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Immigration and the War on Crime: Law and Order Politics and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996

Patrisia Macías-Rojas
University of Illinois at Chicago

Executive Summary

The 1996 Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) was a momentous law that recast undocumented immigration as a crime and fused immigration enforcement with crime control (García Hernández 2016; Lind 2016). Among its most controversial provisions, the law expanded the crimes, broadly defined, for which immigrants could be deported and legal permanent residency status revoked. The law instituted fast-track deportations and mandatory detention for immigrants with convictions. It restricted access to relief from deportation. It constrained the review of immigration court decisions and imposed barriers for filing class action lawsuits against the former US Immigration and Naturalization Service (INS). It provided for the development of biometric technologies to track "criminal aliens" and authorized the former INS to deputize state and local police and sheriff's departments to enforce immigration law (Guttentag 1997a; Migration News 1997a, 1997b, 1997c; Taylor 1997). In short, it put into law many of the punitive provisions associated with the criminalization of migration today.

Legal scholars have documented the critical role that IIRIRA played in fundamentally transforming immigration enforcement, laying the groundwork for an emerging field of "crimmigration" (Morris 1997; Morawetz 1998, 2000; Kanstroom 2000; Miller 2003; Welch 2003; Stumpf 2006). These studies challenged the law's deportation and mandatory detention provisions, as well as its constraints on judicial review. And they exposed the law's widespread consequences, namely the deportations that ensued and the disproportionate impact of IIRIRA's enforcement measures on immigrants with longstanding ties to the United States (ABA 2004).

Less is known about what drove IIRIRA's criminal provisions or how immigration came to be viewed through a lens of criminality in the first place. Scholars have mostly looked within the immigration policy arena for answers, focusing on immigration reform and the "new nativism" that

peaked in the early nineties (Perea 1997; Jacobson 2008). Some studies have focused on interest group competition, particularly immigration restrictionists' prohibitions on welfare benefits, while others have examined constructions of immigrants as a social threat (Chavez 2001; Nevins 2002, 2010; Newton 2008; Tichenor 2009; Bosworth and Kaufman 2011; Zatz and Rodriguez 2015).

Surprisingly few studies have stepped outside the immigration policy arena to examine the role of crime politics and the policies of mass incarceration. Of these, scholars suggest that IIRIRA's most punitive provisions stem from a "new penology" in the criminal justice system, characterized by discourses and practices designed to predict dangerousness and to manage risk (Feeley and Simon 1992; Miller 2003; Stumpf 2006; Welch 2012). Yet historical connections between the punitive turn in the criminal justice and immigration systems have yet to be disentangled and laid bare.

Certainly, nativist fears about unauthorized migration, national security, and demographic change were important factors shaping IIRIRA's criminal provisions, but this article argues that the crime politics advanced by the Republican Party (or the "Grand Old Party," GOP) and the Democratic Party also played an undeniable and understudied role. The first part of the analysis examines policies of mass incarceration and the crime politics of the GOP under the Reagan administration. The second half focuses on the crime politics of the Democratic Party that recast undocumented migration as a crime and culminated in passage of IIRIRA under the Clinton administration.

IIRIRA's criminal provisions continue to shape debates on the relationship between immigration and crime, the crimes that should provide grounds for expulsion from the United States, and the use of detention in deportation proceedings for those with criminal convictions. This essay considers the ways in which the War on Crime — specifically the failed mass incarceration policies — reshaped the immigration debate. It sheds light on the understudied role that crime politics of the GOP and the Democratic Party played in shaping IIRIRA — specifically its criminal provisions, which linked unauthorized migration with criminality, and fundamentally restructured immigration enforcement and infused it with the resources necessary to track, detain, and deport broad categories of immigrants, not just those with convictions.

The GOP, Crime Politics, and Policies of Mass Incarceration

In the sixties and seventies—at the height of social protest and "insurgency" — crime became a central issue in US politics (Beckett 1999; Camp 2016). During the 1964 and 1972 presidential elections, the modern conservative movement used threat narratives to politically construct civil rights protests as "street crimes" and protestors as "thugs" and "criminals." As the sociologist Katherine Beckett and others have shown, this was

not necessarily because crime had worsened. In fact, crime rates remained fairly steady and had declined by the 1990s. Rather Republican presidential candidates, like Barry Goldwater, who ran against Lyndon B. Johnson in 1964 and lost, and Richard Nixon, drew on campaign rhetoric portraying a "breakdown of law and order," a narrative that denied or ignored socioeconomic causes of crime such as unemployment, poverty, or inequality advocated by early reformers (Beckett 1999, 5).

Even as crime was moving to the forefront of US politics, the rhetoric linking immigration and crime that we see today had not yet become firmly entrenched in US political discourse. As Leo Chavez (2001) notes, news coverage on immigration in the sixties and seventies fluctuated between affirmative and alarmist images. News coverage focused on "push-pull" conditions in Mexico and the United States — namely unemployment that pushed migrants from Mexico and US employers who hired unauthorized immigrants, pulling them into the United States — not on immigrants as criminals. Similarly, when testifying before Congress about a rise in unauthorized migration in the late 1960s, the Immigration and Naturalization Service (INS) Commissioner portrayed immigrants as workers, not criminals. The Commissioner attributed the rise in unauthorized migration to federal policies, such as the termination of the Bracero program and the 1965 Immigration Act's "numerical limitation on Western Hemisphere immigrant aliens," which resulted in "increases in surreptitious entry without inspection" (INS 1969, 20). Thus, the dominant rhetoric around immigration at the time portrayed immigration as an economic rather than a crime issue.

In 1980, Ronald Reagan campaigned for the presidency on a promise to make America safe from street crime. His campaign slogan was "Let's Make America Great Again." Reagan's Drug War tripled the prison population and pushed hundreds of thousands of Americans into already overcrowded prisons, even as the crime rate was declining (Tonry 1995; Hagan 2012; Clear and Frost 2015).[1] Overcrowding would become a catalyst for expanding bed space in prisons and detention centers.

