

FAMILY AS A VEHICLE FOR ABJECTION

Kathy Abrams*

INTRODUCTION: IMMIGRATION LAW AS FAMILY LAW

In this paper, I take my bearings from those who have argued we can see a system of family law emerging in the area of immigration. Kerry Abrams, to take one example, has looked at a series of laws relating to marriage, and argued that couples that include a noncitizen are subject to a regime of federal laws and policies that is more stringent and interventionist than the state law relating to citizen couples.¹

My focus here, however, is on a different area of immigration law or policy: a series of enforcement efforts aimed at apprehending and detaining undocumented immigrants. In particular, I will look at two recent initiatives: workplace and residential sweeps² aimed at apprehending undocumented immigrants; and the emergence of “family detention” facilities designed to house families as they await determination of their immigration status.³

* © 2009 Kathy Abrams, Herma Hill Kay Distinguished Professor of Law, University of California, Berkeley School of Law (Boalt Hall). I am grateful to Jack Jackson for research assistance, and for organizing a lively and illuminating session at the Homeless Action Center in Oakland, California, where I first discussed the ideas developed in this paper. Many thanks also to the organizers of the New Frontiers in Family Law conference for providing a stimulating venue for discussion of this paper, and a range of other fascinating topics.

¹ Kerry Abrams, *Immigration Law and the Regulation of Marriage*, 91 MINN. L. REV. 1625, 1626–1629 (2007).

² See Jennifer Bennett, *Operation Return to Sender: The Government's Immigration Enforcers Run Amok*, SLATE, May 30, 2008, <http://www.slate.com/id/2192393/>; Julia Preston, *Immigrants' Families Figuring Out What to Do After Federal Raids*, N.Y. TIMES, Dec. 16, 2006, at A13; Missy Ryan, *U.S. Chases Identity Theft in Biggest Work Raid Ever*, REUTERS, Dec. 13, 2006; <http://www.reuters.com/article/topNews/idUSN1344776020061213>; Press Release, Department of Homeland Security, ICE Apprehends More than 2100 Criminal Aliens, Gang Members, Fugitives and Other Immigration Violators in Nationwide Interior Enforcement Operation (June 14, 2006), available at http://www.dhs.gov/xnews/releases/press_release_0926.shtm.

³ See WOMEN'S COMMISSION FOR REFUGEE WOMEN AND CHILDREN AND LUTHERAN IMMIGRATION AND REFUGEE SERVICE, LOCKING UP FAMILY VALUES 1–3 (2007) [hereinafter FAMILY VALUES], available at www.lirs.org/LockingUpFamilyValues.pdf; Margaret Talbot, *The Lost Children: What Do Tougher Detention Policies Mean for Immigrant Families?*, NEW YORKER, March 3, 2008, available at http://www.newyorker.com/reporting/2008/03/03/080303fa_fact_talbot; see also Settlement Agreement at 3–10, *In re Hutto Family Detention Center*, No. 1:07-CV-00164-SS, (W.D. Tex. Aug. 26, 2007) [hereinafter Settlement Agreement], available at

407—ULR

359—JLFS

This area of immigration policy doesn't provide the kind of direct parallel to an area of conventional family law that we see in the area of marriage—a law that serves the same general purposes but imposes additional regulations. What happens to immigrants during apprehension and detention has no parallel in the experience of families comprised entirely of citizens, except perhaps when a family member is accused or convicted of a crime. And this is part of my point. I will argue that, whatever else they do, these immigration initiatives use family as an instrument of abjection.⁴ The treatment of family under the policies I'm going to discuss operates to produce immigrants as somehow less than human—the kind of beings whose deep connections with parents, children or spouses can be disregarded, indeed flagrantly violated, at will. This abjection has important consequences for the way that immigrants are seen and understood by others, and the way they see their own future in the United States.

I. TWO ENFORCEMENT INITIATIVES

A. *Immigration Sweeps*

Over the past two years, the Department of Homeland Security (DHS)'s bureau of Immigration and Customs Enforcement (ICE), the agency responsible for enforcing immigration laws, has mounted a series of sweeps aimed at rounding up immigrants living and working without documentation in the United States. One set of sweeps has targeted Swift meatpacking plants, as well as a number of other firms known to employ immigrants. These workplace sweeps were ostensibly part of a larger program intended to put pressure on the employers of undocumented immigrants, which also includes regulations making employers liable if they fail to take action on Social Security Administration “no match letters,”⁵ and a regime of enhanced fines. However, during the period of intensified

http://www.aclu.org/pdfs/immigrants/hutto_settlement.pdf (providing that defendants will improve living facilities in a certain family detention center in Texas, in case brought by, among others, the American Civil Liberties Union and the University of Texas School of Law Immigration Clinic against United States Department of Homeland Security and United State Immigration and Customs Enforcement).

