

Restoring Integrity to the Immigration System

By Tom Barry | May 22, 2009

There is broad agreement that the immigration system is broken. But reaching a political consensus on how to fix the system has in recent years proved impossible. In the absence of a comprehensive immigration reform, the government has adopted a “get-tough” posture on immigration designed to “restore integrity to the immigration system” and “uphold the rule of law.”

Immigrants are being arrested, imprisoned, and deported in record numbers. Acknowledging the short-term inability to remove all estimated 11-12 million unauthorized immigrants, the federal government has prioritized the imprisonment and removal of “criminal aliens—legal and unauthorized immigrants who have run afoul of the law.” However, in the search for “criminal aliens” and “fugitive aliens,” the government has cast an alarmingly wide and tightly woven net.

The focus on criminal aliens reflects the increasing merger of immigration and criminal law—a process scholars call “cimmigration.” Not only has immigration law incorporated components of criminal law, but the federal government has also mounted enforcement initiatives in which violators of immigration law are criminally charged and sentenced.

Concerns about the wisdom, lawfulness, and constitutionality of the immigrant crackdown are mounting as immigrant arrests increase, the detained immigrant population expands, and immigrant cases dominate federal criminal prosecutions. Over the past several years the immigrant crackdown has done little to repair the broken immigration system. Instead, the crackdown appears to have further damaged the system, creating an array of new problems and challenges that must be resolved if the integrity of the immigration system is to be restored.

Crimmigration and Immigrant Criminalization

Soon after Sept. 11, 2001 the newly created Department of Homeland Security (DHS) assumed responsibility for immigration and border control. Two new DHS agencies—Immigration and Customs Enforcement (ICE) and Customs and Border Protection (CBP)—took over the operations of the disbanded

Immigration and Naturalization Services (INS), which had been a Department of Justice (DOJ) agency. The post-Sept. 11 linking of immigration and homeland security is readily evident in the ICE and CBP mission statements.” CBP, whose main component is the Border Patrol, states: “We are the guardian of our Nation’s borders. We are America’s frontline. We safeguard the American homeland at and beyond our borders. We protect the American public against terrorists and the instruments of terror.”

As time has passed since Sept. 11 DHS and its immigration agencies have deemphasized the initial immigrant/terrorist linkage and have instead stressed that tough and comprehensive immigration enforcement is essential to the “rule of law” in the United States and the integrity of the immigration system. At her confirmation hearing, DHS Secretary-designate Janet Napolitano promised to “wisely enforce the rule of law at our borders,” and two weeks later issued a departmental directive stating that “upholding the rule of law” was a primary objective of immigration enforcement.¹

The “rule of law” framing for immigration enforcement became common in DHS after Michael Chertoff was appointed director in 2005. With respect to the DHS mission of protecting the country against what DHS Secretary Chertoff called “dangerous people,” he told Congress: “[W]e are also a nation of laws, and illegal immigration threatens our national security, challenges our sovereignty, and undermines the rule of law.”²

Tough immigration enforcement aims to reinstate respect for the rule of law and help repair the broken immigration system. ICE news releases about immigration raids commonly state that the operations help “restore integrity to the immigration system.” Explaining ICE’s program to hunt down criminal aliens

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and other immigration fugitives in a Feb. 4, 2009 release, John Torres, acting assistant ICE secretary, said that this program was part of ICE's commitment to meet the post-Sept. 11 challenge to meet "its mandate to restore integrity to America's immigration system."³

Roots in "Severity Revolution"

While the ongoing crackdown on unauthorized and criminal aliens was launched by DHS in the post-Sept. 11 political context, it has deeper roots in U.S. politics and society. Its law-and-order approach to immigration policy and its particular focus on criminal aliens are an extension of the law-and-order crackdown movement that began to take hold in the 1970s as part of the wars on drugs and crime launched by President Richard Nixon. Rather than formulate proactive measures to address rising crime and illegal drug consumption, the country attempted to solve its new social problems through law-and-order measures that sent ever-rising numbers of mostly poor, urban, ethnic, and young men to prison.

