

## The Social Construction of the Criminal Alien in Immigration Law, Enforcement Practice and Statistical Enumeration: Consequences for Immigrant Stereotyping

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Historically, immigrants have been represented as depriving citizens of jobs, as welfare-seekers, or as criminals (Johnson 2004). Hispanic, and particularly Mexican, immigrants have often been stereotyped as criminals (Bender 2003; Martinez 2002). Although some lawful permanent resident non-citizens and naturalized immigrants do become involved in criminal activities (just as do some U.S.-born citizens), social science research indicates that they are predominately law-abiding (Bohnan 1985; Butcher and Piehl 1998a, 1998b; Hagan and Palloni 1998). Generally, the term “immigrant” has positive connotations in relation to the development and operation of democracy and U.S. history while “illegal aliens” are vilified. What would be normal activities for citizens and lawful permanent resident non-citizens—job seeking and use of social welfare services, for example—is criminalized for undocumented entrants and those who stay longer than their temporary visas permit. Political attacks on unauthorized immigrants emphasize lawbreaking. But is looking for or working a job what we normally view as law-breaking? Welfare fraud is a recognized criminal activity, but when citizens think of crime, they are often fearful of homicide, drug pushers, mugging, burglary, rape and, organized crime, including drug cartels, and recently, terrorists. The media often fosters moral panic and indignation by emphasizing that citizens are fearful that immigrants take jobs, put a drain on social services and commit crimes (Welch, 2003). Media stereotyping concentrates on drug traffickers and gangs, and has depicted Arab and Muslim Americans after 9/11 as terrorists. With the exception of drug traffickers and drug users, these are not the public stereotypes of a common criminal. In the public mind, a consistent

association is made between specific immigrant groups and organized crime (Kleinknecht 1996), but that should not be a reason to stereotype an entire aggregate grouping. Indeed, the diversity of immigrant groups makes it difficult to make generalizations about immigrants and crime (Mears, 2001).

Social construction of immigrants as “criminal aliens” is increasing due to what Kanstroom (2000) has called the “criminalization of immigration,” which involves the unification of social control of both immigrants and criminals through integration of deportation with criminal justice system operation (Welch 1996; 2002; Miller 2005b). In the 21st century, legislation authorizes the collateral civil penalty of deportation for lawful permanent and unauthorized residents convicted of specified felony and misdemeanor crimes (Miller 2005a; Kanstroom 2005). This augments the classification of border crossers as criminal. The crime of crossing the border without authorization is both overt and latent. Inda (2006: 109) writes: “... ‘illegal’ immigrants are always already in violation of the law.” Border crossing violates ideas about “order and authority.” Unauthorized entry and repeatedly detected border crossings are offenses which can result in federal incarceration. Nevertheless, although undocumented immigrants are viewed as criminals, this is not the same as committing felony F.B.I. index crimes. Yet the tightening of social control over immigrants has resulted in making undocumented U. S. entry a more frequently prosecuted felony crime with increased sentences and a greater amount of time required to be served in federal prisons (Scalia and Litras 2002).

Furthermore, social control of lawful resident non-citizens has been augmented by the creation of “aggravated felonies” (Miller 2005a; Kanstroom 2005) that activate a civil deportation penalty for resident aliens who committed and served time for crimes in the past. This could be described as “re-criminalization.” Permanent resident aliens who served time and were released are now being deported once they are located and brought to official attention, especially if they are Arab, Muslim (Miller 2005b), or Mexican. Yet because of the lack of transparency in Office of Immigration statistics, we do not know if immigrants designated as criminal aliens are being deported for: (1) past crimes while residing crime-free; (2) upon release from incarceration for past crimes; or, (3) for the felony crime of repeated border crossing as opposed to the types of

street crime the public has reacted to with moral panic.

Social construction of a criminal alien problem is being assisted in resurrection by the Office of Immigration Statistics. Current tabulations from 1991 through 2004 (Office of Immigration Statistics 2004) give the appearance of a dramatic three-fold increase in deported criminal aliens between 1991 (14,475) and 2004 (42,510), or—as the press might say—“in the tens of thousands.” This increase is parallel to previous legislation impacting upon the War on Drugs, the War on Crime and initiatives for border control prior to the War on Terror. It is important that we question whether or not there has been an actual increase in immigrant crime or, instead, simply a change in how resident criminal aliens are currently handled due to a severity revolution in criminal punishment (Miller 2005b). One might ask if there is an actual immigrant crime wave or simply a manufactured process of creating criminal alien deportees through changes in the law which parallel the contemporary emphasis on incarceration for criminal citizens. Deportation becomes a method of final incapacitation for social control (See Jackson and Parkes, this issue). To understand if immigrant crime is increasing, this essay examines research on the issue, especially focusing on Hispanics and Mexicans, and how the federal government count of criminal aliens is presented. It presents the thesis that changes in immigration law creating retroactively deportable aggravated felonies and further prosecution of undocumented entry and re-entry is creating a non-transparent increase in deported criminal aliens. This process of re-criminalization through changes in immigration law makes it appear that immigrant crime has greatly increased in the present when it may have occurred in the past or due to new prosecution policies regarding unauthorized entry which inflates the criminal alien deportation statistics. We will begin by examining evidence that immigrants have a lower potential for criminality and a lower rate of criminal recidivism.

