CRIMMIGRATION AS POPULATION MANAGEMENT IN THE "CONTROL SOCIETY": LESSONS FROM THE DETENTION OF ASYLUM-SEEKERS IN ISRAEL

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Scholars have offered various accounts of the forces that have caused the contemporary convergence of immigration enforcement and criminal law enforcement, known as "crimmigration." This article argues that such accounts are insufficient, either because they have difficulty explaining the concrete practices by which crimmigration regimes operate, or because they explain the intersection of criminal law and immigration law solely from the perspective of the former. Additionally, much crimmigration scholarship has difficulty explaining why crimmigration regimes target populations that are principally undeportable, such as asylum-seekers.

To fill these voids, this article conceptualizes crimmigration as a product of what Deleuze has termed the "control society." Such conceptualization clarifies the objectives underlying crimmigration: namely, handling aggregates of presumably deviant groups and keeping dangerous behavior at an acceptable level. Additionally, it assists in explaining the precise practices by which crimmigration regimes operate, particularly the utilization of flexible and decentralized techniques of power. The objectives and manners of exercising power typical of the

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control society currently govern both criminal and immigration law, causing the unprecedented cooperation of these two fields. Furthermore, as a product of the control society, crimmigration is primarily a regime of domestic policing and population management, as opposed to a system dedicated to the deportation of undesirable migrants.

By applying a methodology of textual analysis to the case study of detention of asylum-seekers in Israel, the article demonstrates the vast impact that the underlying principles of the control society have on the making of crimmigration regimes.

Keywords: *crimmigration, detention, asylum-seekers, population management, control society*

INTRODUCTION

Over the past decade, tens of thousands of undocumented asylum-seekers have entered the territory of the state of Israel.[1] Israel has respondesd with a new "Anti-Infiltration Law,"[2] establishing an elaborate system of detention and detention alternatives thereof designed to cope with migrants who have illegally infiltrated the state borders. This law was conceived with the asylum-seeking population in mind, despite the fact that under international law, asylum-seekers are not considered to have illegally entered the state of asylum.[3] It targets asylum-seekers regardless of the Israeli government's acknowledgement that the principle of non-refoulement, which prohibits the deportation or return of refugees to any country in which their lives or

1. Population, Immigration and Border Authority—the Department of Policy Planning, Data Regarding Foreigners in Israel: 2017 Summary 4 (Feb. 2017 ed.), *available at* https://www.gov.il/BlobFolder/generalpage/foreign_workers_stats/he/foreign_workers_stats_q2_2017_1.pdf.

2. Anti-Infiltration Law (Offences and Judgment) (Amendment no. 3 and temporary order), 5772–2012, SH No. 2332, 119 (Isr.) [hereinafter "2012 Amendment"]. This law, which defines the infiltration of Israel as a criminal offense, was amended to allow the long-term detention of those who illegally crossed the border. This was the first of four amendments to the law establishing the Israeli detention system. See discussion below in Part III, Section A.

3. United Nations Convention Relating to the Status of Refugees, art. 31, July 28, 1951, 189 U.N.T.S 137 [hereinafter "Refugee Convention"]. The Refugee Convention determines the responsibilities of nations that grant asylum, and provides the most comprehensive codification of the rights of refugees at the international level.

freedom would be threatened,[4] applies to this population. The detention system stipulated by the Anti-Infiltration Law relies heavily on apparatuses of criminal law and depends on various forms of cooperation with law enforcement officials, in a manner that utilizes the criminal justice system for the purpose of regulating immigration. Furthermore, it uses the immigration system to control conventional crime, as it allows for immigration detention to substitute criminal arrest and imprisonment in cases whereby asylum-seekers have been suspected or convicted of criminal offenses.[5]

The Israeli detention policy is thus consistent with the growing integration of immigration enforcement and criminal law enforcement, known in the literature as "crimmigration."[6] Crimmigration—that is, the intersection between the fields of criminal law and immigration law—signifies a dramatic change in both fields, a process by which they assume mutual goals and incorporate one another's standards and methods.[7] Several crimmigration scholars have offered competing accounts of the forces that have affected this change, linking crimmigration to nativism, namely, the unwelcoming and racist treatment of newcomers;[8] the rise of "ad hoc instrumentalism" in thinking about law and legal institutions, that is, the tendency to attribute little importance to formal legal categories, considering instead legal rules and procedures as a set of interchangeable tools;[9] over-criminalization, that is, the tendency of criminal law to expand into areas for which it seems ill-suited;[10] and the rise of the "culture of control," a type of cultural obsession

4. *Id.* at art. 33.

5. See discussion below in Part III, Section B.

6. Juliet P. Stumpf, *The Crimmigration Crisis: Immigrants, crime, and sovereign power*, 56(2) Am. U. L. Rev. 367 (2006).

7. *See, e.g.*, Ingrid V. Eagly, *Criminal Justice for Noncitizens: an Analysis of Variation in Local Enforcement*, 88(4) Nyu L. Rev. 1126 (2013); Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 Wash. & Lee L. Rev. 469 (2007); Leanne Weber, *The Detention of Asylum-seekers: 20 Reasons Why Criminologists Should Care*, 14(1) Current Issues Crim. Just. 9 (2002).

8. *See, e.g.*, César Cuauhtémoc García Hernández, *Creating Crimmigration*, 2013 Byu Law Review 1457 (2014); César Cuauhtémoc García Hernández, *The Perverse Logic of Immigration Detention: Unraveling the Rationality of Imprisoning Immigrants Based on Markers of Race and Class Otherness*, 1 Colum. J. Race & L. 353 (2012); Racial Criminalization of Migrants in the 21St Century (Salvatore Palidda ed., 2011).

9. David Alan Sklansky, *Crime, immigration, and* ad hoc *instrumentalism*, 15(2) N. Crim. L. Rev. 157 (2012).

10. *See, e.g.*, Jenifer Chacón, *Overcriminalizing Immigration*, 102(3) J. Crim. L. & Criminology, 613 (2012); Maria Isabel Medina, *The Criminalization of Immigration*

with security that causes all social problems to be viewed through the lens of crime and victimization.[11]

This article has two main objectives. First, it offers a close analysis of a current example of crimmigraton law's young life. It describes the evolution of the new Israeli crimmigration regime and attempts to identify the views and perceptions that have affected its development. In so doing, the article illuminates the forces that contribute to the integration of criminal and immigration law in the Israeli case. Second, based on the lessons from the Israeli case, the article aims to contribute to the literature currently attempting to explain crimmigration. Although the Israeli case study—like any case study—has its unique features, it also has much in common with the main practices that have been underscored in the works of crimmigration scholars worldwide. Therefore, I believe that the evolution of the Israeli detention policy may serve to illuminate some important roles of crimmigration in general, particularly its role as a system of social control and population management. The article attempts to gain a better understanding of this role, by linking it to what Gilles Deleuze has described as the rise of the "control society" in the second half of the twentieth century.[12]

The control society framework has been previously used to explain certain practices of crimmigration,[13] but has remained underdeveloped

Law: Employer Sanctions and Marriage Fraud, 5 GEO. MASON L. REV. 669, 674–76 (1997).

11. *See, e.g.*, Jonathan Xavier Inda & Julie A. Dowling, *Introduction: Governing Migrant Illegality*, *in* GOVERNING IMMIGRATION THROUGH CRIME: A READER 1–29 (Julie A. Dowling & Jonathan Xavier Inda eds., 2013); Jennifer Chacón, *Managing Migration Through Crime*, 109 COLUM. L. REV. 135 (2009); James Banks, *The Criminalization of Asylum-seekers and Asylum Policy*, 175 PRISON SERVICE J. 43 (2008); Teresa Miller, *Citizenship & Severity: Recent Immigration Reforms and the New Penology*, 17 GEO. IMMIGR. L.J. 611, 617 (2003). For the culture of control, see, generally, DAVID GARLAND, THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN A CONTEMPORARY SOCIETY (2001); see also JONATHAN SIMON, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR (2007).

12. Gilles Deleuze, *Postscript on the Societies of Control*, 59 OCTOBER 3 (Winter 1992).

13. The most notable examples are found in the works of Robert Koulish, who has concentrated on alternatives to detention, claiming they comply with the logic of Deleuze's "control society" and Ulrich Beck's "risk society." However, such accounts do not apply the control society frame to crimmigration in general and have remained undeveloped by the literature. *See* Robert Koulish, *Entering the risk society: A contested terrain for immigration enforcement*, *in* SOCIAL CONTROL AND JUSTICE: CRIMMIGRATION IN THE AGE OF FEAR 61

as a comprehensive account of crimmigration as a whole. By developing this framework, the article aims to make two main contributions to the existing literature. First, it aspires to gain a better understanding of the concrete practices through which crimmigration regimes operate, by offering a broader definition of "control" than the one currently presented in the literature linking crimmigration to the culture of control. Although the culture of control facilitates explanation of some aspects of the intersection between criminal law and immigration law, it does so primarily from the perspective of the former.[14] Consequently, it has been argued that the culture of control cannot fully explain the particular manner in which crimmigration functions.[15] I therefore suggest we look to the control society, which goes further in explaining the growing collaboration of criminal and immigration law from the standpoint of both fields. The control society, I argue, puts crimmigration in a broader perspective, as it illuminates the new methods through which the nation-state exercises its power in general, rather than only for the purpose of governing criminality. Such manners of exercising power have deeply affected both crime control and immigration enforcement, and are accordingly manifested in crimmigration.

During the past few decades, both criminal law and immigration law have been governed by the prime objectives distinctive of the control society: namely, the goals of handling aggregates of presumably deviant groups and, consequently, keeping dangerous behavior as a whole at an acceptable level. Both fields are characterized by the construction of "dangerous classes" and the abandonment of goals such as correcting and integrating individuals, in favor of managing populations that allegedly threaten state security and sovereignty. Similarly, both have abandoned the goal of eliminating undesirable behavior (criminal activity, unwelcome migration), in favor of bringing it within what Michel Foucault has termed the "bandwidth of the acceptable."[16] It is this shared logic, the article

(Maria João Guia, Maartje van der Woude, & Joanne van der Leun eds., 2012); Robert Koulish, *Spiderman's Web and the Governmentality of Electronic Immigrant Detention*, LAW, CULTURE AND THE HUMANITIES (published online, Feb. 13, 2012).

14. See discussion in Part II, Section B(1).

15. *See mainly* Sklansky, *supra* note 9, at 196.

16. MICHEL FOUCAULT, SECURITY, TERRITORY, POPULATION: LECTURES AT THE COLLÈGE DE FRANCE 1977–1978, 20–21 (2009).

proposes, that has caused the rise of crimmigration as a hybrid of crime control and migration control.

Moreover, crimmigration strategies are highly affected by the shift in the spatiality of power, which characterizes the shift from the disciplinary society to the control society.[17] Whereas disciplinary power is mostly located in panoptic sites and works by spatio-temporal practices, power in control societies has become decentralized and fluid. Such a shift has occurred in the field of criminal law: while we live in an era of mass incarceration,[18] we also witness the adoption of flexible alternatives to detention and imprisonment, such as community service, electronic monitoring systems that impose a form of custody without walls, probation, and parole.[19] This shift has similarly occurred in the field of immigration law, as mechanisms designed to screen and monitor migrants already residing in the territory have caused a "delocalization" of the border.[20] Crimmigration, I argue, ties these two developments together, as it utilizes flexible criminal justice apparatuses to routinely police immigrants within the territory, and hence serve as alternatives to the traditional border. Understanding crimmigration as a product of the control society thus assists in explaining the particular methods by which it operates in order to carry out its underlying objectives.

The second contribution this article makes to the literature resides in its emphasis on crimmigration as a regime of *domestic* policing and population management. Some scholars have underlined the roles that crimmigration plays on a domestic level, such as its contribution to racial profiling and subordination[21] and its effect on securing local communities.[22] However, much crimmigration scholarship focuses on practices that affect migrants primarily at the margins of the state, such as the criminalization of

17. For a discussion of this shift, which is central to Deleuze's argument, see Part II, Section B; for a discussion of this shift in the context of immigration enforcement, particularly alternatives to immigration detention, see Koulish, *Entering the risk society*, *supra* note 13.

18. GARLAND, *supra* note 11, at 19, 61.

19. Malcolm M. Feeley & Jonathan Simon, *The new penology: Notes on the emerging strategy of corrections and its implications*, 30(4) CRIMINOLOGY 449, 457 (1992).

20. *See, e.g.*, William Walters, *Border/Control*, 9(2) EUR. J. SOC. THEORY 187 (2006).

21. *See* Yolanda Vázquez, *Constructing Crimmigration: Latino Subordination in a "Post-Racial" World*, 76 OHIO ST. L.J. 599 (2015); Yolanda Vázquez, *Perpetuating the Marginalization of Latinos: A Collateral Consequence of the Incorporation of Immigration Law into the Criminal Justice System*, 54 HOW. L.J. 639 (2011).

22. *See, e.g.*, Adam B. Cox & Thomas J. Miles, *Policing Immigration*, 80U. CHI. L. REV. 87 (2013).

violations of immigration laws[23] and the growing tendency to deport non-citizens convicted of crimes,[24] leading to mass deportation.[25] The objectives of preventing illegal entry and expelling undesirable migrants are unquestionably central to many crimmigration systems. However, once conceptualized as a product of the control society, it becomes clear that crimmigration is not necessarily concerned with these objectives. Many crimmigration strategies in fact reflect an understanding that, in the age of globalization, undesirable migration cannot be eliminated (or even seriously restricted), and may, at most, be brought to a tolerable level through the day-to-day management of migrants who remain in the territory. This may help to explain why certain practices of crimmigration, particularly immigration detention and its alternatives, are directed at populations that the state has no intention or ability to deport, such as refugees and asylum-seekers.

The Israeli detention policy toward asylum-seekers provides us with a unique opportunity to observe these features of crimmigration. First, the very fact that asylum-seekers, whose deportation is prohibited by international law, are the main population subjected to immigration detention in Israel, enables us to see crimmigration in a new light. Detention of asylum-seekers is, of course, not an occurrence unique to Israel, nor is the subjection of asylum-seekers to detention alternatives that likewise rely on crime control apparatuses. However, most countries subject asylum-seekers to a pre-existing crimmigration system, directed primarily at other types of undocumented migrants. Moreover, while asylum-seekers in such countries are not exempt from the crimmigration regime, they are typically immune to some of its ramifications, and are usually detained only while their asylum claims are being processed or upon their rejection.[26] In Israel,

23. *See, e.g.*, Michael T. Light, Michael Massoglia, & Ryan D. King, *Citizenship and Punishment: The Salience of National Membership in U.S. Criminal Courts*, AM. SOCIOL. REV. 79 (2014); Chacón, *Overcriminalizing Immigration*, *supra* note 10; Ingrid V. Eagly, *Prosecuting Immigration*, 104 NW. U. L. REV. 1281 (2010); Chacón, *Managing Migration*, *supra* note 11; Miller, *supra* note 11, at 617.

24. *See, e.g.*, Mary Bosworth, *Deportation, detention and foreign-national prisoners in England and Wales*, 15 CITIZENSHIP STUDIES 583 (2011); Juliet Stumpf, *Fitting Punishment*, 66WASH. & LEE L. REV., 1683 (2009); Jennifer M. Chacón, *Whose Community Shield?: Examining the Removal of the "Criminal Street Gang Member"*, U. CHI. LEGAL F. 317, 321–24 (2007).

25. *See, e.g.*, Ingrid V. Eagly, *Criminal Justice in the Era of Mass Deportation*, 20(1) NEW CRIM. L. REV. 12 (2017).

26. See discussion below in Part II, Section A(1).

conversely, asylum-seekers constitute the population that has inspired the enactment of the crimmigration regime and are this regime's prime target. Prior to the arrival of African asylum-seekers over the past decade, immigration detention was quite uncommon in Israel, and it was only in 2012 that Israel began to view detention and detention alternatives as a sustainable solution to the problem of undocumented migration. Asylum-seekers in Israel are subjected to these measures despite the government's acknowledgement that they cannot be deported and regardless of the status of their individual asylum claims. This demonstrates that the expulsion of undesirable migrants is not necessarily a defining feature of crimmigration.

Second, the Israeli crimmigration regime entails techniques of power that are particularly compatible with those of the control society. Asylum-seekers in Israel are constantly categorized into groups of risk, in order to prioritize the level of state supervision needed to keep their perceived dangerousness within the bandwidth of the acceptable. The practices used to manage the asylum-seeking community are highly flexible, both in the sense that they function primarily via open sites, and in terms of the wide discretion they grant to state officials. Furthermore, the use that Israeli state officials make of criminal law as a standard for differentiating between those asylum-seekers who are to be detained and those who are to remain free, exceeds that of most crimmigration regimes. Whereas many countries detain and deport migrants who have been *convicted* of criminal offenses, in Israel it is enough for asylum-seekers to be *suspected* of an offense for their status to be revoked.[27] This policy, which prioritizes the incapacitation of those who have risen "above the radar" and have "burdened" the authorities, is also highly consistent with the characteristics of the control society.

The third sense in which the Israeli case is particularly illuminating has to do with the level of the judiciary's involvement in the making of the crimmigration regime. The crimmigration policies of most countries have gradually emerged over several decades. Conversely, Israeli crimmigration is the product of a rushed and condensed process, triggered in response to what was considered a mass influx of asylum-seekers and consisting of an intensive four-year "ping-pong" between the legislator and the High Court of Justice.[28] This was a circular process: Parliament amending the Anti-

27. See discussion below in Part III, Section B.

28. At the urging of the executive branch, which drafted the law.

Infiltration Law to include long periods of immigration detention, the court striking down the amendment and referring the legislation back to Parliament, and so forth. It took three petitions to the court and four amendments to the law, as well as some pertinent Supreme Court litigation,[29] to reach a detention policy considered constitutional by the court. When the court finally did settle for this policy, however, it did so based on justifications that strongly echoed the objectives underlying the control society. The court's arguments, as well as the very fact that the logic of control had prevailed as the narrative agreed upon by all three branches of government, demonstrate just how powerful this logic has become. Observing the "negotiation process" between the branches of government thus enables us to view crimmigration in the making and examine the manner in which this process may potentially transform it into an apparatus of the control society.