Criminal justice scholars have referred to this trend in the criminal justice system as the "severity revolution." It represented a retreat from the previously dominant modalities that emphasized rehabilitation and social welfare. In contrast, the "severity revolution" in criminal justice and penology placed a premium on deterrence and collective risk management.⁴

Despite its immense cost (\$60 billion annually) and the large number of imprisoned Americans (2.38 million), the crime-and-punishment system that has developed over the past four decades has had little impact on the levels of drug consumption and has been only marginally effective in reducing crime rates. Until recently, the severity revolution in criminal justice has enjoyed widespread public and policymaker support. But new concern about the financial costs of mass incarceration have led policymakers in several states to criticize the drug laws and harsh sentencing practices that led to mass incarceration in America, which now leads the world in per capita imprisonment.⁵

The immigrant crackdown, like the wars on drugs and crime, came as a response to a deeply problematic social issue that, like illegal drug consumption, eluded a proactive policy solution. A combination of business (demand for both cheap and skilled labor), social

(family and ethnic lobby demands for visas), and political (immigrant voting bloc) pressures, as well as a porous southwestern border and the integrative forces of globalization, have obstructed the design of immigration policy that would effectively regulate immigration flows and ensure that they are sustainable. In the absence of a comprehensive immigration policy that would integrate the millions of unauthorized immigrants living in society's shadows and effectively regularize future immigration flows, the federal government has applied the criminal justice system to the immigration problem.

Criminality as Grounds for Expulsion

Criminality has long been grounds for exclusion of would-be immigrants. Only recently, though, has the U.S. government routinely used criminality as grounds for the expulsion of immigrants. Over the past couple of decades Congress has steadily expanded the criminal grounds for mandatory detention and deportation. The most frequently used criminal grounds for detention and deportation fall into three categories: "aggravated felonies," "controlled substances," and "moral turpitude."

Although codified in immigration law, these three designations of criminal aliens are open to wide interpretation by the officers of the Executive Office of Immigration Review (EOIR) courts and DHS officials. The first step to criminalize immigration occurred as part the mounting crackdown on illegal drug consumption. The Omnibus Anti-Drug Abuse Act of 1988 introduced the concept of an "aggravated felony" into immigration law by specifying that such serious crimes as murder, drug trafficking, or illegal firearms trafficking were separate grounds for deportation. Two years later the Immigration Act of 1990 substantially limited relief for aliens convicted of aggravated felonies. Then in 1994 the Nationality Technical Correction Act expanded aggravated felonies to include common, less serious crimes.⁶

In the mid-1990s the "severity revolution" combined with two other forces in American politics—anti-immigrant backlash and fear of terrorism—to consolidate the criminalization of immigration. Although the restrictionist movement didn't enjoy its current strength and influence, the emerging backlash against

illegal immigration and liberal immigration policy in the mid-1990s was already turning the Republican Party into a restrictionist force in U.S. politics. The 1993 bombing of the World Trade Center by Islamist terrorists and the 1995 bombing of the federal building in Oklahoma City prompted the government to adopt a series of counterterrorism measures that foreshadowed the post-Sept. 11 assault on civil liberties and immigrant rights.

Two bills especially marked the onset of the beginning in 1996 of the current era of anti-immigrant reform: the Anti-Terrorism and Effective Death Penalty Act (AEDPA) and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA).⁷ Although only indirectly related to immigration issues, a third bill—the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) of 1996, commonly referred to as the Welfare Reform Bill—also marked the beginning of a more restrictive policy environment for immigrants.⁸ This latter bill prohibited legal permanent residents (LPRs) from receiving public benefits for their first five years in the country and made them ineligible for Medicare and Social Security for 10 years after getting their green cards. PRWORA also established new limits on social services for unauthorized immigrants.

The Illegal Immigration Reform and Immigrant Responsibility Act dramatically expanded the criminal grounds for mandatory detention and deportation of legal immigrants. The Antiterrorism and Effective Death Penalty Act was the legislative predecessor to the USA Patriot Act enacted shortly after the Sept. 11 attacks.⁹ All three of the 1996 laws—AEDPA, PRWORA, and IIRIRA—marked a shift away from the previously prevailing paradigm of liberal immigration policies toward increasingly restrictive and vindictive policies. The three acts established the policy groundwork for the “enforcement first” and “attrition through enforcement” practices promoted by immigration restrictionists and embraced by DHS during the Bush administration.

