

The Criminalization of Immigration in the United States

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Introduction

In November 2013, NPR reported that U.S. Immigration and Customs Enforcement (ICE) had been instructed by Congress since 2009 to fill 34,000 beds in detention facilities across the country with immigrant detainees every day. It was immediately apparent that this sort of inmate quota would never fly if applied to native-born prisoners. As the NPR story puts it: “Imagine your city council telling the police department how many people it had to keep in jail each night.”¹ Clearly, such a concept has nothing to do with fighting crime or protecting the public. But when it comes to the detention (and deportation) of immigrants, very different standards of justice and reason are at work.

For more than a century, innumerable studies have confirmed two simple yet powerful truths about the relationship between immigration and crime: immigrants are *less* likely to commit serious crimes or be behind bars than the native-born, and high rates of immigration are associated with *lower* rates of violent crime and property crime.² This holds true for both legal immigrants and the unauthorized, regardless of their country of origin or level of education. In other words, the overwhelming majority of immigrants are not “criminals” by any commonly accepted definition of the term. For this reason, harsh immigration policies are not effective in fighting crime.

Unfortunately, immigration policy is frequently shaped more by fear and stereotype than by empirical evidence, which is partly why immigrants are often treated like dangerous criminals by the U.S. immigration system. More precisely, immigrants have the stigma of “criminality” ascribed to them by an ever-evolving assortment of laws and immigration-enforcement mechanisms. From the Immigration Reform and Control Act of 1986 (IRCA) to Operation Streamline (launched in 2005), immigrants are being defined more and more as threats.³ Whole new classes of “felonies” have been created which apply only to immigrants, deportation has become a punishment for even minor offenses, and policies aimed at trying to end unauthorized immigration have been made more punitive rather than more rational and practical. In short, immigrants themselves are being criminalized.⁴ Moreover, as the procedural and substantive law that comprises what has come to be called “crimmigration” law reimagines noncitizens as criminals and security risks, immigration law enforcement has increasingly adopted the securitized approach of criminal law enforcement.⁵ As prominent immigration scholar Douglas Massey has written with regard to the plight of unauthorized immigrants in particular, “not since the days of slavery have so many residents of the United States lacked the most basic social, economic, and human rights.”⁶

This report tackles the criminalization of immigration from two angles. First, it documents the fact that immigration is not associated with “crime” as it is commonly understood. For more than two decades, rates of violent crime and property crime have fallen in the United States as the immigrant population (including the unauthorized population) has grown. Moreover, immigrants are less likely than the native-born to be behind bars or to engage in typically “criminal behaviors.” Second, the report describes the ways in which U.S. immigration laws and policies are re-defining the notion of “criminal” as it applies to immigrants, while also ramping up the enforcement programs designed to find anyone who might be deportable. More and more, a zero-tolerance policy has been applied by the federal government to immigrants who commit even the slightest offense or infraction. “Crimes” which might result in a fine or a suspended sentence for natives end up getting immigrants detained and deported. This represents a double standard of justice for immigrants in which the scale of the punishment (detention and deportation) far outweighs the severity of the crime (traffic offenses, for example). Unfortunately, this double standard has been the guiding principle behind a litany of immigration-enforcement laws and programs, such as the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), the 287(g) program, Secure Communities, and the “Consequence Delivery System” implemented by U.S. Customs and Border Protection (CBP) in 2011.

Immigrants are *Less* Likely to be Criminals Than the Native-Born

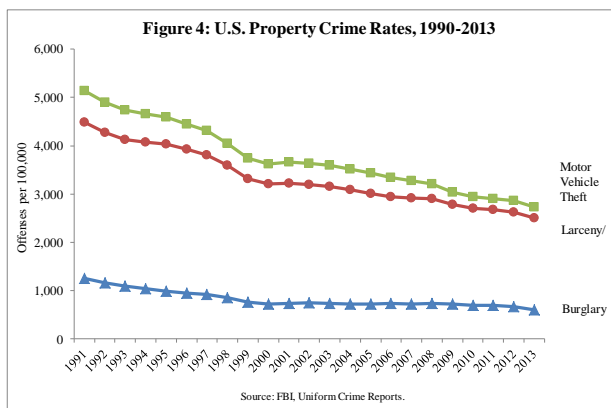
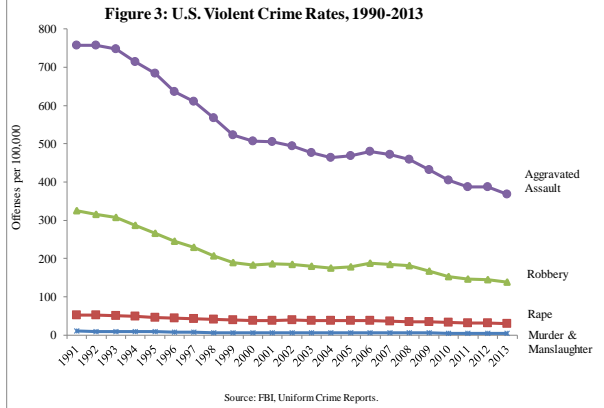
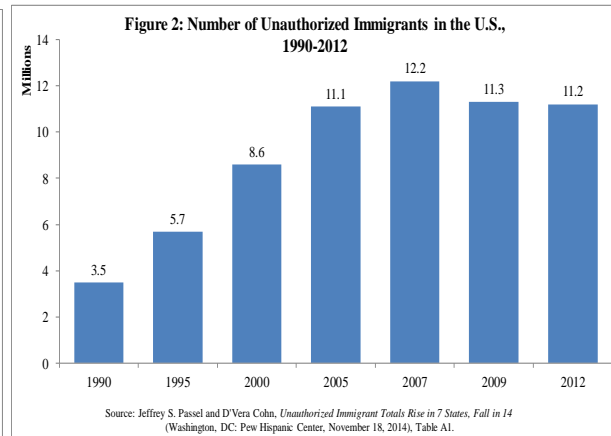
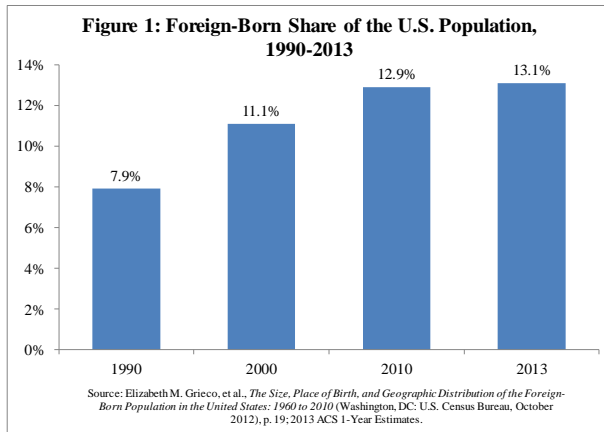
The evidence that immigrants tend *not* to be criminals is overwhelming. To begin with, there is an inverse relationship between crime and immigration. Crime rates in the United States have trended downward for many years at the same time that the number of immigrants has grown. Second, immigrants are *less* likely to be incarcerated than the native-born. And, third, immigrants are *less* likely than the native-born to engage in the criminal behaviors that tend to land one in prison. No matter how you look at the issue, the inescapable conclusion is that immigrants are, on average, less prone to criminality than the U.S. native-born population.