The layout of this article is as follows. Part I introduces the detention mechanisms instigated in Israel to govern the population of asylum-seekers. Part II reviews the literature that informs my case study analysis. Section A begins with a brief description of the norms governing detention and deportation of asylum-seekers under international law, specifying that principally asylum-seekers should be largely immune to the ramifications of the crimmigration regime. Nevertheless, as I demonstrate, many countries subject asylum-seekers to measures associated with crimmigration. I then move on to discuss the various explanations offered in the literature for the causes of crimmigration. I argue that none of these previous accounts fully clarifies the particular methods adopted by crimmigration regimes or the precise objectives that criminal and immigration law have joined to accomplish, suggesting the need for a theory that explains these issues from the perspectives of both fields of law. Section B proposes such a theory. It begins by presenting the notion of the control society, and proceeds to demonstrate that its underlying principles have deeply affected both criminal and immigration law. My argument is that under the control society, the two fields of law have undergone parallel transitions. In the field of criminal

29. The Israeli Supreme Court functions both as the High Court of Justice and as the high appellate court. *See* Basic Law: The Judiciary, 5744–1984, § 15, SH No. 1110, 78 (Isr.). Although the constitutional petitions challenging the Anti-Infiltration Law were filed to the High Court of Justice, there were also several administrative appeals challenging the policy to detain asylum-seekers suspected or convicted of criminal activity, which were submitted to the appellate court. See discussion below in Part III, Section B.

law, this transition may be entitled a shift from an "individual offender model" to a "population management model." Similarly, in the field of immigration law, it may be entitled a shift from a "management of territory model" to a "population management model."[30] As clarified later on, both transitions are representative of similar objectives and, consequently, of similar techniques mobilized to achieve these objectives—all of which encourage criminal and immigration law to cooperate on an unprecedented level.

Part III presents the case study analysis of Israel's detention policy toward asylum-seekers. Given the centrality of Supreme Court litigation to the making of this policy, I focus my enquiry on this litigation. The enquiry is based on the legislation (including the draft bills) and executive orders that were contested at court, as well as the legal documents comprising the litigation, that is, the court verdicts and the documents handed in by the litigating parties. These documents are examined through a methodology of textual analysis,[31] aiming to identify the perceptions and objectives guiding both the government and the court in "negotiating" the character of the Israeli crimmigration regime. Through this methodology I attempt to illuminate the process by which the young Israeli crimmigration regime has been constructed in the image of the control society.

Parts IV and V, devoted to discussion and conclusions, argues that the Israeli crimmigration policy is highly focused on the tasks of population management, risk management, and policing. This policy explicitly deploys detention powers for dispersing the asylum-seeking population and controlling conventional crime that is unrelated to any breach of immigration laws. It allocates resources (the exercise of detention powers) primarily via the classification of asylum-seekers according to the perceived risk that they pose to Israeli society. Although generally viewing all asylum-seekers as a dangerous class, so far the Israeli policy has never been designed to eliminate the perceived threats posed by this population, but rather, to manage and reduce them. The flexibility underlying this policy causes it to function by fluid techniques of power, such as an open detention center,

30. *See* Mathew Coleman & Austin Kocher, *Detention, deportation, devolution and immigrant incapacitation in the US, post 9/11*, 177(3) THE GEOGRAPHICAL JOURNAL 228, 229 (2011).

31. Textual analysis is a methodology adopted for gathering information about how other human beings make sense of the world and offering a glimpse into the set of beliefs through which people from different cultures and subcultures operate. *See, e.g.*, ALAN MCKEE, TEXTUAL ANALYSIS: A BEGINNER'S GUIDE (2003).

periodical reporting requirements, and particularly flexible standards for re-detaining released asylum-seekers. These objectives and techniques represent the type of decentralized power exercised by control societies.

Based on these characteristics, I conclude that as a product of the control society, the true role that crimmigration plays in Israel is one of domestic policing. It has little to do with border control and deportation, and much to do with dispersing, supervising, penalizing, and keeping asylum-seekers in a state of constant uncertainty concerning their status. This means that at least some of the crimmigration strategies that we have come to know and identify with the objective of expelling undesirable migrants, may just as easily be identified with the task of regulating the lives of territorially present migrants. Consequently, I emphasize the need to pay special attention to the effects that crimmigration has on the day-to-day lives of migrants residing in the state long-term.

I. NEW MECHANISMS DESIGNED TO GOVERN THE ASYLUM-SEEKING POPULATION

Over the past decade, tens of thousands of asylum-seekers from African countries entered the state of Israel via the borders of the Sinai Peninsula. Israel's attitude toward this population—currently consisting of approximately 40,000 people[32]—is complex. On the one hand, the Israeli government regards them as illegal "infiltrators," claiming they are not refugees but rather migrant workers. On the other, the government acknowledges that their deportation to their home countries is currently forbidden under the principle of non-refoulement, which is a cornerstone of international refugee law.[33] At the request of the United Nations, Israel has adopted a policy known as "temporary non-refoulement," under which it refrains generally from deporting asylum-seekers based on their country of origin.[34]

32. Data Regarding Foreigners in Israel, *supra* note 1.

33. Refugee Convention, *supra* note 3, at art. 33; U.N. High Commissioner for Refugees (UNHCR), UNHCR Note on the Principle of Non-Refoulement, Nov. 1997, http://www.refworld.org/docid/438c6d972.html.

34. Sharon Harel, *The Development of the State of Israel's Asylum System: The Process of Transferring the Authority of Treatment of Applications for Asylum from the UNHCR to the State of Israel*, *in* Where Levinsky Meets Asmara: Social and Legal Aspects of Israeli Asylum Policy 43, 61 (Tally Kritzman-Amir ed., 2015) (Isr.). This policy is similar,

Asylum-seekers residing in Israel are granted a "conditional release visa" that entitles them to remain in the country temporarily, with no additional rights.[35] They are excluded from all aspects of the welfare state, with the exception of emergency medical treatment[36] and the right to public education.[37] They are also formally excluded from the labor force, as their visas do not entitle them to a work permit. However, the government's formal policy is to refrain from indicting those who illegally employ asylum-seekers.[38] Additionally, individual asylum claims filed with the Ministry of Interior are examined at a slow pace and almost categorically denied, with the current approval rate of less than 1 percent.[39]

A main means of carrying out this bipolar policy has been the establishment of an extensive system of administrative detention for governing

but not identical, to the "temporary protection" regime recognized under international law. International law defines "temporary protection" as a measure to be taken in situations of exceptional humanitarian crisis, in which a country must deal with a mass influx of displaced persons and lacks the ability to process such a large amount of individual asylum claims. In such cases, the country may provide the entire group of displaced persons with immediate and temporary protection that does not entail full refugee status. However, international norms prohibit the use of temporary protection as a permanent substitute for granting refugee status to those eligible for such status. Additionally, while exercised, temporary protection entails a minimum set of rights, parallel to those granted to refugees. *See, e.g.*, UNHCR, Guidelines on Temporary Protection or Stay Arrangements (Feb. 2014), http://www.refworld.org/docid/52fba2404.html. For a general discussion of temporary protection regimes, see, e.g., Joan Fitzpatrick, *Temporary Protection of Refugees: Elements of a Formalized Regime*, 94 AM. J. INT'L L. 279 (2000). In Israel, conversely, asylum-seekers do not enjoy most of the rights granted under the temporary protection regime, and temporary non-refoulement is envisioned as a permanent substitute to granting refugee status.

35. Entry into Israel Law, 5712–1952, § 2(a)(5), 6 LSI 159 (1951–1952) (Isr.) [hereinafter "Entry Law"].

36. In the sense that hospitals are forbidden by law to deny uninsured patients treatment in life-threatening situations. *See* Patients' Rights Law, 5756–1996, § 3(b), SH No. 1591, 327 (Isr.).

37. In the sense that they are able to enroll their children in schools, as the law obligating parents to school their children applies to all children residing in Israel, regardless of their status. *See* Compulsory Education Law, 5709–1949, § 2(a), SH No. 26, 287 (Isr.).

38. *See* HCJ 6312/10 Kav La'Oved v. the Government (Jan. 16, 2011), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

39. ASAF (AID ORGANIZATION FOR REFUGEES AND ASYLUM SEEKERS IN ISRAEL), ASYLUM-SEEKERS IN ISRAEL: BACKGROUND AND FIGURES 1 (Nov. 2016), *available at* http://assaf.org.il/en/node/46; Ilan Lior, *Nearly 15,000 asylum requests still pending—Israel yet to approve single one in 2016*, HAARETZ (July 21, 2016), *available at* https://www.haaretz.com/israel-news/.premium-over-14-000-asylum-seekers-awaiting-answer-1.5413050 (Isr.).

the asylum-seeking population. This system has been created via an amendment to the Israeli Anti-Infiltration Law,[40] which stipulates that any person who has infiltrated the Israeli border must be detained for a period of three months. The law considers any person who has entered the state by any means other than a designated border check-post an illegal "infiltrator," and does not exempt persons filing for asylum in accordance with the Refugee Convention.[41] Asylum-seekers who have arrived in Israel are immediately taken to a special detention facility, which is by nature very similar to a conventional prison and is managed by the State Correctional Authority. After this three-month detention period, the Border Authority may release the asylum-seekers into the community, provided they do not pose a threat to national security, public safety, or public health.[42] The amendment stipulates that an "infiltrator's" country of origin may serve as an indication of such a threat[43]—a criterion that applies mainly to Sudanese asylum-seekers, as Sudan is formally considered an enemy of Israel.[44]

After three months, some asylum-seekers receive the "conditional release visa," which obligates them to report periodically to the Border Authority and renew their permit. However, the amendment to the Anti-Infiltration Law has also instituted a second type of detention, which takes place in an open residence center. This center, known by the name Holot, is located in

40. Anti-Infiltration Law (Offences and Judgment) (Amendment no. 5 and temporary order), 5776–2016, SH No. 2530, 544 (Isr.) [hereinafter "2016 Amendment"].

41. The law therefore does not mention the term "asylum-seeker" but only the term "infiltrator." Consequently, this article likewise uses the term "infiltrator" when referring to the language of the law. In all other instances referring to the population of asylum-seekers in Israel, however, I use the term "asylum-seeker."

42. Additionally, that their deportation has not been prevented by their own fault. *See* the 2016 Amendment, *supra* note 40, at § 30A(D).

43. *Id.* at § 30A(d)(2).

44. An enemy state need not have formally declared war on Israel to have earned such a designation. Israeli legislation defines this term broadly to include any entity with whom Israel is in a de facto state of conflict, regardless of whether hostile military action has been taken. *See* Michael Kagan, *Destructive Ambiguity: Enemy Nationals and the Legal Enabling of Ethnic Conflict in the Middle East*, 38 COLUM. HUM. RTS. L. REV. 263, 308–15 (2006–2007). In the case of the Sudanese asylum-seekers, the presumption of dangerousness stems from the classification of Sudan as a state sponsor of terrorism by the United States Department of State, as well as from reliable representations by Israel that arms and explosives originating in Sudan are smuggled via Egypt to Israel or to the Gaza Strip. *See* Avi Perry, *Solving Israel's African Refugee Crisis*, 51(1) VA. J. INT'L L. 157, 163–64 (2010).

the middle of the desert and is likewise managed by the State Correctional Authority. Pursuant to the amendment, the Border Authority may force "infiltrators," whose deportation is currently prevented, to reside at Holot for a one-year period, after which they are released into the community. Residents of Holot are allowed to leave the center during the day but are required to report back every evening, sleep at the center, and receive permission to leave the center for longer periods or to accept visitors.[45] Several populations (minors, women, persons over age 60, persons suffering from health problems, victims of crimes) are exempt from residence at Holot,[46] and the rest of the asylum-seeking population is still too large to reside at the center simultaneously as it has the capacity to house only 3,360 people.[47] The decision to send an asylum-seeker to Holot thus depends on criteria formulated by the Border Authority, which are updated from time to time.[48]

Another group subjected to the detention powers consists of asylum-seekers suspected or convicted of criminal offenses during their residence in Israel. Using immigration detention to confine such asylum-seekers is implemented in accordance with an administrative directive, initiated by Israel's Attorney General.[49] The Attorney General Directive states that an "infiltrator" convicted or suspected of criminal conduct may automatically and indefinitely be detained, pending a hearing. In the hearing, conducted by the Border Authority, asylum-seekers give their version of the event in question. Convicted asylum-seekers sentenced to imprisonment are transferred to the Border Authority by the State Correctional Authority upon completion of their prison terms and are further

45. Anti-Infiltration and Guaranteed Exit of Infiltrators Law (Amendments and temporary order), 5775–2014, SH No. 2483, 95 (Isr.), at § 32H, § 32J(A)(5) [hereinafter" 2014 Amendment"].

46. *Id.* at § 32D(b).

47. HCJ 7385/13 Eitan et al. v. the Israeli government et al. (Sept. 22, 2014), Nevo Legal Database (by subscription, in Hebrew) (Isr.); see ¶ 3 on the verdict of Justice Amit.

48. *See* Population, Immigration and Border Authority, Updated Criteria for Transfer of Infiltrators to the Holot Center, *available at* https://www.gov.il/he/departments/news/criteria_for_relocating_infilitrators_to_holot_facility (Isr.) (last visited Aug. 10, 2017).

49. Guideline for Coordinating the Treatment of Infiltrators Involved in Criminal Activity Between the Police and the "Population, Immigration and Border Authority" (2014) (on file with author) [hereinafter Attorney General Directive].

incarcerated in a detention facility. Asylum-seekers suspected of criminal conduct, conversely, may be subjected to this procedure rather than being indicted. This means that their criminal case is formally closed and the police transfer them to the Border Authority, where they are subjected to the alternative sanction of immigration detention. Asylum-seekers who are incarcerated in accordance with this Directive are normally sent to a closed detention center rather than to Holot. However, this decision is left to the discretion of the Border Authority, and depends on the severity of the offense. Additionally, the current criteria for sending asylum-seekers to Holot focus on involvement in criminal activity, stating that asylum-seekers suspected or convicted of offenses that do not invoke the Attorney General Directive should alternatively be sent to Holot.[50]

Furthermore, these means for controlling crime have become a device for implementing the powers established by the amendment to the Anti-Infiltration Law.[51] The reason is that the law assists the executive in differentiating between those asylum-seekers who should be detained and those who may remain free, as well as between those who should be detained at the closed detention center and those who should be sent to Holot. The latter bureaucratic decision is further affected by another penal mechanism, which allows the transfer of asylum-seekers, who have committed various offenses during their residence at Holot, to a closed detention center. Following a disciplinary hearing held by the manager of Holot, such asylum-seekers may be subjected to various sanctions, the most severe being a four-month period at a closed center. Some of the

50. Updated Criteria for Transfer of Infiltrators to the Holot Center, *supra* note 48; *see also* AdminA 5296/15 Tspzion Tspbraham v. the Ministry of Interior (Feb. 21, 2016), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

51. Formally, the Attorney General Directive the guideline does not reference the Anti-Infiltration Law, but rather the Entry Law, which authorizes the head of the Border Authority to re-detain undocumented migrants who have been released from immigration detention but have later been proven a risk to national security, public safety, or public health. *See* Entry Law, *supra* note 35, at § 13G(a) and § 13F. The Attorney General Directive draws on this authority to re-detain asylum-seekers suspected or convicted of criminal offenses, who have been detained upon their arrival in accordance with the Anti-Infiltration Law and later released into the community. Given the fact that such decisions to re-detain asylum-seekers result in their incarceration in the detention centers established by the Anti-Infiltration Law, I view the Attorney General Directive as a de facto device for implementing the powers of this Law. For a short discussion of the difference between the Anti-Infiltration Law and the Entry Law, see Part III.

offenses that invoke these sanctions are breaches of the specific rules of conduct of Holot, and others, such as assault and battery, are clearly criminal by nature.[52]

II. LITERATURE REVIEW: BETWEEN CRIMMIGRATION AND THE CONTROL SOCIETY

A. The Rise of Crimmigration

1. Crimmigration and asylum-seekers

Over the past years, much attention has been drawn to the growing intersection between criminal and immigration law, which Juliet Stumpf has labeled "crimmigration."[53] The literature emphasizes several main occurrences of which crimmigration is comprised. First, there is an increasing criminalization of immigration lawsviolations, which in the past would result only in the administrative sanction of deportation.[54] Second, deportation is now an adjunct to criminal punishment in most criminal cases involving noncitizens,[55] turning it into a de facto tool of crime control.[56] Third, there is an increasing reliance on administrative detention and detention alternatives for enforcing decisions to deport noncitizens.[57] Fourth, there is a general dependence on officials and mechanisms of criminal law in civil immigration proceedings, which has produced

52. The 2014 Amendment, *supra* note 45, at § 32T(a); *compare* the Penal Law, 5737–1977, §§ 333–34, SH No. 864, 226 (Isr.).

53. Stumpf, *supra* note 6.

54. *See, e.g.*, Light et al., *supra* note 23; Chacón, *Overcriminalizing Immigration*, *supra* note 10; Eagly, *supra* note 23; Chacón, *Managing Migration*, *supra* note 11; Miller, *supra* note 11, at 617. However, for a contrary view regarding the U.K., see ANA ALIVERTI, CRIMES OF MOBILITY: CRIMINAL LAW AND THE REGULATION OF IMMIGRATION 137 (2013). Aliverti demonstrates that the increase in immigration offenses is not matched by their actual prosecution in practice.

55. *See, e.g.*, Bosworth, *supra* note 24; DANIEL KANSTROOM, DEPORTATION NATION: OUTSIDERS IN AMERICAN HISTORY 653 (2010); Stumpf, *supra* note 24; Chacón, *supra* note 24, at 321–24.