⁴ An influential contemporary exploration of the “abject” comes from the work of political and social theorist Giorgio Agamben. Agamben focuses on the reduction of human beings to “bare life”—a condition that exists in the gap between the human and inhuman—under the “state of exception” established by the Nazi concentration camps. *See, e.g.,* Giorgio Agamben, *Remnants of Auschwitz*. Trans. Daniel Heeler-Roazen. (1999); Giorgio Agamben, *Homo Sacer*. Trans. Daniel Heeler-Roazen (1998).

⁵ The DHS promulgated a Final Rule which described actions which would be required of employers who had received a “no match” letter from the Social Security Administration, in order to avoid the imputation of constructive knowledge of an employee's ineligibility for employment. *See* Dept. of Homeland Security Final Rule: Safe-

enforcement that began in 2006, surprisingly few enforcement efforts were directed against employers. A recent report concludes that despite DHS Secretary Michael Chertoff's vow to place employers of undocumented workers in his sights, the number of DHS "notices of intent to fine" employers for such violations rose to only seventeen in 2007 from three in 2004.⁶ Instead, programs such as the workplace sweeps took action directly against workers.

In these sweeps, ICE agents gained access to workplaces by alleging that they had uncovered a scheme of identity theft (by which they meant the use of the social security numbers of others).⁷ Instead of identifying the specific workers

Harbor Procedures for Employers Who Receive a No-Match Letter, 72 Fed. Reg. 45611 (Aug. 15, 2007) (codified at 8 C.F.R. pt. 274a), *available at* http://www.dhs.gov/files/laws/gc_1209062535824.shtm#0. Within two weeks after the rule was promulgated, a district court for the Northern District of California granted a motion for a temporary restraining order against the implementation of the Rule. Temporary Restraining Order and Order to Show Cause Re: Preliminary Injunction, AFL-CIO v. Chertoff, No. 3:07-cv-04472-CRB (N.D. Cal. Aug. 31, 2007), *available at* http://www.aclu.org/pdfs/immigrants/aflcio_v_chertoff_tro.pdf. The district court subsequently granted plaintiff's motion for a preliminary injunction. Order Granting Motion for Preliminary Injunction, AFL-CIO v. Chertoff, No. 3:07-cv-04472-CRB (N.D. Cal. 2007), *available at* http://www.aclu.org/images/asset_upload_file505_32133.pdf. This action was followed by a Supplemental Rulemaking by DHS, which clarified DHS's development of the no-match policies, and sought to address the problems raised in the district court's opinion. Department of Homeland Security Supplemental Proposed Rule, Safe-Harbor Procedures for Employers Who Receive a No-Match Letter: Clarification; Initial Regulatory Flexibility Analysis, 73 Fed. Reg. 15944 (Mar. 26, 2008) (codified at 8 C.F.R. pt. 274a), *available at* http://www.dhs.gov/files/laws/gc_1209062535824.shtm#0.

⁶ AMERICA'S VOICE, THE OBAMA OPPORTUNITY ON IMMIGRATION ENFORCEMENT: REDIRECT PRIORITIES TO SMART ENFORCEMENT, ABUSIVE EMPLOYERS, AND REAL BORDER SECURITY 1, http://amvoice.3cdn.net/0d60a3b4967c248ebf_gvm6iilzg.pdf (last visited Aug. 30, 2009). In addition, of the administrative and criminal arrests logged by ICE during workplace actions in 2007, 98% of administrative arrests, and 89% of criminal arrests were of workers, rather than employers or managers. *Id.* at 2. Figures were almost identical (98% / 87%) for ICE enforcement actions in 2008. *Id.*

⁷ The patterns noted in the following paragraph are described in two reports on the Swift Plant Raids and related workplace immigration sweeps. See NATIONAL COMMISSION ON ICE MISCONDUCT AND VIOLATION OF 4TH AMENDMENT RIGHTS, RAIDS ON WORKERS: DESTROYING OUR RIGHTS 13-21, *available at* http://www.icemisconduct.org/docUploads/UFCW%20ICE%20rpt%20FINAL%20150B_061809_130632.pdf?CFID=7884052&CFTOKEN=26955985 (last visited June 30, 2009). The National Commission was formed in response to queries and complaints from members of the United Food and Commercial Workers International Union, which, at the time of the sweeps, represented workers at five of the six Swift plants raided by ICE. *Id.* at 1-2. The Commission held hearings in five cities across the country, and heard testimony from workers, community members, immigration experts, members of Congress, psychologists and local elected leaders. *Id.* They requested the appearance of officials from DHS and ICE, who declined to

