimate use of force (Noll 2003: 280). Security politics, within this paradigm, is what emerges when normal politics fails or are inadequate to secure the survival of a political community (van Munster 2004: 5). While security retains important aspects of its traditional character, the end of the Cold War did provoke a shift in the way security was conceptualized. The diminished threat of state-driven war, which had seemed ever-present before the collapse of the Soviet Union, allowed security practitioners and scholars to broaden their horizons vis-à-vis what did, or could, constitute a security threat. A range of new threats and new referent objects were indicated, and the task of evaluating ‘objective’ security threats was abandoned by revisionists in favour of studying the way ‘subjective’ security threats are constructed (Buzan 1991: 1-55; Waever 1995).

Among the security threats designated and highlighted within security discourse over the past decade is the increased migration of asylum seekers. States and political entities, including the United States and the European Union, have explicitly designated the issues of immigration and asylum as matters of security,<sup>2</sup> and scholars and critics have been quick to examine the dynamics and consequences of this association. Central to this research, often, is the influential concept of ‘securitization’ developed by the Copenhagen School of contemporary security studies. Interested in the discursive aspects of security politics, members of the Copenhagen School used the idea of securitization to describe the discourse or ‘speech acts’ by which security threats are constructed. They define securitization therefore as:

The staging of existential issues in politics to lift them above politics. In security discourse, an issue is dramatized and presented as an issue of supreme priority; thus, by labeling it as security, an agent claims a need for and a right to treat it by extraordinary means (Buzan et al. 1998: 26).

According to the Copenhagen School, a security narrative is distinct because it is structured by the logic of war, which itself is generally or traditionally restricted to the realm of national security. “[T]he logic of war – of challenge-resistance (defense)-escalation-recognition/defeat – could be replayed metaphorically and extended to other sectors” proposes Waever. “When this happens, however, the structure of the game is still derived from the most classical of classical cases: war” (Waever 1995: 56). As such, securitization

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<sup>2</sup> As indicated, for example, in the mandate of the Security of Europe’s 1999 Stability Pact for South Eastern Europe, and by the transfer of US asylum and immigration enforcement and service functions to the new Department of Homeland Security in 2003.

theorists aim to examine the application of the national security model outside the immediate context of military state conflict, for example to the environment (Tuchman Matthews 1985) or in this case, to migration (Weaver *et al.* 1993).

The securitization of migrants entails a militarization of borders and a move away from the rights of individuals towards the trump prerogatives of the state (Noll 2003: 280). Claudia Aradau argues that the category of ‘unauthorized immigrant’ has been securitized since the end of the Cold War in order to replace communist states as the ‘enemy’ against which the bureaucratic fragmented state can fulfill its essential role as civil society protector (2001: 2). The issue of securitized enemy, in this case unauthorized immigrants and asylum seekers as the ‘energetic principle of politics’ (Neumann 1996, 1953) is further problematized in the work of security scholar Jef Huysmans. He argues that immigrants and asylum seekers have become the enemy around which political authority and social mobilizations are legitimated as responses, and political ‘exceptionalism’ has been institutionalized. In other words, security imbues these issues with the urgency and gravity necessary to legitimate extraordinary measures taken by politicians and state authorities including breaking the rules that govern normal social relations in liberal democratic states (Huysmans 1995).

Some refugee scholars, such as Gil Loescher, argue that “too often refugees are perceived as a matter for international charity organizations” and that portraying them more accurately as “political and security problems” (1992: 5) – in effect, securitizing refugees – will bring their plight to the attention of powerful states with the capacity to address their root causes. The actual rhetoric through which this securitization has played out since September 11<sup>th</sup>, however, at least in the United States, resonates instead with the view that unauthorized migrants have been constructed as a *threat* to be deflected and contained. Attorney General John Ashcroft, to give but one example, justified his decision on April 17, 2003 to keep an 18-year old Haitian asylum seeker from being released from detention after six months by referring to the “current circumstances of a declared National Emergency,” despite there being no particular allegation that the Haitian man himself posed any risk to the public (Human Rights First 2003: 23).

## **2.2 Problematizing the ‘Securitization’ Approach**

If examined in isolation from previous trends in asylum policy, the response of the United States to asylum seekers and unauthorized immigrants in the period since the attacks of September 11<sup>th</sup> can undoubtedly be characterized by the concept of securitization. Invoking, as the rhetoric does, traditional security language of invasion, war, and an existential threat to the nation, securitization of migration issues has justified exceptionally restrictive asylum policies throughout Europe and North America (Zard 2002).

Yet, a closer examination of actual asylum policy and practice – namely the use of detention, border policing, and legislated ‘illegality’ – reveals that very little is actually new in post-September 11<sup>th</sup> asylum politics (Whitaker 2002). Low-level security measures applied to asylum seekers, and policies designed to deter and constrain unauthorized migration flows, have characterized US practice for at least the past decade. These policies are not ‘exceptional’ measures excused by the so-called ‘war on terror,’ nor are they consistently justified by national security concerns. Their origins lie instead in a much broader set of political, social, and economic dynamics that the securitization framework offers us few tools to comprehend. The securitization framework is inadequate for the task of diagnosing contemporary American asylum and immigration policies in, broadly, four main respects:

First, securitization has been addressed in solely discursive terms, failing to contend with the way in which threats are constructed by both discursive *and* non-discursive practices of security formation. The construction of threat, notes Didier Bigo, “works through everyday technologies...through political struggles...[and] the development of technologies of control and surveillance” (Bigo 2000: 73). In the case of unauthorized immigrants and asylum seekers in the US, the technologies, tactics, laws, and agents mobilized towards the securitization of immigrants are often those deployed by the police to fight crime: increased legal controls, computer surveillance, gathering of information, and imprisonment.

Second, a focus on securitization risks obscuring the processes that stop short of extreme or exceptional politics. As Buzan *et al.* put it, “when any issue is presented as posing an existential threat to a designated referent object,” it justifies “emergency measures” that might not be acceptable within “normal politics” (1998: 21-24). As a framework devoted to an idea of ‘exceptionalism’ or a ‘beyond the law politics’ (Bigo 2000: 73), therefore, it fails to encompass the everyday, legislated and localized treatment of asylum seekers and unauthorized immigrants as sources of threat or danger. The construction of asylum seekers as threats in actual practice occurs more often by way of politically normalized immigration control measures, such as detention, fingerprinting, and border policing, than by discourses of military security or emergency. These practices are also widely accepted as ‘unexceptional’ prerogatives of the state in peacetime and wartime alike.

Third, the pervasive themes in the crackdown on asylum seekers and unauthorized immigrants are ‘management’ and ‘control’, in contrast with traditional security preoccupations with ‘conquest’ and ‘victory’. In its 1994 Strategic Plan, for example, the US Border Patrol declared its mission as being to “control the border of the United States between the ports of entry, restoring our Nation’s confidence in the integrity of the border. A well-managed border will enhance national security and safeguard our immigration heritage” (US Border Patrol 1994: 2). Such themes are in keeping with developments in crime control practices generally, and imply – as the US Border Patrol has made clear in its devotion to regulating the movement of people (Andreas 1998-99) – a focus on human behaviour over that of state action or territorial protection.

Fourth, securitization theory does not prioritize, nor develop analytical tools for, understanding for whom securitization is done, or why. “In the process of securitization, the key issue is for whom security becomes a consideration, in relation to whom” state Buzan *et al.* (1998: 18), thereby laying out the parameters of their mission. Such parameters preclude exploring whose or what interests securitizing issues serve. Drawing only on the securitization framework and the traditional meaning security evokes, those studying asylum politics are inadequately equipped to recognize and appreciate the trajectory of asylum and immigration security politics. Inherent to this approach is the assumption that the aims of such securitizing practices are already known: to keep asylum seekers out; to justify restricting borders to the entry of even those migrants whose refugee rights are enshrined in international law.

Aspects of the limitations just detailed are also discussed in the work of some security theorists themselves. Didier Bigo is one such scholar who has criticized the work of the Copenhagen School, asserting that its authors do not adequately engage with the day-to-day routines and practices of the agencies, bureaucracies and professionals that actually do security work. Bigo argues, “Securitization works through everyday technologies, through

the effects of power that are continuous rather than exceptional, through political struggles, and especially through institutional competition within the professional security field in which the most trivial interests are at stake” (2000: 73). In the case of immigration control, these everyday technologies and struggles include everything from visa authorizations to intradepartmental intelligence sharing. Bigo’s point is a significant one. In its concern with the exceptionality of security politics and its limited focus on the grammar of security construction, securitization fails to grasp the mechanisms by which asylum seekers have been constructed as ‘common criminals.’ It offers neither tools nor impetus for interrogating the local crime and punishment techniques actually employed as part of everyday asylum practice. The scope of the securitization framework is limited to a discursive analysis of asylum’s ascendancy to the security agenda, rather than offering the intellectual fodder for an analysis of the complex social and political phenomena which underlie migration flows and state responses to them; for example: unemployment, economic restructuring, and racism.

What is notable about internal asylum securitization, according to Bigo’s conception of the term, is twofold: it is more insidious than the metaphor of war suggests, and its mechanisms are much more widely accepted as part and parcel of an ever-expanding regime of domestic crime control. Rather than trying to augment the still very traditionalist field of security studies towards an incorporation of these aspects, as Bigo does, a rich theoretical body of analytic tools already exists within the field of crime and punishment. A criminological perspective, as I will argue, is a more appropriate and powerful framework for understanding practices which amount more precisely to the *criminalization* rather than the *securitization* of asylum seekers.