Prison Overcrowding and the Scramble for Beds

Department of Corrections commissioners across the country described inmates backed up in jails waiting to enter the system. In one hearing on prison overcrowding, legislators testified: "Prisons everywhere are now bulging with far more people than their rated capacity. Recreation areas, tents, and trailers have all been pressed into service to meet the crunch."[2] One governor reported: "Everyone has run out of room. To meet the demand for space, we have slept prisoners on the floors of gymnasiums and chapels and laundry rooms."[3]

1 The 1984 Comprehensive Crime Control Act imposed mandatory minimum sentencing and mandated pre-trial detention for certain offenders. It also expanded forfeiture laws that provided incentives for state and local governments to carry out federal drug arrests and prosecutions. The Anti-Drug Abuse Acts of 1986 and 1988 further expanded mandatory sentencing, reduced the discretion of judges, and restricted the possibility of being released on parole, all of which increased the likelihood of incarceration and longer prison sentences.

2 *Prison Overcrowding: Hearing Before the Subcomm. on Criminal Law of the S. Comm. on the Judiciary*, 98th Cong. 5 (1983) [hereinafter *Prison Overcrowding*] (statement of Senator Arlen Spector).

3 *Prison Overcrowding*, *supra* note 2, at 61 (1983) (statement of James R. Thompson, Governor, State of Illinois).

"They are ineligible for parole," explained one commissioner, and beds do not turn over as fast, even as "the crime rate is statistically down."[4] Overcrowding was a central issue in the prisoner rights movement in the sixties and seventies (Thompson 1983). However, Reagan's drug policies, which sent people to prison for longer terms, pushed overcrowding across federal prisons and state and local jails to new and unprecedented levels (Simon 2014; Gottschalk 2016). Prison overcrowding stemmed from mandatory minimum sentencing guidelines for drug-related criminal offenses. Instead of rethinking mandatory minimum sentencing, policymakers responded to the crisis by looking for ways to maximize space at existing facilities and pumping billions in federal funds to build prisons.

Refugees and Detention Overcrowding

The Reagan administration also instituted a policy of detaining refugees and asylum seekers (Simon 1998). The Reagan years saw a rise in apprehensions of asylum seekers from Haiti, Cuba, El Salvador, and Nicaragua, as well as from Ethiopia, Iran, and Indochina. This was part of a global trend. Between 1983 and 1992, three million asylum seekers worldwide bypassed overcrowded and understaffed refugee camps to seek safety and apply for asylum in the United States and other industrialized countries (Loescher 1996, 98). The Reagan administration adopted a military strategy of "deterrence" to prevent people fleeing conflict zones from entering the United States and applying for asylum (Helton 1993, 353; Loescher 1996). Reagan instituted policies to interdict, detain, and deport asylum seekers as a form of deterrence (Dunn 1995).

Under the new detention policies, the INS began arresting and detaining Caribbean and Central American asylum seekers — mostly Cubans, Haitians, El Salvadorans, and Guatemalans, many of whom were fleeing Communism or civil wars in their home countries (Welch 1996; Jonas 1999; Hernandez 2008).[5] In 1980, the INS had detention space for only 1,800 people (ACLU 1990). Traditionally, the INS had maintained a practice of releasing migrants on their own recognizance. With limited space under the new detention policy, the government detained asylum seekers from Cuba and Haiti in overcrowded prisons and jails, resulting in revolts that turned violent, hunger strikes, and calls for "collective suicides" to protest detention conditions (Helton 1986, 364-65, note 93).

Political rhetoric depicted Cuban and Haitian refugees as "criminals" and "dangerous classes" (Simon and Feely 1992; Simon 1998).[6] This new rhetoric contrasted sharply with the national discourse surrounding refugees from just a few years earlier, which focused on compassion and humanitarian concern for refugees (Chavez 2001). The United States had recently passed the Refugee Act of 1980 that aligned US immigration law with international human rights law.

4 *Prison Overcrowding*, *supra* note 2, at 13 (1983); *Federal Bureau of Prisons: Oversight Hearing Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the S. Comm. of the Judiciary*, 98th Cong. 33 (1983).

5 Until Reagan's directive, the Immigration and Naturalization Service (INS) maintained a practice of non-detention that typically paroled apprehended immigrants with pending deportation hearings.

6 *Illegal Alien Felons: A Federal Responsibility: Hearing before the Subcomm. on Federal Spending, Budget, and Accounting of the S. Comm. on Governmental Affairs*, 100th Cong. [hereinafter *Illegal Alien Felons*] (1987).

"Alien Felons" as New Enforcement Targets

Overcrowded prisons and detention centers prompted legislators to introduce measures to deport "alien felons" in order to free up beds.[7] Mandatory minimum sentencing fueled overcrowding; yet Congress defined the problem as a bed space shortage. A government report on prison overcrowding noted that "special prisoner groups" such as 10,000 noncitizens with drug convictions, were "filling prison space that it would cost the Bureau $426 million to construct (GAO 1989, 27)." In states like New York, Illinois, Florida, and California, lawmakers and officials testified before Congress that they could "almost solve our prison overcrowding if the Federal Government does what it needs to do to get these criminals and deport them."[8]

Immigrants with criminal convictions, then, became new enforcement targets (Inda 2013; Macías-Rojas 2016). Legislation specifically targeting immigrants in overcrowded jails and prisons first appeared in 1986. The 1986 Anti-Drug Abuse Act expanded grounds for deporting noncitizens with drug offenses. It also required the INS to conduct pilot programs in four cities — New York City, Los Angeles, Chicago, and Miami — "to enhance exchange of information and level of communication between the INS and state and local justice entities."[9]

The same year, the 1986 Immigration Reform and Control Act (IRCA) included a last minute amendment to fund an "Alien Criminal Apprehension Program" designed to deport immigrants in the criminal justice system upon completing their prison sentences (Fix 1991, 47).[10] In its 1987 budget request to Congress, the INS requested funding for this program, which it argued would "help free up existing detention space."[11] For fiscal year (FY) 1987, Congress appropriated 16.8 million for "criminal alien removal," and for FY 1988, funding for criminal alien removal jumped to $39.2 million (Fix 1991, 46).