listed in the warrants, ICE agents herded hundreds or thousands of workers into common areas, where they were divided by race and national origin, and held, often for hours. Many were questioned about their birthplaces or asked to provide documentation. Those unable to do so were arrested, and taken from the plants—often in handcuffs, and sometimes in front of older children. Arrested workers were taken to detention sites that were often distant from workplaces and family homes. Detained immigrants had very limited access to telephones and were rarely able to communicate with their families. In some cases, those identified as sole caregivers of small children were released late in the same day; in others, they were held overnight, or for several days, with no ability to contact their families. Many arrested parents feared telling officials they needed to contact families, because they believed ICE would arrest their children as well.⁸ Once they arrived at detention sites, detainees faced a choice between signing voluntary departure papers and being deported (usually before they had a chance to contact families or lawyers) and contesting deportation, which might have meant weeks or months of detention, frequently without any family contact.⁹ Approximately 1300 people were arrested at the six Swift plants alone (the vast majority were “collateral catches,” not the people whose Social Security Numbers were in question).¹⁰

These operations prompted a firestorm of criticism, but I want to focus here on their effects on children and on the integrity of immigrant families. A 2007 study by La Raza and the Urban Institute focused on three sites, two Swift plants and a third site in Massachusetts. It found that a very large number of children were affected by the raids—one child for every two of the adults arrested.¹¹ A majority of the children affected were United States citizens; most of the children were under ten years old, many were under five.¹² The raids created sudden, unexpected crises for children and families: children were separated from their parents with no warning and no contact, often for as long as several months. Caregiving responsibilities had to be assumed by an ad hoc combination of extended family and informal community networks, assisted by public school

participate. *Id.* at 6. See also THE NATIONAL COUNCIL OF LA RAZA & THE URBAN INSTITUTE, PAYING THE PRICE: THE IMPACT OF IMMIGRATION RAIDS ON AMERICA’S CHILDREN 21–30 (2007) [hereinafter PAYING THE PRICE], available at http://www.urban.org/UploadedPDF/411566_immigration_raids.pdf (discussing the impact of immigration policies on children who have undocumented parents).

⁸ PAYING THE PRICE, *supra* note 7, at 35.

⁹ *Id.* at 24–27.

¹⁰ One source reported that of 1,282 workers arrested at the six plants, only 65 will face charges of identity theft—most will face administrative immigration charges. Missy Ryan, *US Chases Identity Theft in Biggest Work Raid Ever*, REUTERS, Dec. 13, 2006, <http://www.reuters.com/article/topNews/idUSN1344776020061213>.

¹¹ PAYING THE PRICE, *supra* note 7, at 2.

¹² *Id.*

districts.¹³ Although these networks rose to the immediate challenge of keeping children safe, as time went on, families deteriorated. Families suffered ongoing stress from parental absence, uncertainty about the detained parent's future and the best choices for the family, and financial hardship, because the parents arrested were usually breadwinners. Children began to show symptoms of "emotional trauma, psychological duress, and mental health problems."¹⁴

These workplace sweeps have been supplemented by a larger National Fugitive Operations Program, which has involved efforts such as "Operation Return to Sender."¹⁵ These sweeps have targeted not only workplaces, but residences, malls, and school areas. Under the auspices of finding accused criminals with outstanding warrants, ICE agents ask for documentation from residents or passersby who appear to be of Latino origin; those who cannot provide it may be arrested and pressed into waiting vans.¹⁶ Although this program was originally intended to target undocumented immigrants as to whom there were outstanding warrants for criminal violations,¹⁷ the goals of the program have

¹³ *Id.* at 36.

¹⁴ *Id.* at 4.

¹⁵ See Bennett, *Operation Return to Sender*, *supra* note 2.

¹⁶ Labor journalist and photographer David Bacon described the approach used by ICE in an interview on the Democracy NOW! website:

So ICE has the names of a few people on warrants, so they'll go—for instance, in Richmond, California, they went out to a school and stationed themselves in front of the school, supposedly looking for these people, and just stopped everybody coming in and out, asked people for their documents, but only, of course, people who looked Latino. And in this case, they were stopping women who had just dropped their children off. So, obviously, they were going to separate these families, if they picked up any of the people who were involved.

