



INTERNATIONAL POLICY REPORT

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Immigrant Crackdown Joins Failed Crime and Drug Wars

By Tom Barry

President Bush's "war on terror" established the ideological rationale for the immigrant crackdown. But the campaign to detain and deport immigrants got its policy legs from two previous (and continuing) wars: the "war on crime" and the "war on drugs," both launched by President Richard Nixon in the early 1970s.

The new emphasis by the Obama administration on tracking down and removing "criminal aliens" indicates that the ongoing immigrant crackdown will be driven more by the imperatives of the crime and drug wars than by the ideological fears and fervor of the war on terror.

Removing "criminal aliens" from America's streets will be a new priority for the Department of Homeland Security (DHS), says DHS Secretary Janet Napolitano. President Obama's requested 2010 budget includes \$1.4 billion for collaborative programs to deport "criminal aliens."

The increasing DHS emphasis has met little opposition. Indeed, Democrats in Congress have consistently called for more DHS funding for criminal alien programs, and immigrant advocacy groups in Washington have given the issue a pass in the interest of building broad support for comprehensive immigration reform. Understandably, few immigrant advocates want to be seen as defending "criminal aliens"—a stance that would ostensibly undermine the credibility of their own oft-repeated argument that immigration reform would enhance the "rule of law."

The recent alarm about the possibility that horrific violence associated with the U.S.-supported drug war in Mexico will spill over the border has been met by administration assurances that DHS and the Justice Department (DOJ) will deploy more law enforcement personnel to the region. Secretary Napolitano has promised to put more "boots on the ground" to secure the border against the compound threat of illegal immigrants and drug trafficking.

Part One of this policy report examines the increasing criminalization of immigrants and immigration law. Part Two examines the links between the immigrant crackdown and the drug war. Part Three is a conclusion with recommendations for policy reform.

Part One

Making Criminals of Immigrants

Immigrants have become a principal target of the government's long-running wars on crime and drugs. When President Nixon announced the wars on crime and drugs, he tapped into an incipient backlash movement of largely working- and middle-class white Americans who wanted law-and-order solutions to urban crime and increasing illegal drug use. This was the beginning of what has been called the "severity revolution" and what criminal justice scholar Jonathan Simon calls "governing through crime" in his recent book, *Governing Through Crime: How the War on Crime Transformed American Democracy and Created a Culture of Fear*.

Rather than seek social solutions that address root causes or that prioritize treatment and rehabilitation, government embarked on an era of harsh sentencing and mass incarceration. The idea, promoted by conservatives, was that

criminals and drug users should be removed from society, thereby effectively removing the risk society faced from this deviant minority. As a result, the prison population today is seven times higher than it was four decades ago. With 2.3 million people in prison, America has the highest per capita incarceration rate in the world. More than a half-million of these prisoners are drug-law offenders—up 1,200% since 1980.

For the most part, this conservative backlash movement that successfully promoted "tough on crime" judges, harsh sentencing rules, and drug-user imprisonment didn't affect the immigration issue until the mid-1990s. The first sign that the "severity revolution" was also overtaking the prevailing liberal cast of immigration policy occurred in 1988 when, as part of the Omnibus Anti-Drug Act, Congress required mandatory detention and deportation for

immigrants convicted of "aggravated felonies," which were then defined as drug trafficking, murder, and trafficking in firearms.

Pursuant to the 1988 act, the Immigration and Naturalization Service (INS) established the Institutional Removal Program, which began to review the immigration status of federal prisoners and represented the beginning of what is currently called the Criminal Alien Program. DHS defines criminal aliens as "noncitizens who are residing in the United States legally or illegally and convicted of a crime."

At that time immigration restrictionist groups, notably the Federation for American Immigration Reform, were steadily increasing their influence in immigration policymaking, but their central message that immigration was fueling unsustainable population growth never gained traction in Washington. The first major strikes against the liberal immigration ethos that prevailed in both political parties occurred in 1996, when the new Republican majority in Congress, with substantial Democratic Party support, passed three bills that established the policy groundwork for the current immigrant crackdown.

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Conservative congressional leaders merged anti-immigrant measures with new anti-terrorist, anti-crime, and anti-welfare legislation. These were the Anti-Terrorism and Effective Death Penalty Act (AEDPA), Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA), and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA).

In its newly restrictive grounds for political asylum and wider grounds for the indefinite detention of immigrants, AEDPA broke ground for the USA Patriot Act of 2001. Sparked by an anti-immigrant sentiment following the World Trade Center bombing of 1993 and the Oklahoma City federal building bombing in 1995 (for which foreign terrorists were initially but incorrectly blamed), AEDPA aimed to improve public safety and national security by vastly expanding the criminal grounds for the removal of immigrants.

Together with IIRIRA, AEDPA unhinged the term "aggravated felony" from its original meaning. Many misdemeanor convictions like drug possession and shoplifting, even in the cases of suspended sentences, are now considered aggravated felonies that require mandatory detention and removal. The immigration courts and immigration enforcement agencies also began to expansively interpret crimes of "moral turpitude" and "controlled substances" in their categorization of criminal aliens.

In the wake of Sept. 11, INS and DHS slowly started to put a new criminal alien infrastructure in place. Several programs that INS started developing as a result of the 1996 legislation received greater attention after Sept. 11 and especially after the creation of the Department of Homeland Security in March 2003. However, under the new leadership of DHS Secretary Michael Chertoff, DHS, starting in 2005, began to hone its focus on criminal aliens.