Congress with IIRIRA set forth ever-broader categories of criminal offenses that result in mandatory detention and (if judged correct by either the immigration court or by DHS) subsequent removal. By broadening the definition of “aggravated felony” to include many felonies and violations that would otherwise be considered misdemeanors, IIRIRA had the effect of

consolidating the criminalization shift begun in 1988. “Criminal aliens” became an expansive category of automatically “removable” immigrants. Under this expansive criminalization of immigration law, immigrants are subject to removal despite their immigration status, length of legal residence, existence of immediate family members who are U.S. citizens, or strength of their ties to U.S. community and economy.¹⁰

Over time the working definition of what constitutes an aggravated felony has lost any meaningful connection to either of its two component parts: “aggravated” or “felony.” In most cases, immigrants mandated for automatic detention and removal aren’t guilty of either an aggravated offense or a felony. Notwithstanding the felony designation, immigrants are commonly detained and removed from the country for misdemeanors (which generally mean less serious and less dangerous acts than those traditionally labeled felonies).

Criminal Alien Removals

In its study of the application of the “aggravated felony” provision in immigration law, the Transactional Records Clearinghouse (TRAC) at the University of Syracuse found that from 1992 to 2006 more than 300,000 immigrants were removed using this provision and that the numbers steadily increased annually over this period.¹¹

Perhaps most striking about TRAC’s findings was that 55% of the aggravated felony removals were by an ICE/INS administrative order rather than a court order. In these administrative removals—amounting to nearly 23,000 in 2006—the deported immigrants did not have the benefit of any hearing or adjudication of their removal orders. ICE agents alone were responsible, as the TRAC study noted, for all steps in the process—from apprehension and detention to issuing the order and deporting the individual. Administrative orders for removal for immigrants charged with aggravated felonies have steadily increased as a percentage of all such mandated deportations.

Criminal aliens that have been detained and removed under the aggravated felony statutes are oftentimes longtime U.S. residents who have been in the country since their childhood and don’t even know the language of their birth countries. On the average,

immigrants processed by EOIR from 1997 to 2006 for aggravated felonies were in the United States for 15 years before they were deported. For 25%, the average time between their original date of entry to this country and when deportation proceedings were started in immigration court was 20 years or longer, and for 10% it was more than 27 years.¹²

TRAC cited the case of Carlos Pacheco who entered the United States with a green card as a 6-year-old child. He was judged an aggravated felon based on his misdemeanor conviction for stealing some Tylenol and cigarettes. An appeals court that heard the case agreed that he was an aggravated felon and removable, but expressed its “misgivings” that Congress equated misdemeanors with felonies in its zeal to deport criminal aliens. Pacheco’s case is now one of tens of thousands in which the immigration consequences were much more severe than the criminal consequences.

Jailed Without Justice: Immigration Detention in the United States, a March 2009 report by Amnesty International USA, observed: “Lawful permanent residents can be placed in “mandatory detention” with no right to a bond hearing before an immigration judge or judicial body. It is believed that thousands of individuals are subject to mandatory detention every year. The categories of crimes that trigger mandatory detention include minor, non-violent crimes (such as receiving stolen property) committed years ago, and are broad and difficult to define.”¹³

Of those immigrants, legal and illegal, removed because of a prior criminal charge other than “aggravated felony,” the most frequent of the charges cited are those involving “moral turpitude” and use of “controlled substance violations.” The new criminal context for immigration law means that there are major “immigration consequences” of a criminal plea. Most criminal defense lawyers advise their clients to enter pleas that result in minimal or no jail time with little concern for the nature of the crime for which they plead guilty.

As immigration law expert Ira Kurzban points out: “A plea to a wrong charge could mean a long-term lawful permanent resident was subject to mandatory detention and was deported without relief.”¹⁴ In other words, a legal immigrant might plead guilty to a crime for which he spends no jail time but years later finds that he or she is detained by ICE agents, spends

months or years in an immigrant prison, and then is deported and banished permanently from the United States.

