# SECURITY, THE STATE, AND THE CITIZEN: THE CHANGING ARCHITECTURE OF CRIME CONTROL

*Lucia Zedner**

*Citizenship has become a buzz word of political discourse and policy formation. Recent formulations convey the message that rights are contingent on earning membership in a political community and carry corresponding responsibilities. Acquiring citizenship entails a more rigorous process of validation and conformity with prescribed norms. The notion of probationary citizenship (developed in respect of immigrants) is extended to all those whose standing as full citizens is in doubt. Citizenship comes to be used as a means of policing and a tool of the criminal law. Assertion of the state's duty to provide security for bona fide citizens provides the rationale for measures that are preemptive, exclusionary, and pay scant regard to procedural proprieties. They create a caste of outlaws and aliens whose status renders them suspect aside from any wrongdoing; whose interests are compromised in the name of protecting the public; and who must requalify to enjoy full citizenship. One means of resisting these trends is adherence to a liberal model of the criminal law and assertion of due process protections as security rights for all individuals against the state.*

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*Professor of Criminal Justice, Law Faculty and the Centre for Criminology, University of Oxford, and Conjoint Professor, Law Faculty, University of New South Wales, Sydney. I am grateful to Abigail Bright for her excellent research assistance, to members of the Oxford Centre for Criminology (especially Mary Bosworth, Ben Goold, and Julian Roberts); to members of the Centre for Criminological Research at Keele University; and to the organizers and participants at the LSE seminar on Citizenship and Criminalisation in Contemporary Perspective for their comments on an earlier draft.

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## INTRODUCTION: THE PROMISE AND PERILS OF GLOBALIZATION

Globalization has at its very core the mobility of people, goods, services, capital, and technology, the formation of world markets and of global institutions. Mass mobility occurs upon a scale unimaginable even in the relatively recent past.[1] In periods of economic prosperity the benefits of economic migration are clearly recognized by modern states. The sustained boom in the world economy that preceded the recent financial crisis was built upon a fast-expanding "effective global workforce" that is estimated to have quadrupled since 1980.[2] In purely economic terms, remittances sent home by migrants have also been a vital source of prosperity to poor and developing countries.[3] Migration has been no less vital to rich economies whose labor needs have been met by the influx of both the highly educated and the unskilled willing to take up jobs that native workers decline to fill.

In periods of economic downturn, however, political pressure to put domestic workers first results in greater protectionism, selectivity, and tougher enforcement of immigration controls.[4] Opposing the pull of globalization stands the counterpressure to resist the influx of migrants by strengthening borders and limiting access to citizenship in the name of security.[5] Whereas globalization underwrites freedom of movement, the pursuit of security relies upon limiting the mobility of those deemed to threaten public safety. Immigration is said to imperil social cohesion and the job security of domestic workers, to burden the welfare system, and to contribute to social disorder

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1. In 2007, over 218 million passengers crossed the U.K. border. Source: Cabinet Office, Security in a Global Hub: Establishing the UK's New Border Arrangements 5 (2007).

2. Open Up: A Special Report on Migration, The Economist, Jan. 5, 2008, at 4.

3. In 2008, $305 billion was sent in remittances to developing countries. Source: Trickle-Down Economics, The Economist, Feb. 19, 2009.

4. British Home Secretary Jacqui Smith insisted: "it is right in a downturn to be more selective about the skills levels of those migrants, and to do more to put British workers first." Press Release, U.K. Border Agency, Migrant Workers Face Tougher Test to Work in the United Kingdom (Feb. 23, 2009), http://www.ukba.homeoffice.gov.uk/sitecontent/newsarticles/migrantworkerstoughertest (last visited Feb. 23, 2009).

5. Christopher Rudolph, Globalization and Security: Migration and Evolving Conceptions of Security in Statecraft and Scholarship, 13 Security Stud. 1 (2003); Alexandra Dobrowolsky, (In)Security and Citizenship: Security, Im/migration and Shrinking Citizenship Regimes, 8 Theoretical Inquiries in Law 628 (2007); Catherine Dauvergne, Making People Illegal: What Globalization Means for Migration and Law (2008).

and crime. Mass mobility prompts concerns about the threat of transnational organized crime, trafficking of people, drugs, and other goods, and terrorism. The neoliberal assumption that the invisible hand of the market should determine the movement of people in a rapidly developing global world thus stands in tension with the desire of the sovereign state to exert controls on those deemed hazardous to its very existence.[6]

No surprise then that immigration has emerged as a key issue in contemporary security debates. The resultant "securitization of immigration" recasts migrants as a potential security problem[7] and drives more restrictive, control-oriented policies enshrined in a steady stream of legislation. Successive governments have identified immigration as a challenge to national identity and the dissolving of borders as a threat to the security of the nation-state. It is no coincidence that in the bid to reassert one territorially bounded good—national security—governments have had recourse to another territorially bounded concept—citizenship. The British government has pledged to create a new "architecture of citizenship": yet this benign language conceals more invidious consequences that it is the purpose of this article to reveal.

This article examines moves to mobilize citizenship in the name of security and suggests that two worrisome consequences follow. The first is the effective criminalization of immigration, or "crimmigration."[8] What was formerly termed "illegal immigration" is now relabeled "immigration crime," and the control of immigration is inserted into criminal justice legislation. The second, less obvious, corollary is that new developments in immigration policy seep into domestic crime control. The logic and language of immigration policy as applied to "noncitizens" is mirrored in the policing and criminalization of "irregular citizens" within the body politic.[9] Citizenship is asserted

6. Mary Bosworth, Border Control and the Limits of the Sovereign State, 17 Soc. & Legal Stud. 199 (2008).

7. Jeff Huysmans, The Politics of Insecurity: Fear, Migration and Asylum in the EU 67–69 (2006).

8. Juliet Stumpf, The Crimmigration Crisis: Immigrants, Crime and Sovereign Power, Paper No. 2007-2 Lewis & Clark Law School Legal Research Paper Series (2007).

9. The term "non-citizens" is taken from Mary Bosworth & Mhairi Guild, Governing through Migration Control, 48 Brit. J. Criminology 703, 703 (2008); and the term "irregular citizens" is from Katja Franko Aas, "Security-at-a-Distance": Globalization and the Shifting Boundaries of Criminology, in The New Economy of Security: Contemporary Insecurities and the Pluralization of Coercive Force (Ian Loader & Sarah Percy eds., forthcoming).

not only as a means of controlling immigrants and asylum seekers but also as central to the policing of those irregular citizens who, though already resident, are deemed to stand outside civil society. These twin developments make it simultaneously more difficult to attain and easier to lose full citizenship status.[10] The conditional nature of contemporary citizenship thus becomes a potent tool by which those at the margins of the political community are policed by the state.