Or there was just another immigration raid in Chicago, where they went to a parking lot in a kind of a mall in the Latino community in Chicago, and they just sort of closed off the parking lot, people carrying, you know, assault rifles. They looked like soldiers. And they, again, had the names of supposedly four people that they were looking for. How they expected to find them in a shopping mall in a parking lot, I have no idea. But what they really did was they went and asked everybody for their immigration papers and began just sort of pulling people in, shoving them into vans.

750+ Immigrants Detained in "Operation Return to Sender" Raids, DEMOCRACY NOW!, (Apr. 27, 2007), http://www.democracynow.org/2007/4/27/750_immigrants_detained_in_operation_return (transcribing an interview by Amy Goodman with David Bacon).

¹⁷ A press release by DHS at the end of the first month of the Operation emphasizes the numbers of sexual predators, gang members and associates, and fugitives captured in the enforcement action. See Press Release, Department of Homeland Security, *supra* note 2.

quietly shifted. In 2006, the Department dropped the requirement that 75 percent of those arrested have outstanding criminal warrants, and raised arrest quotas for enforcement teams.¹⁸ These instructions produced a shift toward “easier,” i.e., noncriminal, targets, with the result that 75 percent of the people arrested over five years of enforcement have no outstanding criminal charges, and, in the past year, 40 percent of those arrested had no existing deportation order.¹⁹ The Fugitive Operations Program has generated a range of civil rights complaints,²⁰ many related to the warrantless entry of personal homes. It has also produced many of the same effects on families as the workplace raids. Children are separated from parents who are detained or deported; in some cases, the emotional effects on children have been starker because parents are arrested when their children are present.

B. Family Detention Facilities

With the increase in enforcement activity, government has also had to decide how to house those who are being detained. Because many of those apprehended at or near borders are coming with families, DHS began, under the Bush administration, to develop a system of “family detention.”²¹ Although Congress had instructed DHS to stop separating detained families and to house them in “non-penal, homelike settings,”²² the current family detention facilities have turned out to be anything but.

The most prominent example is the Hutto Family Detention Center in Tyler, Texas, which began housing families in 2006, and was designed to be a model for subsequent family detention centers. In late 2006, two nonprofit watchdog organizations that gained access to the Center revealed that it was a very disturbing model indeed. The Hutto facility was a former prison, and it retained the feel of that use. All family members were required to wear prison-like garb,²³ and families, including children, were permitted only one hour of education, and one hour of outdoor recreation time per day.²⁴ Aside from televisions and video games,

¹⁸ Nina Bernstein, *Target of Immigration Raids Shifted*, N.Y. TIMES, Feb. 3, 2009, at A1, available at <http://www.nytimes.com/2009/02/04/us/04raids.html> (detailing internal memos produced as a result of FOIA challenge by Cardozo Immigration Clinic Students which demonstrate purposive shift in focus in program, without notice to Congress or the public).

¹⁹ *Id.*

²⁰ See Bennett, *Operation Return to Sender*, *supra* note 2 (describing lawsuits against ICE for alleged civil rights violations in 10 states).

²¹ Family detention facilities have also been used to house families awaiting decisions on petitions for asylum. See Talbot, *The Lost Children*, *supra* note 3.

²² See FAMILY VALUES, *supra* note 3, at 2.

²³ *Id.* at 14 (describing new arrivals issued, inter alia, three sets of “scrubs”).

²⁴ *Id.* at 25, 26.

there was virtually no indoor entertainment for children of any age.²⁵ Detainees were housed in very small, cell-like rooms, in halls in which family members were separated from each other by age, with only the very youngest children permitted to remain with their parents.²⁶ Security measures (including lasers connected to an alarm system) prevented parents from going to their children at night, even when the children were in distress.²⁷ Parents experienced little ability to control their children, who were ultimately under the harsh discipline of the ICE officials who administered the Center. This discipline included constant threats to separate children from their families if they misbehaved.²⁸ Yet because parents feared the imposition of such sanctions, they felt compelled to try to control their children, which produced ongoing tensions among the detained families.²⁹

Not surprisingly, these revelations prompted a lawsuit filed in spring 2007 by the ACLU and the University of Texas Immigration Law Clinic. In August 2007, the parties reached a settlement, which provided for the release of the twenty-six plaintiff children, and a series of changes to the Center's environment.³⁰ Among other things, children were permitted to wear street clothing rather than prison uniforms, and they received expanded educational programs, as well as toys and books. ICE agreed to eliminate the count system that had forced families to stay in their cells up to twelve hours per day. Detainees were permitted to have visits from relatives and friends. Guards were instructed not to discipline children by threatening to separate them from their parents. Although hailed as a hard-won starting point, rather than a panacea, Hutto operated under these new requirements for two years. At the conclusion of this period, bowing to sustained legal and community pressure,³¹ DHS made the decision to transfer the remaining families out of Hutto by the end of 2009, ending its use as a family detention facility.³² This

²⁵ *Id.* at 26 (noting that a few plastic trucks and kitchenettes in a cordoned off section of the gym—to which children have only one hour of access per day—are the only “age appropriate” toys that younger children have at Hutto).