Zero Tolerance in Immigration Enforcement

Beginning in 2007 DHS embarked upon another paradigm shift in immigration law. Not only would it continue to target noncitizens that it categorized as “criminal aliens,” DHS also decided that it was necessary to criminalize the conduct of immigrants who previously would not have been criminally charged. Borrowing a phrase from law-and-order theory, DHS launched a “zero tolerance” program called Operation Streamline.

Under this pilot program, which has since been expanded, illegal border crossers picked up by the Border Patrol are not, as has traditionally been the case, turned over to ICE for detention, but rather 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.

Reflecting on the shifting paradigm in immigration law toward “criminalizing civil conduct,” Kurzban observed that “immigration lawyers must be educated in issues concerning traditional criminal law questions, such as unlawful search and seizure, rights against self-incrimination, plea bargaining, and statutory and constitutional defenses for certain federal crimes.”¹⁵

“Crimmigration” Crisis

Juliet Stumpf of Lewis and Clark Law School points out in “The Crimmigration Crisis: Immigration, Crime, and Sovereign Power,” that both criminal and immigration law primarily regulate the relationship between the state and individual, and that the line separating criminal and immigration law has blurred. Not only does the substance of immigration and criminal law increasingly overlap, but immigration enforcement by DHS and DOJ also increasingly resembles criminal law enforcement as seen perhaps most clearly in massive imprisonment of immigrants. “The rapid importation of criminal grounds into immigration law,” notes Stumpf, “is consistent with a shift in criminal penology from rehabilitation to retribution, deterrence, incapacitation, and expressive powers of the state.”¹⁶

Stumpf makes the argument that the merger of the immigration and criminal systems is, at least partly, the result of a newly restrictive sense of the social contract in America. Like criminals, immigrants are increasingly being treated as if they have few rights and have no claim to government protection because they aren’t members of our society. Not only has society since the 1970s adopted an increasingly punitive rather than rehabilitative criminal system that physically excludes them from society but in many cases also denies them benefits such as social services and rights such as the right to vote, serve in public office, or serve on a jury. Similarly, recent trends in immigration law and policy build on the assumption that immigrants have little claim to membership in society and can therefore be excluded and denied basic rights. “When membership theory is at play,” she writes, “whole categories of constitutional rights depend on the decision-maker’s vision of who belongs.”

Aside from the resulting increase in the imprisonment and deportation of noncitizens, a little considered result of this so-called “crimmigration” is that criminal aliens in the immigration system lack the constitutional protection of anyone in the criminal justice system. Although treated as criminals they don’t enjoy the protections of the Eighth Amendment against cruel and unusual punishment.

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.¹⁷

Expanding Immigration Enforcement Apparatus

The 1996 laws—IIRIRA, AEDPA, and PRWORA—established the legal groundwork for the criminal alien focus of the current immigrant crackdown. But it was not until after the Sept. 11 attacks that the government began the programs designed to enforce the criminal alien provisions of the 1996 laws. Post- Sept. 11 legislation that led to the expansion of the government’s border control and immigration enforcement apparatus included the USA Patriot Act, the Homeland Security Act, and the Enhanced Border Security and Visa Entry Reform Act. Supplementing these measures came a flurry of presidential directives, regulations, and policy initiatives aimed at strengthening homeland security through a more consistent enforcement for immigration laws and greater governmental coordination.

These new measures included the Absconder Apprehensive Initiative, the widespread arrest and detention of members of the Arab and Muslim communities under the cover of immigration enforcement investigations, and the practice under the now-defunct Operation Liberty Shield of automatically detaining and interrogating asylum seekers from 34 countries designed as terrorist host countries. As legal scholar Teresa A. Miller observed in “Immigration Enforcement and Crime Control after September 11th,” these and other post-Sept. 11 initiatives drew upon “the objectives, techniques, and discourses of a harshly punitive system of criminal justice to deal with noncitizens and the terrorist threat” and are evidence of “an evolving symbiosis between criminal law enforcement and immigration regulation.”¹⁸

The National Fugitive Operations Program was launched by the legacy INS in 2002. Congress had appropriated funds for INS “absconder removal teams” in 1996 and again in 1998, but it wasn’t until after Sept. 11 that INS launched the initiative to track down immigrants (“absconders”) whose deportation had been ordered but who remained in the country.