### **2.3 Crime Control and Modern Penology**

It is the assertion of this paper that the politics of asylum and unauthorized migration are resonant with the politics of modern crime and punishment, and should be analyzed from and within a criminological framework. Such a framework is derived from a broad disciplinary constellation of theories, perspectives, and characterizations, perhaps better referenced as ‘the field of crime and punishment.’ This field offers powerful analytical tools for understanding the functions and consequences of contemporary asylum politics, the most germane of which will be summarized here.

Of particular relevance to the focus of my argument is a critical vein in criminological thinking that emerged in the late 1960s and proposed a radical shift in the field’s perspective. This critical school problematized ‘objective’ definitions of crime and deviance, asking what they were, how they came about, and what they did to people. Central to this endeavor was the development of what has been termed ‘labeling theory.’ Howard S. Becker, a seminal scholar in this tradition, put the premise of labeling theory this way:

Social groups create deviance by making the rules whose infraction constitutes deviance, and by applying those rules to particular people and labeling them as outsiders... Deviance is not a quality of the act the person commits but rather a consequence of the application by others of rules and sanctions to an ‘offender’ (Becker 1963: 9).

Labeling theory rejected positivistic criminology, which accepted criminological categories as given and control processes as valid responses to them. It suggested that labeling was a political act, and that “what rules are to be enforced, what behaviour regarded as deviant, and which people labeled as outsiders must...be regarded as political questions” (Becker 1963: 7).

Labeling theory has since been subsumed into various streams of ‘critical criminology,’ itself generally concerned with the exercise of power against the economically unwanted, the marginalized, alien, and dispossessed (Mathiesen 1974; Reiman 1979; Wacquant 2002). For this reason it should be of interest to those examining how power is levied against asylum seekers and unauthorized immigrants. Critical criminology suggests that crime is both socially constructed and reflective of inequalities of power. Richard Quinney in his seminal text *The Social Reality of Crime* begins by formulating a general definition of crime in which it is to be regarded as “a definition of human conduct that is created by authorized agents in a politically organized society” (1970: 15). He goes on to postulate that “criminal definitions describe behaviors that conflict with the interests of segments of society that have the power to shape public policy” (*Ibid*: 16).

When critical criminologists therefore refer to the criminalization of whole subsections of a population, they are referring both to legislation that penalizes and constructs as ‘illegal’ activities that characterize particular groups of people, and to discriminatory application of the technologies of crime control to target particularly designated groups. “Indeed, criminal status may be ascribed to persons because of real or fancied *attributes*, because of what they *are* rather than what they *do*, and justified by reference to real or imagined or fabricated behavior” (Turk 1969: 9-10, emphasis in original). It is the actions of the authorities in control of the criminalization process which, within this framework, accounts most significantly for criminality.

While such a body of theory offers useful analytical tools for problematizing and understanding asylum politics, these politics must also be contextualized against the more general backdrop of the crime and punishment field *in practice*. David Garland, to cite one of the most prolific thinkers on the topic, has written extensively about the transformation in American crime control and penology over the past thirty years. He argues that the ‘reconfigured’ field of crime control has a number of notable characteristics. Included in his detailed list are: the re-emergence of punitive sanctions and ‘just deserts’ retribution as general policy goals; an increased and generalized fear of crime, and policies aimed at reducing fear levels, rather than actual crime; the politicization and populism of crime control issues; the reinvention and revival of the prison, made manifest in “the steepest and most sustained increase in the rate of imprisonment that has ever been recorded since the birth of the modern prison in the 19<sup>th</sup> Century” (2001: 14), the emergence of influential *control theories* that deem crime and delinquency to be problems of inadequate controls; and the expanded role of commercial interests in the development and delivery of penal policy, including the growth of private policing and private prisons (*Ibid*: 8-17).

Malcolm Feeley and Jonathan Simon (1992) have argued that the most recent phase in the US criminal justice system – from about the 1980s onward – is so particular that it can be considered ‘a new penology.’ The primary characteristic of the new penology is its *managerial* focus. “The new penology is neither about punishing nor about rehabilitating individuals. It is about identifying and managing unruly groups” (Simon and Feeley 1992: 455). To this end techniques designed to profile, classify, and manage groupings sorted by dangerousness are deployed. Feeley and Simon describe this new penology as having both ‘lowered expectations’ and extensive scope, such that together they provide “the imperative of herding a specific population that cannot be... transformed but only maintained – a kind of waste management function” (*Ibid*: 470). Criminological discourse and practice becomes, therefore, more statistical, actuarial, and ever more concerned with aggregate groups and populations.

Such a trend correlates with the concept of 'risk society' purported by Anthony Giddens and Ulrich Beck. Giddens (1990) argues that risk has become a defining feature of later modernity, such that a 'calculative attitude' has developed in both individuals and institutions to deal with risk, trust and security. For Beck, those of us who live in a risk society "are no longer concerned with such matters as justice and equality. Instead we try to prevent the worst and consequentially a 'risk society' is one obsessed with security" (quoted in Johnson 2000: 24). The notion of the US being a risk society relates to the concept of 'governing through crime', itself drawn from the theory of a 'legitimation crisis' of the state (Hall 1980) and evoked to explain a number of the trends described by Garland. Developed by Simon (1997) 'governing through crime' concerns the way in which, in an era marked by distrust of governments and legitimacy dilemmas of the state, the insecurity and anger aroused by crime translates into public calls for stronger display of state power and resources, thereby relegitimizing state sovereignty and authority.

## Summary

While asylum politics since September 11<sup>th</sup> reverberate deeply with the characteristics of conventional security, most notably in the 'emergency' type measures and 'nation at war' discourse, the actual measures implemented do not depart so much from previous practices as they continue, in perhaps exaggerated form, processes already in motion. From the era of 'normal' politics before September 11<sup>th</sup> and into today, the situation of asylum seekers and unauthorized immigrants has become defined like it is for so many citizen populations in the United States by institutions of policing, penalty, and social control. The themes that dominate crime policy are the themes that dominate asylum and immigration policy – rational choice and the structures of control, deterrents and disincentives, the opportunism of self-interested individuals, the threatening underclass, and the failing, overly lenient system (Garland 2001). The works of scholars in the field of crime and punishment, therefore, offer powerful theoretical and empirical resources with which to analyze asylum and immigration politics. First, however, the case must be made that contemporary asylum policy and practice amount to *de facto* criminalization, commensurate with penal trends in the domestic sphere of crime and punishment.

### 3. THE *DE FACTO* CRIMINALIZATION OF ASYLUM SEEKERS

Refugees are a particular category of immigrants with protection rights enshrined in the 1951 Geneva Convention Relating to the Status of Refugees and the 1967 Protocol, to which the United States has been a signatory since 1968 and whose provisions were incorporated into US domestic law in 1980. For the first thirty years after the inception of the modern refugee regime following World War Two,<sup>3</sup> US refugee policy was adjudicated on an *ad hoc* basis, and to a large degree beholden to a definition of refugees as those fleeing Communist regimes. The US allowed thousands of refugees from Communist countries to enter over the course of this period, above even its own immigration quotas (Einolf 2001: 12). In 1980 however the United States passed the Refugee Act, which, along with laws and regulations developed in later years, established systematic procedures for the INS and immigration courts to adjudicate the claims of non-citizens seeking asylum or refugee status. A technical distinction was made in the Act between ‘refugee’ status, which was to be granted to people asking for protection outside of the US and whom the US government would then bring into the country, and ‘asylum’ status. The latter applied to those migrants who asked for protection after already arriving in the US, even if they were present without legal permission. While both categories were decided according to the same definition, adapted from the UN Protocol Relating to the Status of Refugees,<sup>4</sup> it has largely been asylum claimants who have occupied the focus of recent policy measures and elicited the greatest public outcry, due at least in part to the spontaneity which characterizes their arrival.

In just over a month during the spring of 1980, more than 100,000 Cuban migrants and refugees, including approximately 8,000 prisoners and others considered undesirable under Fidel Castro, landed on the south Florida shores in what would come to be known as the Mariel boatlift. President Jimmy Carter would end up granting legal status to nearly all of the arrived Cubans, but not without the event first causing heated political debate. Concurrent with the controversial Mariel boatlift was a slower but substantial flow of Haitian asylum seekers, landing by boat on the east coast of Florida. Most, if not all, of the Haitians arrived without previous authorization or documents,<sup>5</sup> and in contrast with the Cubans, the majority of their asylum claims were turned down. Both incidents have been historicized as asylum ‘crises’ in whose wake public discontent with immigration, and spontaneous or unauthorized migration especially, was vehemently expressed (Zolberg 1995: 142). In response to these two incidences, as well as the unauthorized migration of thousands of Central Americans fleeing violence in the region throughout the 1980s, dramatic new measures were introduced into US immigration policy, including the large scale interdiction of boats at sea, the revival of asylum imprisonment policies, and the deployment of a large, mobile Border Patrol task force (Nevins 2002: 69). Such police and penal deployment have overwhelmingly defined state action against asylum seekers and unauthorized migrants ever since.

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<sup>3</sup> While the act of providing asylum to individuals fleeing persecution can be dated back for centuries, the contemporary international refugee regime is a 20<sup>th</sup> century creation, institutionalized by the establishment of the United Nations High Commissioner on Refugees in 1950 and the 1951 Geneva Convention Relating to the Status of Refugees.

<sup>4</sup> The Immigration and Nationality Act, at 8 USC II0I(a)(42) defines a refugee as “Any person who is outside any country of such person’s nationality, or in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable and unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.”

<sup>5</sup> Hence the term “undocumented.” From here on in I will use the terms “unauthorized” and “undocumented” interchangeably.

