



THE CHIEF JUSTICE EARL WARREN INSTITUTE ON RACE, ETHNICITY & DIVERSITY

UNIVERSITY OF CALIFORNIA, BERKELEY LAW SCHOOL

BORDERS, JAILS, AND JOBSITES: AN OVERVIEW OF FEDERAL IMMIGRATION ENFORCEMENT PROGRAMS IN THE U.S.

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The Chief Justice Earl Warren Institute on Race, Ethnicity & Diversity is a multidisciplinary, collaborative venture to produce research, research-based policy prescriptions, and curricular innovation on issues of racial and ethnic justice in California and the nation.

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EXECUTIVE SUMMARY

This report provides an overview of the current state of immigration enforcement in the United States in order to encourage and facilitate a productive discussion toward reform. The paper summarizes available background information and the latest research on the key components of the enforcement system. We describe the primary actors and programs, present specific concerns identified by scholars, advocates and researchers, and offer preliminary recommendations.

Overview of Immigration Enforcement Activities

Notable federal emphasis on immigration enforcement emerged largely during the mid- to late-1990s, and took on renewed significance after September 11, 2001. Since the creation of the U.S. Department of Homeland Security (DHS) in 2003, enforcement efforts have escalated to unprecedented levels of funding and scope. These efforts under the DHS and its sub-agencies (e.g., Immigrations and Customs Enforcement) can be categorized into four broad areas of activity:

- **Border enforcement** involves efforts to regulate migration at ports of entry and prevent unauthorized migration along the rest of the border. The vast majority of border spending today is directed toward the southwest border, in expanding the border fence, increasing numbers of Border Patrol agents, and prosecuting individuals who gain unlawful entry across the border in federal courts. This area of enforcement is largely focused on controlling and deterring unauthorized entry into the United States, rather than removing individuals who already live within U.S. borders. However, the Border Patrol has recently asserted its authority 100 miles into the interior of the U.S. by defining the border as a broad zone, as opposed to a fixed line.
- **Interior enforcement** is a newer area of enforcement activity that involves efforts within U.S. borders to capture and remove unauthorized individuals. Interior enforcement has grown from sparse, informal activities to large scale programs in the years following September 11, 2001, and now features a number of partnerships with state and local law enforcement agencies to identify deportable aliens.
- **Workplace enforcement** bears the twin goals of “reduc[ing] the demand for illegal employment, and protect[ing] employment opportunities for the nation’s

lawful workforce.”¹ To this end, Immigration and Customs Enforcement (ICE) takes enforcement actions against employers as well as employees. Under the current administration, there has been an increased emphasis on workplace audits that result in mass firings of suspected unauthorized workers and penalties for employers.

- **Immigration detention** houses individuals awaiting immigration court proceedings and potential deportation. The law has traditionally not recognized detention as criminal punishment for the individuals involved. Nevertheless, the current immigration system involves prison-like confinement, often through criminal detention facilities subcontracting with ICE.

Concerns about Enforcement Activities

Based on our review of the available research, several general concerns arise across these categories:

- Scholars, advocates, and government oversight agencies alike raise issues with the efficacy of government action. Many programs lack clear objectives and standards for oversight and accountability. Even in areas where reforms have been undertaken, progress has been slow.
- Policies and programs are described as targeting dangerous individuals, but in reality they cast too wide a net. Although the first priority of DHS is to prevent terrorism and national security breaches, the government has spent a large amount of resources to target low-level offenders with no links to terrorism and no history of serious or violent crime. Even with regard to deportations of violent criminal aliens, questions remain as to the unintended consequences of this strategy, including an increase in transnational criminal activity.
- Lawful permanent residents, asylum-seekers, and unauthorized immigrants are often treated as criminal offenders. Detainees face the worst of both worlds: they are treated like criminals but not provided criminal protections because of the purported civil nature of immigration proceedings.
- The impacts of immigration enforcement reverberate beyond the individual into the communities where immigrants reside. There appears to be increased racial profiling and decreased trust between communities and police. Loss of trust may diminish cooperation with police and jeopardize community safety.

1. “Worksite Enforcement Overview,” Immigration and Customs Enforcement Website, p. 1 (Apr. 30, 2009), available at <http://www.ice.gov/news/library/factsheets/worksite.pdf>.

Recommendations for Programmatic Improvement

While our proposed changes are specific to each program and area of enforcement, common recommendations included:

- Increased transparency on the scope and nature of activities, as well as on the individuals and communities affected;
- Additional guidelines for and statutory constraints on the activities conducted by federal agencies and the state and local law enforcement with which they partner; and
- Restructuring some of the basic functions of the actors involved, such as the role of local law enforcement in immigration enforcement, the relationship between DHS and the Department of Labor in enforcing workplace rules, and the DHS practice of detaining noncitizens in prison-like conditions.

A shift in priorities and understanding is overdue in the area of immigration enforcement. Particularly in light of the current economic crisis, our tradition of endless escalation in enforcement funding should be re-examined with a critical eye to efficacy, and upholding the legal standards and guarantees that distinguish and define the United States. The administration's efforts to "target offenders" could become a practical way of focusing limited resources on individuals who pose a credible threat to the safety of our communities if "criminal aliens" themselves are redefined narrowly; additional data and transparency are provided to ensure public accountability; and the measurement of enforcement success is no longer calculated based on the volume of individuals who are deported. Further, civil rights are fundamental to our responsibilities and values as a nation. As such, we should re-examine the way immigration enforcement can reinforce—rather than undermine—these rights and norms.

INTRODUCTION

This report provides an overview of the current state of immigration enforcement in the United States in order to encourage and facilitate a productive discussion toward reform.² The paper summarizes available background information and the latest research on the key components of the enforcement system in order to understand potential areas for change and improvement.

There is a vast and growing administrative apparatus that conducts immigration enforcement, mainly under the auspices of the Immigration and Customs Enforcement (ICE) and Customs and Border Patrol (CBP) agencies within the Department of Homeland Security (DHS). This paper focuses on four key responsibilities of DHS: border, interior, workplace enforcement, and detention. Within these four categories, we describe the primary actors and programs, present specific concerns identified by advocates and researchers, and offer preliminary recommendations for reform.³

BORDER ENFORCEMENT

Infrastructure of Border Enforcement

Creating an effective and humane border enforcement policy is challenging for any industrialized nation that shares a land border with a developing country, but it has been particularly difficult for the United States with regard to Mexico. While the border to the north of the United States is over twice as long, the vast majority of border enforcement resources are concentrated along the southwest border, the most heavily crossed international border in the world.⁴ Indeed, over 97% of unauthorized migration apprehensions in recent years have occurred along the southwest border.⁵

In recent years, crime on the U.S. side of the southwest border has been declining.⁶ Furthermore, apprehensions at the border have also declined, from a peak at 1,189,000 in 2005 to about 463,000 in 2010.⁷ However, border security has been often described as being in a state of "crisis," and requests for more resources have been made each year despite

2. An initial draft of this paper was presented at the *U.S.-Mexico Migration Dialogue: Migration, Repatriation and Protection*, on November 17, 2010 at the Woodrow Wilson International Center for Scholars in Washington D.C.

3. Unless otherwise indicated, recommendations are made for executive agencies, rather than legislative bodies.

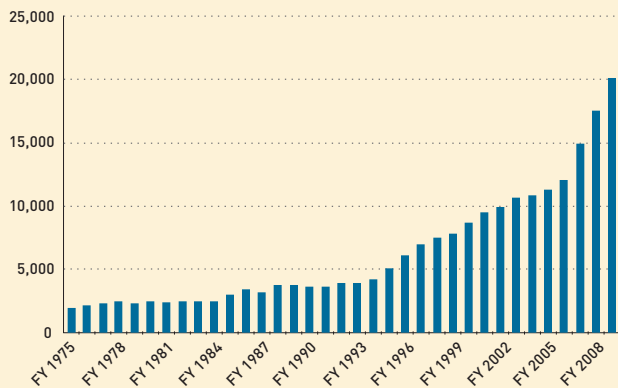
4. Southwest Border Security Operations." Background, National Immigration Forum, p. 1 (Jul. 2009), available at <http://www.immigrationforum.org/images/uploads/SouthwestBorderSecurityOperations.pdf>.

5. Blas Nunez-Neto, "Border Security: The Role of the U.S. Border Patrol." Congressional Research Service, p. i (Nov. 20, 2008) (updated).

6. Although there have been concerns of spillover violence from the Mexican side of the border, crime has not increased on the U.S. side of the southwest border in recent years. See Andrew Selee, et al., "Five Myths about Mexico's Drug War," WASHINGTON POST, (Mar. 28, 2010), available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/03/26/AR2010032602226.html>.

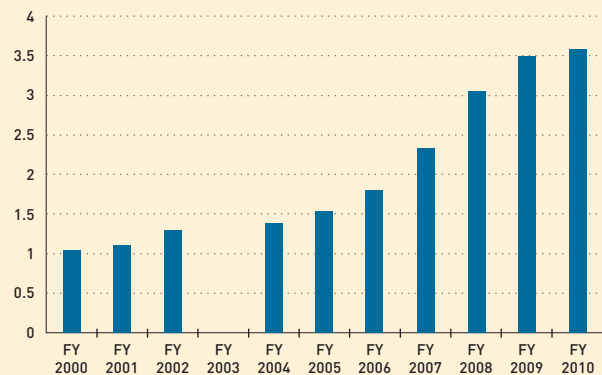
7. "Immigration Enforcement Actions, 2009: Annual Report," Department of Homeland Security, p. 1 (Aug. 2010), available at http://www.dhs.gov/xlibrary/assets/statistics/publications/enforcement_ar_2009.pdf; Julia Preston, "Homeland Security Cancels 'Virtual Fence' After \$1 Billion Spent," NEW YORK TIMES, (Jan. 14, 2011), available at http://www.nytimes.com/2011/01/15/us/politics/15fence.html?_r=1.

FIGURE 1 | Border Patrol Agent Numbers 1975 - 2009



Source: Data from 1975 to 2005 calculated in September of each year, from "Border patrol Expands but Growth Rate after 9/11 much less than before," Transactional Records Access Clearinghouse; Fiscal year data for 2006-2009 from Chad C. Haddal, "People Crossing Borders: An Analysis of US Border Protection Policies," Congressional Research Services, p. 33 (May 13, 2010).

FIGURE 2 | Border Patrol Appropriations in Billions



Source: Chart from Chad C. Haddal, "Border Security: The Role of US Border Patrol," Congressional Research Services, p. 7 (Aug. 11, 2010). Numbers from 2003 unavailable due in part to shifts in agency structures.

these downward trends.⁸ Billions of dollars have been directed towards increasing personnel, equipment, and technology along the southern border—in contrast with the northern border where efforts have focused on intelligence gathering and coordination with Canadian authorities.⁹

United States Border Patrol

The Border Patrol was founded in 1927 with the mission of preventing unauthorized aliens from entering the country. Today, however, the authority of the Border Patrol reportedly extends 100 miles into the interior of the United States, resulting in Border Patrol checkpoints that target anyone who is perceived to be an unauthorized immigrant.¹⁰

The Border Patrol continues to grow with more operations and many more agents—from 1,746 agents in 1975 to 11,106 in 1995 and more than 20,000 agents by the end of the Bush administration.¹¹ (See Figure 1.)

During this time, funding for the Border Patrol increased dramatically as well, to an all-time high of \$3.58 billion in fiscal year (FY) 2010.¹² (See Figure 2.)

Voluntary Departure/Return

Historically, the Border Patrol primarily relied upon the civil immigration system when unauthorized crossers were apprehended. Border crossers of Mexican origin with no prior criminal history were asked to sign a voluntary return agreement, and were returned immediately to the other side of the border with no formal deportation proceedings. Individuals who were not Mexican nationals could not be so easily returned, and were therefore given a court date for removal proceedings. Immigration judges could also grant voluntary departure to those individuals without criminal histories or previous illegal entries.

8. See Mark B. Evans, "Congress needs to Remind Obama Border Crisis Continues," TUSCON CITIZEN, (Feb. 5, 2010), available at <http://tucsoncitizen.com/mark-evans/archives/189>.

9. Chad C. Haddal, "Border Security: The Role of the U.S. Border Patrol," Congressional Research Service, p. 1 (Jul. 30 2010); "Southwest Border Security Operations," *supra* note 4, at 1.

10. "Fact Sheet on U.S. 'Constitution Free Zone,'" ACLU (Oct. 22, 2008), available at <http://www.aclu.org/technology-and-liberty/fact-sheet-us-constitution-free-zone> (noting in addition that two-thirds of the U.S. population lives within 100 miles of an international border).

11. Data from 1975 to 2005 calculated in September of each year, from "Border patrol Expands but Growth Rate after 9/11 much less than before," Transactional Records Access Clearinghouse, available at <http://trac.syr.edu/immigration/reports/143/>, citing underlying table, available at <http://trac.syr.edu/immigration/reports/143/include/rep143table3.html>. Fiscal year data for 2006-2009 from Chad C. Haddal, "People Crossing Borders: An Analysis of US Border Protection Policies," Congressional Research Services, p. 33 (May 13, 2010), available at <http://www.fas.org/sgp/crs/homsec/R41237.pdf>.

12. Chad C. Haddal, "Border Security: The Role of US Border Patrol," Congressional Research Services, p. 7 (Aug. 11, 2010), available at <http://www.fas.org/sgp/crs/homsec/R41237.pdf>.

To date, this method of “voluntary departure” is still utilized in the immigration enforcement system by CBP personnel and immigration judges. It results in the individual leaving the United States, but is less harsh than a final order of removal issued by an immigration judge. A final removal order often bars the individual from returning to the United States for five years or more, even if the person has a valid visa petition pending. Voluntary departure is commonly used by judges to dispose of low-level immigration cases without a lengthy immigration hearing, much like pleas of no *lo contendere* in criminal cases, or settlements in civil cases. Indeed, in 2009, 518,000 individuals were returned to their countries of origin without a formal removal order, as compared to 393,000 individuals who were formally deported.¹³

Expedited Removal

In the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996, Congress authorized the use of a controversial procedure known as expedited removal.¹⁴ The law gives DHS broad authority to place arriving migrants in expedited deportation proceedings without traditional due process rights such as a right to a hearing or appeal in front of a judge. The law applies to aliens who have false, altered, or no documents, or who have not presented themselves to an officer at a port of entry. Those aliens who indicate a fear of persecution or intention to seek asylum are referred to a “credible fear” interview in front of an asylum officer.¹⁵ Even this determination merely gives the individual a referral to an immigration judge, through whom he or she can seek asylum while bearing a heavy burden of proof.¹⁶ Other defenses and exceptions to deportation, such as the relief provided under the Violence against Women Act, or relief provided for victims of crime or trafficking, are not considered in expedited removal proceedings. Besides the limitations on hearings, expedited removal subjects aliens to mandatory detention until deportation, and a subsequent bar from returning to the U.S. for five years.

At its inception, the policy was mandatory for “arriving” aliens, or those caught at the border. (Some discretion is available for aliens caught within the interior of the United States

“Data clearly indicate that Mexican immigration is not and has never been out of control.”

- Testimony of Douglas Massey
before the Senate Judiciary Committee

who cannot affirmatively show that they have been present in the U.S. continuously for two years.)¹⁷ Initially, the program was not used other than at ports of entry. Since 2002, however, CBP has asserted its jurisdiction incrementally, first to individuals arriving by sea, then to those caught within 100 air miles of the U.S. border who cannot prove physical presence for the 14-day period immediately preceding the date of encounter.¹⁸

Due to initial resource constraints, DHS stated that it would apply expedited removal to third country nationals (not from Mexico or Canada).¹⁹ In practice, however, DHS has consistently applied expedited removal to Mexican nationals. In fact, in 2009, Mexicans accounted for nearly 75% of expedited removals.²⁰ This use of expedited removal results is consistent with a policy of significant consequences for unlawful entry.

Proponents of the program argue that expedited removal eliminates the cost of hearings.²¹ Indeed, large numbers of individuals are handled by the system with seeming efficiency. In 2009, 106,600 individuals were deported through expedited removal, which accounted for 27% of all deportations.²² Furthermore, some proponents maintain that aliens seeking formal “admission” have no due process rights with regards to admission, so no such legal concerns arise from the elimination of hearings.²³ However, opponents of the program point to the long standing distinction between the rights of aliens seeking entry, and those physically present within the United States already, albeit without being admitted formally.

Additionally, critics of the program have raised concerns about the nearly unchecked authority of asylum officers to determine the validity of asylum claims of those undergoing expedited removal cases. While statistics show that 90% of aliens who raise fears of prosecution are ultimately deemed “credible” and to a review before an immigration judge, other reports suggest that many individuals with valid claims or

13. “Immigration Enforcement Actions, 2009: Annual Report,” *supra* note 7, at 1.

14. INA § 235(b)(1)(A)(i); 8 U.S.C. § 1225(b)(1)(A)(i).

15. Alison Siskin and Ruth Ellen Wasem, “Immigration Policy on Expedited Removal of Aliens,” Congressional Research Services, RL33109, p. 4 (Jan. 30, 2008) (updated), available at http://assets.opencrs.com/rpts/RL33109_20080130.pdf.

16. *Id.*

17. *Id.* at i.

18. *Id.*

19. Designating Aliens for Expedited Removal, 69 FR 48,877-81 (Aug. 11, 2004).

20. “Immigration Enforcement Actions, 2009: Annual Report,” *supra* note 7, at 4.

21. See *AILA v. Reno*, Nos. 97-0597, 97-1237 and 97-1229 (D.D.C.1998), see also *id.* at 9.

22. “Immigration Enforcement Actions, 2009: Annual Report,” *supra* note 7, at 1.

23. Siskin and Wasem, *supra* note 15, at 8.

even legal rights to remain in the U.S. are ultimately removed under this system.²⁴ Furthermore, the choice to place asylum-seekers in detention has been controversial, in that it may reduce fraudulent claims, but be nonetheless overly harsh for individuals who have arguable claims. Indeed, according to the United Nations High Commission of Refugees, detention of asylum seekers is “inherently undesirable” due to the long term damage of detention on all individuals, and the particular vulnerability of individuals fleeing persecution.²⁵

Recommendations:

- The federal government should conduct oversight and evaluation of DHS personnel tasked with implementing expedited removal to ensure that abuses of authority do not occur.
- Expedited removal should be formally limited to individuals apprehended at ports of entry upon arrival, as opposed to those stopped in the interior of the United States.
- Information regarding available defenses should be provided to all individuals subject to expedited removal proceedings.

Border Patrol Programs and Policies

Secure Border Initiative

DHS’ Secure Border Initiative (SBI) began in 2005 as a multi-year plan to manage and coordinate border security programs within CBP.²⁶ SBI reportedly assists in these functions by increasing the number of Border Patrol agents; expanding detention and removal; enhancing “tactical infrastructure,” such as the southwest border fence projects, and using technology.²⁷ While the southwest border has been SBI’s primary focus, it has initiatives designed to secure the northern border as well.²⁸

Prominent among the infrastructure changes in recent years has been the construction of a 670 mile border fence,

as prescribed by the Secure Fence Act of 2006.²⁹ After delays and changes in plans caused by hydrology concerns as well as legal concerns involving land owners, CBP announced in January, 2011 that 649 miles of fencing was completed, including 299 miles of vehicle fencing and 350 miles of primarily pedestrian fencing.³⁰ The fence has drawn criticism from a variety of groups, who claim the barrier is damaging neighborhoods and waterways as well as disrupting the movement of individuals.³¹

Other prominent programs formerly included SBI’s “virtual border fence” of electronic surveillance, which was launched as a pilot program in a 28 mile portion of the Tucson sector and cost over \$1 billion dollars in the initial stage.³² However, in 2011, DHS terminated the virtual fence program due to problems with cost and effectiveness.³³ DHS announced this decision in conjunction with an increase in Border Patrol manpower, and the planned use of unmanned drones and mobile surveillance along the remaining portion of the Arizona border.³⁴

Recommendations:

- Adapt fences to serve pre-existing cross-border communities where possible.
- Ensure that environmental impacts are considered in any further border infrastructure projects, and that they are mitigated from past projects.