56. Sklansky, *supra* note 9, at 175–81.

57. *See, e.g.*, Cesar Cuauhtemoc Garcia Hernandez, *Immigration Detention as Punishment*, 61(5) UCLA L. REV. 1346 (2013–2014); Anil Kalhan, *Rethinking Immigration Detention (sidebar)*, 110 COLUM. L. REV. 42 (2010).

unprecedented cooperation between criminal and immigration law enforcement.[58] For example, the police in many countries are increasingly called upon to enforce border controls inland and at the border, while prison officers are routinely required to single out and monitor foreigners who will be deported at the end of their prison term.[59] Such practices have caused a reciprocal process, in which the criminal justice system and the immigration system have begun to influence one another and incorporate one another's standards and norms.[60]

Given this characterization of crimmigration, it would seem that asylum-seekers should generally be immune from its ramifications. Most of the occurrences described in the literature pertain to the criminalization of illegal entry and, even more so, to the deportation of undesirable migrants.[61] Refugees and asylum-seekers, conversely, are generally immune from both deportation and criminalization of illegal entry under international law. The Refugee Convention[62] allows for the principle of non-refoulement to be violated only in cases of refugees who are considered a danger to the security of the country in which they are residing, or who constitute a danger to the community upon having been convicted of a particularly serious crime.[63] The United Nations High Commissioner for Refugees (UNHCR) has interpreted the "particularly serious crime" exception to apply only in "extreme cases" of capital crimes or very grave punishable acts, and has clarified that minor offenses punishable by moderate sentences are not grounds for violating the non-refoulement principle.[64]

58. *See, e.g.*, Anil Kalhan, *The Fourth Amendment and Privacy Implications of Interior Immigration Enforcement*, 41 U.C. DAVIS L. REV. 1137, 1161–63 (2008); Legomsky, *supra* note 7, at 489–500.

59. Ana Aliverti & Mary Bosworth, *Introduction: Criminal Justice Adjudication in an Age of Migration*, 20(1) NEW CRIM. L. REV. 1 (2017); Ana Aliverti, *Enlisting the public in the policing of immigration*, 55 BRIT. J. CRIMINOLOGY, 215 (2015); EMMA KAUFMAN, PUNISH AND EXPEL: BORDER CONTROL, NATIONALISM, AND THE NEW PURPOSE OF THE PRISON (2015).

60. Eagly, *supra* note 7; Legomsky, *supra* note 7; Weber, *supra* note 7.

61. Although, as aforementioned, some literature has focused on roles that crimmigration plays domestically; see notes 20–21.

62. Refugee Convention, *supra* note 3.

63. *Id.* at art. 33(2).

64. UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status: Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, Reissued Dec. 2011, *available at* http://www.unhcr.org/publications/legal/3d58e13b4/

The Refugee Convention also acknowledges that seeking asylum may cause refugees to breach immigration rules. Hence, it requires that, subject to specific exceptions, refugees should not be penalized for their illegal entry or stay in the state of asylum.[65] Depriving asylum-seekers of their liberty via detention, for the mere reason of having entered or stayed illegally, is considered a penalty prohibited by the convention, regardless of whether immigration detention is formally defined by the state as an act of penalization.[66] This is consistent with the norms of international law governing immigration detention in general (i.e., the detention of all migrants residing in the country illegally), which prohibit prolonged detention that is not accompanied by effective deportation proceedings.[67]

The Refugee Convention additionally grants asylum-seekers general freedom of movement in the state of asylum.[68] Although the Convention

handbook-procedures-criteria-determining-refugee-status-under-1951-convention.html?query=handbook%20refugee%20status.

65. Refugee Convention, *supra* note 3, at art. 31.

66. Alice Edwards, Back to Basics: the Right to Liberty and Security of Person and "Alternatives to Detention" of Refugees, Asylum-Seekers, Stateless Persons and Other Migrants Iv (UNCHR Legal and Protection Policy Research Series, Apr. 2011), *available at* http://www.unhcr.org/protection/globalconsult/4dc949c49/17-basics-right-liberty-security-person-alternatives-detention-refugees.html; Gregor Noll, *Article 31 (Refugees lawfully in the country of refuge)*, *in* the 1951 Convention Relating to the Status of Refugees and its Protocol: A Commentary 1243 (Andreas Zimmermann ed., 2011); the phrase "penalties" in Article 31 has thus been interpreted broadly, to include not only forms of criminal punishment but also administrative measures imposed on asylum-seekers due to their entry. *See* James Hathaway, the Rights of Refugees Under International Law 408, 411 (2005).

67. International law does not explicitly address the issue of immigration detention in general (as opposed to the detention of refugees and asylum-seekers in particular). However, the rights to liberty and to protection from arbitrary arrest are specified under two provisions of the Universal Declaration of Human Rights, and were subsequently transferred into article 9 of the International Covenant on Civil and Political Rights, which guarantees liberty and security of person and prohibits arbitrary deprivation of such liberty. *See* A. Res. 217 (III) A, Universal Declaration of Human Rights, at art. 3, 9 (Dec. 10, 1948); United Nations General Assembly, International Covenant on Civil and Political Rights, art. 9 (Dec. 16 1966), Treaty Series, vol. 999, 171, *available at* http://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx; these articles have been interpreted to prevent immigration detention that does not serve as an aid to deportation proceedings. *See, e.g.* European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 5(1)(f), Nov. 4, 1950, E.T.S no. 005, *available at* http://www.echr.coe.int/Documents/Convention_ENG.pdf.

68. Refugee Convention, *supra* note 3, at art. 26.

does allow certain restrictions on freedom of movement, including detention, it stipulates that such restrictions must be "necessary."[69] The executive committee of UNHCR (ExCom) has specified a limited number of circumstances whereby such restrictions may be considered "necessary," and has emphasized that decisions to apply these restrictions must be made on an individual basis and must not amount to a "blanket policy."[70] These principles have been further developed in the UNHCR guidelines relating to the detention of asylum-seekers,[71] which stipulate that the state of asylum must not resort to detention before first considering alternatives.[72] Such protections likewise apply to enemy nationals, who are forced to seek refuge in countries that engage in armed conflict with their countries of origin.[73]

In practice, however, asylum-seekers are affected by various policies consistent with crimmigration. First, some countries tend to narrow the scope of the principle of non-refoulement, by flexibly interpreting the requirement that a refugee commits a particularly serious crime and defining offenses resulting in short-term imprisonment as "particularly serious."[74]

69. *Id.* at art. 31(2).

70. U.N. High Commissioner for Refugees, Detention of Refugees and Asylum-Seekers, Oct. 13, 1986, No. 44 (XXXVII), available at http://www.unhcr.org/4aa764389.pdf; *see also* EDWARDS, *supra* note 66, at 12.

71. UNHCR, Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention, 2012, *available at* http://www.refworld.org/docid/503489533b8.html.

72. *Id.* at Guideline 2.

73. Refugees and asylum-seekers, in other words, are exempt from the "enemy nationals" doctrine in international law, which permits states to infringe the liberty and property interests of enemy nationals during armed conflict. *See* Geneva Convention Relative to the Protection of Civilian Persons in Time of War, arts. 35–44, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287; *see also* Kagan, *supra* note 44, at 281.

74. For example, the United States' Immigration Act of 1990 states that an alien who has been convicted of an aggravated felony shall be considered to have committed a "particularly serious crime." The Immigration Act likewise expanded the definition of "aggravated felony" to include money laundering and violent crimes that resulted in a prison sentence of at least five years. *See* Immigration Act, 8 U.S.C. §§ 501, 1158, 1253 (1990). For a historical review of the evolution of the "particularly serious crime" exception in the United States, see David Delgado, *Running Afoul of the Non-Refoulement Principle: The [Mis]Interpretation and [Mis]Application of the Particularly Serious Crime Exception*, 86 S. CAL. L. REV. 1, 16–23 (2013); see also Michael McGarry, *A Statute in Particularly Serious Need of Reinterpretation: The Particularly Serious Crime Exception to Withholding of Removal*, 51 BOSTON COLL. L. REV. 209 (2010). In the United Kingdom,

This means that penal norms currently play an important role in determining when refugees may be deported and that such deportation may be exercised in a relatively wide variety of cases. Second, many countries make extensive use of immigration detention toward asylum-seekers, both to ensure the deportation of rejected asylum-seekers and to control the whereabouts of asylum-seekers whose claims are under review. In most European countries administrative detention generally exists only as a measure to assist the state in carrying out the deportation of rejected asylum-seekers.[75] However, most common-law countries have adopted legislation allowing relatively long detention periods of undocumented asylum-seekers upon their arrival. The length of these periods differs from country to country, and may principally exceed the three-month period that was recently adopted in Israel.[76]

Similarly, it is common for released asylum-seekers, both in the common-law world and in continental Europe, to be subjected to some type of detention alternative. These arrangements may entail various restrictions, such as an obligation to register one's place of residence, to surrender one's passport or other documentation, to appear for appointments and asylum procedures, or to report to the authorities periodically.[77] Some restrictions rely mainly on crime control mechanisms, such as various types of parole, bail,[78] electronic bracelets,[79] as well

the Nationality, Immigration and Asylum Act deems as "particularly serious" any offense attracting a punishment of at least two years' imprisonment, or any offense specified in Home Office regulations; *see* Nationality, Immigration and Asylum Act 2002, ch. 41, § 72 (Eng.); Liz Fekete & Frances Webber, *Foreign nationals, enemy penology and the criminal justice sys*tem, 51(4) RACE & CLASS 1, 20 (2010).

75. *See* OXFORD PRO BONO PUBLICO, REMEDIES AND PROCEDURES ON THE RIGHT OF ANYONE DEPRIVED OF HIS OR HER LIBERTY BY ARREST OR DETENTION TO BRING PROCEEDINGS BEFORE A COURT: A COMPARATIVE AND ANALYTICAL REVIEW OF STATE PRACTICE (2014), *available at* http://ohrh.law.ox.ac.uk/wordpress/wp-content/uploads/2014/05/2014.6-Arbitrary-Detention-Project.pdf.

76. *Id.*

77. For example, France, Luxembourg, and South Africa require asylum-seekers to present themselves in person to renew identity documentation. Other countries—such as Austria, Canada, Denmark, Greece, Hong Kong, Ireland, Japan, Norway, Sweden, and the United States—have legal frameworks that can require individuals to report to the police or immigration authorities at regular intervals. *See* EDWARDS, *supra* note 66, at 53–54.

78. *Id.* at 54–55.

79. Michael Welch, *Economic man and diffused sovereignty: A critique of Australia's asylum regime*, 61 CRIME, LAW & SOC. CHANGE 81 (2014); Koulish, *Spiderman's Web, supra* note 13;

as other biometric technologies,[80] and in extreme cases even partial house arrest.[81]

However, to say that asylum-seekers are treated exactly like other groups of migrants under most crimmigration regimes would also be inaccurate. Asylum-seekers convicted of criminal offenses cannot be deported as easily as other noncitizens.[82] Although they may generally be subjected to immigration detention, it is important to note that some countries exempt this population from detention nearly entirely,[83] or have adopted a presumption that in detention is unnecessary for asylum-seekers.[84] Additionally, some countries, mainly in continental Europe, exercise special detention alternatives that do not rely on crime control apparatuses. Such countries obligate asylum-seekers to reside in special housing centers while their

Jonathan Darling, *Becoming Bare Life: Asylum, Hospitality and the Politics of Encampment*, 27 ENV'T & PLAN.: SOC'Y & SPACE 649 (2009).

80. Koulish, *Spiderman's Web, supra* note 13.

81. EDWARDS, *supra* note 66, at 78.

82. Even those countries that have adopted a broad definition of "particularly serious crime" still demand that the asylum-seeker be convicted of a relatively grave offense or sentenced to a term of imprisonment; *see supra* note 74. In cases of other noncitizens, conversely, even light offenses that resulted in lenient punishments may sometimes lead to deportation; *see, e.g.* Miller, *supra* note 11, at 631–33.

83. For example, Bulgaria, Malta, Portugal, and Spain exempt asylum-seekers from detention. In France, applicants for international protection may be detained only when applying for protection at the border. *See* THE USE OF DETENTION AND ALTERNATIVES TO DETENTION: SYNTHESIS REPORT FOR THE EMN FOCUSED STUDY 2014, 15–16 (2014), *available at* https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/networks/european_migration_network/reports/docs/emn-studies/emn_study_detention_alternatives_to_detention_synthesis_report_en.pdf; the Philippines provides asylum-seekers with a special certification and releases them from detention without conditions; *see* EDWARDS, *supra* note 66, at 53. South African law requires release from detention of anyone applying for asylum, unless other concerns prevail such as national security. Asylum-seekers in South Africa thus have the right to remain free from detention pending the outcome of their asylum application. Once an asylum permit is withdrawn, the individual may be arrested and detained pending final adjudication of the asylum claim; however, any detention of an asylum-seeker longer than 30 days must be reviewed by a judge of the High Court. *See* EDWARDS, *supra* note 66, at 53; OXFORD PRO BONO PUBLICO, *supra* note 75, at 26.

84. A prime example is Canada, where asylum-seekers must be paroled whenever the purpose of detention may be fulfilled by less intrusive means. EDWARDS, *supra* note 66, at 56–60.

asylum claims are under review,[85] or while awaiting deportation upon their claims being denied.[86]

2. Previous accounts of crimmigration

Several attempts have been made in the literature to explain the growing reliance on crime control apparatuses for the purpose of governing immigration.[87] The reason is that although political communities have, at times, taken increased measures to exclude immigrants aspiring to belong, only in the past three decades have crime control mechanisms begun to play a central part in such policies.[88] The existing literature generally attributes this development to three major tendencies.[89] The first is nativism, namely, the unwelcoming and racist treatment of newcomers.[90] The second is overcriminalization, namely, the tendency of criminal law to expand into areas for which it was once considered ill-suited.[91] The third is a tendency termed

85. For example, Germany and Switzerland obligate asylum-seekers to reside in a reception center upon their arrival. *See, respectively*, Asylverfahrensgesetz, AsylVfG [Asylum Procedure Act] art. 47 (Ger.); *and* Ordonnance 1 sur l'asile relative à la procedure [Asylum Act] art. 26 (Swi.).

86. For example, Belgium has established "return houses," aimed at facilitating the return of families with minor children who had no right to remain in the country. Families residing in these housing projects are only obligated to stay there during the night. A similar project exists in Scotland. *See* EDWARDS, *supra* note 66, at 69–78.

87. Alongside this body of literature dedicated to explaining crimmigration, there is, of course, a vast body of literature focusing on normative critique of this occurrence. For critiques focusing on procedural justice, see, e.g., Elizabeth Rossi, *Revisiting INS v. Lopez-Mendoza: Why the Fourth Amendment Exclusionary Rule Should Apply in Deportation Proceedings*, 44 COLUM. HUM. RTS. L. REV. 477 (2013); Michael Flynn, *Who must be Detained? Proportionality as a Tool for Critiquing Immigration Detention Policy*, REFUGEE SURV. Q. 1 (2012); Mark Noferi, *Cascading Constitutional Deprivation: The Right to Appointed Counsel for Mandatorily Detained Immigrants Pending Removal Proceedings*, 18(1) MICH. J. RACE & L. 63 (2012); Angela M. Banks, *Proportional Deportation*, 55(4) WAYNE L. REV. 1651 (2009); Legomsky, *supra* note 7. For critiques focusing on crimmigration's impact on membership in the political community, see, e.g., Juliet P. Stumpf, *Doing Time: Crimmigration Law and the Perils of Haste*, 58(6) UCLA L. REV. 1705 (2011); Stumpf, *The Crimmigration Crisis*, *supra* note 6.

88. Sklansky, *supra* note 9, at 194; though for the argument that contrary to popular view, the origins of crimmigration in the United States may actually be detected in the 1950s, see Rachel E. Rosenbloom, *Policing Sex, Policing Immigrants: What Crimmigration's Past Can Tell Us About Its Present and Its Future*, 104 CAL. L. REV. 149 (2016).

89. Sklansky, *supra* note 9, at 160.

90. See sources cited *supra* note 8.

91. See sources cited *supra* note 10.

by David Garland the "culture of control," namely, a type of cultural obsession with security that causes all social problems to be viewed through the lens of crime and victimization. The culture of control leads criminal law to play an increasing role in the exercise of power in a variety of social contexts[92]—a tendency claimed by some scholars to explain criminal law's current impact on the field of immigration.[93] Other scholars have made similar arguments by focusing on a tendency termed "governing through crime" by Jonathan Simon, namely, the increasing inclination to construe problems of regulation as issues of crime and criminality.[94] The literature applying Simon's work to crimmigration suggests that the increasing salience of crime as a rationale for more punitive treatment of immigrants is indicative of immigration being governed through crime.[95]

A fourth explanation has been offered by David Sklansky. Sklansky links crimmigration to the rise of "ad hoc instrumentalism"—a manner of thinking about law that attributes little importance to formal legal categories. Instead, it views legal rules and procedures as a set of interchangeable tools, which officials are encouraged to choose from according to whichever are most effective in the given situation.[96] Ad hoc instrumentalism, Sklansky argues, is a defining feature of crimmigration, which relies on a blurred boundary between criminal and immigration law to empower state officials to view both as tools that may be employed strategically against the perceived threat of the "criminal alien."[97] Often the tools will work best in combination, so individuals are shifted back and forth between the law enforcement system and the immigration enforcement system, or targeted by both simultaneously.[98]

Sklansky emphasizes that ad hoc instrumentalism should not be understood as the sole reason for crimmigration, but rather as one that

92. GARLAND, *supra* note 11; *see also* Sklansky, *supra* note 9, at 160.

93. *See, e.g.*, Banks, *supra* note 11.