The Cuban and Haitian crisis epitomized the politicization of both asylum seekers and the broader category of unauthorized migrants, more commonly referred to as ‘illegal’ immigrants (Helton 1992: 166-67). Since that time, but perhaps especially since the early 1990s, immigration laws have increasingly narrowed opportunities for both legal and illegal entry into the country as an immigrant or asylum seeker, and the resources put towards the enforcement of these laws – especially along the US-Mexican border – have increased dramatically, despite the more general trend towards government downsizing (Andreas 1998-99). Over the past decade in particular, the measures and laws that have come to define immigration policy have had the effective consequence of criminalizing both asylum seekers and unauthorized immigrants. It is the purpose of this Section to detail some of these central practices – specifically, the enactment of zero-tolerance immigration laws; inter-agency cooperation and technology sharing between immigration officials and the police; increased use of detention and imprisonment in asylum policy; and the rise of the ‘illegal’ as a discursive category of unauthorized migrant – and to reflect on their analogous nature with the practices that currently characterize the field of crime and punishment.

### **3.1 Legislation: The IIRIRA, the AEDPA and the US Patriot Act**

Criminalization, at its most basic, encompasses all legislation that penalizes particular behavior or activities, as well as the discriminatory enforcement of preexisting ordinances. A central starting place for understanding how asylum seekers have been criminalized over the past decade is with two transformative pieces of legislation, both passed by Congress under the Clinton administration in 1996 – *The Illegal Immigration Reform and Immigrant Responsibility Act* (IIRIRA) and the *Anti-Terrorism and Effective Death Penalty Act* (AEDPA). While operationally part of immigration rather than criminal law, many of regulations legislated by the two statutes can be viewed from a criminological perspective as promoting the traditional aims of criminal punishment: retribution and deterrence (Bleichmar 1999: 154).

The IIRIRA and a few supporting provisions in the AEDPA together ushered in a number of significant changes. First, these acts gave low-level immigration inspectors at US airports and borders the power to order the immediate deportation of people who arrive without proper travel documents – a regulation especially injurious to asylum seekers who, in their flight, are often unable to obtain proper documents. This process, called ‘expedited removal,’ added palpable restraints to the ability of asylum seekers without proper documentation to make a claim for asylum. It requires that the asylum seeker immediately, upon arrival at the point of entry, make the INS inspector responsible for issuing their removal aware of their desire to make an asylum claim. She is then required to prove a ‘credible fear of persecution’ at an initial meeting with an INS asylum officer before making the actual claim before an immigration judge (McBride 1999: 19). The ‘expedited removal’ process has been documented as institutionalizing numerous impediments to an asylum seeker wishing to make a claim, resulting in the deportation of many asylum seekers in violation of international law (Human Rights First 2004: 19; also see Human Rights First 1998). The new 1996 statutes further undermined due process, as unprecedented powers granted to the INS, including the use of secret evidence and indefinite detention, were augmented with court-stripping provisions that eliminated judicial review of detention and deportation decisions (Welch 2003: 328).

Procedures developed by the INS to implement the 1996 laws raised the bar for asylum eligibility, allowing for example consideration of convictions for ‘particularly serious

crimes,' previously unsuccessful asylum claims, delay in applying for asylum, and the possibility of the claimant being a threat to the security of the United States (Horne 1997). In other words, they created grounds for failing and returning asylum seekers who may otherwise face real threat of persecution in their home country. As such, these sections of the law have been recognized by the UNHCR as enabling the violation of the 1984 Convention against Torture, which under Article 3 prohibits returning anyone, regardless of previous behaviour, to a situation in which there are "substantial grounds for believing that he would be in danger of being subjected to torture" (UNHCR 1997). Such sections also contravene the 1951/1967 Refugee Convention, which states in Article 31: "Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who ... enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence" (UNHCR 1997).

The 1996 laws also mandated "the arrest, detention and deportation of all non-naturalized immigrants who have *ever committed a felony or broken an immigration law*" (Parenti 1999: 142, emphasis in original). Section 321 of IIRIRA expanded the number and variety of crimes that could lead to both loss of residency and deportation of non-citizens, to include nonviolent offenses and misdemeanors such as shoplifting or drunk driving. 'Aggravated felons' – another category whose threshold was lowered to include a range of low-level crimes – could no longer contest their deportation (*Ibid*: 143). Welch (forthcoming 2006) points out the coercive and punitive nature of such provisions, underscored by the fact that the IIRIRA was made *retroactive*, so that present *and* past offenses and misdemeanors equally render non-citizens liable to deportation. Those whose country of origin, moreover, would not accept them back or did not have diplomatic relations with the United States, such as Cuba and Iraq, were instead subject to indefinite imprisonment.

The USA Patriot Act, signed into law in 2001 just six weeks after the events of September 11<sup>th</sup>, granted the federal government even more expansive powers over immigrants and asylum seekers, particular those aggregate and racialized categories collectively suspected of terrorism. The most notable consequences of the Act's implementation have been widespread racial profiling, mass detentions of non-citizens, and the government's refusal to disclose information about those detained (Welch 2003: 332). Section 215 of the Act enables the FBI to monitor non-citizens without establishing probable causes, in violation of the constitutional rights, by implication, now held only by citizens (Bosworth, forthcoming 2006). In further confirmation that the US Constitution no longer protects non-citizens, Section 412 vests the Attorney General and the state generally with the power to imprison non-citizens without charge. The seven-day time limit later placed on this detention may be extended indefinitely if the detainee is found to be in violation of an immigration law of any kind, such as overstaying her visa. Following the ratification of the Patriot Act the Attorney General announced a new Foreign Terrorist Tracking Task Force, which was to be the means by which the Attorney General found and detained those guilty of minor immigration status violations *or* those suspected of posing a threat to the United States. To this end the Justice Department has targeted individuals on the basis of actuarial criteria, such as gender, religion, ethnicity and national origin – in many cases only seeking grounds to justify arrest after the individual had been detained (Human Rights First 2002).

Another program set up by the US Justice Department in its campaign against terrorists was the National Security Entry-Exit Registration System (NSEERS), active from September 11, 2002 until its official suspension on December 1, 2003. Under this program

non-citizens from a range of primarily Muslim states were required to register with US officials. Failure to comply was designated a deportable offense, and by the end of NSEERS' short-lived existence deportation proceedings were initiated against more than 13,000 of the men and boys *who did register* and were found to be living illegally in the US (Human Rights Watch 2003: 39). While the program was eventually shelved, its poor record as a mechanism for finding terrorists was compensated, according to the Justice Department, by its having led to the arrest of "a wife beater, narcotics dealer and very serious violent offenders," although no terrorists (quoted in Gourevitch 2003).

Laws and policies of this kind turn the presumption of innocence, fundamental to the criminal justice system of most democratic states, on its head. The caveat to this legal dilemma is that immigration law does not, officially, fall into the criminal justice system. So, while the investigation into the September 11<sup>th</sup> attacks constitute a search for criminal suspects, the legal regime under which it has been conducted is not the US criminal code, but rather the immigration enforcement system. This is true of the 1996 laws as well. Under the legal canopy of immigration enforcement, the government retains much wider discretion to arrest, detain, and deport individuals than it does under the nation's criminal justice system. It is obligated to provide fewer protections against abuse of such powers, such as judicial oversight, and does not entitle detainees to legal representation (Human Rights First 2002).

### **3.2 Tactics, Teams and Technologies**

A second spoke of the *de facto* criminalization of unauthorized migrants is inter-agency cooperation between immigration officials, the police, and at times the military. In 1980 the Immigration and Naturalization Service was mandated the task of policing immigration and only immigration. By 1990 however, with President Reagan and then President Bush Sr.'s 'war on drugs' in full swing, its role had been expanded to that of enforcing both contraband and narcotics laws as well. Along both the northern and southern border, but especially along the southern border with Mexico, INS Border Patrol agents began to act simultaneously to keep 'illegal' immigrants out and to act in the capacity of drug enforcement and customs police, establishing and further affirming the perceived relationship between unauthorized migrants and drug trafficking (Parenti 1999: 143).

Not only had the role of the INS expanded to include crime enforcement, but there has also been a growing trend toward increased cooperation and cross-deputation between law enforcement and immigration authorities. Before being transferred into the Department of Homeland Security in 2003, it had become common for the INS to team up with local police, the FBI, the Drug Enforcement Agency and at times the military in various tasks related to both immigration and criminal law. After the 1996 laws were passed mandating detention and deportation of non-citizens for an expanded range of crimes, INS agents became increasingly incorporated into police units, where they worked together with police to track down and deport immigrants with criminal records (*Ibid*: 147).

Apart from increased collaboration, the enforcement and policing capabilities of the INS and its successor, the Bureau of Immigration and Citizenship Enforcement (BICE), have expanded tremendously in their own right. After President Clinton instituted new measures against unauthorized immigration in 1993 and then again in 1996, the INS, under which the Border Patrol operates, became one of the fastest growing federal agencies in the country. Its budget between 1993 and 1999 alone nearly tripled, from 1.5 billion to 4.2 billion dollars, despite economic downsizing in almost all other federal government domains (Andreas 1998-99: 594). The number of Border Patrol agents increased by almost 100 percent during

this time, to the extent that the INS by the late 1990s had to establish an around-the-clock hot line for prospective Border Patrol applicants in order to meet its accelerating hiring targets (*Ibid*: 595).

