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THE IMPACT OF INTERIOR IMMIGRATION ENFORCEMENT ON MIXED-CITIZENSHIP FAMILIES

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Abstract: In this article we trace the expansion of interior immigration enforcement measures since the 1990s, focusing on the period after the creation of the U.S. Department of Homeland Security (DHS) in 2003. We consider the rationale for the escalation of enforcement during this period, as well as the expansion of enforcement to include local and state law enforcement agencies. Detailing in particular the role of local jails, private corrections corporations, and the communities that are financially dependent on the prison industry, the article also examines who benefits economically and politically from these changes. Throughout, we consider how the expansion of immigration enforcement has affected U.S. citizen children and spouses of unauthorized immigrants. We question whether U.S. Immigration and Customs Enforcement (ICE) is fulfilling its mandate to de-emphasize enforcement against parents, guardians, and children given that the number of detentions and removals in these categories continues to increase. We discuss how this is imposing unnecessary costs and burdens on ICE's citizen stakeholders while benefiting private corrections corporations.

INTRODUCTION

On average, there are over 33,000 men and women separated from their families and housed in immigration detention facilities in the United States.¹ Most of these facilities receive scant attention because of their remote locales. Typically, for-profit corrections corporations prefer to locate their detention facilities away from populous areas in smaller, economically depressed cities and towns that are in need of development. Such privately run facilities are found in towns throughout South Texas such as La Villa, Karnes City, Encinal, Los Fresnos, Val Verde, Falfurrias, Robstown, and Raymondville. Many of the

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¹ See Robin Dale Jacobson & T. Elizabeth Durden, *Old Poison in New Security Bottles: Contemporary Immigration Restriction and the Detention Regime*, 2 *MIGRATION STUD.* 235, 248 (2014).

men and women removed to for-profit facilities in South Texas are fathers and mothers of citizen-children who, prior to detention, resided in urban areas as far away as Atlanta and Chicago. The distances to family members, including their U.S. born children, are so great that communication is all but impossible.²

In the absence of meaningful assistance from lawyers, family, and community members, many detainees opt for voluntary departure.³ In fiscal year 2011, the Department of Homeland Security (DHS) apprehended 641,633 persons and, of those, 323,542, or 50.4%, opted for voluntary departure.⁴ These cases are hastily dispatched by an immigration judge with the predictable result of removal. In the end, families are separated and children are left without their parents.

A U.S. born child gains citizenship at birth. However, the unauthorized immigrant parents of a U.S. citizen child can still be deported. As of 2012, the Pew Hispanic Center estimates that 4.5 million children born in the United States are in a mixed-citizenship status family, many with a parent who is a long-term resident of the United States but who does not have authorization to remain in the country.⁵ These citizen-children, or other dependents that are in this situation, have no right to sponsor their non-citizen parents to remain in or to return to the United States through ordinary channels.⁶

The Obama Administration has provided citizen children with one potential option that may allow them to stay with their non-citizen parents. On November 20, 2014, the Obama Administration instituted a new Deferred Action for Parental Accountability (DAPA) initiative, allowing certain parents of U.S. citizen or legal permanent resident children who have continually resided in the United States since January 1, 2010 to apply for a temporary reprieve from

² See HUMAN RIGHTS WATCH, A COSTLY MOVE: FAR AND FREQUENT TRANSFERS IMPEDE HEARINGS FOR IMMIGRANT DETAINEES IN THE UNITED STATES 16 (2011), <http://www.hrw.org/sites/default/files/reports/us0611webwcover.pdf> [<http://perma.cc/HWU7-9VNU>].

³ See *id.* at 27–28.

⁴ See JOHN SIMANKSI & LESLEY M. SAPP, DEP'T HOMELAND SEC., IMMIGRATION ENFORCEMENT ACTIONS 3, 6 (2012) (discussing the number of aliens removed by deportation orders and those who returned to their country of origin without an order of deportation).

⁵ See JEFFREY S. PASSEL ET AL., PEW RES. CTR., AS GROWTH STALLS, UNAUTHORIZED IMMIGRANT POPULATION BECOMES MORE SETTLED 8 (2014), http://www.pewhispanic.org/files/2014/09/2014-09-03_Unauthorized-Final.pdf [<http://perma.cc/VW38-KXEL>]; JEFFREY S. PASSEL & D'VERA COHN, PEW RES. CTR., UNAUTHORIZED IMMIGRANT POPULATION: NATIONAL AND STATE TRENDS, 2010, at 13 (2011), <http://www.pewhispanic.org/2011/02/01/unauthorized-immigrant-population-brnational-and-state-trends-2010> [<http://perma.cc/9QSV-8JRD>].

⁶ See U.S. CITIZENSHIP AND IMMIGRATION SERVICES, I AM A CITIZEN: HOW DO I HELP MY RELATIVE BECOME A U.S. PERMANENT RESIDENT? 1 (2013). A citizen-child is not eligible to sponsor his non-citizen parents to lawfully immigrate to the United States until he is twenty-one years of age. *Id.* Upon filing, the parent is immediately eligible to file for a visa to immigrate to the United States. See *id.* at 2. This is unlike other family members who may have to wait years or decades for a visa number to become available. See *id.*

deportation.⁷ This is an important development in immigration policy that may have the potential to provide mixed-citizenship status families with unauthorized parents temporary relief from the fear that they could be deported at any time.

