

Beds and Biometrics

The Legacy of the Criminal Alien Program

At a crowded bus depot in Phoenix, people line up behind glass doors waiting to board buses. Others leave their bags on the floor to save their places in line. Several men talk about time they served in Arizona prisons. A man with braids chats with another about being "out" and doing good. "I'm working," he says. Another man chimes in. He's just out of prison too.

My attention turns to two uniformed Immigration and Customs Enforcement (ICE) agents who walk into the station with a young woman and a baby she's holding. Badges hang on their necks. Their weapons are visible. They hand the young woman a manila envelope, which I recognize from other times I've observed ICE agents parole migrants from detention. Her name and alien registration number are written across the envelope in blue marker. They speak to her politely as she holds a baby who looks to be no more than three months old. Despite the language barrier, she looks calm. They hand her a bus ticket and explain how to board. She listens. This is ICE in a humanitarian capacity. The agents walk out of the station looking pleased, relaxed even-not tense in the way agents typically are when making arrests.¹

The formerly incarcerated men and the young woman paroled from ICE custody capture two faces of immigration enforcement. On one hand, the Department of Homeland Security (DHS)-in collaboration with the Bureau of Prisons, the U.S. Marshals, the U.S. Attorney's Office, and immigration courts (Executive Office for Immigration Review)-has a mandate to direct enforcement resources toward high-priority "criminals" and "national security threats." On the other hand, DHS has issued explicit guidelines on identifying nonpriority targets-families, nursing mothers, the elderly; and minors-for removal from the deportation and detention docket.

The #NotMore national conference on deportation in Phoenix, where I was headed, addressed precisely these issues.² When I arrived, the tents and canopies sprawled over the grounds of a community center were a welcomed counterpart to the "tent cities" for which the local Maricopa County sheriff, Joe Arpaio, has become known. Instead of chain gangs, each tent hosted a workshop or training on an aspect of deportation policy. I walked toward the strategy session on deportation and the presidency, where the discussion centered on the Obama administration's record on deportation.

It was a historic gathering because, for the first time, critical players in the immigrant-rights movement met to talk about deportation instead of legalization, which tends to dominate immigration debates. Legalization seemed almost irrelevant to the conversation, since deportations often come with bars to reentry; which thwart any possibility of future legal migration. The focus was on immigration enforcement—the rising deportations, detentions, and criminal prosecutions, which the Arizona-based activists understand well.

Less than six months after that gathering, amid ongoing civil disobedience actions outside detention centers across the country, the Obama administration ordered the Secretary of Homeland Security, Jeh Johnson, to conduct an administrative review of deportations. In press conferences, the Obama administration contended that the president has no "power to stop deportations" and could face legal challenges for obstructing the enforcement of immigration laws. Antideportation activists pushed back, arguing that while the president waited for Congress to pass a bipartisan immigration bill, the administration continued its "ramped-up enforcement strategy of deportation."³

The Obama administration deflected mounting criticism from protesters by blaming the GOP for blocking immigration reform and for a bloated enforcement system inherited from previous administrations. According to a former deputy counsel for the Department of Homeland Security, ICE agents must enforce the law. There is a thirty-four-thousand-bed mandate. Agents must fill beds. Allegedly, ICE's "hands are tied" because "they cannot ignore the law." However, the former INS, which now operates under the Department of Homeland Security, has always had the discretion to enforce or not enforce the law.⁵

And its enforcement priorities have reflected political choices of the time.

In the early twentieth century, the former INS prioritized race, nation, labor radicalism, or the demands of powerful industries for cheap labor more than criminal history.⁶ During the earliest moments of racially restrictive immigration laws—the Chinese Exclusion Acts of 1882, 1892, and 1902, the 1921 Quota Act, the 1924 Immigration Act—criminal prosecutions, criminal deportations, and mandatory detentions were not prevalent in immigration enforcement. In fact, the INS maintained its distinction from the criminal justice system on grounds that immigration was a civil, not a criminal, matter.⁷

The recent turn toward enforcement priorities that blend humanitarian concerns and crime control stems from early challenges to immigration enforcement by Chinese antideportation activists, radicals, and reformers and a more recent scramble for detention beds in the post-civil rights imprisonment boom that gave rise to the Criminal Alien Program to purge "criminal aliens" from jails and prisons. I became interested in the history of CAP and the current thirty-four-thousand-bed mandate because congressional funds for detention beds are entangled with the politics of enforcement priorities that directly shape decision making about whom border agents arrest and prosecute and how they do so. This is that story.

Early-Twentieth-Century Enforcement Priorities

Criminal grounds for admission and expulsion have been on the books for over a century.⁸ Yet deportation, detention, and attempts to criminalize migration were highly contested. Deportations of legal permanent residents with criminal convictions were difficult to carry out because of limited resources and time limits on deportations that protected noncitizens from expulsion after three to five years, on the belief that deportation would cause undue hardship on long-term residents.⁹ And detention, which was used administratively to hold migrants in exclusion or deportation proceedings, could be and was legally challenged, since the Constitution protects all persons against constraints on individual liberty.¹⁰

In the early twentieth century, race, radicalism, and labor politics—not crime—drove enforcement priorities. The 1924 Immigration Act established the U.S. Border Patrol to enforce restrictions against Asians, prostitutes, anarchists, and many others categorically prohibited from entering the United States.¹¹ This was a period of tremendous labor radicalism and unrest, as a great many immigrant workers fought for and eventually won the eight-hour workday, collective bargaining rights, and health and retirement benefits taken for granted today.¹² Strikes were brutally repressed by police, sheriffs, and militia groups, and radical immigrants were targeted, often in collaboration with the former INS, which operated under the Department of Labor.¹³ The most well-known enforcement operations were the Palmer Raids, which occurred in 1919-1920, when Attorney General Palmer drew on the immigration system for deportation warrants needed to conduct raids and expel hundreds of labor activists in thirty cities.¹⁴

Throughout the early twentieth century, radicals and reformers mobilized against deportations and the criminalization of migration as political tools designed to weaken the rights of poor and working people. They directly challenged public perceptions that associated immigration with criminality, using statistics to show that the "foreign-born commit fewer crimes than the native born" and that deportation, therefore, would have no impact on crime levels.¹⁵ And they pushed for equal protection and due process rights in both the criminal justice and immigration systems. They mobilized against bills proposing to criminalize migration and expand criminal deportations on grounds that they targeted long-term residents, mostly European immigrants, with long-standing ties to the United States.¹⁶

When in 1929 Congress proposed a bill to criminalize illegal entry and reentry that included a provision to expand criminal grounds for deportation, radicals and reformers pushed back. The American Civil Liberties Union (ACLU) lobbied against the bill, arguing that "no matter how wrong it is for an alien to come here without inspection, ...once he has become part of our society, he should not be thrust out to the country that may be his native land but which may have become alien to him."¹⁷ An Illinois senator proposed amendments to the bill calling for deportable migrants charged with criminal offenses to have access to

a hearing and counsel as well as time limits on deportations that "may result in breaking up a family acquired after [an immigrant's] arrival in this country and years after the offense alleged was committed."¹⁸ And the governor of New York threatened to "issue pardons to those convicted deportable alien criminals coming out of New York penal institutions-to pardon them to prevent their being deported by the Federal Government?"¹⁹

Reformers struck down the criminal deportation provisions in the bill. In the final version of the law, only the criminal penalties for re-entry and illegal entry at sea and land borders remained.²⁰ Yet even after its enactment, criminal prosecution was rare. The commissioner of immigration noted that implementing the law was expensive. And the U.S. Attorney's Office decided which cases to prosecute. The result was that very few prosecutions actually occurred. As the Justice Department reported,

Not all violations result in the institution of criminal proceedings against the offender. Because of the realization that some illegal acts are committed through ignorance of the law or without fraudulent intent, many cases are closed by the administrative officers of the government, even though the investigation established that a crime has been committed. A district Director of the Immigration and Naturalization Service is authorized to close any case insofar as prosecution is concerned. . . . All other cases must be presented for determination to the United States Attorney. . . . That official is not required to institute criminal proceedings in every case presented to him.....²¹

In 1936 Congress debated a bill that included measures to give the INS, then under the Department of Labor, the authority to deport immigrants convicted of any crime and to exercise discretion to "guard against the separation from their families of the non-criminal classes."²² The commissioner of immigration testified to the challenges of deporting long-term residents, mostly European and Canadian immigrants, with criminal convictions.²³ At the time, the law required deportation in cases involving crimes of moral turpitude, with a prison sentence of one year or more within five years of entry into the United States. The INS was unable to deport long-term residents whose conviction exceeded

the time limits on deportation. Or often the judge or magistrate would recommend against deportation, particularly in cases of long-term residents. A 1934 INS training manual stated that "every effort is made, consistent with law, to insure the elimination of the criminal alien from the United States. Unfortunately many cases have developed in which it has been found impossible to deport even habitual criminals because they are not comprehended within the terms of the present deportation statutes."²⁴

Before Congress, the commissioner argued that having more discretion to deport some criminals would prevent the deportation of those with strong ties and roots. In stark contrast to today's punitive rhetoric, the commissioner stressed that the bill targeted "habitual criminals" and was not intended to

deport a man who might have been in the country for 20 years, deport him for some purely minor offense, which was classified technically as involving moral turpitude, such as minor theft, for instance. He may have been a good citizen during all this time, and have had one slip, and yet, he would be met with this terrible penalty for that single offense. Now, neither the present immigration law nor any other statute dealing with criminals is so severe and unyielding as that.²

This sentiment also circulated in training materials of the period.