Concurrent with the infrastructural buildup of the INS and the cross-deputation of its agents with police and military agencies has been the incorporation of police tactics and technologies into immigration and asylum enforcement strategies. Examples include midnight-raiding practices, INS highway checkpoints, and implementation of complex computer surveillance systems. Such practices have become essential to interior immigration enforcement as well as to the past decade's militarization of the US-Mexico border (Nevins 2002; Parenti 1999). Intensified border control enforcement since the 1994 launch of 'Operation Gatekeeper' and 'Operation Safeguard' along the Mexican border has involved the incorporation of technologies and equipment designed initially for military purposes. They include: magnetic football detectors and infrared body sensors, originally used in Southeast Asia; military helicopters and radar equipment; and perhaps more infamously the construction of a "10-foot-high steel wall made up of 180,000 metal sheets, originally designed to create temporary landing fields in the desert during the Persian Gulf war" along the border south of San Diego (Andreas 1996: 46).

State-of-the-art computer surveillance systems have also come to play a central role in the enforcement of both border control and internal immigration policing. The development and utilization of such computerized surveillance have exponentially expanded law enforcement's control over immigration populations. INS files have been directly tied into the intelligence systems of most of the nation's police departments, forming an electronic dragnet of instantaneous and automatic INS/police intelligence. The achievement of such a system, according to journalist Christian Parenti, is "the subjective changes of Bentham's panopticon: making the effects of power constant, even while its application is intermittent" (1999: 149).

### **3.3 Detention and Imprisonment as Asylum Policy**

A third penal practice characterizing asylum policy is the increased use of imprisonment.<sup>6</sup> The INS announced in 1954 that it was abandoning the practice of detention, excepting those rare occasions when an alien was considered likely to abscond or pose a danger to the nation. Detention was reintroduced in 1981, however, and normalized as an asylum policy under President Reagan, as a response to the influx of Cubans and Haitians seeking asylum in the United States. As of May 1981, all Haitians who arrived at the coast of southern Florida without proper entry documents, regardless of whether or not they were likely to abscond or pose a threat to public safety, were detained at Camp Krome, the first INS 'service processing center,' located on a former missile base in the Everglades swamp outside of Miami (Helton 1992: 167). Surrounded by razor wire and guard towers, characterized by frequent overcrowding, prolonged stays, and poorly trained staff, Krome in many ways established the model for other detention centers across the United States (Simon 1998: 587). When Krome became overcrowded, the detainees were transferred to federal prisons and local jails located across the US – another practice which has become routine to immigration imprisonment (Helton 1992: 167).

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<sup>6</sup> While immigration enforcement officials prefer the term 'detention,' I will use the terms imprisonment and detention interchangeably to describe the forced confinement of non-citizens as part of immigration policy, for reasons that will be made clear in this section.

Under President Reagan in the 1980s, the numbers in detention skyrocketed – as did incarceration rates among US citizens generally. Despite a change in White House administration, the detention regime expanded even further when President Clinton, a Democrat, came to power in 1992. As mentioned earlier, the 1996 Immigration and Anti-terrorism Acts expanded the categories of crimes for which non-citizens were subject to mandatory and often indefinite detention. Systematic detention of asylum seekers was not only implemented as policy, but “the Clinton administration continued to detain even those who were granted political asylum by immigration judges while it pursued a reversal of those asylum decisions” (Dow 2004: 9).

The numbers of immigration detainees, consequentially, have increased dramatically. Nationally, the number of people held by the INS increased by almost 70% between 1996 and 1999 alone (Parenti 1999: 141). On any given day, the INS holds up to 23,000 people in its vast archipelago of public and private detention facilities, and detains about 200,000 annually (Dow 2004: 9). Detention, moreover, is a somewhat innocuous term given that these ‘detention’ facilities encompass a whole range of institutions, including local jails, run down motels surrounded by barbed wire, INS run processing centers, facilities owned and operated by private prison companies, and federal penitentiaries (*Ibid.*). The population of non-citizens doing time in federal prisons for immigration offenses, as distinct from criminal offenses, grew from 1593 in 1985 to 13,676 in 2000, an escalation of 859%. Average time served by the same population grew over the same period from about 4 months to 21 months (Bosworth, forthcoming 2006). In 2003 approximately 60% of INS detainees were being kept in local prisons and jails and in private contract facilities (Dow 2004: 9). Even those facilities technically termed processing centers, such as the Krome Detention Center in Miami, are virtually indistinguishable from jails, even among those administering the facilities. Richard Smith, the immigration service regional director responded to a question about Krome’s resemblance to a prison by saying “It is a jail, albeit a minimum security jail. The sign outside may say that it’s a processing center, but that’s just semantics” (quoted in Rohter 1992).

Detention is not, however, technically the same as serving a prison sentence. The centers run by the INS are not called prisons, and a person in the custody of the INS or the Bureau of Immigration and Customs Enforcement (BICE) is considered officially to be an administrative detainee, regardless of where she is being held. Asylum imprisonment, therefore, is not subject to the same procedures of due process as those qualifying the criminal justice system. As pointed out by the NGO Human Rights First, “Neither U.S. laws nor regulations set a limit on the length of time an asylum seeker may be detained while his or her asylum proceedings are pending” (2004: 14). Numerous cases have been catalogued of asylum seekers who have been detained for years at a time. The Dallas Morning News, for example, obtained statistics revealing 361 asylum seekers and other non-citizens who had not been convicted of any crime and had been detained for over three years (cited in Human Rights First 2004: 14).

Since September 11<sup>th</sup> expanded detention policies have led to unprecedented levels of incarceration. Underlying this point, Georgetown University law professor David Cole observes that, “Never in our history has the government engaged in such a blanket practice of secret incarceration” (quoted in Dow 2004: 13). This trend was exemplified by the implementation of ‘Operation Liberty Shield’ by the Department of Homeland Security (DHS) on the eve of the war on Iraq in 2003. An endeavor in nationality-based detention policy, the DHS as part of this operation singled out for mandatory detention asylum seekers

from an *undisclosed* list of 33 ‘terrorist-producing’ nations. Asylum seekers from any of these targeted nations were to have no entitlement to parole or release from detention even if they met the parole criteria and were found to present no risk to the public (Human Rights First 2003: 42). Operation Liberty Shield only lasted a few months, but because the DHS had not reported on the number of asylum seekers detained under this policy, and because the executive branch has refused to release information on the detainees, there is no information as to whether or not those imprisoned were or have yet been released (*Ibid.*).

Under the US Patriot Act of 2001, furthermore, the Attorney General is vested with the authority, under Section 412, to order the detention of those he or she has reasonable grounds to believe may have engaged in terrorism, or other activities that threaten national security. While a terror suspect is only supposed to be detained for up to seven days without charge, if found to have committed an immigration violation of any kind, such as visa overstay, he may be detained for as long as immigration proceedings take (Bosworth, forthcoming 2006).

### **3.4 The Rise of the ‘Illegal’ as a Discursive Category**

As a corollary to the laws and measures outlined so far has been a discourse that increasingly conflates asylum seekers with ‘illegal’ immigrants and criminality. Central to this trend is the rise of the ‘illegal’ as a discursive category, increasingly applied to unauthorized immigrants and asylum seekers alike.

Throughout US history a whole host of pejorative terms qualifying the immigrant have been applied and popularized. They include, for example, the terms ‘wetbacks’ or ‘undesirables’ or, in the case of asylum seekers, the legally meaningless phrase ‘bogus refugees.’ The particular manner in which unauthorized immigration is politically discussed in American society, however, has changed over time, with a growing emphasis on the *legality* or *illegality* of immigrants as of the late 1970s. According to an analysis of major media outlets, it was not until 1977 that ‘illegal’ became the most common term ascribed to unauthorized immigrants. This rhetorical qualifier is now the term of choice, used in fact almost exclusively, among state authorities in public and official discussions about unauthorized immigrants (Nevins 2002: 112).

As Foucault and others have made us aware, language has a constitutive bearing on reality. Laws, decrees, and acts, moreover, as instruments of power, “crystallize into institutions, they inform individual behavior, and they act as grids for [the] perception and evaluation of things” (Foucault 1991: 79). The use of the ‘illegal’ as a discursive category is a meaningful political act, with important repercussions for how asylum seekers and unauthorized immigrants are perceived and acted upon. As an ideological construct, the effect of ‘the law’ at the level of perception and evaluation is to induce a categorical division of right from wrong. The rise of the notion of the ‘illegal’ immigrant, therefore, serves both to justify an increasingly punitive set of social practices (Nevins 2002: 147) and to reduce individuals to a social category defined by criminality and associated with threat. This despite the ‘illegal’ migrant being, essentially, a construct of state practice vis-à-vis the policing of its borders (*Ibid*: 121-22).

On the one hand negative language generally, especially when used by political elites and the media, encourages the vilification of refugees and asylum seekers (Den Boer 1995: 100). As a discursive device, however, the particular fixation on legal status has specific repercussions for the institution of asylum. The ‘refugee’ itself is a legal category, enshrined

in the 1951 Geneva Convention and its 1967 Protocol, to which most states, including the US, are a signatory. While a person, legally, is a refugee as soon as they meet the 1951/1967 Convention definition, the rights that accompany that status are dependent on one's recognition as such by a state of asylum or the international community. According to the UNHCR Handbook (1992):

A person is a refugee within the meaning of the 1951 Convention as soon as he fulfils the criteria contained in the definition. This would necessarily occur prior to the time at which his refugee status is formally determined. Recognition of refugee status does not therefore make him a refugee but declares him to be one. He does not become a refugee because of recognition, but is recognized because he is a refugee. (UNHCR 1992)

As Lisa Hassan puts it, "such language that insists that there is a black and white distinction between 'genuine' and 'abusive' claimants, and that individuals who fail the test have malicious intentions, is unfounded both in law and in reality" (2000: 195). Despite the flawed nature of asylum determination systems, however, and the wide variation in recognition rates across states and across adjudicators, in everyday language the authority of such officials to determine the 'refugeeness' of an asylum seeker is so upheld that anyone who fails such recognition becomes the *de facto* inverse – the 'illegal immigrant,' with all its connotations of criminality.