The 1988 Anti-Drug Abuse Act created an "aggravated felony" category in immigration law that included convictions for "murder, drug trafficking, and illicit traffic in arms" (Osuna 1996; ABA 2004, 23).[12] In 1988, the INS also established the Institutional Hearing Program (IHP), a joint program between the INS and immigration courts to conduct deportation hearings in select federal, state, and local facilities (INS 1988).[13] IHP "eliminate[d] the

7 *Illegal Alien Felons*, *supra* note 6.

8 *Criminal Aliens: Hearing before the Subcomm. on International Law, Immigration, and Refugees of the H. Comm. on the Judiciary*, 103rd Cong. (1994); *Members' Forum on Immigration: Hearing before Subcomm. on Immigration and Claims of the H. Comm. on the Judiciary*, 104th Cong. 39 (1995) (statement of New York Representative Susan Molinari).

9 *Federal Drug Enforcement and Interdiction Provisions of the Anti-Drug Abuse Act of 1986: Hearing before the H. Select Comm. on Narcotics Abuse and Control*, 100th Cong. 53 (1987) (testimony of John F. Shaw, Asst. Commissioner of Investigations, INS).

10 This provision, known as the MacKay Amendment, is named for the Florida representative, Buddy McKay, who added the amendment to the Immigration Reform and Control Act of 1986 (IRCA) when it was debated in Congress (Fix 1991, 46).

11 *Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations for 1988: Hearing before the Subcomm. on Commerce, Justice, State, and the Judiciary Appropriations of the H. Comm. on Appropriations*, 100th Cong. 1252-1253 (1987).

12 1988 Anti-Drug Abuse Act, 21 U.S.C. § 1501 (1988).

13 *Oversight of the Immigration and Naturalization Service: Hearing before the Subcomm. on Immigration of the S. Comm. on the Judiciary*, 104th Cong. (1995).

need for additional detention . . . and assure[d] expeditious removal following . . . the alien's incarceration" (Morris 1997, 1323). Two years later, the 1990 Immigration Act included provisions to detain and deport noncitizens swept up in the drug war, including provisions that expanded the list of deportable crimes to include "attempt to commit a drug crime," authorized INS officers to make warrantless arrests for certain "crimes unrelated to immigration," and limited the period for requesting judicial review of deportation orders.[14] A few years after that, the Violent Crime Control and Law Enforcement Act of 1994 established the Criminal Alien Tracking Center and authorized reimbursement to states for "alien incarceration" under the State Criminal Alien Assistance Program (Morris 1997, 1322).[15]

When the Department of Justice began tracking immigrants in the federal criminal justice system, the Bureau of Justice Statistics reported that the majority, approximately 55 percent, were legal permanent residents with longstanding ties to the United States and no prior criminal history (Scalia 1996). Immigrant rights advocates drew on civil rights protections to legally challenge detention and deportation practices in the courts (Schuck 1992, 62-73; ABA 2004, 74-75). In 1983, Congress established an Office of Immigration Litigation to manage the legal challenges.[16]

Civil rights litigation made Reagan's law-and-order approach to immigration difficult for the federal government to implement. Asylum seekers, held in overcrowded jails and prisons, challenged their confinement through protest and civil rights litigation (Helton 1986). And legal permanent residents with low level drug convictions challenged their deportations through due process and equal protection claims. Lamar Smith, the architect of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), lamented the post-1965 "treatment of immigration as a form of 'civil right'" and the "inappropriate linking of immigration to the domestic civil rights agenda" (Smith and Grant 1996, 888). Detaining asylum seekers and deporting immigrants from jails and prisons required restructuring detention and deportation and reimagining immigration as a crime.

Crime Politics and the New Democrats

In the early 1990s, several bills that would have linked immigrants and criminality were introduced in Congress, many of these by Democrats. Democratic then-Representative Chuck Schumer (NY) sponsored a bill, the Criminal Aliens Incarceration Act of 1993, proposing to deport immigrants with convictions prior to completing their criminal sentences.[17] On July 31, 1992, Schumer had introduced a similar bill, the Criminal Alien and Prison Overcrowding Act, which would have authorized the use of closed military bases for incarcerating immigrants.[18] On October 20, 1993, Democratic Senator Dianne Feinstein

14 Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (1990).

15 Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (1994).

16 In 1983, the Department of Justice also created the Executive Office of Immigration Review (EOIR), which oversees all of the immigration courts in the United States, and the Board of Immigration Appeals. See *INS and the Executive Office for Immigration Review: Hearing before the Subcomm. on Immigration and Claims of the H. Comm. on the Judiciary*, 107th Cong. (2001).

17 Criminal Aliens Incarceration Act of 1993, H.R. 2438, 103rd Cong. (1993).

18 Criminal Alien and Prison Overcrowding Act, H.R. 4440, 102nd Cong. (1992).

followed suit, introducing Senate Bill 1517, the Criminal Alien Deportation and Transfer Act of 1993, proposing that judges in criminal proceedings should be authorized to issue deportation orders during criminal sentencing for immigrants with convictions, essentially curtailing the ability of immigrants to request discretionary relief from removal.[19] The bill also empowered the Attorney General to negotiate international prisoner transfer treaties that would allow immigrants to complete their prison sentences in their home countries. Florida Republican Thomas Lewis also introduced the Criminal Alien Deportation and Exclusion Acts of 1992 and 1993, calling for the expedited removal of immigrants with convictions and the narrowing of relief from deportation.[20] These bipartisan bills addressed pressing issues in Congress — border control and unauthorized migration, detention and refugees, and prison overcrowding and the bed space shortage in the Bureau of Prisons — at a time when Democrats were vying with Republicans over who would appear tougher on crime.