Higher Immigration is Associated with Lower Crime Rates

As the number of immigrants in the United States has risen in recent years, crime rates have fallen. Between 1990 and 2013, the foreign-born share of the U.S. population grew from 7.9 percent to 13.1 percent {Figure 1}⁷ and the number of unauthorized immigrants more than tripled from 3.5 million to 11.2 million {Figure 2}.⁸ During the same period, FBI data indicate that the violent crime rate declined 48 percent—which included falling rates of aggravated assault, robbery, rape, and murder {Figure 3}.⁹ Likewise, the property crime rate fell 41 percent, including declining rates of motor vehicle theft, larceny/robbery, and burglary {Figure 4}.¹⁰ This decline in crime rates in the face of high levels of new immigration has been a steady national trend, and has occurred in cities across the country.¹¹

The most thoroughly studied aspect of this phenomenon has been the drop in rates of violent crime since the early 1990s in cities that have long been “gateways” for immigrants entering the United States, such as Miami, Chicago, El Paso, San Antonio, and San Diego.¹² However, the inverse relationship between immigration and crime is also apparent in “new” immigrant gateways, such as Austin, where rates of both violent crime and serious property crime have declined despite high levels of new immigration.¹³ Declining rates of property crime have also

been documented in metropolitan areas across the country.¹⁴ Some scholars suggest that new immigrants may revitalize dilapidated urban areas, ultimately reducing violent crime rates.¹⁵



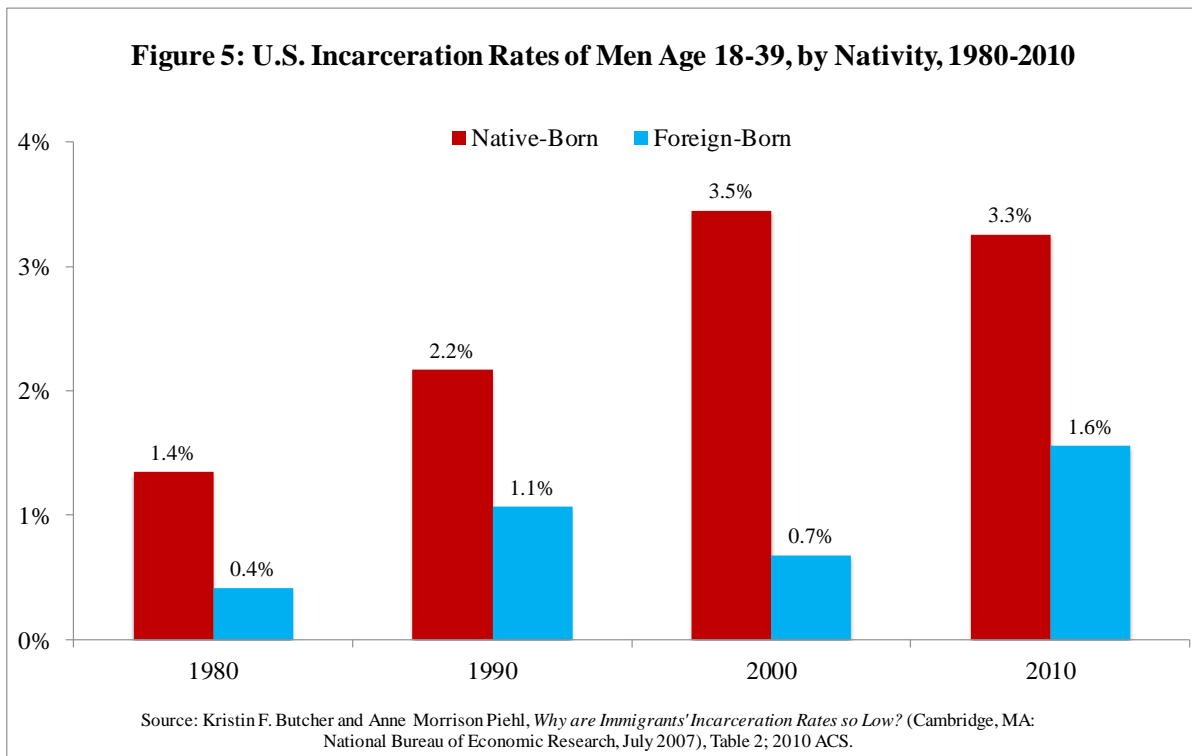
In short, to quote sociologist Robert J. Sampson, “cities of concentrated immigration are some of the safest places around.”²⁰ The reason for this is straightforward. Immigrants as a group tend to be highly motivated, goal-driven individuals who have little to gain by running afoul of the law. As law professor and public-policy expert Michael Tonry puts it: “First-generation economic immigrants are self-selected risk takers who leave their homes, families, and languages to move to a new country to improve their and their children’s lives. They have good reasons to work hard, defer gratifications, and stay out of trouble.”²¹ Sampson and colleagues also find that immigrant communities are insulated from crime because they tend to display “social cohesion among neighbors combined with their willingness to intervene on behalf of the common good.”²²

There is a sense of *déjà vu* in these modern-day findings. In the first three decades of the 20th century, during the last era of large-scale immigration, three government commissions studied the relationship between immigrants and crime and came to the same conclusion as contemporary researchers. The Industrial Commission of 1901, the [Dillingham] Immigration Commission of 1911, and the [Wickersham] National Commission on Law Observance and Enforcement of 1931 each set out to measure how immigration increases crime. But each found lower levels of criminality among immigrants than among their native-born counterparts.²³ A century ago, the report of the Dillingham Commission concluded:

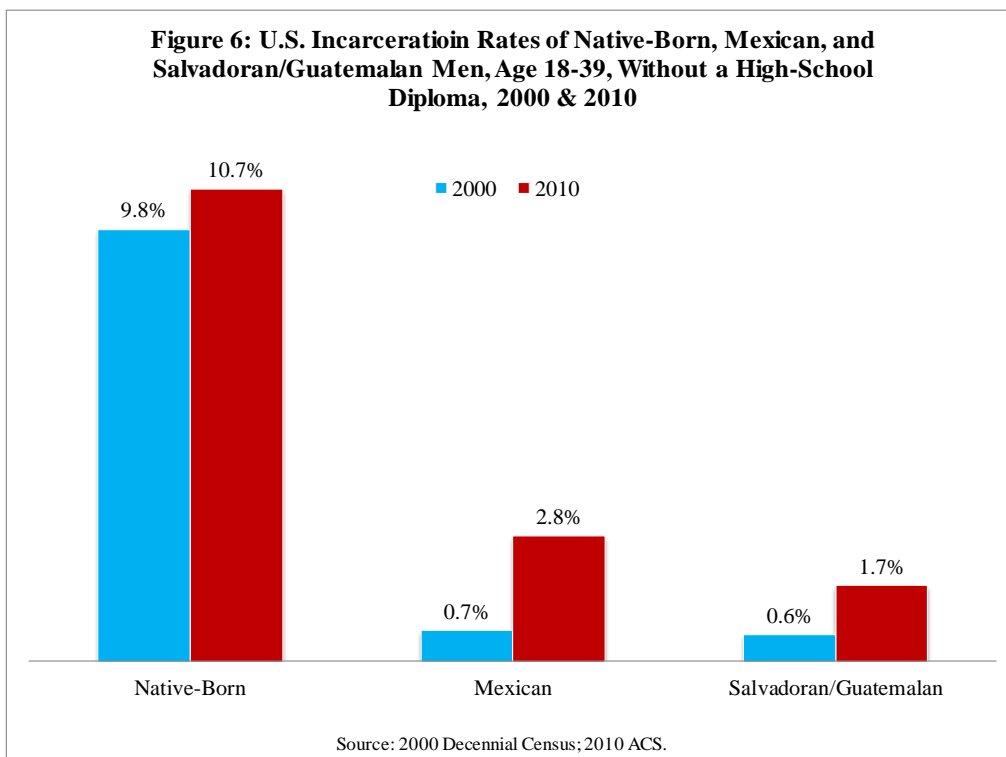
“No satisfactory evidence has yet been produced to show that immigration has resulted in an increase in crime disproportionate to the increase in adult population. Such comparable statistics of crime and population as it has been possible to obtain indicate that immigrants are less prone to commit crime than are native Americans.”²⁴

Immigrants are Less Likely than the Native-Born to Be Behind Bars

Another concrete indication that immigrants are less likely than the native-born to be criminals is the fact that relatively few prisoners in the United States are immigrants. According to a new analysis of data from the 2010 American Community Survey (ACS), roughly 1.6 percent of immigrant males age 18-39 are incarcerated, compared to 3.3 percent of the native-born.²⁵ This disparity in incarceration rates has existed for decades, as evidenced by data from the 1980, 1990, and 2000 decennial censuses {Figure 5}.²⁶ In each of those years, the incarceration rates of the native-born were anywhere from two to five times higher than that of immigrants.



The pronounced difference between immigrants and the native-born in terms of incarceration rates also holds true in the case of those immigrants most likely to be unauthorized. The 2010 Census data reveals that incarceration rates among the young, less-educated Mexican, Salvadoran, and Guatemalan men who make up the bulk of the unauthorized population are significantly lower than the incarceration rate among native-born young men without a high-school diploma. In 2010, less-educated native-born men age 18-39 had an incarceration rate of 10.7 percent—more than triple the 2.8 percent rate among foreign-born Mexican men, and five times greater than the 1.7 percent rate among foreign-born Salvadoran and Guatemalan men {Figure 6}.²⁷



Research also indicates that such statistics are not simply the product of an effective immigration-enforcement system that removes immigrants from the country rather than holding them in U.S. prisons. According to a study by economists Kristin Butcher and Anne Morrison Piehl, the “evidence suggests that deportation and deterrence of immigrants’ crime commission from the threat of deportation are not driving the results. Rather, immigrants appear to be self-selected to have low criminal propensities and this has increased over time.”²⁸ The study begins by using data from the 1980, 1990, and 2000 Censuses to demonstrate that immigrants have had lower incarceration rates than the native-born for quite some time, and that this effect has been growing more pronounced with each passing decade.²⁹ But the study then goes on to answer the question of whether these decreasing incarceration rates are the result of harsh immigration policies enacted in the 1990s, either because more immigrants were deported or because more were deterred from criminal behavior because of the threat of deportation. The answer to this question proved to be “no.”

Nevertheless, it is clear from the ACS statistics that the incarceration rates for immigrant men rose between 2000 and 2010 (although they remained much lower than for native-born men). However, this is likely the product of changes in how immigration laws are enforced, not an indication of some immigrant predisposition towards “criminality” in the commonly understood sense of the word. The most probable explanation for the increase is that many more immigrant men were incarcerated for immigration-related offenses during the first decade of the 21st century as Congress redefined more and more immigration offenses as criminal (such as unauthorized re-entry into the country³⁰), thus triggering incarceration before deportation.

These same factors also explain why immigrants are *over*-represented in the federal prison system: while some may be there for committing a serious criminal offense, a great many more may be there because of an immigration violation. Moreover, it is important to keep in mind that the characteristics of the federal prison population do not necessarily speak to the U.S. prison population as a whole because the overwhelming majority of prisoners are not in federal prisons. According to data from the U.S. Bureau of Justice Statistics, federal inmates accounted for only 9 percent of all prisoners in 2010. Well over half (58 percent) were incarcerated in state prisons and a third (33 percent) in local jails.³¹ So, when anti-immigrant activists and politicians trumpet the out-of-context statistic that one-quarter of the inmates in federal prisons are foreign-born,³² that figure should not be taken at face value.

Although there is no reliable source of data on immigrants incarcerated in state prisons and local jails, the U.S. Government Accountability Office (GAO) sought to overcome this limitation in a 2011 study. Not only did the study examine immigrants in federal prison during the FY 2005-2010 period, but also non-federal immigrant prisoners for whom state and local governments had sought federal reimbursement of some incarceration costs through the U.S. Department of Justice's State Criminal Alien Assistance Program (SCAAP) during the FY 2003-2009 period.³³ The GAO found that, among the immigrant prisoners in its sample, 65 percent had been arrested at least once for (although not necessarily convicted of) an immigration violation, 48 percent for a drug offense, and 39 percent for traffic violations—all of which are generally non-violent acts. In comparison, 8 percent had been arrested at least once for homicide and 9 percent for robbery.³⁴ The GAO also analyzed data from the U.S. Sentencing Commission and found that, in FY 2009, the "federal primary conviction" for 68 percent of offenders who were immigrants was an immigration-related violation—not a violent offense or any sort of crime which could be construed as a threat to public safety.³⁵