Consider the case of the honest industrious alien whose only offense has been illegal entry into the United States. In the natural course of events, he marries an American citizen, establishes a home, and becomes the father of American-born children. Then comes his arrest on deportation charges. Deportation will probably mean the separation of the family—that his home will be broken up forever and that his wife and children will have to depend on charity for their support. Under the existing law deportation is mandatory if the charge of illegal entry is sustained. There is no discretionary power vested in the department that would avert it no matter what suffering may ensue or how meritorious or appealing the case.²⁶

The ACLU and more radical segments of the labor movement were vocal in their opposition to giving the Department of Labor more dis-

cretion, arguing that it would "strengthen the weapon of deportation law as a strike-breaking measure."²⁷ Others argued that "deportation ... is not a solution for crime. When you put in this bill here provisions for the deportation of foreign-born people and non-citizens who commit crimes, you are not going to the bottom of what causes crime, what causes both the native and foreign-born to commit crimes."²⁸

Even official government reports at the time showed that immigrants had lower crime rates than the native born and that those with a longer history of settlement were more likely to commit crimes.²⁹ Opponents successfully defeated the bill because of how it would affect mostly European immigrant families with established roots in the United States. That the bill, and subsequent measures similar to it, failed is a testament to the success of reformers in debunking the perceived criminality of European immigrants at the time, and generating public sympathy and opposition to the deportation of long-term residents, even those with criminal convictions.

These early-twentieth-century struggles over enforcement priorities and discretion show how reformers pushed forth pro-immigrant legislation. But they also illustrate the extent to which reformers fell short of fighting for racial justice. Historian Khalil Gibran Muhammad argues that urban progressives successfully decriminalized European immigrants through a social distancing from the perceived criminality of Black migrants from the South, by failing to directly challenge and ultimately reproducing an association between Blackness and criminality. "From the opening of the Progressive Era to its waning days on the eve of World War I and the Great Migration," writes Muhammad, "black criminality had become not just a universal tool to measure black fitness for citizenship; it was also a tool to shield ...Americans from the charge of racism."³⁰

In the southwest borderlands, Mexicans were also viewed as unfit for citizenship, and not fully "American," despite their historical presence in the United States. Yet in contrast to anti-Black criminalization, they were subjected to "illegalization" that associated Mexicans not with innate criminality but with perpetual foreignness as "aliens." Early enforcement priorities were not aimed at crime per se but were determined by the demands for seasonal, cheap labor by powerful local industries. Historian Kelly Lytle Hernandez provides a wonderful illustration of

how powerful growers successfully influenced a *reduction* in congressional appropriations for enforcement.³¹ Although Mexican migrants were exempt from quotas under the 1924 immigration law, agents arrested and expelled migrants in accordance with the labor needs of growers.³²

When labor demands were low, the INS took pride in arresting migrants before they could establish roots. Border Patrol training materials instructed agents to target aliens

who entered illegally before they had sunk roots in this country ...in the name of American-born wives and children who would be the main sufferers of the almost inevitable event of their ultimate detection and deportation. In holding fast the line, the border patrol performs not only a vital national, but a *humanitarian* service. (emphasis added)"

Rather than criminally prosecuting undocumented migrants for illegal entry or reentry, the legacy INS relied on a voluntary departure system, established in 1927, whereby migrants signed a waiver agreeing to "voluntarily depart" and give up their rights to a removal hearing.³⁴ By giving up their rights to a hearing, migrants could return to Mexico the same day. Even during the historic Mexican repatriations during the 1930s, 1940s, and 1950s, voluntary returns greatly outnumbered formal deportations as the most cost-effective way to expel someone. And the INS prosecuted few migrants for illegal entry or reentry in criminal courts, with the exception of a "small class of undesirable migrants (radicals, prostitutes, smugglers, and 'repeaters')." ³⁵

What is striking about early-twentieth-century enforcement priorities, then, is that criminal prosecutions for immigration offenses and deportations on criminal grounds were not more prevalent. Criminal deportations-particularly for European immigrants-were publicly contested. Criminal *prosecutions* for immigration offenses were uncommon. And for the most part, the immigration system and criminal justice system developed independently of each other. Detention was controversial, reserved for "enemy aliens" during times of war, such as the unconstitutional detention, during World War II, of over one hundred thousand persons of Japanese ancestry, seventy thousand of whom were U.S. citizens.³⁶ By 1940 and 1954, respectively, two major deten-

tion and deportation processing centers on Angel and Ellis islands had closed.

Reformers had successfully swayed public opinion about deportation and detention and exposed the unchecked discretion of immigration officials and law enforcement. Herbert Hoover's National Commission on Law Observance and Enforcement (Wickersham Commission), on which several reformers served as lead investigators, uncovered widespread instances of police brutality, unlawful detention, and due process violations in the immigration and criminal justice systems. Zechariah Chaffee, Walter Pollack, and Carl Stems, who were the three main consultants for the Wickersham Commission's *Report on Lawlessness in Law Enforcement*, for instance, were well-known civil liberties attorneys and

founding members of the ACLU.³⁷ Chaffee was a coauthor of the ACLU's famous report on the Palmer Raids.³⁸ Walter Pollack represented the Scottsboro Nine in *Powell v. Alabama*.³⁹ One of the earliest national reports on police brutality, *Report on Lawlessness in Law Enforcement* documented widespread police abuse, including forced confessions, unlawful detentions, and police violence. Historian Samuel Walker notes that this report's recommendations were noticeably vague and brief, the likely outcome of political compromise.⁴⁰ Civil liberties attorney Reuben

Oppenheimer's *Report on the Enforcement of Deportation Laws* criticized the immigration system, then under the Department of Labor, for serving as immigration inspector, investigator, and prosecutor, culminating in widespread unfair trials for immigrants in deportation proceedings.⁴¹ These early-twentieth-century struggles over enforcement priorities and discretion show how reformers and civil libertarians championed liberal immigration policies with greater protections in the justice systems.⁴² But they also illustrate the extent to which procedural reforms fell short of addressing the root causes of racial and police violence, a struggle that would be taken up by civil rights and antiracist activists.

After the Rights Revolution

Enforcement priorities shifted again in the post-civil rights era, when the federal government struck racial quotas from immigration law. The 1965 Immigration Act unleashed new enforcement challenges for the legacy INS when it imposed the same numerical visa quota limits

of twenty thousand for every country, on justification of equality and "non-discrimination." Until then, Mexico and other countries from the Western Hemisphere had been exempt from quotas. Once inspectors quickly issued all the available visas under the new quota limit, those unable to enter "legally" crossed the U.S.-Mexico border without visas, causing a surge in border arrests for unauthorized migration."