That each of these bills failed to be enacted speaks to the political discourse on immigration at the time. Immigration was not yet entangled with crime in the public imagination. Before the Democratic Party took a "tough-on-crime" approach to immigration, discourse and public opinion fluctuated between being pro-immigrant or restrictive (HoSang 2010; Chavez 2001). During the seventies and early eighties discourse on immigration leaned toward being compassionate and humanitarian, particularly concerning the plight of farmworkers and refugees. This rhetoric circulated alongside more nativist discourse portraying a "border under siege" by unauthorized migrants who were being recruited by US-based employers yet blocked from accessing visas to legally migrate (Chavez 2001; Massey, Durand, and Malone 2002).

Prior to the 1990s, crime-centered rhetoric did not dominate the public narrative on immigration.[21] Opinion polls were largely favorable toward immigrants (HoSang 2010; Nevins 2010, 80). The economy, not immigration, was the most pressing issue for most Americans (Nevins 2010, 102). Even within the immigration bureaucracy, unauthorized crossings were processed administratively as an "entry without inspection," not as criminal offenses (Macías-Rojas 2016). "Illegal immigration" was associated with being "foreign" rather than with "criminality" (Nevins 2010).

The political discourse changed when the Democratic Party shifted its position on unauthorized migration. Senator Feinstein published an op-ed in the *Los Angeles Times* on June 16, 1993, echoing President Bill Clinton's pledge to take a tougher stance on unauthorized immigration and crime "as part of a strategy to appropriate the GOP platform for political gain" (Carlson 2014). Feinstein called for harsher laws for immigrants with convictions. "Rather than having our taxpayers underwrite the prison costs," she wrote, "the federal government ought to require that illegal immigrants who commit felonies be returned to their home countries for imprisonment" (Feinstein 1993).

19 Criminal Alien Deportation and Enhanced Transfer Act of 1993, S. 1571, 103rd Cong. (1993).

20 Criminal Alien Deportation and Exclusion Amendments of 1992, H.R. 5733, 102nd Cong. (1992); Criminal Alien Deportation and Exclusion Amendments of 1993, H.R. 723, 103nd Cong. (1993).

21 Progressive Era reformers debunked early twentieth century political discourses that associated European immigrants and crime (Muhammad 2011).

Feinstein's op-ed marked a shift in the Democratic Party's platform and a pivotal moment in the national immigration debate. While still pro-immigration, the Democratic Party adopted a platform that recast *unauthorized* migration as a crime. There was certainly already such a rhetoric circulating in Congress. However, the Democrats pushed crime and immigration rhetoric beyond Congress and into mainstream public discourse.

As Feinstein's op-ed shows, crime rhetoric on immigration focused on incarcerated "illegal immigrants who commit felonies." In other words, it centered on immigrants in the criminal justice system for mostly low-level drug crimes. This political rhetoric essentially blamed immigrants, as opposed to drug laws, for prison overcrowding and "prison costs" that taxpayers underwrote and called for "illegal immigrants" to be "returned to their home countries for imprisonment."

The rhetoric of "overcrowding" in jails and prisons soon spread to the immigration arena and all aspects of public life. In Congress, undocumented immigrants were depicted as "crowding" schools and hospitals[22] and were blamed for "crowding" labor markets.[23] Democrats and Republicans alike drew on a powerful language of "victim" and "criminal," to advance a political agenda, much as the conservative right had done during the presidential election campaigns of Barry Goldwater, Richard Nixon, and Ronald Reagan. The victims in this case were taxpayers, specifically a white suburban electorate (Cacho 2000, 393; McGirr 2015). The culprits were undocumented immigrants charged with "crowding" prisons, schools, and hospitals. This rhetoric of overcrowding garnered support for punitive federal and state-level anti-immigration laws, while masking the crime politics from which such measures emerged.

Following Feinstein's op-ed and during California's 1994 gubernatorial election, Republican Governor Pete Wilson endorsed the controversial "Save Our State" initiative, or Proposition 187, proposing to deny public education, medical care, and other services to unauthorized migrants (Johnson 1995). He endorsed Proposition 187 late in his re-election campaign — six weeks before the election — inspired by Democrats' efforts to take a more aggressive stance on unauthorized immigration (Skelton 1993; HoSang 2010; Nevins 2010). Like the more centrist New Democrats, Wilson focused on immigration's cost to "taxpayers." Following Feinstein's lead, Wilson invited Attorney General Janet Reno on a border tour and prison visit "to see firsthand . . . the burden on California taxpayers of incarcerating immigrants convicted of felonies" (Skelton 1993). Wilson also endorsed Proposition 184, the "Three Strikes and You're Out" ballot initiative that imposed mandatory sentencing of 25 years to life for anyone convicted of a third offense. He also supported a prison construction boom to manage severe and costly overcrowding in California prisons and jails.

22 *Impact of Federal Immigration Policy and INS Activities on Communities: Hearing before the Subcomm. on Information, Justice, Transportation, and Agriculture of the H. Comm. on Government Operations*, 103rd Cong. (1994); *Increasing Costs of Illegal Immigration, Special Hearing: Hearing before the S. Comm. on Appropriations*, 103rd Cong. (1994); *Proposals To Reduce Illegal Immigration and Control Costs to Taxpayers: Hearing before the S. Comm. on the Judiciary*, 104th Cong. (1995); *Members' Forum on Immigration: Hearing before the Subcomm. on Immigration and Claims of the H. Comm. on the Judiciary*, 104th Cong. (1995).

23 *Impact of Illegal Immigration on Public Benefit Programs and the American Labor Force: Hearing before the Subcomm. on Immigration and Claims of the H. Comm. on the Judiciary*, 104th Cong. (1995).

It didn't matter that the crime rate had flattened out and was declining or that the majority of immigrants in California were lawfully present and documented (HoSang 2010). The rhetoric appealed to a mostly white electorate, 83 percent of California voters anxious about demographic change, a perceived breakdown of law and order, and an economic recession that California was facing at the time (ibid.,185).