### **History of Immigrant and Crime Research**

The “immigrant-crime nexus” (Mears 2001: 1) has been a public concern from colonial times to the present. Immigrants have

often been stereotyped as criminal because of an alternate ladder to social mobility in populations under economic strain: organized crime. Jewish gangsters, the Italian Mafia, Chinese triads, and Mexican and Central American drug cartels typify ethnic organized crime (Bodhan 1985). Recently, the emergence of new organized crime syndicates among Russian, Eastern European and South Asian immigrants has been recognized (Kleinknecht 1996). Nevertheless, research has generally demonstrated both a lower crime rate among immigrants and a lower level of recidivism (Butcher and Piehl 1998a; 1998b; GAO 1987; Hagan and Palloni 1998).

Yet immigration, particularly among Hispanics, is constantly linked to crime in the media (Bender 2003; Martinez 2002). Media accounts and statistics, however, have failed to differentiate between lawful permanent resident and undocumented non-citizen crime (Butcher and Piehl 1998) or crime committed related to undocumented immigration, but not by the immigrants themselves (Mears 2001). McDonald (1997) observed that immigrant crime patterns may be related to victimization rather than commission of offenses. Hagan and Palloni (1999) found that there was a societal focus on the relationship between Hispanic immigration and crime, but that several factors served to inflate the statistics and create a mythology of Hispanic criminality. Hispanic immigrants are disproportionately young and male, an age and gender group more prone to crime commission. A logit regression analysis of data from the U.S.-Mexico border cities of San Diego, CA and El Paso, TX found that Hispanic immigrants are disproportionately arrested, detained before trial, convicted, and incarcerated. Further analysis showed that the youth of the Hispanic immigrant population and the risk of detention prior to trial (which implies lack of access to bail money and legal resources) as well as harsher sentencing guidelines impacted on the difference in crime rates between Hispanic immigrants and the general population. Revised estimates controlling for these social factors indicated that the general citizen population is more crime prone than Hispanic immigrants.

Ramirez (2002) studied homicide rates among Latinos in Chicago, El Paso, Houston, Miami and San Diego. He found that: "Latinos have lower homicide rates... because they exhibit higher levels of social integration, especially as measured by labor market

involvement.” Concentrated unemployment and joblessness is lower in Latino than in other impoverished minority communities. Latino immigrants have recurrent contact with their homeland and tend to perceive their status in the U.S., however impoverished, as better than the conditions they left, reducing relative deprivation. Refuting the idea of an immigrant connection to crime, Ramirez found no evidence that Latino immigrants were more crime-prone than native-born Latinos or that undocumented Latinos in San Diego were any more involved in violent crime than native-born Latinos. This replicates prior research disputing a connection between Hispanic immigration and increased crime.

Despite prior research, Horowitz (2001) concludes that we underestimate the extent and severity of immigrant crime. He highlights the case of Rafael Resendez-Ramirez, an undocumented Mexican entrant who pled guilty to multiple murders committed in Texas and asked for the death penalty. This case has not proven to be a catalyst for public fear of Mexican immigrants but, it is used as a red flag, as Resendez-Ramirez committed four murders in the United States after being released from Border Patrol custody to return to Mexico and then re-entering. Horowitz (2001) has pointed to the increasing deportation of criminal aliens from 1993 to 2000 reported by the Immigration and Naturalization Service (INS 1998) and suggested three reasons why both prior research and Office of Immigration Statistics could represent an undercount of immigrant crime: (1) immigrant culture which views dealing with crime as a family issue, not a public one; (2) immigrant fear of reporting crime to the police; and, (3) foreign-born criminals who are protected by organized crime. Horowitz suggests that a vast amount of immigrant crime is not reported and cites statistics on the rapidly increasing rate of criminal alien deportation. We could well ask: how are the criminal alien figures he cites created?

### **Statistically Constructing the Problem of Unauthorized Immigration and Crime**

Immigrants are numerically constructed as ‘illegal’ through technologies which provide population counts, statistics, and economic forecasts (Inda 2006). Since the 1970s, computerized data

technologies for counting legal and undocumented immigrants have been used by the Immigration and Naturalization Service, and currently the Department of Homeland Security, to stimulate legislation which constructs “illegality” (De Genova, 2002). Demographers, statisticians and social scientists are also active in creating and deconstructing numerical estimates of unauthorized entrants. Inda (2006) argues that this process makes illegal immigration visible and publicly recognized as major and growing. Since 1970, the media in conjunction with the federal government and politicians have used these enumerations to continue socially constructing undocumented immigration as a social problem. He notes that the passage of the Immigration Reform and Control Act of 1986 (IRCA) did not reduce undocumented entrance and that anti-immigrant public reaction peaked with the passage in California of Proposition 187 in 1994. Concurrent with this, it should be considered that Mexican immigrants and the U.S.-Mexico border are typically targeted as the major source of the problem and statistical enumerations are presented to support this idea, including the *Office of Immigration Statistical Yearbooks*. In the first decade of the 21<sup>st</sup> century, statistics on big increases in criminal alien deportation are being generated by the Office of Immigration Statistics (2004) due to changes in immigration law before 9/11.