## I. THE CRIMINALIZATION OF IMMIGRATION

It might appear perverse to identify citizenship as a tool of criminalization. Classic conceptions of citizenship identify it as carrying a defined body of civil, political, and social rights. And citizenship has become a core motif in contemporary debates about the protection of individual freedom from interference by others and by the state. As a legal status, citizenship accords identical rights to all and is central to the generation of political community, civic integration, and the flourishing of democracy. Citizenship in this model derives from the belief that equal treatment and social inclusion are essential prerequisites to political participation.[11] The promotion of citizenship as an integrative tool of political and social participation showed some signs of flourishing in Britain in the 1990s. The early years of New Labour policymaking were characterized by an avowed commitment to social inclusion as manifest in the unfortunately titled but well intentioned Social Exclusion Unit. Compulsory citizenship classes were introduced in British secondary schools in 2002 to furnish children with an understanding of the workings of government, elections, and the law, as well as an appreciation of issues such as diversity and identity. The introduction of

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See also Matthew Gibney, Who Should Be Included? Non-Citizens, Conflict and the Constitution of the Citizenry, Crise Working Paper No. 17 (2006).

10. For example, under amendments made by the Immigration, Asylum and Nationality Act of 2006, British nationals can be deprived of their citizenship if the Secretary of State is satisfied that "deprivation is conducive to the public good." This represented a toughening up of previous provisions that permitted British nationals to be deprived of their citizenship only for acts "seriously prejudicial to the vital interests of the United Kingdom or an Overseas Territory."

11. Dominique Leydet, Citizenship, in The Stanford Encyclopedia of Philosophy (E. Zalta ed., 2006).

citizenship ceremonies in 2003 was intended to provide a symbolic step toward integration for those successful in their application for naturalization. That said, the "problem" of immigration, of illegal immigrants, and of fraudulent asylum seekers remained a central theme in the policies of New Labour. Strategically decoupled from racial politics, immigration was subject to tighter restrictions, penalties for infringement were increased, and the Immigration Service awarded tougher powers of enforcement.[12]

After the London bombings in July 2005, the underlying impulse to exclude reasserted itself yet more forcibly in a retreat from inclusive notions of citizenship in political discourse. In 2006, then Prime Minister Tony Blair gave a high-profile lecture on "the duty to integrate" post 7/7 in which he argued that "integrating at the point of shared, common unifying values . . . isn't about what defines us as people, but as citizens, the rights and duties that go with being a member of our society." For Blair, "the answer lies in precisely defining our common values and making clear that we expect all our citizens to conform to them."[13] That call to arms led to the introduction of a new architecture of regulatory measures designed to promote compliance and conformity with the prescribed expectations of good citizenship (or, where that appears impossible, to label, register, and exclude). The concept of citizenship as carrying universal rights was subject to critical scrutiny, and the Human Rights Act of 1998 was portrayed in the media as a charter for foreign criminals and terrorists.[14]

In this new era citizenship becomes a privileged status granted only to those able to meet specific obligations and accord with preset norms. For those whose status as citizens is in doubt, a more demanding set of requirements, not asked of established citizens, is added. For immigrants and asylum seekers, citizenship can only be sought by demonstrating competence in English and an extensive knowledge of British customs and traditions.[15]

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12. See, e.g., the Home Office White Paper, Fairer, Faster, Firmer: A Modern Approach to Immigration and Asylum (Cm.4018 1998), which led to the Immigration and Asylum Act of 1999. See also the discussion in Bosworth & Guild, supra n. 9.

13. Tony Blair, The Duty to Integrate: Shared British Values, Speech on Multiculturalism and Integration, Delivered at Number 10 Downing Street, London, for the "Our Nation's Future" Lecture (Dec. 8, 2006), quoted in Dobrowolsky, supra n. 5, at 660.

14. Liberty, Liberty's Response to the Home Office Consultation Paper, The Path to Citizenship: Next Steps in Reforming the Immigration System 3 (2008).

15. Elena Jurado, Citizenship: Tool or Reward? The Role of Citizenship Policy in the Process of Integration (2008).

The Nationality, Immigration and Asylum Act of 2002 had already required citizenship applicants to pass an official language test or provide documentary evidence of linguistic competence and to pass tests demonstrating their knowledge of life in Britain. Further plans announced in 2007 introduced a "robust machinery" to "manage migration and protect British values."[16]

Recent developments have pushed this reward model of citizenship still further. The Borders, Citizenship and Immigration Act of 2009 introduced a new scheme by which citizenship is granted only to those able and willing to comply with a hugely complex set of defined criteria. Henceforth, only after would-be citizens meet these criteria will their application be considered. Applicants must first prove they are prime facie worthy of consideration by demonstrating that they have a clean record in their country of origin and by satisfying criteria of economic utility. Although similar entry requirements apply in other jurisdictions, the further twist is that, once in Britain, would-be citizens are required to demonstrate their worthiness anew by meeting criteria of economic self-sufficiency, through social conduct or "active citizenship" (of which more below), and by meeting requirements regarding knowledge of the English language and "knowledge about life in the United Kingdom."[17] Not content with these radical changes, the British government immediately issues new proposals for extending the points-based system introduced in respect of economic migrants to would-be citizens.[18]

These changes come at a cost. The Borders, Citizenship and Immigration Act of 2009 weakens the legal status of immigrants. It amends the rules on naturalization and introduces longer periods of up to eight years before acquiring full citizenship. It also introduces "probationary citizenship," a provisional trial status that has the effect of consigning those on it to a prolonged period of partial exclusion from full civic participation during

16. New measures include the points-based system designed to "build on a package of measures already being introduced to deliver a more secure border." These include: new electronic checks to count people in and out of the United Kingdom, a "clamp down on illegal immigration," fingerprinting of visa applicants abroad, and the introduction of ID cards for foreign nationals, http://www.bia.homeoffice.gov.uk/sitecontent/newsarticles/2007/planstomanagemigration (last visited Mar. 5, 2009).