Wilson won the election on a platform that linked immigrants and criminality. This was during the "Republican Revolution," in which the GOP candidates united behind Newt Gingrich's Contract with America. Republicans ultimately gained 54 seats in the House of Representatives and eight seats in the Senate to become a congressional majority in the 1994-midterm elections, taking over control of both the House and the Senate for the first time in decades.

Despite widespread opposition, Proposition 187 won the majority vote in that election, largely due to the makeup of California's electorate. The courts eventually struck down unconstitutional aspects of the law, but the crime rhetoric lived on. The new narrative recast immigration as a crime. Crime politics converged with nativism. The "tough-on-crime" approach to immigration set the stage for subsequent legislation such as the 1996 Antiterrorism and Effective Death Penalty Act (AEDPA) and IIRIRA under the Clinton administration.

The 1996 Antiterrorism and Effective Death Penalty Act (AEDPA)

Democratic then-Representative Chuck Schumer (NY) introduced the Omnibus Counterterrorism Act of 1995 (H.R. 896), which would have expanded authority to target "alien terrorists" in the United States affiliated with organizations that opposed US support of Israel and that the United States perceived to be "undermining the Middle East Peace process" (Beall 1997).[24] The first hearing on the counterterrorism bill occurred on April 5 two weeks before the Oklahoma City bombing on April 19, 1995. During that hearing, the bill was widely criticized for concerns over due process, free speech, and Fourth Amendment rights. As one ranking minority member said of the counterterrorism bill, "Are we going to allow deportations based on secret evidence? . . . Are we going to expand wiretapping authority?"[25] Representative Schumer defended his bill, arguing that "noncitizens do not, and should not, have rights . . . and that the deportation proceedings are civil proceedings, not criminal trials."[26]

The second hearing took place in June 1995, *after* the Oklahoma City bombing. Although the Omnibus Counterterrorism Act was never signed into law, Illinois Representative Henry Hyde (R) incorporated Schumer's "domestic terrorism" provisions into a new bill — H.R. 1710, or the Comprehensive Antiterrorism Act.[27] It included harsh measures aimed at deporting and denying asylum to immigrants with membership in designated "terrorist

24 Omnibus Counterterrorism Act of 1995, H.R. 896, 104th Cong. (1995); *International Terrorism: Threats and Responses: Hearings before the H. Comm. on the Judiciary*, 104th Cong. (1995) [hereinafter *International Terrorism*].

25 *International Terrorism*, *supra* note 23, at 3.

26 *International Terrorism*, *supra* note 23, at 5.

27 *International Terrorism*, *supra* note 23.

organizations."[28] The "alien terrorist" and "criminal alien" provisions were folded into H.R. 2703 and, ultimately, S. 735, which would become AEDPA.[29]

Former Democratic President Clinton signed AEDPA into law on April 24, 1996, even as legislators acknowledged that the Oklahoma City bombing was caused by "our own people" and not "alien terrorists."[30] Invoking the Oklahoma City bombings, lawmakers drew on national security rhetoric to push through the legislation. AEDPA incorporated controversial measures in early crime bills, which sought to amend the US Constitution's "Great Writ" of habeas corpus that protects individuals from wrongful detention and imprisonment. One such bill that was revived after the Oklahoma City bombings was H.R. 3: Taking Back our Streets Act of 1995 that would have authorized more "resources to build prison beds."[31] The bill proposed measures to expedite death penalty cases by "reforming" the writ of habeas corpus. It also proposed to streamline "criminal alien deportations" in order to "free up desperately needed prison beds."[32] H.R. 3 also included measures that would have amended the exclusionary rule that prohibits illegally obtained evidence in a criminal trial in order to expand law enforcement's investigatory power.[33]

AEDPA also revived earlier bills targeting "criminal aliens." Florida Representative Bill McCullom (R), who sponsored the Taking Back Our Streets Act, introduced H.R. 668, the Criminal Alien Deportation Improvements Act on January 25, 1995. This bill included measures to expedite deportations and bypass judicial review; deport permanent residents with convictions; authorize wiretaps in smuggling investigations; expand deportation for crimes of moral turpitude; and support prisoner transfer to other countries in order to free up prison beds.[34] Although the Taking Back Our Streets Act (H.R. 3) and the Criminal Alien Deportation Improvements Act (H.R. 668) were never enacted, the bills' most punitive provisions were incorporated into AEDPA (S. 735).[35]

Democratic and Republican lawmakers alike used the Oklahoma City bombing to mobilize national security rhetoric that justified merging controversial, and some would argue, unconstitutional, measures in previous crime bills (H.R. 3) and criminal alien deportation bills (H.R. 668), with Schumer's aforementioned Omnibus Counterterrorism Act of 1995 (H.R 896). Put another way, AEDPA fused "counterterrorism" measures targeting Arab and Muslim immigrant communities in the United States with domestic crime bills disproportionately impacting Blacks and Latinx in the criminal justice system, and "criminal alien deportation" provisions directly affecting mostly Latin American and Caribbean immigrants caught in the drug war. More specifically, the proposed bills sought to limit access to due process rights in the criminal justice and immigration systems as a

28 H.R.1710, 104th Cong. (1995).
29 *Id*.
30 *International Terrorism*, *supra* note 23, at 220.
31 Taking Back Our Streets Act of 1995, H.R. 3, 104th Cong. (1995).
32 *Removal of Criminal and Illegal Aliens: Hearing before the Subcomm. on Immigration and Claims of the H. Comm. on the Judiciary*, 104th Cong. 8 (1995).
33 H.R. 3.
34 Criminal Alien Deportation Improvements Act of 1995, H.R. 668, 104th Cong. (1995); *Criminal Alien Deportation Improvements Act of 1995: Hearing before the H. Comm. on the Judiciary*, 104th Cong. 104-122 (1995).
35 Antiterrorism and Effective Death Penalty Act of 1996, S.735, 104th Cong. (1996).

policy response to the crisis of prison overcrowding. Legislators argued that defendants in death penalty cases "abused" the writ of habeas corpus through ongoing appeals, which exacerbated prison costs. Similarly, lawmakers viewed due process protections in the immigration system as obstacles to criminal alien deportations and freeing up bed space.