Operation Stonegarden

In addition to positioning federal agents at the border, DHS also provides funding to local, state, and tribal law enforcement agencies to further increase law enforcement presence along the border. This funding is distributed based on applications made by local law enforcement agencies, and priority is given to those who demonstrate relative need as well as the ability to achieve maximum border protection with minimum cost.³⁵ An appropriation of \$60 million was included in the 2010 budget for funding these projects, despite criticism that

24. Mary Kenney, “DHS Announces Unprecedented Expansion of Expedited Removal to the Interior,” American Immigration Law Foundation, (Aug. 13, 2004); Siskin and Wasem, *supra* note 15 at 9-12.

25. Siskin and Wasem, *supra* note 15, at 10, citing “UNHCR Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers,” Office of the United Nations High Commissioner for Refugees, p. 1 (Feb 1999).

26. “Secure Border Initiative Update,” Factsheet, Department of Homeland Security Website (Aug. 23, 2006), *available at* http://www.dhs.gov/xnews/releases/pr_1158351496818.shtm.

27. *Id.*, “Southwest Border Security Operations,” *supra* note 4, at 2.

28. “Border Security Fencing, Infrastructure and Technology,” Government Accountability Office Report, GAO-10-877R, p. 7 (Jul. 30, 2010), *available at* <http://www.gao.gov/new.items/d10877r.pdf>.

29. P. L. 109 – 367.

30. “Southwest Border Fence Construction Progress.” CBP Website (last visited, Jan. 18, 2011), *available at* http://www.cbp.gov/xp/cgov/border_security/ti/ti_news/sbi_fence/.

31. “Southwest Border Security Operations,” *supra* note 4, at 4.

32. *Id.* at 3.

33. Preston, *supra* note 7.

34. *Id.*

35. “Operation Stonegarden Factsheet,” National Immigration Forum (Feb. 17, 2010), *available at* <http://www.immigrationforum.org/images/uploads/2010/OperationStonegardenFactSheet.pdf>.

the program lacks oversight and internal regulations for the use of funds. Indeed, some reports show the funds were used for activities that were entirely unrelated to border security, such as crowd control at sporting events, and issuing traffic citations.³⁶ Additionally, some agencies reject the funding, in part because the program defines all undocumented immigrants as “criminal aliens,” in its operations grants.³⁷ Finally, in one high-profile case the Otero County Sheriff’s Department used Operation Stonegarden funds to conduct immigration home raids, prompting a lawsuit based on illegal searches and seizures.³⁸

Recommendations:

- Create program objectives and standards for the activities of law enforcement agencies.
- Clarify that local law enforcement agencies should not engage in civil immigration enforcement activity under this program.
- Eliminate the use of the term “criminal alien” from the language of the agreements, and create priorities that actually reflect a focus on aliens who demonstrate an articulable security threat.

Operation Streamline

Operation Streamline is a zero-tolerance immigration enforcement program that requires the federal criminal prosecution and imprisonment of unauthorized border-crossers.³⁹ These migrants, who have no criminal histories, would otherwise be detained and deported through the civil immigration system, or informally removed through voluntary departure. Until 2005, U.S. Attorneys along the border had largely remained uninvolved in routine immigration cases, and focused instead on prosecuting migrants with lengthy criminal records and repeated deportations. However, under Operation Streamline, DHS partners with the Department of Justice (DOJ) to prosecute nearly all migrants for misdemeanor illegal entry or felony re-entry in the sectors where the program has been implemented in the past five years.⁴⁰ Due perhaps to the shortage of resources in implementing Operation Streamline, Border

Patrol attorneys have been deputized in some locations as “special assistant U.S. Attorneys” in order to prosecute these cases, raising issues of prosecutorial independence.⁴¹

A number of concerns have been raised regarding Operation Streamline, including whether the proceedings comport with due process. Particularly controversial have been routine en masse hearings in which as many as 80 defendants are processed at once in a combined arraignment, plea, and sentencing procedure. In such hearings, defendants have routinely pleaded guilty as a group with no (or minimal) individualized representation, and no individualized discussion with the judge to determine whether the nature and consequences of the plea are understood.⁴² In December 2009, this practice was held to violate federal law by the Ninth Circuit, but it remains unclear how courts outside of the Ninth Circuit have changed their practices to comply with due process requirements.⁴³

Additionally, the sheer number of prosecutions has reportedly had other significant effects on the border courts, including: retention problems among court personnel; low morale and training among U.S. Attorneys and federal defenders; transfer of civil dockets to districts away from the border; and the spillover of drug prosecutions to state courts, causing these other court systems to be affected as well.⁴⁴ An internal report by the U.S. Marshals Service also suggested that U.S. Marshals “are being forced to balance the apprehension of child predators and sex offenders against the judicial security requirements” of handling so many immigration detainees.⁴⁵

Although the financial burden to taxpayers is also significant, there is no publically available government estimate of the total cost of the program. Costs include increased Border Patrol agents, U.S. Marshals, DOJ and court personnel, the need for additional holding and court facilities in federal courts along the border, and the increased burden on state court systems experiencing caseload overflow as a result of Operation Streamline.⁴⁶

DHS has promoted Operation Streamline as the primary cause of a decline in border apprehensions along the U.S.-Mexico border. In doing so, the agency has suggested that the goal of the program—or at least the chief benefit—is that of

36. *Id.*

37. “Southwest Border Security Operations,” *supra* note 4, at 8.

38. *Id.*

39. For more details, see Joanna Lydgate, “Assembly-Line Justice: A Review of Operation Streamline,” Policy Brief, Chief Justice Earl Warren Institute on Race, Ethnicity and Diversity at Berkeley Law School (Jan. 2010).

40. Exceptions exist for aliens released for humanitarian reasons. All others are prosecuted for illegal entry for first time border crossers under § 1325 which is usually prosecuted as a misdemeanor, but is a felony in some cases, depending on facts, or illegal re-entry under § 1326, which is a felony. See Tara

Buentello, “Operation Streamline: Drowning Justice and Draining Dollars along the Rio Grande,” Green Paper, Grassroots Leadership, p. 6 (Jul. 2010).

41. 28 U.S.C. § 543.

42. Lydgate, *supra* note 39, at 12-13.

43. *United States v. Roblero-Solis*, 588 F.3d 692 (9th Cir. 2009).

44. Lydgate, *supra* note 39, at 9.

45. *Id.* at 10, citing Jeff Fliss, “Bush Crackdown on Illegal Aliens Stretches Marshalls to Limit,” Bloomberg News, (Mar. 12, 2008).

46. *Id.* at 11-12.

deterrence.⁴⁷ In public statements, DHS leadership has suggested that they are targeting serious criminals, stating, “We are trying to raise the costs of coming here illegally—especially for those who come here illegally and commit additional crimes, like narcotics trafficking and gun trafficking.”⁴⁸ DHS has not demonstrated, however, that Operation Streamline has had the effect of deterring serious criminals or raising costs for narcotics and gun trafficking.

While border apprehensions have steadily declined over the past decade, many questions exist as to whether Operation Streamline is responsible for this decrease.⁴⁹ In fact, the decline in apprehensions has gone down steadily since 2000, well before the creation of the program in 2005. The decrease also took place in areas that did not have Operation Streamline.⁵⁰ DHS has acknowledged that the declining U.S. economy may be a factor in the decrease, among other possible explanations.⁵¹ Social scientists question whether migrants are aware of the difference between civil immigration detention and a federal criminal prosecution, thereby challenging the program’s purported deterrent impact.⁵² Finally, public defenders working with individuals prosecuted under Operation Streamline have stated that their clients have far greater personal incentives to make border crossings and may not be deterred by the threat of criminal prosecution.⁵³

More importantly, information released by DHS does not suggest that the program has been effective in deterring the target population of criminals committing crimes such as drug trafficking. Drug violence has risen in recent years in Mexico, with drug-related murders doubling in Mexican border cities between 2007 and 2008 alone.⁵⁴ Despite these reports of drug trafficking and human smuggling, the numbers of felony alien smuggling prosecutions in federal

criminal courts along the border did not increase, and drug prosecutions actually declined during this same time period.⁵⁵ In contrast, misdemeanor immigration caseloads quadrupled in federal criminal courts between 2002 and 2008 under Operation Streamline, even as border crossing apprehensions declined.⁵⁶ This sharp contrast between policy and practice suggests that Operation Streamline is likely draining resources away from the prosecution of serious border crimes, and undermining efforts at combating the very crimes actually leading to border violence along the U.S.- Mexico border.⁵⁷ Indeed, some individual Assistant U.S. Attorneys and judges have stated that the large low-level immigration caseloads have led to less time and fewer resources being spent on drug- and human trafficking cases.⁵⁸

Unintended Consequences of the Border Patrol Strategy

Before September 11, 2001, the Border Patrol had the national strategy of “Prevention through Deterrence,” leading to controversial programs such as Operation Gatekeeper in San Diego and Operation Hold-the-Line in El Paso in the 1990s, both of which involved increasing the concentration of agents along specific areas of the border. These programs had the stated intent of deterring potential undocumented crossers rather than focusing on apprehensions.⁵⁹ While DHS reported a reduction in apprehensions following the implementation of these programs, some unsubstantiated claims were made by the Border Patrol union that agents in San Diego were encouraged to underreport apprehensions to create the appearance of effectiveness.⁶⁰ Furthermore, others have criticized the strategy for causing the confiscation of indigenous land and other property of private landowners, the increased use of burdensome checkpoints, greater

47. Remarks by Homeland Security Secretary Michael Chertoff and Attorney General Mukasey at a briefing on Immigration Enforcement and Border Security Efforts, U.S. Department of Homeland Security Website (Feb. 22, 2008), available at http://www.dhs.gov/xnews/releases/pr_1203722713615.shtm.

48. *Id.*

49. “Immigration Enforcement Actions, 2009: Annual Report,” *supra* note 7, at 1.

50. Lydgate, *supra* note 39, at 4; Nancy Rytina and John Simanski, “Apprehensions by the U.S. Border Patrol: 2005-2008,” Fact Sheet, U.S. Department of Homeland Security, Office of Immigration Statistics, p. 2 (Jun. 2009), available at http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_apprehensions_fs_2005-2008.pdf.

51. Rytina and Simanski, *supra* note 50, at 2.52. 28 U.S.C. § 543.

52. Lydgate, *supra* note 39, at 7.

53. *Id.*

54. *Id.*, citing U.S. Department of Justice, National Drug Threat Assessment 2009, p. iii (Dec. 2008), available at <http://www.justice.gov/ndic/pubs31/31379/31379p.pdf>.

55. *Id.* at 2, data obtained from “Prosecutions for December 2008,” Transactional Records Access Clearinghouse, available at <http://trac.syr.edu/tracreports/bulletins/overall/monthlydec08/fil>; see also, “Southwest Border Security Operations,” *supra* note 4, at 7. (In December 2008, criminal immigration cases made up the majority of federal criminal prosecutions nationwide, outnumbering all white collar civil rights, environmental, drug-related, and other criminal cases combined. Furthermore, between 2000 and 2007, white collar prosecutions fell by 27%, weapons prosecutions by 21%, organized crime by 48%, public corruption prosecutions by 14%, and drug prosecutions by 20%.)

56. Lydgate, *supra* note 39, at 1, 3.

57. *Id.* at 1.

58. *Id.* at 8, citing “Immigration Crisis Tests Federal Courts on Southwest Border,” The Third Branch, Administrative Office of the U.S. Courts Office of Public Affairs, Washington DC (Jun. 2006), available at <http://www.uscourts.gov/ttb/06-06/border/index.html>.

59. “Southwest Border Security Operations,” *supra* note 4, at 5.

60. *Id.*, citing “Operation Gatekeeper: An investigation into allegations of fraud and misconduct,” U.S. Department of Justice (Jul. 1998), available at <http://www.justice.gov/oig/special/9807/exec.htm>.

scrutiny of non-whites and migrant workers traveling through the area, and increased physical abuse and harassment from immigration officials.⁶¹

Since that time, the national strategy of the Border Patrol has changed to reflect a post-September 11 landscape. Today, the Border Patrol's primary mission is to detect and prevent the entry of terrorists, weapons of mass destruction, and unauthorized aliens into the country, and to interdict drug smugglers and other criminals between ports of entry.⁶² Even so, the "Prevention through Deterrence" model still exists within the overall practices of the Border Patrol. The combined effect of the deterrence model and the new treatment of borders as potential entry points for terrorists has led to an increasingly militarized border. Areas where no physical barriers existed along the southwest border now contain physical fences, technological surveillance, additional patrols, and more checkpoints. More recently, National Guard troops have been deployed, accompanied by multiple Aerial Predator drones surveying the landscape from above.⁶³ Proponents of these policies assert that border apprehensions have fallen as a result of increased enforcement measures, but critics state that the relationship between these trends may be more complex, and that increased barriers and security at the border may have a variety of unintended consequences.

Decreased Circularity of Migration

Rather than simply reducing the numbers of people migrating to the United States, evidence suggests that increased security at border checkpoints may serve to reduce the "circularity of migration," or the repeated flow of individuals entering and leaving the U.S. Research suggests that individuals stay for longer periods of time, or have stopped returning to their home country altogether.⁶⁴

Border Deaths

Part of the Border Patrol's deterrence strategy includes the routing of unauthorized border traffic from urban regions to

less populated and geographically harsher areas.⁶⁵ Some advocates have criticized this tactic, citing an increase in border deaths relative to the decrease seen in border apprehensions in recent years, including a record high of 252 bodies found in Arizona in the year preceding October 2010.⁶⁶ Indeed, after the "Prevention through Deterrence" strategy was deployed in 1995, migrant deaths increased through the late 1990s.⁶⁷ To date, border deaths remain above historical averages, and mortality rates have gone from 1.6 deaths per 10,000 apprehensions in FY 1999 to 7.6 per 10,000 in FY 2009.⁶⁸ In addition, human rights activists have suggested that the reported number undercounts actual fatalities by excluding remains found by other agencies and deaths occurring on the Mexican side of the border or outside of the 100 mile jurisdiction of the Border Patrol.⁶⁹ The increased risks associated with crossing the border have led migrants to rely upon other avenues for entering the United States.

Increased Involvement of Human Smugglers

Migrants may be increasingly relying on coyotes, or human smugglers, rather than attempting to cross the border alone. According to research by Professor Wayne Cornelius of the University of San Diego, 91% of migrants traveling from the town of Yucateco in 2009 used coyotes to assist their most recent border crossing into the United States.⁷⁰ In recent years, the smuggling fees paid to coyotes in this region has dramatically increased, from around \$861 per person before 2001 to approximately \$3,000 between 2007 and 2009.⁷¹ The program "Operation Streamline" has even been described as a "coyote employment bill" in some areas.⁷²

Economic Factors

Finally, many researchers have pointed to the role of the economy as a factor in driving migration. As described by Princeton sociologist Douglas Massey in testimony before the Senate Judiciary Committee, "Data clearly indicate that Mexican immigration is not and has never been out of control.

61. *Id.* at 6; see also "Guilty by Immigration Status: A Report on the Violations of the Rights of Immigrant Families, Workers and Communities in 2008," Human Rights Immigration Community Action Network, pp. 17, 29 (Sep. 2009), available at <http://www.nnirr.org/hurricane/GuiltybyImmigrationStatus2008.pdf>.

62. Nunez-Neto, *supra* note 5, at 1.

63. Marc Lacey, "Arizona: Border Security gets more help from above," *NEW YORK TIMES*, (Aug. 30, 2010), available at http://www.nytimes.com/2010/08/31/us/31brfs-BORDERSECURL_BRF.html?_r=1.

64. See Wayne Cornelius, et al., "Current Migration Trends from Mexico: What are the Impacts of the Economic Crisis and U.S. Enforcement Strategy?" Powerpoint, Center for Comparative Immigration Studies at UCSD, pp. 26-27 (Jun. 2009), available at <http://www.immigrationpolicy.org/sites/default/files/docs/MigrationCornelius060809.pdf>.

65. Haddal, *supra* note 9, at 14. 66. 28 U.S.C. § 543.

66. Ted Robbins, "Illegal Immigrant Deaths Set a Record in Arizona," National Public Radio Website, (Oct. 6, 2010), available at <http://www.npr.org/templates/story/story.php?storyId=130369998>.

67. "Southwest Border Security Operations," *supra* note 4, at 6.

68. Haddal, *supra* note 9, at 26.

69. *Id.*

70. Cornelius, et al., *supra* note 64, at 29.

71. *Id.* at 30. (These amounts are in 2009 dollars.)

72. Lydgate, *supra* note 39, at 10, quoting interview with Robert Kinney, Supervisory Assistant Federal Public Defender, Las Cruces, NM (Mar. 25, 2009).

It rises and falls with labor demand and if legitimate avenues for entry are available, migrants enter legally.”⁷³

Data from a report by Professor Cornelius corroborate this conclusion. The findings suggest that increased difficulty in crossing the border could have some impact on would-be border crossers due to the increased cost, but among those interviewed, the economic considerations of the lack of jobs in the United States were a far greater consideration.⁷⁴

Recommendations:

- Eliminate Operation Streamline and return to pre-existing practices of removing migrants through the civil immigration system.
- Restore U.S. Attorneys’ discretion to prosecute serious crimes along the border.⁷⁵
- If the program is allowed to continue, evaluate the total costs of implementing Operation Streamline.
- Work with Mexican authorities to count border deaths accurately. Incorporate standards and protocols within CBP offices to prevent migrant fatalities.
- Work with other government agencies to allocate resources to target the root causes of unauthorized migration.

General Concerns

Ultimately, border enforcement has expanded dramatically in terms of personnel and resources. However, the bases for expansion are not clearly linked to increased unauthorized migration, nor do these programs necessarily have the desired effect of reducing the rate of unauthorized migration. On the other hand, the increasingly militarized border and criminalization of border crossers also has a host of other consequences, ranging from environmental, to humanitarian and legal. While border security and regulation of the immigration flow are legitimate policy goals of the government, the relationship between these goals and the programs in place should be carefully evaluated, and serious efforts should be made to address civil and human rights concerns.

IMMIGRATION ENFORCEMENT IN THE INTERIOR

While the appropriate scale and type of border enforcement continues to be debated, broad consensus indicates that the United States has the legal authority to police its borders. No such consensus exists with regard to interior enforcement. In fact, scholars, law enforcement officials, policymakers, and advocates continue to have deep disagreements regarding the efficacy and legality of post-September 11 programs and policies that target unauthorized immigrants and lawful permanent residents. In the absence of more comprehensive immigration law reforms, interior enforcement policies have become particularly important for the estimated 11 million undocumented residents in the United States.

Immigration and Customs Enforcement (ICE) is the DHS agency tasked with immigration enforcement in the interior of the United States. The self-stated purpose of the majority of ICE’s interior enforcement programs is to target “criminal aliens.” This term is broadly defined to include any alien with a criminal conviction, including minor traffic convictions or misdemeanors such as unlawful border-crossing. The term “criminal alien” also includes lawful permanent residents who have been convicted of a wide range of crimes, from relatively minor misdemeanors to more serious felonies. This section examines the federal strategy of targeting criminal aliens by analyzing the major enforcement programs for which ICE is responsible.

Although specific concerns are noted for each of ICE’s enforcement programs, some consistent issues have been raised by scholars and researchers. First, targeting criminal aliens, particularly under the frame of national security, may fuel the misconception that noncitizens are more prone to violence or crime than the native-born population.⁷⁶ Second, as local law enforcement becomes more involved in immigration enforcement, racial profiling of Hispanics and other immigrant groups reportedly is on the rise.⁷⁷ Third, some communities report they have lost trust in local police, and individuals may refuse to report or bear witness to local criminal matters for fear of immigration consequences.⁷⁸ These fears undermine community policing efforts and may decrease overall public safety. Fourth, as ICE relies increasingly on

73. Douglas Massey, Testimony to the U.S. Senate Committee on the Judiciary (May 20, 2009), *retrieved from* http://judiciary.senate.gov/hearings/testimony.cfm?id=3859&wit_id=7939, cited by Buentello, *supra* note 40, at 6.

74. *See* Cornelius, et al., *supra* note 64, at 41-42.

75. *Id.* at 2.

76. Rubén Rumbaut, “The Myth of Immigrant Criminality and the Paradox of Assimilation: Incarceration Rates Among Native and Foreign-Born Men.” Special Report, Immigration Policy Center, American Immigration Policy Foundation, pp 1-3, (Spring 2007), *available at* <http://nicic.gov/Library/022189>.

