

## ISSUE BRIEF **Criminalizing Undocumented Immigrants\***

Over the past several years, states and localities around the country have increasingly considered and used state and local laws to impose *criminal* penalties on undocumented immigrants. At the same time, the federal government has increasingly chosen to *criminally* prosecute individuals who enter or reenter the United States illegally rather than rely on the extensive *civil* enforcement scheme under the federal immigration laws.

In public policy debates about criminalizing undocumented immigrants, anti-immigrant lawmakers and groups often throw around terms like “criminal alien” and other misleading rhetoric and statistics suggesting that all undocumented immigrants are criminals or a dangerous threat to the community. Such language can distort debates about the appropriate use of local criminal laws and of federal prosecutorial resources. Local and state officials also often misunderstand the nature of the criminal provisions in federal immigration law and the authority of states and local governments to criminalize undocumented status. In this issue brief, we discuss questions that arise when a state seeks to enact new criminal laws or proposes using existing state criminal laws to punish individuals for being undocumented.

### **Is the fact of being present in the United States in violation of the immigration laws a crime?**

No. The act of being present in the United States in violation of the immigration laws is not, standing alone, a crime. While federal immigration law does criminalize some actions that may be *related* to undocumented presence in the United States, undocumented presence alone is not a violation of federal criminal law. Thus, many believe that the term “illegal alien,” which may suggest a criminal violation, is inaccurate or misleading.

Entering the United States without being inspected and admitted, *i.e.*, illegal entry, is a misdemeanor or can be a felony, depending on the circumstances. [8 U.S.C. § 1325](#). But many undocumented immigrants do not enter the United States illegally. They enter legally but overstay, work without authorization, drop out of school or violate the conditions of their visas in some other way. Current estimates are that approximately 45% of undocumented immigrants did *not* enter illegally. See [Pew Hispanic Center, \*Modes of Entry for the Unauthorized Migrant Population\* \[May 22, 2006\]](#).

Undocumented presence in the United States is only criminally punishable if it occurs after an individual was previously formally removed from the United States and then returned without permission. [8 U.S.C. § 1326](#) (any individual previously “deported or removed” who “enters, attempts to enter, or is at any time found in” the United States without authorization may be punished by imprisonment up to two years). Mere undocumented presence in the United States alone, however, in the absence of a previous removal order and unauthorized reentry, is not a crime under federal law.

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\*Note: In this issue brief, we use the popular term “undocumented” to describe all immigrants whose presence in the United States is unauthorized. “Undocumented

## Didn't Congress refuse to make undocumented presence a federal crime?

Yes. One of the most controversial provisions of H.R. 4437, the “Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005,” or “Sensenbrenner bill,” would have made simply being undocumented in the United States a felony. Although passed by the House of Representatives, the bill was rejected by the Senate after massive street demonstrations around the nation and sharp criticism of the provision criminalizing undocumented presence. Senator Harry Reid (D-Nev.) attacked the bill as “mak[ing] criminals out of and demoniz[ing] a lot of hard-working people who are just trying to provide for their families.”

## Are undocumented immigrants “criminal aliens” under federal law?

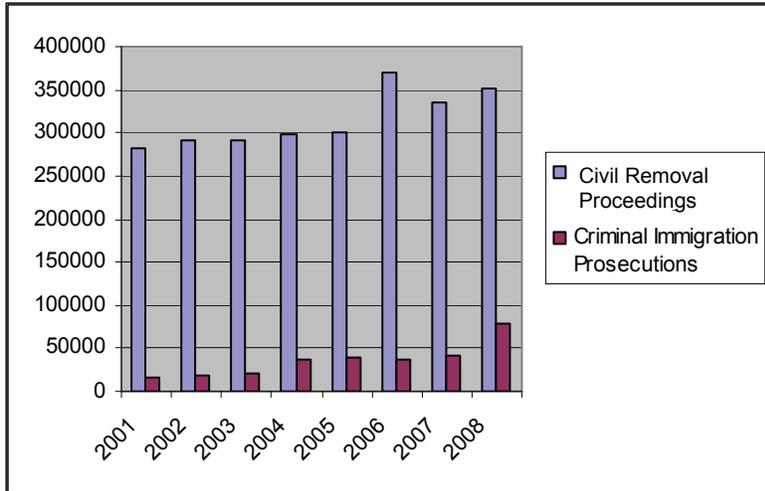
No. Despite the anti-immigrant rhetoric, “criminal alien” is not a legal term and undocumented immigrants are not “criminal aliens” under federal law. The term “criminal alien” is not defined anywhere in the federal Immigration and Nationality Act (INA). To the extent it appears at all in the INA, it is used in the subject heading of several provisions that describe documented and undocumented immigrants who have been convicted of criminal offenses (after a trial or guilty plea) that are designated as “aggravated felonies” or as “crimes involving moral turpitude.” See [8 U.S.C. §§ 1226, 1228, 1252](#). A conviction of such a crime may subject an immigrant to removal from the United States, even if she is a lawful permanent resident. In contrast, immigrants who are undocumented but have not been convicted of any crime are *not* referred to as “criminal aliens” under the immigration laws.