Critics argued that AEDPA restricted habeas corpus and weakened constitutional protections in exchange for a "quick 'solution' to terrorism" (Beall 1997; Chacón 2007). The father of someone killed in Oklahoma bombing wrote:

> The habeas reform provisions . . . are not known or understood by the families who have been used to lobby on behalf of this bill . . . Our family knows that meaningful habeas court review of unconstitutional convictions is essential . . . this package of "reforms" you are being asked to vote for would raise hurdles so high to such essential review . . . . We consider this a direct threat to us and our loved ones still living who may well find themselves the victim of abusive or mistaken law enforcement and prosecutor conduct and unconstitutional lower court decisions....[36]

AEDPA also authorized detention, wiretapping, secret evidence in removal proceedings, and provisions that limit relief from deportation and judicial review in expedited deportation and asylum cases for immigrants designated as "terrorists" or "criminal aliens." It also broadened the criteria for crimes of moral turpitude and re-characterized misdemeanors as aggravated felonies, which disproportionately impacted legal permanent residents and immigrants with long settlement histories (Morris 1997; Morawetz 1998, 2001; Johnson 2001). AEDPA also included a measure that provided that an unauthorized migrant "'found' in the U.S. . . . is deemed 'to be seeking entry and admission to the United States' and is subject to . . . exclusion" (*Interpreter Releases* 1996, 2). Regardless of whether they were living in the United States for many years, they would be processed as new border crossers seeking entry into the United States, making them ineligible for relief from deportation based on longstanding ties and presence (ibid.).[37]

AEDPA was neither an immigration bill nor a border security measure (Chacón 2007, 1852-54). However, as legal scholars have noted, AEDPA's enactment disproportionately impacted legal permanent residents and asylum seekers. Immigration advocates and hard-liners debated whether to ameliorate or intensify AEDPA's immigration provisions in a separate bill that would become the Illegal Immigration Reform and Immigrant Responsibility Act (Interpreter Releases 1996).

Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA)

On June 22, 1995, Texas Representative Lamar Smith (R) introduced Immigration in the National Interest Act (H.R. 1915), a bill that would eventually become the Illegal Immigration Reform and Immigrant Responsibility Act.[38] H.R. 1915 died in Congress. However, Smith inserted the measures into a new bill — H.R. 2202, the Immigration

36 S. 735.

37 This provision, which would take effect on August 1, 1996, was incorporated into IIRIRA.

38 H.R. 2202, 104th Cong. (1996).

Control and Financial Responsibility Act of 1996, which contained provisions aimed at restricting both legal and illegal immigration.[39] On the legal immigration side, for example, it proposed new restrictions on family-based immigration. It would have restructured immigration admissions under a new system based largely on education and skill, rather than family unity. According to Smith, the proposed reform "died on the House floor, due to an amendment to 'split' the issues of legal and illegal immigration" (Smith and Grant 1996, 900, note 54).

The Democratic Party's decision to "'split' the issues of legal and illegal immigration" redefined the latter as a crime in the immigration debate. Democrats struck down measures that would have restricted legal immigration. However, measures targeting "illegal immigration" and "criminal aliens" moved forward with bipartisan support. The latter provisions became the cornerstone of IIRIRA.

Former President Clinton signed IIRIRA into law on September 30, 1996.[40] In his official statement, Clinton described it as a bipartisan "landmark immigration reform legislation that cracks down on illegal immigration without punishing legal immigrants" (Clinton 1996). Following IIRIRA's enactment, Clinton's senior policy advisor, Rahm Emanuel, remarked on the president's success in appropriating the crime issue from the GOP. In a memo to the president, Emanuel wrote: "Since Nixon's Law and Order campaign, crime has been a staple of the GOP platform. Over the last four years, your policies have defined the issue and allowed Democrats to achieve parity. The illegal immigration legislation provides that same opportunity. We can build a strong Administration record on immigration" (Emanuel 1996).

Like Clinton and New Democrats, Lamar Smith and Edward Grant drew on crime rhetoric. "The issue of immigration and crime," they wrote,

> must always be kept in proper focus and perspective. It is true that the vast majority of legal immigrants are law-abiding and even that most *illegal* immigrants do not commit crimes other than immigration-related offenses. This does not mean that Congress has gone overboard, as some suggest, in getting tough on those immigrants who do commit crimes.... Rather, it means precisely the opposite.... When immigration is accompanied by lawlessness, the American people suffer through loss of life, health, and property. In addition, when accompanied by crime, immigration comes to be seen not as a source of pride and renewal for all Americans but as a contributor to our problems. In the end, therefore, it is the immigrants themselves who pay for our failure to be decisive in our treatment of criminal aliens (Smith and Grant 1996, 963).

This rhetoric conveys an important shift in the political discourse on immigration that went beyond conventional "affirmative" and "alarmist" images to encompass crime rhetoric (Chavez 2001, 212). Smith and Grant drew on what Jonathon Simon (2007) calls prosecutorial rhetoric that affirms protecting innocent crime victims and aggressively

39 H.R.1915, 104th Cong. (1995-1996); Omnibus Consolidated Appropriations Act, H.R. 3610, 105th Cong. (1997).

40 Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009 (1996).

punishing criminals. The innocent victims in this case were the "suffering" Americans and "the vast majority of legal" or law-abiding immigrants versus the "illegal immigrants" and "immigrants who commit crimes." The rhetoric conflated "immigrants who commit crimes" with unauthorized migration and violations of immigration law broadly defined.