17. Borders, Citizenship and Immigration Act (2009) § 40.

18. Home Office, Earning the Right to Stay: A New Points Test for Citizenship (London: Home Office, 2009).

which they are both symbolically and legally set apart.[19] The official rationale behind these changes is to clarify what migrants "are entitled to at each stage and what criteria they must meet to progress to the next stage"; to oblige migrants "to support themselves without accessing social security benefits or local authority housing"; and to ensure that "full access to benefits is delayed until citizenship."[20] Endorsed as a means "to incentivise migrants" and ensure that they are not "a burden on the state," this extended period necessarily puts migrants at risk of greater failure, not least because those with conditional immigration status are known to be particularly vulnerable to abuse, open to exploitation, subject to poor working conditions, at risk of homelessness, and it follows, more prone to offending.[21]

Foreign nationals who commit serious offenses already face automatic consideration for deportation. In addition, it is now proposed that those "sent to prison will face removal, and even those committing minor offences will normally need to wait until their conviction is spent before they can become citizens."[22] Little account appears to have been taken of the statistical evidence that ethnic minority suspects and defendants in the criminal justice system are subject to unequal treatment; are more likely to be arrested, prosecuted (as opposed to cautioned), and given custodial sentences; and that offenses committed by young black people are more likely to attract a custodial sentence.[23] These changes would marginalize noncitizens, deny them the protection of benefits, and render them socially and economically more vulnerable, yet subject them to higher expectations than ordinary citizens and impose far graver consequences upon failure to abide by the law. Despite empirical evidence from the Association of Chief Police Officers that the rates of offending within migrant communities is

19. Anne Bostanci, British Citizenship: A Debate of Paradoxes 6 (2008).

20. Home Office, Impact Assessment of Earned Citizenship Proposals (2009), http://www.ukba.homeoffice.gov.uk/sitecontent/documents/managingourborders/border-cit-imm-bill/ (last visited Feb. 24, 2009).

21. Equality and Diversity Forum, Response to The Path to Citizenship: The Next Steps in Reforming the Immigration System (2008); Liberty, Liberty's Evidence to the Joint Committee on Human Rights Call for Evidence on the Draft Legislative Programme 2008–09, 6 (2008).

22. Home Office, U.K. Border Agency, Government's New Bill Shakes up the Route to Citizenship, http://www.ukba.homeoffice.gov.uk/sitecontent/newsarticles/new-bill-route-to-citizenship (last visited Feb. 24, 2009).

23. Statistics published under § 95 Criminal Justice Act 1991. Ministry of Justice, Statistics on Race and the Criminal Justice System, 2006 (2007).

"in line with the rate of offending in the general population,"[24] the government appears to assume that migrant populations are more heavily implicated in criminality. The message sent out conflates immigration with criminality in a manner likely to feed existing prejudice.

## II. CITIZENSHIP AS AN EARNED RIGHT AND RESPONSIBILITY

Another significant move is the introduction of "earned citizenship,"[25] a concept that rejects conventional understanding of citizenship as a matter of right and replaces it with a more onerous requirement that it be positively merited.[26] As "The Path to Citizenship" Consultation Paper stated, "The key feature of the new system is that it aims to increase community cohesion by ensuring all migrants can 'earn' the right to citizenship and asks migrants to demonstrate their commitment to the UK by playing an active part in the community."[27] Applicants will be required to prove their commitment to and engagement in "active citizenship" by doing voluntary work if they are to expedite the process of acquiring citizenship. "The Path to Citizenship" justified the requirement of "active citizenship" on the grounds that integration is furthered by encouraging immigrants to be active rather

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24. The Guardian, Migrant Crime Wave a Myth: Police Study, Apr. 16, 2008, http://www.guardian.co.uk/politics/2008/apr/16/immigrationpolicy.immigration (last visited Feb. 24, 2009).

25. The term "earned citizenship" appears throughout government policy papers, briefings, and perhaps most strikingly throughout the impact assessment published prior to the Borders, Citizenship and Immigration Act of 2009. Home Office, Impact Assessment of Earned Citizenship Proposals (2009), http://www.ukba.homeoffice.gov.uk/sitecontent/documents/managingourborders/border-cit-imm-bill/ (last visited Feb. 24, 2009).

26. The official rationale for the Borders, Citizenship and Immigration Act is that it "reinforces the idea that British citizenship, with its associated benefits, is something to be earned rather than a right." Home Office, U.K. Border Agency, Impact Assessment of Earned Citizenship Proposals (2009), http://www.ukba.homeoffice.gov.uk/sitecontent/documents/managingourborders/border-cit-imm-bill/ (last visited Feb. 24, 2009). See also W. Schinkel, The Moralisation of Citizenship in Dutch Integration Discourse, 1 Amsterdam L.F. (2008).

27. Home Office Border & Immigration Agency, The Path to Citizenship: Next Steps in Reforming the Immigration System 12 (Consultation Paper, Feb. 2008), http://www.ind.homeoffice.gov.uk/sitecontent/documents/aboutus/consultations/pathtocitizenship/ (last visited Feb. 24, 2010).

than "passive participants in UK life" and proposed that "people who have demonstrated their commitment to the UK by playing an active part in the community should be allowed to complete their journey to citizenship more quickly than others who have chosen not to do so."[28]

The difficulty, as many organizations pointed out, is that the requirement of active citizenship could "discriminate against migrants who may, for a variety of reasons, be unable to undertake formal volunteering work," for example, the old, the disabled, and those caring for young children.[29] The oxymoronic "requirement to volunteer" may reduce the capacity of immigrant communities for self-help through mutual support, translation, and language teaching and thus threaten cohesion amongst the most vulnerable and marginalized of communities. It also presumes the capacity of the voluntary sector to absorb and put to good use the consequent increase in volunteers and ignores the danger that an exploitative industry of "volunteering opportunities" may spring up aimed at those seeking to meet this requirement.

Considerable weight is given to the idea that citizenship is to be earned by "playing by the rules," an emphasis that one charity in its response to the Bill considered to carry unwarranted negative implications:

> We are deeply concerned with the way in which this idea is presented is negative and accusatory . . . the rhetoric of "earning rights" or as it was put in a public letter from the BIA [Border of Immigration Appeals] on 20 February 2008, "matching the benefits and entitlements of migrants with the contribution they make to the UK," implies that immigrants are undeserving and suspect by default. . . . The weight given to "obeying the law" in such a way implies a propensity on the part of migrants toward criminal behaviour, evidence for which there is simply none.[30]

Citizenship on this earned model is presented less as a tool of political integration than as a reward held out for those able to prove their commitment to the political polity. It requires of would-be citizens a commitment to "British values" despite the fact that in a highly differentiated, multicultural,

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28. Id. at 29.

29. Liberty, Liberty's Response to the Home Office Consultation Paper, "The Path to Citizenship: Next Steps in Reforming the Immigration System" 8 (2008).