### **Immigration Law, Incarceration and Civil Deportation**

The War on Crime, the War on Drugs, and the War on Terror have impacted upon the number of incarcerated immigrants and the number of deported criminal aliens (Miller 2005a; Kanstroom 2005). Inda (2006: 20) describes this as: “governing through crime,” a concept developed by Simon (1997: 174). Increasingly, the use of zero tolerance policing, three strikes and you’re out, preventative detention, and post-detention surveillance has created a prison industry geared to containment for citizens and incarceration followed by deportation for non-citizens, rather than rehabilitation for the purpose of re-integration into the social fabric.

Zero tolerance policing involves efforts to contain public drunkenness, drugs, prostitution, and misdemeanor level offenses (McArdle and Erzen 2001). This effort is embraced by the public

because it increases the civility of urban environments but, it has negatively impacted on the homeless and immigrants. Three strikes laws have greatly increased the number of offenders imprisoned for long terms, which would include a component of resident aliens and naturalized citizens. Imprisonment has become preventative detention for incapacitation (Waquant 2001) rather than a major attempt to change individual mind-sets and educate or retrain for productive livelihoods. For citizens, release from incarceration means increased post-detention surveillance and substantial civil penalties. For resident aliens, release from prison is connected to deportation without due process because immigration law is a form of civil, not criminal, law and deportation is a civil penalty (Miller 2005a; Kanstroom 2005). Citizenship reverts to the country of origin, if there is a deportation agreement. Otherwise, the prospect of indefinite detention looms (See Snowden and Toth, this issue).

### **Criminal Aliens**

Since the early 20th century, criminal aliens have been subject to deportation for certain offenses such as the ambiguous “moral turpitude” (Johnson 2004). In 1988, the Anti-Drug Abuse Act created the “aggravated felons” legal classification, which made immigrants convicted of murder, drug or firearms trafficking subject to deportation after serving their time (Miller 2005a). An Institutional Removal Program (IRP) expeditiously deported criminal aliens from prison without further detention. Since 1988, the scope of IRP deportation has been recurrently legislatively expanded.

After the War on Drugs began, more Hispanic immigrants were incarcerated for drug offenses. 1991 prison statistics analyzed by Hagan and Palloni (1999) indicated that almost half of non-citizens imprisoned were found guilty of drug offenses; nearly forty percent had used drugs in the month before arrest; and about twenty percent committed an offense under the influence of drugs. Yet, among Hispanic immigrants, rates of conviction for drug related crime was lower than in the general population. Hagan and Palloni (1999) found that drug crime was not typical of legal or unauthorized Hispanic immigrants in their examination of San Diego and El Paso data. Their most important finding was that pretrial detention has

the latent consequence of increasing the likelihood of conviction and incarceration. Subsequent to serving time, permanent resident or undocumented non-citizens are liable to deportation for drug convictions.

The likelihood that immigrants would be re-classified as criminal aliens was increased by successive legislative expansion of the aggravated felonies classification. The Immigration Act of 1990 included any crime of violence with a sentence of five or more years. The Immigration and Technical Corrections Act of 1994 expanded aggravated felonies to include additional, but not all, offenses in the following categories: (1) firearms and explosives; (2) theft and burglary; (3) fraud and prostitution; and, (4) other specified offenses. Next, The Oklahoma City bombing led to The Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996 which added: (1) gambling; (2) transport for purposes of prostitution; (3) alien smuggling; (4) passport fraud or other document fraud; (5) commercial bribery; (6) forgery; (7) counterfeiting; (8) vehicle trafficking if the conviction is more than five years; (9) previously reported offenses committed by an alien; and, (10) offenses related to skipping bail subject to a sentence of two or more years. The Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA) included: (1) rape; and, (2) sexual abuse of a minor. IIRAIRA also lowered the length of sentence and monetary amount qualifying thresholds for many crimes previously defined as aggravated felonies. Post-1996 crimes of "moral turpitude" are punished more harshly than under the old law. Morawitz (2000) reported this example: In the past, a non-U.S. citizen convicted of a shoplifting misdemeanor but given a suspended sentence could not be deported until after two convictions and was then eligible for relief from deportation. Now, such an individual would be deported after the first offense. Non-citizens who are not aware of changes in the law are highly jeopardized. Tyndall (1996) pointed out that defense counsel may provide misinformation or fail to provide information about the possibility of deportation after advising a permanent resident alien to plead guilty. Fortunately, permanent resident non-citizens can challenge criminal convictions as a result of a guilty plea based on the Sixth Amendment right to effective assistance of counsel or the requirement that pleas be intelligently and voluntarily rendered (Kozlov, 1992).

