

# U.C.L.A. Law Review

## Bordering Circuitry: Crossjurisdictional Immigration Surveillance

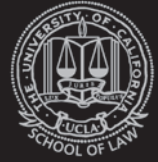
Ana Muñiz

### ABSTRACT

This Article builds upon literature on immigration surveillance, border control, and policing to explore the role of interoperable information systems and data sharing practices in the social control of immigrants from Mexico, Central America, and the Caribbean. Based upon an analysis of Department of Homeland Security (DHS) documents and statistical data, this Article examines two DHS information sharing programs. First, the Law Enforcement Notification System (LENS) enables the U.S. government to disclose information on “criminal aliens” to domestic law enforcement agencies. Second, the Criminal History Information Sharing (CHIS) program enables the U.S. government to share information on “criminal aliens” with the Government of Mexico and the governments of select Central American and Caribbean countries. Through these two information sharing programs, DHS engaged in information sharing with state, local, and foreign law enforcement agencies in over 47,000 instances between 2014 and 2017. This Article describes the construction, implementation, deployment, and consequences of LENS and CHIS. Through information sharing programs like LENS and CHIS, U.S. immigration authorities construct *bordering circuitry*—geographic configurations of information exchange and enforcement practices that are directed at an everwidening group of criminalized immigrants. Patterned geographies of surveillance link jurisdictions in the United States, particularly states and regions with heightened immigration enforcement, to Mexico, Central America, and the Caribbean. In the process, local police become increasingly integral to domestic immigration surveillance and the construction of internal borders. Furthermore, in exporting criminal history information to other countries, U.S. law enforcement officials influence policing and punishment practices in the global South. U.S. immigration surveillance programs thus contribute to global dynamics of criminalization, immobilization, and exclusion, albeit in ways that are limited by interoperability concerns.

### AUTHOR

Ana Muñiz is Assistant Professor of Criminology, Law & Society at the University of California, Irvine. Her work examines gang profiling and enforcement as a practice of racial criminalization and control. Muñiz’s current projects examine information systems, classification schemes, and data sharing between local, federal, and international law enforcement agencies.



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## INTRODUCTION

In 2017, the search began for a contractor to construct a wall along the U.S.–Mexico border from San Diego, California to Brownsville, Texas. The Federal Government issued two Request for Proposals: one to build a “Solid Concrete Wall Prototype,” which called for a barrier constructed of concrete,<sup>1</sup> and a second for an “Other Border Wall Prototype,” which requested a wall constructed of materials other than concrete.<sup>2</sup> Both of the requests meticulously described the physical parameters of the hypothetical wall. The wall was to be physically imposing in height, ideally no less than 30 feet tall; include anticlemb and antitunneling features; and be able to withstand attack by sledgehammers, car jacks, pick axes, chisels, battery operated impact tools, cutting implements, and torches.<sup>3</sup> The solicitations directed the chosen contractor to paint the U.S.-facing side of the wall in an aesthetically pleasing shade.<sup>4</sup>

As the solicitations for border wall construction rolled out, the federal government quietly released another call, to little fanfare, for contractors to continuously monitor information on 500,000 “criminal aliens”<sup>5</sup> including, “FBI numbers; State Identification Numbers; real time jail booking data; credit history; insurance claims; phone number account information; wireless phone accounts; wire transfer data; driver’s license information; Vehicle Registration Information; property information; pay day loan information; public court records; incarceration data; employment address data; Individual Taxpayer Identification Number (ITIN) data; and employer records.”<sup>6</sup>

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1. U.S. CUSTOMS & BORDER PROTECTION, REQUEST FOR PROPOSALS TO CONSTRUCT SOLID CONCRETE BORDER WALL PROTOTYPE 2 (2017) (on file with *UCLA Law Review*).
  2. U.S. CUSTOMS & BORDER PROTECTION, REQUEST FOR PROPOSALS TO CONSTRUCT OTHER BORDER WALL PROTOTYPE 39 (Mar. 17, 2017) (on file with *UCLA Law Review*).
  3. *Id.* at 2.
  4. *Id.*
  5. I use the term *criminal alien* throughout this Article to refer to a noncitizen convicted of a crime in the United States because it is the term used by the immigration enforcement apparatus that constitutes the subject of my analysis. Nonetheless, I take issue with the term through an analytical lens that is critical of the criminalization and othering processes endemic to the construction of one as *criminal* and an *alien*. For style purposes, I will not use quotations around the term for the remainder of the Article. Nonetheless, the reader should approach the term as a political construction to be critically examined.
  6. U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, TARGETING OPERATIONS SUBSCRIPTION DATA SERVICE REQUEST 1 (2017), <https://assets.documentcloud.org/documents/3920931/ICE-TARGETING-OPERATIONS-SUBSCRIPTION-DATA.pdf> [https://perma.cc/SM9H-P67Y].

While the spectacular physicality of the border wall dominates the current political narrative around immigration enforcement,<sup>7</sup> more relevant to enforcement may be the construction of interoperable digital infrastructure to classify and surveil immigrants and other targeted groups. Late twentieth century developments in digital surveillance technology have radically increased law enforcement capacity to collect, analyze, and move information. The emergence of mass surveillance regimes carries substantial implications for immigration enforcement and yet remains underexamined by social science and sociolegal scholars in the U.S. context.<sup>8</sup> This Article examines the role of the U.S. Department of Homeland Security's (DHS) domestic and international information sharing programs in immigration and border control practices.

Advances in interoperable surveillance technology enable the transcendence of migration control practices beyond physical borders. Border-like surveillance and control technologies stretch outward to intercept immigrants before they reach the physical border territory and push inward to police migrants deep in the country's interior. Building upon immigration, border, and surveillance studies literature, I argue that digital information sharing programs construct particular *bordering circuitry*—geographic configurations of information exchange and enforcement practices that are directed at an ever-widening group of criminalized immigrants.<sup>9</sup>

Part I of this Article contextualizes the state of U.S. immigration enforcement by reviewing three contemporary developments: securitization frameworks, immigration surveillance, and amplified border externalization and internalization. The emergence of these three phenomena has enabled the development of DHS information sharing programs. Part II provides an overview of methods and the approach to data analysis. Part III describes the development and deployment of two DHS information sharing programs: the Law Enforcement Notification System (LENS) and the Criminal History Information Sharing (CHIS) program. LENS and CHIS enable the U.S. government to release

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7. See, e.g., Alan Gomez, *Trump Budget Wants Billions More for Border Wall, Immigration Agents and Judges*, USA TODAY (Feb. 12, 2018, 2:46 PM), <https://www.usatoday.com/story/news/politics/2018/02/12/trump-budget-wants-billions-more-border-wall-immigration-agents-and-judges/329766002> [<https://perma.cc/SH4E-2AMT>].

8. A surveillance studies lens is more often applied to examinations of European border and immigration control, American police departments, and American domestic government spying. See ANDREW GUTHRIE FERGUSON, *THE RISE OF BIG DATA POLICING* (2017); DAVID LYON, *SURVEILLANCE AFTER SNOWDEN* (2015); Katja Franko Aas, 'Crimmigrant' Bodies and Bona Fide Travelers: Surveillance, Citizenship, and Global Governance, 15 THEORETICAL CRIMINOLOGY 331 (2011); Sarah Brayne, *Big Data Surveillance: The Case of Policing*, 82 AM. SOC. REV. 977, 979–82 (2017).

9. See *infra* Part IV.A.

information on criminal aliens to domestic law enforcement agencies and foreign governments, respectively. When viewed in combination, LENS and CHIS construct patterned geographies of surveillance between the United States, particularly states and regions with heightened immigration enforcement, into Mexico, Central America, and the Caribbean.

Part IV considers the implications of bordering circuitry for immigrant mobility, exclusion, and subordinate inclusion. Both LENS and CHIS subject criminalized immigrants to enhanced surveillance across domestic and international jurisdictions. As part of LENS, local law enforcement in the interior of the United States are enlisted into the policing of immigrants and thus, the construction of internal borders. In sending back U.S. based criminal history information along with deported immigrants, the U.S. government seeks to incapacitate immigrants in sending states, thus influencing policing practices in the global South. As such, movement within and outside of the United States may become increasingly untenable for targeted individuals, as they face stigmatization in multiple spaces, precluded from accessing basic needs from any one nationstate. Nonetheless, the omnipresence of surveillance and control is limited by challenges to interoperability. Additionally, I consider how crossjurisdictional information sharing is limited by incomplete technological, data, human, and institutional interoperability.

## I. IMMIGRATION SECURITIZATION

In response to the attacks of September 11, 2001, Congress mandated the restructuring of federal law enforcement in such a way as to conflate national security, crime control, and immigration control.<sup>10</sup> The U.S. government simultaneously prioritized collaborative law enforcement initiatives to identify, surveil, and exclude purportedly dangerous populations from U.S. territory.<sup>11</sup> This

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10. See Jennifer M. Chacón, *Unsecured Borders: Immigration Restrictions, Crime Control and National Security*, 39 CONN. L. REV. 1827, 1834–35 (2007). As a result of federal restructuring, the Department of Homeland Security (DHS) was established in 2003 to consolidate immigration, customs, border inspection, border patrol, and transportation security, a reorganization that situated immigration control within a national security mandate. See Lawrence A. Herzog & Christophe Sohn, *The Co-mingling of Bordering Dynamics in the San Diego-Tijuana Cross-Border Metropolis*, 7 TERRITORY, POL., GOVERNANCE 177, 184 (2017).

11. In the aftermath of the September 11, 2001 attacks, the House and Senate Committee and the 9/11 Commission criticized U.S intelligence agencies for their ineffective information sharing practices. See Peter P. Swire, *Privacy and Information Sharing in the War on Terrorism*, 51 VILL. L. REV. 951, 953 (2006); Amy B. Zegart, *An Empirical Analysis of Failed Intelligence Reforms before September 11*, 121 POL. SCI. Q. 33 (2006). In response, Congress prioritized initiatives to increase information sharing between state, local, federal, and international law enforcement agencies. See DAVID LYON, *SURVEILLANCE AFTER SEPTEMBER 11* 88–91 (2003).

was accomplished through a multipronged strategy of increased border security,<sup>12</sup> collaboration with foreign partners,<sup>13</sup> interior enforcement to apprehend and remove immigrants residing in the United States,<sup>14</sup> and interagency information sharing.<sup>15</sup> Nearly two decades later, U.S. immigration control efforts continue to be defined by securitization frameworks wherein federal law enforcement agencies and political actors present immigration as a dire national security issue that warrants punitive action.<sup>16</sup>

Surveillance scholar Didier Bigo's<sup>17</sup> *archipelago of policing* captures the interagency collaboration that undergirds punitive and securitized enforcement. Specifically, the archipelago of policing describes the transnational collection of agencies who perform social control, surveillance, and enforcement functions on multiple jurisdiction levels, including local police departments, county and state law enforcement, immigration and border control authorities, and intelligence services.<sup>18</sup> The targeting of migrants within the context of transnational organized

12. Beginning in the 1990s and accelerating in the early 2000s, Border Patrol personnel and technological support increased steeply at southern border in the service of a "prevention through deterrence" immigration control strategy. See JULIE A. DOWLING & JONATHAN XAVIER INDA, *GOVERNING IMMIGRATION THROUGH CRIME: A READER* 12–14 (2013).
13. I expand more upon collaboration with foreign partners in Part I.B and Subpart III.C.1 of this Article. The international information sharing and collaborative immigration enforcement partnership model is most recently exemplified in the Border Security Arrangement and the Biometric Data Sharing Program Arrangement, which expands biometric data collection and sharing with El Salvador, Guatemala, and Honduras and deploys U.S. immigration enforcement officials to advise law enforcement in El Salvador, Guatemala, and Honduras. See *U.S. and El Salvador Sign Arrangements on Security & Information Sharing: Give Salvadorans With TPS More Time*, U.S. DEP'T OF HOMELAND SEC. (Oct. 28, 2019), <https://www.dhs.gov/news/2019/10/28/us-and-el-salvador-sign-arrangements-security-information-sharing-give-salvadorans> [<https://perma.cc/3HZN-MS59>]; U.S. DEP'T OF HOMELAND SECURITY, *FACT SHEET: DHS AGREEMENTS WITH GUATEMALA, HONDURAS, AND EL SALVADOR* (2019), [https://www.dhs.gov/sites/default/files/publications/19\\_1028\\_opa\\_factsheet-northern-central-america-agreements\\_v2.pdf](https://www.dhs.gov/sites/default/files/publications/19_1028_opa_factsheet-northern-central-america-agreements_v2.pdf) [<https://perma.cc/MQ5Y-TFVH>].
14. DOWLING & INDA, *supra* note 12.
15. Susan Bibler Coutin, *The Rights of Noncitizens in the United States*, 7 ANN. REV. L. & SOC. SCI. 289, 300–01 (2011); c.f. DAVID LYON, *IDENTIFYING CITIZENS: ID CARDS AS SURVEILLANCE* 77 (2009). Coutin reviews the securitization of immigration law and the concomitant construction of immigrants from particular countries as potential security risks.
16. See Robert Pallito & Josiah Heyman, *Theorizing Cross-Border Mobility: Surveillance, Security and Identity*, 5 SURVEILLANCE & SOC'Y 315, 317 (2008).
17. Didier Bigo is a seminal scholar in the areas of border and boundary studies, global security, and surveillance.
18. Didier Bigo, *Globalized (In)security: The Field and the Ban-Opticon*, in *TERROR, INSECURITY AND LIBERTY: ILLIBERAL PRACTICES OF LIBERAL REGIMES AFTER 9/11* 18 (Didier Bigo & Anastassia Tsoukala eds., 2008); see also Didier Bigo, *Security, Exception, Ban and Surveillance*, in *THEORIZING SURVEILLANCE: THE PANOPTICON AND BEYOND* 47 (David Lyon ed., 2006). In this Article, I use the term "policing" consistent with Didier Bigo's conceptualization in

crime, such as gang activity and drug trafficking, further encourages cooperation between local, national, and international law enforcement agencies.