30. Runnymede Trust, Written Evidence on the Draft Immigration and Citizenship Bill 4 (2008).

and multifaith society, there seems to be little agreement beyond a core about what exactly a distinctly British set of values might be.[31]

Even to describe the provisions of the Borders, Citizenship and Immigration Act as a reward model of citizenship is to underplay the extent to which, precisely because the reward is limited to those able to comply with preset norms and demanding expectations of active citizenship, this approach is exclusionary in its purpose and effect. It constitutes a tightening of the rules that replaces universalist readings of citizenship with a new construction of citizenship as a scarce commodity available only to those the state deems worthy. Those unable to satisfy requirements of fluency in English and knowledge of life in the United Kingdom will be subject to repeated periods of "temporary leave" without social protection and access to benefits. Even those who attain probationary citizenship will have to earn the right to stay by showing greater conformity and by making greater social contributions than ordinary citizens. Arguably the changes reflect a larger trend in political discourse to imply that fundamental rights do not belong to all, that full rights protection should be reserved for British citizens, and that, in particular, immigrants should have a diluted standard of protection.

The coupling of rights protections with citizenship is deeply problematic. As Cole argues, "basic protections of liberty . . . are not, and should not be, deemed privileges or rights of citizenship."[32] And yet as the Northern Ireland Human Rights Commission observes, the changes constitute a move away from recognized human rights and toward citizen's rights, a move that is grounded in "the deeply flawed notion that migrants must earn them . . . [U]nder the ECHR and a range of international human rights treaties, to which the UK is a party, migrants in fact have the same rights as UK citizens. While there is no human right to citizenship in the country one migrates to, rights are not conditional on citizenship."[33] Although the only rights that can be the preserve of citizens are matters

31. Chris Huhne, Citizenship Proposals are "Un-British," The Guardian, Aug. 4, 2009, http://www.guardian.co.uk/commentisfree/libertycentral/2009/aug/04/british-citizenship-freedom-expression (last visited Oct. 10, 2009).

32. David Cole, Against Citizenship as a Predicate for Basic Rights, 75 Fordham L.R. 2541, 2548 (2007).

33. Northern Ireland Human Rights Commission, Submission to the Joint Committee on Human Rights' Call for Evidence on the Draft Legislative Programme: Citizenship, Immigration and Borders Bill 11 (2008).

tied to this status such as voting or standing for office, these reforms render a larger range of rights dependent on citizenship in direct contravention of the European Convention on Human Rights and Britain's obligations under the United Nations Refugee Convention of 1951.

Notwithstanding critical responses such as these, the idea that rights protections be made conditional upon citizenship is gaining ground. It is a model that finds parallels in developments in other European countries like the Netherlands, Belgium, and Germany, all of which have introduced "integration courses" and, in the Dutch case, a language test that similarly grants citizenship only to those willing to assimilate to a degree not previously required.[34] The origins of such moves are not difficult to determine: they arise from a hardening attitude toward immigration, a growing sense that immigrants and asylum seekers are a problem to be prevented, and not withstanding the fact that the 7/7 bombers were U.K. citizens, an assumption that immigration is a security issue made all the more pressing by the threat of international terrorism.

## III. CRIMINALIZATION AND EXCLUSION FROM CITIZENSHIP

The recasting of citizenship as a status that has to be earned is not limited to immigration: it is also discernible in domestic criminal law. Policies directed first against immigrants and asylum seekers, as well as foreign nationals suspected of involvement in terrorism, have come to be applied equally to those who are cast as "irregular citizens" within society.[35] These include but are not limited to antisocial youth, persistent offenders, sexual and violent offenders, and suspected terrorists—all of whom occupy liminal spaces at the margins of civil society and are consigned to a probationary or provisional status akin to that imposed upon immigrants and asylum seekers. As we will show below, citizenship rights of participation and protection are made conditional upon compliance with prescribed norms and upon conformity with specified requirements analogous to those of "active citizenship," set out in a welter of contractual terms, restrictions, and prohibitions.

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34. Jurado, supra n. 15, at 11.

35. For a historical analysis, see Barry Vaughan, Punishment and Conditional Citizenship, 2 Punishment & Soc'y 23 (2000).

Those who do not abide or who, in Ramsay's terminology, "fail to reassure" are barred temporarily or indefinitely from full citizenship.[36]

This altogether more exclusionary conception of citizenship has strong historical roots. In Rousseau's *The Social Contract*, for example, criminality moves the offender outside citizenship:

> since every wrongdoer attacks the society's law, he becomes by his deed a rebel and a traitor to the country; by violating its law, he ceases to be a member of it; indeed he makes war against it. And in this case, the preservation of the state is incompatible with *his* preservation; one or other must perish; and when the guilty man is put to death, it is less as a citizen than as an enemy.[37]

This contractarian notion of legal personhood is predicated on the view that only those who abide by the law can be considered citizens: those who offend are deemed noncitizens. It is a concept of citizenship that has long underpinned thinking and debate about the criminal law. As Duff observes, there is "a persistent tendency, among both politicians and theorists, to talk about crime and criminals in the third person: about what 'we' . . . should do about 'them'—those who do or might break the law."[38] The enduring exclusionary bent of the criminal law is exacerbated by the demands for public protection and rebalancing in favor of the "law-abiding majority" that are the hallmark of populist penal politics.[39]

The temptation to characterize criminals not merely as wrongdoers but as enemies is indulged by a political discourse that conveniently ignores research on the normality of offending.[40] And this is only amplified by the tendency to declare war variously on drugs, sexual offenses, guns, and most recently, terrorism. The language of war is not only a potent political discourse, it also

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36. Peter Ramsay, The Theory of Vulnerable Autonomy and the Legitimacy of Civil Preventative Orders, in Regulating Deviance: The Redirection of Criminalisation and the Futures of Criminal Law (Bernadette McSherry et al. eds., 2009).

37. Jean-Jacques Rousseau, The Social Contract 79 (1968).

38. Antony Duff, Inclusion and Exclusion: Citizens, Subjects and Outlaws, 51 Current Legal Probs. 241 (1998), at 243.

39. Home Office, Rebalancing the Criminal Justice System in Favour of the Law-Abiding Majority: Cutting Crime, Reducing Reoffending and Protecting the Public (2006); John Pratt, Penal Populism (2007).

40. For example, a study by Susanne Karstedt and Stephen Farrall revealed that 61 percent of respondents admitted to an offense against business, government, or employers. Cited in Runnymede Trust, supra n. 30, at 5.

informs criminal legislation that introduces measures designed to combat offenders engaging in a broad spectrum of criminal offenses. As Gomez-Jara observes, recent European framework decisions have been enacted variously for "combating sexual exploitation of children," "combating trafficking," "combating corruption," and "combating terrorism."[41] This combative legislation inserts the rhetoric of war into the very terms of legal instruments and has profound implications for the status and rights of those combatants who are its object.