77. Trevor Gardener II and Aarti Kohli, “The C.A.P. Effect: Racial Profiling in the ICE Criminal Alien Program,” Policy Brief, Chief Justice Earl Warren Institute on Race, Ethnicity and Diversity at Berkeley Law School, p. 5 (Sep. 2009); “Under Siege: Life for Low-Income Latinos in the South,” Southern Policy Law Center (Apr. 2009), *available at* <http://www.splcenter.org/publications/under-siege-life-low-income-latinos-south/reporting-crime>.

78. Issac Menashe and Deepa Varma, “We’re Not Feeling Any Safer,” California Immigrant Policy Center and the Warren Institute (Summer 2010), *available at* <http://www.caimmigrant.org/enforcement.html>.

local law enforcement for support and information, local law enforcement may become more reliant on ICE to punish or remove suspected criminal offenders through deportation. Because deportation is a civil proceeding there are substantially fewer protections for defendants. Unlike in criminal proceedings, illegally seized evidence or confessions may be used.⁷⁹ Immigrants also have no right to government-provided counsel, further increasing the likelihood of a deportation.⁸⁰ Deportations may appear to law enforcement agencies as having a similar end result as jail, in terms of removal of the individual from the community, while being substantially easier to achieve. However, fundamental due process rights are often compromised in this use of the deportation system.

Legal History of State and Local Involvement in Immigration Enforcement

It remains unclear whether state and local police can lawfully enforce immigration laws. Immigration enforcement has traditionally been a function of the federal government. The rules for legal immigration, naturalization, deportation and enforcement, are defined by the Immigration and Nationality Act (INA),⁸¹ which contains civil and criminal enforcement provisions. Over time, some courts allowed state and local governments to enforce criminal violations of the INA.⁸² However, the Office of Legal Counsel of the U.S. Department of Justice (OLC) issued a memorandum in 1989 concluding that unauthorized presence in the U.S. was not a crime in itself, and individuals who were present in the U.S. without authorization were mere civil offenders. Local police were therefore not eligible to arrest or hold individuals on the basis of immigration status, or otherwise enforce civil immigration law.⁸³

In 1996, OLC again confirmed in a memorandum that state police lack the authority to arrest or detain aliens for the sole purpose of a civil deportation proceeding.⁸⁴ Furthermore, OLC concluded that stops based on reasonable suspicion of immigration crimes required the “existence of objective, articulable facts suggesting commission of a criminal offense by the persons detained, rather than mere stereotypical assumptions, profiles or generalities.”⁸⁵ Finally, the memorandum determined that local police in California were even prohibited under state law from enforcing criminal misdemeanor provisions of the INA under most circumstances, but allowed brief detentions (of 45 to 60 minutes when necessary) for federal agents to arrive, when reasonable suspicion existed of immigration crimes.⁸⁶ Even so, OLC stated that federal law did not require enforcement of the criminal portions of the INA by state officers.⁸⁷ Soon afterwards Congress passed the Antiterrorism and Effective Death Penalty Act (AEDPA)⁸⁸ and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA).⁸⁹ Both laws had provisions allowing state and local law enforcement to assist federal officers with criminal immigration enforcement under certain circumstances.⁹⁰ In particular, 8 U.S.C. § 1252(c) permits local police to arrest individuals who have presumptively committed the crime of re-entering the United States after having been deported by a court order.⁹¹

In 2002, in a reversal of reasoning, OLC issued a new memorandum⁹² to the U.S. Attorney General stating that its opinion in 1996 was mistaken and that states have “inherent authority” rather than merely “delegated power” to enforce federal law related to immigration.⁹³ This authority derives in part from OLC’s conclusion that states are “sovereign entities.” Federal law “posed no obstacle to the authority of state

79. *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984).

80. 8 U.S.C. § 1362 (INA section regarding right to counsel), *see also* “Broken Justice: A Report on the Failures of the Court System for Immigration Detainees in New York City,” Detention Working Group of the New York University Chapter of the National Lawyers Guild (Volume I 2006-7), p. 15.

81. 8 U.S.C. §§ 1101 et seq.

82. *Gonzalez v. City of Peoria*, 722 F.2d 468, 476 (9th Cir. 1983), Memorandum from the Office of Legal Counsel to Joseph R. Davis, Assistant Director-Legal Counsel, FBI, “Handling of INS Warrants of Deportation in relation to NCIC Wanted Person File,” p. 5 (Apr. 11, 1989).

83. Memorandum from the Office of Legal Counsel to Joseph R. Davis, Assistant Director-Legal Counsel, FBI, “Handling of INS Warrants of Deportation in relation to NCIC Wanted Person File,” pp. 4,9 (Apr. 11, 1989).

84. Memorandum from the Office of Legal Counsel to the United States Attorney, Southern District of California, “Assistance by State and Local Police in Apprehending Illegal Aliens,” p. 2 (Feb. 5, 1996).

85. *Id.*

86. *Id.* (California state law prohibits state police from making warrantless arrests based on the misdemeanor criminal offenses under the INA unless the offense occurred in the presence of the officer. This includes the offense of unauthorized entry into the U.S.)

87. *Id.* at 4.

88. Pub. L. No. 104-132, 110 Stat. 1214.

89. Pub.L. 104-208, Div. C, 110 Stat. 3009-546.

90. AEDPA § 439, IIRIRA § 372.

91. Re-entry after deportation is a criminal offense, rather than a civil immigration offense.

92. This memorandum only became publically available in 2005 after a Freedom of Information Act Request and several years of litigation. “Secret Immigration Enforcement Memo Exposed,” press release, ACLU (Sep. 7, 2005), *available at* <http://www.aclu.org/immigrants-rights/secret-immigration-enforcement-memo-exposed>.

93. Memorandum from the Office of Legal Counsel to the Attorney General, “Non preemption of the authority of state and local law enforcement officials to arrest aliens for immigration violations, for the Attorney General.” p. 5 (Apr. 3, 2002).

police to arrest aliens on the basis of civil deportability.”⁹⁴ In reversing its stance, OLC relied upon prior case law that the 1996 OLC supposedly did not take into account, such as the Tenth Circuit case of *United States v. Salinas Calderon*, in which a state trooper was determined to have general investigatory authority to inquire into possible immigration violations.⁹⁵ Additionally, the 2002 OLC made vastly different conclusions on the points of law discussed in the 1996 memo.⁹⁶ Although some consider the 2002 opinion “deeply flawed” and “unsupported by legislative history or judicial precedent,”⁹⁷ some state and local governments have appeared to embrace this “inherent authority” reasoning in the civil immigration realm.⁹⁸ Furthermore, other states and localities have attempted to enhance their authority by creating their own criminal immigration laws. A particularly controversial example of this has been SB 1070 in Arizona, which is currently being challenged on federal pre-emption and violation of civil rights grounds by the federal government and advocacy groups.⁹⁹

Recommendation:

- The current OLC should revisit the 2002 memorandum and clarify the proper role of state and local police in civil immigration enforcement.

ICE Enforcement Programs Today

Today, ICE collaborates with local law enforcement to enforce criminal and civil immigration laws under the umbrella of ICE ACCESS (Agreements of Cooperation in Communities to Enhance Safety and Security) programs. ICE describes this program as “a response to widespread interest from local law enforcement who have requested ICE assistance through the 287(g) program” although it now encompasses efforts in many more localities. The 287(g) program, the Criminal Alien Program, the Fugitive Operations program, and Operation Community Shield are all major components of ICE ACCESS. Secure Communities (S-Comm) is another interior enforcement program involving localities, although

the federal government does not currently describe it as a collaborative effort that falls under the ICE ACCESS program.

287(g)

Background

The 287(g) program, described as one of ICE’s top state and local partnership programs, serves to authorize local authorities to act as immigration agents based on a memorandum of agreement (MOA) with the federal government.¹⁰⁰ By entering into an MOA with a local or state law enforcement agency, ICE can designate local officers to perform immigration enforcement functions such as screening inmates in local jails for immigration violations, arresting individuals for immigration violations, investigating immigration cases, and working with ICE on task forces on immigration crimes. In theory, such officers are required to undergo training and work under the supervision of ICE and community advisory committees. The first 287(g) MOA was signed in 2002. The program was substantially expanded in 2007 and 2008, and as of January 2010, there were signed MOAs with 71 local law enforcement agencies in 26 states.¹⁰¹ These signatories include sheriffs and local police departments.

Legal Authority

Congress added section 287(g) to the Immigration and Nationality Act in 1996, creating a mechanism for state and local officers to become *de facto* immigration agents.¹⁰² In particular, this section states that the United States Attorney General (AG) can enter into agreements with state officers or state political subdivisions to perform immigration functions such as the investigation, apprehension, or detention of aliens, under the AG’s direction and supervision. Other requirements include knowledge of federal law by the state officer in question, as well as a written certificate of completed training on federal immigration law.¹⁰³ Furthermore, such officers are limited by their own state and local laws.¹⁰⁴

94. *Id.*

95. 728 F.2d 1298 (10th Cir. 1984).

96. Even so, the memorandum assumes that any such State actors would be in compliance with state law, as well as the 4th Amendment. See Memorandum from the Office of Legal Counsel to the Attorney General, “Non preemption of the authority of state and local law enforcement officials to arrest aliens for immigration violations, for the Attorney General.” p. 5 (Apr. 3, 2002).

97. Lisa M. Seghetti et al., “Enforcing Immigration Law: The Role of State and Local Law Enforcement.” Congressional Research Service p. 7 (Mar. 11, 2009), available at <http://www.au.af.mil/au/awc/awcgate/crs/r132270.pdf>, citing “Refutation of 2002 DOJ Memo,” ACLU (Sep. 6, 2005) available at <http://www.aclu.org/FilesPDFs/ACF3189.pdf>.

98. *Id.* at 4.

99. *Friendly House et al. v. Whiting*, No. CV 10-1061 (D. AZ.) (filed May 17, 2010).

100. “Delegation of Immigration Authority, 287(g),” ICE Website, (Aug. 2, 2010), available at <http://www.ice.gov/news/library/factsheets/287g.htm>.

101. *Id.*

102. Pub. L. No. 104-208, div. C, § 133, 110 Stat. 3009–546, 3009-563 to 64, codified in 8 U.S.C. § 1357(g).

103. *Id.* § 1357(g)(2).

104. *Id.* § 1357(g)(1).

FIGURE 3 | ICE Programs Involving Local Law Enforcement Activity

	287(g)	Criminal Alien Program (CAP)	Community Shield	Fugitive Ops	S-Comm
Primary agent making enforcement decisions	Local law enforcement agency (LEA)	ICE and LEA	ICE	ICE	ICE
Is the program pursuant to a formal agreement with the locality?	Yes	Unknown	Yes	Generally no (some ad hoc partnerships exist)	Generally no (There is an agreement signed at the state level, but no agreement required at the local level)
Who does the program officially target?	Individuals who are arrested for crimes in the locality who LEAs suspect to be deportable aliens	Arrested individuals who either the LEA, the prison, or ICE believe to be deportable aliens based on name, interview, or other information	Gang members and 'affiliates'	Individuals who have an outstanding removal order	Arrested individuals who are determined by ICE to be deportable aliens, (or potentially deportable aliens) based on fingerprints
What happens in an enforcement action?	LEA makes an arrest based on a perceived immigration violation, or notifies ICE that a hold should be placed based on such a violation	Facility sends list of names to ICE, ICE selects some individuals to interview, places holds on those determined to be deportable aliens	LEA identifies local gangs, and "associates." ICE apprehends those individuals who are believed to be aliens	ICE conducts searches in homes for immigration fugitives, makes collateral arrests of other aliens encountered	Routine fingerprints taken at arrest or booking are electronically sent to state database, where they are matched against civil immigration databases. ICE informs facility of its decision to place holds on some individuals
Can individuals with no criminal conviction be apprehended by ICE through this program?	Yes	Yes	Yes (3,997 criminal arrests v. 7,109 administrative arrests from 2005-2008)	Yes (73% had no criminal conviction from 2003-2008)	Yes
Racial profiling concerns?	Yes	Yes	Yes	Yes	Yes
Number of currently operating units or agreements	71 MOAs with LEAs, (participation is discretionary for LEA)	unknown	unknown	104 Fugitive Operations Teams ¹⁰⁵	MOAs with 37 states (no requirement of MOA with county or LEA) 969 counties active within those states ¹⁰⁶

105. "ICE Fugitive Ops Program: Background," ICE website, available at <http://www.ice.gov/doclib/news/library/factsheets/fugops.htm>, (last visited Feb. 15, 2011).

106. "Activated Jurisdictions," ICE Website, available at <http://www.ice.gov/doclib/secure-communities/pdf/sc-activated.pdf>, (last visited January 19, 2011).

Program Goals

The stated purpose of these partnerships is to enhance the safety and security of communities by addressing serious criminal activity committed by removable aliens. In its published fact sheet on the 287(g) program, ICE states that “terrorism and criminal activity are most effectively combated” by a multi-agency approach that includes federal, state and local resources.¹⁰⁷ The lack of ICE personnel or detention space needed to address all criminal activity committed by aliens has also been cited as a basis for partnerships between ICE and local law enforcement agencies.¹⁰⁸ According to ICE’s own statistics, 287(g) has identified 173,000 deportable aliens and has certified 1,190 state and local officers to enforce immigration law.¹⁰⁹ Some participants in the program have stated that they have seen a reduction in crime and that the removal of repeat offenders has been a benefit of the program.¹¹⁰

Concerns with the Program

Researchers and advocates have widely criticized the 287(g) program for creating distrust between immigrant communities and local police, and for increasing racial profiling, while being largely ineffective at targeting major offenders.¹¹¹ In North Carolina, for example, research has shown that 287(g) has led to the profiling of Hispanic drivers in the two counties studied, despite claims that the program was intended to target major criminal offenders, and would not create racial profiling.¹¹² Advocates have noted that the 287(g) program has given local police unfettered access to act on discriminatory feelings and motivations to rid their communities of immigrants.¹¹³ Furthermore, Richard Stana, director of the Department of Homeland Security and Justice Issues at the

Governmental Accountability Office (GAO), testified before the U.S. House of Representatives on the effects of 287(g), stating that more than half of the law enforcement agencies they reviewed reported concerns expressed by community members of racial profiling and misuse of the program in targeting of low-level offenders.¹¹⁴

Police associations have echoed these concerns, stating that 287(g) undermines rather than supports their primary mission of protecting public safety.¹¹⁵ Research shows that the public feels safer when local police establish a trusting, cooperative relationship with the communities they serve.¹¹⁶ In communities containing immigrants, many officers help create this type of relationship by openly declaring they are not concerned about immigration status, but rather about community safety.¹¹⁷ This approach encourages victims to report crimes to the police without fear of immigration-related repercussions. Finally, it reduces community isolation, and makes immigrants more willing to assist law enforcement by providing intelligence on criminal activities, including terrorism.¹¹⁸ In practice, local police have often rejected proposals to increase their involvement in enforcing federal immigration law for these same reasons. In 2006, Major Cities Chiefs, a national organization of police chiefs from the largest cities in America, released a position statement that strongly opposed involving local police in immigration enforcement. Their primary concern was that doing so would “undermine the level of trust and cooperation between local police and immigrant communities,” resulting in “increased crime against immigrants and in the broader community.”¹¹⁹ In particular, the mixed status nature of many immigrant families suggests that fear of immigration enforcement has a larger impact in

107. “Fact Sheet: Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act,” ICE Website, available at <http://www.ice.gov/news/library/factsheets/287g.htm>, (last visited Feb. 15, 2011).

108. Richard Stana, “Immigration Enforcement: Controls over Program Authorizing State and Local Enforcement of Immigration Laws Should be Strengthened,” Government Accountability Office, Testimony before the Committee on Homeland Security, House of Representatives, p. 1 (Mar. 4, 2009), available at <http://www.gao.gov/new.items/d09381t.pdf>.

109. “Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act,” *supra* note 100.

110. Stana, *supra* note 108, at 7.

111. Letter organized by the National Immigration Law Center and signed by 521 national and local organizations to President Barack Obama calling on him to terminate 287(g) (Aug. 25, 2009), available at www.nilc.org/immlaw-policy/LocalLaw/287g-Letter-2009-08-25.pdf.

112. Deborah Weissman, Rebecca C. Headen, and Katherine Lewis Parker, “The Policies and Politics of Local Immigration Enforcement Laws,” ACLU and University of North Carolina at Chapel Hill School of Law, p. 29 (2009), available at www.law.unc.edu/documents/clinicalprograms/287gpolicyreview.pdf.

113. *Id.* at 30.

114. Stana, *supra* note 108, at 2.

115. Cristina Rodriguez et al, “A Program in Flux: New Priorities and Implementation Challenges for 287(g),” Migration Policy Institute, citing International Association of Chiefs of Police (IACP), Police Chiefs Guide to Immigration Issues (Alexandria, VA: IACP, 2007), available at www.theiacp.org/Portals/0/pdfs/Publications/PoliceChiefsGuidetoImmigration.pdf.

116. Stephen Martrofski, et al. “Community Policing in Action: Lessons From an Observational Study.” Research in Progress Preview (Jun. 1998), National Institute of Justice, U.S. Department of Justice.

117. See Special Order No. 40, Los Angeles Police Department (Nov. 27, 1979).

118. Anita Khashu. “The Role of Local Police: Striking a Balance Between Immigration Enforcement and Civil Liberties.” The Police Foundation. pp. 22-25 (2009), available at <http://www.policefoundation.org/pdf/striking-a-balance/Rolepercent20ofpercent20Localpercent20Police.pdf>.

119. David A. Harris. “The War on Terror, Local Police, and Immigration Enforcement: A Curious Tale of Police Power in Post 9/11 America.” Legal Studies Research Paper Series, Working Paper No. 2007-4, p. 43 (2007) available at <http://ssrn.com/abstract=1008927>.

communities where immigrants reside, driving a “potential wedge between police and community” in terms of trust.¹²⁰

Beyond these issues, the GAO also found a lack of key internal controls within the program in 2009, leading to additional concerns, including the lack of program objectives identified for the local partners, inconsistent guidance on when to use 287(g) authority, and inconsistent supervision. Additionally, the GAO noted a lack of measures to track data and evaluate progress.¹²¹ Overall, the GAO expressed concern that the lack of support and clarity could lead to a misuse of authority at the local level.

Recommendations:

- If 287(g) programs are continued, improved standards, training, and accountability must be put in place to address current concerns of overreaching and profiling by local law enforcement.
- MOAs should require participating localities to record stop and arrest data by race, ethnicity and level of offense. Participating localities should be required to share this information with government and independent researchers, and this data should be regularly reviewed for effects of the program on localities.

Criminal Alien Program

Background

The purpose of the Criminal Alien Program (CAP) is to identify criminal aliens who are arrested or incarcerated in federal, state, and local facilities, and to secure removal orders for these individuals while they are still in custody.¹²² Pursuant to the program, local officials hold individuals in jail or prison until ICE officers can screen and take custody of those they suspect of being deportable. After screening these individuals, the Office of Detention and Removal Operations (DRO) issues charging documents to begin proceedings to deport identified persons. In 1996, ICE agents began to visit detention facilities and identify deportable immigrants through interviews.¹²³ By 2007, the program expanded to allow ICE agents to review cases by phone and video conference.

Today, there is no public list available of the jails and prisons where CAP is formally present, and ICE has not replied to the Warren Institute’s Freedom of Information Act request for this list to date.¹²⁴ However, based on anecdotal evidence, and conversations with Sherriff’s offices, it appears that the use of ICE officers to screen inmates in city and county jails is widespread.¹²⁵

Legal Authority

Under § 287(a)(1) of the INA, immigration officials have the authority to interrogate individuals reasonably believed to be undocumented aliens about their right to remain in the United States without a warrant.¹²⁶ In this way, ICE can presumably conduct interviews of selected individuals in jails. ICE, however, has a broad interpretation of the reasonable belief standard. Interviews conducted with county sheriffs’ departments in Florida suggest that name, ethnicity, language, or place of birth, or the local officer’s “hunch” of alienage each have been bases for the locality to refer individuals to ICE.¹²⁷ No public information is available on what guidance, if any, ICE provides localities or on what bases ICE decides to screen individuals.