Securitized immigration control is directed unevenly at specific immigrant groups. For example, in the post-9/11 context, the U.S. government and domestic law enforcement agencies have escalated surveillance and enforcement against Muslim Americans and Middle Eastern immigrants.<sup>19</sup> Since at least the 1980s, immigration authorities and law makers have targeted Central American and Mexican immigrants for harsh enforcement on the rationale that they are facilitators of gang activity, crime, and drug trafficking.<sup>20</sup>

Efforts to control the migration of nonwhite immigrant groups into the United States by constructing them as dangerous are interdependent on efforts to police racially subjugated groups within the country.<sup>21</sup> Once within the U.S. interior, nonwhite immigrants are subject to targeted enforcement by local police based upon phenotypic characteristics like skin color.<sup>22</sup> Local law enforcement and other criminal justice actors are integral to the transnational archipelago of

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order to describe a broad range of law enforcement agencies that engage in social control, surveillance, and enforcement. *Id.*

19. SAHER SELOD, *FOREVER SUSPECT: RACIALIZED SURVEILLANCE OF MUSLIM AMERICANS IN THE WAR ON TERROR* 127–28 (2018); Doris Marie Provine & Roxanne Lynn Doty, *The Criminalization of Immigrants as a Racial Project*, 27 J. CONTEMP. CRIM. JUST. 263 (2011).
20. See Mae M. Ngai, *The Strange Career of the Illegal Alien: Immigration Restriction and Deportation Policy in the United States, 1921–1965*, 21 L. & HIST. REV. 69 (2003). Though there is a long history of U.S. immigration authorities associating Mexican immigrants with deviance, crime, and drugs, the criminalization of Central American immigrants took root in the 1980s as large numbers sought asylum. See Cecilia Menjivar & Leisy J. Abrego, *Legal Violence: Immigration Law and the Lives of Central American Immigrants*, 117 AM. J. SOC. 1380, 1391–93 (2012); Jennifer Ridgley, *Cities of Refuge: Immigration Enforcement, Police, and the Insurgent Genealogies of Citizenship in U.S. Sanctuary Cities*, 29 URB. GEOGRAPHY 53, 65–66 (2008). More recently, President Trump and immigration enforcement officials have claimed that Mexican and Central American immigrants, including unaccompanied minors, are involved in gang violence and drug trafficking. See Ted Hesson, *Trump’s Pick for ICE Director: I Can Tell Which Migrant Children Will Become Gang Members by Looking Into Their Eyes*, POLITICO (May 16, 2019, 3:37 PM), <https://www.politico.com/story/2019/05/16/mark-morgan-eyes-ice-director-1449570> [<https://perma.cc/34PP-SVYA>]; Eugene Scott, *Trump’s Most Insulting—and Violent—Language is Often Reserved for Immigrants*, WASH. POST (Oct. 2, 2019), <https://www.washingtonpost.com/politics/2019/10/02/trumps-most-insulting-violent-language-is-often-reserved-immigrants/> [<https://perma.cc/YN4E-JDSA>].
21. See Amada Armenta, *Racializing Crimmigration: Structural Racism, Colorblindness, and the Institutional Production of Immigrant Criminality*, 3 SOC. RACE & ETHNICITY 82, 83 (2017).
22. Gilberto Rosas, *The Managed Violences of the Borderlands: Treacherous Geographies, Policeability, and the Politics of Race*, 4 LATINO STUD. 401, 404–05 (2006). For a description of the Los Angeles Police Department’s policing of Latinx immigrant neighborhoods and the proxy policing of Latinx immigrants through the criminalization of street vending and day labor, see MAX FELKER-KANTOR, *POLICING LOS ANGELES: RACE, RESISTANCE, AND THE RISE OF THE LAPD* 162–89 (2018).

policing and the construction of criminal aliens as enforcement subjects.<sup>23</sup> Through the surveillance and control of nonwhite immigrants in U.S. territory, local law enforcement are complicit in policing the boundaries of the nationstate.<sup>24</sup> Global policing scholar Elana Zilberg argues:

It is, after all, in the city and through the fabric of its built environment—its streets, intersections, sidewalks, commercial strip malls, parks, and overcrowded apartment buildings—that the boundaries of the nation-state are both regulated and exceeded. The contentious border between the United States and Latin America thus extends into the city and into its immigrant neighborhoods, where it is policed and transgressed.<sup>25</sup>

Scholars have thoroughly examined the involvement of local police in immigration enforcement via joint enforcement agreements with federal authorities.<sup>26</sup> Yet, even local law enforcement agencies that resist official collaboration with immigration enforcement agencies may indirectly engage in immigration policing in the course of their daily work through the disproportionate policing of nonwhite people.<sup>27</sup> Whether intentionally or unintentionally, local police occupy a point on the archipelago of policing that surveils nonwhite migrants along transnational migration circuits. Local police stops, pat-downs, questioning, and arrests represent a continuation of the

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23. See Ingrid V. Eagly, *Criminal Justice for Noncitizens: An Analysis of Variation in Local Enforcement*, 88 N.Y.U. L. REV. 1126, 1147–56 (2013).
  24. Elana Zilberg, *Fools Banished From the Kingdom: Remapping Geographies of Gang Violence Between the Americas (Los Angeles and San Salvador)*, 56 AM. Q. 759, 759, 776 (2004).
  25. *Id.* at 776.
  26. A robust body of social science and legal scholarship examines 287(g) agreements, the Secure Communities Program, and the Priority Enforcement Program. See Adam B. Cox & Thomas J. Miles, *Policing Immigration*, 80 U. CHI. L. REV. 87 (2013); Juliet P. Stumpf, *D(e)volving Discretion: Lessons From the Life and Times of Secure Communities*, 36 IMMIGR. & NAT'LITY L. REV. 203 (2015); Tom K. Wong, *287(g) and the Politics of Interior Immigration Control in the United States: Explaining Local Cooperation with Federal Immigration Authorities*, 38 J. ETHNIC & MIGRATION STUD. 737 (2012).
  27. For a historical examination of targeted policing by local law enforcement agencies in immigrant neighborhoods, see FELKER-KANTOR, *supra* note 22. For a discussion of the ways in which Latin American immigrants are racialized and criminalized as Latinos in the U.S., see Chiara Galli, *A Rite of Reverse Passage: The Construction of Youth Migration in the US Asylum Process*, 41 ETHNIC & RACIAL STUD. 1662 (2018). See also Annie Lai & Christopher N. Lasch, *Criminalization Resistance and the Case of Sanctuary City Defunding*, 57 SANTA CLARA L. REV. 539, 547 (2017); Richard Winton, *Trump Delays Immigration Sweeps. Here's Why California Police Say They Won't Take Part*, L.A. TIMES (June 22, 2019, 9:23 AM), <https://www.latimes.com/local/lanow/la-me-ln-trump-immigration-sweeps-police-explainer-california-20190622-story.html> [https://perma.cc/J2Q7-AZRF].



checkpoints, interrogations, screenings, and detentions conducted by immigration and border control agents along migration routes.<sup>28</sup>

Policing can result in noncitizen arrest and conviction through criminal courts, and thus the creation of criminal aliens through local criminal justice processes.<sup>29</sup> The category of criminal alien broadly describes noncitizens with criminal records, though exact federal definitions vary by agency and program.<sup>30</sup> The U.S. Immigration and Naturalization Service (INS) and the U.S. Immigration and Customs Enforcement (ICE) agencies have increasingly prioritized<sup>31</sup> criminal aliens for apprehension and removal, reflected in the steep increase in criminal alien deportations since the 1980s.<sup>32</sup> In 1986, INS removed 1978 noncitizens for criminal violations (both criminal justice system convictions and criminal

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28. See, e.g., *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975); *United States v. Guzman-Padilla*, 573 F.3d 865, 878 (9th Cir. 2009) (recognizing the “extended border” doctrine, which permits police to directly enforce border controls, so long as the officers possess a “reasonable certainty that a border has been crossed, either by the vehicle in question, or by contraband suspected to be within the vehicle”); *United States v. Martinez*, 481 F.2d 214 (5th Cir. 1973) (search conducted 150 miles from the border and 142 hours after a border crossing was an extended border search).

29. See Angélica Cházaro, *Challenging the Criminal Alien Paradigm*, 63 UCLA L. REV. 594, 656 (2016).

30. For example, while the U.S. Government Accountability Office (GAO) considers criminal aliens to be noncitizens who are residing in the United States legally or illegally and who have been convicted of any crime, Jennifer Chacón argues that the Immigration and Nationality Act (INA) defines the category more narrowly to include noncitizens who have specifically committed criminal offenses that render them excludable or deportable under the INA. Compare U.S. GOV’T ACCOUNTABILITY OFF., INFORMATION ON CRIMINAL ALIENS INCARCERATED IN FEDERAL AND STATE PRISONS AND LOCAL JAILS 6 (GAO-05-337R, 2005), <https://www.gao.gov/assets/100/93090.pdf> [<https://perma.cc/5GBA-36NN>] (specifying the GAO’s definition), with Jennifer M. Chacón, *Whose Community Shield? Examining the Removal of the “Criminal Street Gang Member,”* 2007 U. CHI. LEGAL F. 317, 319.

31. See Memorandum from John Morton, Assistant Secretary, U.S. Immigration & Customs Enforcement, to ICE Employees. (June 30, 2010), <https://www.ice.gov/doclib/news/releases/2010/civil-enforcement-priorities.pdf> [<https://perma.cc/SZ5V-7UA8>]. The Memorandum delineates priorities for the apprehension, detention, and removal of noncitizens. The highest priority categories include noncitizens who are engaged in or suspected of terrorism or espionage, or who otherwise pose a danger to national security; have been convicted of crimes, with a particular emphasis on violent criminals, felons, and repeat offenders; have participated in organized criminal gangs; are subject to outstanding criminal warrants; or otherwise pose a serious risk to public safety.

32. See Chacón, *supra* note 30, at 1846–48; David Alan Sklansky, *Crime, Immigration, and Ad Hoc Instrumentalism*, 15 NEW CRIM. L. REV. 157, 177–78 (2012); Juliet P. Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 382–83 (2006); *Immigration Now 52 Percent of All Federal Criminal Prosecutions*, TRACREPORTS (Nov. 28, 2016), <http://trac.syr.edu/tracreports/crim/446> [<https://perma.cc/CCA5-TZC2>].

immigration violations), which constituted three percent of all removals.<sup>33</sup> By 2015, 139,950 removals, or 42 percent, were criminal removals.<sup>34</sup> Although U.S. immigration authorities have framed deportation as a way of expelling crime and deviance from U.S. territory, migration scholars advocate for considering the global effects of deportation. In describing the (voluntary or forcible) movement of criminal aliens and otherwise criminalized<sup>35</sup> youth between El Salvador and the

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33. OFFICE OF IMMIGRATION STATISTICS, U.S. DEP'T OF HOMELAND SECURITY, 2003 YEARBOOK OF IMMIGRATION STATISTICS 150 (2004), [https://www.dhs.gov/sites/default/files/publications/Yearbook\\_Immigration\\_Statistics\\_2003.pdf](https://www.dhs.gov/sites/default/files/publications/Yearbook_Immigration_Statistics_2003.pdf) [<https://perma.cc/2P6G-6QAC>].
  34. OFFICE OF IMMIGRATION STATISTICS, U.S. DEP'T OF HOMELAND SECURITY, 2015 YEARBOOK OF IMMIGRATION STATISTICS 113 (2016), <https://www.dhs.gov/sites/default/files/publications/2016%20Yearbook%20of%20Immigration%20Statistics.pdf> [<https://perma.cc/55B7-U2Z4>]. The pronounced increase in criminal alien deportations was initiated by the creation of the aggravated felony category, which defines violations that qualify immigrants for deportation. See Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 (1988) (codified at 28 U.S.C. § 566(d) (1994)) Subtitle J—Provisions Relating to the Deportation of Aliens Who Commit Aggravated Felonies, p. 4469; Teresa A. Miller, *Citizenship and Severity: Recent Immigration Reforms and the New Penology*, 17 GEO. IMM. L.J. 611, 633 (2003). Since Congress established the category in 1988 to include murder, drug trafficking, and firearms trafficking, immigration statutes have progressively expanded the range of crimes that qualify as aggravated felonies. They now include several violations that do not include violence, crimes of moral turpitude, certain misdemeanors, and convictions resulting in a sentence of at least one year. See Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132 § 435, 110 Stat. 1214, 1274 (1996); Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208 Div. C § 321, 110 Stat. 3009-546, 3009-627 (1996); Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (1990); Miller, *supra*, at 632; Stumpf, *supra* note 32, at 383-84; Judith Ann Warner, *The Social Construction of the Criminal Alien in Immigration Law, Enforcement Practice and Statistical Enumeration: Consequences for Immigrant Stereotyping*, 1 J. SOC. & ECOLOGICAL BOUNDARIES 56, 57-58, 64 (2005). There is evidence that the adoption of risk assessment tools to prioritize immigration enforcement has also encouraged the overlabeling of noncitizens as dangerous, leading to an increase in detention and deportations. See generally Mark Nofferi & Robert Koulish, *The Immigration Detention Risk Assessment*, 29 GEO. IMMIGR. L.J. 45 (2014); DORA SCHIRO, IMMIGRATION & CUSTOMS ENFORCEMENT, U.S. DEP'T OF HOMELAND SECURITY, IMMIGRATION DETENTION OVERVIEW AND RECOMMENDATIONS (2009), <https://www.ice.gov/doclib/about/offices/odpp/pdf/ice-detention-rpt.pdf> [<https://perma.cc/43HM-NEHD>].
  35. While the federal government has most often defined criminal aliens as noncitizens with some sort of conviction, noncitizens without criminal records are criminalized and therefore made enforcement priorities through law enforcement assessments of them as high risk, gang-involved, or connected to terrorist organizations. See generally SEAN GARCIA-LEYS ET AL., UNIV. CAL. IRVINE SCH. OF LAW. IMMIGRANT RIGHTS CLINIC, MISLABELED: ALLEGATIONS OF GANG MEMBERSHIP AND THEIR IMMIGRATION CONSEQUENCES (2016), <https://www.law.uci.edu/academics/real-life-learning/clinics/ucilaw-irc-MislabeledReport.pdf> [<https://perma.cc/P3B5-JGQH>] (discussing the labeling of immigrant youth as gang members based on overbroad and vague criteria); LAILA L. HLASS & RACHEL PRANDINI, IMMIGRANT LEGAL RESOURCE CTR., DEPORTATION BY ANY MEANS NECESSARY: HOW IMMIGRATION OFFICIALS ARE LABELING IMMIGRANT YOUTH AS GANG MEMBERS (2018), [https://www.ilrc.org/sites/default/files/resources/deport\\_by\\_any\\_means\\_nec-20180521.pdf](https://www.ilrc.org/sites/default/files/resources/deport_by_any_means_nec-20180521.pdf) [<https://perma.cc/D278-3TXE>] (discussing the increase in discretionary gang labeling of youth by immigration officers and agents under the Trump administration).

United States, Zilberg illustrates the mutually reinforcing feedback loops of punitive policing, criminalization, and restrictionist immigration control practices.<sup>36</sup> The policing of nonwhite immigrants by local law enforcement in the United States results in the detention and forced return of immigrant youth to El Salvador, a location in which criminal aliens and alleged gang members frequently face restricted opportunities and violence at the hands of gangs, police, and vigilantes.<sup>37</sup> The Salvadoran government's American style zero tolerance policing targets alleged gang members and criminal aliens, resulting in incarceration and exclusion from the labor market. Consequently, deported individuals are forced to seek opportunities again through migration, often back into the United States.<sup>38</sup>

As migrants repeatedly rehash the migration and deportation circuit between the two countries, the United States and El Salvador become locked into a structurally interdependent relationship.<sup>39</sup> Despite attempts by U.S. authorities to restrict the entry and deport large numbers of immigrants, cycles of migration, policing, and reentry dig the grooves connecting nationstates ever deeper. Zilberg identifies the "patterns of circulation that result from the efforts of states to police and control the mobility of subjects considered to be dangerous," which includes flows of people, policing models, labor, currency, commodities, and information, as "securityscapes."<sup>40</sup> Globalizing flows and contemporary technology have resulted, on the one hand, in a "debordering" effect, or breaking down of traditional borders, as well as the rearticulation of borders for security purposes, or "rebordering."<sup>41</sup>

Contemporary debordering, rebordering, and the reproduction of securityscapes increasingly rely upon mass data repositories and information

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36. Zilberg, *supra* note 24.