The INS, operating under the Department of Justice, went to Congress for funds aimed at managing the rise in unauthorized border crossings. Before Congress, the INS explicitly attributed the rise to economic conditions in Mexico and to *federal policies* such as the termination of the Bracero Program in 1964 and the 1965 Immigration Act: "Restrictions on the importation of Mexican agricultural labor, and the numerical limitation on Western Hemisphere immigrant aliens, all combine to produce a situation that results in increases in surreptitious entry without inspection, and other immigration law violations."⁴⁵ Anticipating the spike in unauthorized border crossings, the INS requested funding to establish its antismuggling program in 1965.⁴⁶ Funding for border policing grew steadily just as sweeping civil rights legislations opened a space to legally contest immigration law enforcement practices and as crime was becoming a major political issue in the United States. Barry Goldwater, who during the 1964 elections campaigned on a law-and-order platform as a response to the civil rights revolution, introduced crime as a wedge issue in U.S. politics! President Lyndon Johnson beat Goldwater in a landslide victory and took on the crime issue as his own. By the late sixties, both conservatives and liberals had appropriated the issue. In 1968, the Johnson administration increased federal funds for state and local government to carry out crime control alongside the Great Society programs for which it is known.⁴⁸ Funding for state and local crime control jumped from \$300 million to \$1.25 billion!⁵¹

When Johnson signed the 1968 Omnibus Crime Control and Safe Streets Act that launched the so-called War on Crime, he expanded the Department of Justice's size, power, and funding, much of which went to police departments, criminal courts, prisons, and information management.⁵⁰ The Immigration and Naturalization Service, transferred to the Department of Justice after 1940, did not fall neatly into this broad mission, since it mostly handled matters related to citizenship and immigration, not criminal law. To access the massive funding pouring into the

Department of Justice for crime control, the former INS, in its budget requests before Congress, began to frame its own enforcement actions—long considered administrative rather than criminal—through a prosecutorial language of combating crime.⁵¹ In a 1972 appropriation hearing, the INS commissioner requested funds to curtail the "large influx of illegal aliens on the Mexican Border," arguing that "[i]llegal aliens contribute to unemployment, increased welfare costs, and to the increased crime rate."⁵² The language, almost verbatim to that used in political speeches to mobilize public support for a "war on crime," provided budget justifications for more Border Patrol agents, workplace raids, and "intensified liaisons with federal and local jails holding deportable aliens who are serving sentences so that immediate deportation may be effected upon their release from confinement."⁵³

Yet in practice, the INS did not regard unauthorized immigrants as criminal nor did it have the resources to pursue criminal prosecution. "Most illegal aliens are not criminals," a former INS commissioner stated in a public speech. "[T]hey are good people who have the same concerns that you and I do: to provide for their families and gain some security."⁴ Nor did the agency rely heavily on criminal prosecution. According to the INS commissioner, "Prosecution of persons employing illegal aliens is generally not effective because of the attitude of the public toward Mexican people. Those Mexican aliens found along the border more frequently than not are grateful for food and housing provided in detention facilities. The great bulk of those apprehended should not be treated as criminals."⁵⁵

Here the commissioner indirectly referenced the upsurge in prison reform litigation in the 1960s and 1970s that grew out of the civil rights movement and successfully challenged the constitutionality of deplorable prison conditions.⁵ Drawing from the law-and-order rhetoric of the times, conservative critics contended that raising prison standards "coddled criminals." The commissioner disassociated unauthorized immigrants from criminality by juxtaposing an image of impoverished Mexicans "grateful" for detention conditions with that of "criminal" activists in the prisoner-rights movement.

To the extent that the INS pursued criminal prosecution, it was not for illegal entry but for "aliens of the criminal, immoral, and narcotics classes." In the Border Criminal Identification Program, agents used a

paper copy of an FBI "[be on the] lookout list" in determining admissibility.⁵⁷ During the 1968 budget hearings, the Border Patrol reported that out of 4,000 "lookouts," 600 were excluded or denied admission.⁵⁸ During the 1971 budget hearings, the Border Patrol reported that of the 12,400 cases it referred for prosecution, the U.S. Attorney's Office accepted only 7,300.⁵⁹

Although the former INS drew on crime discourse to justify budget requests, criminal deportations and detentions were less prevalent and more contentious. And as the INS drew on law-and-order rhetoric, immigrants drew on the civil right laws to challenge their deportations.⁶⁰ During one budget appropriation hearing, a former INS commissioner complained that Mexican aliens had learned to ask for trials instead of accepting voluntary departures. "Aliens are no longer willing to accept voluntary departure as they have discovered that by surrendering to the Service and applying for various benefits under the law, they may remain in the U.S. until all remedies have been exhausted."⁶¹ In oral histories, Border Patrol agents deployed during the 1970s also complained that undocumented migrants were no longer docile, temporary workers, but settled U.S. residents unafraid to assert their constitutional rights:

The UDAs, undocumented aliens, have turned into a different group of people....Most of those we dealt with in the early days were the working class. Very rarely did you have a problem with those people. They were polite to me and I was polite with them, and did my job....[T]he working class I was talking about would be like farmer workers....As time went on we ran into people who didn't intend to work on farms. It was just a different class of people. They were belligerent; they wanted something for nothing. If we arrested one, the first thing he wanted was water or food. It was always "Give me something." And then we ran into a lot more that wanted to escape from being arrested.⁶²

Mimicking law-and-order critiques of the welfare state and Great Society programs, this wistful agent notes that in the past, unauthorized (Mexican) immigrants who crossed the border to work in the fields were more like the early, industrious (European) immigrant "working class." The unauthorized border crossers he encountered in the seven-ties were more like native-born minorities (i.e., Blacks and Latinas/os).

They made demands ("give me something") on the federal government for "food and water" during detention and relief from deportation in exchange for "nothing; at the expense of taxpayers.

In a 1976 speech delivered in Phoenix, Arizona, former INS commissioner Chapman similarly noted,

There are some built-in advantages for anyone who is illegally residing in this country, and additional major barriers to enforcement of immigration laws. Unfortunately, the advantages to the illegal seem to be increasing while at the same time barriers to law enforcement are being erected even higher. . . . Court orders and decisions make a difficult job even harder. . . . Our constitutional guarantees of privacy, freedom and the right of due process all work to the advantage of the illegal alien.⁶³

Here the commissioner invoked the legacy of the Warren Court that expanded the rights of criminal defendants through a series of landmark Supreme Court cases in the 1960s. Appropriating the language of civil rights, critics decried that such procedural reforms "handcuffed" police and violated victims' rights.⁶⁴ The commissioner warned that such constitutional constraints advantage immigrants and victimize border agents.

During this period, multiple lawsuits legally challenged the constitutionality of immigration arrests, deportation raids, and detentions.⁶⁵ In appropriation hearings, the Department of Justice sought funding to aggressively target immigration litigation that legally challenged enforcement practices. Again, court rulings and legal opinions by INS general counsels affirm that deportation and detention are civil, administrative matters and not a punishment for a crime. Thus, various lawsuits challenging the constitutionality of key enforcement practices such as search and seizure or area control operations (i.e., workplace raids) ultimately upheld different sets of rules for immigration versus criminal enforcement.⁶⁶ Yet all the cases affirmed procedural rights of due process as evidenced in Border Patrol handbooks and training manuals of this period.

A 1975 Border Patrol handbook explicitly states, "An Immigration officer's powers . . . are subject to constitutional, statutory, and judicial restraints, which require him to take a reasonable and humane approach

in performance of his duties."⁶⁷ The handbook includes a chapter on "Civil Rights in Law Enforcement" that explicitly warns agents that

[i]n addition to a moral obligation to uphold constitutional guarantees of personal liberty, patrol agents must be aware that failure to grant due process of law ...exposes the officer to the possibility of a civil suit for damages or criminal prosecutionThe principal areas of concern are illegal search and seizure, brutality, protracted questioning, illegal deten- tion, and use of confessions made without proper warnings.⁶¹

Despite the onset of a federal "war on crime" in the post-civil rights era, criminal history had not yet become the primary criterion guiding enforcement discretion. The INS had established protections for long-term residents. Intra-agency operating instructions in the 1970s refer to a "non-priority program" recommending "non-priority treatment" in certain deportation cases.⁶⁹ In fact, out of 1,843 in 1975 that varied across nationality, nonpriority status had been granted to "aliens who have committed serious crimes involving moral turpitude (9%), drug convictions (7%), fraud or prostitution ...communists, the insane, and the medically infirm."⁷⁰ The vast majority of cases-32%, or 590-were for "those who would be separated from their families." The program's main purpose was to "avoid an unwarranted hardship upon the subject alien or members of his family.'m