Program Goals

The goal of CAP is to improve safety by promoting federal-local partnerships to target serious criminal offenders for deportation, particularly those who pose a threat to public safety.¹²⁸ For FY 2007, ICE data indicate that approximately 164,000 charging documents were issued to “criminal aliens” under CAP, climbing rapidly to an estimated 220,000 in FY 2008.¹²⁹

Concerns with the Program

Widespread concerns exist over the lack of program transparency. For example, ICE does not disclose their processes to determine whether an individual is a “criminal alien” or even where the program is officially implemented. Additionally, concerns have been raised that racial profiling may be taking place through pre-textual arrests.

120. Craig E. Ferrell Jr., “Immigration Enforcement, Is It a Local Issue?,” 71 THE POLICE CHIEF 2 (Feb. 2004), available at http://policechiefmagazine.org/magazine/index.cfm?fuseaction=display_arch&article_id=224&issue_id=22004.

121. Stana, *supra* note 108, at 3.

122. Description of Criminal Alien Program, Immigration and Customs Enforcement Website, available at <http://www.ice.gov/criminal-alien-program>, (last visited Feb. 15, 2011).

123. These include both undocumented immigrants and those who have valid visas but may be deportable for some reason, such as a criminal conviction.

124. FOIA submitted in June 2010, and re-submitted in September 2010.

125. Notes on file with author; see also Menashe and Varma, *supra* note 78.

126. 8 U.S.C. § 1357.

127. Interview with official in Sherriff’s Office of Marion County, FL (May 7, 2010); Interview with official in Sherriff’s office of Pinellas County (May 28, 2010); Interview with official in Sherriff’s Office of Broward County, FL (May 5, 2010), (notes on file with author).

128. “Fact Sheet: Criminal Alien Program,” ICE Website, available at <http://www.ice.gov/news/library/factsheets/cap.htm>, (last visited Feb. 15, 2011).

129. Gardener and Kohli, *supra* note 77, at 3.

In a 2009 report, the Warren Institute conducted an analysis of arrest data before and after the implementation of the CAP program in Irving, Texas. This study revealed that increased ICE involvement was correlated with increased arrests of Hispanics for low-level offenses. In particular, arrests of Hispanics for the lowest-level offenses tripled and misdemeanor traffic arrests of Hispanics more than doubled when local police began having round-the-clock access to ICE via phone and video teleconference.¹³⁰ Additionally, this research revealed the inability of local law enforcement agencies to make proper immigration determinations. ICE consistently issued detainers for fewer individuals than were referred by the local police to ICE. Even more strikingly, a majority of the Hispanic individuals arrested for low-level misdemeanor arrests during the relevant time period proved to be lawfully present in the United States.¹³¹ This analysis raises concerns that programs such as CAP lead police to target individuals perceived to be undocumented because of their race or ethnicity.

Furthermore, concerns have been raised that the program fails to target real “criminal aliens.” Indeed only 2% of the ICE detainers issued in Irving, Texas during the time period that CAP was implemented in the community were issued to individuals charged with felonies.¹³²

Recommendations:¹³³

- Congress should order an investigation of the implementation of the Criminal Alien Program in other jurisdictions before allocating additional sums for the expansion of the program. Particularly, the investigation should concentrate on whether local law enforcement is in fact increasing its focus on high-level criminal alien offenders as a result of the CAP program.
- ICE should institute a bright-line rule prohibiting CAP screenings for individuals arrested for non-felony offenses in order to reduce racial profiling in the implementation of the Criminal Alien Program. This recommendation is in line with Congress’s mandate to focus on serious criminal offenders.

- Congress should mandate that local jurisdictions who partner with ICE without MOAs or formal agreements record stop and arrest data by race, ethnicity and level of offense.
- ICE should disclose on its website the locations in which it has implemented the Criminal Alien Program to provide full disclosure to local communities who may be impacted by police practices. ICE should furthermore provide local contact information for regional ICE offices which are responsible for CAP in each area of the country, along with a complaint procedure.

Operation Community Shield

Background

Operation Community Shield (Community Shield) was launched in February 2005 as a national law enforcement initiative with the stated purpose of combating transnational gangs who threaten the safety of local communities.¹³⁴ In particular, ICE states that the goal of Community Shield is “to identify, locate, arrest, and prosecute gang members and associates and ultimately disrupt and dismantle gang organizations” using criminal and administrative authority.¹³⁵ Gang-related immigration enforcement had already existed on a local basis since the 1990s in the form of gang taskforces.¹³⁶ Community Shield created the first nationwide initiative, and it focused on the Mara Salvatrucha gang, also known as “MS-13.” Community Shield was then expanded a few months later in May 2005 to “all criminal street gangs that pose a threat to national security and public safety.”¹³⁷

The program involves partnerships between ICE, federal law enforcement agencies and state and local law enforcement in order to identify gangs and develop intelligence on their members, associates and activities.¹³⁸ In practice, ICE leaves the process of the identification of gangs, members and associates to its state and local partners, and then uses the list of names provided to determine if the individuals are eligible for deportation based on immigration violations.¹³⁹

130. *Id.* at 6.

131. *Id.* at 7.

132. *Id.*

133. *Id.* at 8.

134. Operation Community Shield/ Transnational Gangs, Immigration and Customs Enforcement Website, available at <http://www.ice.gov/community-shield>, (last visited Feb. 15, 2011).

135. *Id.*

136. Jennifer M. Chacon, “Whose Community Shield?” UNIVERSITY OF CHICAGO LEGAL FORUM, p. 325 (2007).

137. Operation Community Shield/ Transnational Gangs, *supra* note 134.

138. *Id.*

139. Chacon, *supra* note 136 at 329.

Legal Authority

INA § 287(a)(5)(b) allows immigration officials to make arrests for any felony “cognizable under the laws of the United States, if the officer or employee has reasonable grounds to believe that the person to be arrested has committed or is committing such a felony, if the officer or employee is performing duties relating to the enforcement of the immigration laws at the time of the arrest and if there is a likelihood of the person escaping before a warrant can be obtained for his arrest.”¹⁴⁰ However, the application of this provision to Community Shield is somewhat tenuous, because gang membership or activity itself is not a crime under federal law.¹⁴¹ Furthermore, gang membership is not defined or regulated by the INA. While gang membership is defined for the purposes of sentencing enhancement under federal criminal law, Operation Community Shield does not follow the definition used for federal sentencing standards, nor does it require localities to use any existing state or local standard.¹⁴²

Program Results

From the program’s inception in 2005 to September 2008, apprehensions under this program included 3,997 criminal arrests and 7,109 administrative immigration arrests for a total of 11,106 “gang members and associates.”¹⁴³ Of those arrested, 145 were gang leaders and 2,018 were MS-13 members or “associates.”¹⁴⁴ Also, according to ICE, 4,331 of the arrested suspects had “violent criminal histories.”¹⁴⁵ Through this initiative, ICE has seized 388 firearms in this time period.¹⁴⁶

Concerns with the Program

Scholars and advocates have noted several problems with Community Shield. As stated above, there is no uniform legal standard governing the identification of criminal street gang members for the purposes of immigration enforcement.¹⁴⁷ Furthermore, there is no legal definition for an “associate” of a criminal street gang.¹⁴⁸ Given that a large number of those arrested under the program are described as associates, questions arise as to whom the program really targets. The program does not require individuals to be criminally

prosecuted. Instead, individuals can be referred by local authorities who have no basis for prosecuting them in the criminal legal system. Indeed, as of 2006, 70% of individuals deported under Operation Community Shield had not been found guilty of any crime, and were deported on immigration violations alone.¹⁴⁹ The broad discretion allowed in identifying such individuals and the absence of federal statutory constraints may therefore lead to discriminatory practices by law enforcement agencies. For example, in the absence of due process requirements or definitions of gang association, police may rely on profiling and stereotyping as a means to identify suspects.

Furthermore, questions exist as to whether the removal of gang members from the United States is an effective strategy for combating gang violence. Gang “suppression” has been the focus of many gang-related programs in the United States in recent decades, though its effectiveness is unclear.¹⁵⁰ Some research suggests that “zero tolerance roundups” of gang members have not produced consistent, noteworthy results, in part because “street gangs are the by-products of partially incapacitated communities” and other social and economic conditions must be changed to have a lasting impact.¹⁵¹ Such research suggests that gangs cannot be effectively controlled on a long-term basis by targeting specific existing members or gangs, but that the societal structures that lead to gang formation must be addressed as well. In the domestic context, the Office of Juvenile Justice and Delinquency Prevention recognizes that comprehensive approaches, including social services, crisis intervention, gang suppression, and community involvement together may be more effective than a one-dimensional approach of gang suppression.¹⁵²

Compared to this type of multi-pronged approach, Operation Community Shield appears to only address gang suppression through removal, with no integration with local efforts to address prevention. Furthermore, the program assumes that the deportation of a “gang member” improves domestic safety by removing that individual’s presence and influence. However, officials in “receiving” countries such as El Salvador, as well as advocates and interviewed gang

140. 8 U.S.C. § 1357.

141. 18 U.S.C. § 521(a) (2000).

142. Chacon, *supra* note 136, at 330.

143. Operation Community Shield Factsheet, *supra* note 138.

144. *Id.*

145. *Id.*

146. *Id.*

147. Chacon, *supra* note 136, at 318.

148. *Id.*

149. Mary Helen Johnson, “National Policies and the Rise of Transnational Gangs,” Migration Policy Institute, (Apr. 1 2006), *available at* <http://www.migrationinformation.org/Feature/display.cfm?id=394>.

150. James C. Howell, “Lessons Learned from Gang Program Evaluations,” Robert J. Chaskin, ed. *YOUTH GANGS AND COMMUNITY INTERVENTION*, pp. 57-59 (Columbia University Press 2010).

151. *Id.*

152. James C. Howell, “Youth Gang Programs and Strategies,” National Youth Gang Center, Institute for Governmental Research, Office of Juvenile Justice and Delinquency Prevention (Aug. 2000), *available at* http://www.ncjrs.gov/html/ojdp/summary_2000_8/comprehensive.html.

members, claim that the opposite is true, that deportations fuel international gang networks and an international cycle of violence.¹⁵³ Furthermore, anecdotal evidence shows that many formerly deported gang members return to the United States, often within a few months.¹⁵⁴ In this sense, the program not only fails to suppress gangs, it could undermine other law enforcement and community efforts to address underlying causes of the formation and spread of gangs. Furthermore, many receiving countries have dealt with increased gang violence by passing their own laws with minimal protections for criminal defendants, low standards of proof, and harsher punishments than those considered acceptable by U.S. norms.¹⁵⁵

Recommendations:

- Operation Community Shield should not be used to bypass the criminal justice system and the due process protections it affords individuals accused of criminal activity. In that respect, its focus should be limited to individuals convicted of crimes related to gang activity.
- The federal government should support additional research to understand how deportation policies impact transnational gangs.
- Operation Community Shield should be evaluated in light of its effectiveness in reducing gang activities, particularly violent crime. Furthermore, the government should evaluate the potential impacts on the receiving countries of relocating gang members or “associates” as well as the impact on individuals. These considerations should be weighed with special attention in the case of minors.

National Fugitive Operations

Background

The National Fugitive Operations Program (NFOP) is the primary federal program that conducts home raids in search of deportable aliens. NFOP’s mission is to identify, apprehend, and remove aliens who have either failed to report to

ICE based on a notice or to leave the U.S. after receiving a removal order.¹⁵⁶ These individuals are considered “fugitive aliens” by ICE. This group is notably distinct from “status offenders,” who are immigrants who have no existing order of removal but who may have entered without inspection or have an expired visa.

INS began NFOP in the wake of September 11, 2001, with the plan of increasing information sharing by entering absconder data into the National Crime Information Center (NCIC) so that local law enforcement could access the data.¹⁵⁷ NFOP was then funded as an independent unit in 2003 under the new Department of Homeland Security.¹⁵⁸ From this time forward, the program greatly expanded in scope, from an annual budget of \$9 million in 2003 to approximately \$219 million in 2008.¹⁵⁹

As of 2007, the program was comprised of regional fugitive operations teams (FOTs) tasked with identifying and apprehending fugitive aliens.¹⁶⁰ Investigative work takes place largely under cover, with FOT members often wearing plain clothes, or uniforms identifying them as “POLICE.”¹⁶¹ FOTs obtain administrative warrants for fugitive aliens based on information from a variety of sources, such as public records, commercial records, investigations by field officers, and information contained within ICE’s Enforcement Integrated Database, which holds immigration case history, criminal history, and biographical information.¹⁶² Notably, NFOP has been criticized for using information that is outdated or inaccurate when issuing these warrants.¹⁶³

Unlike criminal warrants, which must be issued by a neutral fact finder such as a judge, these FOT warrants are issued internally. Because of the civil nature of these warrants, FOTs are not permitted to enter dwellings without consent. However, according to former Secretary of Homeland Security Michael Chertoff, individuals encountered during an operation may be questioned as to their immigration status, and if deemed to be illegally present, may be arrested without a warrant.¹⁶⁴

153. Richard J. Lopez, et al, “Gang Uses Deportation to its Advantage to Flourish in U.S.” L.A. TIMES, (Oct. 30, 2005).

154. *Id.*

155. Chacon, *supra* note 136, at 346-7.

156. Mary Ellen Callahan, Chief Privacy Officer, Department of Homeland Security, “Privacy Impact Assessment for the Fugitive Case Management System,” p. 1 (Aug. 2009), available at http://www.dhs.gov/xlibrary/assets/privacy/privacy_pia_ice_fcms.pdf.

157. Memorandum from Larry Thompson, Deputy Attorney General, to the INS Commissioner, the FBI Director, the U.S. Marshals Service Director, and U.S. Attorneys (Jan. 25, 2002) available at <http://f1.findlaw.com/news.findlaw.com/hdocs/docs/doj/abscondr012502mem.pdf>.

158. Margaret Mendelson, et al. “Collateral Damage: An Examination of ICE’s Fugitive Operations Program.” Migration Policy Institute, p. 4 (Mar. 2009), available at http://www.migrationpolicy.org/pubs/NFOP_Feb09.pdf.

159. Office of Inspector General Department of Homeland Security, “An Assessment of United States Immigration and Customs Enforcement’s Fugitive Operations Teams,” p. 6 (Mar. 4, 2007).

160. *Id.*

161. Mendelson, et al., *supra* note 158, at 6.

162. Callahan., *supra* note 156, at 3-4.

163. Mendelson, et al., *supra* note 158, at 6.

164. Nina Bernstein, “Hunts for ‘Fugitive Aliens’ Lead to Collateral Arrests,” NEW YORK TIMES, p. B5 (Jul. 23, 2007), available at <http://www.nytimes.com/2007/07/23/nyregion/23operation.html>.

Legal Authority

INA § 287(a)(5)(B) provides the authority for immigration officials to execute and serve warrants, although § 287(e) prohibits such officials from entering dwellings without consent.¹⁶⁵ ICE asserts that the authority for the program to make “collateral arrests” of individuals not named in the warrant comes from INA § 287(a)(2), which permits immigration officials to arrest individuals who they have reason to believe are in violation of immigration law and are “likely to escape before a warrant can be obtained for his arrest.” At times, local police have also become involved with raids under the Fugitive Operations program, pursuant to § 287(g) authority or informal partnerships.¹⁶⁶

Program Results

The program gives “top priority to cases involving aliens who pose a threat to national security and community safety, including members of transnational street gangs, child sex offenders, and aliens with prior convictions for violent crimes,” pursuant to § 287(g) authority or informal partnerships.¹⁶⁷ As the program has grown, the number of arrests made has increased dramatically from 1,900 in FY 2003 to more than 35,000 in FY 2009.¹⁶⁸ In total, from FY 2003 to 2009, ICE made over 131,467 arrests under the program.¹⁶⁹ However, data available through 2008 indicate that a small percentage of these arrests were of highest level offenders.¹⁷⁰

Past Concerns with the Program

ICE has received substantial and widespread public criticism for home raids conducted by FOTs.¹⁷¹ According to a report by the Cardozo Immigration Justice Clinic in 2009, a typical home raid involved:

“...a team of heavily armed ICE agents approaching a private residence in the pre-dawn hours, purportedly seeking an individual target believed to have committed some civil immigration violation. Agents, armed only with administrative warrants, which do not grant them legal authority to enter private dwellings, then push their way in when residents answer the door, enter through unlocked doors or windows or, in some cases, physically break into homes. Once inside, agents immediately seize and interrogate all occupants, often in excess of their legal authority and even after they have located and apprehended their target—though in the large majority of cases, no target is apprehended.”¹⁷²

Indeed, this report asserts that some FOTs conducted raids in Hispanic neighborhoods and interrogated individuals based on ethnicity rather than their list of targets, or any evidence of criminal wrongdoing.¹⁷³ Legal advocates also argue that ICE officers routinely entered homes without consent, going well beyond the authority of their civil warrants in violation of the Fourth Amendment.¹⁷⁴

In an extensive research report, the Migration Policy Institute (MPI) documented a number of other concerns regarding NFOP.¹⁷⁵ In particular, the report found that the stated priorities seem to have little in common with the practice of the FOTs. From 2003 to 2008, 73% of the individuals arrested by FOTs had no criminal conviction.¹⁷⁶ Meanwhile the percentage of arrests of fugitives with criminal convictions has decreased over time, from 32% of FOT arrests in 2003 to 17% in 2006 to a shocking 9% in 2007.¹⁷⁷ Of these “criminal fugitives,” three-quarters had committed non-violent crimes, such as shoplifting. Ultimately, fugitive aliens “posing a threat to the community” or having a violent criminal conviction represented just 2% of all FOT arrests in 2007.¹⁷⁸

165. 8 U.S.C. § 1357.

166. Bess Chiu, et al, “Constitution on ICE: a Report on Immigration Home Raid Operations,” Cardozo Immigration Justice Clinic, p. 7 (2009), available at http://www.cardozo.yu.edu/uploadedFiles/Cardozo/Profiles/immigrationlaw-741/IJC_ICE-Home-Raid-Reportpercent20Updated.pdf; Memorandum from John Morton, Assistant Secretary of Homeland Security, to Field Office Directors and all Fugitive Operation Team Members, “National Fugitive Operations Program: Priorities, Goals, and Expectations,” p. 1 (Dec. 8, 2009), available at http://www.ice.gov/doclib/detention-reform/pdf/nfop_priorities_goals_expectations.pdf.

167. Description of National Fugitive Operations Program, Immigration and Customs Enforcement Website, available at http://www.ice.gov/pi/news/factsheets/NFOP_FS.htm, (last visited Oct. 14, 2010). (This source appears to be no longer available.)

168. Updated Description of National Fugitive Operations Program, Immigration and Customs Enforcement Website, available at <https://www.ice.gov/fugitive-operations/>, (last visited Nov. 29, 2010).

169. *Id.*, see also Description of National Fugitive Operations, *supra* note 167. (This figure was determined by adding the numbers provided in the Descriptions of NFOP on the older and updated ICE website.)

170. See Mendelson, et al., *supra* note 158, at 11.

171. See Chiu, et al., *supra* note 166, at 40-42, n. 46-48, (discussing police, political leaders, and others expressing a variety of concerns regarding home raids).

172. *Id.* at 3.

173. *Id.* at 1.

174. Julia Harumi Mass and Philip Hwang, “Immigration Raids Trample the Constitution Without Securing the Nation,” ACLU Daily Journal (Jul. 10, 2007), available at http://aclunc.org/news/opinions/immigration_raids_trample_the_constitution_without_securing_the_nation.shtml; see also CHIU, et al., *supra* note 166, at 10, 16-22.

175. While this report predated the 2009 memorandum, it is unclear that the concerns raised have been entirely alleviated.

176. Mendelson, et al., *supra* note 158, at 11.

177. *Id.* at 14.

178. *Id.* at 13.