## Is federal immigration enforcement a criminal or civil system?

Federal immigration laws are principally enforced through *civil* proceedings administered by the Department of Homeland Security and lead to removal from the United States. That means the immigration system lacks many of the protections that are triggered when someone is charged with a crime. Some immigration violations are also designated as crimes, usually misdemeanors. However, civil removal proceedings far outnumber criminal prosecutions and remain the primary manner in which the federal authorities enforce the immigration laws.

**Figure 1.**

**Number of Civil Removal Proceedings And Criminal Immigration Prosecutions, 2001-2008.**

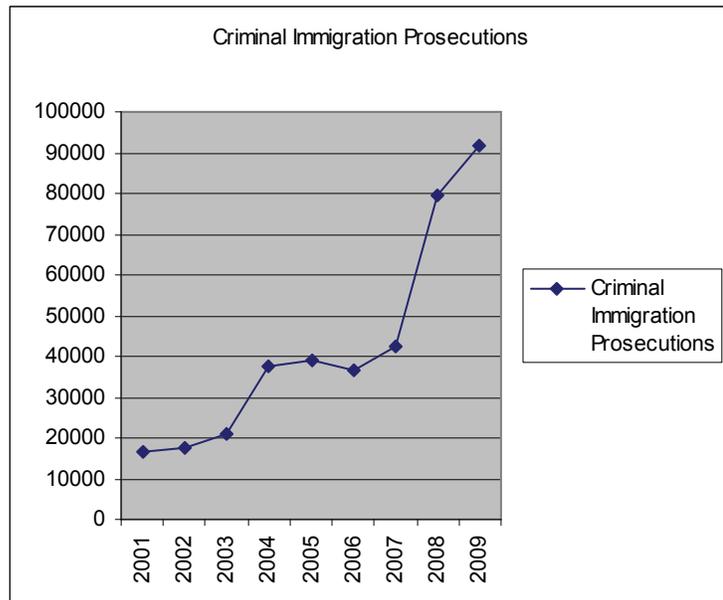


Sources: Transactional Records Access Clearinghouse, "DHS-Immigration Criminal Enforcement Trends"; Transactional Records Access Clearinghouse, "Immigration: Number Prosecuted"; Executive Office for Immigration Review Statistical Yearbooks 2005-2008; Transactional Records Access Clearinghouse, "FY 2009 Federal Prosecutions Sharply Higher."

**Figure 2.**

**Number of Criminal Immigration Prosecutions, 2001-2009.**

Nonetheless, despite the fact that they remain a small fraction of overall immigration enforcement, the use of federal criminal prosecutions has increased significantly in recent years, with prosecutions for violations of the immigration laws growing from just over 20,000 in 2003, to 91,899 in 2009.



Sources: Transactional Records Access Clearinghouse, "Bush Administration's Immigration Prosecutions Soar"; Transactional Records Access Clearinghouse, "FY 2009 Federal Prosecutions Sharply Higher."

This recent surge in immigration prosecutions is overwhelmingly fueled by criminal prosecutions under just two laws: illegal entry (8 U.S.C. § 1325) and reentry after a prior removal order (8 U.S.C. § 1326).

### **What are the consequences of using criminal prosecutions to target undocumented immigrants for immigration violations?**

Use of federal law enforcement resources to target undocumented immigrants for criminal prosecutions may have serious consequences for public safety. The greater focus on criminal violations of immigration laws has led to fewer resources to investigate and prosecute dangerous crimes. At the same time that the Bush administration dramatically increased federal prosecutions for illegal entry and reentry of the United States, the government's prosecution of gun trafficking, public corruption, organized crime and white-collar crime declined. See [Solomon Moore, "Study Shows Sharp Rise in Latino Federal Convicts," \*New York Times\* \(Feb. 18, 2009\)](#). Given the evidence that immigrants are less likely to commit crimes than other residents of the United States (see below), federal law enforcement may find itself targeting a generally law-abiding population at the expense of investigating serious property and violent crimes.

### **Are immigrants more likely to commit crimes than other residents of the United States?**

No. Most evidence collected in academic studies shows that immigrants are not more likely, and are probably *less* likely, to commit crimes than other residents of the United States. Proponents of stricter limitations on immigration frequently suggest that increased immigration—and, in particular, undocumented immigration—increases crime. When the city council of Hazleton, Pennsylvania, for example, adopted a local anti-immigrant ordinance, it declared that "illegal immigration leads to higher crime rates." Similar public statements have been made by state and federal legislators across the country. But when these claims are put to the test, they fail. Studies have shown that increased immigration does not lead to increased crime and that foreign-born individuals are *less* likely to be incarcerated for violating criminal laws than U.S.-born residents of the United States. In Hazleton itself, for example, the crime rate decreased at the same time that the number of immigrants in Hazleton was increasing, and evidence showed that undocumented immigrants were suspected in only 21 out of 8,571 crimes from over five years.