Criminal deportations were difficult to execute because among those with convictions, many were long-term residents. Immigrant detention was also unpopular.⁷² During budget hearings before Congress, the INS commissioner testified that "emphasis is placed on parole [from detention] proceedings whenever possible to avoid detention expenses."⁷³ Training manuals of the time instructed agents to avoid illegal deten- tion, citing "the Constitutional guarantee that a person shall not be de- prived of liberty without due process of law" and noting how "one of the most easily aroused emotions of the American public is sympathy," particularly for the mistreatment of people inINS custody.⁷⁴

Crime-centered approaches, then, did not yet dominate immigra- tion enforcement actions. Nor did a criminal conviction carry the same lasting and unshakeable stigma that it does today. Post-civil rights enforcement discretion emphasized nonpriority categories for enforce-

ment based on "humanitarian" considerations. Such practices continued throughout the 1980s, under a practice of "nondeportation," which often involved letting the file sit on a desk, or paroling migrants from detention, not only as a cost-saving measure but also because of the political pressure to minimize hardship for certain immigrant families with long histories of settlement.⁷⁵

The Prison Boom and the Scramble for Beds

Prison expansion under the War on Crime played a critical yet understudied role in shifting enforcement priorities in the immigration system. During the Reagan era, the 1984 Comprehensive Crime Control Act intensified a prison bed shortage. Considered "the largest Crime Bill in the history of the country," it set into law pretrial detention for certain offenders, imposed mandatory minimum prison sentences, and expanded forfeiture laws that provided incentives for state and local governments to carry out arrests and prosecutions, all of which increased the likelihood of imprisonment, mostly for federal drug offenses.⁷⁶ Until then state and local governments had seldom prosecuted federal crimes, but the funding provided both the resources and the incentive to do so.⁷⁷

Anticipating that a rise in convictions and prison sentences would trigger prison overcrowding, the Department of Justice (DOJ) budget request for FY 1984 included \$6 million to create additional bed spaces in federal prisons. The Appropriations Committee questioned top Department of Justice officials, including former U.S. attorney Rudolph Giuliani and assistant attorney general for administration Kevin D. Rooney, about how the Bureau of Prisons calculated the need.

DOJ (GIULIANI): The need was calculated really over a period of two fiscal years, 1983 and 1984.... We realized that the Federal Prison System was operating over capacity already before you added any additional agents or prosecutors, and we also realized that the kinds of cases we were going to be asking them to concentrate on are the kinds of cases where federal judges would be likely to give long prison sentences. We estimated what we believe to be, again it was a rough estimate, and a conservative one, the number of additional drug defendants we would have over the course of the next year or

two or three years, to try to build up the number of bed spaces that we would have available for those respective defendants.

CONGRESSMAN: Why do you use beds? Why don't you use cells?

DOJ (ROONEY): The Bureau of Prisons has a renovation rehabilitation plan...with respect to expansion of bed space, by renovation, etcetera. These particular beds are...the first group of beds or cells that would open up through renovations at existing facilities.⁷⁸

Prison overcrowding had become so severe that the attorney general and director of the Bureau of Prisons were no longer requesting funding for cells, but for beds. Cells harken back to older approaches to rehabilitating offenders. Beds signified a "new penology" designed to "warehouse" and isolate "dangerous" populations, taking them off the street. Yet they also invoke a benign image of adhering to federally mandated prison standards that prison activists fought and died for. From that moment on, in appropriations hearings and budget line items, "beds" and "bed space" had become a catch-all phrase for "humanitarian" conditions as well as prison overcrowding, prison construction, and mass imprisonment as an accepted policy solution to social problems.

What began as a political strategy to win elections became a dominant policy approach for years to come. During appropriation hearings throughout the 1980s and early 1990s, the attorney general routinely requested additional funds for prison beds and construction projects. The Bureau of Prisons instituted a cooperative agreement with state and local facilities to provide bed space. The Department of Justice borrowed the idea to use private contracts from the INS's historic use of nonservice facilities.⁷⁹

Mass incarceration and prison overcrowding also led to a bed space shortage in the immigration system when the Reagan administration reintroduced detention as a strategy for managing the flow of Cuban refugees of the Mariel boatlift, which began in the final year of the Carter administration when Fidel Castro allowed Cubans to leave through the Mariel harbor. In line with public fears about crime, the media portrayed the Cuban exiles as criminals.⁸⁰ In 1981, the INS abandoned its practice of nondetention and instituted an internal policy of detaining **all** deportable migrants, including those seeking asylum, with the exception of pregnant women and certain juveniles. The INS detained over one hun-

dred thousand Cuban and forty-five thousand Haitian refugees, fleeing political repression under the Jean-Claude Duvalier ("Baby Doc") regime (1971-1986), in prisons and detention facilities.⁸¹

Many Cuban detainees were housed in the Atlanta Penitentiary and in state prisons throughout the country. Most Haitian detainees were in custody at the Krome detention center in Florida and other detention centers in Brooklyn, New York, Fort Allen, Puerto Rico, and Port Isabel, Texas, as well as in federal prisons throughout the United States.⁸² However, bed space in state and local jails and prisons became limited, as prison overcrowding worsened.

Prior to Reagan's detention policy, the more common practice for the INS was to release migrants on parole or bond.⁸³ As the INS detained more people, it encountered a detention bed shortage of its own. In congressional budget hearings, the INS effectively linked enforcement capacity to detention bed space in order to secure more funding. Between 1975 and 1985, detention funds jumped from \$2,451,113 to \$36,474,375.⁸⁴ In 1968, bed space capacity was at 858. In 1982, it more than doubled to 1,800 spaces. In 1985, bed space grew to 2,265.⁸⁵ In 1986, the Department of Justice secured funds to build a one-thousand-bed-capacity detention facility for Cuban detainees in Oakdale, Louisiana. It also contracted with over a thousand nonservice facilities in forty-six states, mostly jails and some private facilities.⁸⁶ Historically, the INS contracted with small boarding houses, and later with local jails, but the security industry had become a growing market by the 1980s, and the INS began contracting with larger corporations.⁸⁷

In addition to Cubans and Haitians, the INS detained El Salvadorans, Hondurans, Guatemalans, and Nicaraguans all fleeing U.S.-backed civil wars, often in violation of the recently signed Refugee Act of 1980 that aligned U.S. refugee and asylum protocol with international human rights law. Mexicans also grew in the population of detainees, particularly when they challenged their deportations. Many testified to being coerced into signing voluntary departures "without notice of rights, legal information, or access to legal counsel."⁸⁸ Faced with mounting pressure from legal advocates, the INS eventually paroled many Cuban detainees but continued to detain those charged with criminal conviction under the drug war. The INS was unable to deport them, because there was no repatriation agreement with Cuba.

Cuban repatriation was central to debates about bed space. The attorney general routinely updated Congress on efforts to negotiate a repatriation agreement with Cuba as "the only long-term solution for about 6,000 or more, many of whom are in custodial institutions, and who exacerbate the prison problem." (emphasis added)

ATTORNEY GENERAL: There will not be an end to it until we can somehow get these people back to Cuba where they belong. And as I say, we are continuing our efforts but, they have not been very fruitful unfortunately.

CONGRESSMAN: What should I tell my folks who say, "Just put them on a boat and push them off the shore?"

ATTORNEY GENERAL: Well, I have got to be candid with you. We did consider this at one time, but we were worried. There were some rather elaborate plans to head the boat in the direction of Cuba and just let it beach itself there. Unfortunately, that did not turn out to be practical.⁸⁹

For the Department of Justice, Cuban detainees "exacerbated" prison overcrowding. So dire was the bed space shortage that the attorney general was willing to expel them without documents and in violation of international repatriation agreements and asylum and refugee law. That such a proposal turned out to be impractical was due to intense political mobilizations on behalf of detainees.