Furthermore, a growing percentage of arrests were made of individuals who were not fugitive aliens at all, but mere immigration status violators, and therefore not even the lowest priority under NFOP's guidelines. These "collateral arrests" of ordinary status offenders made up 40% of FOT arrests in 2007.¹⁷⁹ In addition, these numbers do not account for media and advocacy reports of many individuals arrested in FOT raids who are not at all subject to deportation, and who are in some cases United States citizens or lawful permanent residents.¹⁸⁰

The MPI report suggests that the program has also been an inefficient use of resources. While the funding for the program has increased exponentially, the absolute number of fugitive aliens arrested annually with criminal records has stayed roughly constant at 2600 individuals.¹⁸¹ One possible reason could be the vastly outdated and inaccurate database information. For example after one raid in Nassau County, New York, officials reported that all but nine of the 96 administrative warrants issued by ICE were incorrect or outdated.¹⁸²

After a directive issued in 2006 mandated a 1000 arrest-per-team annual quota in 2006, there were even more low-level arrests.¹⁸³ This quota is notable in that it makes no distinction between ordinary undocumented migrants and individuals threatening national security so long as an arrest is made. The report suggests that such a system encourages FOTs to focus on easy targets, such as non-criminal undocumented individuals rather than expending resources on difficult national security cases.¹⁸⁴

Changes Made in 2009

In 2009, Assistant Secretary of Homeland Security John Morton issued a memorandum directing NFOP to use 70% of its resources to apprehend fugitive aliens. The memorandum further clarified two additional tiers of aliens that NFOP could target, namely previously deported individuals and individuals with criminal convictions. After complaints in which FOTs raids led to the removal of sole caretakers of minor children and nursing mothers, the 2009 memorandum instructed FOTs to refrain from detaining these categories of vulnerable

individuals, as well as the mentally ill and the disabled, absent extraordinary circumstances.¹⁸⁵ Furthermore, the memorandum requires Fourth Amendment training for FOTs and recommends the creation of a cold-case docket for cases without leads in the last decade, in order to focus on more reliable information.¹⁸⁶ The memorandum also redefined the metric for success under the program as a reduction of the fugitive docket, rather than merely an arrest quota, and by crediting teams for locating high priority aliens based on the revised tier system.¹⁸⁷ Finally, ICE now encourages FOTs to engage in partnerships with local law enforcement agencies "under the model of 287(g)" to share information.¹⁸⁸

Concerns Remain

The impact of the new directives remains to be seen. Despite statements about prioritizing resources, the 2009 ICE memorandum still permits FOTs to apprehend and remove "other classes of aliens" if encountered during operations.¹⁸⁹ ICE, therefore, continues to permit collateral arrests. While the 2009 memo contained a discussion of the creation of a cold-case docket, it remains unclear whether the databases have improved.¹⁹⁰ Furthermore, while some changes have been made, NFOP reforms have not addressed other negative consequences such as observed declines in school attendance following raids, to a chilling effect on crime reporting and witness cooperation.¹⁹¹ These issues are exacerbated by FOTs disingenuously identifying themselves as "police" during raids in some instances thereby creating the impression that the local police are involved in immigration enforcement.¹⁹²

Recommendations:¹⁹³

If the NFOP program is to continue, a number of changes should take place to ensure that the program objectives are met, and that constitutional abuses and community harms do not occur.

- Due to their significant, harmful impact on many legally present community members, home raids should become a last resort, if used at all. Raids should not be conducted if children are present.

179. *Id.* at 11.

180. Mass and Hwang, *supra* note 174.

181. Mendelson, et al., *supra* note 158, at 15.

182. *Id.* at 6.

183. *Id.* at 14.

184. *Id.* at 20.

185. "National Fugitive Operations Program: Priorities, Goals, and Expectations," *supra* note 166, at 3.

186. *Id.*

187. *Id.* at 3-4.

188. *Id.* at 4.

189. *Id.*; see also Gardener and Kohli, *supra* note 77, at 6; "National Fugitive Operations Program: Priorities, Goals, and Expectations," *supra* note 166, at 1.

190. "National Fugitive Operations Program: Priorities, Goals, and Expectations," *supra* note 166.

191. Mass and Hwang, *supra* note 174.

192. *Id.*; see also Chiu, et al, *supra* note 166, at 14.

193. Adapted from Mendelson, et al., *supra* note 158, at 25-28.

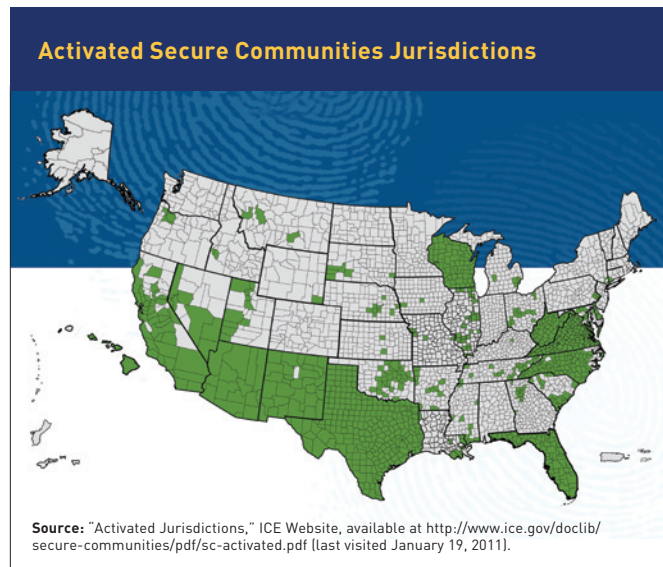
- If entries of homes do continue to occur, FOTs should be trained in their obligation to obtain consent. FOTs should also properly identify themselves when seeking consent.
- Only targeted houses should be approached and targeted individuals should be apprehended by the program. No FOT resources should be used to apprehend bystanders or ordinary status offenders.
- Funding should be scaled back and the program should be tailored to its original purpose of investigating national security threats. In this capacity, database accuracy is critical, and resources should be directed towards assuring accuracy.

Secure Communities Background

There is significant debate as to whether Secure Communities (S-Comm) is an ICE enforcement program that impacts local policing or merely a program that facilitates data sharing between ICE and local law enforcement.¹⁹⁴ Specifically, fingerprints taken at the time of arrest at local booking facilities are sent to a state agency which automatically forwards the fingerprints to the Federal Bureau of Investigation and the DHS. DHS checks the fingerprints against the Automated Biometric Identification System, also known as IDENT, which is a fingerprint repository containing over 91 million individual fingerprints for legitimate travelers, immigration benefit seekers and immigration violators.¹⁹⁵ IDENT also contains a “watchlist” of suspected fugitives, criminals, sexual offenders, military detainees and other “persons of interest.”¹⁹⁶ After matching the fingerprints in IDENT, ICE faxes “detainers” (also known as “ICE holds”) to the local facilities, requesting that police notify ICE when the individual’s criminal case is resolved or dismissed, and further requesting that the jail continue to detain the suspect until ICE is able to assume custody. With a \$1.9 billion budget in 2009, S-Comm was active in 969 counties by mid January, 2011.¹⁹⁷ ICE has widely reported its plans to expand to nationwide coverage by 2013.¹⁹⁸

Legal Authority

To implement S-Comm in a particular state, ICE first executes a Memorandum of Agreement (MOA) with the respective



state agency responsible for handling Criminal Information Systems that normally link to the FBI’s National Crime Information Center (NCIC) database. S-Comm creates an additional check against the IDENT database. In some states, the appropriate agency is the state bureau of investigation, while in others it is the statewide police department or the state department of justice. The MOA’s state as their legal authority the following:

- Immigration and Nationality Act (INA) provisions regarding identification, detention, arrest and removal of aliens, namely 8 U.S.C. § 1226(c) (regarding the Attorney General’s power to detain aliens);
- 8 U.S.C. § 1226(d) (allowing information sharing with localities regarding individuals guilty of “aggravated felonies” with the limited exception of sharing immigration information based on the request of a state governor);
- 8 U.S.C. § 1226(e) (limiting judicial review of Attorney General actions); 8 U.S.C. § 1227(a)(2) (defining which crimes, e.g., crimes of moral turpitude, lead aliens to become deportable);
- 8 U.S.C. § 1228 (creating special removal proceedings in local detention facilities for aliens convicted of crimes leading them to become deportable); and

194. Secure Communities Description, Immigration and Customs Enforcement Website, available at http://www.ice.gov/secure_communities/, (last visited Feb. 15, 2011).

195. “DHS Exhibit 300 Public Release BY10/NPPD-US-VISIT—Automated Biometric Identification System (IDENT) (2010),” Department of Homeland Security Website, available at <http://www.dhs.gov/xlibrary/assets/mgmt/e300-nppd-usvisit-ident2010.pdf>.

196. *Id.*

197. “Activated Jurisdictions,” *supra* note 106.

198. *Id.*; “Secretary Napolitano announces Secure Communities deployment in all Southwest Border Counties, Facilitating Identification and Removal of Convicted Criminal Aliens.” Press Release, Department of Homeland Security Website (Aug. 10, 2010), available at http://www.dhs.gov/ynews/releases/pr_1281457837494.shtm.

- 8 U.S.C. § 1105 (permitting ICE to access federal criminal databases such as NCIC solely in order to make determinations on visa applications or to admit the alien to the United States).

Once the MOA is signed, ICE activates Secure Communities in individual counties in the state according to its own timetable.

Although S-Comm was not created through legislation, Congress has appropriated funds for the program, stating broadly that the purpose of the funding is to “improve and modernize efforts to identify aliens convicted of a crime, sentenced to imprisonment, and who may be deportable, and remove them from the United States once they are judged deportable.”¹⁹⁹

Program Goals

ICE’s primary goals are to: (1) identify aliens using technology and information sharing; (2) prioritize removal of those individuals who are the greatest public threat; and (3) long term transformation of the criminal alien immigration enforcement system.²⁰⁰ Secure Communities stated goal is to “identify and remove the most dangerous criminal aliens from the United States.”²⁰¹ When ICE began S-Comm in 2008, it also established a controversial three-tier system to determine threat levels of various criminal aliens based on whether an individual had been convicted of or charged with particular crimes. Level 1 crimes were ostensibly the most violent, dangerous crimes, although they did include nonviolent misdemeanor offenses such as resisting arrest. A memo issued in June 2010 by ICE Assistant Secretary John Morton changed this definition of Level 1 offenses to refer to individuals convicted of “aggravated felonies”²⁰² under § 101(a) (43) of the INA, or two or more other felonies. Level 2 includes individuals convicted of misdemeanors, and Level 3 consists of individuals convicted of other offenses subject to police discretion, with the example given of particularly minor misdemeanors.

To date, the program has identified more than 262,900 aliens in jails and prisons who have been charged with or

convicted of criminal offenses. Of those, more than 39,000 have been charged with or convicted of Level 1 offenses, which include “major violent or drug offenses.”²⁰³ Furthermore, according to DHS, “through Secure Communities, over 34,600 convicted criminal aliens have been removed from the United States, including more than 9,800 convicted of major violent or drug offenses (Level 1 offenses).”²⁰⁴

Concerns with the Program

Secure Communities is a fairly new program with little research examining its impact; however, it has already generated controversy and concerns among advocates and local law enforcement agencies alike. A striking lack of transparency has characterized S-Comm from the initial roll out, the timeline for expansion, and the day-to-day functioning and technological details of the program. Many localities, including Sheriffs’ offices, often discover that Secure Communities is in place only after a press release announces its implementation. This lack of transparency has concerned some because it suggests a top-down approach from the federal government without consultation with the communities or even the local law enforcement agencies impacted by the program.

A related issue has been the lack of clarity around the ability of localities to opt out of the program. Despite public statements and memoranda to the contrary, the most recent statements by ICE officials indicate that an opt-out is not an option for a county or city where the state has an MOA with ICE. The lack of local choice in the implementation of the program raises particular concerns for communities who either explicitly or implicitly prevent local police from inquiring about a person’s immigration status.²⁰⁵

As with other immigration enforcement programs, advocates and even law enforcement officials have noted that adding immigration to the list of local police duties threatens to undermine community policing efforts.²⁰⁶ Although Secure Communities does not authorize local police to enforce immigration law, it has the same result as other partnership programs, creating the impression that local police are

199. FY 2008 DHS Appropriations Act (Pub. L. No. 110-161, 121 Stat. 1844, 2365 (2007), http://www.ice.gov/doclib/foia/secure_communities/appropriationutilizationplanfy09.pdf.

200. *Id.*

201. Secure Communities Description, *supra* note 194.

202. Notably, the INA definition of aggravated felonies includes offenses which are neither violent nor felonies as well. *See* discussion *infra*, p. 46.

203. “Secretary Napolitano announces Secure Communities deployment in all Southwest Border Counties, Facilitating Identification and Removal of Convicted Criminal Aliens,” *supra* note 198.

204. *Id.*

205. David A. Harris. “The War on Terror, Local Police, and Immigration Enforcement: A Curious Tale of Police Power in Post 9/11 America.” Legal Studies Research Paper Series, Working Paper No. 2007-4. (2007), *available at* <http://ssrn.com/abstract=1008927>.

206. Carol Rose, “ICE scheme undermines community safety,” On Liberty, Boston Globe Website, (Oct. 14, 2010), *available at* http://boston.com/community/blogs/on_liberty/2010/10/governments_s-comm_scheme_unde.html (citing interviews with police chiefs from Chelsea, Salt Lake City, and Boston), *see* discussion *infra*, p. 27.

working with ICE. Although ICE asserts that its presence is merely technological, communities may not know the difference when low-level offenders are increasingly being deported as a result of local arrests.

A major concern raised by advocates has been the misleading nature of the three-tier priority system. Level 1 is the most serious crime category in Secure Communities' classification system, which is now defined as individuals convicted of "aggravated felonies." However, some aggravated felonies are neither felonies nor violent crimes. Furthermore, the data presented by the federal government does not show what percentage of these Level 1 offenders are individuals who truly have convictions for violent crimes and if they are considered offenders under the new Level 1 classification or the old one, in place until June 10, 2010, which was much broader.²⁰⁷ Furthermore, ICE states that it "prioritizes the removal of aliens charged with or convicted of Level 1 offenses, allocating resources to remove those aliens first,"²⁰⁸ but Marc Rapp, then Acting Executive Director of Secure Communities, confirmed that all fingerprints are transmitted to ICE and detainers are sent by ICE for all individuals who appear in their database as eligible for removal, regardless of the suspected crime.²⁰⁹ No explanation has been given for how Secure Communities actually uses their three tier system to prioritize removal of high level offenders, and ICE officials have instead suggested in multiple public forums that all deportable aliens would be removed upon identification, which could include individuals with no conviction at all.²¹⁰

Indeed, in the first year that Secure Communities was operational, ICE reported identifying more than 111,000 undocumented immigrants who have been charged with or convicted of crimes; however, only 11,000 of these immigrants were charged with or convicted of Level 1 crimes. The remaining 90% of individuals were charged with or convicted of Level 2 or 3 crimes including lesser crimes such as minor drug offenses, forgery, and traffic offenses. In recent numbers

released in August 2010, 262,900 individuals were identified as "criminal aliens" by ICE in that they were charged with or convicted of crimes, but other data indicate that only 9,800 individuals actually convicted of violent crimes were deported from the United States in the same time period.²¹¹ In addition, the information released does not indicate whether Secure Communities was necessary or even helpful in removing those 9,800 individuals. Some researchers have tried to investigate the underlying criminal convictions of "criminal aliens" deported by ICE.²¹² ICE, however, has responded by claiming that it was impossible to track everyone in their system from apprehension to removal or release.²¹³ Despite such problems with accessing detailed data, the limited information available suggests that the overwhelming majority of individuals identified by Secure Communities do not fit the profile of "dangerous criminal aliens."

Finally, advocates have raised concerns with regard to racial profiling. While ICE has asserted that Secure Communities should have no effect on racial profiling, there is no evidence to support this assertion. Instead, widespread anecdotal evidence suggests that ICE provides little or no training when implementing Secure Communities in a locality, and local police may have no guidance on whether civil immigration arrests are proper. This lack of training and information may lead to racial profiling. Additionally, the Warren Institute's research in Irving, Texas, on the CAP program suggests that the knowledge that immigration status will be checked at the jail may change the behavior of local police in the field, leading to pre-textual arrests. Further research and investigation is required to determine whether racial profiling is taking place more often in Secure Communities jurisdictions, which raises a potential violation of the Fourth Amendment provision which guards against unreasonable searches and seizures. Such activity may be impermissible under *all* OLC memoranda, including the 2002 memoranda.²¹⁴

207. "Secretary Napolitano and ICE Assistant Secretary Morton announce that the Secure Communities Initiative identified more than 111,000 aliens charged with or convicted of crimes in its first year." News Release. U.S. Department of Homeland Security, ICE Website (Nov. 12, 2009), available at http://www.dhs.gov/ynews/releases/pr_1258044387591.shtm.

208. "Get the Facts: Secure Communities." News Release. ICE Website (Apr. 29, 2010), available at http://www.ice.gov/pi/news/factsheets/secure_communities-facts.htm. (This source is no longer available online.)

209. Marc Rapp, then Executive Director of Secure Communities, Oral question and answer session with Enforcement Working Group (Nov. 10, 2009), meeting notes on file with author.

210. *Id.*; David Venturella, Executive Director of Secure Communities, Oral question and answer session following Roundtable 1, "The Goals, Scope, Effectiveness, and Accountability of Enforcement Programs," Woodrow Wilson International Center for Scholars (Nov. 18, 2010), meeting notes on file with author.

211. "Secretary Napolitano Announces Secure Communities Deployment to all Southwest Border Counties, Facilitating Identification and Removal of Convicted Criminal Aliens," *supra* note 198.

212. "Current ICE removals of noncitizens Exceed Numbers under Bush Administration," Transactional Records Access Clearinghouse (2010), available at <http://trac.syr.edu/immigration/reports/234>.

213. *Id.*

214. See discussion *infra*, pp. 13-14.

Recommendations:

- ICE should consider re-focusing Secure Communities on violent high-level offenders only.
- The program should cease using fingerprints collected at the time of arrest or booking and instead operate the fingerprint checks in prisons where individuals are serving sentences based upon conviction.
- ICE should recognize the impact on local policing and engage local law enforcement partners in its design of Secure Communities. Ideally, the program should not be implemented without an affirmative request by a local agency.
- ICE should make publically available all records regarding detainers placed since the program began. These data should include the bases for the holds issued, the breakdown of Level 1-3 charges and convictions, the specific crimes charged in each instance, and the outcome of the criminal and immigration cases. To the extent some aspects of this data do not exist in ICE's control, ICE should begin tracking and sharing such data immediately. Furthermore ICE should explain why any such data is missing, and should be subject to an independent review.
- ICE should ask Secure Communities jurisdictions to keep stop and arrest data by race and ethnicity to ensure that racial profiling is not taking place as a result of the program.

General Concerns

ICE's prominent initiatives to increase interior enforcement of immigration laws all identify community safety as a goal. However, in each of these programs, data indicate that safety is only a nominal priority. Indeed, the resulting arrests and deportations do not appear to be focusing on major offenders. Rather, anecdotal evidence suggests that these programs may instead increase community distrust of police, increase racial profiling, and, ultimately, reduce community safety.²¹⁵ Moreover, ICE's programs consistently lack essential guidelines or standards to ensure that that the proper suspects are targeted or that local partners are not misusing or abusing their authority. The goals of immigration enforcement

remain contentious; if the government maintains that it is targeting threats to our society, then it should fashion its enforcement programs to more effectively achieve that goal. If, however, the government determines that it wants to identify and remove all undocumented residents, then it should openly acknowledge that ambition as well as understand and acknowledge the collateral impacts of its enforcement programs.

WORKPLACE ENFORCEMENT

Introduction

Employment opportunities in the United States are widely recognized as a primary driving force of unauthorized migration. In this vein, ICE engages in "worksite enforcement" with goals to "reduce the demand for illegal employment, and protect employment opportunities for the nation's lawful workforce."²¹⁶ ICE's workplace enforcement activities target both unauthorized workers and the employers who knowingly hire them.