ICE rapidly expanded the program, saying that it “brings integrity to the immigration process.” Reflecting the government’s harder line on immigration violations, the terminology changed from absconders to fugitives, implying that the targets were criminal outlaws. While immigrants deemed threats to the national security and community safety were set as the top priorities for the new teams, ICE has used a wide net in its manhunt for “fugitive aliens.”

Collateral Damage: An Examination of ICE’s Fugitive Operations Program, a February 2009 report by the Immigration Policy Institute, found that 73% of the 97,000 people arrested by the teams during the program’s first five years were unauthorized immigrants without criminal records. The institute concluded that the fugitive operations teams—which had increased from eight in 2003 to 104 in early 2009—had experienced mission creep as part of the program’s generous congressional funding, which had increased from \$9 million in 2003 to \$218 million in 2008.

Arrests of fugitive aliens with criminal records have represented a declining share of total arrests by the teams, accounting for just 9% of total arrests in 2007, down from 32% in 2003. Fully 40% of those arrested in team raids were what ICE calls “collateral” or arrests of immigrants who had no outstanding removal order (also known as ordinary status violators).

Muzaffar Chishti, director of the institute’s Office at New York University School of Law, said: “It is troubling that a program billed as having an explicit national security focus instead appears to be aimed mainly at arresting non-criminal unauthorized immigrants through the use of SWAT-like operations—typically in residential settings—that increase the risks to law enforcement personnel and civilians alike, alienate communities, and misdirect scarce personnel resources.”¹⁹

Criminal Alien Program and Its Operations

Through its umbrella Criminal Alien Program, DHS directs Operation Community Shield, which targets immigrants judged to be members of street gangs. Describing the program, ICE states that it uses its “broad law enforcement powers, including the unique

and powerful authority to remove criminal aliens, including illegal aliens and legal permanent resident aliens.”²⁰ Under this program, ICE and local police pick up alleged gang members for immigration violations as a preemptive strike against assumed criminal activity.

Another ICE program that is casting a wide net is the 287(g) Program, under which ICE signs intergovernmental agreements that permit ICE to train local and state law enforcement personnel in immigration law enforcement. Although authorized by a 1996 amendment to section 287(g) of the Immigration and Naturalization Act, it wasn’t until 2002 that the first training agreement was signed, under which local police and sheriff deputies are “cross-designated” as immigration agents. Most of the 67 existing agreements have been signed since 2007, when ICE launched its Criminal Alien Program and made criminal alien apprehension a top priority.

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 titled *Policies and Politics of Local Immigration Enforcement* found that it has been used to “purge towns and cities of ‘unwelcome’ immigrants.”²¹

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* noted that while “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.”²²

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 gray 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.”²³

Latest Criminal Alien Initiative— Secure Communities

ICE’s latest criminal alien initiative is “Secure Communities: A Comprehensive Plan to Identify and Remove Criminal Aliens.” Rather than promoting the controversial cross-designation of local police as immigration agents, ICE encourages the “interoperability” of the immigration enforcement system and the criminal justice system by allowing local and state law enforcement to simultaneously check federal immigration and criminal databases of all those arrested. Using the language of the criminal justice system, ICE says that a strategic goal of Secure Communities, which it hopes to extend soon to all state and local law enforcement, is to “maximize cost effectiveness and long-term success through deterrence and reduced recidivism.”²⁴

Although there is generally broad public support for the program’s priority targeting of the most dangerous criminal aliens, there is rising concern that in practice there is no effective prioritization of criminal alien targets. Without internal regulations that enforce the stated prioritization of those immigrants who represent a real threat to community security, the program will involve local law enforcement in a dragnet that picks up all levels of criminal immigrants, illegal and legal. Irving, Texas, one of the first communities involved in the new ICE criminal alien program, is now beset with intra-community tensions and rising Latino distrust of local police because of increased ICE/police cooperation.²⁵

Over the past eight years the executive branch and Congress have lavished ICE and CBP with funding for

a new wave of law enforcement and border control programs. Since 2002 the budgets for the operations of these two DHS agencies have ballooned. CBP’s budget increased from \$5 billion in 2002 to \$10.9 billion in 2009, while ICE’s budget rose from \$2.4 billion in 2002 to \$5.7 billion in 2009. ICE and especially CBP have also benefited from emergency and supplemental funding initiatives passed by Congress to pay for such measures as the border fence. This additional funding gave DHS \$7.2 billion in 2007 and \$5.6 billion in 2008. The overall DHS budget has increased steadily since its creation in 2003—rising from \$35 billion to \$47 billion in 2008. But the funds dedicated to immigration control and border security have increased disproportionately, doubling in size while total DHS funding increased by just a third.