The INS's mandatory and indefinite detention policies unleashed an onslaught of litigation and legal advocacy campaigns. Legal advocates challenged the selective and arbitrary enforcement of detention for Cuban and Haitian refugees. The Sanctuary movement took on aspects of the Underground Railroad and hid migrants from the INS. It also challenged the discriminatory denial of due process and of asylum for Central American refugees. Other lawsuits challenged forced voluntary departure imposed on Mexican detainees. To counter legal challenges, the Department of Justice established the Office of Immigration Litigation in 1983.⁹⁰ Throughout the eighties, DOJ requested funds for "aggressive litigation" in budget appropriations hearings alongside funds for prison beds to address the overcrowding.⁹¹

The 1986 Anti-Drug Abuse Act exacerbated the bed shortage by expanding mandatory sentences for drug offenses. In 1987, the director of the Federal Bureau of Prisons testified at a budget hearing that

[w]ithout question, the single most important issue we face in the Bureau of Prisons today is the rapid increase in the prison population and the overcrowding that has come about as a result.... The fact that Congress enacted the Anti-Drug Abuse Act last session undoubtedly is going to have a major and significant impact on the federal prison population.... The Bureau of Prisons is in the midst of *the largest expansion program in the history of the organization* If we do not increase the capacity of the Federal Prison System, I think we will find that the lack of prison space will become a *constraint on the criminal justice system* We will develop a *gridlock situation* where there is *simply no room available* for those defendants who are sentenced by the U.S. District Courts and committed to the Attorney General's custody. (emphasis added)⁹²

Prison overcrowding, the bed space shortage, and the "gridlock situation" it threatened to create pushed Congress to reintroduce measures to expand criminal deportations. Congress proposed deporting "alien felons" swept up in the drug war as a way to free up more detention space and prison beds for native-born Black and Latina/o youth who would fill them. In order to free up beds and mitigate prison overcrowding, the 1986 Anti-Drug Abuse Act expanded the grounds for excluding and deporting noncitizens charged with drug offenses. It also authorized the federal government to reimburse states for "incarceration costs of alien felons" and included a measure requiring the secretary of defense to deliver a report to the attorney general on unused military buildings that could be converted into detention facilities, including the suggestion to use "land at Guantanamo Bay, Cuba, to build a prison."u

In budget hearings, the INS routinely updated Congress on the status of detention and deportation.

CoNGRESSMAN: It has been reported that INS has not been able to detain aliens who are subject to deportation because of lack of facilities.

INS: Yes, it's true to some extent. INS has requested 15 million dollars in the 1987 supplement budget request for detention facilities to help alleviate the problem. Another major effort, which will reduce the problem of detention in non-INS facilities [Uails and prisons], is being pursued by the INS, the Executive Office for Immigration Review (EOIR) and state and local officials. *This program will identify incarcerated criminal aliens* for the purpose of conducting hearings in identified state or local facilities in order to remove these individuals from the United States expeditiously upon completion of imposed sentences.... *This will help free up existing detention space.* (emphasis added)⁹⁵

The 1986 Immigration Reform and Control Act (IRCA) first introduced the idea of a criminal alien program designed to deport convicted felons. But it was the 1988 Anti-Drug Abuse Act that further expanded criminal penalties for drug offenses, requiring more prison beds. It also included a provision for deporting noncitizens convicted of aggravated felonies, which at the time included a much narrower list of major offenses such as "murder, drug trafficking, and illicit traffic in firearms."

In 1988, the INS also instituted two pilot projects—the Alien Criminal Apprehension and the Border Patrol Criminal Apprehension programs. That year the INS established an Institutional (removal) Hearing Program in state and federal prisons and a Criminal Alien Program (CAP) to handle INS litigation involving criminal deportations involving any "alien who has been convicted of a crime."⁹⁶ CAP established "criminal alien cases as the highest priority for resource allocation in all immigration cases before the Executive Office for Immigration Review."⁹⁷ It also required the secretary of defense to identify facilities "that could be made available to the Bureau of Prisons for use in incarcerating aliens."⁹⁸ The INS's internal procedures handbook also confirms that
detaining
and deporting people under CAP freed up beds in the prison system.

An item of concern for many years is the lack of detention bed space and funding for the INS Detention and Deportation Program. It is advantageous for the INS and an efficient use of tax dollars to commence the lengthy deportation and exclusion process against criminal aliens who

are serving sentences so that the final orders of exclusion and deportation can be obtained before the alien is released into our custody. *It appears to be the intent of Congress in its passage of the criminal provisions of IRCA to take steps to alleviate the nationwide problem of prison overcrowding by addressing expeditiously the large illegal alien population encountered in corrections systems in many states.* (emphasis added)⁹⁹

Between 1980 and 1994, the prison population had grown 50%.¹⁰⁰ Democratic president Bill Clinton signed the 1994 Crime Control Act, which added an additional one million police officers to the streets. It increased death penalty crimes—no doubt to also relieve prison overcrowding. It also included a "three strikes" provision that imposed a life sentence for three-time offenders. The act also raised penalties for immigration offenses such as human smuggling and reentry after deportation. It appropriated \$9.7 billion for more prisons, \$1.2 billion for more Border Patrol and criminal deportations, and \$1.8 billion for the State Criminal Alien Assistance Program, or SCAAP. Funding for the high-profile border enforcement campaigns in the early 1990s further institutionalized the Criminal Alien Program.

Yet deporting people for mostly low-level drug convictions remained difficult to execute because many were not recent immigrants but long-term legal permanent residents swept up in the drug war. Legal permanent residents had been a "nonpriority" category for the INS, as were deportable migrants with long histories of settlement and family ties. In fact, among the 1986 Immigration Reform and Control Act's major provisions was an "attempt to deal humanely with aliens who established roots here."¹⁰¹ It established a legalization program that provided legal status to persons who had been in the United States without authorization before 1982. The attorney general testified before Congress that "the policy of the INS is that if a person would qualify under the Immigration Reform Act for legal residency, they are not deportable."¹⁰² Internal guidelines on prosecutorial discretion confirm that the unauthorized relatives of those legalized under IRCA were also a nonpriority category for enforcement, explicitly stating that "the removal of spouses and children would be inconsistent with enforcement priorities."

Prison overcrowding was a powerful impetus behind proposals to deport noncitizens with convictions, mandatorily detain noncitizens in

order to deport, and eventually criminally prosecute those who violate deportation orders. Yet even by expanding penalties for immigration offenses and grounds of deportability for those with drug convictions, "criminal alien removals; as they came to be known, were still difficult to carry out because they disproportionately targeted immigrants with longer settlement histories, legal permanent residency status, and access to forms of relief from expulsion. Congress would have to revamp the deportation and detention system in order to make a criminal alien program workable. This is precisely what the 1996 immigration law did.

Restructuring Detention and Deportation

Signed by President Bill Clinton, the 1996 Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) targeted "criminal aliens" above those entering without inspection (EWIs) as a major enforcement priority, while putting in place the necessary infrastructure to carry out the new mandate. IIRIRA broke enforcement barriers by restructuring the deportation and detention process. Among its sweeping provisions, IIRIRA eliminated the distinction between exclusion and deportation. Prior to the law, persons entering without inspection and already in the country could contest their deportations in a hearing, whereas persons who presented themselves at the ports of entry were found inadmissible and, therefore, excludable.¹⁰³ Collapsing exclusion and deportation into one removal category was a way to narrow the ways in which immigrants could contest deportation.

But the law did not stop there. It greatly expanded the grounds for "criminal" removal by expanding the category of aggravated felony to include petty theft, DUIs, and minor drug offenses. Before IIRIRA, aggravated felonies were limited to major offenses such as murder, rape, or drug trafficking.¹⁰⁴ The law also imposed mandatory detention and instituted retroactive deportations, which applied to both unauthorized and legal permanent residents. IIRIRA included court-stripping measures that narrowed judicial review in immigration hearings. The law instituted an expedited removal process that fast-tracked formal deportations without a hearing. It also made it legal for the INS to detain and deport on the basis of "secret evidence."¹⁰⁵ In short, it unraveled many of the procedural safeguards developed over a century. It weakened pro-

cedural due process for immigrants with convictions and incorporated criminal processes into immigration enforcement without having to deliver many of the substantive rights found in criminal procedure for those classified as criminal aliens.

In many ways, IIRIRA can be regarded as a backlash against immigrant rights in a post-civil rights era. It did after all promise to curb illegal immigration by fortifying the border, curbing welfare benefits for "legal" immigrants (some of which were later reinstated), and ramping up deportations.¹⁰⁶ The law's most punitive aspects, however, were not necessarily put in place to restrict "illegal immigrants;" as the name suggests. Rather, it was crafted to free up more beds in the prison system for Black and Latina/o youth incarcerated by harsh drug laws. The New Right, by then a congressional majority, proposed the law after the 1995 Oklahoma City bombing. Like the Anti-Terrorism and Effective Death Penalty Act and the welfare reform law—the Personal Responsibility and Work Opportunity Reconciliation Act enacted that year—IIRIRA stems from long-standing political mobilization, beginning with the Goldwater campaign, to regain or maintain political footing in the aftermath of the civil rights movement through a law-and-order agenda.¹⁰⁷

Yet the punitive turn in immigration never abandoned a constitutional framework. On the contrary, the new blend of criminal immigration enforcement directly appropriated a "race-blind" language of rights. IIRIRA gave front line agents more discretion to confer or deny rights on the basis of criminal status. IIRIRA also constrained immigration judges' discretion by mandating retroactive deportation for prior offenses and making immigrants with past convictions ineligible for forms of relief such as adjustment of status or deferred action status. Restructuring detention and deportation was not so much a retreat from civil rights as a move to administer relief and protections on the basis of criminal history. It is precisely the fact that it operates within a constitutional framework that gives the criminalization of migration an air of consensus and makes it difficult to contest.