Terrorists remained central, at least rhetorically, to the mission of protecting the nation against "dangerous goods and people." But when officials of Immigration and Customs Enforcement (ICE) and Customs and Border Protection (CBP), both DHS agencies, talked of "dangerous people" they were increasingly referring to criminal aliens, who represented a much larger and more definable target than terrorists. As the national fear of an imminent terrorist attack diminished, DHS has found broad and steadfast support among the public and in Congress for programs that targeted criminal aliens. But in the hunt for criminal aliens DHS has not only increasingly stretched the definition of crime but has also mounted operations and raids that arrest more "collateral" immigrants than those categorized as fugitives or criminals.

Crackdown Operations

"Operation Return to Sender," which was launched in 2006 under Chertoff's direction, was one of a flurry of new programs and operations that hunted down criminal aliens. National security and homeland security justifications for new immigration enforcement programs gave way to pronouncements about public safety and community security.

On the occasion of a joint federal-local dragnet for criminal aliens in the Boston area on June 14, 2006, Secretary Chertoff said:

"Operation Return to Sender is another example of a new and tough interior enforcement strategy that seeks to catch and deport criminal aliens, increase worksite enforcement, and crack down hard on the criminal infrastructure that perpetuates illegal immigration. The fugitives captured in this operation threatened public safety in hundreds of neighborhoods and communities around the country. This department has no tolerance for their criminal behavior and we are using every authority at our disposal to bring focus to fugitive operations and rid communities of this criminality."

Other associated programs that target criminal aliens together with local law enforcement agencies are Operation Community Shield and Operation Stonegarden. In Operation Community Shield, ICE joins with local police to arrest suspected gang members not necessarily for any suspected crimes but for immigration violations. As part of DHS' Border Security Initiative, Operation Stonegarden provides DHS grants to "support closer coordination of state and federal law enforcement agencies at our borders." Another overlapping ICE operation is the Border

Enforcement Security Task Forces (BESTs), which also joins ICE and local law enforcement agencies along the border. These and other criminal alien programs that promote ICE/local "interoperability" fall under the umbrella program called ICE ACCESS (ICE Agreements of Cooperation in Communities to Enhance Safety and Security).

The National Fugitive Operations Program (NFOP), which targeted immigrants who hadn't responded to immigration court orders, known as "fugitive aliens," as well as criminal aliens, was established by INS in 2002. The program deploys 8-member teams of ICE agents to track down and arrest these "fugitives." From only a handful of teams in 2002, ICE now has a nationwide network of 104 teams.

Through its national deployment of Fugitive Operations Teams and other interior enforcement operations such as Return to Sender, ICE has involved local law enforcement officials in joint raids. Local police and sheriff deputies joined, in theory, not to enforce immigration law but to enforce criminal law, since the priority targets were criminal aliens. Although ICE clearly defined its priorities as dangerous criminal aliens, in practice more than a third and oftentimes more than a half of those immigrants arrested by such raids are what ICE calls "collateral" arrests—not criminals, not fugitives, but simply immigration violators.

According to a recent Migration Policy Institute report, the National Fugitive Operations Program "has failed to focus its resources on the priorities Congress intended when it authorized the program. In effect, NFOP has succeeded in apprehending the easiest targets, not the most dangerous fugitives. Furthermore, the program's structure and design appear to encourage officers to jeopardize their own safety, alienate communities, and misdirect expensive personnel resources."

Whereas the 1996 acts and other legislation have stipulated immigration consequences (detention and removal) for crimes, DHS, acting in concert with the Justice Department, has moved to create criminal consequences for immigration violations. Previously, an illegal entry or reentry or the use of fake credentials were regarded as administrative violations that generally resulted in deportation or voluntary departure.

Borrowing a phrase from the law-and-order playbook, DHS launched a "zero tolerance" program called Operation Streamline. Under this pilot program, illegal border-crossers picked up by the Border Patrol (BP) are criminally charged and turned over to the U.S. Marshals Service (USMS) for pre-trial custody. Instead of being simply "illegal aliens," these immigrants become "criminal aliens" under the new "zero tolerance" regimen. Immigrants crossing illegally are now routinely being sentenced to jail terms of 15 days, while those who reenter after having been deported now face 10-20 years in prison.

DHS hasn't limited its criminalization of immigrants to the border. As part of the expansion of its "interior enforcement," ICE in 2007 also began treating falsely documented or undocumented workers as criminal aliens.

The mass arrest of mainly Guatemalan workers at the Agriprocessors slaughterhouse and meatpacking plant in Postville, Iowa on May 12, 2008 marked, in tragic fashion, the extent to which DHS was willing to go to demonstrate its commitment to enforce the rule of law—as DHS interpreted it. Of the 389 immigrants detained, 307 were criminally charged with using false Social Security numbers and aggravated identity theft (which carries a minimum two-year sentence). Offered a plea deal, most pled guilty to the false social security charge and received a five-month sentence.

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Police as Immigration Agents

Following Sept. 11, INS/DHS began to explore ways to engage local law enforcement in immigration enforcement through "287(g) agreements." Referring to a 1996 change in the Immigration and Naturalization Act (INA), these agreements essentially deputize sheriff deputies, county jailors, and police as immigration agents. By 2002 only two such agreements were in place (in Florida), but currently there are 67 ICE 287(g) agreements with local police and sheriff departments—most of which were signed after 2006.