However, as the Secretary of DHS, Jeh Johnson, noted in a subsequent memorandum, deferred action is a temporary reprieve that “may be terminated at any time at the agency’s discretion.”⁸ Further, the fragility of Obama’s Immigration Executive Actions was underscored by U.S. District Court Judge Andrew Hanen in a February 16, 2015 injunction that placed the deferred action program for parents on hold pending the resolution of a court challenge by twenty-six states.⁹ On May 26, 2015, a divided panel of the U.S. Court of Appeals for the Fifth Circuit denied the government’s motion to stay and limit the scope of Judge Hanen’s injunction.¹⁰ Furthermore, a future president could repeal the broader Deferred Action for Childhood Arrivals (DACA) program, allowing for the removal of DACA applicants from the country. In light of these limitations, the United States Citizenship and Immigration Service (USCIS) reminded applicants in June of 2015 that only Congress can enact the necessary immigration reforms that would lead to a pathway to legal permanent residence and citizenship for the deportable parents of citizen-children in mixed-status families.¹¹

The only remaining avenue that a mixed-legal status family with non-citizen parents and citizen-children has to permanently remain together in the United States is to risk almost certain deportation by entering into “relief from removal” proceedings. If the non-citizen parent is discovered by immigration enforcement personnel and placed in removal proceedings, she can file for relief from removal if she has been in the country for more than ten years and she can demonstrate that her children stand to suffer “exceptional and extremely unusual

⁷ See Barack Obama, Remarks by the President in Address to the Nation on Immigration (Nov. 20, 2014), <https://www.whitehouse.gov/the-press-office/2014/11/20/remarks-president-address-nation-immigration> [<http://perma.cc/QN6T-775V>].

⁸ Memorandum from Jeh Johnson, U.S. Sec’y of Homeland Sec., to León Rodríguez, Dir., U.S. Citizenship and Immigration Servs., Thomas S. Winkowski, Acting Dir., U.S. Immigration and Customs Enf’t, R. Gil Kerlikowske, Comm’r, U.S. Customs and Border Prot., Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States As Children and with Respect to Certain Individuals Who Are the Parents of U.S. Citizens or Permanent Residents (Nov. 20, 2014), http://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action.pdf [<http://perma.cc/254T-JEX3>].

⁹ See *Texas v. United States*, 86 F. Supp. 3d 591, 677 (S.D. Tex. 2015).

¹⁰ *Texas v. United States*, 787 F.3d 733, 769 (5th Cir. 2015).

¹¹ See U.S. Citizenship and Immigration Serv., *Consideration of Deferred Action for Childhood Arrivals Process, Frequently Asked Questions* (Jun. 15, 2015), <http://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-process/frequently-asked-questions> [<http://perma.cc/22CW-73A5>].

hardship” if she is deported.¹² Unlike the family-based immigration admissions process that is initiated by an adult citizen or lawful permanent resident, very few applicants ever gain the right to lawfully remain in the United States with their families.¹³ Parents are deported even if this means that their citizen-children will experience the hardship of either having to leave their country of upbringing to stay with their parents, or having to stay in foster care to remain in the United States.¹⁴ Some parents do not even have the choice of taking their children with them because family courts are declaring unauthorized immigrant parents unfit based solely on their immigration status.¹⁵

DHS has consistently insisted that its priority for interior immigration enforcement is to arrest, detain, and remove criminal and fugitive aliens who constitute a threat to national security and/or the welfare of American communities.¹⁶ Through a failure of oversight, and out of political pressure to produce results, federal enforcement officers and their local and state law enforcement partners have been targeting unauthorized immigrants without regard to their risk profile. This has led to residential raids in which long-term resident migrants have been separated from their families, disrupting the lives of otherwise law-abiding migrants and their citizen dependents alike. Under the Obama Administration, a larger percentage of the total number of detainees and deportees are non-citizens who committed a previous criminal offense.¹⁷ But with a record number of non-citizens deported every year since 2009, ordinary status violators still make up an increasing number of the total number of detainees and deportees.¹⁸

In this article, we will trace the expansion of interior immigration enforcement measures since the 1990s, focusing on the period after the creation of the DHS in 2003. We will consider the rationale for escalation of enforcement and its expansion to include local and state law enforcement agencies

¹² Illegal Immigration Reform and Immigrant Responsibility Act of 1996 § 240A(b), 8 U.S.C. § 1229b(b) (2012).

¹³ See *In re Monreal-Aguinaga*, 23 I. & N. Dec. 56, 58–59 (B.I.A. 2001); Sunny Harris Rome, *Promoting Family Integrity: The Child Citizen Protection Act and Its Implications for Public Child Welfare*, 4 J. PUB. CHILD WELFARE 245, 249 (2010). Although 4.5 million citizen-children have an unauthorized immigrant parent, only 4000 parents are statutorily eligible for cancellation of removal based on “exceptional and extremely unusual hardship” to the child. See Rome, *supra*, at 249.