### **3.5 Comparing Asylum Practice and Domestic Crime Control**

The sum total of the practices constituting US policy towards asylum seekers and unauthorized migrants over the past decade is the *de facto* criminalization of such migrants. It follows that applying a criminological approach to their analysis is indeed appropriate, but the case for this approach becomes even stronger when such measures are compared with those used concurrently against actual 'criminal' populations. Significant parallels exist between the characteristics of the field of contemporary crime control and current trends in asylum and immigration politics.

Incarceration is a case in point. The United States is currently experiencing an unprecedented growth in the rate of imprisonment, steeper and more sustained than in any other period since the 19<sup>th</sup> century birth of the modern prison (Garland 2001: 14). Between 1980 and 2000 the prison population, overwhelmingly represented by Black and Hispanic males, increased by 319 percent (Austin *et al.* 2004: 433). Accelerated incarceration rates have similarly come to characterize contemporary asylum and migration policy. Mary Bosworth (forthcoming 2006), among others, has pointed out how "incarceration has become the standard response for asylum seekers who arrive with or without proper documents" as well as those who break what are otherwise civil offenses regarding their immigration status, resulting in a booming population of foreign prisoners. A point should also be made about the analogous nature of the populations in question in terms of race, gender, and class. Immigration prisons, like domestic US prisons generally, are disproportionately full of men of colour and the poor. And just as women are increasingly and systematically alienated from society by punitive crime and welfare legislations, they are also particularly disadvantaged and prevented from entering the United States by recent changes in immigration legislation.<sup>7</sup>

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<sup>7</sup> For a good description of the particular effects of recent immigration legislation on women, see Bosworth, forthcoming 2006.

More generally, the mechanisms by which unauthorized migrants are policed, imprisoned, and kept under surveillance mirror the recent shift in corrections from a rehabilitation model to the ‘new penology’ (Simon and Feeley 1992) of risk management. INS and recent DHS practices of processing large aggregates, such as groups of specific nationalities, instead of reviewing individualized cases of asylum and applications for citizenship, echo a trend in penology in which criminality is regarded as a condition that should be managed by sorting and policing populations according to risk (Welch 1999: 266). Even mandatory deportations in cases of so-called ‘criminal’ migrants, while not a practice prevalent in the modern criminal justice system as it applies to citizens, is consistent with broader trends in criminal justice away from rehabilitation efforts, insofar as it “replaced a system that allowed immigration judges to consider equities, such as whether or not an alien with criminal convictions had reformed” (Coutin 2005: 12). Further involvement of the corporate sector in the management of non-citizens – for example the management of BICE facilities by private companies (Greene 2001) – mirrors the increasing role private capital is playing in criminal prisons and security apparatus.

Still another way of reflecting on the interplay between the fields of asylum and immigration practice and criminal justice is to consider how these practices further what Welch (forthcoming 2006) calls a ‘forceful criminal justice mandate,’ or Parenti (1999) calls a ‘nation-wide law and order crackdown.’ Coinciding with the reintroduction of immigration imprisonment in the 1980s, the intensification of border control and immigration enforcement as of 1993, and the 1996 immigration and anti-terrorism laws, has been a growing emphasis on individualizing culpability and punishment in other areas of state regulation as well. One example of this policy trend is the *Violent Crime Control Act*, signed into law under President Clinton in 1994, which deployed greater numbers of police onto the streets, lengthened sentences, and introduced a series of new federal capital offenses. A second example can be found in President Clinton’s campaign to eliminate “welfare as we know it.” This campaign included the passage of the *Personal Responsibility and Work Opportunity Reconciliation Act*, which “not only denied benefits to illegal immigrants and their children, but also threw thousands of American citizens, predominantly women, off the welfare rolls and back to ‘work’ or starvation” (Bosworth, forthcoming 2006).

The analogous nature of immigration and crime control policies has significant implications for understandings of their purposes and functions, but it also has bearing on the potential *self-perpetuating* and *self-justifying* quality of criminalizing and penal management strategies. This Section ends, therefore, with a brief but important consideration of both the social and institutional consequences of ‘labeling’ asylum seekers, legally and symbolically, as ‘criminals’.

### **3.6 The Asylum Seeker as Criminal: Constructing Alienation and Illegitimacy**

Current trends in the policing and imprisonment of asylum seekers really only make sense if it can be argued that such migrants constitute a criminal or dangerous threat (Bosworth, forthcoming 2006). This in fact continues to be the conclusion drawn, explicitly or by implication, by many local observers of asylum politics. While the alienation of the non-citizen is often assumed, rarely is the social construction of that estrangement from the social body interrogated. Securitization theory, perhaps, is an attempt at such an interrogation, and this may be its most important contribution to the field of forced migration. While the construction of unauthorized immigrants and asylum seekers as national security threats may have had significant influence on public attitudes and political policies in the post-September 11<sup>th</sup> climate, a more relevant discussion concerns the essentializing and

alienating impact of constructing asylum seekers specifically as ‘criminals’. Given the particular social and political meaning already inhering to the criminal in contemporary American society, I argue that this construction acts as a powerful form of delegitimizing asylum-seekers’ claims to the rights of citizenship, and may in fact engender or inflame the very public hostility so often cited as the political *impetus* for penal strategies.

Recent policies of mandatory detention, detention of undocumented immigrant children, interdiction of asylum seekers, and the practice at times of forcibly tranquilizing and deporting detainees have come under fire by human rights lawyers and organizations for violating international human rights law. These policies and practices have also been challenged as unconstitutional under US law (see the Minnesota Lawyers for International Human Rights and Physicians for Human Rights 1991; American Civil Liberties Union 1994; Human Rights First 1999, and Welch 1999: 261-64). Punitive treatment of citizens, on the other hand, is rarely considered an abuse of human rights, in part because there are many rights, such as the right to liberty, that the state in liberal democracies reserves the authority to deny, according to *due process*, to those who fail to fulfill the responsibilities of citizenship. The criminal by definition therefore already occupies a space in society that divorces her from the regular social body. As Barry Vaughan notes, “If citizenship is defined as the sum of obligations owed by the state to the citizens, there may be a tendency to divide society up into two groups, the first of whom enjoy full citizenship, the second of which for reasons of status or conditions are debarred from it” (2000: 25). Both the criminal and the asylum seeker therefore share a place in this second category.

Crime and the criminal, furthermore, occupy particular meaning in the popular imagination. As David Garland remarks, “the criminology invoked by the punitive strategy is one of essentialized difference. It is a criminology of the alien other which bears little resemblance to us” (1996: 461). To maintain incarceration and even more punitive practices such as capital punishment, the monstrosity, incorrigibility, and societal dangerousness of the criminal must be evoked. As part of the shift in perceptions of criminality identified by Garland, moreover, the criminal has come to be viewed as an illicit, opportunistic consumer. Described also as ‘situational man’ (Cornish and Clark 1986), the criminal is believed to think rationally and selfishly, and to be lacking in effective internal controls to keep him from taking advantage of criminal opportunities for self-gain or gratification (Garland 1996: 451).

All of these characterizations have significant implication when applied to the asylum seeker. Policed, criminalized, and incarcerated, asylum seekers are by implication social deviants “who maliciously exploit the generosity of Western states and the rights of ‘genuine’ refugees for their own advantage” (Hassan 2000: 196). With her ‘refugeeness’ discredited before even articulated, the asylum-seeker’s rights as a member of a particular legal category are obscured, even nullified, by her symbolic and legal construction as a member of *another* legal category: the criminal. Socially, moreover, the asylum seeker is estranged from the political community even more so than she already was by constructions of racialized and nationalized difference, by her association with the image of the criminal. Anti-foreigner hostility, and hostility towards unauthorized immigrants in particular, it follows, is not to be taken as a given but explored as a deeply complex phenomenon, capable of being incited, constructed, and developed.

As well as structuring the environment in which asylum seekers are known and understood penal strategies engender their own (tautological) logic of existence: the

criminalized asylum seeker is a criminal because she is treated as one: because an asylum seeker is a criminal she should be treated as one – in other words, policed, distrusted, and incarcerated. Compounding this self-perpetuating, if paradoxical, logic are the institutional implications of criminalization. It was Weber (1985, 1930) who pointed out that institutions have a way of outliving the meanings and motivations which led to their establishment in the first place. The practices referenced throughout this paper and the exigencies of power to which they are beholden, once institutionalized in such structures as the Border Patrol and the Department of Homeland Security, are capable of developing autonomous interests of their own – at the very least that of institutional self-preservation. As technologies of power, therefore, penal strategies are capable of engendering both the institutional interests and the popular narratives necessary to justify their deployment and continuation.

## **Summary**

Examining the politics of asylum and unauthorized immigration in detail and in context elucidates the significant relationship at work between asylum and immigration policy and the politics of crime and punishment. The techniques by which unauthorized migrants are currently being criminalized are those that criminalize citizen populations as well, and the penal trends in both fields follow a similar and familiar path. A further irony of their correspondence is that just as modern mechanisms of crime control have been all but discredited as tools for constructively addressing or solving the problem of crime (Garland 2001) immigration control and deterrence has similarly been, for the most part, a failed project (Cornelius 2001; Castles 2004) – albeit a project with the capacity of generating its own self-perpetuating logic. To decipher why criminalizing tactics in particular have come to define state response to asylum seekers and unauthorized migrants, especially given their documented failures as means of deterrence, it is necessary to explore some of the unstated functions these measures serve.