For the most part, the 287(g) program has appealed to non-metropolitan counties, often in areas of the South where there is a new immigrant presence and a rising anti-immigrant sentiment among the largely white political establishment. North Carolina and Virginia are the states with the most 287(g) programs. In contrast, cities and areas with a longtime immigrant presence have generally opposed the cross-designation of law enforcement officers as immigration agents.

Like its other criminal alien programs, ICE claims that through the 287(g) program it aims to protect against threats to the community. In its description of the 287(g) program, ICE says the local law enforcement officials should be cross-designated as immigration agents because "during the course of daily duties, they will often encounter foreign-born criminals and immigration violators who pose a threat to national security or public safety." The program gives local police the "necessary resources and latitude to pursue investigations related to violent crimes, human smuggling, gang/organized crime activity, sexual-related offenses, narcotics smuggling, and money laundering."

The 287(g) program has led to widespread concerns about racial profiling, reduced community trust, inadequate

prioritization of dangerous criminals, and misplaced law enforcement resources. A study of the operation of the program in North Carolina found that it has been used to "purge towns and cities of 'unwelcome' immigrants." The Policies and Politics of Local Immigration Enforcement report noted:

"Instead of focusing on those people who commit the violent crimes as stated by ICE, local law enforcement officers seem to be targeting drivers of a particular race or national origin and stopping them for traffic violations. For example, during the month of May 2008, 83% of the immigrants arrested by Gaston County ICE-authorized officers pursuant to the 287(g) program were charged with traffic violations. This pattern has continued as the program has been implemented throughout the state. The arrest data appears to indicate that Mecklenburg and Alamance Counties are typical in the targeting of Hispanics for traffic offenses for the purposes of a deportation policy."

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These problems were also highlighted in a January 2009 report by the U.S. Government Accountability Office (GAO) titled Immigration Enforcement: Better Controls Needed over Program Authorizing State and Local Enforcement of Federal Immigration Laws. The GAO report discovered that despite ICE's claims that the program would target dangerous criminal aliens, the agency did nothing to ensure that the police and sheriff deputies it cross-designated prioritized immigrants who were suspected of "posing a threat to national security or public safety." GAO concluded:

"While ICE officials have stated that the main objective of the 287(g) program is to enhance the safety and security of communities by addressing serious criminal activity committed by removable aliens, they have not documented this objective in program-related materials consistent with internal control standards. As a result, some participating agencies are using their 287(g) authority to process for removal aliens who have committed minor offenses, such as speeding, carrying an open container of alcohol, and urinating in public. None of these crimes fall into the category of serious

criminal activity that ICE officials described to us as the type of crime the 287(g) program is expected to pursue."

The GAO found that ICE didn't even attempt to ensure that the local officers it trained and designated as immigration agents used their authority only for arrested immigrants. Of the 287(g) agreements studied by GAO, not one of the 29 "mentioned that an arrest should precede use of 287(g) program authority." In other words, cross-designated local police have been investigating the immigration status of people they stop or otherwise encounter even when there is no crime involved.

A March 2008 report by Justice Strategies, Local Democracy on ICE, also pointed to the broader problem of mixing immigration law and criminal law. In their report, Aarti Shahani and Judith Greene warned:

"287(g) represents the fusion of two separate systems of law enforcement power. Once in place, it can lead to further entanglement of these powers as state and local politicians jump into the campaign to 'crack down' on immigrants. But civil immigration and criminal law are fundamentally incompatible. The grey area between civil and criminal law creates a situation ripe for abuse. The Constitution's protections against arrest without probable cause, indefinite detention, trial without counsel, double jeopardy, and self-incrimination, as well as the statute of limitations, do not apply equally (or in some cases at all) in the civil immigration context."

Consolidation and Expansion of Criminal Alien Program

The creation of the Criminal Alien Program (CAP) in 2007 represented ICE's determination to consolidate its criminal alien operations as a central focus of its immigration enforcement duties. CAP brought together its Institutional Removal Program and Alien Criminal Apprehension Program under one roof. Unlike the Return to Sender raids or its deputizing local officials in immigration law enforcement, CAP's aim is to ensure through expanding criminal and immigration databases that all criminal aliens in federal, state, and local custody are remanded to ICE upon their release.

ICE had been able to establish methods to track all aliens in federal prisons but had been less successful in ensuring that aliens entering state and local jails were turned over to ICE processing. Its new Detention Enforcement and Processing Offenders by Remote Technology Center (DEPORT) in Chicago was established to monitor all aliens in Federal Bureau of Prisons (BOP) facilities.

DEPORT ensures that the roughly 50,000 aliens in BOP prisons—more than one in four federal prisoners—are transferred to ICE once they complete their sentences. Over the past several years, BOP has facilitated this task by setting up five criminal alien prisons run by two private prison

companies (Corrections Corporation of America and GEO Group) to hold 10,000-plus low-security "criminal alien residents," most of whom have been convicted for drug possession and immigration violations.

To secure custody of the criminal aliens in state and local custody, ICE has proceeded on two fronts: training local officials to search for the immigration status of those suspected immigrants it cites or charges through 287(g) agreements, and encouraging local officials to use the integrated criminal/immigration databases it has established.

No one knows how many immigrants are in local and state custody. One measure of this population is the federal program that reimburses state and local governments for holding criminal aliens. According to a GAO report, in 2003 the State Criminal Alien Assistance Program (SCAAP) of the DOJ partially reimbursed the submitted expenses of state and county governments for the incarceration, respectively, of 74,000 and 147,000 criminal aliens.