The chief impact of the creation of the aggravated felony categories was that non-U.S. citizens with criminal convictions were made retroactively subject to mandatory detention and deportation without consideration of extenuating conditions (Horowitz 2005a; Kanstroom 2005). Crimes now subject to mandatory detention and deportation include: (1) misdemeanor convictions of at least one year (example: shoplifting); and (2) criminal convictions prior to 1996 which were reclassified as “aggravated felonies” under AEDPA and IIRAIRA. All categories of non-U.S. citizens including lawful permanent residents were made subject to the ruling.

These major changes in deportation were made possible because loss of the right to reside in the United States is a collateral civil penalty for non-citizens convicted of crimes (Horowitz 2005; Kanstroom 2005). Reclassification of non-citizen crimes as deportable was viewed as regulatory, not punitive, so constitutional provisions for due process and other rights of criminals were not applied. Under criminal law, the U.S. Constitution, Amendment V (“...[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb...”) is referred to as the constitutional guarantee against double jeopardy. It places a restriction upon government that protects individuals from multiple criminal punishment for the same crime. Because of a distinction between criminal law and civil law, under which immigration policy falls, non-citizens have been denied due process although they are covered by the Constitutional guarantee of due process (See Snowden and Toth, this issue). The aggravated felony classification is retroactive, involving re-criminalization. A legal argument can be made that non-citizens have been made subject to double jeopardy. Lon Fuller (1969), a procedural natural law theorist, stressed that a valid law could not be retroactive. Non-citizen convictions for aggravated felony offenses carry the following retroactive or current consequences: (1) mandatory detention; (2) after removal, an individual cannot re-enter for twenty years; (2) penalties for re-entry after removal are increased; and, (4) all aliens, including permanent residents are not eligible for cancellation (relief from deportation) for their entire lives (Lancaster 2003).

A summary of measures enacted by AEDPA and IIRAIRA is given by Kanstroom (2005: 174) and numerically listed in this essay as:

- (1) The elimination of judicial review of certain kinds of deportation (removal) orders (Immigration and Nationality Act (INA) 242, 8 U.S.C. 1252 (1999));
- (2) Major changes to many grounds of inadmissibility and deportation (INA 212, 8 U. S. C. 1182 (1999); INA 237, 8 U.S. C. 1227 (1999));
- (3) Elimination and Limitation of some discretionary waivers of deportation (INA 240(A), 8 U.S.C. 1229 (b) replacing 212 (c) and former suspension of deportation with more restricted forms of relief known as cancellation of removal);
- (4) Dramatic, often retroactive, expansion of criminal grounds of deportation (INA 101(a) (43), 8 U.S.C. 1101 (a) (43) (adding retroactive felony grounds);
- (5) Mandatory detention for certain classes of non-citizens (INA 236, 8 U.S.C. 1226 (listing rules governing apprehension and detention of aliens));
- (6) Expedited deportation procedures for certain types of cases (INA 238, 8 U.S.C. 1288 (1999));
- (7) Creation of a new system with extremely limited judicial review, for the summary exclusion from the United States of certain non-citizens who lack proper documentation (INA 235, 8 U.S.C. 1225 (1999));
- (8) Authorization for vastly increased state and local law enforcement involvement in immigration matters (INA 103 (a) (8), 8. U.S.C. 1103 (a) (8) (1999)); and
- (9) A new type of radically streamlined “removal” proceeding- including the possibility of using secret evidence—for non-citizens accused of terrorist activity (INA 501-507, 8 U.S.C. 1531-1537 (1999)).

IIRIRA expanded this program to most deportable non-citizens. The Immigration Act of 1990 strengthened this program by requiring states to notify federal authorities of alien convictions. Aggravated felony designations work with the IRP program to greatly increase criminal alien deportations. Gallagher (2001) indicates that there were 1,000 deportations in 1984. After these changes in immigration law, the Department of Homeland Security, Office of Immigration Statistics (2004) reported 42,810 criminal alien deportations in 2004. This looks like a large increase in immigrant crime, but it is due to changes in immigration law and increased enforcement rather than a crime wave.

## **Incarceration and Immigrants**

Before 9/11 the incarceration rate of certain immigration offenders increased from 57% in 1985 to 91% in 2000 (Scalia and Litras 2002). Sentencing policy changes and increased prosecution have resulted in this incapacitation. Eighty-seven percent of individuals charged with an immigration offense were Hispanic. Increased Southwestern border control activity and stiffer sentencing for felony immigration offenses contributed to this increase. As a result, non-citizens accounted for two-thirds of the growth in the federal prison population from 1985 to 2000. Only one-third of individuals charged with unlawful entry and approximately 25% of those charged with visa offenses had any prior U.S. arrest history. Individuals are now being federally incarcerated for undocumented entry and repeated undocumented entry.