Legal Authority

The rules governing worksite enforcement have, like other areas of immigration enforcement, changed over time. In 1986, Congress passed the Immigration Reform and Control Act (IRCA) which contained the federal prohibition against hiring unauthorized workers.²¹⁷ The law imposed requirements to verify the immigration status of workers and placed sanctions on non-compliant employers.²¹⁸ Additionally, IRCA contained penalties for migrants using false documents to evade the employment verification law.²¹⁹ As a result, the government began to require that all employees fill out a federal form, commonly referred to as an I-9 form, to establish their eligibility to work in the United States.²²⁰

In order to address concerns of civil rights groups and immigrant advocates that employment verification would lead to discrimination against lawfully authorized immigrants, Congress included an anti-discrimination provision in IRCA and created the Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC) within the Department of Justice to enforce this provision.²²¹ In particular, OSC adjudicates complaints of employer discrimination due to citizenship status or national origin, and conducts a

215. Harris, *supra* note 205, at 37.

216. "Worksite Enforcement Overview," *supra* note 1, at 1.

217. IRCA, Pub. L. No. 99-603, 100 Stat. 3359 (1989) codified at 8 U.S.C. § 1324(a).

218. *Id.* at § 102(a)-(b),(e)-(f).

219. *Id.* at § 103(a).

220. *Id.* at § 101(b).

221. *Id.* at § 102(a)-(b), codified at 8 U.S.C. § 1324(b).

public information campaign.²²² In addition, the National Labor Relations Act (permitting collective bargaining and unions) and the Fair Labor Standards Act (wage and hour protections as well as workplace safety), as well as federal laws prohibiting employment discrimination apply to all workers, authorized or not.²²³ Safeguards are extended to unauthorized workers because of concerns that substandard jobs and conditions for these workers can “seriously depress wage scales and working conditions of citizens and legally admitted aliens . . .”²²⁴ Furthermore, the rationale for these safeguards includes the concern that “employment of illegal aliens under such conditions can diminish the effectiveness of labor unions.”²²⁵

The government has taken several steps to balance immigration enforcement against worker protections. First, a Memorandum of Agreement was created in 1998 between the INS (now ICE) and the Department of Labor (DOL) to reduce incentives to employ illegal workers by increasing compliance with minimum labor standards.²²⁶ In addition, the MOA seeks to avoid victimization of unauthorized workers and improve the employment opportunities and conditions for legal workers.²²⁷ The MOA established a firewall between DOL inspections and INS enforcement actions, creating guidelines to prevent immigration enforcement from trumping labor enforcement and encouraging complainants to come forward about violations without fearing immigration consequences.²²⁸ For example, during wage and hour cases, the MOA states that the DOL should not conduct reviews of I-9 work authorizations nor inquire about the immigration status of complainants.²²⁹

Second, internal immigration policies, first under INS Operating Instruction 287.3(a) and now under ICE Special Agents Field Manual 33.14(h), exist to prevent immigration enforcement officials from becoming involved in labor disputes.²³⁰ The original policy, first initiated in 1996, states that “(w)hen information is received concerning the employment

of undocumented or unauthorized aliens, consideration should be given to whether the information is being provided to interfere with labor rights.”²³¹ Specific components of the instruction include: 1) that authorities will look closely at information from any source that raises an issue about whether immigration status is being used to retaliate against workers; 2) whenever there are concerns that a labor dispute may be involved, the agency must make specific inquiries into the details of the information received; 3) discussion and approval from specified higher level officials must take place before any enforcement action takes place; and 4) that the agency should assist victims of labor violations with remaining in the United States to pursue their claims.²³²

Third, the Trafficking and Violence Protection Act (TVPA) provides immigration relief for those unauthorized workers who are victims of labor trafficking or crime.²³³ Therefore, migrants who are working unlawfully at the time of arrest may have an avenue for becoming authorized workers due to serious workplace exploitation. As with the other protections listed above, the challenge appears to be in the implementation and coordination of activities between ICE, DOL, and DOJ.

Worksite Enforcement Programs

Workplace Raids

The best known, as well as the most controversial of worksite enforcement actions, have been raids of workplaces. According to ICE, the Worksite Enforcement Program investigates claims of illegal employment of aliens based on anonymous tips and independent investigation by ICE and other agencies.

Along with other ICE programs, worksite enforcement raids increased sharply since FY 2002, from 25 criminal arrests and 485 administrative arrests to 1,103 criminal arrests and

222. “Introduction on OSC,” US Department of Justice Website, Civil Division, available at <http://www.osc.gov/intro.htm>, (last visited Feb. 15, 2011).

223. See Rebecca Smith, et al., “ICED Out: How Immigration Enforcement has Interfered with Worker’s Rights,” Report, National Employment Law Project, p. 5 (Oct. 2009), available at http://www.nelp.org/page/-/Justice/ICED_OUT.pdf?nocdn=1, citing *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 892 (1984) (holding all illegal aliens to be also considered ‘workers’ under the NLRB); *Patel v. Quality Inn South*, 846 F.2d 700 (1988), cert denied, 489 U.S. 1011 (1989) (regarding FLSA); and *EEOC v. Hacienda Hotel*, 881 F.2d 1504 (9th Cir. 1989).

224. *De Canas v. Bica*, 424 U.S. 351, 356-357 (1976), cited in Smith, et al., *supra* note 223, at 5.

225. *Id.*

226. See Smith, et al., *supra* note 223, at 13, citing “Memorandum of Understanding between the Immigration and Naturalization Service Department

of Justice and the Employment Standards Administration Department of Labor,” Department of Labor Website (Nov. 23, 1998), available at <http://www.dol.gov/whd/whatsnew/mou/nov98mou.htm>.

227. *Id.*

228. *Id.*

229. *Id.*

230. See *Id.*

231. See *id.*, citing INS Operating Instruction 287.3(a), now 33.14(h) of the Special Agent Field Manual (SAFM).

232. See *Id.*

233. Trafficking and Violence Protection Act § 107 (c) (3), P.L. 106-386 (2000) codified at 22 U.S.C. § 7105.

5,184 administrative arrests in FY 2008.²³⁴ These administrative arrests were of workers for immigration violations, while the criminal arrests of workers were based on identity theft and Social Security fraud, and, in much smaller numbers, employers and managers for harboring or knowingly hiring unauthorized workers. In 2009, however, workplace raids decreased dramatically to 1,644 administrative arrests, a 70% drop.²³⁵ Indeed, in April 2009, priorities were refocused to target employers rather than employees, although ICE maintained that it would still arrest unauthorized employees caught during an investigation.²³⁶ However, small scale workplace raids have not ended altogether, and it remains unclear what types of information lead to arrests at workplaces.²³⁷

Advocates have roundly denounced employment raids as being ineffective at reducing unauthorized migration, as well as being inhumane and damaging to employment standards and labor rights. As one report describes, there are an estimated eight million unauthorized workers in the U.S. economy, and even at the rates of workplace enforcement in 2008, it would take ICE 1,272 years to reach the current unauthorized worker population.²³⁸ Anecdotal evidence suggests that some employers are using the threat of immigration enforcement to prevent workers from asserting labor rights, such as collective bargaining, workplace safety, overtime pay, and minimum wage.²³⁹ For a period of time, it appeared ICE made no effort to investigate violations of labor laws and sometimes knowingly sabotaged them by using information from news stories of union mobilization to plan raids and by ignoring DOL requests for witnesses.²⁴⁰ In this way, employment raids may have perversely created incentives for employers to hire undocumented workers over domestic workers, because they are easier to exploit.²⁴¹ It remains unclear if these concerns have been addressed under the current administration and whether the DOL can still pursue labor investigations without regard to the status of the workers. Some advocates express concerns that despite the changes in policy towards punishing employers, ICE has affirmed that arrests of undocumented workers will continue during the course of these investigations.

Recommendations:

- The MOA between ICE and DOL should be reaffirmed with strong language upholding the rights of unauthorized workers to labor and employment protections. ICE and DOL investigators should be trained on this MOA and best practices should be developed to ensure compliance.
- Special Agents Field Manual 33.14(h) should be broadened beyond labor disputes to include any information interfering with workers' rights.²⁴² Furthermore, immigration courts should implement an exclusionary rule against any information that was derived from retaliation against employees.
- A screening process should take place after any workplace investigation to ensure that anyone potentially eligible for immigration relief under TVPA or other programs is informed and assisted in seeking this relief.

E-Verify

E-Verify is an online work eligibility verification system operated jointly by DHS through the Citizenship and Immigration Service (USCIS) Verification Division, and the Social Security Administration (SSA). After making a new hire, employers send a query to the government through the E-Verify website based on information contained in the employee's I-9 form. The E-Verify system then checks the information against the SSA database and then DHS databases for work eligibility status. Upon entering the employee's information through several steps, the employer usually gets a response within 24 hours indicating whether the individual is authorized to work.²⁴³ Employees who are initially not confirmed are eligible to contest the finding, although this can be a lengthy process. Pursuant to a federal executive order signed in 2008,²⁴⁴ E-Verify is mandatory for federal contractors or subcontractors, but voluntary for most other employers.

The basic pilot of E-Verify began in 1997. The program was re-authorized in 2001 and tracking data showed that 1,064

234. "Worksite Enforcement Overview," *supra* note 1, at 3.

235. N.C. Aizenman, "Latinos increasingly Critical of Obama's record on Immigration," WASHINGTON POST, (Mar. 20, 2010), available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/03/19/AR2010031904676.html>.

236. Worksite Enforcement Strategy Factsheet, ICE Website, p.1 (Apr. 30, 2009), available at <http://www.ice.gov/doclib/news/library/factsheets/pdf/worksite-strategy.pdf>.

237. Aizenman, *supra* note 235.

238. See Smith, et al., *supra* note 223, at 10-11.

239. See *Id.*

240. See generally *Id.*

241. *Id.* at 10-11.

242. See *Id.* at 44.

243. "Findings of the E-Verify Program Evaluation," Report submitted to U.S. Department of Homeland Security, Westat, p. xxv (Dec. 2009), available at http://www.uscis.gov/USCIS/E-Verify/E-Verify/Final%20E-Verify%20Report%2012-16-09_2.pdf.

244. Exec. Order No. 13465, 3 C.F.R. 193 (2009), amending Exec. Order No. 12989.

employers were using the system.²⁴⁵ The system was then extended to the Internet and to all states in 2004. Subsequent changes to the system's technology and underlying databases continue to be made every year.

As of May 2010, 200,000 employers were using E-Verify with as many as 1,000 new businesses using the database each week.²⁴⁶ The program has also become politically popular. Some states, such as Mississippi and Arizona, mandate the use of E-Verify under state law, and others, including Colorado, Georgia, Idaho, Minnesota, Mississippi, North Carolina, Oklahoma, Rhode Island, Tennessee, and Utah, have passed some legislation mandating the use of E-Verify for a subset of employers, such as state contractors.²⁴⁷ Many businesses have reported satisfaction with the efficiency and the lack of burden on the employer when using the system.²⁴⁸ Proposals have been raised to make E-Verify mandatory for all employers.

A Westat report analyzing E-verify identified concerns as well as some potential benefits with the system. One concern highlighted in the report is that E-Verify does not accurately screen for individuals engaging in document fraud. For example, data from several months in 2008 show that the overall level of inaccuracy of the system was about 4% (comprising 17.8 million records), though for individuals who were unauthorized to work, the rate of inaccuracy was around 54%. Westat attributed the inaccuracy to the fact that many of these individuals may have used valid documents belonging to another individual that did not trigger the system.²⁴⁹ Advocates have stated, however, that inaccurate and outdated information in the DHS and SSA databases are a major source of misidentification of workers who should be considered eligible.²⁵⁰

The program has some guidelines in place to limit abuse by employers. For example, the screening process is applied to all newly hired employees of participating employers.

Selective screening or pre-screening before employment is prohibited, although it is difficult to police.²⁵¹ Reports in 2007 found that 47% of employers were screening employees before the first day of work, in violation of this rule.²⁵² The Westat report suggests that in 2009 a significant amount of pre-screening continues to take place, and these instances are widely underreported by employers.²⁵³

E-Verify has had mixed results with regard to its impact on employer discrimination. The Westat report concluded that the program may have the benefit of reducing intentional discrimination on the part of some employers. Seventeen percent of surveyed employers self-reported in 2008 that they were more likely to hire immigrants based on E-Verify, compared to 2% who said they were now less likely to do so.²⁵⁴ However, inaccurate findings in the system are 20 times more likely for foreign-born individuals, suggesting that the program has a discriminatory impact on these workers.²⁵⁵

Finally, concerns have been raised about ICE's track record of handling large amounts of data because of privacy issues.²⁵⁶ Advocates on the left and right of the political spectrum have raised the issue that anyone posing as an employer may access E-Verify's system and data. This lack of security has led to statements by the Heritage Foundation in 2006 that E-Verify "would run afoul of legitimate privacy concerns" and would tempt identity theft.²⁵⁷

Recommendations:

- Congress should examine the impact of current E-Verify expansions before making the program mandatory for more employers.
- DHS should provide increased training and education for employers on the proper use of the E-Verify system.

245. "History and Milestones: E-Verify," U.S. Citizenship and Immigration Services Website, <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=84979589cdb76210VgnVCM100000b92ca60aRCRD&vgnnextchannel=84979589cdb76210VgnVCM100000b92ca60aRCRD>, (last visited Sep. 15, 2010).

246. "What is E-Verify?" U.S. Citizenship and Immigration Services Website, <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=e94888e60a405110VgnVCM1000004718190aRCRD&vgnnextchannel=e94888e60a405110VgnVCM1000004718190aRCRD>, (last visited Sep. 15, 2010).

247. "Findings of the E-Verify Program Evaluation," *supra* note 243, at xxvi.
248. *Id.*

249. *Id.* at xxx-xxxii; see also "Basic Pilot/E-Verify: Not a Magic Bullet," National Immigration Law Center (Jan. 4, 2008), [available at http://www.nprc.org/blogs/ombudsman/e-verify_nomagicbullet_2008-01-04.pdf](http://www.nprc.org/blogs/ombudsman/e-verify_nomagicbullet_2008-01-04.pdf).

250. "Facts about E-Verify," National Immigration Law Center (Oct. 2009), [available at http://www.nilc.org/immseplymnt/ircaempverif/e-verify-facts-about-2009-10.pdf](http://www.nilc.org/immseplymnt/ircaempverif/e-verify-facts-about-2009-10.pdf).

251. "What is E-Verify?" *supra* note 246.

252. "Basic Pilot/E-Verify: Not a Magic Bullet," *supra* note 249, citing "Findings of the Basic Pilot Program Evaluation," Westat (Sep. 2007).

253. "Findings of the E-Verify Program Evaluation," *supra* note 243, at xxiv, 149.

254. *Id.* at xxxv.

255. *Id.*; see also "Basic Pilot/E-Verify: Not a Magic Bullet," *supra* note 249.

256. "Facts about E-Verify," *supra* note 250.

257. "Basic Pilot/E-Verify: Not a Magic Bullet," *supra* note 249, citing James Jay Carafano, "Workplace Enforcement to Combat Illegal Migration: Sensible Strategy and Practical Options," The Heritage Foundation (Aug. 2006), [available at http://www.heritage.org/Research/Lecture/Workplace-Enforcement-to-Combat-Illegal-Migration-Sensible-Strategy-and-Practical-Options](http://www.heritage.org/Research/Lecture/Workplace-Enforcement-to-Combat-Illegal-Migration-Sensible-Strategy-and-Practical-Options).

- The E-Verify system should only be accessible to actual employers to avoid violations of privacy rights. Checks should be created within the system to detect queries from non-legitimate employers, and personal data should be encrypted when possible to avoid major security breaches.

I-9 Audits

Recently, ICE has increased the use of worksite enforcement through I-9 audits. While such audits have taken place in the past in various forms, a new I-9 audit initiative was launched on July 1, 2009, with Notices of Inspection (NOIs) being issued to 652 businesses across the nation to determine compliance with employment eligibility verification laws.²⁵⁸ According to ICE, this initiative demonstrates the new focus on employer accountability.

Any business can be subject to an I-9 audit, though likely targets have been construction companies, landscapers, hotels, restaurants, manufacturing, agriculture, and food processing plants.²⁵⁹ The process begins when ICE issues a NOI subpoena to the employer requesting certain documents and information, followed by a potential interview. The employer is given a list of suspect documents, such as I-9 forms, as well as a list of employees who must be terminated. The employer may ultimately be fined or criminally prosecuted if he is found to have knowingly hired an unauthorized employee or if he has committed technical violations on I-9 forms.²⁶⁰ Fine amounts are determined based on the number of forms with a discrepancy and are raised or lowered based on mitigating or aggravating factors.²⁶¹ Finally, fines are increased based on whether the employer is a first, second, or third time violator.²⁶² Fines can therefore range anywhere from \$110 to \$14,050 per I-9 form, resulting in costly fines for some employers.²⁶³

Concerns have been raised about several aspects of these I-9 audits. First, there appears to be little transparency in the process by which businesses are chosen for investigation. While ICE states that these businesses were identified based on leads

and information obtained through other investigative means, public information is scarce on how these leads or methods are prioritized. ICE has stated that there is an investigative priority on those employers who “knowingly” hire undocumented workers.²⁶⁴ Elsewhere, ICE has stated that it focuses on companies connected to public safety and national security like utilities and military contractors, rather than retailers and manufacturers of nonessential goods.²⁶⁵ However, American Apparel, a garment manufacturer known for good working conditions as well as a public campaign supporting the legalization of undocumented immigrants, was recently investigated in an I-9 audit by ICE resulting in the termination of nearly 2,000 workers, a quarter of its workforce.²⁶⁶ The targeting of American Apparel over other garment manufacturers raised questions as to how ICE chooses which companies to investigate. According to an analysis by the Associated Press, over 250 of the 430 I-9 audits of companies that took place between July 2009 and January 2010 had no suspect forms.²⁶⁷ Such numbers suggest there may be problems with the methods used by ICE to target specific employers. Some concerns have been raised that I-9 audits may encourage discrimination by employers. Fear of audits and fines could create a chilling effect where employers avoid hiring workers they perceive to be immigrants.²⁶⁸

Recommendations:

- If ICE wants to target employers engaged in labor violations, then it should coordinate its enforcement activities with the Department of Labor.
- DHS should provide public information regarding the number of NOIs sent as well as the fines levied to each business.
- ICE priorities in workplace enforcement should be made public, and, if necessary, revamped to ensure that agency actions are consistent with agency goals.

258. “ICE launches initiative to step-up audits of businesses’ employment records,” news release, ICE Website (Jul. 1, 2009), available at <http://www.ice.gov/news/releases/0907/090701washington.htm>.

259. “Anatomy of an I-9 audit.” Ogletree Deakins, firm publications (Jul. 23, 2009), available at <http://www.ogletreedeakins.com/publications/index.cfm?Fuseaction=PubDetail&publicationid=867>.

260. “Form I-9 Inspection Overview,” ICE Website (Dec. 1, 2009), available at <http://www.ice.gov/news/library/factsheets/i9-inspection.htm>.

261. *Id.*

262. *Id.*

263. *Id.* (See fine schedules provided.)

264. “ICE launches initiative to step-up audits of businesses’ employment records,” *supra* note 258.

265. Neil A. Lewis, “ICE to Audit 1000 More Companies in Immigration Crackdown,” *NEW YORK TIMES*, (Nov. 20, 2009), available at <http://www.nytimes.com/2009/11/20/us/20immig.html>.

266. “American Apparel terminations are in store for 1500 workers,” *LOS ANGELES TIMES*, (Sep. 3, 2009), available at <http://articles.latimes.com/2009/sep/03/business/ft-american-apparel3>, see also *id.*

267. Manuel Valdez, “Warnings Abound in Enforcing Immigration Job Rules,” *THE ASSOCIATED PRESS*, (Nov. 1, 2010), available at <http://www.msnbc.msn.com/id/39956299>.

268. Anna Gorman, “L.A. employers face immigration audits,” *LOS ANGELES TIMES*, (Jul. 2, 2009) available at <http://articles.latimes.com/2009/jul/02/local/me-immigemploy2/2> (describing the audit of American Apparel in which fines were expected to exceed 100,000 though there was no exploitation or intention to violate immigration law found through the audit, and many workers were dismissed.)

General Concerns

Since the implementation of employer sanctions in 1986, scholars and advocates have been concerned that the sanctions regime has allowed employers to exploit immigrant workers. By placing the power of verification in the hands of employers, Congress allowed them to wield more control in an inherently unequal relationship. While the government was rarely able to prove that employers “knowingly” hired unauthorized workers, employers were easily able to report workers to ICE (or its predecessor, the INS). As a result, immigrant workers feared the consequences of asserting their rights and were less likely to report labor violations to the detriment of all workers. Federal worksite enforcement raids reinforced the authority of employers by focusing on the apprehension and deportation of workers with little regard for labor conditions. While raids have diminished under the current administration, it is unclear whether ICE and DOL have established processes to ensure that employers cannot retaliate against workers who file complaints and that DOL investigations continue unhindered by immigration enforcement activity.