## IV. CITIZENS AND ENEMIES

The trend toward developing criminal laws aimed less at law-abiding citizens than at those whose persistent criminality or determined defiance of the law allows them to be designated as "unlawful combatants" was recognized as far back as 1985 by the German criminal law scholar Günther Jakobs. Jakobs coined the term *Feindstrafrecht* (translated variously as enemy criminal law or enemy penology) to identify that body of criminal law which does not accord with the norms of conventional criminal law or *Bürgerstrafrecht* (citizens' criminal law), but privileges the pursuit of security against those deemed dangerous or persistently defiant.[42] *Feindstrafrecht* is, for Jakobs, characterized by three prominent traits. First, it tends to punish prospectively in a bid to prevent future harms; second, it imposes disproportionate sanctions in the name of security; and third, it departs from conventional procedural protections. The most prominent current example of enemy criminal law is arguably that growing body of legislation pertaining to terrorist suspects. But Jakobs's claim is that enemy criminal law is much more extensive than this and that it has become a significant feature of wider criminal law practice.

The recognition that many areas of criminal law share the traits of enemy criminal law and treat their objects not as citizens but as presumptive enemies is a striking insight. It has provoked a heated debate in European

41. Carlos Gomez-Jara Diez, Enemy Combatants versus Enemy Criminal Law, 11 N. Crim. L. Rev. 529, 558 (2008).

42. Günther Jakobs, Kriminalisierung im Vorfeld einer Rechtsgutsverletzung, 97 Zeitschrift für die Gesamte Strafrechtswissenschaft 751 (1985) (Deutsch); Gomez-Jara Diez, id.; Susanne Krasmann, The Enemy on the Border: Critique of a Programme in Favour of a Preventive State, 9 Punishment & Soc'y 301 (2007).

criminal law theory,[43] not least because Jakobs later developed the concept of *Feindstrafrecht* not only to describe particular developments in criminal law but also as a legitimizing or prescriptive norm grounded in the right to security (*Grundrecht auf Sicherheit*). Jakobs went on to argue that in the case of those who pose a danger or persistently threaten, and who thereby fail to recognize the validity of the legal norms set out in the criminal law, enemy criminal law imposes the penal pain (*Strafschmerz*) necessary to underpin normative reasons to comply and thus to elicit the cognitive reassurance that criminal law will be upheld.[44]

A powerful counterview is that to permit enemy criminal law to license actions against individuals, however dangerous, that erode or undermine their basic rights is to place the criminal law and indeed the very legal system in peril. Gomez-Jara observes: "to the extent that the State uses enemy criminal law to secure citizen criminal law it risks the whole existence of the latter."[45] Arguably the criminal law is better protected by insisting upon the citizenship status of those against whom criminal proceedings are brought; by maintaining, through the presumption of innocence, that they are law-abiding members of society until proven guilty; and by adhering to the protections of the criminal process even in the gravest case.

No group has been more enthusiastically subject to the preventive measures, disproportionate sanctions, and diminished procedural protections that characterize enemy penal law than those suspected of terrorism. Yet even, or perhaps especially, here there are strong reasons to resist the development of a differentiated set of procedures.[46] Cole develops four powerful arguments against allowing the treatment of noncitizens (his particular interest is in the status of foreign nationals suspected of involvement in terrorism) to be traded for the security of citizens. First, permitting governments to treat noncitizens less favorably than citizens "creates a template for how it will treat citizens tomorrow" not least because "alienage discrimination is often closely tied to (and a cover for) racial animus, and

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43. For an excellent overview, see Gomez-Jara Diez, supra n. 41. See also Dubber, this volume.

44. See discussion id. at 545. Günther Jakobs, Staatliche Strafe: Bedeutung und Zweck 26 (2004).

45. Gomez-Jara Diez, supra n. 41, at 533.

46. Jeremy Waldron, Security and Liberty: The Image of Balance, 11 J. Pol. Phil. 191 (2003); Lucia Zedner, Securing Liberty in the Face of Terror: Reflections from Criminal Justice, 32 J. L. & Soc'y 507 (2005).

is therefore particularly susceptible to being extended to citizens along racial lines."[47] Second, Cole suggests that applying a double standard with respect to the basic rights accorded to citizens and noncitizens is "likely to prove counterproductive as a security matter" because it undermines the legitimacy of government both domestically and overseas.[48] Third, he argues that insisting on equitable treatment of citizens and noncitizens "may help counteract our historic tendency to overreact in times of fear" and act as a "prophylactic against such excesses."[49] This argument is not limited to times of crisis. Permitting government to apply legislation only to noncitizens enables it to evade the "natural political resistance" that might otherwise arise if controversial measures were applied to all.[50] Fourth and most important, Cole insists that we resist the temptation to trade the rights of noncitizens for citizens' security because "it is morally and constitutionally wrong to do so."[51] Under the Constitution, (with the exception of the right to vote and the right to run for office), core political, religious, due process, and equal protection rights are not limited to citizens but apply to all "persons" subject to U.S. laws.

In Britain, just as in the United States, due process protections apply to all persons including aliens, whether their presence is lawful, unlawful, temporary, or permanent. Those tried for crimes are entitled to all the protections that attach to the criminal process irrespective of their status as citizens or noncitizens. This constitutional prescription that basic rights apply to all and are not the privilege of citizenship accords strongly with the presumption to be found in many constitutions and human rights instruments (including the European Convention on Human Rights) that fundamental rights extend to all persons regardless of nationality or citizenship status.[52] Cole's argument, although particularly powerful with respect of the treatment by the U.S. government of "enemy combatants" in the war on terrorism, is no less germane to current debates in respect of criminalization writ large.

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47. David Cole, Enemy Aliens: Double Standards and Constitutional Freedoms in the War on Terrorism 7 (2003).