## **4. THE FUNCTIONS OF CONTEMPORARY ASYLUM POLITICS**

Whether by design or default, the policies of the American state towards asylum seekers and unauthorized immigrants over the past decade embrace practices that mirror and intersect those of modern crime control. My argument has been that the substantial interface between the fields of immigration control and criminal justice compels both recognition and interrogation. Comprehending the subtexts and subtleties of asylum politics in the United States, therefore, necessitates drawing on critical work developed in the field of crime and punishment. This Section begins by exposing a dominant assumption guiding most investigations into the rationale of current asylum policies, which is the belief that such strategies have as their primary purpose the goal of keeping asylum seekers out. Reflecting on the limitations of the parameters set by this assumption, I argue for the incorporation of criminological concepts and analyses in order to decipher alternative, and often neglected, functions served by current criminalization strategies. Three such functions are briefly delineated: the legitimization of the state by simultaneously ‘governing through crime’ (Simon 1997) and ‘governing through migration control’; the regulation of the movement, availability, and independence of illegal labour; and the management of social insecurity and the containment of political unrest, domestically and internationally.

### **4.1 Asylum Policy as ‘Keeping Foreigners Out’: Variations on a Theme**

Anti-immigrant and anti-foreigner sentiments are not new to American society, nor to American foreign or domestic policy. The post-September 11<sup>th</sup> securitization practice linking ‘the asylum seeker’ with ‘the terrorist’ are very much the continuation of a trend of criminalizing unauthorized immigrants, and these penal practices too follow a long history of legislating against non-citizens. Evidence to this effect can be found in one of the first pieces of immigration legislation, the Chinese Exclusion Act of 1882, established in response to a backlash from US labourers threatened by perceived job competition from Chinese migrants (Hofstetter 1984: 153). The law restricted the immigration of Chinese workers for a decade, prohibited Chinese naturalization, and provided deportation procedures for ‘illegal’ Chinese in the US. In a series of Supreme Court decisions concerning the Act, furthermore, the exclusion of a particular ‘class’ of immigrants was ruled constitutional, and this has paved the way for other restrictions since (Daniels 1990: 272).

Beginning in the early 1980s but especially over the course of the 1990s the United States, like many other Western states, has come to embrace increasingly obstructive measures towards asylum seekers, many of which were detailed in Section Three. The literature in forced migration studies abounds with statements characterizing such measures as strategies of restriction, the goal of which is, and it seems an obvious one, to “prevent asylum seekers from arriving at frontiers where they could claim the protection of the Refugee Convention” (Gibney 2003: 20). Among those that ascribe contemporary measures such as interdiction, detention, and border policing to the logic of territorial restrictionism, there are certainly many who support the arguments commonly made to justify closed or tightly controlled borders. Examples of such arguments include: the perception that large or increased numbers of foreigners pose cultural threats to the cohesion or identity of the nation-state; fears that migrants constitute an economic burden on scarce welfare resources or competition for employment opportunities; or that asylum seekers and immigrants act as potential security threats given their perceived links to crime, terrorism, or drug trafficking (Loescher 1992; Weiner 1992-93; Zimmerman 1995). More generally, increased flows of asylum seekers and unauthorized migrants seem to concern both the public and scholars of

migration insofar as they indicate “the US has lost (if it ever had) an important aspect of sovereignty – control of its borders” (Zimmerman 1995: 95).

The accuracy or legitimacy of such arguments has been called into question among those involved in the debate on asylum policy (see Geddes 2005; Martin 2004: 68-72). The particulars of that debate are beyond the focus of this paper, but it is relevant to note the parameters common to all sides. For even within the work of those critical of current trends in asylum practice there seems to be a general consensus attributing measures, characterized in this paper as criminalizing, to the goal of keeping some or all asylum seekers and unauthorized immigrants *out*. “In both developing and developed countries, governments have for some times been constructing legal and physical barriers against the influx of asylum seekers” (Newman 2003: 7), to cite one standard expression of this prevailing discourse.

Committed to the paradigm of prevention, therefore, a variety of arguments have been expounded to explain why the goal of keeping asylum seekers out should so dominate the formulation of Western asylum policy in recent years. From an international relations perspective, for example, it has been argued that the end of the Cold War has diminished the most important quality capable of generating political will and public sympathy towards refugees: their symbolic embodiment of the failures of Communism (Chimni 1998). Others emphasize the role of nativist and racist hostility by pockets of the American public, to which politicians are at best responding to and at worst exploiting for political gain (Gibney 2003). This is a compelling argument. Anti-immigrant sentiment, as documented in public opinion polls, legislative initiatives, and media reports, does seem to have reached a post WW2 peak in the mid-1990s, and like other periods of heightened xenophobia, corresponds to some degree with more exclusionary policy responses to immigrants and other foreigners (Muller 1996). The superficial level on which this argument is often made, however, renders it deeply misleading. Simply *citing* public racism to explain restrictive immigration or asylum policy does not oblige or enable actually *comprehending* racism. Such diagnosis too often treats racism as simply a personal attitude born of prejudice and ignorance, rather than as a political project or an idea whose development has been, throughout history, made expedient for political reasons. Neither does it invite investigation into the conditions in which racism, as an ideological edifice for interpreting group interests, finds potency, nor into racism’s institutionalization by way of particular structures and technologies. Such investigations would no doubt complicate the causal logic assumed between racism and territorial exclusionism.<sup>8</sup>

While geo-political interests and popular racism may fairly represent *part* of the story of asylum politics, as analyses they are limited by their assumption of restriction as the *raison d’etre* of contemporary asylum and immigration policy. In other words, this line of thinking accepts or assumes that the response of the US state to asylum seekers is a logical (if unacceptable) product of its interest in restricting membership. It does not account therefore for policies that contradict that goal, for example the Immigration Act of 1990, which raised the US’s annual ceiling on both immigrants and refugees (Martin 2004: 66). The main problem with such reasoning, however, is not that excluding unwanted foreigners is not in

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<sup>8</sup> For two very good theoretical analyses of racism, see Lentin 2004 and Dunn 1996. Lentin develops a convincing case for historicizing the growth of racism as a political project used by states under particular conditions of modernity. Dunn more broadly contends that the historical presence and human force of racist consciousness cannot be understood outside of both the pragmatics of political competition and the insecurities of those deciding, as we all do, whom to fear and whom to trust.

fact a very real policy goal, but that it limits the debate on asylum politics to the legitimacy of that interest *alone*, and does not seek to explain alternative or additional motives for state action. Such explanations therefore insufficiently contend with the choice made to deploy *particular* tactics and measures over others. Neither do they question the continued saliency of such measures despite their documented failures at meeting stated goals, such as the US Border Control's goal of "prevention through deterrence" (US Border Patrol 1994).<sup>9</sup>

The inconsistencies, contradictions, and failures of current practices in asylum policy have not gone entirely unnoticed by scholars of migration, and not all scholars subscribe to the view that contemporary asylum policy is predicated on keeping migrants out. One tempting thesis is that purported by Christian Joppke, who seeks to explain the continued presence of unauthorized migrants in liberal states. Joppke argues that "accepting unwanted immigration is inherent in the liberalness of liberal states" and that the liberalism upon which the United States was founded and spread by its hegemony guarantees a respect for human rights and the rule of law, thus constraining the state from exercising its capacity to keep such migrants out (1998: 292).

While Joppke is right to credit strong ethnic and civil rights groups for advocating on behalf of the rights of immigrants and refugees, the very fact that their work exists, and in many cases has constituted such an arduous battle, speaks to the *weakness* of the state's commitment to liberal ideals. It is perhaps the ideological optimism of Joppke's thesis that renders the securitization framework such an attractive one to those making sense of contemporary asylum policy. In both legal and moral terms, the measures waged towards asylum seekers over the past decade are in fact inherently illiberal and unconstitutional, comprehensible to those who see the United States as a bastion of liberalism only if understood as *exceptional* measures, occupying a plane above and beyond 'normal' politics. Yet, as this paper has demonstrated, such practices have been an increasingly accepted part of 'unexceptional' US policy for at least the last decade. The fact that such measures are being applied to non-citizens does little to refute the illiberalism of, for example, imprisoning a person without charge and with little judicial recourse for an indefinite period of time.

Just as it has been widely acknowledged that asylum policy throughout the 1950s and 1960s was intimately tied to America's anti-Communist agenda, central to rigorous analysis must be an acknowledgement that asylum policies serve a wide and complex variety of functions domestically as well – functions that may well explain the significant gaps between US policy goals and policy outcomes.<sup>10</sup> US asylum policy since its official inception has indeed been deeply riddled with 'ironies' (Welch 2003) and inconsistencies (Teitelbaum and Weiner 1995). No one set of factors can therefore possibly explain current migration practice and discourse. While the relationship between competing interests and forces must always be taken into account, the following observations about the domestic functions served by penal measures elucidate issues much deserving of attention and debate.

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<sup>9</sup> For further detail on the failures of policies aimed at preventing and eliminating 'illegal' migration, see Cornelius 2001.

<sup>10</sup> Of eleven industrialized countries reviewed, the United States has "by far the largest gap between the stated goal of controlling immigration and the actual results of policy: ever-increasing numbers of both legal and illegal immigrants" (Cornelius and Tusuda 2004: 5).

## 4.2 Bolstering State Legitimacy by Governing Through Crime and Migration Control

A first approach to understanding contemporary immigration policy concerns the role that policing, border control, and penal management of unauthorized migrants play in showcasing the authority of the state and bolstering state legitimacy. In an era increasingly distinguished by the apparent *weakness* of the state, unauthorized migrants can be seen as having become the objects of the state's claim to exercise authority through its monopoly over the legitimate means of coercion (Weber 1985, 1930) and movement (Torpey 2000).