Immigrants are Less Likely Than the Native-Born to Engage in Criminal Behavior

The available evidence indicates not only that immigrants are less likely to end up behind bars than the native-born, but that immigrants are also less likely to commit criminal acts to begin with. For instance, a 2013 study found that "immigrants to the US are less likely to engage in violent or nonviolent antisocial behaviors than native-born Americans. Notably, native-born Americans were approximately four times more likely to report violent behavior than Asian and African immigrants and three times more likely than immigrants from Latin America."³⁶ The study analyzed data from the National Epidemiologic Survey on Alcohol and Related Conditions (NESARC) to determine how often natives and immigrants engage in a wide range of violent and nonviolent "antisocial behaviors," from hurting another person on purpose and using a weapon during a fight to shoplifting and lying.³⁷

In a related vein, another 2013 study tracked 1,354 "high risk" adolescents over the course of seven years and found that the immigrants in the sample were less likely than the native-born to be repeat offenders. In the words of the authors, immigrants "appear to be on a path toward desistance much more quickly than their peers."³⁸ All of the adolescents in question had been convicted of a serious offense (usually a felony) in either a juvenile or adult court in Maricopa County, Arizona, or Philadelphia County, Pennsylvania. The study sought to determine who became a "persistent offender" and who did not.³⁹

A 2010 study yielded similar findings based on data from the National Longitudinal Study of Adolescent Health (Add Health).⁴⁰ Add Health offers a “national, longitudinal account of delinquency by gender, race/ethnicity, and immigrant group from the onset of adolescence (ages 11-12) to the transition into adulthood (ages 25-26).”⁴¹ The study found that “immigrant youth who enrolled in U.S. middle and high schools in the mid-1990s and who are young adults today had among the lowest delinquency rates of all youth.”⁴² The authors conclude that the national-level data gathered by Add Health “debunk(s) the myth of immigrant criminality. Fears that immigration will lead to an escalation of crime and delinquency are unfounded.”

Criminalizing Immigration and Expanding the Apparatus of Enforcement

Despite the abundance of evidence that immigration is not linked to higher crime rates and that immigrants are less likely to be criminals than the native-born, U.S. immigration policy is criminalizing an ever-broadening swath of the immigrant population. Given that immigrants in general are not a threat to life, limb, or property, the federal government accomplishes this by applying a double standard as to when someone is a “serious” criminal. In short, immigrants who experience even the slightest brush with the criminal justice system, such as being charged with a misdemeanor (even if they are not convicted), can find themselves subject to mandatory detention for an indefinite period, after which they are summarily expelled from the country and barred from returning. This reality is at the core of what law professor Juliet Stumpf calls “crimmigration”—the “criminalization of immigration law.”⁴³ Stumpf argues that “as criminal sanctions for immigration-related conduct and criminal grounds for removal from the United States continue to expand, aliens become synonymous with criminals.”⁴⁴ In other words, for years the government has been redefining what it means to be a “criminal alien,” using increasingly stringent definitions and standards of “criminality” that do not apply to U.S. citizens.

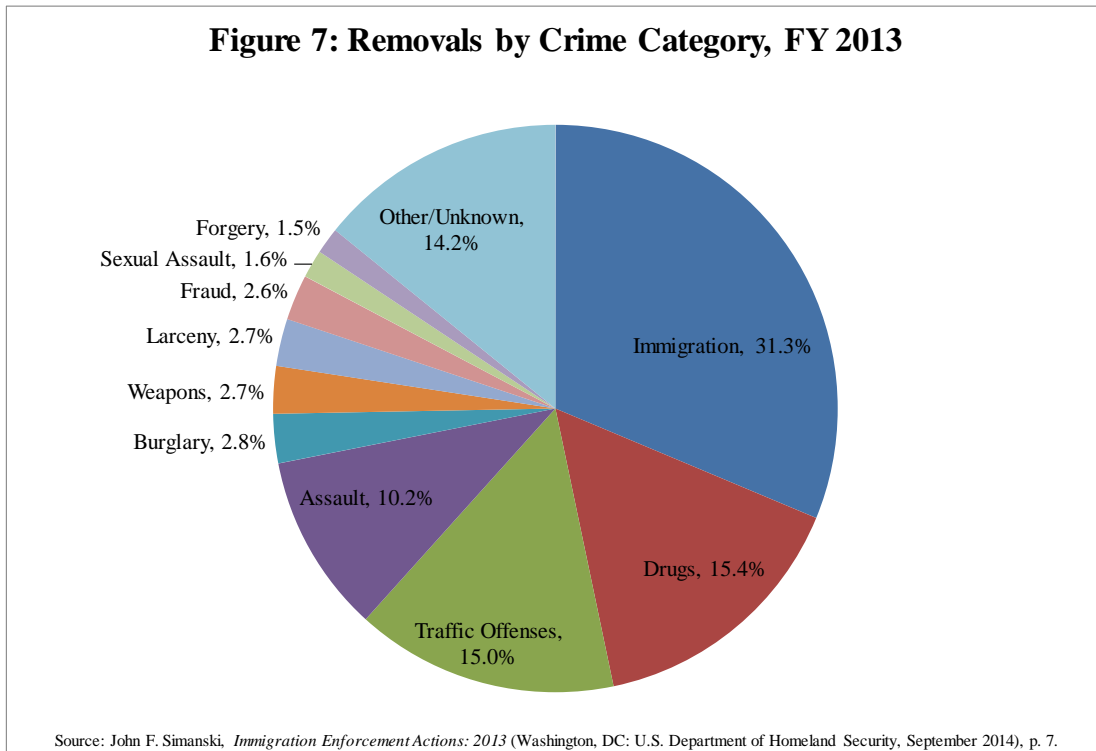
Of course, these increasingly punitive laws are only as effective as the immigration-enforcement apparatus designed to support them. And this apparatus has expanded dramatically over the past three decades.⁴⁵ More and more immigrants have been ensnared by enforcement mechanisms new and old, from worksite raids to Secure Communities. Detained immigrants are then housed in a growing nationwide network of private, for-profit prisons before they are deported from the United States.⁴⁶ In short, as U.S. immigration laws create more and more “criminal aliens,” the machinery of detention and deportation grows larger as well, casting a widening dragnet over the nation’s foreign-born population in search of anyone who might be deportable.” With the technologically sophisticated enforcement systems in place today, being stopped by a police officer for driving a car with a broken tail light can culminate in a one-way trip out of the country if the driver had long ago pled guilty to a misdemeanor which had since been defined as a deportable offense.