The Obama administration is asking Congress to allocate increased funds for ICE’s various criminal alien programs. The proposed 2010 DHS budget “provides over \$1.4 billion for Immigration and Customs Enforcement programs to ensure that illegal aliens who commit crimes are expeditiously identified and removed from the United States.”²⁶ Soon after becoming DHS secretary, Janet Napolitano told senior ICE officials and reporters that a top priority was removing criminal aliens from America’s streets.²⁷ DHS Secretary Napolitano has expressed concerns about the previous administration’s policy of work-site raids that ostensibly target immigrant employees more than employers, and about the large proportion of “collateral” arrests in fugitive operations raids. But thus far there is no indication that the administration intends to reevaluate ICE’s criminal alien program, given its lack of effective prioritization, its lack of internal regulations, and its double-jeopardy impact (creating severe immigration consequences for even legal residents).

At an April 2, 2009 hearing of the House Subcommittee on Homeland Security, Rep. David Price (D-NC) stated: “Last year, we directed ICE to use \$1 billion of its resources to identify and remove aliens convicted of crimes, whether in custody or at large, and mandated that this be ICE’s number one mission. I continue to believe in the wisdom of this course and want to know how ICE plans to make more progress identifying criminal aliens and deporting them once their sentences are complete. Since her confirmation, I have been encouraged by Secretary

Napolitano's public statements that she shares this perspective."²⁸

Mass Incarceration for Immigrants

The immigrant crackdown and the accompanying "crimmigration" of immigration law have led to the mass incarceration of immigrants. Throughout the country, private prison firms are hurriedly constructing new immigrant prisons for the immigrant detainees and prisoners of ICE, USMS, and the Federal Bureau of Prisons (BOP). At a time when the U.S. criminal justice system is coming under new public and congressional scrutiny because of its high costs and high rates of incarceration, the federal government—in close collaboration with local governments and the private prison industry—is imprisoning unprecedented numbers of illegal and legal immigrants.

Indicative of the growing alarm at the failure of the country's decades-long "get tough" stance on crime, on March 26, 2009 Sen. James Webb (D-VA) introduced the National Criminal Justice Act, which would establish a blue-ribbon commission to "look at every aspect of our criminal justice system with an eye toward reshaping the process from top to bottom." According to Webb, "America's criminal justice system has deteriorated to the point that it is a national disgrace. Its irregularities and inequities cut against the notion that we are a society founded on fundamental fairness. Our failure to address this problem has caused the nation's prisons to burst their seams with massive overcrowding, even as our neighborhoods have become more dangerous. We are wasting billions of dollars and diminishing millions of lives."²⁹

The mass incarceration of immigrants mirrors the greater incarceration trends in the United States. The U.S. prison population has skyrocketed, rising from about 500,000 in 1980 to 2.38 million today—nearly a five-fold increase in three decades and five times the world's average incarceration rate. In the 1994-2007 period, the number of immigrants detained on a daily average by ICE rose nearly five-fold, rising from an average daily population of 6,785 in 1994 (under INS) to 30,295 in 2007. In 2007 ICE detained a total of 311,213 immigrants—up from 231,500 in 2004, an increase of more than 80,000 in four years. Like the country's larger prison system price tag, the immigrant detention system is enormously costly. ICE alone spends \$1.7 billion annually to detain immigrants.

ICE detainees constitute the largest sector of the imprisoned immigrant population. But the number of immigrants held by USMS and BOP is also increasing rapidly. The number of immigrants held by USMS has increased more than six-fold since 1994. Over a third of the more than 180,000 USMS detainees in 2008 were immigrants. The upsurge in federal prosecutions of immigrants has led BOP to open five new privately operated prisons to hold 10,000-plus "criminal alien residents."