¹⁴ See *Oforji v. Ashcroft*, 354 F.3d 609, 617 (7th Cir. 2003); *Acosta v. Gaffney*, 558 F.2d 1153, 1157 (3d Cir. 1977); *Coleman v. United States*, 454 F. Supp. 2d 757, 767–68 (N.D. Ill. 2006).

¹⁵ C. Elizabeth Hall, Note, *Where Are My Children . . . And My Rights? Parental Rights Termination as a Consequence of Deportation*, 60 DUKE L.J. 1459, 1460–62 (2011).

¹⁶ See SIMANSKI & SAPP, *supra* note 4, at 1; Obama, *supra* note 7.

¹⁷ See SIMANSKI & SAPP, *supra* note 4, at 1. In Fiscal Year 2011, the Department of Homeland Security Immigration and Customs Enforcement (ICE) detained a record-high 429,000 foreign nationals. *Id.* Additionally, ICE removed an all-time high of 188,000 known criminal aliens from the United States. *Id.*

¹⁸ See *id.* at 4. “The number of removals increased from 385,100 in 2010 to 391,953 in 2011.” *Id.* (explaining the increase in the number of total removals from the United States).

during this period. We will examine who benefits economically and politically, detailing the role of local jails, private corrections corporations, and the communities that are financially dependent on the prison industry. Throughout, we will consider how the expansion of immigration enforcement has had collateral consequences on U.S. citizens, particularly the citizen children and spouses of non-citizens who are being detained and deported en masse with the expansion of interior immigration enforcement since 2003.

I. HISTORICAL CONTEXT

For most of the twentieth century, most migrants who traveled to the United States were content to return to a country and community of origin that they still regarded as home. Their partners (usually their wife) and children remained in the country of origin, received remittance money, and expected their migrant family member (usually husbands and fathers) to return. Their other important relationships of interdependence were rooted in their communities in their home countries and they had few ties in the United States beyond their workplace.¹⁹ This is still the case for many unauthorized immigrants who see themselves as guest workers and enter, make use of existing ties, develop new ones in the United States to earn money, and save or send the money home. However, there has always been a counter-narrative of settlement in the United States that prompted further network-based migration and the development of far-reaching ties in adopted American communities. This trend accelerated after Operation Hold the Line was initiated in 1994, which increased border enforcement that raised the costs and risks of seasonal migration. As a result, more migrants settled in the United States and sent for their families to join them.²⁰ This led to a rapid increase in the unauthorized immigrant population in the United States, from 5.7 million in 1995 to a peak of 12.2 million in 2007.²¹

As return migration became more difficult, adaptation and integration into U.S. communities became a greater priority among migrants who had previously been focused on returning home.²² The transition in migration that has

¹⁹ See DEBORAH COHEN, BRACEROS: MIGRANT CITIZENS AND TRANSNATIONAL SUBJECTS IN THE POSTWAR UNITED STATES AND MEXICO 22–24 (2010).

²⁰ See WAYNE A. CORNELIUS & JESSA M. LEWIS, IMPACTS OF BORDER ENFORCEMENT ON MEXICAN MIGRATION: THE VIEW FROM SENDING COMMUNITIES 1–6 (2007); DOUGLAS S. MASSEY, JORGE DURAND & NOLAN J. MALONE, BEYOND SMOKE AND MIRRORS: MEXICAN IMMIGRATION IN AN ERA OF ECONOMIC INTEGRATION 110, 136–37 (2002).

²¹ See JEFFREY S. PASSEL, D'VERA COHN & ANA GONZALEZ-BARRERA, PEW RES. CTR., POPULATION DECLINE OF UNAUTHORIZED IMMIGRANTS STALLS, MAY HAVE DECLINED: NEW ESTIMATE: 11.7 MILLION IN 2012, at 9 (2013).

²² See Jonathan Hicken, Mollie Cohen & Jorge Narvaez, *Double Jeopardy: How U.S. Enforcement Policies Shape Tunkaseño Migration*, in MEXICAN MIGRATION AND THE U.S.

brought spouses and entire families north, coupled with the necessity of settlement in the face of more rigorous border enforcement, has increased the probability that migrants will give birth and/or raise their children in the United States. This trend is reflected in the number of children in the public school system with at least one undocumented parent, which was estimated at 6.8% of all kindergarten through twelfth grade students in the United States in 2008.²³

The growth in the settled unauthorized immigrant population in the United States was one of the factors that led to the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996.²⁴ This measure made it considerably more difficult for unauthorized immigrant parents facing deportation to file for an appeal based on hardship to citizen-children. It also authorized the 287(g) agreements, which provide for cooperation between state and local law enforcement and federal immigration authorities.²⁵ The first of these agreements was instituted in 2003 after the reorganization of the interior enforcement arm of the Immigration and Naturalization Service (INS) into the Bureau of Immigration and Customs Enforcement (ICE). The 287(g) agreements dramatically expanded the reach of immigration enforcement into local communities.