37. *Id.* at 760–61, 772, 776; Elana Zilberg, *Gangster in Guerilla Face: A Transnational Mirror of Production Between the USA and El Salvador*, 7 *ANTHROPOLOGICAL THEORY* 37, 41 (2007). Zilberg argues that the combination of zero tolerance gang abatement strategies and provisions in the Illegal Immigration Reform and Individual Responsibility Act of 1996 have resulted in the deportation to El Salvador of thousands of allegedly gang involved Salvadoran youth. Upon return to El Salvador, youth are targeted by gang members, law enforcement, and civilians.

38. Susan Bibler Coutin, *Exiled by Law: Deportation and the Inviability of Life*, in *THE DEPORTATION REGIME: SOVEREIGNTY, SPACE, AND THE FREEDOM OF MOVEMENT* 353, 363, 367 (Nicholas De Genova & Nathalie Peutz eds., 2010); Zilberg, *supra* note 37, at 44.

39. Zilberg, *supra* note 24, at 774.

40. ELANA ZILBERG, *SPACE OF DETENTION: THE MAKING OF A TRANSNATIONAL GANG CRISIS BETWEEN LOS ANGELES AND SAN SALVADOR* 3 (2011).

41. For discussions of bordering, debordering, and rebordering, see generally DIDIER BIGO & ELSPETH GUILD, *CONTROLLING FRONTIERS: FREE MOVEMENT INTO AND WITHIN EUROPE* 233 (2005); M. Coleman, *U.S. Statecraft and the U.S.–Mexico Border as Security/Economy Nexus*, 24 *POL. GEOGRAPHY* 185 (2005); Herzog & Sohn, *supra* note 10, at 178.

sharing mechanisms to identify, assess, track, and impede individuals as they move domestically and internationally. This Article considers how surveillance technology structures the securityscapes that stretch between locales within the United States and Latin America. In the following Part, this Article provides an overview of the technologies that form immigration surveillance infrastructure.

### A. Immigration Surveillance

Securitized immigration enforcement is facilitated by modern surveillance technology. While surveillance is an old practice,<sup>42</sup> late twentieth century technological innovations have transformed American law enforcement practices and produced “new surveillance” regimes, which use “technical means to extract or create information” in novel ways.<sup>43</sup> In this Subpart, this Article reviews select new surveillance practices in the U.S. immigration enforcement system—the consolidation of secondary information, big data analytics, and interoperability—to describe how new surveillance technology has been used to amplify the identification, tracking, apprehension, detention, and deportation of immigrants.

Under new surveillance regimes, law enforcement primarily collects and consolidates data from secondary sources, rather than recording information gleaned from first hand observation.<sup>44</sup> U.S. immigration enforcement authorities access criminal record databases, other publicly and commercially available databases (i.e. registries, social media), and private databases (i.e. insurance, credit) to build comprehensive dossiers on surveillance subjects.<sup>45</sup> The number of people entered into criminal records databases for low level offenses has substantially

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42. See generally SIMONE BROWNE, *DARK MATTERS: ON THE SURVEILLANCE OF BLACKNESS* (2015). Browne traces the roots of contemporary surveillance to racial control practices developed during American slavery. See also CHRISTIAN PARENTI, *THE SOFT CAGE: SURVEILLANCE IN AMERICA FROM SLAVERY TO THE WAR ON TERROR* (2004).

43. GARY T. MARX, *WINDOWS INTO THE SOUL: SURVEILLANCE AND SOCIETY IN AN AGE OF HIGH TECHNOLOGY* 20 (2016).

44. *Id.* at 49, 51.

45. Bigo, *Globalized (In)security*, *supra* note 18, at 38–39. See U.S. DEP’T OF HOMELAND SEC., Privacy Impact Assessment for the FALCON Tipline DHS/ICE/PIA-033 (Nov. 2, 2012) 3, 7–8 for a description of Immigration and Customs Enforcement (ICE) and Department of Homeland Security (DHS) personnel’s use of the FALCON environment to access criminal records and other publicly available databases to investigate and enforce federal criminal and administrative laws. See U.S. IMMIGRATION & CUSTOMS ENF’T, TARGETING OPERATIONS SUBSCRIPTION DATA SERVICE REQUEST 1 (2017) for a description of ICE consolidation of credit and insurance information.

increased since the 1990s<sup>46</sup> as a result of broken windows policing and the war on drugs.<sup>47</sup>

The capacious consolidation of information and the development of sophisticated analytical tools has enabled the emergence of big data surveillance and policing in multiple law enforcement contexts, including local police departments, national security organizations, and immigration control agencies.<sup>48</sup> With increased surveillance capacity, law enforcement organizations are able to surveil more people than before, analyze large datasets to identify categories of suspicious people for further investigation, and track targeted individuals across institutions and jurisdictions.<sup>49</sup> While traditional policing approaches aim to identify individual suspects and investigate them, big data analytics allow law enforcement to deductively identify types of people who are high risk.

The policing archipelago has gradually become more connected through interoperable databases. Immigration agencies are part of Department of Homeland Security (DHS) interoperability initiatives that seek to connect discreet data repositories and facilitate information sharing.<sup>50</sup> Digital technology scholars John Palfrey and Urs Gasser broadly define interoperability as “the ability to transfer and render useful data and other information across systems, applications, or components”<sup>51</sup> and identify four layers of interoperability:

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46. See Kevin Lapp, *Databasing Delinquency*, 67 HASTINGS L.J. 195, 208 (2015).
  47. JAMES B. JACOBS, *THE ETERNAL CRIMINAL RECORD* 2 (2015) (“The numbers have increased significantly over the last several decades on account of aggressive policing in the name of the war on drugs, zero tolerance, and broken windows.”).
  48. See generally ANDREW GUTHRIE FERGUSON, *THE RISE OF BIG DATA POLICING* (2017); LYON, *supra* note 8; Aas, *supra* note 8.
  49. Sarah Brayne, *Big Data Surveillance: The Case of Policing*, 82 AM. SOC. REV. 977, 979–82 (2017). For discussions of big data assessments and categorizations of purportedly suspicious people, see generally Katja Franko Aas, *From Narrative to Database: Technological Change and Penal Culture*, 6 PUNISHMENT & SOC’Y 379, 386 (2004) (discussing generic and categorical identity); MATTHEW LONGO, *THE POLITICS OF BORDERS: SOVEREIGNTY, SECURITY, AND THE CITIZEN AFTER 9/11*, at xvi (Keith Darden & Ian Shapiro eds., 2018) (discussing deindividuation through regulated individuation); David Lyon, *Technology vs ‘Terrorism’: Circuits of City Surveillance Since September 11th*, 27 INT’L J. URB. & REGIONAL RES. 666, 673 (2003) (discussing categorical suspicion).
  50. The most high-profile interoperability initiative may be the Secure Communities program in which the fingerprints of people arrested and booked by a local law enforcement agency are automatically run through both Federal Bureau of Investigation (FBI) and DHS databases to flag unauthorized immigrants for apprehension and removal. See Cox & Miles, *supra* note 26. For an overview of immigration-related interoperability initiatives, see DORIS MEISSNER ET AL., *MIGRATION POLICY INST., IMMIGRATION ENFORCEMENT IN THE UNITED STATES: THE RISE OF A FORMIDABLE MACHINERY* 65–75 (2013).
  51. MEISSNER ET AL., *supra* note 50 at 6–7.

technological, data, human, and institutional.<sup>52</sup> The first layer—technological—refers to the extent to which two systems or more can be connected through compatible interfaces in order to exchange data.<sup>53</sup> A closely related second layer—data interoperability—refers to the capability of systems to make sense of the data that has been exchanged.<sup>54</sup> Although typically conceptualized as a matter of technical compatibility, interoperability also requires human and institutional cooperation. The human layer of interoperability refers to the will and ability of humans to work together to make systems interoperable.<sup>55</sup> Lastly, the institutions in which information systems are couched must be compatible enough, though not necessarily identical, to engage in collaboration and exchange.<sup>56</sup> Legal institutions and definitions vary across jurisdictions and societies. Physical assault, for example, may be defined differently within the legal systems of two nationstates. Crossjurisdictional information sharing—particularly international information sharing programs—require the translation of these legal standards such that statutes, violations, and the substantive meaning of convictions make sense across societies.<sup>57</sup> Because of the ubiquity of these challenges, interoperability is often not fully realized and is best understood by degree rather than according to a binary model.<sup>58</sup>

High levels of interoperability increase the mobility of data. While information in the analog age was recorded in paper files and thus, limited or slow in its reach, digital information is more easily exchanged.<sup>59</sup> Interoperable data systems currently constitute the connective tissue that tie together a web of decentralized federal law enforcement agencies to form an immigration surveillance regime couched within a larger national surveillance state.<sup>60</sup> On the international level, interoperability among foreign partners enables the crossborder surveillance and global policing of migrants.<sup>61</sup>

Scholars argue that, partly as a result of technological advancements, borders have become “more mobile, more ad hoc, less formalized, and as a result, more

52. JOHN PALFREY & URS GASSER, *INTEROP: THE PROMISE AND PERILS OF HIGHLY INTERCONNECTED SYSTEMS* 5 (2012).

53. *Id.* at 6.

54. *Id.*

55. *Id.*

56. *Id.*

57. *See id.* at 178.

58. *Id.* at 76; *see also, e.g.*, DAVID LYON, *SURVEILLANCE AS SOCIAL SORTING: PRIVACY, RISK, AND DIGITAL DISCRIMINATION* 113 (2003).

59. LYON, *supra* note 58, at 22.

60. MEISSNER ET AL., *supra* note 50, at 5; *see* Anil Kalhan, *Immigration Surveillance*, 74 MD. L. REV. 1, 11 (2014).

61. Bigo, *Globalized (In)security*, *supra* note 18, at 47.

omnipotent and dangerous,”<sup>62</sup> with border control resembling “a distributed network of myriad checkpoints, technologies and actors, which can be situated inside or outside a given state territory.”<sup>63</sup> The border is diffuse: rather than a singular, discrete site, it is instead encountered at various points.<sup>64</sup> To describe the configuration of immigration control in an era of mass surveillance, Anil Kalhan introduced the term “migration border” to describe the decoupling of border control practices from the territorial border.<sup>65</sup> The migration border captures the multiple, mobile, and scattered “set of boundary points at which nationstates authorize individuals to enter or be admitted, prevent or allow their entry or admission, or subject them to possible expulsion.”<sup>66</sup> The migration border is layered and thick, pushing inward and outward from the boundary line, and policed by a collection of both private and public actors.<sup>67</sup> In the next Part, this Article explores the thickening of the border as mechanisms of externalization and internalization.

## B. Externalization and Internalization of Border and Migration Controls

In contemporary information driven U.S. immigration enforcement strategies, physical borders represent both an ending and a beginning. Immigration authorities strive to metaphorically push the border outward by using information technology to intercept immigrants before they reach crossing points.<sup>68</sup> In this way, borders are an ending, a last line of defense rather than a first point of contact.<sup>69</sup> When immigrants do reach and cross borders, the omnipresence of immigration surveillance technology pulls policing functions of the border inward to the interior of the country. The border crosser is thus subjected to a regime of immigration surveillance to which they will continue to be subjected despite their distance away from the physical border.

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62. Irus Braverman, *Civilized Borders: A Study of Israel's New Crossing Administration*, 43 *ANTIPODE* 264, 265 (2010).

63. Katja Franko Aas, *Analysing a World in Motion: Global Flows Meet "Criminology of the Other"*, 11 *THEORETICAL CRIMINOLOGY* 283, 296 (2007).

64. LYON, *supra* note 58; Louise Amoore, *Biometric Borders: Governing Mobilities in the War on Terror*, 25 *POL. GEOGRAPHY* 336, 338 (2006).

65. Kalhan, *supra* note 60, at 59.

66. *Id.*

67. *Id.* at 60–61.

68. *Id.* at 15–17. Since September 11, 2001, the U.S. government has required international carriers to collect and transmit information on all passengers in order to assess their admissibility to the United States before arrival. Furthermore, as this Article demonstrates, the U.S. government enters into information sharing agreements with and provides technical assistance to foreign partners in order to ensure the incapacitation of migrants in sending and transit states.

69. *Id.* at 60.

The stretching or thickening of the border beyond the physically demarcated boundary is accomplished in part through border externalization and internalization practices.<sup>70</sup> Externalization involves the expansion of border controls beyond the physical nationstate, often with the assistance of other countries.<sup>71</sup> Internalization refers to the strengthening of interior immigration enforcement and the expansion of border controls into the territorial center of the country, leading to detention and deportation.<sup>72</sup> Externalization and internalization serve as complementary prongs in a migration securitization agenda.<sup>73</sup>

The externalization, or outsourcing, of migration and border controls,<sup>74</sup> consists of direct or indirect “extraterritorial state actions to prevent migrants, including asylum seekers, from entering the legal jurisdictions or territories of destination countries or regions or making them legally inadmissible without individually considering the merits of their protection claims.”<sup>75</sup> This includes unilateral, bilateral, and multilateral state action as well as intervention by private entities.<sup>76</sup> Externalization policies take a variety of forms and target migrant groups unevenly. For example, the U.S. Coast Guard has focused primarily on the interception of migrants who travel across the Caribbean.<sup>77</sup> The U.S. government’s land based interdiction efforts, which disproportionately target Mexican and Central American immigrants,<sup>78</sup> include: attempts to engage transit countries in strengthening border controls;<sup>79</sup> public education initiatives in sending states about the dangers of migration intended to dissuade crossing attempts;<sup>80</sup> measures designed to improve conditions in countries of origin and

70. For a discussion of thick and thin borders, see generally LONGO, *supra* note 49, at 23–24.

71. Cecilia Menjivar, *Immigration Law Beyond Borders: Externalizing and Internalizing Border Controls in an Era of Securitization*, 10 ANN. REV. L. & SOC. SCI. 353, 355 (2014).

72. *Id.* at 360.

73. *Id.* at 369.

74. Border controls ensure that only persons and objects who are authorized to enter a country cross the border. See Maarten den Heijer, *Europe beyond its Borders: Refugee and Human Rights Protection*, in EXTRATERRITORIAL IMMIGRATION CONTROL: LEGAL CHALLENGES 196–97 (Bernard Ryan & Valsamis Mitsilegas eds., 2010).