Although a helpful guide to the number of criminal aliens in state and local custody, the SCAAP figures don't provide a full accounting of the number of immigrants who could potentially be shifted to ICE custody since many government entities don't keep track of the immigration status of their prisoners or don't submit reports to the DOJ because they are only partially compensated for their expenses.

ICE is well aware that 287(g) agreements have limited reach since they appeal mostly to rural communities where there is substantial anti-immigrant sentiment. Larger, metropolitan communities are critical of the agreements for many of the problems cited in the GAO and Justice Strategies reports. ICE says it recognizes that "there is no 'one size fits all' solution that will apply to every community in the country, so area Special Agents in Charge (SACs) and Field Office Directors (FODs) work closely with their local counterparts to find solutions that will meet their needs."

Latest Crackdown Initiative

ICE's most recent criminal alien initiative, "Secure Communities: A Comprehensive Plan to Identify and Remove Criminal Aliens," shows more potential for involving local communities in immigration enforcement. ICE explains that Secure Communities, which it introduced in March 2008 and began implementing in October 2008, will "change immigration enforcement by using technology to share information between law enforcement agencies and by applying risk-based methodologies to focus resources on assisting communities [in] removing high-risk criminal aliens."

Instead of training local law enforcement officials in immigration law enforcement, ICE equips police, sheriff departments, and local jails with "integration technology that links law enforcement agencies to both FBI and DHS biometric databases." Whereas police now routinely submit

data on suspects to the FBI, they will now be able to simultaneously check immigration and criminal databases.

In the program's first eight months, ICE has entered into agreements with 50 localities to use this integrated technology when booking prisoners. ICE says that "in collaboration with DOJ and other DHS components, ICE plans to expand this capability to all state and local law enforcement agencies throughout the nation."

Announcing its latest agreement with Fairfax County (Virginia) on March 9, executive director for ICE Secure Communities, David Venturella, said, "Secure Communities is a new effort to identify and ultimately remove dangerous criminal aliens from our communities. Our goal with this ICE program is to use technology to prevent criminal aliens from being released back into the community, with little or no additional burden on our local law enforcement partners."

"This is a win-win situation both for the community and law enforcement," said Fairfax County Sheriff Stan Barry. "We will be able to identify illegal immigrants who commit crimes in Fairfax County and get them in the process for deportation, and it does not require additional funds or manpower from us."

Like ICE's 287(g) program, the Secure Communities program doesn't have any internal regulations that would ensure that the stated priorities are followed on the ground.

"We view our participation in Secure Communities as an additional tool to enhance what is already a very effective partnership with Immigration Customs Enforcement," said Larry Boyd, chief of police in Irving, Texas, which joined up in February.

At its heart, Secure Communities is a technological identification program developed jointly by the Justice and Homeland Security Departments. It integrates DHS' new U.S. VISIT Automated Biometric Identification System (IDENT), which holds biometrics-based immigration records, with the FBI's Integrated Automated Fingerprint Identification System (IAFIS), which contains biometric-based criminal records. Other components to DHS' new focus on computerized identification programs and expanded immigration databases are its Law Enforcement Support Center (LESC) and its new Video Conferencing project (VTC).

ICE says it is going after "high-risk criminals" with its Secure Communities program. It makes similar assurances

with its other criminal alien programs, but in practice there is no prioritizing and ICE's wide-net approach has led to indiscriminate enforcement that captures many more simple immigration violators and nonviolent offenders than the "dangerous people" it says that it targets.

But like its 287(g) program, the Secure Communities program doesn't have any internal regulations that ensure that the stated priorities are followed on the ground. As Joan Friedland of the National Immigration Law Center observes:

"Secure Communities has a deceptively benign appearance because of its name and purported focus on criminals. But the program applies to immigrants regardless of guilt or innocence, how or why they were arrested, and whether or not their arrests were based on racial or ethnic profiling or were just a pretext for checking immigration status."

In Irving, Texas, which signed up for the Secure Communities program in March 2009, the Latino community has protested such unfocused criminal alien programs. In 2006 the city began participating in ICE's 24/7 Criminal Alien Program, under which city police and jailors alerted the ICE office in nearby Dallas when booked individuals were suspected of having dubious immigration status. At the time the city regarded participation in the ICE pilot program as a compromise option—between signing a 287(g) agreement that would essentially deputize city police as immigration agents, and not doing anything to defuse the rising anti-immigrant sentiment among white city residents concerned about the recent infusion of immigrants.

With the acceleration of Secure Communities, ICE expects these annual metrics of success to skyrocket.

Irving's 24/7 Criminal Alien Program resulted in so many deportations that the Mexican consul warned immigrants to avoid Irving. Of the 1,675 immigrants arrested by Irving and turned over to ICE, 60% have been arrested for level three misdemeanors, mainly driving violations. As a result of the upsurge in deportations because of the criminal alien program—about 300 monthly—the Latino community felt under siege. As the *Dallas Morning News* reported, "Many Hispanics are afraid to leave their homes or send their children to schools in a suburb where one-third of the population is foreign-born. They feel racially profiled by police and unwanted by white neighbors."

In Irving the 24/7 Criminal Alien Program evolved into the Secure Communities program. But there is more a sense of division and fear than of security as a result of the city's

collaboration with ICE. While the new attention to criminal aliens has resulted in the deportation of a few immigrants who could be identified as threats to community security, most of those arrested and deported have been hardworking members of the community who have run afoul of the law for minor offenses such as driving without a license.