These agreements later became a key component of a broader strategy of “attrition through enforcement” developed by legal scholar and Kansas Secretary of State Kris Kobach as a model for both partnership-based immigration enforcement and state immigration ordinances, including Arizona’s Senate Bill 1070 (SB 1070).²⁶ Kobach argued that local and state police are essential to the success of “attrition through enforcement” as a strategy. Their role in the “attrition through enforcement” strategy is to arrest suspected unauthorized immigrants within and beyond the parameters of a 287(g) agreement in order to

ECONOMIC CRISIS: A TRANSNATIONAL PERSPECTIVE 47, 56–59 (Wayne A. Cornelius et al. eds., 2010).

²³ Edward M. Olivos & Marcela Mendoza, *Immigration and Educational Inequality: Examining Latino Immigrant Parents’ Engagement in U.S. Public Schools*, 8 J. IMMIGR. & REFUGEE STUD. 339, 342 (2010).

²⁴ See Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104–208, 110 Stat. 3009 (codified as amended in scattered sections of 8 U.S.C.); Matis I. Vaira-Lucero, Daehoon Nahm & Massimiliano Tani, *The Impact of the 1996 US Immigration Policy Reform (IIRIRA) on Mexican Migrants’ Remittances* 5 (IZA Discussion Paper No. 6546, 2012).

²⁵ See Immigration and Nationality Act § 287(g), 8 U.S.C. § 1357(g) (2012).

²⁶ See Luis B. Plascencia, *Attrition Through Enforcement and the Elimination of a Dangerous Class*, in LATINO POLITICS AND ARIZONA’S IMMIGRATION LAW SB 1070 93, 110 (Lisa Magaña & Erik Lee eds., 2013); Kris Kobach, *Attrition Through Enforcement: A Rational Approach to Illegal Immigration*, 15 TULSA J. INT’L & COMP. L. 155, 161–62 (2007); JESSICA M. VAUGHAN, CTR. IMMIGR. STUD., ATTRITION THROUGH ENFORCEMENT: A COST EFFECTIVE STRATEGY TO SHRINK THE ILLEGAL ALIEN POPULATION 1, 9 (2006); *infra* notes 75–85 and accompanying text. Attrition through enforcement is a strategy in which law enforcement encourages aliens to depart the United States. Kobach, *supra*, at 156. The strategy involves “the risks of detention or involuntary employment [going] up, and the probability of being able to obtain unauthorized employment [going] down.” *Id.*

pressure their families and community members to self-deport and return to their countries of origin.²⁷ Kobach views local and state law enforcement officials as “force multipliers” for ICE that can more effectively reach into local communities to target ordinary status violators.²⁸

Additionally, ICE’s new Office of Detention and Removal (DRO) drafted a new strategic plan, Operation Endgame, designed to “thwart and deter continued growth in the illegal alien population . . .” by “[m]oving toward a 100% rate of removal for all removable aliens”²⁹ To achieve this objective, the DRO established a quota of 1000 arrests of fugitive aliens per Fugitive Operations Team.³⁰ This priority shift led to an increase in arrests of ordinary status violators as a percentage of total aliens apprehended by Fugitive Operation Teams from twenty-two percent from 2003 to 2005 to forty percent in 2007. Over the same period, the proportion of security threats and criminal non-citizens diminished from thirty-two percent to nine percent of total arrests.³¹ This shift in the operational mission of ICE’s National Fugitive Operations Program prompted Fugitive Operations Teams to conduct nighttime residential raids that involved breaking into homes and arresting everyone who could not prove that they were a U.S. citizen, causing parents to be separated from their citizen-children without any provision for the short-term care and long-term custody of the children. The number of parents separated from their citizen-children during detention and removed from the United States increased with the expansion of these types of enforcement actions, including in particular home raids in Latino neighborhoods.³²

²⁷ See Kris Kobach, *Reinforcing the Rule of Law: What States and Localities Can and Should Do to Reduce Illegal Immigration*, 22 GEO. IMMIGR. L. J. 459, 472, 478, 482 (2008).

²⁸ See Kris Kobach, *The Quintessential Force Multiplier: The Inherent Authority of Local Police to Make Immigration Arrests*, 69 ALB. L. REV. 179, 234–35 (2005).

²⁹ ANTHONY S. TANGEMAN, DEP’T HOMELAND SEC., ENDGAME: OFFICE OF DETENTION AND REMOVAL STRATEGIC PLAN, 2003–2012: DETENTION AND REMOVAL STRATEGY FOR A SECURE HOMELAND 2-2 (2003).

³⁰ Memorandum from John P. Torres, Acting Dir., U.S. Immigration and Customs Enforcement on Fugitive Case Management System Reporting and the 1,000 Arrests Annual Goal for Fugitive Operations Teams to Assistant Dirs., Deputy Assistant Dirs. & Field Office Dirs., U.S. Immigration and Customs Enforcement (Sept. 29, 2006) (on file with author).