²⁶ *Id.* at 2 (noting that children as young as six are separated from their parents). The report notes that some parents have been permitted to keep all of their children with them, but they are often required to sleep in a single bed. *Id.* at 17.

²⁷ *Id.* at 17.

²⁸ *Id.* at 29. The report also notes that children may be sanctioned for such benign, child-like activities as running around, making noise or climbing on couches. *Id.*

²⁹ *Id.* at 42.

³⁰ The following details may be found in Settlement Agreement, *supra* note 3, at 1–7.

³¹ Miguel Liscano and Claire Osborn, *Critics Push for Immigrant Detention Center in Taylor to Close*, AUSTIN-AMERICAN STATESMAN, August 2, 2009, <http://www.statesman.com/news/content/news/stories/local/2009/08/02/0802hutto.html?cxtype=rss&cxsvc=7&cxcat=52>.

³² In addition to transferring families out of Hutto, and halting plans for three additional family detention facilities, ICE announced that it would gather feedback from local and national organizations as a vehicle for developing a national strategy, which could include the creation of “civil detention centers” and alternatives to detention. Nina

decision does not, however, end the dilemmas presented by family detention. Families currently housed in Hutto will be transferred to the Berks Family Detention Center. Although possessed of a slightly more hospitable physical setting, and better educational and recreational programs, Berks was critiqued in the same report that exposed the deficiencies at Hutto, in many of the same terms.³³

II. TREATMENT OF FAMILY AS A VEHICLE FOR ABJECTION

These enforcement efforts regulate immigrant families in ways that have little precedent in conventional state family law regimes. The issue here is not the one Kerry Abrams identified in the marriage context,³⁴ that when immigrants are involved, there are additional nexuses of legal intrusion—a requirement of governmental approval, or the imposition of a waiting period. In the immigration contexts described above, we've entered a kind of Alice-in-Wonderland world in which very few of the usual assumptions of family law seem to apply. We are miles away from conventional family law regimes, in which the interests of parents in the “care, custody and control” of their children give rise to a doctrine—in some cases a fundamental right—of family privacy. We confront instead scenarios in which parents are separated from children, without parental instigation or findings of inadequacy, and without opportunity for contact or planning. Children are deprived of the protection and financial support of one or both parents, without any consideration of their best interests or even their well-being. Parents are denied the ability to comfort, supervise, or even discipline their children in settings where family members are being held together. The treatment of family in these contexts of immigration enforcement is in many ways more comparable to the treatment of family when a parent has been arrested on a criminal warrant or convicted of a crime.³⁵ But the family member who is the subject of ICE enforcement in the immigration context has not, in the vast majority of cases, been convicted or even

Bernstein, *US to Reform Policy on Detention for Immigrants*, N.Y. TIMES, Aug. 5, 2009, at A1, available at <http://www.nytimes.com/2009/08/06/us/politics/06detain.html>; Desiree Evans, *The End of Family Detention? Facing South*, ONLINE MAGAZINE OF THE INSTITUTE FOR SOUTHERN STUDIES, Aug. 7, 2009, <http://www.southernstudies.org/2009/08/the-end-of-family-detention.html>.

³³ See FAMILY VALUES, *supra* note 3, at 2. Although noting Berks' comparative advantages, the study also emphasized that it “strip[ped] parents of their role as arbiter and architect of the family,” “place[d] families in settings modeled on the criminal justice system,” and “violated various aspects of existing standards for the treatment of unaccompanied children and adults in immigration proceedings.” *Id.*

³⁴ Abrams, *Immigration Law and the Regulation of Marriage*, *supra* note 1.

³⁵ For vivid descriptions of the experience of having a parent apprehended, tried, and imprisoned for the commission of a crime, see NELL BERNSTEIN, *ALL ALONE IN THE WORLD: CHILDREN OF THE INCARCERATED* (2007).

accused of a crime. Immigration violations, even if demonstrated, are civil infractions; and in these cases the government usually has no more than a suspicion based on employment or residence in a particular setting, brown skin, or—in the strongest cases—maybe a no-match letter.