Much as with the funding that backed the War on Drugs, Congress vigorously funded IIRIRA's enactment, particularly by expanding high-profile border initiatives, efforts to remove a greater number of "criminal and non-criminal deportable aliens," and funding for detention bed spaces. In addition to pouring resources into Border Patrol operations,

Congress also funded the Criminal Alien Program. In 1998, Congress earmarked \$109.7 million to detain and deport criminal aliens.¹⁰⁸ Congress also funded the U.S. Marshals and U.S. Attorney's Office to assist with prosecuting and deporting immigrants charged with drug offenses.

Similarly to the way in which the federal government created financial incentives for state and local police departments to enact federal drug laws, Congress also expanded the State Criminal Alien Assistance Program to incentivize local law enforcement's cooperation in detaining and deporting noncitizens with criminal records. The funds were primarily to reimburse state and local law enforcement agencies for noncitizen offenders in their custody. This marks an important shift in INS-police collaboration because, prior to this, it was the INS that was supporting federal drug enforcement efforts. The collaboration reorganized around immigration enforcement, namely, detention and deportation of criminal aliens.

This is a surprising turn of events, because it really was the War on Drugs, not illegal immigration, that was burdening law enforcement budgets. IIRIRA, which required mandatory detention for noncitizens who had completed their prison sentences, as well as the high-profile Border Patrol operations of the mid-1990s, drained local and county law enforcement budgets. Yet this never factored into congressional debates. Instead, Congress continued to fund detention beds in INS facilities, prisons and jails, and private detention centers.

By then the justification for expanding detention bed space was no longer to manage overcrowding in federal prisons but to manage the detention bed shortage that the 1996 law's mandatory detention provisions triggered. Between 1995 and 1997, INS beds jumped from 6,000 to 11,500.¹⁰⁹ In 1997, the INS commissioner requested funds for three thousand additional beds in FY 1998.¹¹⁰ By 1998, bed capacity had reached 16,000. Yet even with the substantial increase in beds, the INS Commissioner reported that the agency "would be unable to meet the [mandatory] custody requirements of IIRIRA."

In addition to mandatory detention, IIRIRA expanded expedited removal, which bypassed the immigration courts, essentially "allow- ing lower level officials to make decisions which were once reserved for judges," as one senator put it. To counter criticism from migrant advocates that the expedited removal process ran the risk of "mistak-

only sending some refugees back to persecution and torture," the INS commissioner requested funding for immigration adjudication under the Executive Office of Immigration Review (EOIR). The commissioner stressed that "INS removal goals are tied to EOIR adjudication efforts.... [E]nhanced detention is dependent on expedited caseload, the maximum number of aliens the INS is able to process through facilities."¹¹¹ The director of EOIR also requested funding to hire twenty-eight new immigration judges and twelve BIA (Board of Immigration Appeals) attorneys in anticipation of a thirty thousand caseload increase in response to the 1996 law.¹¹²

During a budget hearing for FY 1998, the Committee on Appropriations criticized the INS's progress on deportation.

CoNGRESSMAN: By recent INS estimates there are five million illegal immigrants now living in the U.S.; the same peak level of illegal immigrants in the country as of 1986, which was the reason we passed the Immigration Reform and Control Act of 1986.

We've given you triple the resources you had in 1986, and despite the unprecedented increase in funding, a 105% increase over the last four years, your strategy has only made a dent.... Instead the population of illegal immigrants continues to grow.

You seem to be making progress on the border in California, I admit; stopping illegal border crossings, though, is only one facet of the fight. And I'm talking about , . , removing illegals presently here, including criminals. You deported 68,000 last year. That's less than 1.5% of those living here.

You fell short 37% of your own plan to deport 110,000 aliens in 1996. The Institutional Hearing Program is 23% short of your own goal. There are 193,000 outstanding orders of deportation ...where an Immigration Judge has ordered someone deported and they're still here; can't be found.

Neither of you can say that your problem is because you don't have resources. *We shoveled money at you, gave you more money than you asked for year in and out.... In 1997, we gave INS \$78 million and 2,000 more detention beds; 2,000 more than you asked for. You said in 1996 that you would deport 110,000.... In fact there were 68,000 deported.*

INS CoMMISSIONER: Removals for last year are 36% higher than the year before. This year when we move up into the 93,000 range, that will be 37% higher than what we achieved last year....That system rests not only on the removal action, but detention facilities and detention capacity which has also been funded generously by the Committee. *Using that detention space effectively is a major link that needs to be properly developed in order for removals to increase at the level they've been increasing.*

CoNGRESSMAN: Why can't the INS find the 193,000 for which you've got orders of deportation and they're just staying here?

INS CoMMISSIONER: We do very well on deporting those people who are in detention. Its very difficult and labor intensive to deport people who have orders of deportation and are not in detention. Its crucial. That's why we ask for it. Thafs why we look very, very closely at having the maximum turnover in that bed space so that we can remove the largest number as effectively as we can. (emphasis added)¹¹³

The testimony conveys challenges associated with implementing the 1996 law, even with "triple" the resources. Mandatory detention for people with convictions exacerbated a detention bed shortage in the immigration system. Yet there was political pressure to continue investing in detention (as opposed to adjudication in the immigration courts) as the necessary vehicle for executing deportations.

The INS also confronted various legal challenges from various advocacy groups that criticized the law, and how it not only hurt asylum seekers but also disproportionately targeted legal permanent residents. As the agency's commissioner later explained, "This was new. Until then green card holders had greater protections in the system. As enforcement went forward, people were put in the system who were never in before."¹¹⁴ In August 1999, the National Immigration Forum, the ACLU, and other immigrant-rights groups officially launched the "Fix '96" campaign, intended to amend provisions in the 1996 law concerning judicial review, mandatory detention, the use of secret evidence, and expedited removals.

In November 1999, twenty-eight congresspersons, led by Lamar Smith of Texas, one of the 1996 law's main backers, sent a letter to At-

tomey General Janet Reno and INS commissioner Doris Meissner, urging the INS to refine its enforcement priorities and use prosecutorial discretion to reduce hardship for legal permanent residents with citizen children. The letter stated that

[L]egislative reforms enacted in 1996, accompanied by increased funding, enable the INS to remove increasing numbers of criminal aliens.... However, some cases may involve removal proceedings against legal permanent residents who many years ago committed a single crime at the lower end of the aggravated felony spectrum, but have been law abiding ever since, obtained and held jobs and remained self-sufficient and started families in the U.S.... There has been widespread agreement that some deportations were unfair and resulted in unjustifiable hardship. If the facts substantiate the presentations that have come to us, we must ask why the INS pursued removal in such cases when so many other more serious cases existed.... We write to you because many people believe that you have the discretion to alleviate some of the hardship, and we wish to solicit your views as to why you have been unwilling to exercise such authority in some of the cases.... True hardship cases call for the exercise of discretion, and over the past year many members of Congress have urged the INS to develop guidelines for the use of prosecutorial discretion.... We hope that you will develop and implement guidelines for INS prosecutorial discretion in an expeditious and fair manner.¹¹⁵

In 2000, the INS commissioner issued an internal memo on the INS policy of prosecutorial discretion. The memo instructed district directors and chief Border Patrol agents throughout the agency to exercise discretion "at all stages of the enforcement process."¹¹⁶ It listed factors for enforcers to consider—immigration status, length of residence in the United States, criminal history, and humanitarian consideration for vulnerable groups such as women, the elderly, and minors—when "deciding whom to stop, question, and arrest" and whom to detain or deport.¹¹⁷ It also stressed factors *not* permissible, such as "an individual's race, religion, sex, national origin, or political association, activities or beliefs."¹¹⁸ The commissioner affirmed protection from discrimination and "humanitarian" principles while also directing agency resources toward expansive criminal enforcement priorities under IIRIRA. The

guidelines, continued under later administrations, are the basis for current prosecutorial discretion guidelines.