ICE's Criminal Alien Program and its various initiatives do have a clear list of priorities—Level One through Level Three targets. Level One are individuals convicted of "major drug offenses and violent offenses," while Level Two priorities are "individuals who have been convicted of minor drug offenses and mainly property offenses." Level Three priorities are "individuals who have been convicted of other offenses."

But as the GAO and other recent reports on the implementation of the 287(g) program have found, ICE doesn't insist that local law enforcement agencies abide by these priorities. Another problem is that those immigrants, legal and illegal, caught in ICE's widening net for criminal aliens catches immigrants who haven't even been convicted of crimes but simply arrested or even just stopped by local police officers.

But the central problem is ICE operates under a mandate to arrest and deport not only criminal aliens but all immigrants without the proper documentation. Whether it is its Fugitive Operations Teams, Return to Sender initiatives, or its new Secure Communities program, ICE's interior enforcement operations cast a wide net. In practice, ICE is not netting the U.S. captains of the transnational drug and human smuggling organizations, but immigrants who are stopped because of a broken tail light or who have personal quantities of illegal drugs.

Criminal Aliens Without End

Through its widening net, ICE is catching a rapidly rising number of criminal aliens. In 2008 it identified 221,000 aliens in local, state, and federal prisons, who will be remanded to ICE for removal. That's up from 164,000 incarcerated criminal aliens in 2007 and 67,000 in 2006. With the acceleration of Secure Communities, ICE expects these annual metrics of success to skyrocket.

ICE claims that it is "transforming community safety by transforming the way the federal government cooperates with state and local law enforcement agencies to identify, detain, and remove all criminal aliens held in custody." When situated within the crackdown on crime, the immigrant crackdown counts on more support. While other DHS initiatives, such as its worksite raids and border fence, have come under widespread criticism, DHS has found broad support for its focus on criminal aliens—which is one reason why the Obama administration is insisting that such programs will be a priority.

The prosecution and imprisonment of criminal aliens is saturating the country's criminal justice system. Overall, federal criminal prosecutions are rising spectacularly,

overwhelming judges and burdening federal prosecutors with unprecedented caseloads. According to new statistics released by the Transactional Records Access Clearinghouse (TRAC), prosecutions in 2008 were 70% higher than in 2003.

The arrest and prosecution of immigrants for immigration violations accounted for 55% of the new cases in December 2008, while drug cases accounted for 16% of the caseload that month. Five years ago drug abuse cases accounted for the most prosecutions but today immigration violations far outnumber drug abuse prosecutions. While charges for illegal entry and reentry have increased steadily over the past five years, the charge that showed the greatest increase in prosecutions—up 120% over 2007—was document fraud, a charge filed mostly against illegal immigrants living and working in the country.

Even as illegal immigration and apprehension rates have been falling over the past three years, the number of immigrants detained and deported by ICE has been rising. Between 2003 and 2007, the total number of immigrants detained by ICE rose from 231,500 to 311,213. Although apprehensions along the border fell by 17% in 2008, deportations increased, rising from 319,382 in 2007 to 349,041 in 2008.

One major reason for increased detention and removals is the increasing number of legal immigrants who are being removed because they have been identified as criminal aliens. In 2007, 99,924 of the 319,041 immigrants deported were criminal aliens. Roughly one in five of these criminal aliens had been charged with criminal immigration violations such as illegal entry and aggravated identity fraud. The leading criminal violation—one in three—was a drug abuse conviction. In 2008 ICE deported 110,000 criminal aliens.

The proportion of criminal aliens to the total number of deported immigrants will likely increase at a much greater rate in coming years as ICE implements its plans to identify and charge with deportation all the immigrants, legal and illegal, who are in federal, state, or local detention. In the past, legal and illegal immigrants who were convicted and sentenced to prison were generally released following the completion of their sentence.

When fully implemented, ICE's Criminal Alien Program will ensure that all criminal aliens will be transferred to ICE custody after being released. Having met the criminal consequences of their violations, they will then face the immigration consequences—imprisonment at an ICE facility (mostly privately run) until their removal from the country. Within the past few years, DHS and DOJ have instituted procedures to ensure that all noncitizens in federal custody are transferred to ICE upon completion of their sentences.

Once the Secure Communities initiative takes hold, the names of immigrants who come under state and local criminal jurisdiction will automatically be forwarded to ICE for processing. This goal is a subset of DHS' overriding

goal, as defined by its 2003 Operation Endgame strategy, to "remove all removable aliens."

There is no good estimate of the number of criminal aliens because it's a constantly expanding population, as the number of new immigrants grows and as the number of immigrant residents who are convicted of crimes grows as well. The number also continues to rise because the federal government's definition of deportable crimes keeps expanding, and because new border control and interior enforcement programs at DHS have been increasingly turning immigration violations into criminal violations.

There are roughly 20 million legal noncitizen residents and 11 million illegal residents in the United States. ICE estimates that there are 300,000-450,000 criminal aliens detained at federal, state, and local prisons and jails. Once it gets data systems fully operating and with sufficient budgeting (\$2-3 billion), ICE can remove all these aliens, most of whom are legal residents.

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An unknown number, presumably much larger than those currently detained, of legal residents who have at any time during their residence been convicted of a "removable offense" are also criminal aliens. They are "removable" but will likely remain outside ICE's custody until they are identified by a cross-check of the government's increasingly integrated immigration/criminal databases. Then their records could come to ICE's attention when they reenter the country after a foreign visit, apply for citizenship, are booked in a local jail, or stopped by a law enforcement official for any type of infraction or questioning.