It is undeniable that a certain proportion of non-citizens sent to federal prison are serious offenders who repeatedly cross the border without documents. Between 1985 and 2000, the number of individuals arrested for drug trafficking offenses increased from 1,799 to 7,803. Fifty-six percent of non-citizens charged with re-entry had prior violent or drug-related convictions. No data is available on whether those with drug-related convictions were being used as “mules” for drug transport to cross the border as opposed to drug cartel members or convicted of having drugs in their possession. Drug-related crime is a red flag offense with culpability, but what degree of culpability?

In 2000, 16,492 people were referred for suspected immigration offenses (Scalia and Litras 2002). Unlawful entry and re-entry can result in a felony conviction. Seventy-five percent were officially charged with unlawful entry (25%), or re-entry (50%) while twenty percent were charged with alien smuggling and the rest committed visa violations or other immigration related offenses. Approximately seventy-one percent of individuals officially charged with unlawful entry and 94.8% of those charged with re-entry were given prison terms. During 1999, the Immigration and Naturalization Service removed 1.8 million undocumented individuals, most by voluntary departure, and incapacitated 9,500 non-citizens for entry or re-entry. How were the 25% imprisoned for undocumented entry chosen? Were all individuals who re-entered

subject to being held and prosecuted? Or were the individuals tried selected as examples of what could happen? Eighty-seven percent of those charged with unlawful entry or re-entry were Hispanic and from Mexico. Thus, federal prisons are increasingly housing Mexicans for undocumented entry or re-entry. This increase in imprisonment of Mexicans for violation of immigration law parallels increases in minority citizen imprisonment and provides another social control buffer for the mainstream non-Hispanic white population.

Parallel to immigration incapacitation, changes in federal sentencing guidelines have resulted in far greater incarceration of native-born minorities and Hispanic Americans than non-Hispanic whites. Holman (2001) indicated that prison statistics which group Hispanic and non-Hispanic whites together disguise the great degree of under-representation of the non-Hispanic white population in prison. Using 1997 data for eleven states and the federal prison population and breaking it down by race-ethnicity, he found that data which lumped Hispanic and non-Hispanic whites showed a 41% rate of imprisonment for whites which included a 17% overcount (74,074) comprised of Hispanics. Non-Hispanic whites were 75% of the general population and 35% of prisoners. African Americans were over-represented as 45% of the prison population, as compared to 11% of the general population. Hispanics were 16% of the prison population as compared to 10% of the general population. Holman (2001) found that the gap between the non-Hispanic white and "non-white" population imprisonment rate had doubled from 1985 to 1997, from 15% to 30%. This racial-ethnic divide is not accounted for by differences in drug use—it is due to differential treatment by the criminal justice system because non-Hispanic whites are less likely to be arrested for a comparable or higher rate of drug use and more likely to be given probation.

The Sentencing Project (2004) indicates that 161,673 persons were held in federal prison in 2003, 55% of whom were serving time for drug offenses. Since implementation of federal sentencing guidelines in 1989, Hispanics are 40% more likely to be federally imprisoned. In 2002, 283,000 Hispanics were in jails, state and federal prisons (The Sentencing Project 2003). Thirty-two percent of those in federal prison were Hispanic. Hispanic men were found to be four times more likely at some point in their life to be imprisoned

than non-Hispanic white males and to be one-third less likely to be released prior to trial, a social factor Hagan and Palloni (1999) connected to a higher likelihood of conviction among Hispanic immigrants. The Sentencing Project (2003) observed that differences in ethnic classification of prisoners may obscure an even higher rate of Hispanic incarceration. No statistics exist for examining the extent to which imprisonment includes lawful resident and undocumented non-citizens.

Thus, there is an increase in incarceration of native-born minorities, including Hispanics which is paralleled by the aforementioned increase in federal incarceration of Hispanic non-citizens. Is there a criminal alien or Hispanic criminal alien crime wave?

### **Criminal Alien Costs**

Criminal aliens are defined as: “Noncitizens who are residing in the U.S. legally or illegally and convicted of a crime (GAO 2005: 7).” The federal government enumerates criminal alien deportations for two reasons: (1) to keep track of why resident aliens are deported; and (2) to figure out how much incarceration costs federal, state, and local government. These appear to be neutral reasons, but increasing criminal alien deportations and incarceration costs have created a local and state fiscal issue.

There is a special category of State Criminal Alien Assistance Program (SCAAP) non-citizens (GAO 2005: 7). The federal SCAAP applies to certain undocumented individuals who were incarcerated and met legal requirements for partial federal reimbursement which can be received by local and state jurisdictions. Individuals eligible for reimbursement are those who have a felony conviction or two misdemeanors and were imprisoned for a minimum of four days, individuals entering ‘without inspection’ (no documents); residents subject to immigration removal proceedings when taken into custody (retroactive deportation for prior criminal offenses) or individuals legally admitted who did not maintain non-immigrant status, such as visa overstaying. The SCAAP does not necessarily cover all costs for incarceration which local and state governments incur. This is a potential conservative political issue in

the making and the Federation for American Immigration Reform (F.A.I.R.) is making the number and cost of criminal aliens held a fiscal concern in terms of federal and state costs, especially since SCAAP only partially reimburses state and local governments. Meanwhile, there appears to be a huge increase in alien criminality which is raising costs.