94. Jonathan Simon, *Governing Through Crime*, *in* THE CRIME CONUNDRUM: ESSAYS ON CRIMINAL JUSTICE 174 (Lawrence M. Friedman & George Fisher eds., 1997); SIMON, *supra* note 11; for the differences between the arguments of Simon and Garland, see SIMON, *supra* note 11, at 25–26.

95. Miller, *supra* note 11; *see also* Chacón, *Managing Migration*, *supra* note 11; and Legomsky, *supra* note 7, at 475.

96. Sklansky, *supra* note 9.

97. *Id.* at 161, 162, 201–02.

98. *Id.* at 202.

complements the previous accounts of this phenomenon. Nevertheless, he argues that each of these previous accounts cannot, by itself, fully explain the contemporary intersection between criminal and immigration law.[99] First, Sklansky dismisses the notion that this intersection is simply a pragmatic response to the rising problem of crime committed by noncitizens. He does so by convincingly demonstrating that crimmigration has been on the rise in the United States despite the fact that crime rates have been steadily decreasing over the past two decades, and regardless of the absence of any evidence that immigrants are responsible for a disproportionate share of crime. Quite the contrary, statistics have shown immigrants to be generally more law-abiding than native-born Americans.[100] However, Sklansky rejects the attempts to explain this discrepancy between the level of crime committed by immigrants and the level of law enforcement applied to immigrant based solely on nativism. Nativism, he argues, fails to account for the role of criminal law in the backlash against immigrants, as opposed to other possible means of exclusion (for example, limiting immigration quotas or enhancing traditional measures of immigration enforcement).[101] The blurring of the boundaries between criminal and immigration law is a relatively new occurrence; nativism is not. Thus, nativism by itself cannot explain why criminal and immigration law have recently become intertwined.

Next, Sklansky considers over-criminalization and cultural obsession with control—two tendencies that he ties together. He rejects the possibility that crimmigration is simply a particular example of over-criminalization, namely, a replication of the relentless expansion of criminal law in the context of immigration. Although concurring that this explanation has some merit, Sklansky claims that it is yet unclear that the blurred boundary between criminal and immigration law is indicative of the former colonizing the latter rather than vice versa.[102] Similarly, the cultural obsession with control, viewed by Sklansky as a more nuanced version of over-criminalization,[103] is an important component of crimmigration, but cannot fully account for the particular manner in which the "criminal alien" has been

99. *Id.* at 161.
100. *Id.* at 189–92.
101. *Id.* at 194.
102. *Id.* at 195.
103. *Id.*

targeted. It does not explain such occurrences as the continued existence of criminal law enforcement and immigration enforcement as two distinct systems; the criminalization of illegal entry and growth of a parallel system of jails for noncitizens suspected of immigration violations; or the way that local police have become enlisted in immigration work, drawing them away from dealing with violent offenses.[104] In other words, the theories concerning the culture of control and governing through crime may explain those crimmigration techniques that are indicative of criminal law's "takeover" of the immigration system. They prove less explanatory of the many cases in which the objectives and needs of the immigration system seem to dictate the priorities of the criminal justice system.

Ad hoc instrumentalism, Sklansky contends, facilitates filling the void left by the competing accounts of crimmigration, as it provides the conditions for the growing cooperation between law and immigration enforcement, and explains their interchangeable use. I agree that ad hoc instrumentalism is a defining feature of crimmigration, as there is no denying that the boundary between criminal and immigration law has grown dependent on ad hoc, instrumental decision making by various state officials.[105] It is also clear that a system that attributes much importance to formal legal categories would be reluctant to regularly utilize criminal law for the purpose of governing immigration, and vice versa. However, two important points must be made with regard to Sklansky's thesis. The first concerns the link that Sklansky draws between cultural obsession with control and over-criminalization. Whereas over-criminalization and cultural obsession both entail the expansion of criminal law into new domains, cultural obsession with control does not necessarily lead to over-criminalization. It may, in fact, even lead to under-criminalization in instances where there are more cost-effective measures to secure an acceptable level of criminality than applying criminal law.[106] Therefore, I am not entirely convinced that cultural obsession with control fails to explain the continued separate existence of the immigration system as a means of coping with the perceived threat of the "criminal alien." However, I do agree that it has difficulties in explaining the vast amount of resources devoted by the criminal justice system to the criminalization of relatively

104. *Id.* at 196.
105. *Id.* at 162.
106. GARLAND, *supra* note 11, at 19.

minor immigration offenses, at the expense of coping with more severe offenses.

The second point is that, as Sklansky himself notes, ad hoc instrumentalism is only explanatory in the sense that it clarifies what *enables* crimmigration.[107] In other words, it does not clarify the precise objectives that criminal and immigration law have joined to fulfill, nor does it fully explain what currently makes these two fields of law particularly and equally suitable for accomplishing these objectives, thus justifying their interchangeable use.

To further understand these issues, I suggest we expand our understanding of the concept of control by moving from the "culture of control" to what Deleuze has termed the "society of control" (or "control society"). The two theories have much in common; however, the control society theory is broader in the sense that it applies not only to the criminal justice system but to other social systems as well. The culture of control and governing through crime are, essentially, theories of criminal law. They illuminate important processes that have begun with the criminal justice system and that have indeed contributed to the rise of crimmigration from the perspective of this system. Nevertheless, they cannot fully explain what is happening in the immigration system that calls for its cooperation with the criminal justice system. After all, not all social systems are equally governed through crime; some are less prone than others to incorporate the norms and methods of criminal law. Why is the immigration system so inclined to do so? Moreover, what allows the immigration system to dictate its priorities to the criminal justice system, as Sklansky points out often happens in crimmigration regimes?

The answer to these questions, I argue, lies in the underlying principles of the control society, which explain the mutual tendencies that currently dominate both the criminal justice system and the immigration system, and thus encourage their intersection. I refer to the theory of the control society as explanatory in the sense that it helps us understand *what* is happening in the field of crimmigration—or perhaps, *how* crimmigration operates—rather than in the sense that it explains *why* crimmigration is happening.[108] In other words, I consider the control society to give the best

107. Additionally, ad hoc instrumentalism is an important descriptive account of crimmigration; see Sklansky, *supra* note 9, at 197.

108. It is my understanding that apart from nativism, none of the theories attempting to explain crimmigration claim to do so in that sense.

account of the concrete objectives and the particular techniques of power mobilized to achieve these objectives, which encourage the interchangeable use of criminal and immigration law.

The next section illustrates the ways in which crimmigration is fueled by the rise of the control society, by means of tracing the parallel transitions that took place in the criminal justice system and immigration system under the impact of this new regime.

B. The Rise of the Control Society

In his lectures "Security, Territory, Population,"[109] Foucault introduces the apparatus of security, claiming that it differs substantially from the disciplinary form of power. "Disciplinary normalization" is designed to individuate the human body according to its modern societal tasks via its constant observance.[110] It transformed criminal punishment by introducing to it the objective of correcting the individual through techniques of surveillance and diagnosis. This task required that penal institutions be designed according to a particular model, which Foucault found in Bentham's Panopticon.[111] "Security normalization," conversely, is concerned less with the individual offender and more with the costs of crime as a whole. Unlike the traditional legal/juridical mechanism, security does not establish a binary division between the permitted and the prohibited. Rather, it constitutes an average considered optimal on the one hand, and on the other, a "bandwidth of the acceptable" that must not be exceeded.[112] The apparatus of security thus does not aspire to eliminate dangerous activity altogether, nor does it aspire to eliminate it from the conduct of a particular individual. Instead, it aims to manage society as a whole so as to reduce dangerousness to a manageable level. It is by nature not panoptic, but biopolitical, as it works on probabilities, on minimizing what is dangerous rather than suppressing it.[113]

Building on Foucault's notions of "discipline" and "security," Deleuze introduces the concept of "control," arguing that we are witnessing

109. FOUCAULT, *supra* note 16, at 20.

110. For disciplinary normalization, see, generally, MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON (Alan Sheridan trans., 1977).

111. JEREMY BENTHAM, THE PANOPTICON WRITINGS (1995).

112. FOUCAULT, *supra* note 16, at 6.

113. *Id.* at 4–6, 19.

a gradual transformation of disciplinary societies into "control societies."[114] Like "security," control abandons the dream of an all-encompassing, normalized society and replaces the quest to train and moralize individuals with the goal of managing aggregates of presumably dangerous groups.[115] Control societies thus enable the neglect of their marginal elements and function as a particular strategy of social division. Populations that risk society's security, or are unable to partake in its patterns of consumption, are excluded from it. They are, however, simultaneously included in society, by way of their classification as "outsiders," who serve to mobilize fear.[116]

The control society can be characterized in terms of certain key transformations. First, there is a shift in the spatiality of power. Whereas disciplinary power is concentrated in sites of enclosure and works by spatio-temporal practices, in control societies, power has become decentralized and fluid. It operates in open sites—community service or electronic monitoring as a substitute to prison; day clinics as a substitute to hospitals—and functions through mechanisms such as restrictions on freedom of movement.[117] Physical barriers have therefore become secondary to codes, or passwords, in determining access (to places, to information), and it is the computer—capable of tracking a person's location at any given time—that is best suited to manage the society of control.[118] These new techniques, Deleuze emphasizes, must not be confused with indicators of liberalization or considered more tolerant than their parallels. Rather, they compete with the harshest forms of incarceration and play an equal part in strategies of supervision.[119]

Second, there is a shift in assumptions about the subject of power. Whereas the disciplinary society is concerned with individuals, their education and reform, the control society has given rise to "dividuals"—entities that are subject to control at multiple levels of the organization of the individual.[120] Unlike individuals, indivisible and complete entities whose

114. Deleuze, *supra* note 12.

115. Nikolas Rose, Powers of Freedom: Reframing Political Thought 234 (1999).

116. Walters, *supra* note 20, at 192.

117. *Id.* at 191.

118. Deleuze, *supra* note 12, at 5–7.

119. *Id.* at 4.

120. Gilles Deleuze, Negotiations 1972–1990 180 (Martin Joughin trans., 1995).

identities are tied to the spaces in which they circulate, "dividuals," with their heterogeneous activities and identities, are fragmented and fractured.[121]

The emergence of the control society does not mean that control is now always the most dominant form of power governing the modern nation-state. Rather, control should be thought of as a diagram—one possible way of mapping and understanding the present. This leaves room for competing diagrams that may point to the revival of older forms of domination.[122] What truly matters, Deleuze argues, is that something new has begun, that control has started its rise as a form of power that affects various social systems, such as the prison system, the education system, and the health system.[123] Indeed, since Deleuze first published his "Postscript on the Societies of Control," the developments to which he has drawn attention have been noted in various contexts, including both criminal and immigration law.

1. Criminal enforcement in the control society: From individual offenders to population management

In the field of criminal law, several scholars have put forward theories that, although not drawing explicitly on Deleuze's control society, certainly correspond with his account of control. David Garland's theory concerning "the culture of control" has highlighted the current tendency to view crime as *the* paradigmatic social problem through which all other social problems are understood and their suitability for government intervention assessed.[124] Jonathan Simon's "governing through crime" theory has demonstrated that crime and punishment have increasingly become the occasions and institutional contexts for shaping the conduct of others.[125] To govern through crime, in other words, is to construe problems of regulation

121. Deleuze, *supra* note 12, at 5; Walters, *supra* note 20, at 191.

122. Walters, *supra* note 20, at 192–93; similarly, Foucault stresses that security has not replaced discipline, just as discipline has not replaced the modality of law. Rather, the three modalities of power continue to co-exist, with only the dominant characteristic, or the precise system of correlation among the three, changing over time. FOUCAULT, *supra* note 16, at 8.

123. Deleuze, *supra* note 12, at 7, clarifies that older methods—borrowed from the former societies of sovereignty—may return to the fore. However, if they do, it will be with necessary modifications.

124. GARLAND, *supra* note 11.

125. SIMON, *supra* note 11.

as problems of crime, and by doing so, to make available a host of tools and techniques of criminal punishment that would otherwise be inappropriate and unavailable.[126] Since the 1980s, this type of obsession with crime has triggered a withdrawal from the highly medicalized approach to punishment—a key feature of the disciplinary society. It has transformed punishment from a tool of rehabilitation of individuals proven criminally deviant into a device for managing presumed deviance. Simon links this development in the United States to the collapse of the New Deal approach to governing during the 1960s, arguing that the decline of the welfare state has motivated political leaders to search for new models of governance.[127]

This process, termed "the new penology" in the early works of Feeley and Simon,[128] is comprised of three main transformations. First, new discourses replace the moral or clinical description of the individual with an actuarial language of probabilistic calculations and statistical distributions applied to populations. Second, new objectives for the penal system prioritize efficient management of internal system processes over the traditional objectives of rehabilitation and retribution. The new penology is less concerned with responsibility, fault, diagnosis, or treatment of the individual offender, than with identifying, classifying, and managing groups sorted by dangerousness. Its goal is not to eliminate crime but to make it tolerable through systemic coordination. Third, these altered, lowered expectations manifest themselves in new techniques that target offenders as an aggregate, such as cost-effective forms of custody and surveillance intended to identify and classify risk.[129]

Punishment has thus become a tool of cost-effective risk management[130] and has produced a system that is increasingly selective in its responses to crime.[131] Practices such as the targeting of crime "hot-spots," "career criminals," and high-risk offenders; gate-keeping to exclude low-risk cases; decriminalization of minor offenses—all embody this tendency to conserve expensive crime-control resources for the more serious offenses

126. Miller, *supra* note 11, at 618.

127. SIMON, *supra* note 11, at 23–31.

128. Feeley & Simon, *supra* note 19.

129. *Id.* at 450, 452–58.

130. John Pratt, *Risk Control, Rights and Legitimacy in the Limited Liability State*, BRIT. J. CRIMINOLOGY, azw065 (2016).

131. GARLAND, *supra* note 11, at 19.

and dangerous offenders.[132] These practices illustrate the important difference between the culture of control and over-criminalization, as they demonstrate that the new objectives of the penal system are not always achieved by expanding criminal law's jurisdiction.[133] However, they also reinforce Sklansky's point that the willingness of the criminal justice system to allocate resources to the criminalization of relatively minor immigration offenses seems at odds with the culture of control.

The culture of control has radically altered the mechanisms of criminal punishment. Perhaps the clearest example is the reinvention of the prison as a means of incapacitation rather than a panoptic site of normalization.[134] The theory of incapacitation holds that the main goal of imprisonment is to detain offenders for a time and thus delay their resumption of criminal activity. If such delays are sustained for enough time and enough offenders, significant aggregate effects in crime can occur.[135] One of the main occurrences associated with the culture of control is thus mass incarceration.[136] However, imprisonment is far from the only form of punishment that accomplishes the new objectives of the penal system. Quite the contrary, we are currently witnessing an increased reliance on fluid techniques of supervision, such as community service, electronic monitoring systems that impose a form of custody without walls,[137] probation, and parole.[138] Moreover, the state supervision that parole entails is no longer conceived as a way to reintegrate offenders into society, but as an enhanced monitoring technique for policing a chronically troublesome population. The result is that technical violations of parole conditions now lead to automatic re-incarceration.[139]

Moreover, the culture of control entails a shift from disciplinary normalization to security normalization that has deeply affected criminal

132. *Id.*

133. Compare Sklansky's point on the resemblance between over-criminalization and the culture of control; Sklansky, *supra* note 9, at 194–96.

134. SIMON, *supra* note 11, at 142; for a similar argument, see Zygmunt Bauman, *Social issues of law and order*, 40(2) BRIT. J. CRIMINOLOGY 205 (2000). Bauman claims that we are witnessing a tendency to maintain order by resort to a "paradigm of exclusion," rather than by discipline and re-subjectification.

135. Feeley & Simon, *supra* note 19, at 450–51.

136. GARLAND, *supra* note 11, at 19, 61; Bauman, *supra* note 134.

137. Feeley & Simon, *supra* note 19, at 457.

138. GARLAND, *supra* note 11, at 12.

139. Feeley & Simon, *supra* note 19, at 455.

procedure. Zedner, for example, has noted the increasing securitization of criminal justice, manifest in such practices as the formation of preventive criminal offenses, preventive punishments, and extended police powers.[140] Additionally, crime control has become instrumental in counter-terrorism efforts, operating via police powers that permit suspicionless stops and searches, extended police custody, and closed legal proceedings. These practices seem to be more focused on investigating and intelligence gathering than on convicting culpable wrongdoing.[141]

The "new penology," the "culture of control," and "governing through crime" are all essentially ways of describing the shift from the disciplinary society to the control society in the context of criminal law. Under the control society, criminal law is characterized by what may be termed as a transition from an "individual offender model" to a "population management model." The task of disciplining individual offenders is gradually abandoned,[142] for, as Feeley and Simon note, once the penal system prioritizes separating people into distinct categories of dangerousness, the idea of the "normal" itself becomes obscured. Consequently, the "norm" can no longer function as a relevant criterion of success for the organizations of criminal justice.[143] Such symptoms of the shift to the control society are similarly evident in the field of immigration.

2. Immigration enforcement in the control society: From management of territory to population management

If the field of criminal law is characterized by a transition from the individual offender model to the population management model, it seems that the main transition occurring in the field of immigration may be termed as a shift from a "management of territory model" to a "population management model." The territorial border was once considered to epitomize state

140. Lucia Zedner, *Criminal justice in the service of security*, *in* CHANGING CONTOURS OF CRIMINAL JUSTICE 152, 155 (Mary Bosworth, Carolyn Hoyle, & Lucia Zedner eds., 2016); *see also* ANDREW ASHWORTH & LUCIA ZEDNER, PREVENTIVE JUSTICE (2014).

141. Zedner, *supra* note 140, at 158.

142. Perhaps this is why, as Zedner argues, various groups such as antisocial youth and persistent, sexual, and violent offenders have acquired the position of "irregular citizens" and have become consigned to a probationary or provisional status, rather than being reintegrated into society. Lucia Zedner, *Security, the State, and the Citizen: the Changing Architecture of Crime Control*, 13 NEW CRIM. L. REV. 379 (2010).