75. Bill Frelick et al., *The Impact of Externalization of Migration Controls on the Rights of Asylum Seekers and Other Migrants*, 4 J. ON MIGRATION & HUM. SEC. 190, 193 (2016).

76. See *id.*

77. Bernard Ryan, *Extraterritorial Immigration Control: What Role for Legal Guarantees?*, in EXTRATERRITORIAL IMMIGRATION CONTROL: LEGAL CHALLENGES 3, 24–26 (Bernard Ryan & Valsamis Mitsilegas eds., 2010).

78. Menjivar, *supra* note 71, at 358. Doris Marie Provine & Roxanne Lynn Doty, *The Criminalization of Immigrants as a Racial Project*, 27 J. CONTEMP. CRIM. JUST. 261 (2011).

79. Frelick, *supra* note 75, at 200–01.

80. Media Release, U.S. Customs & Border Patrol, El Paso Sector Kicks Off 21st Annual BSI Awareness Campaign (Apr. 17, 2018), <https://www.cbp.gov/newsroom/local-media->



address causes of migration;<sup>81</sup> and the return of migrants to third countries deemed safe—also known as first countries of asylum.<sup>82</sup> Particularly relevant to this Article is the support and technical assistance provided by the U.S. government to Latin American governments to target and detain alleged gang members and drug traffickers before they reach U.S. borders.<sup>83</sup>

Although governments frequently frame externalization as a method of dissuading dangerous crossings therefore ensuring migrant safety, externalization prevents migrants from entering nationstate boundaries and therefore precludes them from benefitting from protective mechanisms like asylum.<sup>84</sup> Immigration authorities also deploy securitization lenses to portray externalization as a security imperative that prevents purportedly dangerous migrants, illicit drugs, and weapons from reaching the border.<sup>85</sup> Lastly, governments sometimes frame externalization practices as a capacity building opportunity for partner countries.<sup>86</sup> Some scholars argue that such interoperable externalization practices enable the global North to export, not only technology and expertise, but also crime control and penal state agendas to other regions, the global South in particular.<sup>87</sup>

Border enforcement also encroaches into the interior of nationstates through policies and practices of internalization, or insourcing, of border and migration controls.<sup>88</sup> Internalization includes interior enforcement by federal immigration

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release/el-paso-sector-kicks-21st-annual-bsi-awareness-campaign [https://perma.cc/EJ77-QPA6].

81. Christina Boswell, *The 'External Dimension' of EU Immigration and Asylum Policy*, 79 INT'L AFF. 619, 619–620 (2003).

82. *Id.* at 622. In migration literature, the country of origin that a migrant leaves is referred to as the sending country. The destination country is referred to as the receiving country. A country of transit is a country through which a migrant passes in traveling from the sending to receiving country. A 'safe third country' refers to a country other than the sending or receiving state where a migrant is deemed, usually by the receiving country, to be safe. Under the 'first country of asylum' principle, a migrant must apply for asylum in the first country to which they arrive, often intended by the migrant to be a transit country.

83. See Zilberg, *supra* note 24.

84. Frelick, *supra* note 75, at 195.

85. *Id.* at 193. For an analysis of security framings of EU border externalization practices see Maribel Casas-Cortes, Sebastian Cobarrubias & John Pickles, "Good Neighbours Make Good Fences": *Seahorse Operations, Border Externalization and Extra-Territoriality*, 23 EUR. URB. & REGIONAL STUD. 231 (2016).

86. Frelick, *supra* note 75, at 194.

87. Aas, *supra* note 8, at 333; Zilberg, *supra* note 37. Zilberg argues that the adoption of U.S.-style broken windows policing, anti-gang enforcement, and terrorist legislation by El Salvador's ruling right wing represents the globalization of conservative U.S. crime control agenda.

88. Menjivar, *supra* note 71, at 354.

enforcement authorities targeting noncitizens for detention and deportation.<sup>89</sup> Border patrol checkpoints on roads within 100 miles from an international border constitute an internal border control strategy that expands border-like screenings geographically inward.<sup>90</sup> Immigrants are also surveilled and policed by local law enforcement and other agencies whose missions are not primarily dedicated to immigration enforcement. This can take the form of explicit joint enforcement agreements that enable the devolution of daily immigration policing to local jurisdictions<sup>91</sup> or more informal, indirect forms of immigration policing practiced by local law enforcement, such as local law enforcement access to immigration data in National Crime Information Center (NCIC) database files.<sup>92</sup>

Digital surveillance systems act as heightened externalization and internalization mechanisms. Regarding externalization, digital surveillance stretches the border outward from nationstate boundaries to meet migrants before they reach ports of entry. Even as states continue to engage in infrastructure building and militarization at the border, they simultaneously push border control mechanisms geographically outward from border territory. Referring to EU

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89. Daniel M. Goldstein & Carolina Alonso-Bejarano, *E-Terrify: Securitized Immigration and Biometric Surveillance in the Workplace*, 76 HUMAN ORG. 1, 2 (2017). See also DANIEL KANSTROOM, DEPORTATION NATION 5–6 (2007) for a discussion of the interior post-entry social control of immigrants in the United States.
  90. Heide Castañeda & Milena A. Melo, *Geographies of Confinement for Immigrant Youth: Checkpoints and Immobilities Along the US/Mexico Border*, 41 LAW & POL'Y 84 (2019). Castañeda and Melo note that Border Patrol checkpoints represent a layered approach to border control known as the “defense in depth” strategy. *Id.* at 81.
  91. See SCHIRRO, *supra* note 34. 287(g) programs, named after section 287(g) of the US Immigration and Nationality Act, authorize the deputation of local law enforcement in the enforcement of federal immigration law. In practice, such deputation devolves federal immigration enforcement authority to local law enforcement agencies. For case studies of local law enforcement deputation, see Amada Armenta, *From Sheriff's Deputies to Immigration Officers: Screening Immigrant Status in a Tennessee Jail*, 34 L. & POL'Y 91 (2012); Mathew Coleman, *The “Local” Migration State: The Site-Specific Devolution of Immigration Enforcement in the U.S. South*, 34 L. & POL'Y 159 (2012).
  92. Laura Sullivan, *Enforcing Nonenforcement: Countering the Threat Posed to Sanctuary Laws by the Inclusion of Immigration Records in the National Crime Information Center Database*, 97 CALIF. L. REV. 567, 569 (2009). The National Crime Information Center (NCIC) database is an index of criminal justice information maintained by the Federal Bureau of Investigation (FBI) that is available at all times to federal, state, and local law enforcement in the United States. When an officer accesses NCIC to perform a criminal records check on an individual, the officer will be automatically alerted to all available criminal and civil immigration data pertaining to the individual. Sullivan argues, “By indiscriminately presenting immigration information, even when unwanted by officers, the NCIC encourages local officers to acquiesce to federal enforcement priorities despite potential conflicts with local sanctuary policies.” For additional information on the role of NCIC in immigration policing, see Anil Kalhan, *Immigration Policing and Federalism through the Lens of Technology, Surveillance, and Privacy*, 74 OHIO ST. L.J. 1105, 1122–26 (2013).

border control, Didier Bigo and Elspeth Guild argue that the core of immigration enforcement is “not in the systematic checking of documents at borders, but in the methods of profiling and of identifying threats coming from foreign countries.”<sup>93</sup> Technologically mediated screening procedures enable governments in destination states to manage the movement of some people before they reach a border, even before they leave sending states.<sup>94</sup>

Surveillance systems also enable enhanced interior enforcement through initiatives like the Secure Communities program,<sup>95</sup> the Criminal Alien Program (CAP),<sup>96</sup> E-Verify,<sup>97</sup> and the Systematic Alien Verification for Entitlements (SAVE) Program,<sup>98</sup> all of which utilize interoperable surveillance technology to increase law enforcement contact with immigrants in the United States. Surveillance systems follow immigrants away from the border into interior spaces.

These concepts are interdependent in their manifestation of a more comprehensive and overbearing administration of immigration law. In the post-9/11 context, immigrants from the global South have been constructed as a national security threat. The U.S. government deploys immigration surveillance

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93. Bigo & Guild, *supra* note 41, at 246.

94. Didier Bigo, *Immigration Controls and Free Movement in Europe*, 91 NAT'L REV. RED CROSS 580 (2009). See also BIGO & GUILD, *supra* note 41 (2005). Bigo (2009) and Bigo & Guild (2005) refer to the concept of “policing at a distance,” which describes the export of controls that used to be carried out by officials at national borders to foreign officials and private security agents outside of nationstate borders such that migrants are intercepted and screened before entering the territory of destination countries. Policing at a distance is conceptually similar to Kalhan’s “migration border” in which federal immigration authorities cooperate with public and private actors who act both within and outside the U.S. territory “to collect, analyze, store, and share biometrics and other personal information, to identify individuals, to monitor and control mobility, and in some instances to detain individuals or otherwise restrain their liberty.” Kalhan argues that interoperable database systems integrate otherwise separate surveillance regimes. See Kalhan, *supra* note 60, at 68.

95. See *supra* note 50 for an in-depth description of the Secure Communities program.

96. The goal of the Criminal Alien Program (CAP) is to identify removable noncitizens in jails and prisons and initiate removal proceedings. See PATRISIA MACÍAS-ROJAS, FROM DEPORTATION TO PRISON: THE POLITICS OF IMMIGRATION ENFORCEMENT IN POST-CIVIL RIGHTS AMERICA (2016).

97. E-Verify allows employers to electronically verify employment eligibility by checking identification against Social Security Administration and DHS databases. See A. S. Leerkes, Mark Leach, & James Bachmeier, *Borders Behind the Border: An Exploration of State-Level Differences in Migration Control and their Effects on US Migration Patterns*, 38 J. ETHNIC & MIGRATION STUD. 111, 114 (2012); Cecilia Menjivar & María E. Enchautequi, *Confluence of the Economic Recession and Immigration Laws in the Lives of Latino Immigrant Workers in the United States*, IMMIGRANT VULNERABILITY & RESILIENCE 105, 108–09 (2015).

98. The Systematic Alien Verification for Entitlements (SAVE) Program enables federal, state, and local government agencies to obtain immigration status information for the purposes of screening eligibility for public benefits. See Micah Bump, *Immigration, Technology, and the Worksite: The Challenges of Electronic Employment Verification*, 22 GEO. IMMIGR. L.J. 391, 400 (2008); Kalhan, *supra* note 60, at 55–57.

systems to control the movement of immigrant groups. Securitized immigration enforcement strategies, undergirded by immigration surveillance systems, expand border controls inward and outward from the physical territory of the border. Building upon the concepts of the migration border, securitescapes, debordering, and rebordering, I argue that digital information sharing programs construct particular geographic configurations of information exchange and enforcement practices called bordering circuitry. This Article has chosen to use the term “bordering” to highlight that border control is an active, ongoing social and political process that increasingly occurs away from physical borderlands.<sup>99</sup> Circuitry refers both to the circuits of migration and enforcement endemic to securitescapes and the technological hardware that makes information sharing possible. The bordering circuitry discussed in this Article targets so-called criminal aliens and thus represents a conduit for reproduction of criminalization.

## II. METHODS

The findings presented in this Article are derived from primary documents. I analyze the documents as objects of research.<sup>100</sup> Specifically, I analyzed documents dating from 1995 to 2017 from the following categories: system of records notices (fifty-two documents); privacy impact assessments (forty-four documents); reports and audits from the U.S. DHS Office of Inspector General (thirty-one documents); U.S. DHS memos, strategic plans, and budget documents (twenty-one documents); and technical manuals and training materials (thirty-six documents). I also reviewed relevant case law, policies, and executive orders that established or modified federal databases and information systems.

I examine both the political processes behind the development of surveillance technology and the implementation of information sharing programs. System of records notices, privacy impact assessments, strategic plans, budget documents, technical manuals, training materials, and internal memos provide insight into the institutional logics of the immigration enforcement apparatus. A system of records is defined as “a group of any records under the control of an agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular

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99. Herzog & Sohn, *supra* note 41, at 177–78.

100. See generally JOHN SCOTT, *A MATTER OF RECORD* (1990); ANNELISE RILES, *DOCUMENTS: ARTIFACTS OF MODERN KNOWLEDGE* (2006). In adopting an approach that situates DHS documents as research objects, I do not assume that the documents reveal objective truth about the nature of immigration or immigrants. Rather, I analyze the documents to illuminate the political construction of immigrants as criminal and of punitive immigration control as necessary.

assigned to the individual.”<sup>101</sup> The Privacy Act of 1974 requires that federal agencies give public notice as to the development and alteration of records systems via the Federal Register’s system of records notices.<sup>102</sup> Under the authority of the Homeland Security Act of 2002, the Department of Homeland Security’s Privacy Officer requires that federal agencies produce privacy impact assessments to describe their methods for collecting and storing personally identifiable information.<sup>103</sup> Office of Inspector General reports, audits, and internal memos offer a window into the implementation of directives and coordination of immigration enforcement processes through technology.

I employ an abductive analytical process to develop my argument.<sup>104</sup> With the system documents, I conducted an initial round of open coding by hand to inductively elicit general coding categories. I used the topics that emerged from the first round of coding to proceed with a second round of more directed coding with the entire set of documents, once again by hand, according to seven dimensions. Specifically, I looked for indications that there were changes to information systems concerning the following components: (1) recording of criminal history information; (2) broader forms of criminal classification; (3) automation; (4) standardization; (5) interoperability; (6) risk assessment analytical tools; and (7) information sharing. Lastly, I conducted a third round of coding by combining all of the document sets chronologically. I sorted data excerpts and drafted memos through an iterative analytical process in which I integrated themes drawn inductively from the data set with theory from relevant literature.

In order to acquire novel statistical data about information sharing programs, I submitted and litigated multiple Freedom of Information Act (FOIA) requests to the U.S. Department of Homeland Security (DHS). One FOIA request inquired as to the number of repatriated individuals who had their criminal history information shared with foreign countries under the Criminal History Information Sharing (CHIS) program between January 1, 2010 and October 1, 2017 broken down by year, country of birth, gang flag, and National Crime Information Center (NCIC) Code(s) from the 85 crimes enumerated in the

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101. Privacy Act of 1974: Implementation of Exemptions, 71 FED. REG. 42603 (July 27, 2006).

102. *The Privacy Act of 1974*, NAT’L ARCHIVES, <https://www.archives.gov/about/laws/privacy-act-1974.html> [https://perma.cc/SEK9-NLGF].

103. Roger Clarke, *Privacy Impact Assessment: Its Origins and Development*, 25 COMPUTER L. & SEC. REV. 123 (2009).

104. See generally Stefan Timmermans & Iddo Tavory, *Theory Construction in Qualitative Research: From Grounded Theory to Abductive Analysis*, 30 SOC. THEORY 167 (2012). Abductive analysis involves moving iteratively between data and theory, rather than beginning inquiry with a fully developed hypothesis. Abductive approaches combine both induction and deduction to explore surprising findings through field note writing, theoretical sampling, coding, sorting, diagramming, memo writing, and comparison.

cooperation agreements. Another FOIA request inquired as to the number of individuals whose information was shared as part of the Law Enforcement Notification System (LENS) between January 1, 2015 and October 1, 2017, broken down by year, country of citizenship, law enforcement jurisdiction of intended residence (domestic law enforcement agency to whom the notification was sent), and description of crime(s) or conviction(s).