We might ask, as some scholars have, whether creating this disparate regime of family regulation exceeds even Congress's plenary power over immigration. But at least initially, I want to do something different: I want to ask what is being produced or accomplished by the brutal suspension of the usual family law assumptions or rules. The frank disrespect for the integrity of family and for the relationships between parents and children—the gratuitously harsh and very public disruption of those relationships—can be understood as something more than a regrettable byproduct of enforcement imperatives. The harshness, and the divergence between the treatment of these families and of families under conventional family law doctrine seems to be very much the point—or at least one point—of these efforts. It seems to have a communicative or even performative dimension: it serves to demean and deny the humanity of undocumented immigrants.

It is, sadly, not news that when our society seeks to abject certain members, one of the key vehicles through which this degradation is performed is restrictions on the ability to form or preserve families. The ability of slave owners to disrupt families through the sale of particular slaves, as a form of discipline or as a simple market transaction, is perhaps the most familiar example of such abjection.³⁶ But legal scholars have documented other forms of legal intervention that abject through regulation—both crude and subtle—of family forms. Katherine Franke, for example, has written about the legally imposed inability of enslaved African Americans to marry, and the harsh regulatory regimes that accompanied the postbellum granting of that right.³⁷ Adrienne Davis has explored the “sexual economy” of slavery—the ability of slaveholders to devalue the intimate bonds among enslaved people while producing more slaves through sex with enslaved women—and the ways in which postbellum inheritance law did and did not recognize the children of interracial unions.³⁸ And Leti Volpp has analyzed the

³⁶ The speed and brutality of the fracturing of families performed by this practice has some parallels in the group deportations occurring today.

³⁷ Katherine Franke, *Becoming a Citizen: Reconstruction-Era Regulation of African-American Marriages*, 11 *YALE J. L. & HUM.* 251, 252 (1999) (describing prohibition of marriage under slavery).

³⁸ Adrienne Davis, *The Private Law of Race and Sex: An Antebellum Perspective*, 51 *STAN. L. REV.* 221, 246–47 (1999) (describing legal treatment of interracial relationships and its effect in producing a “sexual economy”); see also Mary Frances Berry, *Judging Morality: Sexual Behavior and Legal Consequences in the Late Nineteenth-Century South*, 78 *J. AM. HIST.* 835, 854 (1991) (noting that white men “reinforced the subordination of blacks by arranging their sexual relationships with African-American women in whatever fashion they desired”).

ways that the status of male Chinese immigrants was degraded by prohibitions on immigration by Asian women, and the effective prevention of family formation.³⁹ In other contexts, abjection has been produced by interference with the ability of parents to support, control and care for their children. The most extreme examples concern the removal of children from indigenous families,⁴⁰ without findings of parental inadequacy, and their placement with parents of the majority culture. But a more quotidian and pervasive intrusion of this sort is governmental surveillance of the parenting of women receiving public assistance.⁴¹

We can think about the treatment of immigrant families in a similar light. The treatment of immigrants during these enforcement efforts signals, both to immigrant communities, and to the neighbors and other citizens who observe them, that these families can be disrupted at will: children can be separated from their parents, parents can be deprived of their ability to care for or even to discipline their children without findings of inadequacy and without recourse. These families are in fact abjected: expelled from the community symbolically, before they are expelled concretely. They are reduced to beings for whom the quintessentially human imperatives of care and nurturance, and the possibilities of family formation and preservation, seem not to apply.

This abjection produces a number of important political effects. First, it reinforces specific features of the anti-immigrant discourse articulated by critics from Samuel Huntington to Lou Dobbs, suggesting the current wave of immigrants is different from previous waves, distinctively alien and unassimilable.⁴² Treating these immigrants like the most dangerous kinds of criminals also reinforces the dimension of that discourse that associates them with lawlessness.⁴³ This abjection

³⁹ See Leti Volpp, *Divesting Citizenship: On Asian-American History and the Loss of Citizenship through Marriage*, 53 UCLA L. REV. 405, 460–61 (2005) (examining the effects of the 1875 Page Act, which prevented Asian women from entering the U.S. “for the purposes of prostitution” and observing that “[t]he Chinese immigrant was generally kept from reproducing a heterosexual family, due in part to restrictions on immigration. This fact produced the perception of Chinese men as aberrant and alien, given the notion of the family as the foundation of civil society”).