Misleading Language in the “Official” Deportation Statistics

The definition of “criminal alien” used by the federal government is clearly inconsistent with the general public’s understanding of serious crime. The term represents a terminological sleight-of-hand used to justify a punitive approach to immigration enforcement that is based on

incarceration and deportation. An important part of the government’s attempt to redefine what it means to be a “criminal alien,” with all the fraught social and legal implications this label carries, becomes clear upon closer consideration of the data on enforcement actions that is released by the U.S. Department of Homeland Security (DHS). According to DHS, 438,421 foreign nationals were removed from the United States in FY 2013. Among those removed, roughly 45 percent (198,394) were classified as “known criminal aliens.”⁴⁷ (Along these lines, the director of ICE recently testified before Congress that “eighty-five percent of individuals removed or returned from the interior were previously convicted of a criminal offense.”⁴⁸)

However, a more detailed examination of the data clearly illustrates that the majority of “criminal aliens” are in fact *not* being removed for what most Americans perceive to be serious crime, such as the FBI’s eight Index Crimes, which consist of “Part I” offenses (homicide, assault, forcible rape, and robbery) and “Part II” offenses (larceny, burglary, motor vehicle theft and arson).⁴⁹ In fact, DHS’s FY 2013 enforcement actions indicate that serious crimes such as “Assault,” “Robbery,” “Burglary,” and “Sexual Assault” collectively make up only one-fifth of the crime categories for which “criminal aliens” were removed. Nearly one-third (31.3 percent) of “criminal aliens” were removed for “Immigration” offenses (i.e., illegal entry or reentry into the United States), followed by 15.4 percent for “Dangerous Drugs” (which includes possession of marijuana), and 15 percent for “Criminal Traffic Offenses” (including both Driving Under the Influence (DUI) and “hit and run”). Also noteworthy are an additional 14.2 percent of “criminal aliens” who were removed for “All other categories, including unknown” {Figure 7}.⁵⁰



Immigrant Incarceration and the Rise of the Private Prison Industry

The criminalization of immigration involves much more than the manipulation of official deportation statistics. It is also driven by a massive expansion in the infrastructure for the detention of immigrants who fit one or more of the growing list of offenses that qualify as “criminal” for immigration purposes. The immigrant-detention industry began to expand in earnest during the early 1980s following the creation of the Krome Avenue Detention Center in Miami to detain Mariel refugees from Cuba. Moreover, at the same time the immigration detention system has grown, the nation’s prison system has become increasingly privatized.⁵¹ The end result is the federal government’s reliance upon private prison corporations, such as Corrections Corporation of America (CCA) and The GEO Group, to handle the burgeoning inflows of “criminal aliens.”⁵²

As the immigrant-detention industry grew, so did the redefinition of “immigrants” as an inherently dangerous group of people. This can be attributed in part to the fact that private prison companies work actively to shape the federal and state laws governing corrections and law-enforcement. The companies make sizeable campaign contributions to politicians, and lobby Congress and state legislatures on bills that affect their interests. These companies also belong to organizations such as the American Legislative Exchange Council (ALEC), which champions free markets, limited government, and public-private partnerships which bring together federal and state legislators with members of the private sector. These partnerships can wield considerable power. For instance, there are indications that ALEC and CCA may have played a major role in drafting the legislation that would become Arizona’s infamous anti-immigrant law, SB 1070.⁵³ This scenario represents a conflict of interest in which a company that has a vested financial interest in the incarceration of as many people as possible is writing legislation that will increase the flow of prisoners into that company’s prisons. One can only wonder if this business ethic is behind the fact that ICE is now required by law “to maintain an average daily population of 34,000 detainees.”⁵⁴

A Chronology of Criminalization and the Expansion of Immigration Enforcement

The scale of the federal government’s drive to criminalize immigration and expand the reach of the enforcement dragnet becomes very apparent when the proliferation of immigration laws, policies, and enforcement mechanisms is tracked over the past three decades.⁵⁵ The 1996 laws stand as the most flagrant modern examples of laws which create a system of justice for non-U.S. citizens that is distinct from the system which applies to citizens.⁵⁶ And, from old-fashioned worksite raids to the modern databases which are the heart of initiatives such as Secure Communities and the Criminal Alien Program (CAP), the government’s immigration-enforcement mechanisms continue to expand and reach deeper and deeper into the immigrant community. In the process, basic principles of fairness and equal treatment under the law are frequently left by the wayside.

Worksite Immigration Raids

For decades, worksite raids of businesses employing unauthorized immigrants were a mainstay of immigration enforcement in the United States. In recent times, their economic and social

destructiveness are perhaps best exemplified by the case of Postville, Iowa. On May 12, 2008, 389 workers were arrested during an immigration raid at Postville's Agriprocessors, Inc. meatpacking plant. The consequences for the community and the local economy have been dire.⁵⁷ According to the authors of *Postville U.S.A.*, one year after the raid, Postville "lost 40% of its pre-raid population, the economy was in shambles, the city government teetered on the brink of financial collapse, and the future of the town's major employer grew increasingly doubtful with time."⁵⁸ Long after the Agriprocessors raid, Postville was still what its leaders described as "a human and economic disaster area."⁵⁹ The population loss meant steep losses for Postville in taxes and utility revenue. Local businesses closed, rental units remained empty, and the town couldn't pay its bills. According to the book's authors, "Attempts to come up with simple black-and-white solutions, such as arresting undocumented workers or closing down the companies that employ them, often causes a host of far more complex situations that do little to address any of the real concerns expressed by either side in the immigration debate."⁶⁰

The use of worksite raids as an enforcement mechanism has waned in recent years, although unauthorized workers are occasionally still swept up in such raids. According to ICE, in FY 2012, the agency made "520 criminal arrests tied to worksite enforcement investigations. Of the individuals criminally arrested, 240 were owners, managers, supervisors or human resources employees." The remaining were workers who faced charges "such as aggravated identity theft and Social Security fraud."⁶¹

Criminal Alien Program

The Immigration Reform and Control Act of 1986 (IRCA) is perhaps best known for providing an avenue to legal status for most unauthorized immigrants in the country at that time. However, IRCA also spurred the creation of new immigration-enforcement programs targeting noncitizens with criminal convictions.⁶² Among those programs were two that eventually became ICE's Criminal Alien Program (CAP)⁶³—a moniker which actually encompasses a number of different systems designed to identify, detain, and begin removal proceedings against deportable immigrants within federal, state, and local prisons and jails. CAP is currently active in all state and federal prisons, as well as more than 300 local jails throughout the country. It is one of several so-called "jail status check" programs intended to screen individuals in federal, state, or local prisons and jails for removability. CAP is by far the oldest and largest such interface between the criminal justice system and federal immigration authorities. CAP also encompasses other activities, including the investigation and arrest of non-detained noncitizens.⁶⁴

Regardless of its official intent, in practice CAP encourages local police to engage in ethnic profiling. In particular, police are motivated to arrest as many Latinos as possible in order to snare as many deportable immigrants as possible. For instance, one study found:

"compelling evidence that the Criminal Alien Program tacitly encourages local police to arrest Hispanics for petty offenses. These arrests represent one part of an implicit, but relatively clear logic: the higher the number of Hispanic arrests, the larger the pool of Hispanic detainees; the larger the pool of detainees, the more illegal immigrants that can be purged from the city via the CAP screening system."⁶⁵

The War on Drugs

Starting in the mid-1980s, the expansion of the infrastructure for detention in the United States was based not only on an escalating crackdown on immigrants, but was also a central component of the “war on drugs.” While IRCA and the Immigration Act of 1990 specifically expanded immigration detention, prisons were also filled with offenders—immigrant and native-born alike—on the basis of the Anti-Drug Abuse Act of 1988 (which created the concept of the “aggravated felony”), the Crime Control Act of 1990, and the Violent Crime Control and Law Enforcement Act of 1994, among other laws. In fact, the battles against illegal drugs and “illegal aliens” were frequently linked to each other in the political rhetoric of the time.⁶⁶ The result was a growing number of prisons and a growing number of offenders to fill them.