The potential for increased criminal stereotyping of immigrants is increasing. For example, the “ICE Ten Most Wanted List” (Miller 2005a) is among the publicity techniques to heighten concern about criminal aliens. Often, these individuals are wanted for violating a civil order of removal for crimes previously committed for which time was served. They are on the list because their location is not known. These individuals are listed as criminally dangerous despite lack of recent criminal warrants. Is this “Most Wanted List” of the same consequence as the famous F.B.I. “most wanted” list?

### **Criminal Alien Statistical Enumeration and Incarceration Cost**

The number of criminal aliens incarcerated has been steadily increasing over time. Table 1 shows that in 1991, 14,475 criminal aliens were deported. In 2001, 42,000 were deported while 49,000 were removed by the end of 2004 (GAO 2005). These statistics make it look like immigrant crime has vastly increased. Nevertheless, both retroactive deportations and increased imprisonment for undocumented entry or re-entry would produce an increase in criminal aliens held that cannot be precisely detected from the statistics, as reported, because they do not identify the time period of the offense.

In 2004, a majority of criminal aliens were from Mexico (GAO 2005). Is there a possibility that Hispanic and Mexican immigrants will again be subjected to negative publicity campaigns—about criminality and prison costs? In the time period from 2001 to 2004 the cost for imprisonment of non-citizens was \$4.2 billion of which \$1.6 billion was SCAPP reimbursements. At the federal level, 42,424 (2001); 44,073(2002); 46,063 (2003); 48,708 (2004) have been held. In 2004, the nationality of prisoners held was as follows:

Mexico (63%); Columbia (7%); Dominican Republic (7%); Jamaica (4%); Cuba (3%); El Salvador (2%); Honduras (1%); Haiti (1%); Guatemala (1%); and other (11%). Will conservatives use these statistics to stigmatize resident aliens and alarm the public about costs, particularly those related to Mexican immigrants?

At the state level, in fiscal year 2002, 50 states were reimbursed for holding 77,000 criminal aliens (GAO 2005). In fiscal year 2003, 47 states were reimbursed for holding 74,000. In 2003, Arizona (4,200), California (30,200), Florida (5,200), New York (5,700) and Texas (11,200) held approximately 76 percent of criminal aliens. In mid-2003, these states predominately held Mexican citizens (58%). Countries of origin of incarcerated individuals included: Dominican Republic (5%); Cuba (5%); El Salvador (4%); Jamaica (3%); Viet Nam (2%) and Other (22%). The GAO estimates that the states in this listing spent \$1.6 billion to hold these individuals and were reimbursed 233 million. At the local level, in 2002, SCAPP reimbursed 752 local jail systems for holding 138,000 (GAO, 2005). In 2003, 698 jurisdictions were reimbursed for 147,000. In 2003, five local jail systems held 30 percent of criminal aliens: Los Angeles County, California (18,900), New York City, New York (8,100), Orange County, California (7,800), Harris County, Texas (4,600) and Maricopa County, Arizona (4,300). Sixty five percent of individuals held in those jails were born in Mexico. Other individuals held were of the following nationalities: El Salvador (6%); Guatemala (3%); Honduras (2%); South Korea (1%); Viet Nam (1%); Dominican Republic (1%); Philippines (1%) and other (20%). The GAO (2005) estimated that four of these five jail systems spent \$390 million on incarceration and that they received \$73 million in SCAAP reimbursements. Issues of stigmatization and fiscal cost are being brought as close to the taxpayer as can be possible.

One interesting omission from Office of Immigration Statistics is information on Middle Eastern or Muslim immigrants held in relation to the post 9/11 intelligence gathering sweep. Presumably, Middle Easterners held and questioned during the post 9/11 sweep are "immigrant detainees," not listed as criminal aliens, unless they were found to be holding fraudulent documents. There is a great deal of shadow in the statistics on government immigration enforcement which make it difficult to enumerate human rights concerns.

Clearly, the new immigration laws and collateral civil penalties can be used as a ready tool to socially control suspect populations who are deprived of due process because of resident non-citizen or unauthorized status.

Cole (2003) reports that U.S. Department of Justice mass sweeps of ethnically targeted “suspected terrorists” did not produce any significant results other than public harm and humiliation of resident aliens. In May, 2003, only 3 of the 1,200 “suspected terrorists” arrested in the seven weeks after 9-11 and no individual among the 4,000 arrested since then could be charged with terrorism (GAO 2003; USDOJ, Office of the Inspector General 2003). At what human cost and for what limited social benefit is the federal government pursuing suspected terrorists among new immigrant communities?