After DHS failed to respond to the request by the statutory time limit, I filed suit to compel DHS to release the data. DHS complied with the request to release information on the CHIS program pertaining to 39,197 repatriated individuals who had their criminal history information shared with foreign countries between January 1, 2010 and October 1, 2017, broken down by year and country of birth. Nonetheless, DHS refused to release data on gang flags and NCIC codes on the basis of privileged law enforcement information. DHS also released highly detailed data pertaining to 8100 individuals who had their criminal history information shared as part of the LENS program between January 1, 2010 and October 1, 2017.<sup>105</sup> SPSS software was used to analyze the data.<sup>106</sup>

### III. THE CROSS-BORDER CONSTRUCTION, SURVEILLANCE, AND POLICING OF “CRIMINAL ALIENS”

The Law Enforcement Notification System (LENS) is an information sharing agreement that enables the U.S. government to disclose information held in federal databases to domestic law enforcement agencies. Disclosure is permitted in cases where a noncitizen who is a criminal alien, defined as having been convicted of one or more serious crimes in the U.S., is released from ICE custody into U.S. territory. Another information sharing program, the Criminal History Information Sharing (CHIS) program, enables the U.S. government to disclose information on criminal aliens held in federal databases with the Government of Mexico and the governments of select Latin American and Caribbean countries. The LENS and CHIS programs, which are the focus of this Article, obtain the majority of information shared with outside agencies from the Enforcement Integrated Database (EID)—a DHS data repository accessed through a collection of

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105. These data were broken down according to the following classifications: country of citizenship; detention location; release date; release reason; release facility; release facility city; release facility state; release facility zip; release address; release city; release state; release zip; agency code; agency type; message status; last send date; “enqueue” date; and NCIC (National Crime Information Center) codes.

106. Seth Alan Williams, a PhD student and graduate research assistant in the Department of Criminology, Law & Society at the University of California, Irvine, cleaned and analyzed the data, and provided the visual representations (graphs and tables) included in this Article.

applications called ENFORCE and EAGLE.<sup>107</sup> Therefore, I provide an overview of EID, and the LENS and CHIS programs.

#### A. The Enforcement Integrated Database (EID)

The Enforcement Integrated Database (EID) is a shared database repository that maintains information on federal investigation, arrest, booking, detention, and removal operations.<sup>108</sup> It is owned and operated by U.S. Immigration and Customs Enforcement (ICE) and directly accessed by certain Department of Homeland Security (DHS) components, including ICE, U.S. Customs and Border Protection (CBP), and U.S. Citizenship and Immigration Services (USCIS).<sup>109</sup>

The biographic information stored in EID is notably broad and includes “name(s), aliases, date of birth, telephone numbers, addresses, nationality, citizenship, Alien Registration Number (A-Number), Social Security Number (SSN), passport number, visa information, employment history, educational history, immigration history, and criminal history . . . [H]eight, weight, eye color, hair color, and any other unique physical characteristics (e.g., scars, marks, tattoos).”<sup>110</sup> EID also contains information related to a subject’s travel, health, bond, case management, detention, detainees, family, spouse(s), and associates,<sup>111</sup> as well as information about DHS agents’ encounters with individuals in the

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107. ENFORCE applications are software applications that allow users to create, update, and access records stored in EID. EAGLE applications are used by ICE officers to process the biometric and biographic information of arrested individuals.

108. U.S. DEP’T OF HOMELAND SEC., PRIVACY IMPACT ASSESSMENT FOR THE ENFORCEMENT INTEGRATED DATABASE (EID) 2 (2010) [hereinafter EID], <https://www.dhs.gov/sites/default/files/publications/PIA%2C%20ICE-EID%2C%2020100118%2C%20%5Bsigned%5D.pdf> [https://perma.cc/V7E3-732U].

109. U.S. DEP’T OF HOMELAND SEC., PRIVACY IMPACT ASSESSMENT UPDATE FOR THE ENFORCEMENT INTEGRATED DATABASE (EID) ENFORCE ALIEN REMOVAL MODULE (EARM 3.0), DHS/ICE/PIA-015(B) 2 (2011) [hereinafter DHS/ICE/PIA-015(B)], <https://www.dhs.gov/sites/default/files/publications/PIA%20ICE%20EID%20EARM%20Update%2020110520%20Final.pdf> [https://perma.cc/KF9X-UCZ6]. Records stored in EID are accessed, created, and modified through the ENFORCE and EAGLE applications. For more information on ENFORCE and EAGLE, see U.S. DEP’T OF HOMELAND SEC., PRIVACY IMPACT ASSESSMENT UPDATE FOR THE ENFORCEMENT INTEGRATED DATABASE (EID)—EAGLE, DHS/ICE/PIA-015(E) (2012), <https://www.dhs.gov/sites/default/files/publications/PIA%20Update%2C%20ICE%20EID%20EAGLE%2020120725%20%5Bsigned%5D.pdf> [https://perma.cc/7E33-5N2K].

110. *Id.* at 7.

111. *Id.* at 7–9; Privacy Act of 1974, Department of Homeland Security United States Immigration Customs and Enforcement—011 Immigration and Enforcement Operational Records System of Records, 75 FED. REG. 23274, 23275–76 (May 3, 2010) [hereinafter 2010 Notice of Amendment to the Privacy Act of 1974].

course of law enforcement activities.<sup>112</sup> Lastly, EID and the ENFORCE and EAGLE applications process biometric information on suspects in the form of fingerprints, DNA, and photographs.<sup>113</sup>

Sources from which system users collect the information stored in EID is expansive, including: suspects, victims, witnesses, and associates interviewed by DHS officers or agents; undercover operations and related surveillance technology; confidential informants; visa and immigration benefits applications, travel documents, and identification documents (i.e. visas, birth certificates); federal, state, local, tribal, international, or foreign governmental organizations; employers, schools, and universities; individuals making bond arrangements; applicants, sponsors, and those representing noncitizens during immigration benefit application processes; publicly and commercially available databases (i.e. newspapers, registries, social media); and other federal databases.<sup>114</sup> ICE imports comprehensive criminal history information into EID for all subjects from the National Crime Information Center (NCIC) database, an index of criminal justice information maintained by the Federal Bureau of Investigation (FBI) that is available to federal, state, and local law enforcement in the United States.<sup>115</sup>

EID reflects the mass secondary consolidation characteristic of new surveillance systems. The extensive information consolidated in EID provides a basis for immigration authorities to construct immigrants as criminal aliens or otherwise dangerous entities. EID provides the foundational data for several information sharing programs, including the Law Enforcement Notification System and the Criminal History Information Sharing program.

112. EID, *supra* note 108, at 7.

113. *Id.* at 21.

114. *Id.* at 9–11, 18.

115. U.S. DEP'T OF HOMELAND SEC., PRIVACY IMPACT ASSESSMENT UPDATE FOR THE ENFORCEMENT INTEGRATED DATABASE (EID) 2 (2010) [hereinafter PRIVACY IMPACT ASSESSMENT UPDATE], <https://www.dhs.gov/sites/default/files/publications/PIA%2C%20ICE-EID%20Update%2C%2020100728%2C%20%5Bsigned%5D.pdf> [<https://perma.cc/ZV66-SEL4>]; U.S. DEP'T OF HOMELAND SEC., PRIVACY IMPACT ASSESSMENT FOR THE ENFORCEMENT INTEGRATED DATABASE (EID) RISK CLASSIFICATION ASSESSMENT (RCA 1.0), ENFORCE ALIEN REMOVAL MODULE (EARM 5.0), AND CRIME ENTRY SCREEN (CES 2.0), DHS/ICE/PIA-015(D), 3 (2012) [hereinafter DHS/ICE/PIA-015(D)], [https://www.dhs.gov/sites/default/files/publications/PIA%20EID%20Update%20for%20RCA\\_EARM%205\\_CES%202%2020120406%20FINAL%20%5Bsigned%5D.pdf](https://www.dhs.gov/sites/default/files/publications/PIA%20EID%20Update%20for%20RCA_EARM%205_CES%202%2020120406%20FINAL%20%5Bsigned%5D.pdf) [<https://perma.cc/GC4R-YW64>].



**Table 1:** Information Systems Timeline

1984	2007	January 2010	July 2012	2014	2015
Deportable Alien Control System (DACS) operational	Enforcement Case Tracking System (ENFORCE) applications operational	Enforcement Integrated Database (EID) operational	Comprehensive criminal history from the National Crime Information Center (NCIC) Database populated into EID/ENFORCE	Criminal History Information Sharing (CHIS) Program operational	Law Enforcement Notification System (LENS) operational

## B. The Law Enforcement Notification System

In April 2015, DHS initiated a program to disclose information held in federal databases to domestic law enforcement agencies pertaining to noncitizens released from ICE custody into U.S. territory, if a noncitizen has both been convicted of a violent crime, a serious crime (including certain misdemeanors), or a sex offense; and if the agency receiving the notification has an interest in “(1) a pending investigation or prosecution, (2) parole or other forms of supervision, or (3) the individual’s intended residence or location of release falling within the agency’s jurisdiction.”<sup>116</sup> To notify the receiving agency, ICE developed the Law Enforcement Notification System (LENS). When a noncitizen who meets one of the qualifying conditions listed above is booked out of ICE custody, LENS pulls information from federal databases and sends it to the law enforcement agency where the individual is released and the state where the released individual intends to reside.<sup>117</sup>

ICE shares the following data on a given noncitizen in the LENS notification message: name, alias, date of birth, address of residence, country of citizenship, A-Number, and other identifying law enforcement numbers (for example, state

116. Privacy Act of 1974, Department of Homeland Security United States Immigration Customs and Enforcement—011 Immigration and Enforcement Operational Records System of Records, 80 FED. REG. 24269 (Apr. 30, 2015) [hereinafter 2015 Notice of Amendment to the Privacy Act of 1974]; *see also* U.S. DEP’T OF HOMELAND SECURITY, PRIVACY IMPACT ASSESSMENT UPDATE FOR THE ENFORCEMENT INTEGRATED DATABASE (EID) LAW ENFORCEMENT NOTIFICATION SYSTEM (LENS) 1 (2015) [hereinafter LENS], <https://www.dhs.gov/sites/default/files/publications/PIA%2C%20ICE-EID%20Update%20%28LENS%29%2C%2020150922%2C%20PRIV%20FINAL%20%5Bsigned%5D.pdf> [https://perma.cc/E94M-F64B].

117. LENS, *supra* note 116, at 4.

identification number, FBI number, and fingerprint number).<sup>118</sup> With this information, the recipient law enforcement agency can conduct its own query into the National Crime Information Center (NCIC) database and other databases to ascertain the noncitizen's criminal history.<sup>119</sup> Thus, ICE sends LENS notifications to domestic law enforcement agencies when a released noncitizen has a criminal history, information ICE personnel most likely gleaned from NCIC. The notification message itself, however, contains no substantive criminal history information but rather, provides the necessary identifying numbers for a domestic law enforcement agency to circle back and access the criminal history information from NCIC independently.

Three agency conditions that trigger a LENS notification: first, pending investigation/prosecution, second, parole or other forms of supervision, and third, released individual's intended residence or location of release falling within the agency's jurisdiction. Of these, the third is the broadest. If a criminal alien is released into the United States by ICE, they necessarily will settle in a law enforcement jurisdiction, thus by definition being eligible to have their information shared.

Nationwide deployment of the program was complete by September 2015,<sup>120</sup> at which time LENS notifications were sent to state law enforcement partners. These partners were mainly State Identification bureaus and fusion centers, who then distributed the information to local law enforcement agencies. By August 2016, local law enforcement agencies (including sworn campus safety officers)

118. *Id.* at 3. For a sample image of the LENS notification sent to subscribing state and local law enforcement agencies, see U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, LAW ENFORCEMENT NOTIFICATION SYSTEM (LENS) (2016), [https://www.nccpsafety.org/assets/files/misc/LENS\\_Fact\\_Sheet.pdf?utm\\_source=Weekly+Snapshot%3A+August+17%2C+2016&utm\\_campaign=WS+8%2F17%2F16&utm\\_medium=email](https://www.nccpsafety.org/assets/files/misc/LENS_Fact_Sheet.pdf?utm_source=Weekly+Snapshot%3A+August+17%2C+2016&utm_campaign=WS+8%2F17%2F16&utm_medium=email) [https://perma.cc/QFA2-CWBL].

119. U.S. DEP'T OF HOMELAND SEC., PRIVACY IMPACT ASSESSMENT UPDATE FOR THE ENFORCEMENT INTEGRATED DATABASE (EID) PROSECUTIONS MODULE (PM), ELECTRONIC REMOVAL MANAGEMENT PORTAL (ERMP), OPERATIONS MANAGEMENT MODULE (OM<sup>2</sup>), LAW ENFORCEMENT NOTIFICATION SYSTEM (LENS), AND COMPLIANCE ASSISTANCE REPORTING TERMINAL (CART), DHS/ICE/PIA-015(i) 7 (2018) [hereinafter DHS/ICE/PIA-015(i)], <https://www.dhs.gov/sites/default/files/publications/privacy-pia-ice-eid-december2018.pdf> [https://perma.cc/J9TJ-SA45].

120. *Criminal Aliens Released by the Department of Homeland Security: Hearing Before the Comm. on Oversight and Government Reform H.R.*, 114th Cong. 9 (2016) [hereinafter *DHS Hearing*] (written testimony of ICE Director Sarah Saldaña) <https://www.dhs.gov/news/2016/04/28/written-testimony-ice-director-house-committee-oversight-and-government-reform> [https://perma.cc/7X3A-5VJT].

were able to subscribe via email to receive LENS notifications directly, without going through a state level agency per the previous protocol.<sup>121</sup>

### 1. Development of the Law Enforcement Notification System

In reporting documents, fact sheets, and newsletters, immigration authorities frame LENS as an information sharing program intended to assist local agencies “in narrowing the pool of potential suspects when a violent or serious crime is committed in their jurisdiction and there are few leads in the investigation, or if the particulars of a crime being investigated are similar to circumstances surrounding the violent or serious crime for which the individual was previously convicted.”<sup>122</sup> In this characterization, LENS is a resource for local law enforcement agencies to conduct investigations.<sup>123</sup>

Yet, in testimony and memos, immigration enforcement officials also refer to the development of LENS in relation to frustration with “limited or declined cooperation on the part of some state and local law enforcement agencies [ . . . ] on removals and returns of individuals posing a threat to public safety.”<sup>124</sup> Indeed, federal officials have expressed dissatisfaction with locales that refuse to cooperate with federal agencies for immigration enforcement purposes.<sup>125</sup> More recently, the Trump administration has threatened to withhold federal funding from police departments, cities, and states who abide by sanctuary policies that prohibit cooperation between local public agencies and federal immigration authorities.<sup>126</sup> Thus, it appears that immigration enforcement officials hope LENS might counteract local oppositional trends and encourage local law enforcement cooperation with federal authorities.