ICE appears to be shifting towards employer accountability under the current administration, but is doing so with flawed programs such as E-Verify and I-9 audits. The databases E-Verify relies upon contain many errors and create particular burdens for foreign-born individuals who are legally authorized to work. The selection process of employers who are subject to I-9 audits remains unclear. Further evaluation of the I-9 audit program is needed to understand the collateral impacts of the program.

DETENTION

Detention Overview

The number of individuals detained for immigration reasons has increased dramatically over the past few decades due to changes in the law as well as intensified enforcement efforts. Today, ICE’s Office of Enforcement and Removal Operations (ERO) operates the largest detention and supervised release

program in the United States.²⁶⁹ In 2010, the U.S. will have detained close to 400,000 individuals at an annual cost of around 1.77 billion dollars, while thousands of others participate in Alternatives to Detention programs.²⁷⁰ These numbers are particularly striking because ICE has no authority to detain aliens for criminal violations, but only detains individuals subject to removal based on violations of administrative immigration law.

The average length of administrative immigration detention is 30 days, though there is considerable variation for different individuals. Twenty-five percent of detainees are released within one day of admission, while several thousand are detained for a year or more.²⁷¹ Detainees who accept voluntary removal have much shorter stays than those who seek relief for any reason, including those who seek relief based on asylum claims.²⁷² Individuals subject to mandatory detention based on a past criminal record or those deemed a flight risk for any reason are often in custody for long periods of time. Some of the lengthiest detentions are of individuals whose return to their country of origin is delayed based on the processing of travel documents, the lack of diplomatic relations with their country of origin, or other similar problems.²⁷³

ICE uses over 300 detention facilities nationwide.²⁷⁴ Where a detainee is housed varies based on the expected length of detention. While about half of the individuals in ICE custody are held in 21 large facilities dedicated in some way to the administrative detention of aliens, the other half are scattered among county jails which house local criminal defendants and prisoners.²⁷⁵ Women are assigned to a subset of these jails.²⁷⁶ In addition, two residential facilities are designated to maintain custody of families with minor children, although one of these has been slated for conversion to a female-only facility.²⁷⁷

A variety of circumstances may render an immigrant deportable: entering the United States without inspection at a port of entry, overstaying a visa, being convicted of a crime (even legal permanent residents are subject to deportation under many circumstances), and being denied asylum, etc.²⁷⁸

269. Dora Schriro, “Immigration Detention Overview and Recommendations,” Report, Immigration and Customs Enforcement, p. 2 (Oct. 6, 2009).

270. “Community-Based Alternatives to Immigration Detention,” Mills Legal Clinic, Stanford Law School, pp. 1-2 (Aug. 2010).

271. Schriro, *supra* note 269, at 6.

272. *Id.*, *supra*, p. 4, discussion on voluntary departure.

273. See “Deportation by Default: Mental Disability, Unfair Hearings, and Indefinite Detention in the U.S. Immigration System,” Human Rights Watch, p. 83 (2010), available at http://detentionwatchnetwork.org/sites/detention-watchnetwork.org/files/Deportation%20by%20Default_1.pdf.

274. Schriro, *supra* note 269, at 10.

275. *Id.*

276. *Id.* at 11.

277. *Id.* at 11.

278. “Deportation 101 Manual,” Detention Watch Network, p. 7 (2010), available at <http://www.detentionwatchnetwork.org/sites/detentionwatchnetwork.org/files/Deportation101Manual-English.pdf>.

The formal deportation process begins when ICE institutes removal proceedings against an individual. Often, the immigrant will sign a Stipulated Order of Removal which waives his right to a hearing before an immigration judge but allows him to be deported immediately and therefore released from detention. Others will present their case before an immigration judge (IJ) in an immigration court hearing, which may be held at a detention facility or prison. In such cases, an ICE attorney will also be present, opposing the immigrants' cases to remain. Despite the name, immigration courts are not part of the judicial branch, rather they are under the jurisdiction of the Executive Office of Immigration Review (EOIR) within the Department of Justice. There are no court-appointed lawyers for persons challenging their removal, and data shows that only 39% of respondents whose immigration cases were completed in 2009 had representation.²⁷⁹

A significant number of individuals are ineligible for release while their cases are pending, due to circumstances such as conviction for certain crimes, arrest at an airport, or, in rare occasions, a suspicion of terrorist ties.²⁸⁰ Others who are granted bond may return home, subject to reporting requirements and other conditions through EOIR. Still others are "paroled" from detention by ICE to be placed in alternative to detention programs described below.

Areas of Detention Reform

Shifting to a "Civil" Detention System

In August 2008, an Office of Detention Policy and Planning was created to provide oversight, pay attention to detainee care, and design a detention system tailored to ICE's needs.²⁸¹ A subsequent report written in October 2009 by the head of that office, Dr. Dora Schriro, identified a number of concerns about the system in place, many of which stemmed from a core finding that detention facilities operated under the assumptions made for criminal defendants and sentenced felons. Dr. Schriro determined that this standard is more restrictive and expensive than necessary for civil immigration detainees.²⁸²

Following Dr. Schriro's report, ICE has taken several actions towards a new civil model. Among efforts to create uniformity in the detention system, ICE centralized detention

facility contracts, consolidated the Alternatives to Detention programs under one provider, and trained detention service managers.²⁸³ To improve standards, ICE began a process of:

- Hiring personnel to create more on-site oversight;
- Revising guidelines of custody and care;
- Creating a Detention Monitoring Council to engage leadership in review of facility inspection reports and to ensure remedial measures are taken;
- Collaborating with vendors to seek cost efficient solutions, such as repainting, and increased recreation for inmates;²⁸⁴
- Creating risk assessment tools, and actively house populations based on risk, in locations such as in the Broward Transitional Center in Florida, which offers a secure but less restrictive environment for "non-criminal, non-violent populations;"²⁸⁵
- Exploring the concept of civil detention, and evaluating bids for a civil detention facility.²⁸⁶

While preliminary steps have been taken, much remains to be done before the immigration detention system is fundamentally transformed. Most immigrants in custody are still confined in jails and jail-like detention centers at great human and financial cost, when many of these individuals pose no risk and could be released on their own recognizance.²⁸⁷ Furthermore, the steps taken by ICE such as soliciting bids for low-custody facilities, or training detention managers may not indicate meaningful reform. No standards have yet been created for civil detention facilities, and personnel in these facilities still come from law enforcement and correctional backgrounds.²⁸⁸

The transformation to a civil detention system may be further impeded by a simultaneous shift towards the criminalization of migrants. In 2009, about 60% of aliens apprehended by ICE were encountered through the CAP program or 287(g), which are both programs focused on criminal aliens.²⁸⁹ Advocates and government officials estimated that Secure Communities would account for a large proportion

279. "FY 2009 Statistical Year Book," Executive Office for Immigration Review, Office of Planning, Analysis and Technology, p. G1 (Mar. 2010), available at <http://www.justice.gov/eoir/statspub/fy09syb.pdf>.

280. "Deportation 101 Manual," *supra* note 278, at 28.

281. "Detention Reform Accomplishments," Immigration and Customs Enforcement website, available at <http://www.ice.gov/detention-reform/detention-reform.htm>, (last visited Feb. 15, 2011).

282. Schriro, *supra* note 269, at 2.

283. "Detention Reform Accomplishments," *supra* note 281.

284. *Id.*

285. *Id.*

286. *Id.*

287. "Year One Report Card: Human Rights and the Obama Administration's Immigration Detention Reforms," Heartland Alliance, et al., pp. 6, 15 (Oct. 6, 2010), available at <http://www.immigrantjustice.org/policy-resources/ice-reportcard/icereportcard.html> (noting that even the Broward Transitional Center is overly restrictive for individuals who pose no risk to society).

288. *Id.* at 18, 25.

289. Schriro, *supra* note 269, at 12.

of immigration arrests in 2010.²⁹⁰ As discussed earlier, these numbers are misleading because these programs result in widespread apprehension of aliens with no criminal record, or minor criminal records. However, the efforts of ICE to target “criminal aliens” are clear.²⁹¹ Equating removable aliens with criminals may justify the existence of jail-style immigration detention in the public eye. The conflation between detained immigrants and criminals may therefore reduce the political will to shift towards a civil detention system.

Recommendations:

- Establish a guiding principle that immigration detention is administrative and civil in nature, and that criminal defendants have already served time and paid their debt to society.
- Ensure that risk assessment tools are completed, and shift towards a system of minimal restrictions and security. Create more opportunities for individualized assessment and urge Congress to evaluate mandatory detention.
- Develop and implement a model of civil detention as soon as possible based on best practices from international models, and develop corresponding standards for detention conditions.²⁹²
- Create an internal and external system of evaluation of facilities and programs to ensure that standards are enforced. Phase out the use of contract facilities that do not meet standards.²⁹³

Creating Alternatives to Detention

While primarily relying upon incarceration, ICE already utilizes two main Alternatives to Detention (ATD) programs: the Intensive Supervision Assistance Program (ISAPII) in which individuals make regular visits or phone calls to the ICE subcontractor operating the program, and the Electronic Monitoring Program (EMP) which uses GPS and ankle bracelets.²⁹⁴ Currently, ICE supervisors decide who may be released into an alternative program on a case-by-case basis.²⁹⁵ There is no screening system in place to determine who is eligible for these programs, although such a system has reportedly been

developed, and was scheduled to be rolled out in late 2010.²⁹⁶ This new process, however, will continue to have a presumption of detention unless an individual can prove eligibility for release.²⁹⁷

Some have argued in favor of expanding ATDs because they are less restrictive, and more humane than traditional prison-style detention facilities. By leaving detention, individuals are able to return to their families and communicate regularly with legal counsel in order to prepare for their case. Furthermore, ATDs appear to be significantly cheaper than detention: some estimate that a large expansion of ATDs could cut ICE’s per diem custody operations costs in half.²⁹⁸ The federal government has taken some notice of these arguments, and, in 2010, submitted responses to a congressional request for information about implementing an alternative to detention program nationwide, though no such program has been created yet.²⁹⁹

Other critics, however, describe the current system of ATD measures as “alternative *forms of detention*” based on the significant restrictions and reporting requirements.³⁰⁰ Such concerns include the overuse of electronic monitoring devices which are similar to those used in the criminal justice system. These ankle bracelets require individuals to “sit or stand near a wall socket for several hours each day” in order for the batteries to recharge daily, which creates discomfort and restrictions in movement in daily life.³⁰¹ Furthermore, the reporting requirements have been described as hard to manage, in some instances involving traveling over 85 miles each way three times a week to check in with officials.³⁰²

One recent report from the Stanford Law School Immigrants’ Rights Clinic discussed incorporating a community-based ATD model to provide case management and community support services such as medical care and legal counsel, as well as assistance with transportation to distant court locations. Furthermore, the proposed model involves tailored supervision to ensure compliance with court dates and removal orders.³⁰³ It describes electronic monitoring as a more restrictive measure that should be used only in particular circumstances.

290. *Id.* at 13.

291. See discussion of criminal aliens, *supra*, pp. 12-13

292. “Year One Report Card,” *supra* note 287, at 9-10, (suggesting the Australian civil detention model).

293. *Id.* at 11-12, 25.

294. “Deportation 101 Manual,” *supra* note 278, at 28.

295. *Id.*

296. “Detention Reform Accomplishments,” *supra* note 281; “Year One Report Card” *supra* note 287, at 6.

297. “Year One Report Card,” *supra* note 287, at 6..

298. “The Math of Immigration Detention,” Backgrounder, National Immigration Forum, p. 2 (Jul. 7, 2009), available at <http://www.immigrationforum.org/images/uploads/MathofImmigrationDetention.pdf>.

299. “Detention Reform Accomplishments,” *supra* note 281.

300. “Community-Based Alternatives to Immigration Detention,” *supra* note 270, at 5.

301. *Id.* at 9.

302. *Id.*

303. *Id.* at 1.

Community ATD participants have shown a fairly high rate of appearance for court cases in test programs, at around 93%.³⁰⁴ These community based programs, like the ATDs currently in practiced, are a fraction of the cost of detention. According to ICE, the cost of detention facilities per immigration detainee is \$122 per day and rising, while the cost of a community based ATD program by the Vera Institute was found to be \$12 per participant per day.³⁰⁵

Recommendations:³⁰⁶

- ERO should shift priorities such that ATDs are the default means to supervise individuals. ERO continue detention only in cases where ICE demonstrates a legitimate government objective, such as based on flight risk or danger to the community based on risk assessment screening.³⁰⁷ Even these considerations should be weighed against factors such as age, health, and family needs, and access to counsel.
- DHS should redirect funding from bed space in detention facilities to expand ATDs to all areas that have ICE offices.
- ERO should create two tiers of ATD's to serve those that require electronic monitoring as well as case management and assistance with services, and those that need only a community model of ATDs.

ERO should utilize existing networks of nonprofits to provide ATD community support and information on court processes.

Improving Medical Care and Safety of Inmates

According to multiple reports, immigrants in detention have been subject to inadequate medical care.³⁰⁸ ICE patients do not have the option of using their own private

insurance and must rely on inadequately funded, poorly managed care. Reports note instances of refused treatments, incorrect medications, denial of post-operative prescribed medications, delayed care, and harassment by detention personnel when treatment is requested.³⁰⁹ The physically disabled do not receive the systematic routine care they need while in immigration detention.³¹⁰ Eye care was not even mentioned in the medical standards in 2009, while dental care was limited to emergency treatment during the first six months of detention.³¹¹ Reports have also noted an increase of deaths in custody.³¹²

In her assessment, Dr. Schriro also noted the lack of medical classification based on mental health and inadequate screening tools.³¹³ Mental health concerns are particularly important in detention settings as many patients' conditions destabilize over the course of confinement and may ultimately deteriorate.³¹⁴ A number of suicides have taken place in immigration custody, suggesting shortcomings in mental health crisis intervention.³¹⁵ Furthermore, the report noted that the method of organizing medical records was haphazard and made complete medical histories difficult to reproduce.³¹⁶

Reports also indicate that women have received substandard medical care in immigration custody. Women represent about 10% of immigration detainees, and have unique health care needs based on pregnancy, sexual abuse, and other situations.³¹⁷ Some women have not received regular gynecological and obstetric care, which may have contributed in some cases to miscarriages and long-term health complications.³¹⁸ Other women with indications of cancer were denied pap smears or mammograms contrary to doctors' instructions before detention.³¹⁹

Some of these problems may be the result of unclear standards and inadequate oversight.³²⁰ Advocates have noted that Division of Immigration Health Services (DIHS) staff

304. *Id.*

305. "The Math of Immigration Detention," *supra* note 298, at 2; *see also* Oren Root, National Director, Appearance Assistance Program, Vera Institute of Justice, "The Appearance Assistance Program: An Alternative to Detention for Immigrants in U.S. Immigration and Removal Proceedings" p. 8 (2000), available at http://www.vera.org/download?file=209/aap_speech.pdf.

306. Derived in part from "Community-Based Alternatives to Immigration Detention," *supra* note 270, at 2-3.

307. "Year One Report Card," *supra* note 287, at 6.

308. "Detained and Dismissed: Women's Struggles to obtain Medical Care in United States Immigration Detention," Human Rights Watch, (Mar. 2009), available at <http://www.nsvrc.org/publications/reports/detained-and-dismissed-womens-struggles-obtain-health-care-united-states-immigr>; "Dying for Decent Care: Bad Medicine in Immigration Custody," Florida Immigrant Advocacy Center, p. 7 (Feb. 2009), available at <http://www.fiacfla.org/reports/DyingForDecentCare.pdf>; Schriro, *supra* note 269, at 25.

309. "Detained and Dismissed," *supra* note 308; "Dying for Decent Care: Bad Medicine in Immigration Custody," *supra* note 308, at 7.

310. "Dying for Decent Care," *supra* note 308, at 40.

311. *Id.* at 31.

312. *Id.* at 33; "Detained and Dismissed," *supra* note 308.

313. Schriro, *supra* note 269, at 25.

314. "Dying for Decent Care," *supra* note 308, at 33.

315. *Id.*

316. Schriro, *supra* note 269, at 25.

317. "Detained and Dismissed," *supra* note 308.

318. "Dying for Decent Care," *supra* note 308, at 29.

319. "Detained and Dismissed," *supra* note 308.

320. *See* Schriro, *supra* note 269, at 25-26.

is comprised of contract employees who face more relaxed credentialing standards than regular employees.³²¹ However, a report by the Florida Immigrant Advocacy Center suggests that poor care is related to cost-cutting measures by ICE which appear to prioritize financial goals over sound medical principles.³²²

ICE has noted the need for improved medical and dental care in immigration detention as well as quality mental health services.³²³ During 2010, a number of changes were made to address these problems. ICE reviewed the medical system with assistance from the Bureau of Prisons and launched a pilot classification tool to determine medical needs of detainees during the intake process.³²⁴ In the area of detainee deaths, ICE has issued a directive to promote transparency and accountability following any detainee death, including notifying stakeholders as well as media.³²⁵ Ongoing reports of inadequate care for immigration detainees suggest that systematic meaningful reform has not yet occurred.³²⁶

Recommendations:

- ICE should create a single medical records system for all detainees and develop a method to access complete medical histories of those in custody.
- Denials of medical procedures or medication should be made only by treating physicians.
- ICE should implement preliminary mental health and medical screenings to ensure detainee placements are consistent with medical need.³²⁷
- ICE detention facilities should be held, at a minimum, to national standards for health care in federal correctional facilities.³²⁸
- Health concerns, including mental health and reproductive health concerns as well as physical disability, should be a factor in parole determinations, and ATD placements.

- ICE should create a comprehensive training regarding medical care in custody, as well as periodic assessments in order to improve standards of care.
- The President should appoint a permanent director of the Division of Immigration Health Services (DIHS) with particular expertise in meeting health needs of detainees.³²⁹

Decreasing Inmates' Isolation from Family and Counsel

The intense isolation of immigration detainees has been widely criticized in numerous reports. In part because bed space does not correspond to detention needs, detainees are routinely transferred to locations hundreds of miles from their families and attorneys without warning.³³⁰ Besides the psychological trauma associated with such isolation, these transfers can also have a devastating effect on the detainee's ability to present her immigration case. Finally, transfers limit the ability for detainees to obtain consistent medical treatment.³³¹

According to research by Human Rights Watch (HRW), 1.4 million such transfers of detainees took place in the ten years between 1999 and 2008, with over 300,000 transfers in 2008 alone.³³² The HRW report described the majority of these transfers as occurring from subcontracting prisons and jails due to changing local detention needs or even based on the whim of facility directors.³³³

In a public document summarizing detention reform in August 2010, ICE officials described the reduction of transfers as a policy goal. In line with these efforts, ICE launched a web-based detainee locator system in the summer of 2010 to help family members and attorneys locate individuals in ICE custody, including the address and visiting hours of the detention facility.³³⁴ This kind of information is critical to reduce detainees' isolation from family and effective counsel. However, advocates point to the lack of internet access for many family members, as well as the problematic requirement of entering the detainee's place of birth in order to locate her.³³⁵ While the detainee locator system is a first step, ICE has a number of further steps to take in order to meet its goal.

321. "Year One Report Card," *supra* note 287, at 22.

322. "Dying for Decent Care," *supra* note 308, at 7.

323. "Detention and Policy Reforms," ICE Website, *available at* <http://www.ice.gov/detention-reform/policy-reform.htm>, (last visited Feb. 15, 2011).

324. "Detention Reform Accomplishments," *supra* note 281.

325. *Id.*

326. "Year One Report Card," *supra* note 287, at 16.

327. Schriro, *supra* note 269, at 26.

328. "Detained and Dismissed," *supra* note 308, at 51.

329. "Year One Report Card," *supra* note 287, at 16.

330. Schriro, *supra* note 270, at 6.

331. "Locked up Far Away," Human Rights Watch, pp. 1-2 (Dec. 2, 2009), *available at* <http://www.hrw.org/en/node/86760/section/2>.