## **Conclusion**

Criminal alien deportation and incarceration statistics need to be based on uniform guidelines and disaggregated over time to understand the increase. The civil penalty of deportation has been retroactively applied and incarceration varies in length of time. Therefore, criminal alien deportation statistics include individuals who committed a crime in a prior year, even the far past, or non-citizens released from incarceration for either a crime or an immigration offense which may have been committed in the same year or prior years. This produces inflation of the statistical enumeration of criminal alien offenders based on a lack of relationship between the year an individual was deported and the year in which an offense was committed. In addition, legislation which re-criminalized the past crimes of permanent resident aliens and the increase in federal incarceration of unauthorized first time or prior entrants has greatly increased criminal alien deportation. Immigration convictions based on first time entry or re-entry without commission of any criminal offense should also be disaggregated in these statistics. Office of Immigration statistics which imply a rapidly increasing immigrant crime wave will promote stereotyping on a very dubious basis in a nation already suffering a xenophobic reaction to the new immigration and the threat of terrorism.

This practice of applying civil penalties have been referred to as a “civil death” disproportionately impacting racial-ethnic minorities through such loss as the right to vote (Holman 2001) but, they burden permanent resident immigrants through the possibility of retroactive criminalization. This form of social control marginalizes immigrant and native-born minorities but not non-Hispanic whites, a group which has access to significantly greater social capital. Indeed, Stewart Anderson, a Canadian who rode the famous thoroughbred, Smarty Jones, was identified as deportable due to a felony assault conviction in the United States, but he obtained an immigration waiver. Welch (1996) views detention and increased incarceration as an actuarial approach which reduces re-integration of stigmatized populations through a process of managerial processing of large aggregates based on social categories related to nationality.

The War on Terrorism has had one impact on stigmatization of undocumented immigrants as criminal. Although Mexican immigrants have been the primary source of undocumented border crossers and represented as a fiscal burden to the nation-state, those “OTM” (Other than Mexican) or “foreigners” are viewed as the primary terrorist threat (Inda 2006). The hidden message is that Muslims are a threat, as the 9-11 hijackers were all of Muslim religious background and the open message is that all land borders and ports of entry are vulnerable. Ida (2006: 121) considers this new issue as primarily an ethical one linked to past representation of immigrants. He states that unauthorized immigrants, whether or not they are connected to terrorism are: “deemed to be irresponsible non-citizens tied to communities of anti-civility and uncommitted to the rule of law.” Every undocumented entrant is represented as a potential terrorist and punitive reaction will likely be increasingly unquestioned and legitimized unless vigilance regarding human rights and citizens’ loss of civil liberties is maintained (See Costanza and Kilburn, this issue).

When we consider our three ‘Wars’—‘Drugs,’ ‘Crime,’ and ‘Terror’—we need to reflect upon whether criminalization and use of civil penalties in immigration law is being expanded both as a tool of social control and as a potential device for demonstrating that the government is effective in removing “undesirables” to control a manufactured public fear. Conservative politicians need

issues, and “criminal aliens” and their fiscal costs have the potential for being drawn into the media limelight. Mexican undocumented immigrants are especially likely to be fiscally targeted, but the War on Terror also impacts Arab and Muslim Americans.

Re-criminalization of acts for which a resident was convicted and for which they served time for the purpose of deportation results in an unknown level of increase in the number of criminal aliens deported each year and makes it look like there has been a vast increase in immigrant crime and/or more effective enforcement on paper. Convicting non-citizens of undocumented entry or re-entry is a recent practice which is also inflating the criminal alien incarceration and deportation statistics. Office of Immigration Statistics that are taken at face value and not considered as artificially inflated could be used to bolster a traditional type of attack on immigrants, identifying them as criminals, and the public could be encouraged to fear new immigrants and stereotype them. Wouldn't it be better to develop a clearer system of immigrant statistical enumeration and to fight for a return to the right of due process for resident aliens involved in deportation proceedings? Re-criminalization through retroactive changes in immigration law which create deportable aggravated felonies is problematic because it places resident aliens who have served time for offenses and often lived problem-free lives afterward in double jeopardy. It is like being punished for the same crime twice, which is unconstitutional unless a verdict is under appeal. It also increases the atmosphere of a hostile mode of reception (Portes and Rumbaut 2001) for many immigrant groups if the public is encouraged to think that immigrants have a high crime rate based on the increase in the number of criminal aliens incarcerated or being deported each year.

A hostile reception that decreases opportunity for social mobility could potentially increase immigrant crime, most likely in the second generation or third generation of the citizen-born, due to social strains due to low income caused by a segmented assimilation process in which some immigrant groups prosper while others are held back. This would reinforce the connection between immigrants and crime in the public mind and could produce the latent consequence of actually increasing crime instead of socially incorporating the labor force that employers encouraged to come.

Martinez et. al. (2004) found some support for a negative

impact of segmented assimilation upon Latino immigrant crime. Yet economic deprivation was the strongest predictor of drug related homicide in San Diego and Miami, not percent Mexican immigrant. Mexican communities in San Diego were poor, but working, which the researchers speculate provided sufficient social capital to act as a buffer against crime. In San Diego, however, neighborhoods with a higher proportion of young male Mexican recent immigrants susceptible to downward assimilation had a higher incidence of drug-related homicides. Martinez et. al. indicated that economic conditions are a stronger predictor of drug homicide than ethnic or immigrant composition of a neighborhood. This finding is supported by California survey data which showed that unauthorized status of Latinos did not impact the probability of being arrested for a drug related or economic crime (Marcelli 2004).