Scholars have documented how the daily work of policing immigrants has devolved from the federal to the local level, most explicitly by deputizing local law

121. *The Weekly Snapshot*, NAT’L CTR. CAMPUS PUB. SAFETY (Aug. 17, 2016), <https://www.nccpsafety.org/news/weekly-snapshot-archives/2016/08> [<https://perma.cc/HU2C-D2ZJ>].

122. 2015 Notice of Amendment to the Privacy Act of 1974, *supra* note 116.

123. It is concerning that DHS’ wording in the first part of the quotation above implies that the information in a LENS notification could implicate a noncitizen simply because the law enforcement agency may have failed to locate other leads.

124. *DHS Hearing*, *supra* note 120.

125. Lai & Lasch, *supra* note 27, at 547. Most notably regarding the Secure Communities program in which the fingerprints of people booked into local jails was automatically shared with federal immigration authorities during routine criminal records database checks. *Id.* Eventually, the Federal Government clarified that locales did not have discretion to opt out of Secure Communities. *Id.*

126. Exec. Order No. 13768 82 Fed. Reg. 8799, 8801 (Jan. 25, 2017) (issuing order entitled “Enhancing Public Safety in the Interior of the United States”).

enforcement officers to enforce federal immigration law or enlisting local law enforcement to assist in the transfer of immigrants to ICE custody.<sup>127</sup> Laura Sullivan argues that including civil immigration warrant information in criminal law enforcement databases that are accessed by local and state police informally imposes immigration enforcement tasks on the state and local levels.<sup>128</sup> LENS similarly acts as an indirect way to enlist state and local law enforcement in immigration control. Notifications are “situational awareness [messages] only . . . ; [t]hey neither direct nor require law enforcement agencies to take action”<sup>129</sup> but rather, are intended to “inform”<sup>130</sup> the local law enforcement agency of a criminal alien in their jurisdiction. Nonetheless, the notifications draw law enforcement attention to noncitizens with criminal records residing in or passing through their jurisdictions, enabling targeted surveillance and policing.

## 2. Deployment of the Law Enforcement Notification System

Since program implementation in the late summer of 2015, LENS notifications to state and local law enforcement agencies have increased at a steep pace.<sup>131</sup> Between August 2015 and August 2016, DHS issued roughly 100 notifications per month. Beginning in September 2016, LENS notifications increased sharply to about 400 cases per month. It is possible that this abrupt increase was due, at least in part, to structural changes in LENS notification procedures in August 2016, as greater numbers of local law enforcement agencies subscribed directly to the program, rather than receiving LENS information from a central state law enforcement agency. This abrupt increase was followed by a general trend of increasing cases through September of 2017 (the last available data point), which had the highest reported count of LENS notifications at 625 (See Figure 2).

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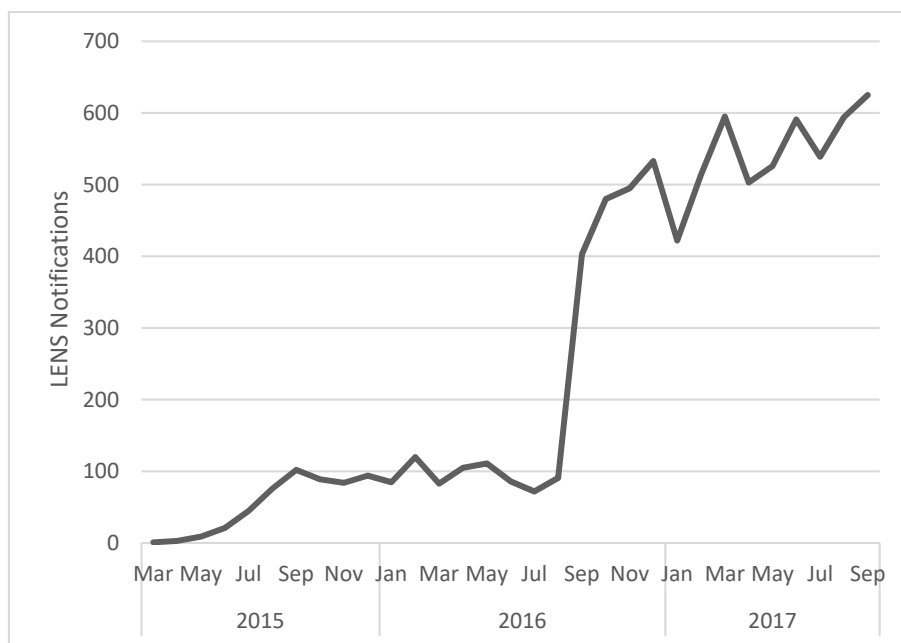
127. Amada Armenta, *Between Public Service and Social Control: Policing Dilemmas in the Era of Immigration Enforcement*, 63 SOC. PROBS. 111, 115 (2016); Monica W. Varsanyi, *Immigration Policing Through the Backdoor: City Ordinances, the “Right to the City,” and the Exclusion of Undocumented Day Laborers*, 29 URB. GEOGRAPHY 29, 33 (2008).

128. Sullivan, *supra* note 92, at 588–91.

129. DHS/ICE/PIA-015(1), *supra* note 119.

130. *Id.*

131. Data in the Subparts III.B.2 and III.C.2 are the result of statistical analysis using SPSS software.

**Figure 1:** LENS Notifications, March 2015–September 2017<sup>132</sup>

*Frequency of LENS notifications to state and local law enforcement agencies between March 2015 and September 2017.*

From January to December 2015, there were 524 LENS notifications affecting immigrants from seventy-four countries. Notifications for immigrants from Mexico were the most common, followed by Cuba, Vietnam, China, and Laos. From January to December 2016, there was a 408 percent increase in the total number of notifications from 524 to 2,664. The range of countries of origin increased to ninety-eight countries, though one case is indicated as “Stateless.” Notifications for immigrants from Mexico were again the most common, followed by Cuba, El Salvador, Vietnam, and Guatemala. In 2017, there was again an increase in notifications from the previous year, this time of 84.3 percent. This is particularly notable since data is only available for the first nine months (January through September) of 2017. The number of countries of origin associated with notifications increased once again, to a total of 119. Notifications for immigrants from Mexico were again the most common, followed by Cuba, El Salvador, Guatemala, and Honduras (See Table 2).

132. January and February 2015 are not included in the graph because only one LENS notification was released over the course of those two months.

**Table 2:** LENS Notifications by Country of Origin, 2015–2017

2015			2016			2017		
Country	Freq.	% of Total	Country	Freq.	% of Total	Country	Freq.	% of Total
Mexico	130	24.81	Mexico	983	36.93	Mexico	2213	45.11
Cuba	67	12.79	Cuba	350	13.15	Cuba	547	11.15
Vietnam	41	7.82	El Salvador	153	5.75	El Salvador	320	6.52
China	29	5.53	Vietnam	141	5.30	Guatemala	252	5.14
Laos	26	4.96	Guatemala	128	4.81	Honduras	187	3.81
El Salvador	20	3.82	Honduras	102	3.83	Vietnam	165	3.36
Somalia	15	2.86	Laos	77	2.89	Laos	105	2.14
Jamaica	13	2.48	Jamaica	52	1.95	Jamaica	59	1.20
Dominican Republic	10	1.91	Cambodia	46	1.73	Cambodia	57	1.16
Guatemala	9	1.72	Sudan	28	1.05	Somalia	53	1.08

Summarily, the trend in LENS notifications indicates a focus on regional migration circuits, with a heightened focus on immigrants with Mexico as their country of origin, followed by Cuba. Central American countries, including the Northern Triangle (Guatemala, Honduras, El Salvador), consistently receive a relatively high proportion of LENS notifications. Jamaica and the Dominican Republic have a presence in the top countries of origin for LENS notifications in some years, though the proportion of notifications is between just one and three percent of the total. In select years, Somalia and Sudan also garner between one and three percent of LENS notifications. Laos, Cambodia, and Vietnam are also consistently represented as countries of origin in LENS notifications.

For the purposes of this Article, I focus on the data pertaining to Mexican, Central American, and Caribbean immigrants, which constitute groups towards whom U.S. immigration authorities have historically dedicated large proportions of enforcement resources and, particularly since the 1980s, have targeted under various criminal alien initiatives.<sup>133</sup> Though not the focus of this Article, immigrants from Laos, Cambodia, and Vietnam are also targeted under similar antigang, antidrug trafficking, and other criminal alien enforcement programs.

Each year, law enforcement in California receive by far the largest share of LENS notifications. Other states that consistently receive a relatively high proportion of LENS notifications for all three of years for which data was available include Arizona, Texas, and Florida. The September 2016 spike in LENS notifications was particularly pronounced in Nevada, where notifications

133. MACÍAS-ROJAS, *supra* note 96, at 55–57.

increased from forty-three between January 2015 and December 2016 to 362 notifications between January 2017 and September 2017, causing Nevada to bump New York out of the top five LENS notification recipients. Most of Nevada's increase is attributable to Las Vegas, where twenty-three LENS notifications were received between January 2015 and December 2016, compared to 233 between January 2017 and September 2017. The increase brought Nevada to fourth place overall for frequency of LENS notifications received in 2017. The other state that appears for the first time in the top ten states for receipt of LENS notifications after the 2016 spike is Colorado, which experienced an increase from fifty-three LENS notifications between January 2015 and December 2016 to 151 notifications from January 2017 to September 2017, largely attributable to Denver (see Table 3).

**Table 3:** Frequency of LENS Notifications to Receiving States, 2015–2017<sup>134</sup>

2015			2016			2017		
State	Freq.	% of Total	State	Freq.	% of Total	State	Freq.	% of Total
CA	170	32.44	CA	748	28.08	CA	1247	25.40
NY	74	14.12	FL	254	9.53	AZ	414	8.43
TX	47	8.97	AZ	208	7.81	FL	365	7.43
FL	36	6.87	TX	197	7.39	NV	362	4.37
AZ	25	4.77	NY	152	5.71	TX	317	6.46
MN	16	3.05	NJ	96	3.6	VA	194	3.95
NJ	15	2.86	WA	70	2.63	CO	151	3.08
VA	13	2.48	MN	57	2.14	NY	149	3.03
IL	9	1.72	VA	56	2.10	NJ	119	2.42
MD	8	1.53	IL	53	1.99	MN	108	2.20

### C. The Criminal History Information Sharing Program

In July 2010, DHS announced that U.S. immigration authorities would begin to electronically share information held in federal databases with the government of Mexico under the Criminal History Information Sharing (CHIS) program.<sup>135</sup> Specifically, DHS began providing criminal history information and, beginning in 2014, biometric information (photographs and fingerprints) to the Mexican

134. Table 3 describes the states that have received the most LENS notifications. These are the states in which the released noncitizen intends to reside and may be different than the state from which the noncitizen was released from detention. Over the three years for which data is available, thirteen states, in varying order each year, occupy the top ten states for receipt of LENS notifications: California, Texas, New Jersey, New York, Florida, Arizona, Virginia, Minnesota, Maryland, Washington, Illinois, Nevada, and Colorado.

135. DHS/ICE/PIA-015(D), *supra* note 115, at 3.

government on repatriated Mexican nationals.<sup>136</sup> Since the initiation of the program, DHS has expanded CHIS program agreements to El Salvador, Guatemala, Honduras, Jamaica, the Dominican Republic, and the Bahamas.<sup>137</sup> The fields of information that may be shared with foreign partners include, “A-Number, Subject ID, name, alias, date of birth, city of birth, country of birth, mother’s name, father’s name, gender, gang flag, photographs, fingerprints, National Crime Information Center (NCIC) Code(s) from the 85 crimes enumerated in the cooperation agreements, description of crime, and date of conviction.”<sup>138</sup> ICE states that the exported information “better prepares foreign partners for potential public threats when the alien returns to their country.”<sup>139</sup>

The CHIS program also enables ICE to “negotiate with partner countries for criminal conviction information on foreign nationals who are being repatriated from the United States.”<sup>140</sup> Thus, in addition to sending criminal records, ICE solicits criminal history information from foreign partners in order to “assist ICE in making more informed decisions about aliens’ custody, detention, and overall risk to public safety and security while they remain in ICE custody or if they return to ICE custody in the future.”<sup>141</sup> ICE describes a “criminal history matrix” onto which foreign partners’ criminal justice information is mapped and translated into equivalent terms in the context of the U.S. criminal justice system.<sup>142</sup>

In May 2018, Raymond Villanueva, Assistant Director of International Operations for Homeland Security Investigations, identified CHIS as a priority program slated for expansion during the 2018–2019 fiscal year as part of a larger focus on international information initiatives.<sup>143</sup> In stating that CHIS “supports

136. U.S. DEP’T OF HOMELAND SECURITY, PRIVACY IMPACT ASSESSMENT UPDATE FOR THE ENFORCEMENT INTEGRATED DATABASE (EID), DHS/ICE/PIA-015(F) (2014) [hereinafter DHS/ICE/PIA-015(F)], <https://www.dhs.gov/sites/default/files/publications/PIA%20Update%2C%20ICE-%20Enforcement%20Integrated%20Database%20%28EID%29%2C%2020140408%20approved%20FINAL.pdf> [https://perma.cc/FHQ7-TPKU].

137. *Id.*

138. U.S. DEP’T OF HOMELAND SECURITY, PRIVACY IMPACT ASSESSMENT FOR THE ENFORCEMENT INTEGRATED DATABASE (EID) CRIMINAL HISTORY INFORMATION SHARING (CHIS) PROGRAM, DHS/ICE/PIA-015(H) 3–4 (2016) [hereinafter DHS/ICE/PIA-015(H)], <https://www.dhs.gov/sites/default/files/publications/privacy-pia-ice-eidchis-january2016.pdf> [https://perma.cc/85FA-LZWZ].

139. DHS/ICE/PIA-015(F), *supra* note 136, at 4.

140. WILLIAM A. KANDEL, CONGRESSIONAL RESEARCH SERVICE, INTERIOR IMMIGRATION ENFORCEMENT: CRIMINAL ALIEN PROGRAMS 11 (2016), <https://fas.org/sgp/crs/homesecc/R44627.pdf> [https://perma.cc/DL3H-L8QD].