⁴⁰ See, e.g., HUMAN RIGHTS AND EQUAL OPPORTUNITY COMMISSION, BRINGING THEM HOME: REPORT OF THE NATIONAL INQUIRY INTO THE SEPARATION OF ABORIGINAL AND TORRES STRAIT ISLANDER CHILDREN FROM THEIR FAMILIES (1997), available at <http://www.austlii.edu.au/au/journals/AILR/1997/36.html>; Jennifer Nutt Carleton, *The Indian Child Welfare Act: A Study in the Codification of the Ethnic Best Interests of the Child*, 81 MARQ. L. REV. 21 (1997).

⁴¹ See DOROTHY ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE (2002); Martha Fineman, *Images of Mothers in Poverty Discourses*, 1991 DUKE L.J. 274.

⁴² See SAMUEL P. HUNTINGTON, WHO ARE WE? CHALLENGES TO AMERICA’S NATIONAL IDENTITY (2005).

⁴³ An example of this discourse is the quote that concludes Margaret Talbot’s article on Hutto. See Talbot, *The Lost Children*, *supra* note 3. She quotes Cynthia Long, a county, as regretting the separations and difficulties faced by immigrant families, but adding: “The

may also help to enlist neighbors in expelling the communities of immigrants, a kind of mobilization we're beginning to see in a number of communities.⁴⁴ It may finally give the immigrants themselves a jarring sense of the future they face if they decide to remain in, or return to, the United States.

III. THE OBAMA ADMINISTRATION AND THE FUTURE OF IMMIGRANT FAMILIES

When I first began examining this question, we were at the height of the Bush administration's efforts to apprehend and deport undocumented immigrants. Is the election of a new Democratic administration that won broad Latino support and campaigned on a platform of comprehensive immigration reform likely to change these dehumanizing practices? Surprisingly, the answer is less than clear.

There are some signs that point in a positive direction. Both President Obama and DHS Secretary Janet Napolitano have previewed a shift in focus, from mass raids that target large numbers of undocumented workers, to enforcement against employers who seize on flaws in the immigration system to undercut competition or exploit vulnerable workers who may be underpaid, or fired or deported for participating in labor activism. DHS has declared that they will not enter a workplace and arrest workers unless local U.S. attorneys are prepared to prosecute the employer.⁴⁵ They have expanded the application of "humanitarian guidelines," which encourage immigration officers "to contact local health agencies and nongovernmental groups, to give people the special medical, social and family support they need—such as making sure that the children of a person who is arrested are properly cared for."⁴⁶ Early investigations also suggest that DHS may be willing to look for violations that go beyond the simple employment of undocumented immigrants to patterns of racial discrimination, or exploitation of undocumented status to suppress labor mobilizations.⁴⁷ Perhaps most importantly, the administration has situated these enforcement efforts within a broader

thing we forget is the adults who are being detained have broken the law . . . [Children sometimes] have to suffer with the sins of our parents . . . to suffer, if you can call it that, because of their parents' choices." *Id.*

⁴⁴ See Bill Ong Hing & David Bacon, *Rights Not Raids*, THE NATION, May 5, 2009, available at http://www.thenation.com/doc/20090518/hing_bacon (reporting on the authors' work with the National Commission on ICE Misconduct, and observing that "[i]ncreased enforcement has poisoned communities, spawning scores of state and local anti-immigrant laws and ordinances that target workers and their families").

⁴⁵ Edward Sifuentes, *Obama Shifts Gears on Work-Site Enforcement*, NORTH COUNTY TIMES (San Diego), May 9, 2009, http://www.nctimes.com/news/local/sdcounty/article_3536866f-0e84-5529-88e1-cff42f2eaf3a.html.

⁴⁶ *Id.*

⁴⁷ Martin Kaste, *Employers May Face More Immigration Scrutiny* (National Public Radio broadcast Apr. 3, 2009) (describing DHS investigation of Yamato Engine Specialists in Bellingham, Washington).

aspiration to legislate comprehensive immigration reform within the year, including a path to citizenship for those undocumented workers currently living in the United States.⁴⁸

Yet these proposed changes offer security neither for undocumented workers nor for the integrity of their family bonds. Workers may still be arrested under revised DHS priorities where U.S. attorneys are prepared to prosecute. Workers and their families, who may have little sense of pending actions against employers, may still be blindsided by workplace arrests, and may have little time to plan for family separations. The E-Verify system, which requires employers to check the social security numbers and other documentation provided by employees may function in a less abrupt fashion; yet it presents other difficulties. Some analysts argue that the database used by E-Verify is so flawed that it may end up depriving U.S. citizens of employment.⁴⁹ Humanitarian guidelines acknowledge the enormous strains the immigration enforcement places on families. But they are hortatory rather than mandatory; and, more importantly, they provide social support for children and families facing separations, rather than addressing the enforcement priorities that create those separations.⁵⁰