³¹ See MARGOT MENDELSON, SHAYNA STROM & MICHAEL WISHNIE, MIGRATION POL’Y INST., COLLATERAL DAMAGE: AN EXAMINATION OF ICE’S FUGITIVE OPERATIONS PROGRAM 1–2 (2009).

³² See AJAY CHAUDRY ET AL., URB. INST., PAYING THE PRICE: THE IMPACT OF IMMIGRATION RAIDS ON AMERICA’S CHILDREN 11, 15–20 (2010); BESS CHIU ET AL., CONSTITUTION ON ICE: A REPORT ON IMMIGRATION HOME RAID OPERATIONS (2009), <http://cw.routledge.com/textbooks/9780415996945/human-rights/cardoza.pdf> [<http://perma.cc/L37T-GALE>]; David Thronson, *Creating Crisis: Immigration Raids and the Destabilization of Immigrant Families*, 43 WAKE FOREST L. REV. 391, 398–401 (2008); Nina Bernstein, *Report Says Immigration Agents Broke Laws and Agency Rules in Home Raids*, N.Y. TIMES (Jul. 21, 2009), <http://www.nytimes.com/2009/07/22/nyregion/22raids.html> [<http://perma.cc/4XP4-QWQV>].

Under the Obama Administration residential raids have been scaled back in favor of new enforcement initiatives such as ICE's Secure Communities partnership with local and state officials. This program allows ICE to place a detainer on non-citizens arrested by local and state law enforcement, leading to possible removal even if they are not convicted of the crime for which they were originally charged. Thirty-nine percent of persons apprehended through this initiative report that they have a U.S. citizen child or spouse.³³ Through this and other enforcement initiatives, the deportation rate has increased to new highs under the Obama Administration.³⁴ In response to a Freedom of Information Act request, ICE reported that it deported 204,810 parents of citizen-children between 2010 and 2012.³⁵ Recent changes in enforcement strategies have not made mixed-status families any less susceptible to separation through the detention and removal of their parents.

II. INTERIOR IMMIGRATION ENFORCEMENT AND ITS IMPACT ON ICE'S CITIZEN STAKEHOLDERS

The U.S. government's official characterization of deportation as a civil sanction rather than a criminal punishment has been subject to intensive judicial and scholarly criticism since this justification was first offered by the Supreme Court in *Fong Yue Ting v. United States*.³⁶ The justification of deportation as a civil sanction is controversial given the hardship that arises from an immigrant's removal from the country. It also does not reflect arguments that citizens and officials have provided to justify increasing the severity and scope of immigration enforcement measures as authorized under the 1996 Illegal Immigration Reform and Immigrant Responsibility Act.³⁷ For these reasons, legal scholars working at the intersection of immigration and criminal law (cimmigration) argue that immigration detention and removal constitutes a form of punishment, and that detainees ought to be accorded criminal constitutional protections.³⁸ We agree on the latter point.

³³ AARTI KOHLI, PETER L. MARKOWITZ & LISA CHAVEZ, UNIV. CAL. BERKELEY SCH. L., SECURE COMMUNITIES BY THE NUMBERS: AN ANALYSIS OF DEMOGRAPHICS AND DUE PROCESS 5 (2011).

³⁴ See U.S. OFFICE OF IMMIGRATION STATISTICS, DEP'T HOMELAND SEC., 2011 YEARBOOK OF IMMIGRATION STATISTICS 102 (2012).

³⁵ Seth Freed Wessler, *Primary Data: Deportations of Parents of U.S. Citizen Kids*, COLORLINES (Dec. 17, 2012, 9:30 AM), <http://www.colorlines.com/articles/primary-data-deportations-parents-us-citizen-kids> [<http://perma.cc/EX5M-49L7>].

³⁶ See *Fong Yue Ting v. United States*, 149 U.S. 698, 730 (1893).

³⁷ See DANIEL KANSTROOM, *AFTERMATH* 28–42 (2012).

³⁸ Juliet P. Stumpf, *The Cimmigration Crisis: Immigrants, Crime, and Sovereign Power*, in *GOVERNING IMMIGRATION THROUGH CRIME* 59, 69–73 (Julie A. Dowling & Jonathan Xavier Inda eds., 2013); DANIEL KANSTROOM, *DEPORTATION NATION* 15–20 (2007).

The severity of the consequences to the migrant arising from immigration detention and removal does not necessarily make detention and removal a form of punishment with a retributive purpose.³⁹ Therefore, we need to understand why citizens and officials insist upon the detention and removal of unauthorized immigrants.⁴⁰ What objectives do they hope to accomplish by doing so? What possible sanctions other than detention and deportation are available for ordinary status violators whose only offense was to enter the country unlawfully?