141. DHS/ICE/PIA-015(F), *supra* note 136.

142. *Id.*

143. *Combating Transnational Criminal Threats in the Western Hemisphere: Hearing Before the U.S. H.R. Comm. on Foreign Affairs, Subcomm. on Western Hemisphere*, 115th Cong. 66–76 (2018).



efforts in immigration management, law enforcement and national security,” Villanueva makes explicit the conflation of immigration enforcement, crime control, and national security that justifies the removal of noncitizens, some of who pose no demonstrable risk, under securitization logic.<sup>144</sup> CHIS also maintains documentation on gang identification, reflecting U.S. immigration authorities’ concerns about gang involvement by immigrants from Mexico and Central America.<sup>145</sup>

### 1. Development of the Criminal History Information Sharing Program

Since at least the 1990s, Central American and Caribbean countries have demanded more robust information from the U.S. government concerning “criminal deportees,” to whom some Latin American and Caribbean officials attributed rising violent crime rates after a surge in removals following the enactment of the 1996 Illegal Immigration Reform and Immigrant Responsibility Act.<sup>146</sup> Regardless of the veracity of the connection between violence and deportees, representatives from Latin American and Caribbean countries focused on tracking and managing returning citizens who had been labeled criminal aliens in the United States, including alleged gang members.<sup>147</sup> Latin American and Caribbean authorities requested that the United States provide advance notice of removals and in the case of criminal aliens, photographs, criminal history information, and fingerprints, for the purposes of the tracking, reintegration, and incapacitation of criminal aliens in the country of origin.<sup>148</sup> In 1997, the U.S. government agreed to provide at least three days advance notice of a “criminal

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(statement by Raymond Villanueva, Assistant Director of International Operations, Homeland Security Investigations, U.S. Department of Homeland Security).

144. Chacón, *supra* note 30.

145. *Id.* at 329; Jordan Blair Woods, *Systemic Racial Bias and RICO’s Application to Criminal Street and Prison Gangs*, 17 MICH. J. RACE & L. 303, 309–10 (2012).

146. *Deportees in Latin America and the Caribbean: Hearing and Briefing Before the Subcomm. on the Western Hemisphere of the Comm. on Foreign Affairs H.R.*, 110th Cong. 38, 66 (2007) (brief by Annmarie Barnes and statement by Dr. Roy L. Austin, U.S. Ambassador to Trinidad & Tobago); Jonah M. Temple, *The Merry-Go-Round of Youth Gangs: The Failure of the U.S. Immigration Removal Policy and the False Outsourcing of Crime*, 31 B.C. THIRD WORLD L.J. 193, 194 (2011).

147. *Violence in Central America: Briefing and Hearing Before the Subcomm. on the Western Hemisphere of the Comm. on Foreign Affairs H.R.*, 110th Cong. 11–22 (2007) (statement by His Excellency Roberto Flores Bermudez).

148. MARGARET H. TAYLOR & T. ALEXANDER ALEINIKOFF, *DEPORTATION OF CRIMINAL ALIENS: A GEOPOLITICAL PERSPECTIVE* (1998).

alien's" return to their country of origin, accompanied by criminal conviction information.<sup>149</sup>

Despite these reforms, representatives from several countries, including Jamaica<sup>150</sup> and Honduras,<sup>151</sup> claimed that the U.S. government provided criminal history information only in the case that it was directly related to the incident that incited removal from the country. Latin American and Caribbean representatives requested comprehensive, detailed criminal records on "criminal deportees" from local, state, and federal agencies in the United States.<sup>152</sup>

U.S. policymakers and law enforcement in turn sought criminal history information and surveillance tools to track previously deported alleged gang members and drug traffickers, specifically from Mexico, Central America, and the Caribbean in case of their return to the United States. U.S. authorities have met repeatedly with representatives of Mexico and Central American countries to discuss collaborative antigang efforts, including the development of shared training academies and a crossnational biometric database for gang enforcement.<sup>153</sup> Officials in the United States, Mexico, and Central America have a collective interest in collecting and sharing migrants' biometric and criminal history information.

## 2. Deployment of the Criminal History Information Sharing Program

Although DHS announced the development of the CHIS program in 2010, it appears that the department did not begin to release program notifications to foreign partners until 2014, when it expanded partnership agreements beyond Mexico. CHIS notifications to partner countries hovered between roughly 800

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149. Tara Pinkham, *Assessing the Collateral International Consequences of the U.S.' Removal Policy*, 12 BUFF. HUM. RTS. L. REV. 223, 228 (2006).

150. *Deportees in Latin America and the Caribbean: Hearing and Briefing Before the Subcomm. on the Western Hemisphere of the Comm. on Foreign Affairs H.R.*, 110th Cong. 38, 66 (2007) (brief by Annmarie Barnes).

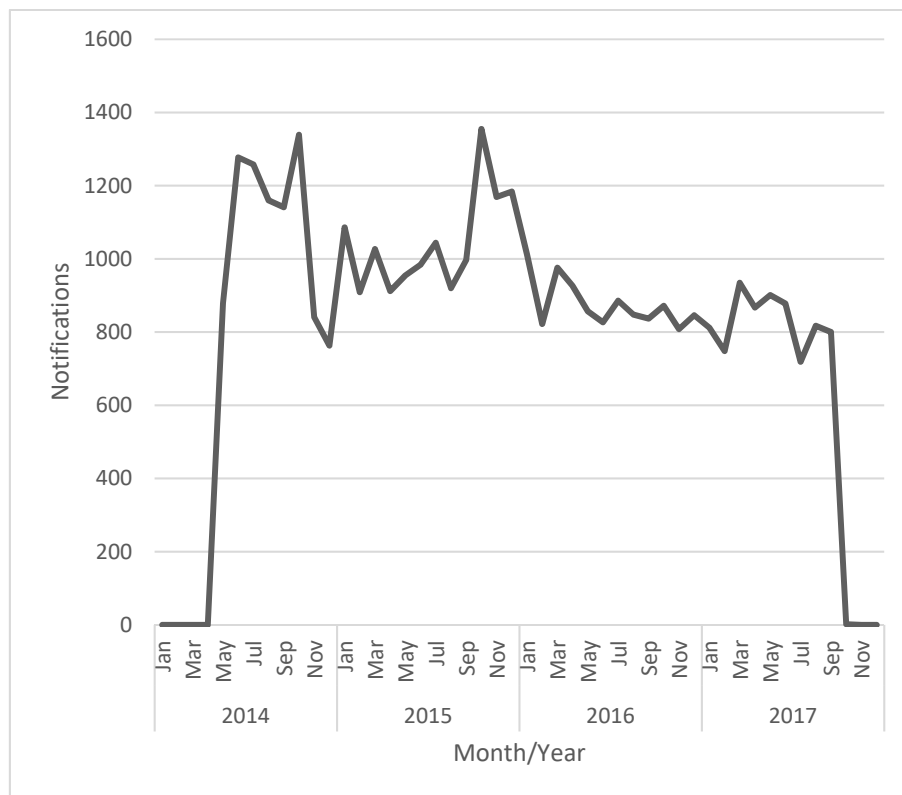
151. *Id.*

152. See *Violence in Central America Briefing and Hearing Before the Subcomm. on the Western Hemisphere of the Comm. on Foreign Affairs H.R.*, 110th Cong. 22 (2007) (statement of Roberto Flores Bermudez); *Deportees in Latin America and the Caribbean, Hearing and Briefing Before the Subcomm. on the Western Hemisphere of the Comm. on Foreign Affairs H.R.*, 110th Cong. 14–15 (2007) (statement of Charles Shapiro, Principle Deputy Assistant Secretary, Bureau of Western Hemisphere Affairs, U.S. Department of State); *Deportees in Latin America and the Caribbean, Hearing and Briefing Before the Subcomm. on the Western Hemisphere of the Comm. on Foreign Affairs H.R.*, *supra* note 146, at 42 (statement of Annmarie Barnes).

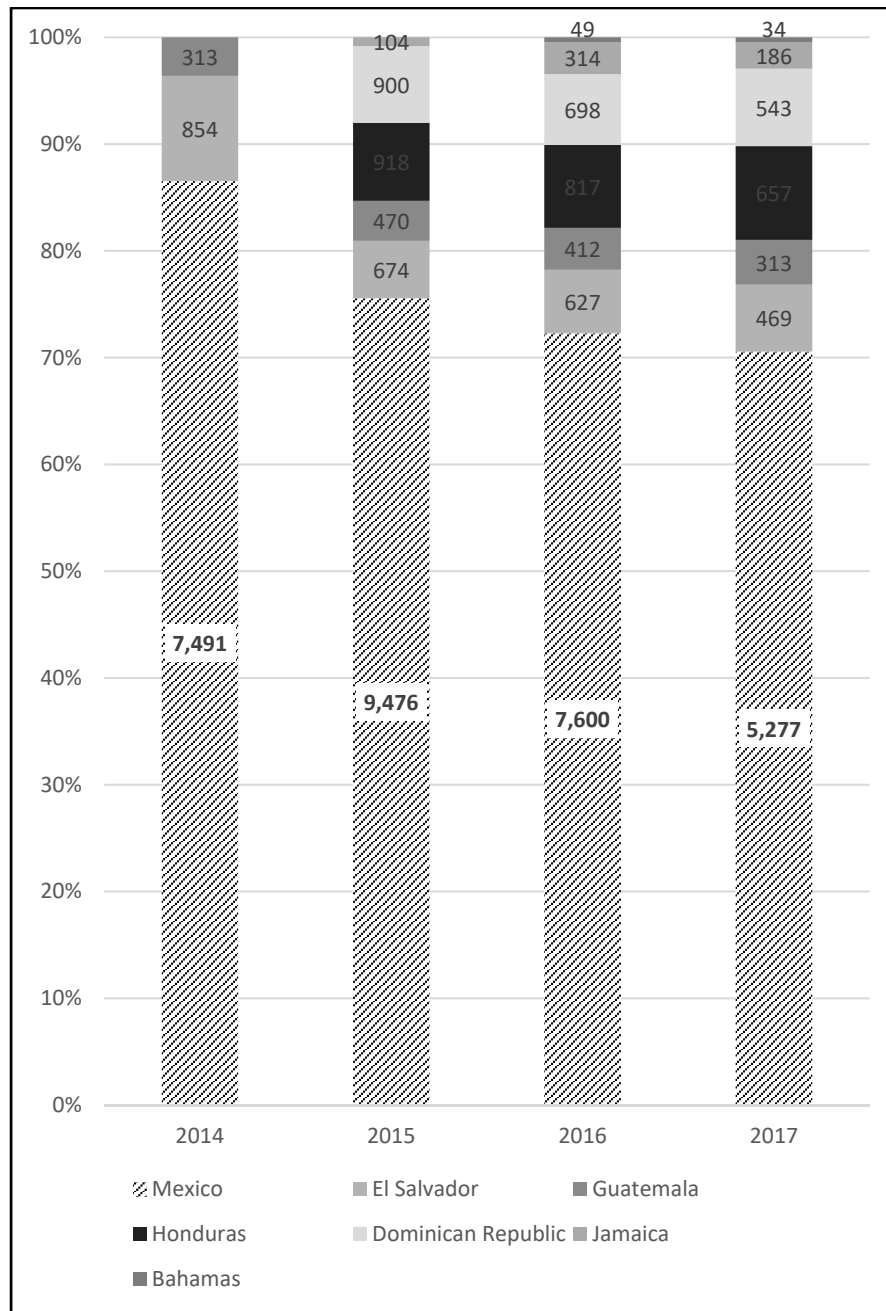
153. *Deportees in Latin America and the Caribbean*, *supra* note 146, at 30 (statement of Charles Shapiro); *Violence in Central America*, *supra* note 147, at 75 (statement of Bureau of Western Hemisphere Affairs).

and 1400 per month between May 2014 and September 2017, with peak frequency in October during the first two years and shifting to the summer for the latter two years (see Figure 3).

**Figure 2:** Frequency of Criminal History Information Sharing Program Notifications (Total), March 2014–September 2017



**Figure 3:** Criminal History Information Sharing Program Notifications by Country of Origin (Recipient Countries), 2014–2017



The greatest proportion of CHIS notifications each year were distributed to the Mexican Government, the original program partner. Although Mexico maintains the most CHIS notifications over time period in which data is available, there is increasing diversity in the partner countries receiving notifications. Across all four years for which data is available, the Bahamas consistently receives the fewest notifications, followed by Jamaica. The Dominican Republic, Honduras, Guatemala, and El Salvador progressively assume slightly greater proportions of notifications over time (See Figure 4).

#### IV. DISCUSSION

##### A. Bordering Circuitry

There are several analytical advantages in discussing the Law Enforcement Notification System (LENS) and the Criminal History Information Sharing (CHIS) program together. For one, the two information sharing programs developed in roughly parallel chronology. While DHS officially deployed CHIS in 2010, the program did not appear to have been substantively instituted until 2014, one year before the initiation of LENS. Second, the two programs mirror one another in form. Both programs pull data from the same source—primarily the Enforcement Integrated Database (EID) and associated ENFORCE/EAGLE applications—and export the information to other law enforcement entities.<sup>154</sup> Third, there is substantial overlap in the immigrant groups that are targeted by LENS and CHIS, particularly those from Mexico, Central America, and to a lesser extent, Caribbean countries. Fourth, LENS and CHIS are an outgrowth of the increased enforcement prioritization of criminal aliens, a category that has, since the 1980s, come to apply to a greater number of immigrants and come to dominate the logic of immigration control in the United States.

When considered through the lenses of border thickening, immigration surveillance, and securityscape construction, LENS and CHIS are the constituent parts of a bordering circuitry wherein interoperable information infrastructure constructs patterned geographies of information flow and enforcement practices that are particularly consequential for criminal aliens. The production and deployment of information sharing programs provides insight into the state's larger vision for the surveillance and social control of immigrant populations, which relies upon the categorization of greater numbers of immigrants as criminal

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154. Both programs have also become increasingly automated to release messages with progressively less human intervention, a trend I address more in other forthcoming work.

or dangerous.<sup>155</sup> Over time, the criminal alien category has come to include progressively larger portions of the immigrant population, thus enabling enhanced enforcement actions and expanding state control over broader populations.<sup>156</sup>

Contemporary policing and surveillance technologies have altered and heightened immigration and border control strategies. Digital data repositories have increased law enforcement's capacity to store and analyze large volumes of information. Moreover, data is more mobile than ever before. The capability to move data across borders—or in the words of Jennifer Daskal, to render data “un-territorial”<sup>157</sup>—has enabled federal law enforcement to implement old strategies, including border externalization and internalization, in newly capacious ways.<sup>158</sup> Information sharing programs, including the CHIS program, stretch outward to intercept migrants before they reach the physical territory of the border. In sharing the criminal history information of deported people, U.S. immigration authorities seek to enable their incapacitation in the sending state, making a return to the United States less likely.<sup>159</sup>

At the same time, information sharing programs like LENS enable the policing and surveillance of migrants far from any physical border. In cases where detention and immediate deportation are not feasible, federal law enforcement agencies track criminal aliens within the U.S. territory, a task that enlists the assistance of local and state law enforcement agencies.