In other words, if a legal resident has ever been convicted of a crime, even if the sentence was waived, they can at any point in their life be arrested and deported as a criminal alien. To this expanding pool of criminal aliens, any noncitizen who in the future commits a removable offense will be added.

All 11 million undocumented immigrants are removable, in addition to the 300,000-500,000 additional immigrants who enter illegally or overstay their visas each year. If any of these individuals are convicted of a crime or charged with a criminal violation of immigration law, they are considered criminal aliens, and will likely serve a prison sentence before being returned to ICE for detention and removal.

Part Two

Fighting the Drug War at Homeland Security

The drug war, declared by President Richard Nixon in 1971, is a prohibition campaign that began in the United States and has since spread around the globe, often with U.S. assistance and under U.S. direction. It started more as a backlash movement against the spread of recreational drugs by America's youth in the 1960s, when the use of marijuana and hallucinogens became associated with the protest movement against the Vietnam War and against the dominant culture.

At first, the drug war was largely regarded as a war on the home front, although what may be regarded as one of the opening forays of the soon to-be-declared war was Operation Intercept, a short-lived initiative to search all northbound traffic from Mexico to intercept the inflow of marijuana. Over the past four decades the drug war has become a global war fought by the United States to eradicate drug production and to interdict narcotics shipments. The initial primary focus on treatment, especially for heroin addiction, quickly gave way to the prevailing focus on suppression and imprisonment.

When the CBP says it is protecting the homeland against "dangerous people and goods," it in effect is talking about illegal immigrants and illegal drugs.

As the U.S.-supported drug war in Mexico rages, rising concern that the related violence may spill over the border has led to new calls to reinforce border security. Although expressing concerns about militarizing the border, the Obama administration is responding by beefing up the presence of ICE, CBP, Drug Enforcement Administration (DEA), and other federal agencies along the embattled southwestern border. At the same time, the Obama administration has restated its strong support for Mexican President Felipe Calderon's decision to deploy the army to fight the drug war, and for the Merida Initiative, which provides U.S. military support for that "war."

Immigration restrictionists have jumped on the issue of drug-related violence in Mexico to renew their demands for more border security in the form of an extended border fence, more Border Patrol agents, and the deployment of the National Guard. On March 9, 30 anti-immigration Republican congressional representatives signed a letter to President Obama requesting more border fencing.

"Contiguous fencing is an effective and proven enforcement mechanism that will serve to directly reduce cross-border traffic and drug violence by closing the smuggling corridors exploited by drug cartels," the letter states. Rep. Brian Bilbray (R-CA), chairman of the Immigration Reform Caucus, and Rep. Duncan Hunter (R-CA), were the lead signatories of the letter.

Along the border the drug war and the immigrant crackdown are already one and the same. When the CBP says it is protecting the homeland against "dangerous people and goods," it in effect is talking about illegal immigrants and illegal drugs. The Border Patrol is as much a drug enforcement agency as an immigration control force. At the CBP ports of entry and at their proliferating highway checkpoints, drug-sniffing dogs, car searches, and billboards announcing the quantities of drugs seized at each location sends the clear message that illegal drugs are regarded as a serious threat to homeland security.

On both sides of the border, marijuana holds the most prominent place in the drug war. During its nearly year-long deployment in the border state of Chihuahua, the Mexican Army points to the tonnage of marijuana seizures as the best evidence of its success in its campaign against the drug organizations. The army regularly stages photo-ops of bundles of seized marijuana going up in flames.

Forty years after President Nixon's Operation Intercept, the Border Patrol is still hailing the quantity of marijuana it seizes as evidence that it is winning the drug war. The Tucson Sector Border Patrol recently announced that it had seized more than 500,000 pounds of marijuana since October 1—a 22% increase over the same period last year.

In the same period the Border Patrol reported having seized only 53.13 ounces of heroin, 65.25 pounds of cocaine, and 6.39 pounds of methamphetamines. Marijuana, which ignited the drug war four decades ago, remains central to the war as it plays out in Mexico and along the border. According to the DEA, the smuggling of marijuana into the United States from Mexico has increased over the past two years to meet a new surge in U.S. demand.

CBP explains its drug war mission this way:

"Drug interdiction is a priority undertaking encapsulated by CBP's overall mission to secure the nation's borders and prevent unlawful entry of dangerous people and goods while facilitating the legitimate flow of travel and trade. CBP's border and border nexus drug interdiction activities contribute to the National Drug Control Strategy by disrupting the flow of drugs into the United States."

CBP has "performance metrics" to measure its contribution to the drug war. Although it doesn't set target goals, it does

measure the quantity of drugs seized annually. Its "performance objective" is "using a risk-based approach, [to] deploy and employ the most effective inspection and scanning technology available at designated land border ports, airports, seaports, permanent Border Patrol traffic checkpoints, and international areas ..."

Despite this "risk-based approach," marijuana, a non-addictive plant and the least harmful of the targeted illegal drugs, has for the past four decades consistently topped the list of "dangerous goods" seized. In 2008 CBP seized 2,471,931 pounds of marijuana. That's up from the 1,339,492 pounds seized in 2005 but down 11 % from 2007 seizures. It also reports cocaine and heroin seizures in its annual performance reports. In 2008 CBP seized 178,770 pounds of cocaine and 2,178 pounds of heroin.