The original legal justification for immigration enforcement through detention and removal may be obsolete. Or it may fail to reflect the true risk that many unauthorized migrants and settlers in removal proceedings pose to the security of the nation and the welfare of local communities. An approach that was designed to respond to an immediate threat to the security of the nation is less applicable to the typical unauthorized immigrant parent of a citizen-child who has never transgressed any non-immigration related laws or community standards. Therefore, it is questionable whether the Department of Homeland Security (DHS) needs to detain an ordinary status violator in order to accomplish its stated objectives and mandate to all of its stakeholders.⁴¹

Furthermore, U.S. courts continue to stand by their initial characterization of deportation or removal as a civil proceeding that has a remedial, non-punitive objective.⁴² Courts in most major destinations of immigration throughout the world share this perspective.⁴³ We may acknowledge that we are dealing with a legal fiction that does not reflect current views on the severity of the alleged offense in question. Additionally, this legal fiction does not do justice to the consequences that are experienced by long-term settled immigrants and their families when they are detained and deported. As long as this doctrine is in place, it is important to understand the logic and implications of the Supreme Court's doctrine and the government's position. This information can then be used to hold the government accountable for how it chooses to enforce its immigration regulations that affect ordinary status violators.

³⁹ See Robert Pauw, *A New Look at Deportation as Punishment: Why at Least Some of the Constitution's Criminal Procedure Protections Must Apply*, 52 ADMIN. L. REV. 305, 325–27 (2000).

⁴⁰ See *id.*; Stumpf, *supra* note 38, at 67–69 (discussing the theory of membership in order to understand the enforcement of immigration law).

⁴¹ See TANGEMAN, *supra* note 29, at 3-1 to 3-6 (detailing the strategies and goals of the Department of Homeland Security in regards to detention and removal).

⁴² See *Padilla v. Kentucky*, 559 U.S. 356, 365 (2010) (holding that “deportation is a particularly severe ‘penalty,’ but it is not, in a strict sense, a criminal sanction” (quoting *Fong Yue Ting*, 149 U.S. at 740)).

⁴³ See Galina Cornelisse, *Immigration Detention and the Territoriality of Universal Rights*, in THE DEPORTATION REGIME: SOVEREIGNTY, SPACE, AND THE FREEDOM OF MOVEMENT 100, 120 (Nicholas de Genova & Nathalie Peutz eds., 2010); Daniel Wilsher, *The Administrative Detention of Non-Nationals Pursuant to Immigration Control: International and Constitutional Law Perspectives*, 53 INT’L & COMP. L.Q. 897, 922–24 (2004).

Why should it matter to the Bureau of Immigration and Customs Enforcement (ICE) or its political overseers if front-line enforcement officials and their state and local partners are overstepping their mission priorities by arresting large numbers of non-criminal aliens? More importantly, why should ICE and its local and state law enforcement partners change their strategy? After all, a large part of their mission is to remove unauthorized immigrants from the United States. However, even ICE has acknowledged that its authority is constrained by whether it fulfills its intended purpose on behalf of the stakeholders identified by Operation Endgame for whom immigration enforcement is intended to serve. The internal legitimacy and effectiveness of ICE's enforcement operations as defined by Operation Endgame are predicated on the development of "cooperative relationships and effective partnerships with our internal and external stakeholders" in order to "fulfill the demands of the President, the Congress and the American people."⁴⁴ This means coordinating enforcement priorities with the interests of "critical stakeholders" including law enforcement, community leaders, and U.S. Senators and Congressmen, which are not always consistent with or best served by maximizing arrests, detentions and removals. Also, because ICE defines immigrant rights groups, non-citizens, and their families as stakeholders in the process, this means that ICE and its 287(g) partners have an interest in ensuring that the human and legal rights of migrants and their families are respected in any enforcement operation.⁴⁵ This helps to ensure that the overall mission priorities are not compromised by negative publicity, political pressure, or adverse litigation.

III. IMMIGRATION POLICY CHANGES UNDER THE OBAMA ADMINISTRATION

In the absence of congressional action, the Obama Administration has taken an active role in setting priorities for the implementation of existing immigration policy. Some of these changes were designed to shift the priority from ordinary status violators whose only offense was entering the country unlawfully to non-citizens who have committed criminal offenses.

The Obama administration has taken a number of steps to shift the priority of the United States's immigration policy, using its discretionary power over the enforcement of legislative mandates to, in effect, institute its own immigration policy agenda that contains many progressive features. As early as 2009, the Obama Administration began to redirect enforcement efforts towards workplace enforcement. Further, in June 2011, the Bureau of Immigration and Customs Enforcement (ICE) Director John Morton issued a memo directing agents not to detain ordinary status violators who are disabled, elderly, pregnant, or nursing, or demonstrate that they are primary caretakers of children or

⁴⁴ TANGEMAN, *supra* note 29, at 1-1.