143. Feeley & Simon, *supra* note 19, at 459.

sovereignty by drawing a clear distinction between those who may enter the nation-state and those who may not.[144] Immigration policy was thus highly focused on border control. However, those who managed to overcome border security or who overstayed their permit enjoyed quite a solid set of rights and privileges. This was particularly true for refugees and asylum-seekers, but to some extent also for other groups of undocumented migrants who were relatively tolerated.[145]

In the last decades, however, globalization processes challenged the assumption that formal borders continued to effectively serve as the physical threshold of the political community.[146] In a world of mass transnational migration and easily penetrable borders, separation of "outside" from "inside" has often become elusive.[147] This challenge is further intensified in the case of refugees and asylum-seekers, who have substantially increased in number in recent decades[148] and whose physical expulsion from the community is legally prohibited. Consequently, the nation-state is forced to envision alternative means for controlling undesirable migration, means which focus on interior enforcement. Coleman and Kocher, for instance, argue that American immigration policy has traditionally been conditioned by foreign policy considerations, and as such best thought of as constitutively "between" the realms of foreign and domestic policy. However, it has recently been transformed from an outward-looking power, located at the territorial margins of the state, into an inward-looking power, focused on the day-to-day control of resident immigrants. Rather than remaining principally concerned with border control, and hence a form of "management of territory," it has been supplemented with a "management of population" strategy, focused on policing already present migrants.[149]

144. Linda Bosniak, the Citizen and the Alien 126 (2006).

145. *See, e.g.*, Miller, *supra* note 11, at 619, who claims this was the case in the United States.

146. *See, e.g.*, Bosniak, *supra* note 144, at 126–29; Saskia Sassen, Losing Control?: Sovereignty in an Age of Globalization (1996).

147. Bosniak, *supra* note 144, at 4, 7.

148. *See, e.g.*, Philip Marfleet, Refugees in A Global Era (2006). However, as Marfleet demonstrates, the precise number of refugees remains unknown, and there is conflicting data on this issue; see pp. 14–16.

149. Coleman & Kocher, *supra* note 30.

The rise of the control society is inherently tied to the process of globalization[150] and the pertinent changes in immigration policy. Control is largely a product of globalization, as it has no necessary connection to the territorial nation-state and is infinitely extendable.[151] Moreover, it entails techniques of power that are particularly suited for governing immigration under the decentralized border model. Such techniques have indeed been observed in the field of immigration law.

First, contemporary immigration policy is characterized by the construction of immigrants as a dangerous class and the abandonment of goals such as assimilation and integration.[152] Similarly to the field of criminal law, it is losing interest in the individual (the immigrant who, upon overcoming border security, may be integrated into society and perhaps naturalized) and focusing increasingly on aggregates. Shamir, for example, argues that we are currently witnessing the emergence of a global mobility regime, oriented to closure and blocking of access, which is premised on a "paradigm of suspicion."[153] This implies that the primary principle for determining the "license to move" both across borders and in public spaces within borders, has become the degree to which the agents of mobility are suspected of representing the threats of crime, undesirable immigration, and terrorism. The new mobility regime relies heavily on biosocial profiling—a technology of social intervention that objectifies whole strata of people by assigning them into suspect categories. In contrast to the modality of law, which operates through a binary guilty/innocent distinction, and contrary to the modality of discipline, which corrects behavior, profiling predicts behavior and regulates mobility by situating subjects in categories of risk. Citing Feeley and Simon, Shamir claims that the modalities of power governing the new penology, which do not seek to reform people but rather "to manage them in place," likewise perfectly comply with the mobility-confining tasks of such biosocial profiling.[154]

150. David Murakami Wood, *What is global surveillance? Towards a relational political economy of the global surveillant assemblage*, 49 GEOFORUM 317, 319 (2013).

151. *Id.* at 319, 323; Ayse Ceyhan, *Surveillance as biopower*, *in* ROUTLEDGE HANDBOOK OF SURVEILLANCE STUDIES 38, 38–45 (2012).

152. *See, e.g.*, Jonathan Simon, *Refugees in a Carceral Age: The Rebirth of Immigration Prisons in the United States*, 10(3) PUB. CULTURE 577 (1998); Miller, *supra* note 11.

153. Ronen Shamir, *Without Borders? Notes on Globalization as a Mobility Regime*, 23(2) SOC. THEORY 197 (2005).

154. *Id.* at 213.

Second, such exclusionary immigration policies were yet never aimed to eliminate unauthorized migration. Much like criminal enforcement, they have become increasingly selective in their responses and do not muster the type of concentrated, focused management found in disciplinary power. As Bauman argues, the fact that governments are largely stripped of their sovereign prerogatives by globalization forces, leaves them no alternative but to carefully select targets that they can conceivably overpower. They thus search for "spheres of activity" in which they can assert their sovereignty.[155] This is true for border control, which, as Doty notes, generally exerts only the efforts necessary to give the appearance of a border security consistent with the "bandwidth of acceptability."[156] It is also true for other types of immigration control. For example, although all undocumented migrants are de jure subject to deportation, de facto immigration enforcement is about selective policing and the subsequent production of a population of territorially present, yet not legal, residents, who live under the ongoing *threat* of deportation.[157]

Third, the mechanisms designed to govern populations of migrants are no longer confined to spatial-temporal practices. They thus cause a delocalization and decentralization of the border, a process whereby the border is both "externalized" and "internalized." "Border externalization" refers to the process of relocating the state's border authorities to other sovereign territories, and outsourcing border control responsibilities to another countries.[158] By rethinking borders beyond the dividing line between nation-states

155. Zygmunt Bauman, Wasted Lives: Modernity and its Outcasts 56–57 (2013).

156. Roxanne L. Doty, *Bare Life: Border-Crossing Deaths and Spaces of Moral Alibi*, 29(4) Env't & Plan.: Soc'y & Space 599, 606 (2011).

157. Coleman & Kocher, *supra* note 30, at 235.

158. Maribel Casas-Cortes et al., *New keywords: Migration and borders*, 29(1) Cultural Studies 73–76 (2015); a main example of border externalization is the practice of "offshore processing" of asylum-seekers, i.e., stopping asylum-seekers at sea, before or immediately after they enter the state's territorial waters, and transferring them to other countries for the purpose of examining their asylum claims. *See* Michelle Foster & Jason Pobjoy, *A Failed Case of Legal Exceptionalism—Refugee Status Determination in Australia's Excised Territory*, 23(4) Int'l J. Refugee L. 583 (2011); for a fascinating example of how crimmigration itself participates in border externalization by extending the geographical reach of penal power, see Mary Bosworth, *Penal humanitarianism? Sovereign power in an era of mass migration*, 20(1) New Crim. L. Rev. 39 (2017); for the manner in which prison bureaucrats often resist such extra-territorial execution of punishment, see Emma Kaufman, *Extraterritorial Punishment*, 20(1) New Crim. L. Rev. 66 (2017).

and extending the idea of the border into forms of dispersed management practices, externalization is an explicit effort to "stretch the border" and extend sovereignties.[159] Similarly, the process of "internalization" "stretches" the border into the territory of the nation-state. Walters, for example, detects a disaggregation of border functions as migrants are screened and monitored routinely within the territory, viewing this tendency as consistent with the shift in the spatiality of power typical of the control society.[160] Kalhan similarly describes a trend of "post-entry monitoring and enforcement," under which immigration officials in the United States have dramatically increased their efforts to oversee the residence of territorially present migrants via new surveillance and dataveillance technologies.[161]

Like contemporary criminal justice policy, current immigration policy demonstrates the shift from the disciplinary society to the control society. As the remainder of this article demonstrates, it is this common logic that invites the collaboration of the two fields, manifest in crimmigration.

3. Crimmigration in the control society

In the control society, both criminal enforcement and law enforcement have abandoned the quest to discipline and integrate individuals into society, as well as the goal of eliminating undesirable behavior (criminal activity; unwelcome migration). These objectives have been replaced with the goal of managing aggregates of presumably deviant groups, in order to keep dangerous behavior within the "bandwidth of acceptability." Both legal fields thus form dangerous classes (groups considered statistically prone to criminality; undocumented/"criminal" aliens) and prioritize their incapacitation, supervision, or surveillance.[162]

There is no denying that, to a large extent, crimmigration constitutes a tendency to govern immigration through crime. Crimmigration construes mass migration as a problem of criminality and, by doing so, renders

159. Casas-Cortes et al., *supra* note 158, at 73.

160. Walters, *supra* note 20.

161. Anil Kalhan, *Immigration Surveillance*, 74 MD. L. REV. 1 (2014–2015).

162. For an important account of the manner in which criminal and immigration enforcement have joined forces to construct Latinos as a dangerous class in the U.S., see Vázquez, *Constructing Crimmigration*, *supra* note 21; and Vázquez, *Perpetuating the Marginalization*, *supra* note 21.

a host of criminal punishment tools available for regulating immigration.[163] It indeed replaces social liberal governing strategies with punitive measures.[164] However, the notion of governing immigration through crime does not fully capture the essence of crimmigration. For, as Sklansky argues, some practices of crimmigration seem more indicative of immigration's colonization of criminal law than vice versa. For example, in the United States crimmigration causes the criminal justice system to devote plenty of resources to the incarceration of undocumented migrants and to prosecution of immigration violations, rather than devoting these resources to the prevention and prosecution of serious crimes. This fact seems at odds with the new penology, which works through cost-effective risk management and the targeting of high-risk offenders while decriminalizing minor offenses.

The explanation lies in the fact that the theories of governing through crime and the culture of control are only private examples of the theory of the control society. They describe the shift from the disciplinary society to the control society in the field of criminal law, just as the transition from a management of territory model to a population management model describes this shift in the field of immigration law. Crimmigration may, at times, prioritize the particular needs of the immigration system over those of the criminal justice system, because unlike the culture of control, the control society is not concerned only with reducing criminal activity. It is concerned with reducing risk as a whole—be it the risk of crime and victimization or the risks associated with undocumented migration, such as the decline in state sovereignty or the need to allocate resources in order to accommodate a large population of migrants.

Consequently, crimmigration should be perceived as a legal hybrid designed to accomplish the objectives of both the new penology and the new domesticized manner of governing immigration. Although dedicated to controlling conventional crime, crimmigration regimes also act as "spheres of activity," which allow the nation-state to maintain sovereignty (or, perhaps, the illusion of sovereignty) in face of the declining ability of its borders to keep out unwanted immigrants. The fact that immigration policy is being transformed from an outward-looking power into an inward-looking power, calls for the utilization of domestic norms and

163. Miller, *supra* note 11.

164. Xavier Inda & Dowling, *supra* note 11; Miller, *supra* note 11; Chacón, *Managing Migration*, *supra* note 11; Legomsky, *supra* note 7, at 475.

apparatuses for regulating immigration. Criminal law—a domestic field of law, designed primarily for citizens[165]—serves this purpose. It is particularly fit for governing immigration—a task once considered foreign to criminal law—under the new penology, which no longer inherently ties criminal sanctions to individual guilt, moral responsibility, or rehabilitation, but is more concerned with population and risk management. Moreover, as Shamir argues, the modalities of power governing the new penology are suitable for restricting mobility, not only across borders but also within the territory of the state.[166]

This is particularly true for immigration detention, which, as Koulish has noted, currently abides primarily by the logic of risk management.[167] Detention functions in accordance with the theory of incapacitation, as it strives solely to remove immigrants from the community. When full detention is not the most cost-effective method for remaining within the bandwidth of acceptability, crimmigration utilizes detention alternatives, which represent the fluid technologies of power governing the post-panoptic world described by Deleuze.[168] As Koulish points out, such technologies disaggregate the individual into both fragments and aggregates of identity data. They are designed to dissolve the notion of a concrete individual and to replace it with a combination of risk factors.[169] In this way they partake in the formation of what Deleuze has termed "dividuals."[170]

Crimmigration, particularly the widespread use of immigration detention, therefore attempts to complement, if not replace, border control with the interior policing devices that, under the new penology, criminal law is inclined to provide.[171] The next part explores the manner in which these motifs come into play in the case of detention of asylum-seekers in Israel.

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165. Lucia Zedner, *Is the Criminal Law Only for Citizens? A Problem at the Borders of Punishment*, *in* THE BORDERS OF PUNISHMENT: MIGRATION, CITIZENSHIP, AND SOCIAL EXCLUSION 40 (Katja Franko Aas & Mary Bosworth eds., 2013).

166. Shamir, *supra* note 153, at 213.

167. Robert Koulish, *Sovereign Bias, Crimmigration and Risk*, *in* IMMIGRATION DETENTION, RISK AND HUMAN RIGHTS: STUDIES ON IMMIGRATION AND CRIME 1 (Maria João Guia, Robert Koulish, & Valsamis Mitsilegas eds., 2016).

168. Koulish, *Spiderman's Web*, *supra* note 13, at 15–25; Koulish, *Entering the risk society*, *supra* note 13; for an account of control as "post-panoptic," see ROSE, *supra* note 115, at 234.

169. Koulish, *Spiderman's Web*, *supra* note 13, at 15.

170. Deleuze, *supra* note 12, at 5.

171. Galina Cornelisse, *Immigration Detention and the Territoriality of Universal Rights*, *in* THE DEPORTATION REGIME: SOVEREIGNTY, SPACE, AND THE FREEDOM OF MOVEMENT

III. ISRAELI CRIMMIGRATION IN THE CASE OF ASYLUM-SEEKERS

In the late 1940s, shortly after the establishment of the state of Israel, the young country was instrumental in the formulation of the Refugee Convention.[172] Moreover, Israel was one of the first countries to ratify the Convention, as well as its 1967 protocol.[173] Despite these facts, Israel has yet to incorporate the convention into its domestic legislation[174] and has, in effect, consistently refrained from adopting a clear asylum policy. As Kritzman-Amir demonstrates, Israel's asylum system is essentially an extension of its immigration and citizenship regime, as it excludes non-Jewish refugees and frames them as "others."[175] As a self-proclaimed Jewish state, Israel's most fundamental immigration law is the Law of Return,[176] the general premise of which being that every Jew has the right to immigrate to Israel.[177] It is a widely agreed upon fact that this legislation defines Israel as an "Aliyah" state—a state of Jewish return—rather than an immigration state.[178] In contrast to the treatment of Jewish immigrants, non-Jewish migrants are discouraged from entering Israel, as their presence undermines and challenges the state's ethno-national foundations. They do not hold a right to immigrate to Israel, and their entry into the state is restricted by the Entry into Israel Law.[179] Consequently, most non-Jewish immigrants

101 (Nicholas De Genova & Nathalie Peutz eds., 2010); for this argument in the case of detention of asylum-seekers in Israel, see Yonatan Berman, *Detention of Refugees and Asylum-Seekers in Israel*, *in* WHERE LEVINSKY MEETS ASMARA: SOCIAL AND LEGAL ASPECTS OF ISRAELI ASYLUM POLICY 147, 149–51 (Tally Kritzman-Amir ed., 2015) (Isr.).

172. Harel, *supra* note 34, at 43.

173. Israel ratified the Refugee Convention in 1954 and accepted the protocol in 1968; *see id.* at 43. From a legal standpoint, the acceptance of the obligations stipulated in the protocol—"accession"—is the same as its "ratification"; *id.*

174. Harel, *supra* note 34; the only domestic legal norm obligating the state to act in accordance with the convention is thus the "presumption of compatibility," which requires the Israeli courts to interpret domestic legislation in a way that is compatible with the state's international obligations. *See* David Kretzmer, *Israel*, *in* THE ROLE OF DOMESTIC COURTS IN TREATY ENFORCEMENT: A COMPARATIVE STUDY, 287 (David Sloss ed., Dec. 2009).

175. Tally Kritzman-Amir, *"Otherness" as the Underlying Principle in Israel's Asylum Regime*, 42 ISR. L. REV. 603 (2009) (Isr.).

176. Law of Return, 5710–1950, SH No. 51, 159 (Isr.).

177. *Id.* at § 1.

178. Kritzman-Amir, *supra* note 175, at 608.

179. Entry Law, *supra* note 35; Kritzman-Amir, *supra* note 175, at 609.

can only come to Israel as temporary migrant workers, who are essentially excluded from the rights granted by the Israeli welfare state.[180] The fact that Israel has not adopted an inclusive or welcoming policy toward the tens of thousands of non-Jewish asylum-seekers that have entered its territory should therefore come as no surprise.

Nevertheless, the widespread use of detention and detention alternatives to govern asylum-seekers is a new occurrence in Israel. Prior to 2005, undocumented asylum-seekers were generally exempt from detention, unless they were enemy nationals.[181] Conversely, migrant workers whose visas had expired were heavily targeted by Israeli law enforcement during the first years of the new millennium. This policy was carried out mainly via the establishment of the "immigration police," a special police unit dedicated to the task of deporting persons residing unlawfully in Israel.[182] The immigration police—perhaps a paradigmatic example of the way local policing has become involved in immigration enforcement—was, in a sense, the harbinger of the future crimmigration regime. However, this police unit was rather short-lived[183] and had the relatively limited task of arresting undocumented migrant workers, so that they could be detained and deported in accordance with the Entry Law. This law permits immigration detention for a maximum period of 60 days and only pending deportation.[184] Asylum-seekers whose claims were under review at the time received a special "protection paper," shielding them from the arrest powers of the immigration police.[185]

180. Migrant workers are eligible for some social security benefits. Children of migrant workers are eligible for partially state-sponsored health care and can attend the public school system. Kritzman-Amir, *supra* note 175, at 609.

181. The most notable example of detention of enemy nationals concerns a group of Iraqi asylum-seekers who arrived at Israel in the 1990s and were detained for several years before finally being released into the community. *See* Berman, *supra* note 171, at 180–82.

182. Government Resolution No. 2469, Expulsion of Foreigners Working in Israel Illegally to Encourage the Integration of Israelis in the Work Force (Aug. 18, 2002) (Isr.).