Outdoing even the DEA in announcements of drug-war victories, the Border Patrol issued a flood of press releases about its drug seizures. The Border Patrol has announced a string of seizures in 24-hour drug-seizure "busts." Over a 24-hour period in Hidalgo County, Texas, the Border Patrol boasted that it had seized more than \$3.6 million worth of marijuana. About the same time on the northern border, Border Patrol agents at the Sweet Water port of entry in Montana seized \$284,000 worth of "drug paraphernalia" in the form of 5,380 assorted pipes and bongs. "I've never seen so many shipments at a time," said Sandy Owens, chief of the Sweet Grass Port of Entry for 16 years.

One of the hot spots for marijuana interdiction is in the Border Patrol's Yuma, Arizona sector. As elsewhere along the border, Border Patrol agents aren't arresting many illegal border crossers lately. On some days, the immigrant arrest count is in the single digits. But all along the border BP agents are still focused on their drug war mission, especially at the dozens of permanent and temporary checkpoints that are mounted along roads within the 100-mile wide swath of borderlands in which they operate.

The merger of the drug war and the immigrant crackdown is on vivid display throughout the borderlands at an increasing number of CBP highway checkpoints. These checkpoints—33 permanent and numerous "tactical" or temporary ones—are raising the ire of borderlands residents who are being repeatedly stopped, interrogated, and having their vehicles searched. Borderlands residents complain that the permanent and tactical checkpoints are violating their constitutional rights and victimizing legal U.S. residents, while smugglers avoid the permanent checkpoints and deploy scouts to notify them of the tactical ones.

Last year, Sen. Patrick Leahy (D-VT) in a March 4 statement to the Homeland Security Subcommittee questioned the need and purpose of the new Border Patrol checkpoints along the northern border and told a story about when he was stopped at a Border Patrol checkpoint:

"It was about 125 miles from the border. In a car with license plate one on it from Vermont. With

little letters underneath it that said U.S. Senate. We were stopped and ordered to get out of the car and prove my citizenship. And I said 'What authority are you acting under?' and one of your agents pointed to his gun and said 'That's all the authority I need.' Encouraging way to enter our country!"

An investigative report in the Phoenix *New Times* (March 13) found that a permanent Border Patrol checkpoint in the Yuma sector was reaping thousands of recreational drug users. While vehicles passing the checkpoint on Interstate 8 are not routinely searched by Border Patrol agents, K9 dogs go up and down the line of stopped traffic sniffing for traces of illegal drugs.

Despite this "risk-based approach," marijuana, the least harmful of the targeted illegal drugs, has for the past four decades consistently topped the list of "dangerous goods" seized.

Over the past year, the Border Patrol has mounted a joint operation, called Operation Citation, in conjunction with the Yuma County Sheriff's Department, to issue local-jurisdiction fines for drug possession. In a twist of the "interoperability" promoted by DHS' Criminal Alien and Secure Communities programs, instead of having local police certified as immigration enforcement officers, immigration and border control agents are certified to enforce local drug laws. In the past 11 months, the two Border Patrol checkpoints along the Arizona-Sonora border—"the biggest weed traps in the country"—have nabbed more than 1,200 people for marijuana possession.

Before Operation Citation, Border Patrol agents confiscated drug paraphernalia and small quantities of personal-use drugs and then sent the subject's information to the county attorney's office for prosecution. Now, BP agents are cross-certified by the sheriff's department to issue citations and fines, which has netted the county hundreds of thousands of dollars in the past year.

It's a zero tolerance policy, as Border Patrol spokesman Jeremy Schappell told the *New Times*: "If we get just a pipe, they are getting written up. If it's a seed, they are getting written up."

Part Three

Breaking the Connections, Ending the Wars

The traditional frameworks for viewing the immigration issue—from the "nation of immigrants" history to demands for "comprehensive immigration reform"—treat immigration as a distinct issue in U.S. society and politics. In public and policy discourse, we regard immigration policy as the special way we deal with outsiders—the regulations and laws we institute to determine who can come inside and remain in our society.

But as the crackdown on immigrants evolves, the old frameworks for understanding the plight of immigrants and for advancing policy solutions fall increasingly short. That's largely because the federal government, in concert with local and state governments, has stopped treating immigrants as a special case.

The Department of Homeland Security's immigration agencies should not get a free pass in a budget review of pork-barrel and unnecessary funding.

The way we have decided to deal with these outsiders—the 30 million illegal and legal immigrants who live among us—is how we already decided to deal with ourselves.

In the early 1970s America began a new experiment in social engineering and control. It rejected the liberal, democratic, and humanitarian impulses that had previously played such an important role in defining U.S. identity.

Instead of hope, fear increasingly defined governance in social policy. Increasing drug use and rising urban crime were met with reactionary policies rather than problem solving—the get-tough wars on crime and drugs. We began "governing through crime," as criminal justice scholar Jonathan Simon has observed.

Millions of Americans began to be imprisoned for victimless drug-possession crimes. To enforce the social order and uphold the rule of law, the drug and crime wars filled America's expanding prison complex with petty criminals and illegal drug users.

While liberal programs—drug treatment, Head Start and other education programs, social services, etc.—persisted, the newly dominant response was to isolate our social problems rather than address them. Mass imprisonment became our prevailing risk-management strategy.

Similarly, rather than fixing a dysfunctional immigration system, government has since the mid-1990s moved to manage the immigration crisis through a strategy that stresses deterrence and exclusion. The immigration system has been shifted to the criminal justice system.