By most accounts, the INS border enforcement strategy of "prevention through deterrence" (US Border Patrol 1994) reinforced by the 1996 Immigration and Terrorist Acts and subsequent efforts at stemming flows of both unauthorized migrants and asylum seekers, have largely failed. "Recent efforts to reduce the influx of unauthorized migrants entering via Mexico through concentrated border enforcement operations and other control measures have not reduced the stock of such immigrants in the US," note Cornelius and Tusuda (1995: 20).<sup>11</sup> A recent *Guardian* article noted "The number of undocumented immigrants in the US has leapt by 23% to just over 10.3 million in the past four years" (Younge 2005).

Reviewing INS progress reports and press releases, Peter Andreas (1998-99) observes that most of the indicators held up as signs of success can also be read as a signs of failure, and that those that do point to failure are downplayed or dismissed. His explanation for policy failure along the Mexican border is that "[e]nhanced border policing has less to do with actual deterrence and more to do with managing the image of the border and coping with the deepening contradictions of economic integration" (1998-99: 593; see also Nevins 2002). Andreas claims that a failing deterrence strategy can still succeed politically, if it can project the *appearance* of order or increase the visibility of state control mechanisms. If one takes this assessment as credible, one must then ask what political function the *image* of control provides.

Of relevance to an analysis which seeks to explain the synergy of migration management and crime control is the observation that both control over borders, and capacity for punishment, are essential facets of the legitimacy of the state. Max Weber (1985, 1930) famously defined the state as that agency within society which possesses the monopoly of legitimate violence. Violence, or force, is in turn the ultimate of a variety of sanctions deferred to the state towards its broader designated task of maintaining and enforcing order (Gellner 1983: 4), where order involves, primarily, the control of crime. High crime rates and the limitations of criminal justice agencies, argues Garland, "have begun to erode one of the fundamental myths of modern societies: namely, the myth that the sovereign state is capable of providing security, law and order, and crime control within its territorial boundaries" (1996: 448). The legitimacy of the state also, it has been argued, rests on its ability to maintain control over membership and entry into its territory (see Held 1995; Poggi 1990). Increasingly salient is the perception, valid or not, that the US state is unable to control entrance and has 'lost control' of its borders (Frelick 1989; Nevins 2002). Both the persistence of crime and unauthorized migration, therefore, are direct contradictions to the state's capacity to exert authority.

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<sup>11</sup> According to Cornelius and Tusuda the principal effects of intensified border enforcement along the border with Mexico since 1993 have instead been to marginalize illegal entry attempts to more remote areas, increase the financial cost and physical dangers of illegal entry, and induce more unauthorized migrants to stay for longer periods or settle permanently in the US (2004: 8).

Against this backdrop, US state policy and practice towards unauthorized migrants, especially its boat interdiction and border enforcement efforts, fulfill the appearance of *simultaneously* fighting crime, and enforcing territorial control. It could be said to add a whole other dimension to ‘governing through crime’ (Simon 1997) – that of governing through migration control. Indeed, increased border policing and asylum criminalization have emerged at a time when state autonomy and authority is being eroded on a number of fronts. On the one hand the forces of globalized neo-liberal economics have undermined the US’s autonomous jurisdiction over its production, trade, and fiscal and monetary controls (Adelman 1999: 93). Meanwhile, the post-Keynesian retrenchment of welfare provisions and, essentially, the discrediting of welfare solutions to social insecurities since the 1970s likewise disqualify another possible front for the legitimation of the state (Garland 1996: 448).

Zygmunt Bauman, a leading globalization theorist, has argued that, in the European context, nation-states and their insecure citizens have sought to compensate for eroding economic authority by focusing on palpable factors such as the “all-too-tangible enemy [of] the stranger next door” (1998: 7). Again, within criminological work one finds a similar explanation for the trend in increasingly *punitive* crime control. As Garland notes, “punishment is an act of sovereign might, a performative action which exemplifies what absolute power is all about” (1996: 460). A punitive response, such as imprisonment, to social anxieties and political problems are attractive to both the state and its citizens because “it can be represented as an authoritative intervention...[that] gives the appearance that ‘something is being done’ here, now, swiftly, and decisively” (*Ibid.*). To the extent that high-profile – but arguably unsuccessful – border enforcement programs such as Operation Gatekeeper and increasingly punitive policies towards unauthorized immigrants may serve to bolster state legitimacy in the eyes of its public, they also distract attention from the state’s deepening and extended cross-border market activity with Mexico – activity itself held responsible for high levels of unauthorized immigration.<sup>12</sup>

### 4.3 The Regulation and Exploitation of Labour

A second function served by the illegalization of unauthorized immigrants has been the regulation of movement, availability, and independence of migrant labor (Cockcroft 1986; Calavita 1992; Cornelius 2001). To this effect the deployment of penal and policing mechanisms, as the technologies of power by which immigration law is enforced, not enforced, or partially enforced, offer valuable insights into the way in which these laws shape the actual dynamics of immigration politics in response to economic context. The function of criminalization, this analysis suggests, is not to prevent the entry of unauthorized migrants but to construct those that do enter as a body of inexpensive, unorganized, and expendable workers willing, due to their immigration status, to work “hard and scared” (Marshall 1978).

The role of migrant labour in the US economy, and especially that of Mexican labour, is not a new phenomenon. Mexican workers in the early 1900s were recruited and even smuggled into the United States by American labor contractors, not just to meet the labor demands of an industrializing United States but as strikebreakers in situations of labour unrest (Rodriguez 1996: 235). Some contend that it has been since the 1970s especially that

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<sup>12</sup> See Muller 1996 and Andreas 1998-99 for a discussion on how the 1994 implementation of the North American Free Trade Agreement (NAFTA) facilitated increased flows of migrants from Mexico, both in terms of the technological infrastructure for cross-border movement, and the erosion of economic opportunities for workers in Mexico.

this migrant labour population, *as an illegalized and policed workforce*, has become an essential ameliorative to industry's recurring crisis of profitability. In his book *Outlaws in the Promised Land* documenting this important economic role, Cockcroft quotes a Wall St. Journal article declaring the importance of "the present wave of Western Hemisphere immigrants" in offsetting profitability declines in the 1970s, and which a decade later ran a headline "Illegal immigrants are the backbone of economy in states of the Southwest" (1986: 130). Kitty Calavita points out that in the US, Spain and other advanced capitalist economies unauthorized workers are both "well-suited to the restructured economy of the late twentieth century with its proliferation of low-wage, contingent work" (2003: 406) and competitively advantageous given their lack of power relative to domestic labor to exact concessions from employers (*Ibid*: 400).

This lack of power is a consequence of the 'illegality' of such workers, and the intensified enforcement of this illegality over at least the past decade. Not only have the surveillance and punitive capabilities of immigration enforcement developed, but the laws directing them are crafted such that the migrant bears the brunt of immigration policing, rather than his or her employers. While arrest, imprisonment, and deportation have become very real and actualized consequences of working illegally, under the 1986 Immigration Reform Act employers are not responsible for verifying authorization documents presented to them by employees and therefore able to hire undocumented workers with false documents with relative impunity (Cornelius and Tusuda 2004: 11). In fact, while the US has the toughest penalties for immigrant smuggling and related activities among advanced industrialized countries, in terms of sanctions against employers of illegal immigrants it is ranked among the lowest (*Trafficking in Migrants Quarterly* 1996). This imbalance persists even though enforcement of employer sanctions are regarded by many to be the more effective strategy for stemming the flow of unauthorized migrants (Cornelius 2001).

INS raids, conducted in aggressive sweeps by large heavily armed teams, and accompanied by immediate arrest and deportation, serve to instill fear among unauthorized migrants and therefore act as an effective anti-unionizing tool for managers and employers. In areas and industries of the United States where unauthorized immigrants provide a substantial bulk of the labour force, unionizing efforts by migrant workers are routinely undermined by managerial campaigns casting "unionization as an invitation for more [INS] raids."<sup>13</sup> The most direct consequence has been the marginalization and docility of such workers, rather than the deterrence or obstruction of illegal labour (Calavita 1992).

One might observe that cracking down on unauthorized immigration serves *against* the economic interests of those who employ illegal labor. While it is true that there is incoherency in capital's response to immigration policing, and that the interests of *particular* employers may be damaged by policing undocumented workers, the strategy of non- or partial enforcement of immigration laws – an irony inherent to law enforcement generally (Marx 1981) – may in fact serve the interests of industry *in general*. It is the *threat* of enforcement that is important, as evidenced by high incidence rates of businesses and employers themselves notifying the INS, or threatening to do so, as a means of deterring organizing activities among their undocumented workers (Welch 2003: 329).

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<sup>13</sup> Examples of these kinds of actions abound in the agricultural sector in California, the meat packing industry in the Midwest, and service industry in New York (Parenti 1999:150-52).

This analysis is of the utmost relevance to the study of anti-immigration sentiment and the potency of anti-immigration politics, insofar as domestic workers and unions have cited their own job security as rationale for supporting anti-immigration policies and politicians (Muller 1996: 106-07). The contradictions therefore inherent in criminalization mechanisms deserve further study, if only to better understand the class dynamics of xenophobia and its ferment.

#### **4.4 Social Control and the Containment of Social Unrest**

A third area deserving of attention concerns the use of crime control apparatuses as mechanisms of social control and tools for containing social unrest. Insofar as it can be argued that asylum seekers occupy a position similar to populations deemed surplus or socially disruptive *within* a polity, theories interrogating the social order functions served by criminalizing citizen populations are relevant to analysis of the criminalization of asylum seekers as well.