183. The "immigration police" was formed in 2002 and dismantled in 2008, following a government resolution transferring its powers to a new Population, Immigration and Border Authority; *see* Government Resolution No. 3434, Establishment of A Population, Immigration and Border Authority in the Ministry of Interior (Apr. 13, 2008) (Isr.).

184. Entry Law, *supra* note 35, at § 13F(a)(4).

185. The protection paper was valid for six months, subject to extension, and until 2005, it automatically granted asylum-seekers the right to a work permit. Harel, *supra* note 34, at 58.

This dynamic began changing in 2005 with the arrival of the first Sudanese asylum-seekers.[186] These asylum-seekers constituted a threat in the eyes of the Israeli government, given their country of origin, which is formally defined as an enemy of Israel.[187] Therefore, they were taken to military bases upon their arrival and held there despite no formal detention warrant. It was only several months later that they were processed and transferred to civilian detention facilities. In these facilities they remained in custody according to the exceptions listed in the Entry Law, which allow for detention to be prolonged in cases that may jeopardize national security.[188] However, they were eventually released into the community with very minimal restrictions.[189] Shortly after Sudanese asylum-seekers began entering Israel, they were followed by asylum-seekers from other African countries, mainly Eritrea, that are not considered enemies of Israel. These asylum-seekers were likewise detained pursuant to the Entry Law, and released after relatively brief periods. The majority of the released asylum-seeking population settled in the southern neighborhoods of Tel Aviv. The asylum-seekers were gradually perceived by many local residents as a threat to their well-being and personal security, bringing about a wave of protests. It is worth mentioning in this context that most of the asylum-seekers were not issued work permits and were likewise excluded from most aspects of the Israeli welfare state, generally known to be in decline since the 1980s.[190] Hence, the asylum-seeking population was left to live in poverty and was increasingly considered a burden on the state and its citizens—a burden that could only be eased via the long-term incarceration of this population.[191]

Consequently, in 2012, Parliament amended the Anti-Infiltration Law to entail substantially longer periods of detention than those permitted by the Entry Law, thus allowing the prolonged detention of the asylum-seeking population.[192] This decision was justified on the grounds that there was an important difference between those undocumented migrants who initially

186. *Id.* at 64.

187. *See supra* note 44.

188. Entry Law, *supra* note 35, at § 13F(b)(2); Berman, *supra* note 171, at 186–87.

189. Berman, *supra* note 171, at 189–90.

190. *See, e.g.*, YOAV PELED & GERSHON SHAFIR, BEING ISRAELI: THE DYNAMICS OF MULTIPLE CITIZENSHIP 272–96 (2005) (Isr.).

191. *Compare* Simon's argument concerning the link between the decline of the welfare state and the tendency to govern through crime; *see, e.g.*, SIMON, *supra* note 11, at 25–31.

192. The 2012 Amendment, *supra* note 2.

entered Israel legally and overstayed their visa, and those undocumented migrants who illegally infiltrated the state border. Whereas the former could be coped with by means of short detention periods, in the case of the latter, severe measures were needed.[193] According to the government's formal position, the asylum-seekers were in fact not refugees but rather undocumented migrant workers who had entered Israel illegally. They were therefore subjected to the harsh detention periods of the Anti-Infiltration Law. Meanwhile, migrant workers, as well as tourists, who had originally entered Israel legally and whose visas had later expired, are detained in accordance with the more lenient Entry Law. Moreover, whereas law enforcement heavily targets asylum-seekers, who are principally undeportable, undocumented migrant workers and visa over-stayers are rarely deported.[194]

In the last few years, asylum-seekers in Israel replaced migrant workers as the new dangerous class.[195] Sudanese asylum-seekers were depicted as enemies of the state, and all African asylum-seekers were categorized as "undocumented migrant workers" of the worst type, namely those "infiltrating" the state illegally, rather than entering it legally and becoming "illegal" only eventually. Their long-term detention was accordingly justified based on the notion that there was something fundamentally graver about undocumented entry of state territory than about undocumented residence in the territory. In other words, the state soon began to envision the detention of asylum-seekers as a way of preserving its sovereignty in the face of the declining ability of its borders to physically exclude this population.

This extensive utilization of detention mechanisms to complement the traditional border complies with the general widespread use of arrest

193. Draft bill for the Anti-Infiltration Law (Offences and Judgment) (Amendment no. 3 and temporary order), 5771–2011, HH (Gov.) No. 577, 594 (Isr.).

194. Data Regarding Foreigners in Israel, *supra* note 1, at 8.

195. Contrary to the highly exclusionary attitude that the Israeli authorities show the asylum-seeking community, migrant workers in Israel are now relatively tolerated. As of 2017, over 18,000 undocumented labor migrants have been estimated to reside in Israel, in addition to over 84,000 documented ones; *id.*; moreover, following a government resolution in 2005, some labor migrants whose children were born in Israel were offered a path to naturalization. *See* Government Resolution No. 3807, Temporary Arrangement for Giving Status to Children of Illegal Residents, Their Parents and Siblings Who Reside in Israel (June 26, 2005) (Isr.); Adriana Kemp, *Managing migration, reprioritizing national citizenship: Undocumented migrant workers' children and policy reforms in Israel*, 8(2) Theoretical Inquiries in Law 663, 664 (2007).

powers in Israel. Both pre-trial and pre-charge detention have been on the rise in Israel in the last two decades.[196] The majority of suspects and defendants who are detained are eventually released from jail and subjected to detention alternatives such as house arrest, electronic bracelets, restrictions on freedom of movement, and parole.[197] Imprisonment rates have also been rising consistently,[198] making Israel the OECD country with the second highest share of its population incarcerated, after the United States.[199] This remains the case despite the fact that crime rates have been steadily decreasing over more than a decade.[200] These statistics are but one indication of the Israeli criminal justice system's compliance with the core principles of the control society. Other indications include the fact that imprisonment is increasingly envisioned as a means of incapacitation rather than normalization, and many prisoners do not enjoy a right to rehabilitation.[201]

Israel's detention policy toward asylum-seekers likewise abides by these core principles. The following sections describe the process by which the nature and scope of this policy have been negotiated via Supreme Court litigation.

196. See the Annual Statistical Reports of the Israeli Police, each dating several years back. For example: Israeli Police, 2016 Annual Statistical Report 58, *available at* https://www.gov.il/he/departments/publications/reports/police_statistical_abstract_2016 (Isr.); Israeli Police, 2012 Annual Statistical Report 59, *available at* http://www.fkn.org.il/webfiles/fck/st2012.pdf (Isr.); Israeli Police, 2009 Annual Report 195, *available at* http://www.news1.co.il/uploadFiles/3645135760307 32.pdf (Isr.); for the extremely high rates of pre-trial detention in Israel, see also Michal Tamir, *Alternatives to Detention—Are they Always Advantageous to Defendants?*, 17 Mishpat Umimshal 25 (2015) (Isr.).

197. In accordance with the Criminal Procedure Law (Powers of Enforcement—Arrest), 5756–1996, SH No. 1592, 338, § 13(b), at 22 (Isr.); *see also* Tamir, *supra* note 196.

198. See Report of the Public Committee Concerning the Punitive and Rehabilitation Policy Towards Offenders 4 (Aug. 2015), *available at* http://www.justice.gov.il/Units/SanegoriaZiborit/News/Documents/dorner%20report.pdf (Isr.).

199. Organisation for Economic Co-operation and Development (OECD), *Crime and prisoners*, *in* Society at A Glance 2016: Oecd Social Indicators (2016), *available at* http://dx.doi.org/10.1787/soc_glance-2016-29-en (Isr.).

200. *See, e.g.*, Israeli Police, 2015 Annual Statistical Report 17, *available at* https://www.police.gov.il/Doc/TfasimDoc/shnaton2015.pdf (Isr.).

201. Report of the Public Committee, *supra* note 198, at 22–26.

A. The Amendments to the Anti-Infiltration Law

On December 11, 2011, the Israeli government reached a resolution entitled "The Establishment of a Detention Center for the Residence of Infiltrators and the Curbing of the Illegal Infiltration of Israel."[202] The resolution consisted of two main components: first, the allocation of 280 million NIS for the purpose of completing the Egypt-Eilat border fence; second, the establishment of several special internment centers, operated by the State Correctional Authority, for detaining undocumented migrants who may not, at the time, be deported. Shortly after this resolution, work on the Egypt-Eilat border fence began. Simultaneously, Parliament introduced an amendment to the Anti-Infiltration Law, authorizing the automatic detention of "infiltrators" for a minimum period of three years. Thereafter, they would only be released if they did not pose a threat to national security, public safety, or public health.[203]

Several asylum-seekers and human rights organizations responded by filing a petition to the High Court of Justice, challenging the constitutionality of the 2012 Amendment.[204] The petitioners claimed the amendment constituted a disproportional infringement upon the right to liberty and freedom of movement, which did not meet the requirements of the Basic Law: Human Dignity and Liberty.[205] The main argument of the petition was that the mandatory three-year detention period violated the principle—acknowledged in both international and Israeli law—allowing immigration detention only as a short-term measure to assist the state in carrying out the deportation of undocumented migrants.[206] Moreover, the explanatory notes annexed to the draft bill demonstrated that the main purpose of the extensive detention period was to deter future asylum-seekers from entering Israel. Deterrence, the petitioners argued, could not serve as a justification for immigration detention but only for criminal punishment.[207]

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202. Government Resolution No. 3936, the Establishment of A Detention Center for the Residence of Infiltrators and the Curbing of the Illegal Infiltration of Israel (Dec. 11, 2011) (Isr.).

203. The 2012 Amendment, *supra* note 2, at § 30A(D).

204. HCJ 7146/12 Adam et al. v. the Knesset et al. (petition, submitted Oct. 4, 2012) (Isr.), *available at* http://www.acri.org.il/he/33661.

205. Basic Law: Human Dignity and Liberty, 5756–1992, § 8, SH No. 1391, 150 (Isr.).

206. *Adam et al.* (petition), *supra* note 204, at ¶¶ 119–25.

207. *Id.* at ¶ 254; *see also* UNHCR, *supra* note 71, at Guideline 3, which prohibits such use of detention.

In its response to the petition,[208] the state began by laying down a general narrative for understanding infiltration.[209] According to this narrative, the vast majority of persons who recently entered Israel did so for employment purposes and were not, in fact, refugees or asylum-seekers. The response went on to emphasize two main negative consequences of large-scale infiltration. First, the state argued that the large number of infiltrators living in Israel caused a decrease in public security, as infiltrators became increasingly involved in criminal activity.[210] Second, the state argued that infiltration negatively affected Israeli economy by introducing a large unauthorized workforce into the market.[211] The state further claimed that the amendment served the suitable goals of reducing future infiltrators' incentives for illegally entering Israel and preventing those who have already entered from settling within state borders.[212]

In an 8-1 verdict, the High Court of Justice granted the petition and struck down the entire 2012 Amendment, deeming it disproportional in its infringement upon the right to liberty, and thus unconstitutional.[213] Justice Arbel, who wrote the majority opinion, agreed that immigration detention could generally be applied only as a means of carrying out deportation. Justice Arbel ruled that the long-term incarceration of asylum-seekers without a trial and with no option of deportation in sight, constituted a fatal blow to their right to liberty. This infringement upon their constitutional rights was amplified by the fact that it was not based on individual guilt and had nothing to do with their personal characteristics or conduct.

With regard to the state's arguments concerning the negative effects of infiltration, Justice Arbel commented that the data concerning criminal offenses committed by asylum-seekers was misleading, as it did not take

208. *See* HCJ 7146/12 Adam et al. v. the Knesset et al. (preliminary response, submitted Dec. 25, 2012) (Isr.), *available at* http://www.acri.org.il/he/33661; HCJ 7146/12 Adam et al. v. the Knesset et al. (main response, submitted May 13, 2013) (Isr.), *available at* http://www.acri.org.il/he/33661.

209. *Adam et al.* (main response), *supra* note 208, at ¶¶ 16–22, 58.

210. *Id.* at ¶ 24.

211. *Id.* at ¶¶ 24–31.

212. *Adam et al.* (preliminary response), *supra* note 208, at ¶¶ 58, 61; *id.* at ¶¶ 44–51, 75–108.

213. HCJ 7146/12 Adam et al. v. the Knesset et al. (Sept. 16, 2013), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

into consideration the comparison between asylum-seekers and the general Israeli population. The data that did compare the two populations showed that, contrary to the picture depicted by the state, asylum-seekers in fact manifested less unlawful behavior than the general population. Despite this fact, Justice Arbel commented that the *feeling* of insecurity shared by Israelis living in neighborhoods with large concentrations of asylum-seekers could not be ignored and should be addressed by the state.[214] As for the impact that the asylum-seeking population had on the Israeli economy, Justice Arbel noted that here, too, the picture proved complex, as statistics showed that most unauthorized workers in Israel were not asylum-seekers but undocumented migrant workers and tourists.[215]

Furthermore, Justice Arbel ruled that the objective of deterring future asylum-seekers from entering Israel was problematic, as it violated the Kantian categorical imperative, which instructs us never to treat a human being merely as a means to an end.[216] The goal of preventing those asylum-seekers already living in Israel from settling in the country, conversely, might be considered legitimate. However, it remained unclear whether it would indeed be served by the amendment, as the internment centers were capable of housing only a few thousand of the 55,000 asylum-seekers residing in Israel at the time.[217]

The principle idea that population management (preventing a certain group from settling in the state) might be achieved via detention was thus not entirely rejected by the court. However, the court did object to a "blanket policy" that considered all asylum-seekers a threat to the state, and took no individual characteristics into consideration when deciding to detain. Although this attitude will continue to characterize the court's verdicts concerning the Anti-Infiltration Law to certain extent, its limits will become clearer as the amendments to the law become more consistent with the principles of the control society.

In response to the verdict, Parliament amended the law once again.[218] The 2013 Amendment determined that "infiltrators" who entered Israel be

214. *Id.* at ¶¶ 12–14 (majority opinion).

215. *Id.* at ¶ 16 (majority opinion).

216. *Id.* at ¶ 93 (majority opinion). *See* IMMANUEL KANT, GROUNDING FOR THE METAPHYSICS OF MORALS 46–47 (Allen W. Wood ed. & trans., 2002).

217. *Adam et al.*, *supra* note 213, at ¶¶ 97–99 (majority opinion).

218. Anti-Infiltration Law (Offences and Judgment) (Amendment no. 4 and temporary order), 5774–2013, SH No. 2419, 74 (Isr.) [hereinafter "2013 Amendment"].

sent to a closed detention center for a one-year period, following which they were to be transferred to the open center Holot and reside there until their deportation becomes possible. The amendment stipulated no maximum period of residence at Holot.[219] The notes annexed to the draft bill explicitly stated that Holot was intended for those "infiltrators" whose deportation was currently impractical,[220] thus formally severing the inherent connection between immigration detention and deportation pursuant to international law.[221]

Those residing at Holot, which is also managed by the State Correctional Authority, were obligated to report back three times a day and sleep at the center. The 2013 Amendment gave the Holot prison guards several powers that were similar to those granted to them by the Israeli Prison Directive,[222] including, for example, the authority to conduct searches, use reasonable force, and detain those suspected of an intention to commit a criminal offense.[223]

Like the 2012 Amendment, the purpose of the 2013 Amendment, as stated in the draft bill,[224] was both to reduce the incentive of potential "infiltrators" to enter Israel—a goal that the High Court of Justice had deemed "problematic"—and to prevent "infiltrators" from settling in Israel. The draft bill noted the rising crime rates in areas with a concentration of "infiltrators." The draft bill also stated the need to allocate resources from the education, health, and welfare systems, "reserved for citizens and legal residents of Israel."[225]

Like the 2012 Amendment, the 2013 Amendment entailed a highly exclusionary position regarding the asylum-seeking population. However, it acknowledged that incapacitation could no longer be achieved solely

219. *Id.* at ch. 4.

220. *Id.* at 126.

221. As abovementioned, international law prohibits prolonged detention that is not accompanied by effective deportation proceedings. See discussion above in Part II, Section A(1).

222. Prison Directive (new version), 5732–1971, Laws of Israel: New Version No. 21, 459 (Isr.).

223. The 2013 Amendment, *supra* note 218, at §§ 32L–32P; *compare* the Prison Directive, *id.* at §§ 95A–95K.

224. Draft bill for the Anti-Infiltration Law (Offences and Judgment) (Amendment no. 4 and temporary order), 5774–2013, HH (Gov.) No. 817, 122 (Isr.), at 126.

225. *Id.* at 123.

through full confinement. Thus, it established a more open site for the purpose of governing asylum-seekers, where the fluid techniques of power typical of the control society were implemented.

However, the High Court of Justice struck down the 2013 Amendment, ruling that both the one-year detention period in the closed center and the obligation to reside indefinitely at Holot were unconstitutional.[226] Justice Fogelman, who wrote the majority opinion, ruled that Holot was by nature more similar to a closed detention facility than to an open one.[227] The fact that its residents were obligated to report to it three times a day, coupled with its location in the middle of the desert, far from any major city, amounted to a de facto deprivation of liberty, for:

> The infiltrator is thus prevented from developing his personality . . . how could he meet a romantic partner? Which hobbies could he possibly pursue? When would he meet his friends, who have yet to receive notice to report to Holot? Could he attempt to acquire an education? It is clear that the infiltrator is denied the possibility of realizing his individual autonomy.[228]

This reasoning may be construed as an objection to the prioritization of the aggregate over the individual that is typical of the control society. In Justice Fogelman's view, an asylum-seeker is, first and foremost, a concrete individual who is a bearer of rights, including the right to develop his or her personality. This must be taken into consideration when applying detention and detention alternatives. However, Justice Fogelman and the majority opinion did not reject the use of other detention alternatives, which could serve to restrict asylum-seekers' freedom of movement. The court commented that other countries had adopted measures such as open housing centers, confinement to a certain geographic area, electronic bracelets, and the posting of bail for supervising asylum-seekers, all of which may be acceptable in the Israeli case.[229] Crimmigration as a general policy, and the techniques of power that constitute crimmigration and are associated with control, seem to be tolerated by the majority opinion.