More broadly, as immigration—particularly undocumented immigration—has surpassed historic highs over the last fifteen years, the violent crime rate has not only failed to rise but has declined to its lowest level ever recorded in 2005. This is consistent with a U.S. Commission on Immigration Reform 1994 report that concluded that immigration is not associated with higher crime, as well as with case studies of towns and large U.S. cities that have reached the same conclusion.<sup>1</sup> And census data demonstrates that across the United States foreign-born men between the ages of 18 and 39 are five times less likely than native-born residents to be incarcerated.<sup>2</sup> Studies of those groups that are most likely to contain undocumented immigrants have concluded that they are not only substantially less likely to commit crimes than U.S.-born residents, but less likely to commit crimes than even other foreign-born groups.<sup>3</sup>

## What arguments do anti-immigrant groups make about immigrants and crime?

Anti-immigrant groups frequently counter the academic studies showing low incarceration rates of immigrants across the United States by pointing to the rate of incarceration of immigrants in federal prison. It is true that, as a result of the enormous increase in federal prosecution of immigration crimes, immigrants' share of the *federal* prison population has grown in recent years. See [Pew Research Center, \*A Rising Share: Hispanics and Federal Crime\* \(February 2009\)](#). But federal prison inmates represent only 8.6% percent of all incarcerated persons in the United States. The overwhelming majority of individuals convicted of crimes in the United States are in state prisons or local jails. By contrast, a study of the incarcerated population in the state with both the highest number of immigrants and the largest inmate population confirms the national trend: in California, the incarceration rate for U.S.-born residents is more than two-and-a-half times higher than for foreign-born individuals.<sup>4</sup>

Anti-immigrant groups also rely on data from the State Criminal Alien Assistance Program (SCAAP) that are unreliable and likely overcount the number of undocumented immigrants in U.S. prisons and jails. Under SCAAP, states are entitled to be reimbursed by the federal government for the incarceration of undocumented immigrants who are convicted of crimes. States report to the Department of Homeland Security (DHS) those individuals they *suspect* of being undocumented immigrants. An Office of Management and Budget (OMB) analysis concluded that only 30% of the individuals who states report as undocumented are verified by DHS to be undocumented immigrants, another 20% are found not to meet the requirements for reimbursement, and the nationality of the remaining 50% is unknown, although the OMB concluded that many of these "unknowns" are likely also U.S. citizens or otherwise lawfully in the United States. See [Office of Management and Budget, \*State Criminal Alien Assistance Program Assessment\*](#).

## Are state and local criminal penalties for being undocumented preempted by federal law?

State and local attempts to impose criminal penalties for being undocumented may be preempted by federal law. The federal government has the exclusive authority to regulate immigration, and state or local statutes that effectively criminalize immigrants solely for being undocumented are likely to be preempted by federal law.

<sup>1</sup>[Robert J. Sampson, Jeffrey D. Morenoff and Stephen Raudenbush, \*Social Anatomy of Racial and Ethnic Disparities in Violence\*, American Journal of Public Health \(2005\); Ramiro Martinez, Jr., Matthew T. Lee, and A.L. Nielsen, \*Segmented Assimilation, Local Context and Determinants of Drug Violence in Miami and San Diego: Does Ethnicity and Immigration Matter\*, International Migration Review \(March 2004\).](#)

<sup>2</sup>[Ruben G. Rumbaut and Walter A. Ewing, \*The Myth of Immigrant Criminality and the Paradox of Assimilation: Incarceration Rates Among Native and Foreign-Born Men\*, Immigration Policy Center Special Report \(Spring 2007\).](#)

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<sup>4</sup>[Kristin F. Butcher and Anne Morrison Piehl, \*Crime, Corrections, and California: What Does Immigration Have to Do With It?\*, California Counts: Population Trends and Profiles \(February 2008\).](#)

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### **Selected Additional Resources:**

[Ruben G. Rumbaut and Walter A. Ewing, \*The Myth of Immigrant Criminality and the Paradox of Assimilation: Incarceration Rates Among Native and Foreign-Born Men\*, Immigration Policy Center Special Report \(Spring 2007\).](#)

[Kristin F. Butcher and Anne Morrison Piehl, \*Crime, Corrections, and California: What Does Immigration Have to Do With It?\*, California Counts: Population Trends and Profiles \(February 2008\).](#)

[Congressional Research Service, \*Criminalizing Unlawful Presence: Selected Issues\* \(May 2006\).](#)