The rise of the immigrant population in USMS and BOP detention centers and prisons reflects a dramatic increase in immigrants being charged in federal courts. According to a study by the TRAC, prosecutions in 2008 were 70% higher than in 2003. In December 2008 the prosecution of immigrants for immigration violations accounted for 55%, while drug cases accounted for 16% of the caseload that month.³⁰

Most immigrant prisoners and detainees are held not in government prisons and detention centers but ones that are operated by private prison firms. Rather than build and operate immigrant prisons themselves, ICE, USMS, and BOP outsource their immigrant charges to an expanding network of contractors and subcontractors. In most cases, the federal agency enters into intergovernmental service agreements (IGSAs) with city or county governments in economically deprived, rural areas that are eager for a new revenue stream and a source of jobs. Only 13% of ICE detainees are held in ICE-owned detention centers, and ICE has no plans to build new federally owned and operated detention centers.

Through the IGSAs the federal government transfers to the contracting local government the operational responsibility to hold the immigrant detainees and prisoners. But then the local government usually subcontracts private prison firms to meet its contractual obligations with ICE, USMS, or BOP. The world's two largest private prison corporations, Corrections Corporation of America and GEO Corp, got their start in the prison business with INS detainees in the 1980s and remain the firms with the most immigrant prisoner business. The trail of accountability in immigrant detention is further complicated by other subcontracts for medical and transportation services.

The contracting and subcontracting of immigrant detention responsibilities would in theory not lead to

systemic problems. In practice, however, immigrant detention, which is now largely in the hands of contractors and subcontractors, is the part of the immigration system that is the most badly broken.

One indicator of the severity of the crisis in immigrant detention is the mounting death count of immigrants in detention. At least 90 immigrants have died in ICE custody since 2003, most of them in contracted and subcontracted facilities. The March 2009 death of a detainee at the Stewart Detention Center in rural southwest Georgia spurred the Georgia American Civil Liberties Union (ACLU) to issue a report condemning conditions at the detention center.

“As illustrated by the report, conditions at the CCA-run facility are grossly inadequate, even compared with ICE’s own nonbinding standards,” said Azadeh Shahshahani, National Security/Immigrants’ Rights project director with the ACLU of Georgia. “It is high time for Congress and the new administration to create enforceable standards binding ICE and corporations such as CCA to humane standards of care for the detainees and to ensure an effective and independent oversight mechanism,” said Shahshahani.

Judith Greene, director of Justice Strategies, addressed some of the detention problems resulting from the immigrant crackdown in “Immigrant Goldrush: The Profit Motive Behind Immigrant Detention,” a report written for the UN Special Rapporteur on the Rights of Migrants. She wrote:

“This fragmented immigrant detention system has long been a troubled operation, rife with human rights abuses. The recent crackdown campaigns have added strain to this poorly-managed crazy-quilt of detention beds. Immigrant rights advocates have criticized the lack of accountability of this system for many years ...

“Detention-for-dollars puts perverse financial incentives in play ... This insidious incentive cuts directly across concerns about compliance with detention standards that were created to foster a decent, humane custodial environment for the rapidly-growing number of people who are subjected to detention.”³¹

Conclusion and Recommendations

The increasing emphasis on immigration enforcement has shifted the immigration system from a regulatory system to a punitive one. This shift to enforcement and punishment has been accompanied by an increasing merger of criminal and immigration law and an increasing emphasis on criminal alien apprehension. Together, the new enforcement practices have resulted in the mass incarceration of immigrants.

Although the immigrant crackdown raises its own special concerns, the government’s harsh response to the country’s immigration problem is not a case apart. Certainly issues of race, ethnicity, citizenship status, and underground presence in our society and economy distinguish the immigration problem and the governmental response. But it’s also a response that mirrors and merges with the broader wars on drugs and crime, which the country has been fighting ineffectually for more than three decades.

Just as the country has responded to crime and drug use with deterrence and incarceration strategies, we are now responding to the immigrant problem. Isolation and exclusion in an expansive penal system have been the dominant responses to these tough social problems. Similarly, the government is largely relying on the strategies of deterrence and imprisonment to address the immigration crisis.