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226. *Eitan et al.*, *supra* note 47.
227. *Id.* at ¶ 98 (majority opinion).
228. *Id.* at ¶ 125. The use of the singular "he" is in the original text.
229. *See, e.g.*, *id.* at ¶ 63; *id.* at ¶ 5 (Naor, J., concurring).

In their dissent, Chief Justice Grunis[230] and Justices Amit[231] and Hendel[232] ruled that the one-year detention period in the closed center was constitutional. Chief Justice Grunis and Justice Hendel likewise ruled in favor of the mandatory residence at Holot, suggesting that only the obligation to report back to the center three times a day be nullified and replaced with a more lenient reporting requirement.[233] With regard to the similarity between Holot and a conventional prison, Chief Justice Grunis stated that the attitude toward residents of Holot must differ from the attitude toward those criminally imprisoned.[234] However, "the concentration of a large population in one center may naturally bring about various problems, both disciplinary and others. It would not be unfounded to determine that the State Correctional Authority is best equipped for preventing disorderly conduct, having been trained to cope with a civilian population."[235]

Justice Hendel seemed more inclined to draw a direct comparison between the residents of Holot and criminal convicts:

> It is hard to ignore the fact that we are dealing with those who do not respect the sovereignty of the state and instead chose to infiltrate across the border while breaking the law. And do not tell me that we are dealing with "presumed refugees." Experience teaches us that a person who wishes to receive recognition as a refugee turns to the relevant authorities.[236]

Parliament quickly responded to the verdict rendering void the 2013 Amendment, by introducing yet a third amendment to the law.[237] The 2014 Amendment stipulated that any "infiltrator" who entered Israel would be confined at the closed center for three months.[238] It further stated that asylum-seekers already residing in Israel may be sent to Holot for a period of twenty months, during which they would be required to report to the center only in the evenings.[239] Consequently, a third

230. *Id.* at 141–81 (Grunis, C.J., dissenting).
231. *Id.* at 130–41 (Amit, J., dissenting).
232. *Id.* at 202–15 (Hendel, J., dissenting).
233. *Id.* at ¶ 5 (Grunis, C.J., dissenting); *id.* at ¶ 6 (Hendel, J., dissenting).
234. *Id.* at ¶ 30 (Grunis, C.J., dissenting).
235. *Id.* at ¶ 31 (Grunis, C.J., dissenting).
236. *Id.* at ¶ 7 (Hendel, J., dissenting).
237. *See* 2014 Amendment, *supra* note 45.
238. *Id.* at § 1(1)(c).
239. *Id.* at § 32H(b).

petition was filed to the court, focusing mainly on the period of residence at Holot.[240] The petitioners described in detail the living conditions at Holot,[241] emphasizing the various restrictions posed on the everyday lives of the residents.[242] Also emphasized were the grave consequences that transporting asylum-seekers to Holot after a long period of residence in Israel had on such persons' ties to the community.[243] Rather than sending asylum-seekers to Holot, the petitioners suggested that the government regulate the employment of asylum-seekers, a policy that would reduce their incentives for criminal conduct.[244] The state strongly objected to this suggestion in its response, emphasizing that such a policy of "containment" and "acceptance" would incentivize future "infiltrators" to enter Israel.[245]

On this occasion, the High Court of Justice sustained the petition only partially. The court ruled that the initial three-month detention period was reasonable, despite the fact that it was not used to review individual asylum claims or expected to lead to deportation.[246] It likewise ruled that although the period of residence at Holot must be reduced, the government may principally continue to obligate asylum-seekers to reside at the center.[247] Perhaps the most interesting aspect of the court's third verdict was its struggle to articulate an objective that would justify the policy of detaining asylum-seekers at Holot. Chief Justice Naor, who wrote the majority opinion,[248] accepted the state's position that it could not be obligated to adopt an inclusive policy of "'containment and absorption" toward the asylum-seeking community.[249] Moreover, she accepted the state's position that the

240. Though the initial three-month detention period in the closed center was likewise challenged. *See* HCJ 8665/14 Desta et al. v. the Israeli Parliament et al. (Petition, submitted Dec. 18, 2014) (Isr.), *available at* http://www.acri.org.il/he/33661.

241. *Id.* at ¶¶ 97–35.

242. *Id.* at ¶¶ 104, 112–13.

243. *Id.* at ¶ 107.

244. *Id.* at ¶ 330.

245. HCJ 8665/14 Desta et al. v. the Israeli Parliament et al. (Response, submitted Jan. 27, 2015) (Isr.), *available at* http://www.acri.org.il/he/33661; see ¶ 10.

246. HCJ 8665/14 Desta et al. v. the Israeli Parliament et al. (Aug. 11, 2015), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

247. *Id.*; for the minority opinion of Justice Hendel that upheld the constitutionality of the entire amendment, see *id.* at 116–33 (Hendel, J., dissenting).

248. *Id.* at 2–70 (majority opinion).

249. *Id.* at ¶ 80.

main purpose of Holot was legitimately to prevent asylum-seekers from settling in Israeli cities. The problem with this justification, however, was clear. Holot could house only a small percentage of the asylum-seeking population, and the state was prohibited from indefinitely detaining asylum-seekers there until their deportation became possible. Then, in what way exactly would Holot prevent asylum-seekers from settling in Israel?

The answer, according to the court, was that Holot was not intended precisely to prevent any given individual from developing ties to Israel. It was rather designed to reduce the general burden on Israeli cities by dispersing the population of "infiltrators" that resides in these cities. This goal, Chief Justice Naor explained,

> does not focus on the individual infiltrator or the risk posed by him to society . . . I believe that in order to fulfill this goal there is no need to hold any particular infiltrator at the residence center. It is enough to hold any group of infiltrators at the center. Indeed, we may assume that with the release of one infiltrator from the center another will take his place. This change-over achieves the purpose of the law. It is enough that at every given moment a part of the population of infiltrators . . . will be removed from the city centers. Such a "revolving door" policy causes a lesser infringement upon the constitutional rights of the infiltrators called to the residence center, and it achieves the purpose of the law. It is therefore possible to make do with a significantly shorter period of residence at the center, for the purpose of complying with the objectives of the law.[250]

If Justice Fogelman formerly insisted on "individualizing" the asylum-seeking population, Chief Justice Naor seems to do the opposite. By Chief Justice Naor's logic, individual asylum-seekers are meaningless, not in the sense that they have no personal rights (on the contrary, the constitutional rights of asylum-seekers are part of the rationale of the decision), but in the sense that they are simply not the entity with which the Israeli detention policy is concerned. This policy is about aggregates, about reducing the population as a whole, in order to diminish the general undesirable consequences that its presence has on Israeli society. It is quite simply a numbers game. Following this logic, Chief Justice Naor ruled that the maximum period of residence at Holot should be decreased, as shorter

250. *Id.* at ¶ 100. The use of the singular "him" is in the original text.

periods would sufficiently attain this objective. In response, Parliament amended the Anti-Infiltration Law to entail a twelve-month residence period.[251]

The 2012 Amendment and, to lesser extent, the 2013 Amendment focused on incarcerating the asylum-seeking population in concentrated sites of enclosure. The 2014 and 2016 Amendments, conversely, intended to exclude asylum-seekers from Israeli society by more flexible measures, considered sufficient to reduce the undesirable effects of undocumented immigration as a whole. Although from the perspective of the asylum-seeking population, the 2014 and 2016 Amendments undoubtedly still constitute a grave infringement upon the right to liberty, they are yet more open by nature than their predecessors. This development will be discussed in Part IV.

B. Particular Mechanisms for Controlling Asylum-Seekers Involved in Criminal Activity

The new mechanisms for detaining and controlling asylum-seekers, established by the amendments to the Anti-Infiltration Law, are complemented by two further arrangements, designed specifically for controlling crime within the asylum-seeking community. The first is an executive directive allowing the use of immigration detention to confine and sanction "infiltrators" who have demonstrated unlawful behavior during their release into the community.[252] The Attorney General Directive allows the head of the Border Authority to revoke the conditional release visa and detain an asylum-seeker convicted or merely suspected of any offense that the head of the authority considers might jeopardize national security or public safety.[253] Convicted asylum-seekers are detained in accordance with the Directive upon completion of their sentence, which results in a de facto double punishment. As for asylum-seekers who have yet to be convicted, the Attorney General Directive permits the incarceration without trial of those suspected of a crime or misdemeanor and whose case was closed due to insufficient evidence, provided that the evidence of guilt is similar to the level of proof sufficient for a criminal conviction. In these cases, the

251. The 2016 Amendment, *supra* note 40.

252. Attorney General Directive, *supra* note 49.

253. In accordance with § 13F of the Entry Law; *see supra* note 51.

Directive hence serves as a type of alternative criminal procedure for asylum-seekers, one consisting of relaxed evidentiary standards and far fewer procedural safeguards. The offenses allowing the enforcement of the Attorney General Directive include severe crimes, such as security-related offenses, sexual offenses, drug distribution, and aggravated assault, as well as some relatively minor crimes and misdemeanors.[254]

The second mechanism is a disciplinary hearing, instigated by the 2013 Amendment to the Anti-Infiltration Law and designed to sanction asylum-seekers who have demonstrated unlawful behavior during their residence at Holot. The hearing may result in various sanctions—including a reprimand, a fine, and prohibition of the asylum-seeker from leaving Holot—the most severe of which is a four-month period at a closed detention center.[255] Some of the offenses that invoke these sanctions are breaches of the specific rules of conduct of Holot (for instance, failing to report back to the center on time), whereas others, such as acts of violence, are offenses that come under the Israeli Penal Law.[256]

These special mechanisms are particularly telling examples of crimmigration. The amendments to the Anti-Infiltration Law entail a one-way relationship between criminal law and immigration, namely, a utilization of the former (in the form of detention and detention alternatives) to govern the latter. Conversely, the disciplinary hearing, and even more so the Attorney General Directive, are each a two-way street, in which tools of immigration management (powers granted to the Border Authority) are additionally used to control conventional crime.

Much like the final amendment to the Anti-Infiltration Law, these mechanisms were also preceded by more extreme versions and negotiated through Supreme Court litigation. The Attorney General Directive initially[257] permitted the detention of asylum-seekers suspected of a wider range of offenses,[258] demanded a lower burden of proof,[259] and was not

254. Attorney General Directive, *supra* note 49.

255. The 2014 Amendment, *supra* note 45, at § 32T(b).

256. *See supra* note 52.

257. The Attorney General Directive was originally termed the Procedure of Treatment of Infiltrators Involved in Criminal Proceedings, Regulation No. 10.1.0010 (2013) (Isr.), *available at* http://www.justice.gov.il/Pubilcations/News/Documents/NohalMistanenim.pdf [hereinafter the Procedure].

258. *Id.* The Procedure applied to any offense potentially compromising public order.

259. *Id.* The Procedure required "clear and convincing evidence."

limited to cases closed due to insufficient evidence.[260] These conditions were revised following several petitions to the Supreme Court, challenging the Directive's legality. The court's verdicts expressed some uneasiness about the Directive and stated that principally speaking, the criminal process was the appropriate way of coping with suspected criminals.[261] The court likewise ruled that decisions to detain asylum-seekers in accordance with the Attorney General Directive were subject to judicial review and should conform to the principle of proportionality.[262]

However, unlike its reaction to the amendments to the Anti-Infiltration Law, with respect to the long-term detention of asylum-seekers accused of breaking the law, the court refused to make a general ruling that such a policy was unconstitutional. The court was unwilling to rule that the criminal process was the only acceptable way of determining guilt or innocence,[263] or that immigration detention was permitted only to enable deportation and not to control crime,[264] claiming that such general rulings might prevent the state from attaining security for its citizens.

Such rulings were issued by the court not only before, but also after its decision to annul the 2012 Amendment to the Anti-Infiltration Law. For example, in the case of *Habtum*, Justice Rubinstein rejected the petitioners' claim that immigration detention could only be exercised when it was expected to lead to deportation, stating that:

> Such a binary result is unfitting . . . for, it would possibly mean that in the absence of the immediate option of deportation, the authorities and the courts would not be able to perform their duty to protect public safety. This result is unreasonable . . . It is difficult to accept the argument that the state and the courts must ignore the public interest and allow those illegal residents who jeopardize public safety—and of course, not all of them do—and who cannot at this time be deported, to freely roam the streets.[265]

260. *Id.* The Procedure applied also to cases closed due to insufficient public interest.

261. *See, e.g.*, AdminA 4326/13 Halhalu v. The Ministry of Interior (Nov. 3, 2013), Nevo Legal Database (by subscription, in Hebrew) (Isr.); AdminA 298/14 the State of Israel v. Ismail (Mar. 17, 2014), Nevo Legal Database (by subscription, in Hebrew) (Isr.); AdminA 4496/13 Habtum v. The Ministry of Interior (Nov. 12, 2013), Nevo Legal Database (by subscription, in Hebrew) (Isr.), at ¶ 16.

262. *Habtum*, *id.*

263. *See, e.g.*, AdminA 8642/12 Taspahuna v. The Ministry of Interior (Feb. 4, 2013), Nevo Legal Database (by subscription, in Hebrew) (Isr.); *Ismail*, *supra* note 261.

264. *See, e.g.*, *Habtum*, *supra* note 261; and *Ismail*, *id.*

265. *Habtum*, *id.* at ¶ 16.

The court thus accepted that asylum-seekers were illegal residents whose noncompliance with the law of the community could lead to the revocation of their immigration status.[266] It rejected the position that asylum-seekers and citizens who commit crimes should be treated equally, under the same evidentiary rules and procedural safeguards, or be considered to pose a similar threat to public security. This is evident in the court's insistence that forbidding the use of immigration detention for controlling crime would unreasonably jeopardize the safety of the Israeli public. Such a claim ignores the numerous tools that conventional criminal law and procedure offer to the state in its efforts to suppress criminal activity, such as pre-charge and pre-trial detention, detention alternatives, and imprisonment. It likewise ignores the fact that where citizens are concerned, administrative evidence is generally considered unsatisfactory grounds for depriving liberty. Furthermore, when deciding to close criminal cases due to insufficient evidence, the state declares its willingness to allow an individual who may potentially compromise public safety to "freely roam the streets." The court thus partakes in the classification of asylum-seekers as a dangerous class that poses a particular danger to Israeli society.

As for the disciplinary hearing, when it was first instigated as part of the 2013 Amendment to the Anti-Infiltration Law, it entailed a maximum sanction of a one-year period at a closed detention center.[267] However, the High Court of Justice nullified this in its verdict granting the petition against the 2013 Amendment. The court ruled that although the hearing was formally defined as disciplinary rather than criminal, this did not obscure the fact that it entailed the criminal sanction of imprisonment. Such a sanction could only be imposed by a member of the judiciary and upon applying the procedural safeguards typical of the criminal process.[268] Following this ruling, the disciplinary hearing was revised, and its current version, enacted by the 2014 Amendment, introduced the more lenient sanction of a four-month detention period.

The revised disciplinary hearing was challenged in the petition against the 2014 Amendment to the Anti-Infiltration Law, and was upheld by the court. Nonetheless, an interesting dispute arose between Justice Joubran,

266. For similar rhetoric, see, e.g., AMN (Be'er Sheva) 4254-12-13 the State of Israel v. Gbharna (Dec. 25, 2013), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

267. The 2013 Amendment, *supra* note 218, at § 32T.

268. *Eitan et al.*, *supra* note 47, at ¶¶ 177–84 (majority opinion).

who joined the majority opinion, and Justice Fogelman. Justice Fogelman's minority opinion[269] was that the revision made in the hearing was insufficient, as it did not change the fact that the sanctions it entailed were criminal sanctions by nature. In order for or the hearing to comply with constitutional requirements, the legislature must further reduce the maximum penalties it entails, so that they become compatible with those prevalent in other disciplinary procedures. Justice Fogelman pointed out three such procedures that exist under Israeli law: disciplinary hearings held in the military, disciplinary hearings held for employees of the State Correctional Authority, and disciplinary hearings held for police officers, all of which entail substantially shorter incarceration periods.

Justice Joubran, conversely, rejected this comparison:

> The infiltrators are a group of people who have violated the law to begin with—due to illegal entry and/or residence. The group of soldiers, jailers, and police officers, by contrast, are professionals who serve the country. When an infiltrator commits a disciplinary offence, this offence is added to the one he has already committed (I am not addressing the question of the reason for his illegal entry) . . . It seems to me that we must distinguish between the powers of an executive figure to discipline a group of people who are under his care due to breaking the law, and his power to discipline a group of people who reside under his authority in a professional capacity.[270]

Interestingly, when discussing the justifications for imposing severe sanctions on asylum-seekers via a disciplinary hearing, Justice Joubran seemingly abandons the notion that Holot is not a prison but a housing center justified by concerns of population management, underlying the court's ruling on its constitutionality. Justice Joubran's statement that asylum-seekers reside at Holot "due to breaking the law"' is obviously inconsistent with this notion. The "unlawfulness" of the asylum-seeking population was not a major factor in the court's rulings concerning all other aspects of the amendments to the Anti-Infiltration Law.[271] However, when concerned with asylum-seekers accused of breaching the law upon entering

269. *Desta et al.*, *supra* note 246, at ¶¶ 38–51 (Fogelman, J., dissenting). Justice Amit joined the minority opinion on this matter; see *id.* at ¶ 6 (Amit, J., dissenting).

270. *Id.* at ¶ 7 (Joubran, J., concurring). The use of the singular "he" is in the original text.

271. *See, e.g.*, *Eitan et al.*, *supra* note 47, at ¶ 30 (Grunis, C.J, dissenting); and at ¶ 98 (majority opinion); though for an opposite view, see ¶ 7 (Hendel, J., dissenting).

the country, the fact of their unauthorized entry became an issue in the eyes of the court.