1996 Laws

The year 1996 was pivotal in terms of the criminalization of immigration. The Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) and the Antiterrorism and Effective Death Penalty Act (AEDPA) transformed immigration law in two profound ways. First, the laws mandated the detention and deportation of noncitizens (lawful permanent residents and unauthorized immigrants alike) who had been convicted of an “aggravated felony,” including individuals who may have pled guilty to minor charges to avoid jail time by opting for probation. Second, the laws expanded the list of offenses which qualify as “aggravated felonies” for immigration purposes, and applied this new standard retroactively to offenses committed years before the laws were enacted.⁶⁷

A prime example of just how unfair these laws can be is the case of Mary Anne Gehris, who was born in Germany in 1965 but adopted by U.S.-citizen parents when she was two years old and taken to live in the United States. In 1988, she got into a fight with another woman over a boyfriend, pulled that woman’s hair, and ended up pleading guilty to misdemeanor assault. In 1999, she applied for U.S. citizenship and found herself in deportation proceedings instead because the 1996 immigration reforms defined her 1988 misdemeanor assault conviction as a “crime of violence.” Fortunately, the Georgia Board of Pardons intervened on Ms. Gehris’s behalf and pardoned her, thereby sparing her from deportation and allowing her to become a U.S. citizen.⁶⁸ But many other non-citizens have not been so lucky and have found themselves deported to countries of which they have no memory.

287(g) Program

Created by IIRIRA in 1996, 287(g)—which refers to the relevant section of the Immigration and Nationality Act—allows DHS to deputize select state and local law-enforcement officers to perform the functions of federal immigration agents. Like employees of ICE, so-called “287(g) officers” have access to federal immigration databases, may interrogate and arrest noncitizens believed to have violated federal immigration laws, and may lodge “detainers” against alleged noncitizens held in state or local custody. The program has attracted a wide range of critics since the first 287(g) agreement was signed more than 10 years ago. Among other concerns, opponents say the program lacks proper federal oversight, diverts resources from the investigation of local

crimes, and results in profiling of Latino residents—as was documented following the entry into a 287(g) agreement with Sheriff Joe Arpaio of Maricopa County, Arizona. Following the nationwide expansion of the Secure Communities program, which has its own drawbacks but is operated exclusively by federal authorities, critics have asked whether the 287(g) program continues to serve any law-enforcement benefit.⁶⁹ In its budget justification for FY 2013, DHS sought \$17 million *less* in funding for the 287(g) program, and said that in light of the expansion of Secure Communities, “it will no longer be necessary to maintain the more costly and less effective 287(g) program.”⁷⁰

While 287(g) may be on the way out, it is important to keep in mind that state governments have repeatedly sought to enlist their police forces in immigration enforcement without the cooperation or permission of federal authorities. Arizona’s SB 1070 and Alabama’s HB 56 are the most notorious examples of sweeping anti-immigrant laws that sought to turn police officers into immigration-enforcement agents. Although major provisions of these laws were struck down in the courts as a preemption of federal immigration-enforcement powers, other onerous provisions have survived. In Arizona, for instance, the U.S. Supreme Court upheld the provision of SB 1070 that permits police to conduct immigration status checks during law-enforcement stops.⁷¹ Even if 287(g) programs eventually cease to exist, anti-immigrant laws introduced in state houses will remain a very real equivalent.

9/11

The U.S. government responded to the attacks of September 11, 2001, in the same way it has in so many other times of national crisis: by using “national security” as a justification for incarcerating and deporting greater numbers of immigrants. “Foreigners” were broadly defined as potential threats and were detained on immigration-related charges that do not require the same standard of proof that is necessary in a criminal investigation.⁷² Although federal authorities first targeted Arabs, Muslims, and South Asians in the aftermath of 9/11, the “war on terror” has had an impact on all immigrants regardless of ethnicity or legal status—including Latin American immigrants, particularly Mexicans, who comprise the majority of immigration detainees.⁷³ Post-9/11 policies not only increased funding for various immigration-enforcement functions as part of the broader effort to enhance national security, but fostered an “us or them” mentality in which “they” are the foreign-born.⁷⁴

More precisely, the USA PATRIOT Act of 2001 (“Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001”), the Homeland Security Act of 2002, and the Enhanced Border Security and Visa Entry Reform Act of 2002 collectively “illustrate the accelerating criminalization of the immigration system.”⁷⁵ This intersection of criminal and immigration law has led to a notable increase in deportations.⁷⁶ As Stumpf notes, in the period “between 1908 and 1980, there were approximately 56,000 immigrants deported based on criminal convictions. In 2004 alone, there were more than 88,000 such deportations.”⁷⁷ While immigration law had been used by U.S. authorities to remove non-citizens who came into contact with the criminal justice system in the pre-9/11 era, the relationship between these two systems of law intensified after 9/11.⁷⁸ As law professor Teresa A. Miller notes, “After the attacks, zero-tolerance enforcement of immigration laws was extended to immigrants who had not passed through the criminal justice system, such as asylum

seekers and undocumented immigrants.”⁷⁹ The PATRIOT Act in particular allowed federal officers to apprehend and detain “non-citizens on immigration grounds without legal review and without public disclosure of the specific charge for a period of seven days, or for a maximum of six months if the case is deemed a national security risk.”⁸⁰

The “war on terror” thus had immediate implications for foreign-born individuals residing in the United States. As Miller notes, “In January of 2002, Deputy Attorney General Larry Thompson announced a new initiative to ‘locate, apprehend, interview, and deport’ approximately 314,000 noncitizens who had been ordered deported, but had failed to comply with their deportation orders.”⁸¹ This initiative led to the arrest of more than 1,100 Muslim and Arab men without formally charging them with a crime.⁸² However, the consequences of the PATRIOT Act extended beyond these individuals and into immigrant communities, ultimately being manifested through “racial profiling and scapegoating, mass detentions and mistreatment, and the government’s refusal to disclose information about those detained.”⁸³