The drug trade is the source of major stereotyping of Latinos in the cinema. *Mi Vida Loca* and *Traffic* are examples of films which connect Latinos to drug-related crime and gang involvement. Politicians use stereotypes of Latino drug lords, cartels and gangs to motivate immigration-related moral panic, yet Ramirez (2002) found no evidence that Latino neighborhoods have high rates of drug-related violent crime. What we do find, however, in Department of Justice statistics, is that 56% of those charged with a re-entry immigration offense had previously been convicted of a violent or drug-related felony (Scalia and Litras 2002). U.S.-Mexico border cities, such as San Diego have been major ports of entry for drug traffickers and the Barrio Logan in San Diego, because of the crack business, had major gang involvement and the highest rate of drug-related homicide of cities studied by Ramirez (2002). Drug trafficking involves repeated efforts to cross the border and it would be useful to know if apprehended individuals are professional traffickers or 'mules' who have been again recruited for transport but not a part of a cartel organization. The apprehension of drug traffickers and high ranking drug cartel members, not 'mules', should be a key priority of immigration enforcers. The social control of new immigrant communities, including Hispanics, by incapacitation and deportation is, however, far more expansive than the drug problem and very questionable.

Finally, we must consider if justice is done if resident aliens are deported for crimes for which they served time in the past when they

have not evidenced recidivism. The purpose of the law is primarily to deter crime and secondarily to punish and incapacitate as a mode of further deterrence. How can retroactively enacted law deter a crime in the mind of an individual? It may tighten social control of resident aliens and even give the government a tool for deportation and incapacitation by removal which can especially be used on immigrant populations connected to terrorism: Arab and Muslim Americans who are being highly scrutinized. Nevertheless, is that just? Terrorists such as the 9-11 hijackers avoided criminal acts to prevent detection. The federal government is unlikely to prevent terrorism through retroactive criminal deportation. Because of the lower rate of recidivism among resident non-citizens, it is unlikely to deter crime. It will only increase the potential for the public to stereotype immigrants as criminals, and now, as terrorists, reinforcing a hostile mode of reception for certain immigrant groups, possibly impacting upon crime rates in the second generation or beyond. These laws have a potential for creating prejudice and encouraging discrimination, which is not socially just, and they should be re-examined by policy-makers.

Table 1. Aliens Removed by Administrative Reason for Removal: Fiscal Years 1991-2004.

Year	Total	Attempted Entry Without Proper Documents or Through Fraud or Misrepresentation	Criminal	Failed to Maintain Status	Previously Removed; Ineligible for Reentry	Present Without Authorization <sup>1</sup>	Security	Smuggling	Other	Unknown
1991	33,189	3,058	<b>14,475</b>	1,135	735	13,247	7	28	191	213
1992	43,671	3,630	<b>20,098</b>	1,076	1,088	17,403	31	177	57	191
1993	42,542	2,968	<b>22,470</b>	783	913	15,018	54	208	95	33
1994	45,674	3,482	<b>24,571</b>	716	1,052	15,500	57	218	51	17
1995	50,924	5,822	<b>25,684</b>	611	1,432	17,069	34	196	63	13
1996	69,680	15,412	<b>27,655</b>	708	2,005	23,522	36	275	49	18
1997	114,432	35,737	<b>34,113</b>	1,031	3,302	39,297	30	385	522	15
1998	173,146	79,290	<b>34,946</b>	986	7,103	48,477	15	497	816	16
1999	181,072	91,876	<b>42,014</b>	802	9,290	35,007	10	407	1,653	13
2000	186,222	89,912	<b>41,127</b>	740	11,659	40,396	13	492	1,877	6
2001	178,026	76,254	<b>40,170</b>	720	10,677	48,053	12	509	1,625	6
2002	150,542	41,347	<b>37,785</b>	1,248	12,838	55,603	11	579	1,106	25
2003	189,368	52,670	<b>40,266</b>	1,309	17,950	75,052	14	619	1,482	6
2004	202,842	50,420	<b>42,510</b>	1,104	19,773	85,659	11	722	2,632	7

**NOTE:** The administrative reason for formal removal is the legal basis for removal. Some aliens who are criminals may be removed under a different administrative reason (or charge for the convenience of the government. Removals include those actions known as deportation and exclusion prior to the revision of law that was effective April 1, 1997.

**SOURCE:** Yearbook of Immigration Statistics: 2004. <http://uscis.gov/graphics/shared/statistics/yearbook/2004/Table42.xls> (last accessed 1-5-2006).

<sup>1</sup>Includes those aliens charged under the statutes previous to April 1, 1997 as "entered without inspection" (EWI).

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