⁴⁵ *See id.* (setting forth stakeholders).

an infirm person, or whose detention is otherwise not in the public interest.⁴⁶ In June 2012, the Department of Homeland Security (DHS) Secretary Janet Napolitano issued a directive authorizing “deferred action for childhood arrivals” (DACA) allowing unauthorized immigrants to apply for status that would shield them from removal for two years.⁴⁷ In January 2013, DHS also allowed non-citizens seeking to stay together with their citizen family members to appeal the provision of the 1996 Illegal Immigration Reform and Immigrant Responsibility Act that requires them to return to their country of origin for ten years prior to applying for an immigration benefit in the United States.⁴⁸ In November 2013, the Obama Administration agreed to parole non-citizen family members of citizen armed forces personnel while they are serving overseas.⁴⁹

At the same time, however, the enforcement arm of DHS remains committed to aggressive immigration enforcement tactics aimed at increasing the number of deportations. To this end, ICE reported a new record number of deportations every year during the Obama Administration, culminating in 409,849 removals during fiscal year 2012.⁵⁰ While the John Morton memo has shifted ICE’s enforcement priorities to emphasize the removal of criminal non-citizens, the agency is still removing record numbers of ordinary status violators. To accomplish its deportation objectives, ICE continues to employ key elements of the “attrition through enforcement” strategy outlined by Kris Ko-

⁴⁶ See Memorandum from John Morton, Dir., U.S. Dep’t of Homeland Sec. on Exercising Prosecutorial Discretion Consistent with the Priorities of the Agency For the Apprehension, Detention, and Removal of Aliens to All Field Office Dirs., All Special Agents in Charge & All Chief Counsel 4 (June 17, 2011), <https://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf> [<https://perma.cc/88DW-E45F>].

⁴⁷ Memorandum from Janet Napolitano, Sec’y, Dep’t of Homeland Sec. on Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children to David V. Aguilar, Acting Comm’r, U.S. Customs and Border Protection, Alejandro Mayorkas, Dir., U.S. Citizenship and Immigration Servs., & John Morton, Dir., U.S. Immigration and Customs Enforcement (June 15, 2012), <http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf> [<http://perma.cc/7RJ4-PD5N>].

⁴⁸ See Provisional Unlawful Presence Waivers of Inadmissibility for Certain Immediate Relatives, 78 Fed. Reg. 536, 536 (Jan. 3, 2013) (to be codified at 8 C.F.R. 103, 212) (discussing how this process will reduce the amount of time spent away from family still in the United States).

⁴⁹ See Policy Memorandum, U.S. Citizenship and Immigration Servs., U.S. Dep’t of Homeland Sec. on Parole of Spouses, Children and Parents of Active Duty Members of the U.S. Armed Forces, the Selected Reserve of the Ready Reserve, and Former Members of the U.S. Armed Forces or Selected Reserve of the Ready Reserve and the Effect of Parole on Inadmissibility under Immigration and Nationality Act § 212(a)(6)(A)(i) (Nov. 15, 2013), <http://www.uscis.gov/executive-actions-immigration-parole-place-memorandum>.

⁵⁰ See Press Release, U.S. Immigration and Customs Enforcement, Dep’t of Homeland Sec., FY 2012: ICE Announces Year-end Removal Numbers, Highlights Focus on Key Priorities and Issues New National Detainer Guidance to Further Focus Resources (Dec. 20, 2012), <https://www.ice.gov/news/releases/fy-2012-ice-announces-year-end-removal-numbers-highlights-focus-key-priorities-and> [<https://perma.cc/8C8M-4MV9>].

bach, including new state and local partnerships (Secure Communities) and criminalizing and prosecuting unlawful entries (Operation Streamline). ICE continues to work with state and local partners that are implementing their own enforcement measures, even as the Obama Administration challenged Arizona's unilateral approach (SB 1070) in federal court.⁵¹

A. Secure Communities

Similar to the 287(g) agreements authorized under the Illegal Immigration Reform and Immigrant Responsibility Act, the Secure Communities program relied on integrated databases and collaborations with local and state law enforcement to enhance domestic deportation capacity.⁵² The goals of Secure Communities were to: "1. Identify criminal aliens through modernized information sharing . . . 2. Prioritize enforcement actions to ensure apprehension and removal of dangerous criminal aliens," and "3. Transform criminal alien enforcement processes and systems to achieve lasting results."⁵³ But the scope and impact of Secure Communities on local policing is far more expansive than those of the 287(g) agreements. The 287(g) agreement model was voluntary and required the federal government and the subnational jurisdiction in question to agree on their terms of cooperation. The Secure Communities Program was mandatory and nationwide in scope until it was replaced as part of the Obama Administration's November 2014 Immigration Accountability Executive Actions with the Priority Enforcement Program.⁵⁴

Although Secure Communities was piloted in fourteen jurisdictions in the last months of the George W. Bush administration in 2008, the program was dramatically expanded under the Obama Administration. By January 2013, ICE reported that Secure Communities has been activated in all 3181 jurisdic-

⁵¹ See *Arizona v. United States*, 132 S. Ct. 2492, 2494 (2012); *Delegation of Immigration Authority § 287(g) Immigration and Nationality Act*, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, DEP'T OF HOMELAND SEC., <http://www.ice.gov/factsheets/287g> [<http://perma.cc/2VTF-5JNS>].