The court has, at least partially, rejected the notion that asylum-seekers accused of no crime (apart from the arguably illegal infiltration of Israel) may be subjected to criminal measures. However, it has accepted the premise that those who have demonstrated unlawful behavior may be treated differently than citizens who have done so. In other words, it seems that asylum-seekers involved in criminal activity evoke a type of "double illegality" in the eyes of the court—an added unlawfulness that is piled upon their already unlawful existence in the state. This first "tier" of illegality justifies their unequal treatment in cases when they have additionally breached (or have been accused of breaching) the law of the community and have thus validated their image as a dangerous class.

IV. DISCUSSION

The current Israeli detention policy toward asylum-seekers serves as a fascinating example of how natural the intersection between criminal and immigration law has become for the modern nation-state. In a remarkably short period, Israel created an extensive immigration detention system that regularly utilizes powers and norms embodied in criminal law and may, in certain instances, go so far as to serve as an alternative criminal procedure for asylum-seekers. This policy surely does not derive solely from the characteristics of the control society. The initial attempts to confine asylum-seekers for extremely long periods (three years at the closed centers, indefinite residence at Holot, which was originally a nearly closed center) may point to contradictory and older forms of domination.[272] So may the decision to complement this extensive crimmigration policy with the construction of the Egypt-Eilat border fence. During the years of the Supreme Court litigation described above, the government completed the construction of this fence, leading to the rapid decrease in the number of asylum-seekers who managed to cross the border each month.[273] This insistence on reinforcing state borders in their traditional sense demonstrates that

272. And, accordingly, to alternative "diagrams" for mapping the present; *see* Walters, *supra* note 20.

273. *See* DATA REGARDING FOREIGNERS IN ISRAEL, *supra* note 1.

mechanisms of control have yet to entirely replace formal border checkposts in the efforts of the nation-state to control immigration.

Additionally, the Israeli crimmigration policy is certainly affected by forces such as nativism and ad hoc instrumentalism, which are complementary to control. The control of conventional crime via immigration detention rather than by the regular criminal process, for example, probably would not have existed in a system that places special emphasis on formal legal categories. Nor would a near-sweeping refusal to grant asylum and a near-automatic classification of non-Jewish migrants as a dangerous class exist in a legal system untouched by nativism.

However, nativism and ad hoc instrumentalism cannot fully account for the changing logic of both criminal law and immigration law in a way that truly clarifies the willingness of the two fields to collaborate. The shift to the control society, conversely, entails a new and mutual understanding of both fields of law, making them particularly adequate for governing both immigration and crime. The objectives of classifying populations into groups of risk and managing those groups perceived as dangerous in order to minimize unwanted behavior as a whole and bring it to an acceptable level, are central to the two fields. Crimmigration is a method of achieving these objectives on both fronts—crime and undesirable migration—combined. Apart from explaining the objectives of crimmigration, control likewise sheds light on the techniques of power that are suitable for accomplishing these objectives, leading to the formation of crimmigration policies.

The Israeli crimmigration policy is particularly influenced by the objectives and techniques of power typical of the control society. This policy is focused on the task of population management, as it explicitly deploys detention powers for relocating parts of the asylum-seeking population and thus "reducing the burden" from certain populations of Israelis. It is likewise governed by the principle of cost-effective risk management, as it allocates resources (the exercise of detention powers) primarily via the categorization of asylum-seekers according to the perceived risk that they pose to Israeli society. The power to indefinitely detain all asylum-seekers convicted or merely suspected of criminal activity, except in cases of minor offenses, and the power to refrain from releasing detained asylum-seekers for security considerations based on their country of origin, are particularly telling examples of the logic governing the control society. This logic is manifest in the Supreme Court's willingness to uphold the Attorney General Directive based on the premise of "double illegality," which views

undocumented asylum-seekers as a dangerous class and justifies their unequal treatment in cases that validate this view. The criteria for exercising the detention alternative of residence at Holot are likewise an example of the classification typical of the control society. By exempting women, children, the sick, and the elderly, these criteria seem to prioritize the incapacitation of groups statistically more prone to dangerous behavior. Holot has thus become a mechanism for incapacitation of high-risk groups and population distribution.

Notwithstanding its insistence that certain aspects of the detention policy toward asylum-seekers take into consideration individual characteristics, the Supreme Court has generally settled for this strategy of targeting aggregates of presumably dangerous groups. This is attested by the court's willingness to uphold the Attorney General Directive. Although the Directive targets those who have personally broken the law, it is far more concerned with prevention of future crimes based on a perceived deviance than with retribution of past conduct. It allows the incarceration of asylum-seekers whose guilt has not been proven beyond a reasonable doubt, as well as multiple periods of incarceration for the same offense in cases of convicted asylum-seekers. Such disproportional confinement periods exceed the severity of punishment needed to amend the wrong that has already been committed, thereby aiming to prevent future risk, based on a presumption of dangerousness. The Attorney General Directive is therefore less about punishing those proven personally guilty of committing crimes and more about prioritizing the incapacitation of those who, due to being accused of criminality, have risen "above the radar."

Despite the undeniably harsh treatment enabled by the Israeli detention policy, it is noteworthy that this policy was never designed to eliminate the perceived threats posed by the dangerous class of asylum-seekers, but rather, to manage and reduce these threats. The special detention powers have never been used to incarcerate the majority of the asylum-seeking population, even when the first and most severe amendment to the law was valid. In 2013, shortly before the High Court of Justice struck down the 2012 Amendment, only approximately 2,000 of the 54,000 asylum-seekers residing in Israel at the time were confined at the closed detention centers.[274] In 2017, Holot operated at full capacity but could accommodate only 3,360

274 HCJ 7146/12 Adam et al. v. the Knesset et al. (Sept. 16, 2013), Nevo Legal Database (by subscription, in Hebrew) (Isr.), at ¶ 35 (Arbel, J., majority opinion).

residents, and in late 2016, the Immigration Authority began informally exempting all asylum-seekers originally from the region of Darfur from residence at the center.[275] Thus, the Israeli detention policy is about creating options for acting, not necessarily exercising them. It operates through a constant *threat* of incarceration and revocation of status, aimed at a population of territorially present, yet not formally legal, residents. As such, it allows the state much flexibility in its treatment of asylum-seekers, designed to ensure that only the resources necessary for remaining within the bandwidth of acceptability are exhausted at any given time.

This flexibility is manifest in the techniques of power through which the Israeli crimmigration regime operates. The large population of released asylum-seekers supervised via periodical reporting requirements, the flexible standards for re-detaining released asylum-seekers who have surfaced "above the radar," and the Border Authority's wide discretion to decide who to send to Holot, all represent the type of decentralized power exercised by control societies. An even more telling example is the gradual "openness" of Holot, a center that started out very similarly to a prison or closed detention facility, and has come to resemble somewhat the characteristics of an open residence center. This development derived directly from the court's perception of Holot as a device of population management. Settling for this narrative meant that there was simply no justification for harsher restrictions on freedom of movement or longer residence periods than those needed to ensure the minimal dispersal of the asylum-seeking population.

What lessons does the Israeli case teach us about crimmigration? Perhaps the most important lesson is that while the crimmigration regimes in many countries focus on the task of deporting undesirable migrants, this task is in fact not a necessary component of crimmigration. The Israeli crimmigration system entails mechanisms very similar to those in other countries. It may even be considered more extreme in the sense that it utilizes immigration detention in cases of mere suspicion of criminal activity. Yet, it was initiated precisely due to the state's inability to deport the asylum-seeking population. It was enacted despite the fact that the

275. This new policy derives from the fact that most asylum-seekers from Darfur have officially filed for asylum, and the review of their claims has been prolonged. *See* Ilan Lior, *The State Will cease to Summon Asylum-Seekers from Darfur to Holot*, HAARETZ (27 Oct. 2016), *available at* https://www.haaretz.co.il/news/education/.premium-1.3104408 (Isr.).

government had agreed to a policy of temporary protection and had formally acknowledged that it did not intend to use the detention periods to explore the possibility of deportation in individual cases. Both Holot and the closed detention facilities were never intended as a short-term measure to assist the state in examining individual asylum claims or in carrying out the deportation of rejected asylum-seekers, but as a long-term measure of incapacitation and population distribution. Likewise, the powers granted to the Border Authority to detain asylum-seekers engaged in criminal activity were certainly never about deportation, but about policing a territorially present population and controlling crime that is unrelated to immigration laws.

This policy—namely, utilizing immigration detention and detention alternatives for purposes that are unrelated to border control—has essentially been approved by the Supreme Court. Although the court has rejected deterrence of future asylum-seekers from entering the country as a legitimate objective of the amendments to the Anti-Infiltration Law, it was willing to accept the objective of dispersing the territorially present asylum-seeking population. It was likewise willing to accept immigration detention as a tool for controlling conventional crime via the Attorney General Directive and disciplinary procedure. It thus participated in designing the crimmigration regime as a mechanism of social control.

The true role that the crimmigration regime plays in Israel is therefore one of domestic policing. Asylum-seekers are dispersed, supervised, penalized, and kept in a state of constant uncertainty concerning their status through the mechanism of immigration detention. This mechanism is concerned with governing a population of migrants expected to remain in the country in the foreseeable future, not with regulating their right to reside in the country. The conclusion is reinforced by the fact that the Israeli crimmigration regime remains in effect although the construction of the fence on the state's southern border has significantly decreased the number of asylum-seekers who manage to enter the country each year.

Although most crimmigration regimes worldwide do not focus primarily on asylum-seekers and may be more concerned with expelling undesirable migrants or discouraging their entry, Part II of this article demonstrates that they yet reflect a tendency to replace border control with strategies of governing territorially present populations. It is therefore important to acknowledge the role that criminal law plays in the domestication of immigration policy through its participation in crimmigration systems. Criminal

law, traditionally a matter of domestic jurisdiction,[276] enables, and perhaps encourages, the transformation of immigration policy from an outward-looking power into an inward-looking power. Any attempt to understand crimmigration, let alone resist it, must take this into consideration. It must focus not only on the effects crimmigration has at the margins of the state (i.e., the ways in which it leads to deportation or criminalization of illegal entry), but also on the ways in which it affects the day-to-day lives of migrants residing in the state indefinitely.[277]

Finally, we should consider some of the potential implications that crimmigration, as a product of the control society, has on the concept of citizenship. If crimmigration should truly be understood as a system of domestic social control, perhaps then it should likewise be understood to contribute to the blurring of the boundary between "outsider" and "insider" to the political community, which is inherent to the process of globalization.[278] The reality whereby the territorial border is delocalized and no longer possesses the sole power to determine who remains "outside" the community and who is allowed "inside," contributes to the construction of citizenship as a non-binary concept. Status in the national community is gradually envisioned as structured by a series of concentric circles of belonging, with those individuals in the innermost circle enjoying the full benefits and burdens of membership, and those farther from the center possessing increasingly fewer claims vis-à-vis the community.[279] Crimmigration's central role in delocalizing the border by enabling the nation-state to cope with undesirable migrants through means other than full physical exclusion, may thus contribute to the formation of migrants as an intermediate category between citizen and noncitizen.[280] This is especially true given the logic of risk management underlying the control society, which

276. Zedner, *supra* note 165.

277. *Compare* Koulish's warning that "the risk society is likely to increase control over the population of immigrants who reside inside the territorial boundaries of the United States"; Koulish, *Entering the risk society*, *supra* note 13, at 66.

278. For the manners in which the concept of citizenship has evolved in the era of globalization, see generally BOSNIAK, *supra* note 144.

279. *Id.* at 74–76.

280. *Compare* Bosniak's argument, that alienage is an intrinsically hybrid legal category, governed both by governments' immigration power and by the rights of persons already residing within the national society—a domain in which government power to impose disabilities on people is considered far more limited; *id.* at 13–14.

prevents the exclusionary mechanisms of crimmigration from operating at full capacity, leaving those populations categorized as low-risk relatively free to pursue their integration into society.[281]

V. CONCLUSION

This article offered a close analysis of the evolution of the Israeli detention policy, attempting to observe crimmigration in the making and, in so doing, to better understand the forces contributing to the contemporary integration of criminal and immigration law. Israeli crimmigration, I argued, is highly affected by the principles underlying the control society. It works through the construction of dangerous classes and the categorization of populations according to the perceived threat they pose to the nation-state. It is highly focused on population and risk management, and strives to keep the perceived threat of the "criminal alien" within the bandwidth of acceptability. The type of power exercised for this purpose—although resulting in a harsh and unjust treatment in many cases—is yet fluid and flexible. It utilizes immigration detention (in closed facilities strongly resembling conventional prisons) as a means of incapacitation, but it also operates in open sites and is decentralized by nature.

Although the scope and degree of such features certainly vary in crimmigration regimes worldwide, Part II of this article suggested that they are quite characteristic of crimmigration in general, and stem from transitions that have taken place in both the criminal justice and immigration systems of control societies. The article contended that these mutual transitions not only explain what has encouraged the current cooperation of the two

281. In the Israeli case, for example, the categorization of the asylum-seeking population into groups of dangerousness has caused most of this population to be released, resulting in a large group of migrants who are not only territorially present, but a visible part of the community as well. Part of this population has been integrated into the Israeli labor market, as the state generally refrains from prosecuting those who illegally employ asylum-seekers. Likewise, children of asylum-seekers, some of whom have been born in Israel, attend the public education system. Just recently, the government announced its decision to grant temporary residency to 200 Sudanese asylum-seekers who filed for asylum several years ago. See Ilan Lior, *The State Will Grant temporary residency to 200 Former Residents of the Darfur Region*, HAARETZ (July 8, 2017), *available at* http://www.haaretz.co.il/news/education/1.4158293 (Isr.).

systems, but also clarify the particular manners in which crimmigration targets "criminal aliens."

Perhaps the most important lesson to be learned from the Israeli case, is that the current emphasis put by some countries on deporting undesirable migrants is not necessarily a defining feature of crimmigration. This article has attempted to demonstrate that crimmigration is likewise a regime of domestic policing, social control, and population management. Such roles derive from the transitions that have occurred in the fields of criminal and immigration law. These transitions have caused crime control apparatuses to become concerned with managing aggregates rather than with reforming individuals, and immigration apparatuses to focus less on border control and more on the management of territorially present migrants. It is thus clear why crimmigration, as a product of the control society, does not avoid targeting migrants who are mostly undeportable, such as asylum-seekers. If, like in the Israeli case, crimmigration systems can be built on the premise of an inability to deport their target populations, then it seems that they will remain in existence so long as migrants continue to be unjustly perceived as a dangerous class in need of control.

VI. EPILOGUE

On August 28, 2017, the Israeli Supreme Court ruled against the state on a petition filed by two asylum-seekers, who were detained indefinitely due to their refusal to leave Israel for Rwanda.[282] The petition was filed following the government's decision to form deportation agreements with two safe "third countries" (Rwanda and Uganda) that could seemingly guarantee the security of Sudanese and Eritrean asylum-seekers. The agreement with Rwanda stated that asylum-seekers who *agreed* to leave Israel would be deported to Rwanda and receive a residence permit. To encourage asylum-seekers to agree to leave for Rwanda, Israel invoked a clause in the Entry Law, which states that an illegal resident who refuses to cooperate with

282. AdminA 8101/15 A.G.Z et al. v. the State of Israel—Ministry of Interior (Aug. 28, 2017), Nevo Legal Database (by subscription, in Hebrew) (Isr.). During the proceedings, the two petitioners were released from detention at the order of the court. See Decision, AdminA 8101/15 A.G.Z et al. v. the State of Israel—Ministry of Interior (Dec. 30, 2015), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

deportation proceedings may be detained indefinitely.[283] Asylum-seekers who refused to leave were thus incarcerated in accordance with this clause.

The Court rejected this new detention policy, ruling that it in fact coerced asylum-seekers to leave Israel and thus could not satisfy the demand that they consent to their deportation.[284] In response, the government attempted to form new deportation agreements, which would allow for coerced deportation to "third countries." The government also decided to close Holot and shift its focus to the detention of asylum-seekers who refused deportation.[285]

As of the beginning of 2019, this attempt to return to the traditional role of immigration detention as an aid to deportation seems to have back-fired. The attempts to reach new deportation agreements have failed;[286] Holot was closed nonetheless during 2018, after most asylum-seekers that were eligible for residence in the center had finished their one-year period of residence; only a few dozen asylum-seekers, who were incarcerated due to being accused of criminal activity, remain in detention.[287] There is currently no clear path for deporting asylum-seekers or for their long-term incarceration. The Israeli crimmigration regime has thus been reduced significantly and currently functions mainly as a system of conventional crime control.

This turn of events seems to reinforce the conclusion concerning the limitations of crimmigration as a system of deportation and border control. However, it also demonstrates that extensive judicial intervention in government policies may serve to weaken the control society apparatus and mitigate its ramifications as a system of population management. Although the future of the Israeli crimmigration regime remains unclear, one may hope that the current impasse it has reached indicates that the asylum-seeking community is on its way to receiving a permanent status in Israel.

283. Entry Law, *supra* note 35, at § 13F(b)(1). Additionally, any asylum-seekers who agreed to leave received a payment of $3,500. See AdminC 5126-07-15, *id*.

284. AdminA 8101/15, *supra* note 282.

285. Government Resolution No. 3154, Draft of the Anti-Infiltration Law (Offences and Judgment) (Temporary Order), 5777–2017—Empowerment of the Minister Legislation Committee (Nov. 19, 2017) (Isr.).

286. Lee Yaron, *The State Admits to the High Court of Justice: The Outline has Collapsed, there is No Viable Option for Forcefully Deporting Asylum-seekers*, Haaretz (Apr. 24, 2018), *available at* https://www.haaretz.co.il/news/law/1.6028205 (Isr.).

287. the Hotline for Refugees and Migrants, "Ye Shall have One Law"—Administrative Detention of Asylum Seekers Implicated in Criminal Activity (Sept. 2017), *available at* https://hotline.org.il/en/publication/criminal-procedure-eng-2017/ (Isr.).