Although IIRIRA was not crime legislation, crime politics played an important role in shaping IIRIRA's most punitive provisions. In the scramble to free up prison beds for thousands sentenced to prison under harsh drug laws and minimum criminal sentences, Congress turned to noncitizens in the criminal justice system — mostly legal permanent residents — as a new enforcement target and unleashed a rhetoric associating immigration with crime. AEDPA's criminal and terrorist alien provisions were an important starting point in targeting new criminal enforcement priorities. But it was IIRIRA that extended "zero tolerance" approaches to "immigration reform" more broadly and ultimately led to the deportation of many long-term legal permanent residents, with dire consequences for their families (Morris 1997; CLINIC 2000; ABA 2004).

Smith and Grant described IIRIRA as "the toughest legislation against *illegal immigration* enacted in our lifetimes. A myriad of *provisions that would have been impossible to enact as little as three years ago* are now the law of the land" (Smith and Grant 1996, 913). Smith and Grant were referring to the period before 1993, when the Democratic Party redefined unauthorized migration through a law and order framework. This "toughest of legislation against illegal immigration" was designed, Smith and Grant wrote, to bring immigration enforcement "closer to that of the criminal justice system" (Smith and Grant 1996, 921).

In at least six ways, IIRIRA increased the involvement of immigrants with the criminal justice system. First, IIRIRA expanded the criminal grounds of deportation. AEDPA expanded the categories of crimes that count as "crimes of moral turpitude" and as "aggravated felonies" to include some misdemeanors (Morris 1997, 1324-25; ABA 2004, 23). IIRIRA went further by adding to the aggravated felony definition convictions "accompanied by a sentence of one year or longer" (Osuna 1996; Smith and Grant 1996, 993). These broad criminal classifications effectively redefined enforcement priorities in the immigration system.

Second, IIRIRA authorized funding to classify and identify criminal enforcement priorities through a "nationwide fingerprinting of apprehended aliens" and an "annual report on criminal aliens." Among the new targets were many low-level employees in the drug economy, namely low-income Mexican, Colombian, Dominican, Nigerian, Cuban, and Jamaican ancestry caught in the drug war (US Congress 1996; Scalia 1996, 3). Indeed, the Bureau of Justice Statistics reported that noncitizens in the criminal justice system were more likely than their native-born counterparts "to have played a minor role in the drug conspiracy" (Scalia 1996). The biometric technologies used to track anyone who fell within a new aggravated felony classification produced and expanded a "criminal alien" population.

Third, IIRIRA collapsed exclusion at the border or ports of entry and deportation from the interior under a single category, renamed "removal," in order to limit immigrants' access

to discretionary relief from removal (Martin 2012).[41] It authorized the "rescission of legal permanent residency status" declaring that "an order of removal issued by an immigration judge shall be sufficient to rescind the alien's status."[42] It instituted fast-track deportations such as expedited removal for unauthorized immigrants apprehended at the border and asylum seekers without a convincing "credible fear of persecution" (Pistone and Schrag 1996). It authorized administrative removals by INS officials, who were authorized to issue a deportation order to immigrants with convictions that made them ineligible for any form of relief from deportation (Smith and Grant 1996, 931-932; Kanstroom 2012). This has led to an unprecedented rise in informal deportations that bypass the immigration courts and criminal prosecution for reentry after deportation (Morris 1997; MRS/USCCB-CMS 2015, 182-83; Macías-Rojas 2016).

Fourth, IIRIRA "mandate[d] the detention of aliens who have been ordered removed" (Smith and Grant 1996, 918). Mandatory detention ultimately expanded an already overcrowded and costly immigrant detention system, requiring more resources for detention officers and transportation (ABA 2004). The law authorized $15 million to detain criminal aliens (US Congress 1996), and was viewed by Congress as necessary for carrying out criminal deportations (Smith and Grant 1996; Taylor 1997). It also commissioned a "pilot program on the use of closed military bases for the detention of inadmissible aliens."[43] The law also expanded the detention of asylum seekers and legal permanent residents and the indefinite detention of those who could not be deported to their home countries, and it created a new market for private corporations to build and manage detention centers (ABA 2004, 64; MRS/USCCB-CMS 2015).

Fifth, IIRIRA went beyond AEDPA to restrict avenues for relief from deportation and detention (Guttentag 1997; ABA 2004). It denied noncitizens' right to come before an immigration judge and directly constrained judicial review for immigrants classified as criminal aliens."[44] It redefined the criteria for immigrants with convictions, including legal permanent residents and asylum seekers, to be able to stay in the country (Smith and Grant 1996, 917; ABA 2004, 33)." When Smith first proposed to amend relief from deportation, he drew on similar crime rhetoric used to justify amending habeas corpus under AEDPA, which depicted criminal defendants as abusing constitutional protections. He argued that "forms of relief may be exploited by illegal aliens to extend their stay in the United States . . . . Illegal aliens also may frustrate removal through taking advantage of certain procedural loopholes in the current removal process."[45] The American Bar Association reported that this disproportionately impacted immigrants with long histories of settlement and ties to the United States and who have been classified as criminal (ABA 2004). Criminal branding makes people ineligible for protections in the immigration system.

Finally, IIRIRA authorized formal cooperative agreements that directly involved state and local law enforcement personnel in federal immigration enforcement (e.g., detention

41 *Illegal Immigration Reform and Immigrant Responsibility Act of 1996: Hearing before the H. Comm. on the Judiciary*, 104th Cong. 70-73 (1996) [hereinafter *IIRIRA*].

42 *IIRIRA*, *supra* note 39, at 105.

43 *IIRIRA*, *supra* note 39, at 111.

44 Illegal Immigration Reform and Immigrant Responsibility Act of 1996, § 236(3) .

45 *Immigration in the National Interest Act of 1995: Hearing before the H. Comm. on the Judiciary*, 104th Cong. 122 (1996).

and deportation) under the 287(g) program (Capps et al. 2011). Prior to IIRIRA, the Department of Justice funded and trained immigration agents to support drug enforcement operations. IIRIRA established an infrastructure, backed by federal funding, to provide financial incentives for criminal justice agencies to become more directly involved in federal immigration enforcement.