The attack on the World Trade Center on September 11, 2001, thwarted any efforts to repeal the 1996 law's detention and deportation provisions. On the contrary, Attorney General John Ashcroft drew on immigration law as a pretext to target and detain members of Arab and Muslim communities as potential terrorist subjects—the majority of whom were held in maximum security prisons without ever being charged with any terrorist crime.¹¹⁹ On September 20, 2001, the Department of Justice and the INS amended detention custody procedures in order to allow for continued detention, even when there was no charge, during times of emergency. The PATRIOT Act of October 26, 2001, authorized indefinitely detaining immigrants if there were "reasonable grounds to believe" they were involved in terrorism. Prior to these amendments, routine detention and removal practices required that custody and removal occur as quickly as possible. Indefinite detention keeps persons in custody even after their cases have been determined and when there is no charge against the detainee. This went against the Supreme Court ruling in *Zadvydas v. Davis* that indefinite detention is unconstitutional.¹²⁰

The controversial policy of preventative detention allowed the Department of Justice to detain 1,128 immigrants, mostly Muslim and Arab men, as potential security risks. The vast majority had been charged only with immigration violations and minor criminal charges, not terrorism. Additionally, the INS rounded up 6,000 Arab and Muslim immigrants with outstanding deportation orders. It also detained another 2,747 Arab and Muslim immigrants under a special registration program initiated after 9/11.¹²¹ These numbers do not include the hundreds of "enemy combatants" detained in Guantanamo Bay, who were not under the custody of the Department of Justice but under the supervision of the Department of Defense.¹²²

By 2001, the U.S. detention capacity had grown from six thousand to nineteen thousand over seven years and, in that same year, Congress appropriated \$75 million for immigrant detention and construction projects.¹²³ The detention beds were used primarily for "criminal aliens"—mostly noncitizens charged with minor convictions during the drug war. Under Attorney General Ashcroft, the Department of Justice

also requested funds for additional prison beds for the growing population of incarcerated women and terrorist suspects apprehended on minor criminal charges. Filling the beds with incarcerated Black and Latina women and immigrants charged with drug offenses and Arab and Muslim immigrants suspected of, but never charged with, terrorism provided the body counts necessary to justify more funding for wars on crime, illegal immigration, and terrorism.

The Detention Bed Mandate

In 2003, Congress transferred the INS to the newly created Department of Homeland Security (DHS), separating immigration service from its enforcement actions. Under the DHS, there are three main bureaus that handle immigration matters. Citizenship and Immigration Services (USCIS) receives applications of migrants seeking to enter the United States or to adjust their immigration status, or those wishing to become naturalized citizens. Customs and Border Protection (CBP), which merged Inspections, Customs, and the Border Patrol, polices authorized and unauthorized flows in areas between and at various ports of entry. Immigration and Customs Enforcement (ICE) concentrates on interior immigration enforcement through detention and removal operations. The immigration courts and the Board of Immigration Appeals, under the Executive Office of Immigration Review; remained under the Department of Justice.¹²⁴

The reorganization of the INS under the Department of Homeland Security (DHS) transformed the funding structure for immigration enforcement. Before the reorganization in 2003, the INS commissioner had more discretion over where and how to direct congressional funds.¹²⁵ Since the creation of the DHS, funds for Citizenship and Immigration Services come directly from user fees.¹²⁶ CBP and ICE, the main enforcement arms of DHS, derive funding directly from Congress. Most federal funds are no longer pouring into the Department of Justice, but instead are directed to the Department of Homeland Security, which has since then become the government's largest law enforcement agency.

The importance of this shift in funding streams cannot be overstated. For decades, INS commissioners complained of being the "step-child" of the Department of Justice and of being underfunded. As one former

INS commissioner stated, "The Attorney General carried the agenda: From the late 1970s onward, Congress funded the INS to play a supporting role to law enforcement and other agencies within the Department of Justice, mostly for *drug enforcement*, not immigration control.¹²⁸ After the reorganization, federal funding went directly to the Department of Homeland Security, which trickled down to state and local law enforcement agencies, the U.S. Marshals, and the U.S. Attorney's Office-this time for *immigration enforcement*, not drug control-to assist with criminal alien removal and criminal prosecution for immigration offenses.

The turn toward criminal prosecution, it turns out, was also a direct outcome of IIRIRA and the bed-space shortage it created. By 2004, detention beds along the border were filling up with "criminal aliens"- casualties of IIRIRA's expanded definition of aggravated felony-who had been stripped of their legal permanent residency status, and had been mandatorily detained and retroactively deported long after serving their sentences. This left fewer beds to detain unauthorized border crossers without convictions. Mexican nationals could be removed through voluntary departure, and they were. But the cases of Central American migrants apprehended at the border were more complicated and were more likely to result in detention, while immigration judges from the Executive Office of Immigration Review (EOIR), which remained under the Department of Justice, determined their cases.

DHS expanded criminal prosecution in order to minimize the practice of paroling eligible, mostly Central American, migrants from detention and to reduce a backlog of removal cases in the immigration courts.¹²⁹ Often when detention centers on the border were at capacity, the Border Patrol and Detention and Removal officers paroled apprehended Central American migrants without convictions, by releasing them on recognizance. This infuriated conservative critics in Congress who renamed the historic practice of detention parole as a "catch and release policy"- that encouraged migrants to abscond or go underground once they were released on recognizance. In a 2004 congressional hearing, the Committee on Appropriations berated DHS officials for its policy of "catch and release"-that is, releasing people "based on capacity, not merit."¹³⁰

To put an end to "catch and release," Congress increased funds for detention bed space *and for criminally prosecuting immigration offenses*. The idea was to prosecute in criminal courts instead of the immigration

courts and to avoid paroling migrants from detention.¹³¹ Increasing the bed count was touted as a measure to reduce the level of "absconders" who failed to show up to their removal hearing once they are released on recognizance.^{u1} In 2004, the Intelligence Reform and Terrorism Prevention Act funded eight thousand detention beds each year between fiscal years 2006 and 2010.¹³³ In 2005, the Bush administration requested additional funds for criminally prosecuting immigration offenses, particularly under the federal prosecution program, Operation Streamline. Migrants criminally prosecuted for border-crossing offenses are deported directly from prison, which circumvents any additional strain on detention capacity.

Bipartisan support for immigrant detention-related bills had by then become commonplace, many of these calling for more beds. Those calling for constraint and discretion in the uses of detention often failed. Some proposals argued for more immigration judges, but Congress continued to invest in building detention capacity, much as it did during the era of prison expansion. In 2005, the Sensenbrenner Immigration Bill (HR 3477) included measures to increase detention beds and to impose mandatory sentences. Another bill debated that year, HR 4312, the Border Security and Terrorism Prevention Act, included provisions for more bed space and a line mandating that DHS "fully utilize bed space." The bill died and was reintroduced in 2006, again calling for more beds and repeating the mandate to utilize bed space.

That spring, mass protests broke out in cities throughout the United States, involving many of the very people the Sensenbrenner bill targeted.¹³⁴ That so many took to the streets, I believe, had less to do with what the bill proposed and more to do with the punitive detention and deportation practices, already firmly entrenched, that people experienced when crossing the U.S.-Mexico border. Other bills introduced in 2007 proposed expanding appropriations for criminal prosecution—HR 2630, 3283, and 3093 and the Federal Criminal Immigration Courts Act. The Sensenbrenner bill, HR 3477, and those that followed, failed. But immigration raids and a surge in deportations ensued.

In congressional hearings, ICE reported issues related to three major "categories" of people who made ending "catch and release" difficult:

(1) the lack of detention facilities for family groups; (2) an injunction preventing the detention and deportation of El Salvadorans; and (3)

problems with "really difficult countries; referring to the lack of a repatriation agreement with China over thirty-nine thousand Chinese nationals with final orders of deportation."¹³⁵

At the time, detention bed capacity was at 20,800, and 85% of people in custody were mandatory detainees or those classified as "a national security threat or a criminal threat."¹³⁶ Rather than revisit mandatory detention provisions, Congress continued to fund more beds. During FY 2007 appropriation hearings, the Committee on Appropriations questioned the assistant secretary of ICE, Julie Myers, about bed space capacity, acknowledging that instituting a "catch and return" policy would require still more beds:

CONGRESSMAN: Without Congress even acting on immigration reform, we now have a policy that's going to cause a need to detain them until they're returned. Sometimes that takes a while....Are we utilizing what we can use? Is there anything you need to change statutorily to be able to use all the beds to detain as many of them as possible so that catch and return can be successful?