Immigration increasingly has been criminalized—a process some legal scholars have called "crimmigration." Federal courts are clogged with immigrants. Ever larger numbers of immigrants, legal and illegal, are regarded as "fugitive aliens" or "criminal aliens." Shifting immigrants to the U.S. system of crime and punishment has obligated ICE, U.S. Marshals Service, and Bureau of Prisons to greatly expand their network of prisons. Immigrant prisons operated by private prison firms have popped up all across the nation but especially in Texas and other border states.

This immigrant crime/prison complex overlaps with the citizen crime/prison complex. But there are important differences. While state and local governments in the face of budgetary and economic crises are starting to question the sustainability of the crime and punishment system as the costs of maintaining the penal system mount, DHS and DOJ are the beneficiaries of generous congressional funding increases for the immigrant crackdown. ICE alone spends \$1.7 billion a year for immigrant detention.

While DHS officials routinely say that immigration law enforcement aims to uphold the "rule of law," it's a rule of law for citizens alone that is being enforced. A far inferior and ever-more degraded set of laws and regulations rules the immigrant world.

Legal or illegal, they aren't protected by the same constitutional guarantees as citizens. While immigrants have the right to counsel in immigration court, they don't have the right to a government-provided attorney if they can't afford to hire an attorney. When in the immigration system, criminal aliens are protected by the Fifth Amendment's due process clause, but they aren't protected by the criminal process rights in the Fourth, Fifth, and Sixth Amendments. As aliens, they are defined and treated as outsiders with few of the rights and guarantees of citizens.

Policy Recommendations

The economic crisis has preempted any immigration reform that expands work visa programs or regularizes the status of unauthorized immigrants. Even if the Democratic majority expands in Congress, such liberal immigration reforms will likely remain politically dead until the economy stabilizes and revives.

This gives immigration advocates a few years or more to sharpen their arguments and broaden the support for liberal immigration reform. Not constrained by the exigencies and demands of a lobbying campaign for comprehensive reform, as they have been for the past several years, immigrant advocates and others have the opportunity to address the way immigration has become governed by crime. While the Obama administration continues to insist that immigration reform is a priority, it's unlikely that it will use its

diminishing political capital to exercise the strong and visionary leadership that this issue demands.

Americans are rightfully proud that the country we have created respects the "rule of law." But, while important, respect for law and for the order that it provides never has been and never should be the animating principle of the United States. Our founders believed, as we do, that when rules or laws do not serve the interests of justice, they need to be changed.

With respect to immigration and immigrants, over the past two decades we have changed our rules and laws, but not to serve justice. Rather the new "rule of law" in immigration matters has been legislated and applied in fits of political opportunism and backlash. The criminal justice and penal systems, already weighed down and distorted by the wars on crime and drugs, have been tapped to provide order to immigration. Justice and reason are nowhere in sight.

In this political interim, Congress, President Obama, Attorney General Eric Holder, and DHS Secretary Janet Napolitano should begin to bring justice and reason back into immigration enforcement. A combination of congressional and administrative actions could go a long way toward making the rule of law in immigration matters that deserves our respect.

Both at the state and federal levels, there are new signs that the logic, rationale, and methods of the wars on crime and drugs are coming under hard review. This reconsideration of the "severity revolution" is largely a product of the economic crisis. Current patterns of law enforcement, sentencing, and imprisonment are at long last recognized as being unsustainable and counterproductive.

As lawmakers move to roll back drug laws and downsize the crime/prison complex, they would do well also to consider the costs of criminalizing and imprisoning immigrants. On the federal level, Congress should question whether the nation can afford the billions of dollars allocated annually for arresting and imprisoning immigrants.

The Department of Homeland Security's immigration agencies should not get a free pass in a budget review of pork-barrel and unnecessary funding. Specifically, Congress should tell the president, Napolitano, and Holder that ICE's criminal alien programs are unfocused and as such do little to improve community security and public safety, as they claim.

Secretary Napolitano has given signals that she will halt her predecessor's support for worksite raids that send hard-working immigrants to prison. She has promised to focus more on charging employers that exploit immigrant labor.

But neither she nor Attorney General Holder has thus far challenged the array of DHS and DOJ programs that as part of a "deterrence" strategy have employed the heavy hand of the law to make life in the United States increasingly unbearable for immigrants—a strategy that immigration restrictionists accurately describe as "attrition through

enforcement." Law and justice operate at cross-purposes in such a criminalizing strategy, and it's the responsibility of Holder and Napolitano to recognize this and correct it.

Rather than fixing a dysfunctional immigration system, government has since the mid-1990s moved to manage the immigration crisis through a strategy that stresses deterrence and exclusion.

Congress should also move to reinstall the separation of immigration and criminal law through legislative amendments that roll back the 1996 and other laws that have established the legal foundation for the current regime of governing immigration through crime. The executive branch is free to distance itself from this regime by dismantling its array of programs that unproductively categorize and treat an ever-growing number of immigrants as criminals and fugitives. Current funding for these programs can be used to target the immigrants who truly represent a threat to "national security and public safety."

Solutions Not Crackdowns

There is no doubt that the United States has the right to control who enters its borders and who becomes a citizen. It's just as clear that our immigration system is badly broken and that there are valid citizen concerns about illegal immigration, immigrant crime, and border security.

But instead of dealing proactively with the complexity of the problem, the United States has reacted to the immigration issue chiefly with the "get tough" strategies employed in the crime and drug wars for so long, for so much money, with so little result, and with so much tragedy. As U.S. society begins to reconsider its prohibitive and punitive response to the immigration crisis, it also would do well to declare an end to the crime and drug wars that are now so closely linked.

It's time to start solving these problems, not just "cracking down."

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