Nils Christie's seminal treatise on the infinite expansion of the crime control industry opens with a simple statement about its theme:

Societies of the Western type face two main problems: Wealth is everywhere unequally distributed. So is access to paid work. Both problems contain potentialities for unrest. The crime control industry is suited for coping with both. This industry provides profit and work while at the same time producing control of those who otherwise might have disturbed the social process (1993: 13).

The use of crime control and penal apparatuses as tools for managing social unrest and populations deemed surplus or subversive to the economic and social order has recently emerged into the foreground of critical crime and punishment analysis. Much of the literature deployed towards this argument begins with the observation that the mid-1970s saw a sharp upward shift in penal practice, alongside other significant changes in the socio-economic role of the US State. Before this point, the prison population of the US had been steadily declining, and had reached a low of 380,000 inmates by 1975. In contrast to the predictions of criminologists writing at the time, America's incarcerated population would quadruple over the ensuing twenty years and reach two million by 2000, despite stagnant crime levels over much of that period (Wacquant 2000: 386). These increased incarceration rates reflect just one element of the intensified and increasingly punitive crime control policy characteristic of criminal justice in late modernity, termed the 'new culture of control' by Garland (2001).

The demise of a social-welfare approach to governing in the US is usually dated from the mid-1970s as well, as is the ascendancy of the defining features of advanced economic neo-liberalism: flows of global capital and labor, economic deregulation, and the casualization of the labor force. Derivative of economic restructuring and welfare retrenchment, according to social control theorists, has been the emergence of both a new 'underclass'<sup>14</sup> and new social anxieties to be governed. Loic Wacquant notes, therefore, that

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<sup>14</sup> According to Christopher Crowther, the 'underclass' is a concept used to reference "a group surplus to the requirements of the system of production and the institutions of civil society," produced by structurally generated changes in the political economy and characterized by such indicators as welfare dependence, educational failure, and a propensity to engage in criminal and disorderly behaviour. "One of the outcomes of the construction of a free market economy since the late 70s was a burgeoning 'underclass' and a strong state

in all neo-liberal states that abide by ‘free market’ principles one observes in recent decades a spectacular rise in the number of people imprisoned, as the state “relies increasingly on the police and penal institutions to contain the disorders produced by mass unemployment, the imposition of precarious wage work, and the shrinking of social protection” (2001: 404).

In the United States communities of colour, and specifically the African-American population, have been over-represented in the penal system, effectively linking individuals of colour to the category of the ‘criminal’ in the popular imagination (Bosworth, forthcoming 2006). Wacquant (2000) and Parenti (1999) view this trend, in part, as evidence of a “racial and class backlash against the democratic advances won by the social movements of the preceding decade” (Wacquant 2000: 384). As populations such as African-Americans, or immigrants, have become the target of social anxieties, Wacquant maintains, the prison serves to institutionalize differentiation and segregation (1999: 218). This point substantiates the claim made by Christie that “gulags, Western type will not exterminate, but they have the possibility of removing from ordinary social life a major segment of potential trouble-makers for most of those persons’ lives” (1993: 16). It also corroborates Foucault’s (1977) analysis of the functions of the prison, in light of its record of maintaining delinquency and transforming occasional offenders into habitual offenders. To Foucault, the prison, at least in part, served to represent criminals to other sections of the possibly sympathetic poor as dangerous and wicked, neutralizing their potential alliance. “Penalty does not simply ‘check’ illegalities,” he writes, “it differentiates them, it provides them with a general economy” (1977: 262).

This body of work has potential application to the case of criminalized asylum seekers and immigrants as well. Political campaigns blaming asylum seekers and immigrants for crime, joblessness, and community breakdown have proven successful in recent years in uniting voters from disparate classes in support of ‘tough’ policies, and politicians who support them.<sup>15</sup> Wacquant’s description of poor African-Americans in the US and foreigners in Europe, both disproportionately represented prison populations, as ‘suitable enemies’ who serve as a “symbol of and target for all social anxieties” (1999: 219) might apply to unauthorized immigrants in the US as well. The peaks of anti-immigration sentiment in the US have all taken place during times of economic uncertainty (Nevins 2002: 96) and widespread frustration with such material insecurities as stagnant earnings and increasing service costs consistently underpin outbreaks of anti-immigrant unrest (Muller 1996: 106-09). A valuable inquiry might therefore be to probe the degree to which those most disenfranchised by mass unemployment, the imposition of precarious wage work, and diminished social protection, invest blame for their material insecurities into unauthorized migrants *rather* than considering systematic or national causes of their economic conditions. A similar question might be asked of citizens seeking explanations for the social disorders in their communities, and whose impugning of asylum seekers and ‘illegal’ immigrants keeps them from more thoroughly probing into why and from where such social ills actually derive.

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was required to manage the problems posed by this stratus, hence the paramilitarization of the police force” (Crowther 2000: 150-151).

<sup>15</sup> In California in the early 1990s for example, politicians of both the Democratic and Republican Parties were anxious to come across to the public as tough on border enforcement and unauthorized immigration. Almost forty separate measures aimed at addressing immigration were introduced by members of the California Senate and Assembly in 1993. According to an August 1993 Field Poll, 81 percent of non-Hispanic whites believed unauthorized immigration to be a very serious problem (Nevins 2002: 89)

Still another perspective on the potential social control features of criminalizing asylum seekers concerns the containment or the delegitimation of *foreign* social unrest. This is a function that harks back to the Cold War, when state sympathy for refugees from Communist countries reflected the degree to which refugees symbolized the illegitimacy of America's foes. Since the mid-1980s however, rising numbers of asylum seekers fleeing persecution, civil war, and poverty can to some degree be linked to both US foreign policy and its economic activities. US foreign policy in Central America, for example had enormous influence on the conditions that gave rise to flows of migrants fleeing both violence and poverty. The Reagan administration's support for the Contras in Nicaragua, US support for the El Salvadoran Government's violent repression of a left-wing insurgency during the 1980s, and its well documented contribution to the civil war in Guatemala over decades into the mid-1980s, are only the more militaristic examples of US involvement in conflict and impoverishment in the region.<sup>16</sup> NAFTA, the free trade agreement championed by President Bush Sr. and US business elite, has similarly been implicated in degraded economic conditions in Mexico (Andreas 1998-99). The very *existence* of refugees and economic migrants, therefore, *if considered credible*, pose a potential threat, not to citizens or national security, but to the legitimacy of US foreign policy objectives and economic prerogatives.

## Summary

Asylum and immigration policy, while generated like all policy out of myriad of interests, accidents, and negotiations, does reflect considerably on the prerogatives of a state and its dominant political actors. This Section has offered a few of the functions the employment of penal measures and criminality discourse serve in the context of managing unauthorized migration. While they stand as significant analyses for consideration, a broader point has also been to emphasize the importance of *means* and *tools* as windows to understanding why, and for whom, such contentious practices occur.

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<sup>16</sup> For a more detailed account of the economic and political factors which influenced flows of migrants from Central America over the 1980s and 1990s, see Zolberg 1995, especially pp. 148-152. Many of the displaced citizens of these countries, it should be noted, came to the US illegally and either did not apply for asylum or stayed as 'illegal' immigrants when their asylum claims were rejected.

## 5. CONCLUSION

This paper has attempted to demonstrate how contemporary practices constitutive of asylum and immigration policy in the United States amount to a *de facto* criminalization of asylum seekers and unauthorized immigrants. It questions the assumption that such measures and tactics are designed primarily to keep some, or all asylum seekers and unauthorized immigrants out, as well as the notion that such measures occupy a realm of 'exceptional' politics outside normal political practices. Immigration law spanning over at least the past decade represents the traditionally punitive goals of retribution and deterrence, as well as inserting suspicion and the assumption of 'guilt' into the mechanisms by which unauthorized migrants are processed. The corollary of such laws has been the militarization and technological intensification of border enforcement along the US-Mexico border (Andreas 1998-99; Nevins 2002), as well as a build-up of interior immigration policing (Parenti 1999). The criminality of unauthorized migration, moreover, finds its penal conclusion in the growth of asylum and immigration imprisonment (Simon 1998; Welch 2002). This paper has therefore sought to locate measures such as asylum detention, policing, border militarization, actuarial surveillance and legislated illegality and punishment into the critical framework of crime and punishment theory.

Criminology provides more than just a theoretical language. Constant in such theorizing and research have been accounts of prisons, policing, surveillance and the construction of criminality as functioning not so much to control crime (a task at which these methods have largely failed) but to repress and divide the poor, to legitimate the authority of the state by 'governing through crime' and to serve the needs of the economy by segregating surplus populations and creating 'docile' bodies for labour. Such functions are not specific to the management of registered citizens; they can also help explain contemporary asylum and immigration politics and the proportion of law enforcement resources devoted to managing unauthorized immigrants.

Since September 11<sup>th</sup> 2001 and the subsequently overwhelming employment of military discourse and action by the US government, 'securitization' has seemed an ever more tempting paradigm for understanding asylum policy. What its application risks obscuring however is the much more pervasive, insidious, and too often accepted penal practices through which asylum seekers and unauthorized immigrants are criminalized. The only irony of discrediting security as an appropriate framework for studying asylum politics is that *insecurity* occupies such an essential place in the narrative of contemporary asylum policy: the insecurity inherent to statelessness and the daunting process of applying for refugee status; the insecurity of institutionalized immigration law enforcement agents and other 'professional managers of unease' in need of a *raison d'être* (Bigo 2002); the insecurity of those citizens calling for punitive measures against non-citizens and people of colour, hungry for categorical and categorized sources for their economic, social, and existential fears; and the insecurity of the social order and its profiteers from which the rest of those insecurities at least partially derive.

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