MYERS: Well we are certainly looking to make sure we use the 20,800 beds we have ... and squeeze every dollar we can out of those beds by making sure they spend less time in the beds.

The testimony illustrates a law-and-order focus on maximizing resources, increasing efficiency, and processing as many people as possible, and marks a shift away from traditional adjudication in the immigration courts. Yet the testimony also reveals a disconnect between what Congress legislates and the enforcement reality on the ground and complicates the bed space issue. "Currently bed space is *not* limiting us except for the issue of families" (emphasis added), Myers explained.

MYERS: We make over 1.1 million apprehensions a year and the majority of these are Mexicans who are returned to their country ... and we do not detain them. The catch and release issues, the bed space issues, relate to what we refer to as other than Mexican.

CONGRESSMAN: Well, my question relates to all of them.... The problem we have on returning Mexicans to Mexico or other than

Mexicans is that you have to recognize them in court without keeping them in custody until their court appearance.¹³⁸

In the hearing, ICE assistant secretary Myers clarified that most Border Patrol apprehensions are of Mexican nationals, who are more likely to be "voluntarily returned" than detained and deported, at cost to the federal government. The "catch and release" policy most directly affected "other than Mexicans." As she explained, bed space was not an impediment to enforcement actions against Mexican nationals, who make up the majority of apprehensions and removals every year. Unable to grasp the complexity of migration flows and enforcement actions in the U.S.-Mexico border region, the congressman boiled the issue down to a shortage of beds.

Expanding bed space and alternatives to detention, as well as coming up with more sophisticated ways to deport by reducing court time or bypassing immigration judges altogether, had become a major focus in budget hearings when Barack Obama was elected president in 2008. That year, Congress approved funds for Operation Streamline. By then the bed capacity had risen to 31,500, up from 28,000 the year before. During a DHS appropriation hearing for FY 2008, then president Bush's budget included a request for \$569,800,000 for three thousand new Border Patrol positions, \$1 million for border fencing and biometric technology, and an increase of \$8,000,000 for the Criminal Alien Program. The Committee on Appropriations expressed "disappointment" that the president had not requested funding for detention beds. It approved funding anyway.¹³⁹ Senator Robert Byrd, from the Committee on Appropriations, stated that

[t]he Committee is disappointed that the President's budget request does not maintain the linkage between requested increases for Border Patrol agents with a similar increase in detention beds.... Therefore the Committee provides an additional \$146,451,000 for a total of \$236,843,596, for 4,000 new detention beds. This is an increase of 3,050 beds . . . above the request and ensures a total of 31,500 beds.¹⁴⁰

To prevent a detention policy rollback, Congress instituted a bed mandate in 2009, requiring that DHS maintain a bed level of no less than 33,400 beds. A Senate report on appropriations for the Department of Homeland Security in FY 2010, submitted by Senator Harry Reid, stated that

[m]aintaining an adequate number of detention beds is critical to ensuring the integrity of our detention and removal system while at the same time preventing a return to the ill-advised "catch and release" policy.... The Congress took the lead and added funding for additional detention beds above the President's request the past 5 fiscal years.... Bill language is included directing that a detention bed level of 33,400 beds shall be maintained throughout the fiscal year 2010.¹⁴¹

Several bills came before Congress that year to "mandate" increasing detention bed levels.¹⁴²

In 2009, following public scandals concerning medical care in detention facilities, ICE revised and publicized its new detention standards.¹⁴³ In response to protests against the Obama administration's record on deportations, ICE director John Morton released a memo on June 30, 2010, later revised on March 2, 2011, to field directors, special agents in charge, and all chief counsel outlining priorities for enforcement. The memo states that "ICE only has resources to remove 400,000 aliens per year, less than 4 percent of the illegal alien population in the United States.... ICE must prioritize its enforcement personnel, detention space, and removal resources to ensure that the removals the agency does conduct promote the agency's highest priorities" (e.g., terrorist suspects and "violent criminals, felons, and repeat offenders").¹⁴⁴ In 2011, Representative Lamar Smith introduced the "Keep Our Communities Safe Act of 2011," which would have authorized indefinite detention of migrants with orders of deportation who could not be deported due to a lack of repatriation agreements with the sending country.¹⁴⁵ The bill died.

By FY 2012, detention bed space in the United States had reached thirty-four thousand.¹⁴⁶ On May 23, 2012, the Committee on Appropriations stressed fiscal discipline for DHS, noting that "[w]hile the Department is charged with countering serious threats to our security, the

Nation faces another, perhaps even greater threat. This threat lies . . . here at home, where America's fiscal situation remains unsustainable."u.7 Nevertheless, during this period of *fiscal crisis and government shutdowns*, the committee recommended \$n,683,317,000 for Customs and Border Protection (CBP), \$76,999,000 above the president's budget request. "This funding;' the committee's report states, "sustains the highest level of Border Patrol agents and CBP officers in history.... The Committee also recommends \$5,785,656,000 for ICE, an increase of \$141,595,000 above the request, and sustains 34,000 detention beds—the greatest detention capacity in ICE's history ...*denying the President: S request for a reduction* in these crucial enforcement areas." (emphasis added).¹⁴⁸

A dissenting Minority Report challenged the detention provisions in the bill, stating,

[w]e strongly oppose inclusion of statutory language mandating that ICE maintain a level of not less than 34,000 beds through September 30, 2013, which is 1,200 more beds than the budget request.... While we have no problem funding the capacity at 32,800 beds, as requested, the use of those beds should be determined by enforcement actions and judgment of ICE on whether detention is required for particular detainees based on flight risk and danger posed to the public.... Further, in an environment of fiscal restraint, telling a federal agency that they are not permitted to spend less than a certain amount limits the ability of ICE to achieve its objectives with a savings to the taxpayer.¹⁴⁹

Until then, challenges to the bed quota had been rare; detention-related legislation had the unexpected privilege of bipartisan support. The final appropriations act maintained a bed level of **thirty**-four thousand for FY 2013. In order to prevent the transfer of Guantanamo detainees to the United States, it also prohibited

any federal funds from being used to construct, acquire, or modify any facility in the United States or its territories or possessions to house any individual who, as of June 24, 2009, is located at Guantanamo, and who: (1) is not a U.S. citizen or a member of the Armed Forces; and (2)

is either in DOD custody or control, or otherwise under detention at Guantanamo.¹⁵⁰

In 2013, HR 2217, which passed in the House, called for "ICE funding to maintain a level of not less than 31,800 detention beds through September 30, 2014."¹⁵¹ However, the final appropriations act of 2014 maintained the thirty-four-thousand-bed mandate, despite a letter to the president signed by sixty-five House Democrats calling for an end to the bed quota.¹⁵² In May 2014, Representative Adam Smith of Washington State introduced the "Accountability in Detention Act" proposing that "the number of detention beds maintained shall be determined by the Secretary of Homeland Security and shall be based on detention needs. It is the sense of Congress that Appropriations Acts shall not mandate maintenance of a minimum number of detention beds."¹⁵³

Filling Beds

The punitive turn in immigration enforcement must be understood in the context of the post-civil rights era of mass incarceration. Conservatives and, some would argue, liberal reformers helped spearhead law-and-order policies that exploded the U.S. prison population and created a crisis of prison overcrowding.¹⁵⁴ This chapter argues that the scramble for prison beds was a major force behind the Criminal Alien Program (CAP), which Congress pushed as a way to purge noncitizens from jails and prisons in order to free up prison beds. What is striking about this story is that the criminal alien mandate stemmed from a desire not to control migration but to free up bed space in the criminal justice system. CAP's roots, then, lie in the hyperincarceration of Black and Latino youth.

The Criminal Alien Program has transformed immigration enforcement on the border. It triggered a change in enforcement priorities. It transformed detention and removal. It led to developing integrated biometric technologies to track and measure risk, and it led to expanding detention bed space. The most seemingly benign aspects of CAP—beds and biometric technology necessary to identify and hold deportable criminal aliens—have played a crucial role in merging the immigration