332. *Id.* at 1.

333. *Id.* at 6.

334. "Detention Reform Accomplishments," *supra* note 281.

335. "Year One Report Card," *supra* note 287, at 24, (noting that this requirement implicates legal considerations and allows ICE to circumvent its responsibility to prove place of birth in immigration proceedings).

Recommendations:³³⁶

- Detention should be as geographically close as possible to the location of the individual's apprehension, and Notices to Appear should be filed by ICE at the nearest immigration court to the location of apprehension, unless the individual moves for a transfer.
- ICE and EOIR should both create a policy to avoid all transfers unless the detainee requests one, or medical or security risks require a transfer. These guidelines should be particularly enforced in instances where the detainee is represented by counsel, or before a bond hearing is conducted by the immigration judge.
- When detainees are transferred, prior notice should be given in writing to counsel of record, and, where no counsel exists, to any next of kin whose contact information is provided by the detainee.
- ICE should create a telephone locater system in order for information to be available to family members who do not have access to the Internet, and remove place of birth as a required field to obtain information on detainee location.³³⁷
- Where transfers do occur, immigration attorneys should be allowed to make court appearances by telephone or video to maintain continuity of representation.
- Resources should be dedicated to providing pro-bono legal counsel when detainees are transferred to remote locations.
- Alternatives to Detention should be used wherever possible to avoid problems of custody altogether.

Meeting the Needs of Children in Custody

The federal government has recognized that children have unique needs in the immigration context. In a 1996 case, the government agreed that the least restrictive setting should be used for detention of minors and that no detention should be used if alternatives are available.³³⁸ However, prior to reforms in 2003, ICE was criticized for holding unaccompanied

minors in immigration detention facilities, shackling and locking them in cells, and co-mingling them in some facilities with juveniles in custody for criminal offenses.³³⁹ In 2003, the newly created Division of Unaccompanied Children's Services (DUCS) in the Department of Health and Human Services assumed the primary responsibility for the care and custody of unaccompanied children³⁴⁰ DUCS uses less restrictive means of confinement than traditional immigration detention, including home placements with relatives when possible and "child friendly" shelters when family members are not available to care for the children.³⁴¹ ICE appears to retain custody of some children based on criminal records, though this practice was proscribed in the Trafficking Victims Protection Reauthorization Act of 2008 (TVPRRA).³⁴² Trainings to identify victims of trafficking have led to some successful identification of child victims of trafficking by DUCS employees.³⁴³

Even while these substantial improvements have been made, some children are placed in inappropriate facilities because DHS makes the determination of who is unaccompanied based on inconsistent definitions.³⁴⁴ ICE may categorize a child as "accompanied" due to the presence of family members in the United States and therefore refuse to release the child to the custody of DUCS, while simultaneously refusing to release the child to the custody of relatives.³⁴⁵ In other circumstances, ICE may separate families in custody and then consider children to be unaccompanied and transfer custody to DUCS of the children alone.³⁴⁶

While ICE is mandated to transfer children to DUCS custody within 72 hours, many children report waiting much longer, such as a week or ten days, if transferred at all.³⁴⁷ While children are in temporary ICE custody awaiting transfer to DUCS, they may be placed in inappropriate custody arrangements. Reports have included instances of minor girls being housed with adult men, and of children being housed in crowded conditions with intentional setting of cold temperatures to keep them "docile," without beds or blankets, with inadequate nutrition or water for children's physical needs, without clean clothing or shower facilities, and with inadequate medical care.³⁴⁸

336. Adapted from "Locked up Far Away," *supra* note 331, at 8-11.

337. "Year One Report Card," *supra* note 287, at 24.

338. Stipulated Settlement Agreement, *Flores v. Reno*, Case No. CV85-4544-RJK (C.D. Cal. 1996).

339. "Prison Guard or Parent?: INS Treatment of Unaccompanied Refugee Children," Women's Refugee Commission, p. 1 (2002).

340. "Unaccompanied Children's Services," Office of Refugee Resettlement Website, available at http://www.acf.hhs.gov/programs/orr/programs/unaccompanied_alien_children.htm, (last visited Oct. 19, 2010).

341. "Halfway Home: Unaccompanied Children in Immigration Custody," Women's Refugee Commission, p. 1 (Feb. 1, 2009), available at http://www.womensrefugeecommission.org/docs/halfway_home.pdf.

342. *Id.* at 8.

343. *Id.*

344. *Id.* at 7.

345. *Id.*

346. *Id.* at 8.

347. *Id.*

348. *Id.* at 10-11.

Although DUCS custody was designed for children and is a significant improvement over ICE confinement in prior years, a report by the Women’s Refugee Commission indicates that the conditions in DUCS facilities continue to be inadequate.³⁴⁹ Higher than anticipated numbers of unaccompanied children have led to overcrowding in facilities, and has created a more institutional setting for the children in custody, with many reporting that they believed they were in jail.³⁵⁰ Inadequate mental health services have led to the placement of children with mental health needs, behavioral problems, or suicidal tendencies in secure facilities rather than therapeutic settings.³⁵¹

Recommendations:

- DHS should not separate families who are under review for immigration cases. ATDs should be used whenever possible, and confinement should not take place if there are no family-appropriate facilities.
- DUCS should take custody over all children in immigration custody and create assessment tools to ensure that the principles of “least restrictive means” and “best interests of the child” are utilized. Mental health and other programmatic needs should be assessed and provided.
- Trafficking screening tools should be further developed, to ensure that affected children receive immigration relief and needed social services.

Improving Conditions for Asylum Seekers and Refugees

Advocates have criticized the immigration detention system for being particularly harmful for asylum seekers. In 2005, a bipartisan U.S. commission found that the jail-like confinement of immigration detention was overly restrictive, and inappropriate for asylum seekers.³⁵² Even so, these conditions persist, and

in fact, have become more widespread. Although ICE has not provided complete information on the numbers of asylum seekers in detention, reports show that there was at least a 62% increase in the use of prison style detention for asylum seekers between 2003 and 2009.³⁵³ In 2007, over 10,000 asylum seekers were placed in immigration detention at a cost exceeding \$300,000.³⁵⁴ Ironically, asylum seekers on average remain in detention longer than most immigration detainees.³⁵⁵

Research has shown that detention is harmful to the physical and mental health of many asylum seekers.³⁵⁶ Individuals seek asylum based on persecution in their country of origin, and are sometimes survivors of torture. Many asylum seekers experience additional trauma in immigration detention, including Post Traumatic Stress Disorder, extreme anxiety, and depression, all of which worsen with longer periods of detention.³⁵⁷

As in the case of other immigrant detainees, detained asylum seekers face obstacles in gaining favorable rulings. For example, successful asylum cases require an initial determination the individual has a “credible fear” of persecution or torture if returned to her country of origin.³⁵⁸ A determination of “credible fear” requires the individual to establish there is a “significant possibility” that she could be eligible for asylum under the INA or for withholding of removal under the Convention against Torture.³⁵⁹ For 60% of asylum seekers in 2007, these “credible fear” hearings were conducted by video camera due to the remote locations of facilities.³⁶⁰ Advocates criticize this remote testimony as ineffective; one study conducted among several thousand detainees in a Houston facility showed hearings via video camera were half as likely to result in a determination of credible fear by the immigration judge.³⁶¹

349. *Id.* at 1.

350. *Id.* at 15, 19.

351. *Id.* at 15.

352. “Report on Asylum Seekers in Expedited Removal,” U.S. Commission on International Religious Freedom, Vol. I, p. 68 (Feb. 8, 2005), available at http://www.uscirf.gov/index.php?option=com_content&task=view&id=1892&Itemid=1; “Guidelines on Detention of Asylum-Seekers,” UNHCR, p.1 (Feb. 1999), available at <http://www.unhcr.org/refworld/pdfid/3c2b3f84.pdf>.

353. “U.S. Detention of Asylum Seekers : Seeking Protection, Finding Prison,” Human Rights First, p. 3 (Jun. 1, 2009), available at http://detentionwatchnetwork.org/sites/detentionwatchnetwork.org/files/U.S.%20Detention%20of%20Asylum%20Seekers_1.pdf.

354. *Id.* at 1.

355. *Id.*, citing “Report to Congress: Detained Asylum Seekers Fiscal Year 2007,” Immigration and Customs Enforcement Website, (2008).

356. See generally “From Persecution to Prison: The Health Consequences of Detention,” Physicians for Human Rights and the Bellevue/NYU Program for Survivors of Torture, (Jun. 2003).

357. “U.S. Detention of Asylum Seekers,” *supra* note 354, at 1, citing “From Persecution to Prison: The Health Consequences of Detention,” Physicians for Human Rights and the Bellevue/NYU Program for Survivors of Torture (Jun. 2003).

358. “Credible Fear Screenings.” U.S. Citizenship and Immigration Services Website, available at <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=4d28d86c760ac110VgnVCM1000004718190aRCRD&vgnnextchannel=3a82ef4c766fd010VgnVCM100000ecd190aRCRD>, (last visited Nov. 1, 2010).

359. INA § 235(b)(1)(B)(v); 8 C.F.R. § 208.30(e)(3); see also “What is a Credible Fear of Persecution or Torture?” U.S. Citizenship and Immigration Services Website, available at <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=ddc90f953ff9c110VgnVCM1000004718190aRCRD&vgnnextchannel=f39d3e4d77d73210VgnVCM100000082ca60aRCRD>, (last visited Nov. 1, 2010).

360. “U.S. Detention of Asylum Seekers,” *supra* note 353, at 2.

361. Frank M. Walsh and Edward M. Walsh, “Effective Processing or Assembly-Line Justice? The Use of Teleconferencing in Asylum Removal Hearings,” 22 GEO. IMMIGR. L.J. 259, 271 (2008).

The parole system has also come under attack. Grants of parole for asylum seekers dropped from 66.6% in 2004 to 4.5% in 2007, showing that far fewer applicants succeeded in their applications for legal admission into the United States. Advocates proposed that part of the problem may be the arbitrary and unilateral control of parole decisions by local ICE officials, rather than an independent body, such as a court.³⁶²

Finally, burdensome legal requirements for refugees are also cited as a concern, such as the requirement for admitted refugees to apply to adjust their status to legal permanent residents within one year of entering the country or be subject to detention and deportation. Human Rights Watch published a report highlighting the harshness and senselessness of this requirement, noting that compliance is impossible due to the additional requirement of residing within the United States for one year before applying for legal permanent status.³⁶³

The federal government responded to some of this criticism in late 2009 by instituting a presumption that all asylum-seekers will seek parole. Furthermore, the government established that if an alien is found to have a credible fear of persecution, verifies his or her identity, and shows that he or she does not pose a flight risk or a danger to the community then parole should be granted.³⁶⁴

Recommendations:³⁶⁵

- An independent body should review parole reforms to determine if asylum seekers are in fact being paroled in higher numbers.
- ERO should reduce the detention of asylum seekers to the most extreme cases, when medically necessary, or when essential to public safety.

- ERO should reduce the use of remote detention facilities, and ensure that credible fear hearings take place in person, unless video conference is medically necessary.
- Immigration judges should make bond amounts for asylum seekers commensurate with available resources.
- ERO should expand ATDs to incorporate the needs of asylum seekers recovering from trauma.

Improved Legal Information and Access to Counsel

As described above, 61% of all individuals with cases in immigration court, and over 80% of immigrants in immigration jails do not have an attorney.³⁶⁶ For many such individuals, immigration judges are the only source of information on rights, procedures, and assistance with their applications for relief.³⁶⁷

Many individuals with immigration cases could benefit greatly from legal representation. According to a report by the City Bar Justice Center based on interviews of 158 detainees in a New York City detention facility, 39.2% had meritorious claims for relief from removal.³⁶⁸ However, the barriers to recognizing complex claims and defenses are substantial for detainees without counsel. Reports by the National Lawyers Guild have found detainees without counsel to have substantially lower rates of success than those who had lawyers, both in terms of obtaining immigration relief and avoiding court-ordered removal.³⁶⁹

Some advocates have raised the argument that the immigration court process can be improved and streamlined by increasing access to counsel, resulting in reduced detention times, which may ultimately reduce costs for the government.³⁷⁰

Recognizing the need for better legal information, the federal government created the Legal Orientation Program

362. "U.S. Detention of Asylum Seekers," *supra* note 353, at 1.

363. "Jailing Refugees: Arbitrary Detention of Refugees who fail to adjust to Permanent Resident Status," Human Rights Watch, p. 2 (Dec. 2009), available at http://detentionwatchnetwork.org/sites/detentionwatchnetwork.org/files/Jailing%20Refugees_1.pdf.

364. "Parole of Arriving Aliens Found to have a Credible Fear of Persecution or Torture," Immigration and Customs Enforcement Directive, (Dec. 8, 2009), available at http://www.ice.gov/doclib/dro/pdf/11002.1-hd-parole_of_arriving_alien_found_credible_fear.pdf.

365. Adapted from "Deportation by Default: Mental Disability, Unfair Hearings, and Indefinite Detention in the US Immigration System," Human Rights Watch, p. 15 (2010), available at http://detentionwatchnetwork.org/sites/detentionwatchnetwork.org/files/Deportation%20by%20Default_1.pdf.

366. *Id.* at 2; "Locked up Far Away," *supra* note 331, at 42-43.

367. "Community-Based Alternatives to Immigration Detention," *supra* note 270, at 9.

368. "NYC Know Your Rights Project: An Innovative Pro-Bono Response to the Lack of Counsel for Indigent Immigrant Detainees," City Bar Justice Center, p. 2 (Nov. 2009), available at http://detentionwatchnetwork.org/sites/detentionwatchnetwork.org/files/NYC%20Know%20Your%20Rights%20Project_1.pdf.

369. "Broken Justice," Detention Working Group of the New York Chapter of the National Lawyers Guild, Vol. I September 2006-May 2007, pp. 15-16; "Give Me Your Tired, Your Poor..." Detention Working Group of the New York Chapter of the National Lawyers Guild, pp. 15-16, 31 (Jun 25, 2005).

370. "Recommendations for Reforming our Immigration Detention System and Promoting Access to Counsel in Immigration Proceedings." The Constitution Project, p. 8 (Jan. 1, 2009), available at http://detentionwatchnetwork.org/sites/detentionwatchnetwork.org/files/Recommendations%20for%20Reforming%20Our%20Immigration%20Detention%20System%20and%20Promoting%20Access%20to%20Counsel%20in%20Immigration%20Proceedings_1.pdf.

(LOP). LOP provides information about potential legal relief to newly admitted detainees. The program was in place in 50 facilities in late 2009, and early reports suggest that it has been successful in helping detainees move more quickly through the immigration court system.³⁷¹ ICE has also taken steps to dismiss cases where there are obvious avenues of relief. Such policies may reduce program costs, as well as human costs of detention and deportation. In September 2009, ICE issued a directive for its attorneys to grant a stay of removal and dismiss cases against aliens who are prima facie eligible for relief based on having been the victim of a crime.³⁷² Despite these efforts however, many immigrants continue to face challenges in obtaining representation.

Recommendations:

- Expand the LOP to provide greater access to low-cost or pro-bono counsel.
- ERO should provide access to additional resources within detention facilities, including law libraries and LOP materials in various languages.

Improving Procedural Fairness for Individuals with Mental Disabilities

Individuals with mental disabilities face particular challenges in representing themselves. In the criminal court system, there is a basic requirement for individuals to understand the nature proceedings against them in order to be subjected to punishment. However, no such limitations exist in the immigration system. A 2010 report describes the lack of safeguards or consideration of mental competence in immigration proceedings.³⁷³ The report estimates that 15% of immigrants facing deportation in 2008 had a mental disability, totaling 57,000 individuals.³⁷⁴

The problems faced by the mentally disabled included lack of care in custody as well as lack of standards to measure the adequacy of a hearing.³⁷⁵ While judges are sometimes willing to handle issues of competency on a case by case basis, they rely on limited observation of the individual, the

information provided by the individual themselves, and information volunteered by ICE.³⁷⁶ Because ICE has no incentive to draw attention to factors that could delay deportation and immigration hearings are often very short, many individuals may never be identified by judges as needing additional assistance. Finally, even when mentally disabled individuals are identified, judges can do very little; the only support provided by law is that the “custodian” of the individual may appear on their behalf. If the person is detained, the custodian is ICE, which presents a direct conflict of interest.³⁷⁷ Furthermore, any investigation of competence results on a hold or adjournment of the case during which detainees are simply subject to further detention.³⁷⁸

These effects combine to raise doubts about the outcomes and accuracy of many immigration hearings. This concern has been heightened by several high profile cases in which U.S. citizens with mental disabilities were mistakenly deported after being unable to adequately present their case in immigration court.³⁷⁹ ICE has since conducted a workshop on competency and mental health issues to explore a pilot project to provide greater access to counsel and services.

ICE has also recognized that it has no authority to detain or deport U.S. citizens, mentally disabled or not, and has instituted new guidelines to “ensure that this does not occur.”³⁸⁰ Such guidelines include the prioritization of investigation of claims of U.S. citizenship and the new policy that probative evidence of U.S. citizenship should prevent individuals from being taken into custody although further investigation of their immigration case may continue.³⁸¹ However, nothing in this guideline addresses the difficulty that the mentally disabled may have in demonstrating probative evidence.

Recommendations:³⁸²

- Competency standards should be developed for immigration proceedings.
- Immigration judges should be trained in competency standards, as well as in recognizing individuals that require competency investigations.

371. Schriro, *supra* note 269, at 13.

372. “Guidance: Adjudicating Stay Requests Filed by U Nonimmigrant Status (U-Visa) Applicants,” Immigration and Customs Enforcement (Sep. 24, 2009), available at http://www.ice.gov/doclib/foia/dro_policy_memos/11005_1-hd-stay_requests_filed_by_u-visa_applicants.pdf.

373. “Deportation by Default,” *supra* note 365, at 2.

374. *Id.* at 3.

375. *Id.* at 2.

376. Observation conducted by Deepa Varma of immigration court on May 12, 2010, before Judge Yamaguchi, San Francisco; *see also id.* at 6.

377. “Deportation by Default,” *supra* note 365, at 7.

378. Observation conducted by Deepa Varma, *supra* note 376; *see also id.* at 6.

379. “Deportation by Default,” *supra* note 365, at 4-5.

380. “Detention and Policy Reforms,” *supra* note 323.

381. “Superseding Guidance on Reporting and Investigating Claims to U.S. Citizenship.” Memorandum from John Morton, (Nov. 19, 2009.)

382. Adapted from “Deportation by Default,” *supra* note 365, at 9.

- Anyone determined to be incompetent to proceed in immigration hearings should be exempted from mandatory detention, and be appointed counsel.
- ICE should de-prioritize immigration enforcement against the mentally incompetent, and when applicable, use prosecutorial discretion to dismiss proceedings. In all instances where incompetency is suspected, ICE should be required to inform the immigration judge.
- Mental health services and access to caseworkers should be provided in ATD programs.

General Concerns

Immigration detention has arguably grown so rapidly that the associated legal protections and humanitarian considerations have not kept pace. While ICE and DHS have made some progress in responding to the concerns of advocates and government oversight committees, a complex array of problems still face detainees and government reformers alike—from medical care to bed space, communication with attorneys and families, to the custody problems involving vulnerable populations. The systemic problems highlighted in this section suggest that the government needs to undertake larger scale reforms in order to create a truly “civil” detention system.

CONCLUSION

A shift in priorities and understanding is overdue in the area of immigration enforcement. Particularly in light of the current economic crisis, our tradition of endless escalation in enforcement funding should be re-examined with a critical eye to efficacy and upholding the legal standards and guarantees that distinguish and define the United States. The administration’s efforts to “target offenders” could become a practical way of focusing limited resources on individuals who pose a credible threat to the safety of our communities if “criminal aliens” themselves are redefined narrowly; additional data and transparency are provided to ensure public accountability; and the measurement of enforcement success is no longer calculated based on the volume of individuals who are processed. Finally, in crafting reform, policymakers should recognize that civil rights are fundamental to our responsibilities and values as a nation. As such, they should be treated as a limiting principle for enforcement activity, rather than as considerations to be weighed against enforcement goals. Immigration policy should reinforce rather than undermine these rights and norms.

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