48. Id. at 9.

49. Id. at 10–11.

50. Cass Sunstein, Laws of Fear: Beyond the Precautionary Principle 204 (2005).

51. Cole, supra n. 47, at 11.

52. See also the reasoning in the landmark decision A v. SSHD [2004] UKHL 56; [2005] 2 WLR 87.

In the British case the demand for public protection against noncitizens and irregular citizens rests in large part upon a claim that the law-abiding public have a right to security that imposes a correlative duty upon the state to guard against those who threaten public safety. New criminal legislation and the development of crime control policies in the name of public protection rely upon the powerful political lever of the public interest to assert the rights of the many (to live in safety) against the loss of the rights of the few (who are deemed to threaten). Yet for all its undoubted political force, prioritizing protection leaves open the question of who is to be protected. As Aas observes, "If, in the post-war social democratic societies, the 'who of justice' was the citizenry of the territorial state, now, on the other hand, boundaries become of crucial importance as they define some as members and others as aliens. . . . This boundary-drawing and frame-setting excludes some people as non-members who do not even have 'the right to have rights.'"[53] If there is a right to security—and this is open to debate[54]—that right is extended only to those who can legitimately call upon the state to protect their interests, leaving a marginalized and often vulnerable population beyond the pale of protection.

## V. THE CHANGING ARCHITECTURE OF CRIME CONTROL

Exceptional measures introduced in time of heightened threat or emergency have a well-documented tendency to become "normalized."[55] Although their introduction is often controversial and justified only by the need to avert catastrophic risks, once enacted they become accepted and, over time, percolate down into the everyday criminal law.[56] In much the same way controversial

53. Aas, supra n. 9.

54. Liora Lazarus, Mapping the Right to Security, in Security and Human Rights (Ben Goold & Liora Lazarus eds., 2007).

55. David Dyzenhaus, The Permanence of the Temporary: Can Emergency Powers Be Normalized?, in The Security of Freedom: Essays on Canada's Anti-Terrorism Bill (Ronald Daniels et al. eds., 2001); Oren Gross, Cutting Down Trees: Law-Making under the Shadow of Great Calamities, in The Security of Freedom: Essays on Canada's Anti-Terrorism Bill (Ronald Daniels et al. eds., 2001).

56. One such example is the curtailment of the right to silence introduced originally against suspected IRA terrorists under the Criminal Evidence Order (Northern Ireland) (1988) and later extended to all criminal suspects under the Criminal Justice and Public Order Act of 1994. See Paddy Hillyard, The Normalization of Special Powers from Northern Ireland to Britain, in A Reader on Criminal Justice (Nicola Lacey ed., 1994).

measures, whose introduction would ordinarily be resisted if applied to all, are more readily initiated against immigrants and other marginalized groups who have little political leverage to protest. Rendered routine by their use against these marginal populations, they are more easily extended to the general public without provoking the broad resistance that might otherwise have attended their introduction. So it is that introducing criminal laws and security measures targeted at those whose citizenship status is precarious serves as a wedge for their extension to all. Some of the key characteristics of the changing architecture of crime control against non- and irregular citizens seem to fit this pattern. Let us examine just three features.

First, as Jakobs observed, "enemy criminal law" spawns preemptive quasipenal measures often imposed well in advance of any harm. Over the past decade a striking development at the very margins of the criminal law is that of hybrid civil-criminal preventive orders aimed at preventing harm or even the risk of harm. These orders span the entire spectrum of seriousness. In the United Kingdom they range from travel restriction orders, football banning orders, exclusion from licensed premises orders, and antisocial behaviour orders (ASBOs) at the bottom of the scale to restraining orders, sexual offenses prevention orders, risk of sexual harm orders, serious prevention crime orders, and control orders targeted at the most serious offenses. As civil orders they may be made without conviction (or at sentence after conviction); however breach of the order is a criminal offense with a maximum sentence of five years' imprisonment.

The origins, drivers, justifications, and implications of these orders for the criminal law have been the subject of lively academic debate, not least because they permit significant intrusions into an individual's lifestyle, freedom of movement, and freedom of association before any crime has been committed.[57] In the case of the most intrusive measures (for example, control orders [quasi house arrest] imposed upon terrorist suspects), the multiple, onerous, and indefinite restrictions imposed severely limit the

57. ASBOs have attracted particular attention. See, e.g., Andrew Ashworth, Social Control and Anti-Social Behaviour Order: The Subversion of Human Rights?, 120 L.Q. Rev. (2004); Elizabeth Burney, Making People Behave: Anti-Social Behaviour, Politics and Policy (2005); Peter Ramsay, Legitimating Government with Civil Preventive Orders, in Regulating Deviance: The Redirection of Criminalisation and the Futures of Criminal Law (Bernadette McSherry et al. eds., 2008); Andrew von Hirsch & Andrew Simester eds., Incivilites: Regulating Offensive Behaviour (2006).

individual's ability to participate in civil society. The preemptive extension of social control is justified by the fact that those subject to such orders are deemed to have failed to accord with social or legal norms and by so doing bear liability for a "failure to reassure."[58] Where the failure to reassure' in question is the threat of terrorist atrocity, intrusive measures may seem more justifiable, though the procedures by which they are imposed remain controversial.[59] Further down the scale, in respect of antisocial behavior, the failure in question less clearly justifies the intrusion. Granted, antisocial or offensive behavior may be seen as a failure of social citizenship—a falling short of the expectations laid upon the "responsible subject."[60] Whether targeting the individual alone adequately addresses the demise of social capital, cohesion, and trust that feeds the disaffection that spawns much antisocial behavior remains open to doubt.[61]

A second related change in the architecture of crime control is the proliferation of regulatory control measures, of contractual devices, and responsibilization strategies promoted in the name of better regulation but whose regulatory label barely conceals an emerging technology of intrusive and often disproportionate behavioral controls.[62] Inducing compliance with the prescribed requirements of citizenship becomes the task of multiple hybrid, civil, contractual, and administrative measures. In the United Kingdom these include informal acceptable behavior contracts, individual support orders, drug intervention orders, parenting orders, parenting contracts, child curfew orders, and penalty notices for disorder. Criminalization becomes only one tool in this array of administrative and regulatory orders deployed to define status, impose surveillance, and enforce obligations designed variously to control, restrict, or exclude. These measures impose on individuals the burden of responsibility for self-governance or, at

58. Ramsay, supra n. 36.

59. David Bonner, Checking the Executive? Detention without Trial, Control Orders, Due Process and Human Rights, 12 Eur. Pub. L. 45 (2006); Lucia Zedner, Preventive Justice or Pre-Punishment? The Case of Control Orders, 59 Current Legal Probs. 174 (2007).

60. Peter Ramsay, The Responsible Subject as Citizen: Criminal Law, Democracy and the Welfare State, 69 Mod. L. Rev. 29, 51 (2006).

61. Bryan Turner, Social Capital, Trust and Offensive Behaviour, in Incivilities: Regulating Offensive Behaviour 231 (Andrew von Hirsch & Andrew Simester eds., 2006); Richard Sennett, The Corrosion of Character: The Personal Consequences of Work in the New Capitalism (1998).