IIRIRA authorized $670 million for state prison grants, of which $170 million was made available to states for "alien incarceration" and $12.5 million for a Cooperative Agreement Program between the INS and state and local correctional facilities for subleasing prison beds. IIRIRA also approved $330 million for the State Criminal Alien Assistance Program or (SCAAP), funds that could be used "for reimbursement to states for the costs of incarceration of criminal aliens." It included provisions for expanding Prisoner Transfer Treaties to relocate incarcerated immigrants who opt to be detained in prisons in their home countries (DOJ 1996; US Congress 1996). These bilateral agreements call for "the incarceration, in the country of the alien's nationality, of any alien who — (A) is a national of a country that is party to such a treaty; and (B) has been convicted of a criminal offense" (Taylor and Aleinikoff 1998). IIRIRA required that the Secretary of State and the Attorney General submit a report on "the use and effectiveness of the prisoner transfer treaties with the three countries with the greatest number of their nationals incarcerated in the United States in removing from the United States such incarcerated nationals."[46] Taken together, IIRIRA's criminal provisions extended the War on Crime to the immigration system.

No one, arguably not even Lamar Smith, could have foreseen the impact that IIRIRA would have on immigration enforcement. Though the law's primary enforcement targets were immigrants convicted of crimes, many long-term, legal permanent residents were caught in its dragnet. News outlets and legal advocates reported that refugees and legal permanent residents in the United States for as long as 36 and even 50 years were suddenly facing deportation under the new law (CLINIC 2000, 38-39; ABA 2004, 44).

Many thought IIRIRA had gone too far. In August 1999, the National Immigration Forum, the American Civil Liberties Union (ACLU), and other immigrant rights advocates officially launched the "Fix '96" campaign intending to amend IIRIRA's provisions concerning retroactive deportations, constraints on judicial review, mandatory detention, the use of secret evidence, and expedited removals. Even Lamar Smith, IIRIRA's main architect, together with 28 members of Congress, sent a letter to the Attorney General and former INS Commissioner in November 1999 urging the INS to use prosecutorial discretion to reduce the hardship inflicted by deportation on legal permanent residents with citizen children (Smith 1999). On November 17, 2000, the INS Commissioner published an internal memo calling for the use of prosecutorial discretion in immigration cases (Meissner 2000).

The attack on the World Trade Center on September 11, 2001 thwarted any efforts to repeal IIRIRA's detention and deportation provisions. IIRIRA's criminal provisions became entwined with counterterrorism policies. And immigration became further entangled with national security rhetoric (Johnson 2001;Chacón 2007). In fact, 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

46 Illegal Immigration Reform and Immigrant Responsibility Act of 1996, § 331(a).

maximum-security prisons without ever being charged with any terrorist crime (Cole 2003; ABA 2004). After the creation of the Department of Homeland Security in 2003, Customs and Border Protection (CBP) and Immigration and Customs Enforcement (ICE) became the largest enforcement agencies in the country with a combined budget of $18 billion dollars (Meissner 2013 et al.).

Conclusion

In a law review article that Lamar Smith and Edward Grant published on IIRIRA, nativist sentiments, with racial undertones surface as a major rationale for the law. In it, Smith and Grant expressed concern about the changing US (racial) demographics and the cultural and economic impact of post-1965 immigration from Latin America and Asia (Smith and Grant 1996). "How we write and enforce our immigration laws plays a critical role in determining the type of nation that the United States will be in the twenty-first century," they wrote, "[t]he United States *must set immigration policy consistent with our national interest*. Immigration may be restricted due to anticipated impacts on culture, economics (including the labor market), public institutions (including schools, hospitals, and social services), and our overall quality of life" (ibid., 892, 884).

Smith and Grant lamented that the stigma of being labeled a "nativist" impeded immigration reforms: "There exists an inchoate sense among the American people that our culture is changed by immigration and that the pace and direction of that change ought to be debated more openly. Yet this debate is studiously avoided, due to concern that in raising such issues, *one will be labeled anti-immigrant, nativist, or worse*" (ibid., 905, 887).

To deflect IIRIRA's nativist and racial undertones, Smith mobilized the anti-civil rights crime rhetoric of the New Right. This crime rhetoric rests on a colorblind logic arguing that "tough-on-crime" measures like IIRIRA's criminal provisions target "lawbreakers," not racial groups (Skelton 1993; Johnson 1995). Like Smith and the GOP, New Democrats also mobilized this crime rhetoric to rebuild and rebrand the Democratic Party's image from that of "tax and spend" to "law and order" liberals.

Twenty years after its enactment, IIRIRA's legacy lives on through the recent escalation of detention and deportation and in ongoing debates about "criminal aliens." Former President Barack Obama's mandate to deport "felons, not families" is part of that legacy (Obama 2014). The succeeding Republican administration continued the legacy by signing executive orders that broaden categories of crime that make people deportable, ramp up detention and deportation, and deepen ties between the immigration and the criminal justice system (Medina 2017; Stanley 2017).

This historical revisit shows that current enforcement practices can be traced to criminal classifications, legal and technological infrastructure, inter-agency cooperation, and the fundamental restructuring of detention and deportation that IIRIRA put it place. Moreover, the current administration has also drawn almost verbatim on the rationale and crime rhetoric of IIRIRA's chief architect, Lamar Smith, when it proposed measures to "reform" the legal immigration system and to expand criminal immigration enforcement "that serves the national interest" (Sessions 2017).

The practices of the current administration, however, can and must also be traced to the crime politics of liberal Democrats that shifted the discourse on unauthorized migration, recast it as a crime in the contemporary immigration debate, and allowed IIRIRA to become law. These findings warrant rethinking IIRIRA's criminal provisions — from criminal enforcement priorities to fast-track deportations to mandatory detention and immigrant incarceration and federal appropriations — that have legitimized branding entire groups of people as criminal so as to exclude them.

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