Operation Streamline

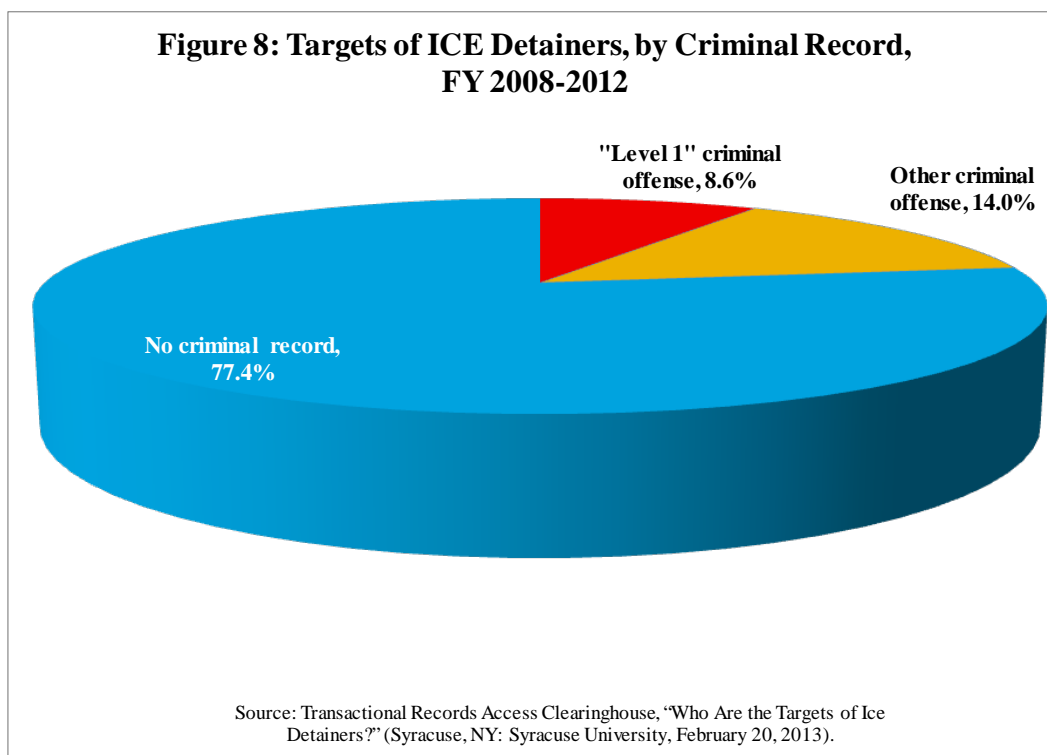
The detention-and-deportation machine is also being fed by Operation Streamline, a program begun in 2005 in the southwest under which unauthorized border-crossers are prosecuted in group trials and convicted of illegal entry into the country—a misdemeanor. If they cross again, they may be convicted of an aggravated felony and face up to two years in prison.⁸⁴ Although these offenses have been on the books since 1929, they are being applied under Operation Streamline more widely than they ever were before.⁸⁵ Yet the structure of Operation Streamline—in which up to 80 immigrants are tried at a time, and each defendant has only a few minutes to speak to an attorney—practically guarantees the violation of basic legal and human rights. Moreover, Streamline has severely strained the capacities of courtrooms along the border and clogged the courts with petty immigration offenses.⁸⁶ This program currently operates in all but three southwestern Border Patrol Sectors.

Operation Streamline has fueled a surge in immigration prosecutions over the past decade. According to Justice Department data analyzed by the Transactional Records Access Clearinghouse (TRAC), immigration prosecutions “reached an all-time high” in FY 2013 with 97,384 (53,789 for “illegal entry” and 37,346 for “illegal re-entry”). This marks an increase of 367 percent over the number of prosecutions 10 years earlier.⁸⁷ Between FY 2005-2012, a “total of 208,939 people were processed through Operation Streamline,” which represents 45 percent of the 463,051 immigration-related prosecutions in Southwest border districts during this time period.⁸⁸ U.S. Sentencing Commission data analyzed by the Pew Research Center finds that the “Dramatic growth over the past two decades in the number of offenders sentenced in federal courts has been driven primarily by enforcement of a particular immigration offense—unlawful reentry into the United States.”⁸⁹ Operation Streamline has ultimately diverted resources away from drug and human smuggling prosecutions.⁹⁰ All this means that massive amounts of time, money, and manpower are being wasted on the prosecution of non-violent immigrants who do not represent a threat to public safety or national security.

Secure Communities

Although the double-standards inherent in immigration law have been applied to immigrants for more than a decade and a half, they took on new meaning starting in 2008 with the launch and dramatic expansion of Secure Communities. This was (or still is, depending on one's perspective) a DHS program, eventually activated in all 3,181 jurisdictions across the United States,⁹¹ which used biometric data to screen for deportable immigrants as people were being booked into jails.⁹² Under Secure Communities, an arrestee's fingerprints were run not only against criminal databases, but immigration databases as well. If there was an immigration "hit," ICE could issue a "detainer" requesting that the jail hold the person in question until ICE could pick them up.

Not surprisingly, given the new classes of "criminals" created by IIRIRA, most of the immigrants scooped up by Secure Communities were non-violent and not a threat to anyone. In fact, one report found that in Los Angeles County, "the vast majority of those deported through Secure Communities have merely had contact with local law enforcement and have not committed serious crimes."⁹³ Moreover, as the program metastasized throughout every part of the country, more and more people were thrown into immigration detention prior to deportation, which led to mounting financial costs.⁹⁴ In FY 2013, 306,622 immigrants convicted of crimes were removed from the United States after identification through Secure Communities.⁹⁵



More broadly, regardless of whether they were identified through Secure Communities or not, the overwhelming majority of people receiving ICE detainers while in the custody of local, state, and federal law-enforcement officials had no criminal record.⁹⁶ For instance, among the nearly one million detainers issued by ICE during a 50-month period during FY 2008-2012, over 77

percent consisted of individuals who “had no criminal record—either at the time the detainer was issued or subsequently.”⁹⁷ Records from this same time period illustrate that for “the remaining 22.6 percent that had a criminal record, only 8.6 percent of the charges were classified as a Level 1 offense” {Figure 8}.⁹⁸

Secure Communities was not a practical or responsible approach to public safety. It undermined community policing by creating distrust of local law enforcement within immigrant communities, which in turn made community members less likely to report crimes or cooperate with local authorities in on-going investigations due to fear of deportation. This had negative consequences for public safety.⁹⁹ Secure Communities, along with other programs of its kind, also led to the separation of U.S.-citizen children from their parents.¹⁰⁰ These were issues that could not be fixed by simply altering the program. Further, one study found that “ICE’s failure to adhere to its own stated priorities is a feature rather than a reparable flaw of the program” and “has led to increased use of racial profiling in policing.”¹⁰¹

The current status of Secure Communities is somewhat murky. In February 2013, ICE stated that it would transfer “full responsibility” for the day-to-day management of Secure Communities to CAP, and began to redirect Secure Communities funding towards CAP.¹⁰² But Homeland Security Secretary Jeh Johnson announced in a November 20, 2014 memo that, due to widespread opposition to the program by law-enforcement officers and elected officials, “the Secure Communities program, as we know it, will be discontinued.”¹⁰³ It is to be replaced by the “Priority Enforcement Program” (PEP), under which ICE can “issue a request for detention” to state or local law-enforcement agencies if it can “specify that the person is subject to a final order of removal or there is other sufficient probable cause to find that the person is a removable alien.”¹⁰⁴ It remains to be seen how substantively different PEP will be from Secure Communities.