62. Adam Crawford, Governing through Anti-Social Behaviour: Regulatory Challenges to Criminal Justice, 49 Brit. J. Criminology 810 (2009).

a minimum, compliance with norms prescribed in the terms of the orders. The particular contractual or regulatory terms of each order are individuated in every case, subverting the universalism of the criminal law and delegating considerable quasilegislative powers to the courts and the public officials who determine their precise terms and police their enforcement.

Like the preventive orders described above, regulatory measures also seek to govern the future by intervening early in the lives of those irregular citizens whose conduct or life choices attract adverse attention. In parallel with the treatment of immigrants and asylum seekers, no longer are these citizens able to claim membership of the social or political community as a right. Here too citizenship becomes conditional. Earlier rhetoric of social exclusion and economic marginalization is replaced by the language of responsibility: those who fail to comply are deemed irresponsible, guilty of making poor "lifestyle choices," or showing a failure of respect. Yet many of those so targeted belong to socially and economically deprived, isolated ethnic or religious communities and are constructed as irregular citizens as much on the basis of their marginalized status as any proven wrongdoing. Nor should the stigmatizing, isolating, and exclusionary effects of regulation and criminalization themselves be overlooked—perhaps the most extreme example of which is the profound social isolation suffered by those placed on sexual offender registers or subject to control orders (to say nothing of their spouses and children).[63]

For some offenders, restoration to full citizenship is made contingent not only on abiding by the law but also by fulfilling additional requirements of conduct and association. By directing and manipulating their choices, for example, through the imposition of specific contract terms, these measures seek to bring individuals back into conformity with prescribed expectations of good citizenship.[64] Those, such as sexual offenders and suspected terrorists, whose continuing control is deemed necessary for the protection of the public are indefinitely or permanently consigned to this marginal status by being placed upon registers, under surveillance, under quasi house arrest (in the case of terrorist suspects), or in prevention detention.[65]

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63. Zedner, supra n. 59.

64. Adam Crawford, "Contractual Governance" of Deviant Behaviour, 30 J.L. & Soc'y 479 (2003).

65. Zedner, supra n. 59; Hazel Kemshall & Mike Maguire, Public Protection, Partnership and Risk Penality: The Multi-Agency Risk Management of Sexual and Violent Offenders, 3 Punishment & Soc'y (2001).

A third core change is the introduction of diluted procedures that are less regarding of basic rights and that infiltrate the mainstream criminal process with alarming speed.[66] A prime example here is the use of special advocates; these are barristers specially cleared to see secret or closed documents from the intelligence services, but not allowed to speak to suspects or defense lawyers after they have seen the documents. Special advocates were introduced under Section 6 of the Special Immigration Appeals Commission Act of 1997 to serve the Special Immigration Appeals Commission (SIAC) by representing foreigners appealing immigration and asylum decisions where issues of national security were involved. Special advocates were introduced to represent the interests of appellants excluded from the proceedings, justified as an extraordinary measure to meet national security concerns, and designed to enhance procedural fairness in immigration hearings. Yet they quickly came to be applied under the Anti-Terrorism, Crime and Security Act of 2001 to foreign terrorist suspects detained indefinitely without trial.[67] When indefinite detention of foreign nationals was declared unlawful,[68] use of special advocates was extended to proceedings against terrorist suspects subject to the new system of control orders introduced (under the Prevention of Terrorism Act of 2005) in its place. Before long the use of special advocates was ushered into the mainstream to be deployed in Parole Board hearings, in judicial review hearings, and most controversially, in criminal proceedings. Here, in the absence of any statutory procedural framework, the work of special advocates appears to proceed by unsatisfactory analogy with the rules pertaining to SIAC.[69]

The expanding use of special advocates is worrisome not least because it contravenes a basic principle of the English trial that accused persons

66. Lucia Zedner, Seeking Security by Eroding Rights: The Side-Stepping of Due Process in Security and Human Rights (Benjamin Goold & Liora Lazarus eds., 2007).

67. Clive Walker, Prisoners of "War All the Time," 1 Eur. Hum. Rts. L. Rev. 50 (2005).

68. In A v. SSHD [2004] UKHL 56.

69. The House of Lords in R v. H and C [2004] UKHL 3, [2004] 2 AC 134 held that "special Counsel" (in effect a Special Advocate) might exceptionally be appointed in a criminal case. The House held however that such an appointment will always be exceptional, never automatic; a course of last and never first resort; and should not be ordered unless and until the trial judge is satisfied that no other course will adequately meet the overriding requirement of fairness to the defendant. See Special Advocates Support Office, A Guide to the Role of Special Advocates and the Special Advocates Support Office Open Manual 20 (2006), http://www.attorneygeneral.gov.uk/attachments/Special_Advocates.pdf (last visited Nov. 26, 2008).

should know the charge and have access to the evidence against them. As the parliamentary all-party Constitutional Affairs Committee chairperson, Liberal Democrat MP Alan Beith, has observed, "The special advocate system lacks the most basic features that make for a fair trial. To deprive someone of their liberty without telling them the charge or the evidence is completely foreign to our system of justice."[70] Unwittingly, his use of the term "foreign to our system of justice" alludes precisely to the very reason why a measure so antithetical to normal procedure found acceptance. That it was introduced first against noncitizens and terrorist suspects undoubtedly eased its path to the mainstream. In a welcome counter to this trend, a panel of nine law lords recently held that three men, subject to control orders, were denied a fair trial by the use of special advocates relying on secret evidence.[71] The judgment of the House of Lords in the case of AF and others suggests that a turning point may at last have been reached with respect to the use of secret evidence. This victory is but a small dent in the larger changes to the architecture of crime control described so far. Occurring principally at the margins of the criminal law and before wrongdoing, such changes cede considerable discretion to executive decision makers and operate in less onerous procedural channels. Targeted first against those at the very periphery of civil society, they serve as a template for the future of crime control more generally.

## VI. CRIMINAL LAW, CITIZENSHIP, AND POLITICAL COMMUNITY

These developments need not necessarily lead us to conclude that the criminal law is a "lost cause."[72] Even in the most frayed and fractured of modern societies, the legitimacy of the criminal law lies partly in its collective creation of a contractual political community. Criminal law is justified by and answerable to a liberal polity.[73] This account has the virtue of

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70. Quoted by Claire Dyer, MPs Demand Reform of Special Advocate System, The Guardian, Apr. 4, 2005.

71. Secretary of State for the Home Department v. AF and Another (2009) UKHL 28.

72. Andrew Ashworth, Is the Criminal Law a Lost Cause?, 116 L.Q. Rev. 225 (2000); Andrew Ashworth & Lucia Zedner, Defending the Criminal Law: Reflections on the Changing Character of Crime, Procedure, and Sanctions, 2 Crim. L. & Phil. 21 (2008).