To revise those priorities, and stem the tide of those separations, more than a shift toward enforcement against employers will need to take place. The administration—and ultimately the American public—will have to broaden the frame, from the punitive “bad actor” focus that penalizes, and justifies the stigmatization of, undocumented workers.⁵¹ Immigration enforcement will have to be understood not as a singular end, but as part of a broader set of policies that include comprehensive immigration reform—a goal that the Obama administration endorses, but on which it has expended little political capital.⁵² And the decision to migrate in search of employment will have to be understood not simply as the decision of an individual, but as a choice shaped by market forces, governmental

⁴⁸ Julia Preston, *Firm Stance on Illegal Immigrants Remains Policy*, N.Y. TIMES, August 3, 2009, at A14.

⁴⁹ *Id.*

⁵⁰ Edward Sifuentes, *Obama Shifts Gears*, *supra* note 45.

⁵¹ One might imagine that a simple shift to an enforcement focus on employers could produce a similarly penalizing (though, given the American veneration of the market and of capital, perhaps a less stigmatizing) focus. Employers who exploit the immigration system to secure low-wage workers and suppress labor mobilizations may prove in the eyes of some, including myself, to be a more culpable target. Yet a focus on even on their exploitation is less satisfactory than a focus on the flaws in the immigration system that they are able to exploit.

⁵² Preston, *Firm Stance on Illegal Immigrants Remains Policy*, *supra* note 48. Preston quotes immigration expert Michael Olivas as saying that we now have the “worst of all worlds” because the administration’s in enforcement has not (yet) been accompanied by broad efforts to overhaul immigration policy. *Id.*

labor regulations and transnational trade policies.⁵³ As we navigate these transitions, it is also crucial to take a broader perspective on those individuals who, for whatever combination of reasons, have violated existing immigration laws. It is too simple to say, as enforcement advocates sometimes do, that “children sometimes have to suffer” because their parents “have broken the law.”⁵⁴ We do not, in fact, impose such excruciating hardships on everyone who breaks our laws. We can, on the one hand, observe a hierarchy in the familial treatment of lawbreakers. Prosecutors told Andrew Fastow, the architect of Enron, and his wife Lea, that their sentences might be so that someone could remain at home to provide continuity of care to their two young children.⁵⁵ But we can, on the other hand, glimpse moments of broader social and legal recognition that intimate relationships—and other integral dimensions of our shared humanity—deserve to be respected, even when someone may have violated a law. Though we retain only some fruits of the Warren Court revolution, the rights of the accused reflect this understanding,⁵⁶ as do innovative prison programs such as in-house children’s centers that facilitate parent-child bonding, and conjugal visits that respect the integrity of intimate bonds, even for those who have been convicted of serious crimes.⁵⁷ The stringency—indeed, the ferocity—with which the government has violated these precepts in the case of immigrants may reflect an effort to reduce a dauntingly complex array of causes and effects to a single culpable act, and a single, highly dispensable actor. We should keep these more humane intuitions in mind, as we struggle to bring the broader picture underlying immigration into view.

⁵³ Hing & Bacon, *Rights Not Raids*, *supra* note 44 (describing pressure to migrate as being created by forces such as NAFTA and globalization).

⁵⁴ Talbot, *The Lost Children*, *supra* note 3.

⁵⁵ Speaking after the entry of Lee Fastow’s guilty plea, the prosecutor noted that one factor shaping the timing of incarceration for the Fastows is likely to be the goal of facilitating continuous care for the couple’s two young children. “‘The Fastows’ children can be taken into account in deciding when Andrew Fastow will begin serving his sentence,’ [Prosecutor Andrew] Weissmann said. ‘There is no reason for the government, when it can, to have a husband and wife serve their sentences at the same time,’” Mary Flood, *Lee Fastow Expresses “Regret” at Sentencing*, HOUSTON CHRON., (Dec. 19, 2005).

⁵⁶ J.R. Watson captured something of this understanding when he wrote, in 1967, “[a]t no time are the civil rights of an individual citizen more vulnerable than when a man stands before a criminal court of justice which will decide his guilt or innocence.” J.R. Watson, *Indigent’s Right to Counsel*, 3 NEW ENG. L. REV. 61, 61 (1967).

⁵⁷ Some examples of these kinds of family-oriented innovations—which remain rare, but promising—are discussed in NELL BERNSTEIN, *ALL ALONE IN THE WORLD: CHILDREN OF THE INCARCERATED* 87–107 (2005).