There’s no doubt that exclusion is central to any viable immigration policy in America. The problem here is not that the government is implementing its sovereign right to restrict foreigners from making their permanent home in the United States. Rather the government is relying disproportionately on exclusionary strategies—arrest, detention, and imprisonment—for immigrants living and working in the interior of the country.

Rectifying this imbalance in the exclusionary and integrative functions of immigration policy must be the guiding principle of the Obama administration and Congress as they seek to restore integrity to the immigration system. Many of the new enforcement and exclusion measures undertaken by DHS—such as the E-Verify employment verification program and initiatives to deport violent criminal aliens who truly represent a threat to public safety—have a rightful place in immigration enforcement.

To achieve the balance and integrity so needed in our immigration system, Congress and the administration should move to integrate the current immigrant population into our society and to guarantee their civil and constitutional rights. At the same time, an immigration policy with integrity must include clear guidelines and mechanisms to integrate new immigrant flows. Special interests, particularly business lobbies, shouldn't be allowed to set the level of new immigration. These new immigration flows must be legal and they must be economically sustainable, meaning that they don't undermine wages or working conditions of U.S. workers. An immigration policy with integrity must also be responsible internationally in that it honors our values and international commitments to provide safe harbor for refugees and asylum seekers.

Congress and the administration would also help restore the integrity of the immigration system if it moved to pass legislation and institute administrative reforms that rolled back the "cimmigration" process. The current practice of sentencing and imprisoning illegal immigrants for immigration violations should end, as should the practice of using lengthy immigrant detention as a tool to persuade immigrants to ask for deportation rather than spend more time locked up while seeking legal relief. ICE should terminate the current practice of arbitrarily transferring immigrants under custody to remote facilities far away from their families, friends, and support communities, including lawyers. While not unlawful, this practice is surely unjust and inhumane.

The federal government should end controversial and ineffective programs that involve local law enforcement in immigration enforcement. Not only does such collaboration blur the distinction between federal immigration and local public-safety responsibilities, but it also erodes the trust between local communities and police forces. Ending the new programs that promote federal/local cooperation in immigration issues does not preclude close cooperation between ICE and local law enforcement when such cooperation is critical in apprehending truly dangerous criminals.

With regard to detention, the Obama administration should end the current practice of mass immigrant incarceration. Detention of immigrants for immigration violations should not be routine, except for dangerous aliens. DHS should greatly expand its "alternatives to detention" program, which uses electronic

bracelets, reporting requirements, and community supervision to guard against flight.³² All immigrants, including criminal aliens with nonviolent records, should be eligible for these less costly methods of maintaining custody. DHS and DOJ should promulgate binding minimum standards for immigrant detention facilities, and immediately ensure that detention centers comply with the existing and nonbinding standards.

The federal government should also move quickly to take back full and direct responsibility for immigrant imprisonment. Imprisoned and detained immigrants are distributed throughout a vast public/private complex of prisons and detention centers over which the government has relinquished direct responsibility and oversight. DHS and DOJ should end its contracts with private prison firms and county governments for the operation of privately operated, for-profit prisons. By outsourcing immigrant prisoners, the federal government has played a leading role in creating a shadow prison system that is not transparent or accountable and is ridden with abuse. Immigrant detention should not be, as it is now, the most prominent feature of our immigration policy. Rather it should be used only as a last resort.

Senator's Webb proposal for a Criminal Justice Commission should receive broad public and policymaker support. In the mission to reshape the criminal justice system and America's penal system from "top to bottom," the commission and Congress should include the immigration system in their purview. Immigrants are, as should now be readily recognized, the fastest growing sector of both our criminal courts and our prisons.

To restore integrity in the immigration system, the Obama administration needs to act decisively to restore its function as a regulatory system and remove it from the country's overcharged system of crime and punishment.

The increasing emphasis on immigration enforcement has shifted the immigration system from a regulatory system to a punitive one. This shift to enforcement and punishment has been accompanied by an increasing merger of criminal and immigration law and an increasing emphasis on criminal alien apprehension. Together, the new enforcement practices have resulted in the mass incarceration of immigrants.

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