73. Duff, supra n. 38, at 265.

characterizing the criminal law as a means of calling citizens to account for wrongdoing that concerns the whole political community and that offends against the public interest. The difficulty with this account is that it presumes that we know what is meant by "the public" and that we can confidently state what is in its interest. In a complex, multicultural, multifaith society—and more particularly when the offense at issue is a matter of immigration law or of transnational jurisdiction or of international criminal law—determining who constitutes the relevant public and what is or is not in the public interest is no simple or uncontroversial matter.

Furthermore, as Duff observes, to have recourse to a communitarian conception of the criminal law as a declaration of shared values provides no guarantee that the values espoused by the community in question will accord with a liberal model of the criminal law. Duff recognizes that "communities can be, and all too often are, oppressive, illiberal, and unjust. They can also . . . be in various ways *exclusionary*: they can exclude from full membership or participation groups or individuals whom they (mis)perceive as alien, inferior, or 'other.'" So Duff does not argue that the citizens should accept the legal obligations imposed upon them by the community uncritically. Rather his point is that, unless the individual is addressed as a full member of a community, "he cannot be bound by that law as a citizen."[74]

Yet insistence that all those subject to the criminal law must be citizens in the sense of being full members of the political community does not acknowledge that even to speak of community is, of necessity, to acknowledge its boundaries. A model of the criminal law predicated upon the idea of community presumes a bounded entity to which most will belong but from which, if community is to mean anything, some must by definition be excluded. This accords with a concept of citizenship predicated upon a territorially defined political community to which the citizen belongs or seeks to belong, to which he or she owes predefined obligations, and from which the rights accorded to citizens derive. Yet, as we saw at the outset of the paper, that territorial grounding of citizenship in the nation-state is now being challenged by the scale of globalization. It is also challenged by a growing political commitment to the idea that citizenship is open to a more expansive reading based on notions of humanity and legal personhood.[75]

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74. Id. at 257.

75. Cole, supra n. 32.

On this reading "citizenship" connotes not membership of a particular polity but a new transcendent status, sometimes optimistically referred to as "global citizenship" in which rights derive not from citizens' relationship to a particular political community but from their status as "world citizens."[76] Utopian as these terms appear, they acknowledge that locating the legal status of citizenship within a sovereign state with defined territorial boundaries is profoundly challenged by the scale of migration and the increasingly porous quality of national borders.[77] Where citizenship is conceived of as a universal legal status carrying with it a bundle of rights that cuts across territorial borders (fundamental human rights and international security are core examples), it is not self-evident that the sovereign state is the optimal guarantor, still less a necessary locus for its protection. Where, on the other hand, citizenship is conceived principally in terms of membership of a political community, the sovereign state comes right back in. To the extent that it can be argued that citizenship as a meaningful political practice can thrive only in the institutional context of the democratic nation-state, the state can fairly claim the right to protect its integrity and the security of its citizenship by controlling its borders, establishing restrictive immigration policies, and excluding those nonmembers who threaten. The key question remains how on the one hand to preserve liberal democratic political communities and on the other to protect the rights of aliens and outsiders.

Whether a communitarian account of the criminal law can resolve entirely the problems posed by citizenship in a modern highly dispersed society is doubtful. Where legitimate differences of opinion persist even about the core of our conventional morality,[78] then at least we may agree upon the universal application of the rule of law that underpins a liberal model of criminal law. Conceiving the criminal law, along the lines suggested by Glanville Williams, as that which results in criminal proceedings[79] has the enormous merit of making no claim about the moral territory of the substantive criminal law nor reference to the population to whom it applies, and at the same time, of insisting that criminalization must not occur without the protections due in criminal proceedings. Where due process is foregone, the

76. Klaus Günther, World Citizens between Freedom and Security, 12 Constellations 379 (2005).

77. Rudolph, supra n. 5.

78. Witness the heated debates about assisted suicide, euthanasia, and abortion.

79. Glanville Williams, The Definition of a Crime, Current Legal Probs. 107 (1955).

threat posed by the exercise of state power over those accused is without limit. Likewise, to insist that criminal measures are pursued through criminal channels with proper procedural protections is a constitutional guarantee against arbitrary state conduct and potential misuse of its authority. Although the security of the individual is provided principally *by* the state, it must simultaneously be secured *against* the state by proper regard for due process rights.[80]

## CONCLUDING THOUGHTS: REVIVING CITIZENSHIP AS AN INTEGRATIVE TOOL

The promotion of citizenship as an earned right need not mean that older concepts of citizenship as a tool of integration be wholly abandoned.[81] Citizenship is a powerful means of creating a social bond that underpins social and democratic engagement, encourages access to civic life, and promotes political participation. It can provide the means of forging and sustaining communities that accommodate diversity and transcend cultural, religious, and ethnic differences. So, all that has been said here is not intended as an assault on citizenship per se.

The deployment of citizenship within criminal law, however, is fraught with difficulty. Here the application of citizenship appears more often exclusionary than inclusive. Forms of probationary, provisional, or contingent citizenship have been forged to control would-be immigrants and asylum seekers, as well as to police those within the body politic whose lifestyle or behavior falls short. Rendering citizenship a condition that is hard won bears the necessary implication that those who have yet to earn it are not entitled to the panoply of rights that come with full citizenship. Noncitizens and irregular citizen are addressed by law not as coequals or members of the community but as outsiders. As outsiders they are subject to the criminal law but may be neither authors of its prohibitions nor full beneficiaries of its protections. For both groups attaining citizenship is conditional upon their ability to accord with an increasingly complex set of

80. James Nickel, Due Process Rights and Terrorist Emergencies, 1 Eur. J. Legal Stud. (2007), http://www.ejls.eu/1/12UK.htm (last visited Mar. 10, 2009).

81. Some basis for optimism is to be found in the Goldsmith Review: Lord Goldsmith QC, Citizenship: Our Common Bond, Ministry of Justice (2008).

norms and requirements of responsible citizenship—whether as specified in immigration legislation with respect to noncitizens or as set out in a growing array of civil preventive orders, regulatory and contractual measures, and diluted procedures applied against irregular citizens within the domestic polity. Given that many of those subject to these measures are already marginalized, disadvantaged, and vulnerable, the demands imposed are likely to be especially burdensome. In effect they may simply be setting individuals up to fail. The much vaunted new architecture of citizenship may just prove to be no more than a new architecture of crime control.