While much of the surveillance literature argues that surveillance and therefore enforcement is omnipresent,<sup>160</sup> the evidence herein indicates that information sharing programs reterritorialize enforcement along specific geographies. LENS notifications consistently cluster in about a dozen states within the United States, and disproportionately concern people from Mexico, Central American, and Caribbean countries, the same immigrant groups targeted through the CHIS program. Thus, when combined, domestic and international information sharing programs strengthen securityscapes that span from the United States, particularly states and regions with heightened immigration enforcement, into Mexico, Central America, and the Caribbean.

155. See Cházaro, *supra* note 29, at 601; Miller, *supra* note 34, at 649; Nofferi & Koulisch, *supra* note 34.

156. Cházaro, *supra* note 29, at 643.

157. Jennifer Daskal, *The Un-Territoriality of Data*, 125 YALE L.J. 326, 397 (2015).

158. Menjivar, *supra* note 71, at 355.

159. Conversely, Zilberg notes, the global spread of punitive enforcement makes transnational migration *more* likely. See Zilberg, *supra* note 24.

160. David Lyon, *The Border is Everywhere: ID Cards, Surveillance and the Other*, in GLOBAL SURVEILLANCE AND POLICING: BORDERS SECURITY, IDENTITY 66, 66 (Elia Zureik & Mark B. Salter eds., 2005).

While data is deterritorialized in the sense that it moves across space as a result of technological advancements and interoperability, it carries the marks of legal and social processes that are grounded in specific territories. The criminal alien category, as defined in these programs, originates at the intersection of the American criminal justice and immigration systems. Noncitizens are often ascribed the “criminal” in criminal alien as a result of local policing and criminal justice processing. The task of information sharing programs, then, is to move data produced in specific contexts and activate them in other locales, in ways that make sense in the new context. This task is challenged by imperfect interoperability, an issue I address further in Part IV.C.

### **B. Implications for Mobility, Exclusion, and Subordinate Inclusion**

Bordering circuitry has implications for peoples’ mobility, exclusion, and subordinate inclusion both within and outside of U.S. territory. Within the United States, those surveilled under the LENS program occupy a limbo status as not *yet* deported. DHS and ICE officials frame the LENS program as a part of their larger public safety charge in which they surveil and contain people who will eventually be removed from the country. Officials do not appear to conceptualize immigrants released with LENS notifications as noncitizens who may eventually pursue a change in citizenship status or remain in the United States. When discussing LENS, immigration authorities insist that criminal aliens are only released in cases where ICE is unable to secure travel documents, ICE encounters resistance to the removal from the home country, or federal court rulings require the release of immigrants from detention.<sup>161</sup> By flagging released criminal aliens to local law enforcement, ICE officials delegate, at least for the short term, the task of immigration surveillance and social control to local law enforcement. In the process, local law enforcement assumes a central role in policing internal borders.

Through the Law Enforcement Notification System, the federal immigration enforcement apparatus expands criminal alien surveillance, at least temporarily, to the local agencies better equipped to engage in day-to-day oversight. Whether or not the local agency actively pursues action will be inconsistent across jurisdictions. Nonetheless, information sharing programs threaten to further ensnare criminal aliens in the criminal justice and immigration enforcement systems by both targeting the group for prioritized enforcement in the immigration system and encouraging enhanced control under local criminal justice processes—the very processes that may have affixed a given criminal alien

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161. *DHS Hearing*, *supra* note 120.

with the criminal label in the first place, thus continuing the cycle of enhanced surveillance and enforcement.<sup>162</sup> As a result, bordering circuitry potentially aggravates dynamics of social exclusion and subordinate inclusion<sup>163</sup> in which immigrants are within the boundaries of the country but nonetheless treated as if they are outside.<sup>164</sup> At its most extreme, efforts to “delink territorial presence and citizenship” create stateless people who are unable to reside safely in sending states and prevented from establishing citizenship in receiving states.<sup>165</sup>

CHIS is directed at criminal aliens undergoing deportation whom immigration enforcement personnel have determined are a safety risk and therefore, according to ICE enforcement priorities, should not be allowed back into the United States. Through interoperable technology, criminal records are globally diffused and become part of the collaborative construction of transnational strategies of social control. Although sharing information—including criminal and other derogatory labels—between sending and receiving countries is not a new phenomenon, interoperable information sharing programs standardize the practice, thus expanding spaces of subordinate inclusion, exclusion, and risk globally.<sup>166</sup>

In addition to heightened vulnerability to detention and deportation in the United States, criminal aliens who are deported carry the stigmatized identity back to their country of origin, potentially resulting in exclusion from labor markets, social rejection, and amplified susceptibility to victimization and state violence.<sup>167</sup> Deportation is a transformative experience that, in addition to expelling an individual from one territory, affects one’s status in the home country. This is particularly true for migrants affixed with derogatory labels in the United States, who—as a consequence of the unterritoriality of law enforcement data—may carry that stigmatizing label across borders. Consequently,

162. For an overview of the mutually reinforcing entanglement of noncitizens in both criminal justice and immigration enforcement systems see César Cuauhtémoc García Hernández, *Creating Crimmigration*, 2013 BYUL REV. 1457, 1467 (2014).

163. Sebastien Chauvin & Blanca Garcés-Masareñas, *Becoming Less Illegal: Deservingness Frames and Undocumented Migrant Incorporation*, 8 SOC. COMPASS 422 (2014).

164. LEO R. CHAVEZ, *THE LATINO THREAT: CONSTRUCTING IMMIGRANTS, CITIZENS, AND THE NATION* (2008); Leerkes et al., *supra* note 90; Nandita Sharma, *Anti-Trafficking Rhetoric and the Making of a Global Apartheid*, 17 NWSA J. 88 (2005).

165. Menjivar, *supra* note 71, at 361.

166. MACÍAS-ROJAS, *supra* note 96, at 18.

167. DANIEL BERLIN ET AL., HUMAN RIGHTS INST., GEORGETOWN UNIV. LAW CTR., *BETWEEN THE BORDER AND THE STREET: A COMPARATIVE LOOK AT GANG REDUCTION POLICIES AND MIGRATION IN THE UNITED STATES AND GUATEMALA* 16 (2007).



deportation serves as a mechanism of transnational stigmatization and policing rather than solely expulsion from one specific space.<sup>168</sup>

Interoperable surveillance systems increasingly connect disparate geographies and components of the global policing archipelago, including local law enforcement, federal law enforcement, and international partners. As such, both movement and full social participation in multiple spaces may become increasingly untenable for targeted individuals.

### C. Implications for Interoperability

The full realization of the dystopic possibilities of bordering circuitry is contingent upon ideal operation of information systems. Nonetheless, there is inevitably a gulf between the planned operation of information systems and implementation. DHS's crossjurisdictional interoperability initiatives have produced mixed results.<sup>169</sup> LENS and CHIS require extensive interoperability modifications on each of the four levels—technological, data, human, institutional—identified by Palfrey and Gasser.<sup>170</sup>

Regarding the first two levels of interoperability, information sharing programs present recurring issues with technological and data interoperability, even between federal law enforcement agencies. Federal information system development has often proceeded with ad hoc interoperability, rather than in a strategically preplanned manner. Federal law enforcement agencies respond to new data storage and analysis needs by commissioning the development of a new information system, which may need to be made interoperable with existing information systems inherited from former agencies that no longer exist, including INS. Although system developers may attempt to make interoperability modifications, many inherited systems are “stove-piped,” or maintained by separate entities and lacking interoperability capacity, requiring system users to instead access and search multiple databases to triangulate data on a single target.<sup>171</sup> Information sharing programs between

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168. Susan Bibler Coutin, *Exiled by Law: Deportation and the Inviability of Life*, in *THE DEPORTATION REGIME: SOVEREIGNTY, SPACE, AND THE FREEDOM OF MOVEMENT* 353, 363, 367 (Nicholas De Genova & Nathalie Peutz eds., 2010); William Walters, *Deportation, Expulsion, and the International Police of Aliens*, in *THE DEPORTATION REGIME: SOVEREIGNTY, SPACE, AND THE FREEDOM OF MOVEMENT* 90 (Nicholas De Genova & Nathalie Peutz eds., 2010).

169. OFFICE OF INSPECTOR GENERAL, U.S. DEP'T OF HOMELAND SECURITY, *DHS TRACKING OF VISA OVERSTAYS IS HINDERED BY INSUFFICIENT TECHNOLOGY 1* (OIG-17-56, 2017), [https://www.oig.dhs.gov/sites/default/files/assets/2017/OIG-17-56-May17\\_0.pdf](https://www.oig.dhs.gov/sites/default/files/assets/2017/OIG-17-56-May17_0.pdf) [<https://perma.cc/YR46-TGF9>]; LYON, *supra* note 160, at 88–91.

170. PALFREY & GASSER, *supra* note 52, at 6.

171. OFFICE OF INSPECTOR GENERAL, DEP'T OF HOMELAND SECURITY *supra* note 169, at 7.

federal law enforcement and local law enforcement, and between federal law enforcement and foreign partners, face compounded technological and data interoperability challenges.

In addition to technological and data interoperability, information sharing programs must address human and institutional interoperability issues, meaning that people have the will to collaborate and that they can make respective social institutions amenable. The structure of LENS addresses human interoperability issues in that it is designed to fit into local police routines. Under LENS, ICE identifies noncitizens who have transgressed criminal laws and alerts state and local law enforcement agencies, requiring minimal effort by local law enforcement. LENS exemplifies the Kalhan's automated immigration policing models wherein law enforcement "deploy interoperable database systems and other technologies to automate and routinize the identification and apprehension of potentially deportable noncitizens in the course of ordinary law enforcement encounters and other moments of day-to-day life."<sup>172</sup>

Furthermore, LENS is conceptually interoperable with the increasing use of risk assessment and predictive techniques in local policing. These approaches rely on the shared premise that criminality can and should be predicted.<sup>173</sup> For example, DHS rationalizes LENS notifications as assisting law enforcement "in narrowing the pool of potential suspects" in a given jurisdiction where "the particulars of a crime being investigated are similar to circumstances surrounding the violent or serious crime for which the individual was previously convicted."<sup>174</sup> This approach is strikingly similar to LAPD predictive policing paradigms that target individuals who "indicate a propensity to engage in at-risk behavior."<sup>175</sup> The LAPD sends letters to "high-risk" individuals in which the departments warns: "When certain types of crimes occur in areas we have connected to you, we will investigate the crime to determine if there are any patterns or similarities related to your past practice."<sup>176</sup>

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172. Anil Kalhan, *Immigration Policing and Federalism through the Lens of Technology, Surveillance, and Privacy*, 74 OHIO ST. L.J. 1105, 1108 (2013).

173. See generally BERNARD E. HARCOURT, *AGAINST PREDICTION: PROFILING, POLICING, AND PUNISHING IN AN ACTUARIAL AGE* (2007); Andrew Guthrie Ferguson, *Big Data and Predictive Reasonable Suspicion*, 163 U. PA. L. REV. 329 (2015); SARAH BRAYNE ET AL., *PREDICTIVE POLICING* (2015), [http://www.datacivilrights.org/pubs/2015-1027/Predictive\\_Policing .pdf](http://www.datacivilrights.org/pubs/2015-1027/Predictive_Policing.pdf) [<https://perma.cc/6VU9-WTCM>]. Since the 1990s, local police departments have increasingly relied upon data analytics to predict criminal behavior and connect repeat offenders to criminal activity.

174. 2015 Notice of Amendment to the Privacy Act of 1974, *supra* note 116, at 24269.

175. Oriana Luquetta et al., Presentation at the RAND Corporation Los Angeles Policy Symposium: Predictive Policing Case Studies in Los Angeles and Chicago 61 (2016).

176. *Id.*

CHIS is consistent with this framing as well. DHS officials state that the CHIS information “better prepares foreign partners for potential public threats when the alien returns to their country”<sup>177</sup> and “assist[s] ICE in making more informed decisions about aliens’ custody, detention, and overall risk to public safety and security while they remain in ICE custody or if they return to ICE custody in the future.”<sup>178</sup> The focus on criminal alien tracking allows immigration authorities to ground their work in a public safety and securitization mission, further conflating the issues of national security, public safety, and immigration control justifying ICE cooperation with criminal justice entities.

CHIS notifications move data across jurisdictions where legal definitions may vary, necessitating institutional interoperability, particularly pertaining to legal institutions. Because definitions of criminal transgression vary by legal system, the exchange of criminal history information between countries requires translation of legal codes and decision making about equivalent violations. The “criminal history matrix” described in CHIS protocols,<sup>179</sup> which assists DHS personnel in mapping foreign partners’ criminal records information onto the U.S. context, is one concrete example of the tools DHS plans to use to achieve legal interoperability. According to a DHS document, the criminal history matrix “will identify the categories of crimes to be reported to ICE. Then, the criminal histories maintained by the foreign partners will be mapped to the established coding system in the matrix, and only the matched crimes will be entered into EID.”<sup>180</sup> The degree to which these efforts are ultimately successful, however, is unclear.

### CONCLUSION

As immigration control in the United States becomes ever more organized around a securitization paradigm that ties together immigration enforcement, national security, and crime control, criminal aliens and immigrants with other derogatory labels are subject to increased scrutiny. Simultaneously, digital surveillance systems, databases, and information sharing programs have increased federal law enforcement agencies’ ability to store, process, and ultimately transfer information on suspect groups to domestic police and foreign partners. Global data flows push border control mechanisms outward and inward from the physical territories of international borders in particular geographic circuits.

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177. DHS/ICE/PIA-015(F), *supra* note 136, at 4.

178. *Id.*

179. DHS/ICE/PIA-015(D), *supra* note 115.

180. *Id.* at 4–5.

The two DHS information sharing programs reviewed in this Article—the Law Enforcement Notification System (LENS) and the Criminal History Information Sharing (CHIS) program—enable the U.S. Government to release information on criminal aliens to domestic law enforcement agencies and foreign governments. In the process, geographies of surveillance are constructed between jurisdictions in the United States, particularly states and regions with heightened immigration enforcement, into Mexico, Central America, and the Caribbean. Local police are thus integral to domestic immigration surveillance and the construction of internal borders. In exporting criminal history information to other countries, U.S. law enforcement officials influence policing and punishment practices in the global South. U.S. immigration surveillance programs contribute to discourses of criminalization and dynamics of immobilization and exclusion, albeit in ways that are limited by interoperability concerns.

**APPENDIX A: ACRONYM GLOSSARY**

<i>CBP</i>	United States Customs and Border Protection
<i>CHIS</i>	Criminal History Information Sharing Program
<i>DACS</i>	Deportable Alien Control System
<i>DHS</i>	United States Department of Homeland Security
<i>EAGLE</i>	EID Arrest Guide for Law Enforcement
<i>EID</i>	Enforcement Integrated Database
<i>ENFORCE</i>	Enforcement Case Tracking System
<i>ICE</i>	United States Immigration and Customs Enforcement
<i>INA</i>	Immigration and Nationality Act
<i>INS</i>	Immigration and Naturalization Service
<i>LENS</i>	Law Enforcement Notification System
<i>NCIC</i>	National Crime Information Center Database
<i>USCIS</i>	United States Citizenship and Immigration Services