CBP’s Consequence Delivery System

The systematic criminalization of unauthorized immigrants in particular has intensified along the U.S.-Mexico border. In 2011, CBP, in collaboration with ICE, rolled out a program described as the Consequence Delivery System (CDS). Rooted in the notion of specific deterrence, CDS is designed “to break the smuggling cycle and deter a subject from attempting further illegal entries or participating in a smuggling enterprise.”¹⁰⁵ The program “guides management and agents through a process designed to uniquely evaluate each subject and identify the ideal consequences to deliver to impede and deter further illegal activity.”¹⁰⁶ Possible “consequences” under this initiative include, but are not limited to, being processed through the Alien Transfer and Exit Program (commonly referred to a “lateral repatriation,” often resulting in people being sent to unfamiliar and dangerous Mexican border towns plagued with drug war violence), being repatriated to Mexico in the middle of the night, or being charged with “unauthorized entry” (a misdemeanor) or “unauthorized re-entry” (an aggravated felony), which commonly occurs through Operation Streamline. Not only has CDS contributed to the further criminalization of immigration, but it has also needlessly contributed to the increased vulnerability of the already vulnerable unauthorized population.

Executive Action

With Congress perennially deadlocked to pass comprehensive immigration reform legislation, the Obama administration eventually took matters into its own hands. On November 20 and 21, 2014, President Obama announced a series of “executive actions” that would grant a temporary reprieve from deportation, and work authorization, to up to 5.3 million unauthorized immigrants (5.8 million remain ineligible).¹⁰⁷ This would be accomplished through expansion of the already functioning 2012 Deferred Action for Childhood Arrivals (DACA) program, as well as the creation of a new deferred action program called Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA). DACA offers temporary relief from deportation (and temporary work authorization) to qualified young adults who were brought to the United States as children. DAPA grants temporary relief from deportation, as well as temporary work authorization, to some unauthorized parents of U.S. citizens or lawful permanent residents.¹⁰⁸ However, neither of these programs can get off the ground until the legal challenges to them are resolved in court. So it remains to be seen how the President’s “executive action” will impact the drive to deportation that still permeates the U.S. immigration system.¹⁰⁹ Moreover, the rhetoric used by the Obama administration in justifying executive action—such as saying that immigration authorities will now target only “felons, not families”¹¹⁰—fails to account for the fact that there are a great many “felons” who have committed only immigration offenses and pose a threat to no one.

Conclusion

There are many signs that the U.S. immigration-enforcement system has run amok. Deportations during the Obama Administration have exceeded the two-million mark.¹¹¹ Families and communities have been and are being needlessly torn apart in the process.¹¹² And each year, billions upon billions of dollars are spent on border and interior enforcement, while hundreds of migrants die in the deserts and mountains of the southwest trying to cross into the country from Mexico—sometimes while trying to reach their families in the United States.¹¹³ These are tragedies that could be prevented—if only Congress would choose to inject proportionality, ameliorative discretion, and a little humanity back into the immigration system.

The problem of crime in the United States is not caused or even aggravated by immigrants, regardless of their legal status. This is hardly surprising since immigrants come to the United States to pursue economic and educational opportunities not available in their home countries and to build better lives for themselves and their families. As a result, they have little to gain and much to lose by breaking the law. Unauthorized immigrants in particular have even more reason to not run afoul of the law given the risk of deportation that their lack of legal status entails. Yet, the terminological sleight-of-hand inherent in the government’s definition of “criminal alien” perpetuates and exacerbates the fallacy of a link between immigration and crime.

Public policies must be based on facts, not anecdotes or emotions. And the fact is that the vast majority of immigrants are *not* “criminals” in any meaningful sense of the word. The bulk of the immigration-enforcement apparatus in this country is not devoted to capturing the “worst of the worst” foreign-born criminals. Rather, as Secure Communities exemplifies too well, the

detention-and-deportation machine is designed primarily to track down and expel non-violent individuals, including legal residents of the United States who have worked and raised families here for many years. This brand of immigration policy is cruel, pointless, and counterproductive. And it is not an effective substitute for immigration reform which makes our immigration system responsive to the economic and social forces which drive migration in the first place.

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- ⁹² Marc R. Rosenblum and William A. Kandel, [Interior Immigration Enforcement: Programs Targeting Criminal Aliens](#) (Washington, DC: Congressional Research Service, December 20, 2012), pp. 15-16.
- ⁹³ Edgar Aguilasocho, David Rodwin, and Sameer Ashar, [Misplaced Priorities: The failure of Secure Communities in Los Angeles County](#) (Immigration Rights Clinic, University of California, Irvine School of Law, January 2012): 2.
- ⁹⁴ Michele Waslin, [The Secure Communities Program: Unanswered Questions and Continuing Concerns](#) (Immigration Policy Center, American Immigration Council, updated November 2011); Edgar Aguilasocho, David

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⁹⁵ U.S. Immigration and Customs Enforcement, "[Secure Communities: Monthly Statistics through September 30, 2013](#)," accessed January 31, 2014; According to U.S. Immigration and Customs Enforcement, "Level 1 offenders are those aliens convicted of 'aggravated felonies,' as defined in § 101(a)(43) of the Immigration and Nationality Act, or two (2) or more crimes each punishable by more than 1 year, commonly referred to as 'felonies.' Level 2 offenders are aliens convicted of any other felony or three (3) or more crimes each punishable by less than 1 year, commonly referred to as 'misdemeanors.' Level 3 offenders are aliens convicted of 'misdemeanor' crime(s) punishable by less than 1 year." See U.S. Immigration and Customs Enforcement, "[Secure Communities: Get the Facts](#)," accessed January 5, 2014.

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¹⁰⁴ [Memorandum](#) from Homeland Security Secretary Jeh Charles Johnson Regarding Secure Communities, November 20, 2014.

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¹⁰⁷ Jens Manuel Krogstad and Jeffrey S. Passel, [*Those from Mexico will benefit most from Obama's executive action*](#) (Washington, DC: Pew Research Center, November 20, 2014).

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¹¹¹ U.S. Department of Homeland Security, *Yearbook of Immigration Statistics: 2013*, Table 39.

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