⁵² DEP'T OF HOMELAND SEC., *SECURE COMMUNITIES: A COMPREHENSIVE PLAN TO IDENTIFY AND REMOVE CRIMINAL ALIENS (STRATEGIC PLAN)* (2009). Secure Communities is a program in which the federal government works with other "federal, state, tribal, and local law enforcement agencies" to maximize resources for finding criminal aliens. See *id.* The combined law enforcement agencies prioritize efforts to target the aliens that pose the greatest threat to public safety. *Id.*

⁵³ *Id.*

⁵⁴ Office of Enf't and Removal Operations, U.S. Immigration and Customs Enf't, Dep't of Homeland Sec., *Priority Enforcement Program* (2015), https://www.ice.gov/sites/default/files/documents/Fact%20sheet/2015/pep_brochure.pdf [<http://perma.cc/N3A3-AU6S>] ("ICE will only seek transfer of individuals in state and local custody in specific, limited circumstances. ICE will only issue a detainer where an individual fits within DHS's narrower enforcement priorities and ICE has probable cause that the individual is removable. In many cases, rather than issue a detainer, ICE will instead request notification (at least 48 hours, if possible) of when an individual is to be released. ICE will use this time to determine whether there is probable cause to conclude that the individual is removable.")

tions in the country.⁵⁵ As of 2015, under the Priority Enforcement Program that replaced Secure Communities, ICE is continuing to build on its information sharing agreements that it initiated under the Secure Communities program to identify and detain aliens apprehended by local and state law enforcement agencies.⁵⁶ For ICE, the success of the program is measured by the removal of convicted criminal aliens as a percentage of the total number of deportations. But even as the program approached full activation in 2012, 47.5%, or 199,445, of the record 419,384 aliens removed in fiscal year 2012 had not been convicted of crimes.⁵⁷

The program has received considerable scrutiny from its state and local partners in part because ICE officials misrepresented who should be detained as well as what the program requires partnering law enforcement agencies to do.⁵⁸ Moreover, ICE did not disseminate any rules regarding how states and local communities should administer the program's implementation. Some state and local partners to the program have also criticized it because of its detrimental effects on community policing.⁵⁹ In a June 2011 letter, Mary Heffernan, the Massachusetts Secretary of Public Safety and Security, writing on behalf of Massachusetts Governor Deval Patrick, informed the acting director of Secure Communities that Massachusetts would not be entering into a memorandum of agreement with ICE because "residents . . . expressed concerns about racial profiling . . . law enforcement fears that the program is overbroad and may deter the reporting of criminal activity," and the apprehensions of mayors that "the program will deteriorate relationships with communities that have been carefully cultivated with years of hard work."⁶⁰ New York and Illinois also attempted to withdraw from Secure Communities in 2011.⁶¹ In re-

⁵⁵ IMMIGRATION POL'Y CTR, THE GROWTH OF THE U.S. DEPORTATION MACHINE: MORE IMMIGRANTS ARE BEING "REMOVED" FROM THE UNITED STATES THAN EVER BEFORE 5 (2014), http://www.immigrationpolicy.org/sites/default/files/docs/deportation_machine_march_2014_final.pdf.

⁵⁶ U.S. IMMIGRATION AND CUSTOMS ENF'T, ICE'S USE OF IDENT/IAFIS INTEROPERABILITY: MONTHLY STATISTICS THROUGH FEBRUARY 28, 2015 (Feb. 28, 2015), http://www.ice.gov/sites/default/files/documents/FOIA/2015/sc_stats_YTD2015.pdf [<http://perma.cc/L8EQ-BDFN>].

⁵⁷ OFFICE OF IMMIGRATION STATISTICS, DEP'T OF HOMELAND SEC., 2012 YEARBOOK OF IMMIGRATION STATISTICS 113 (2013).

⁵⁸ See Lee Romney, *Congresswoman Says Federal Officials Lied About Program Targeting Arrested Inmates*, L.A. TIMES (Apr. 23, 2011), <http://articles.latimes.com/2011/apr/23/local/la-me-immig-jails-20110423> [<http://perma.cc/5SB7-NQ74>].

⁵⁹ NAT'L CONFERENCE OF STATE LEGISLATURES, SECURE COMMUNITIES (2012), <http://www.ncsl.org/documents/statefed/SecureCommunitiesJuly2012.pdf> [<http://perma.cc/3VMD-XX8N>].

⁶⁰ Letter from Mary Elizabeth Heffernan, Sec'y of Pub. Safety and Sec., to Marc Rapp, Acting Dir., Secure Communities, U.S. Immigration and Customs Enforcement (June 3, 2011), http://epic.org/privacy/secure_communities/sc_ma.pdf [<http://perma.cc/6URR-FMUQ>].

⁶¹ Kirk Semple & Julia Preston, *Deal to Share Fingerprints Is Dropped, Not Program*, N.Y. TIMES (Aug. 6, 2011), <http://www.nytimes.com/2011/08/06/us/06immig.html>; Letter from Pat Quinn, Governor of Ill., to Marc Rapp, Acting Assistant Dir., Secure Communities, U.S. Immigration and

sponse, ICE rescinded all of its joint agreements with state and local officials in August 2011 and proceeded to implement the program unilaterally with no provision for jurisdictions to opt-out.⁶²

In direct response to the criticism of the Secure Communities program by local and state law enforcement officials and the extent of their non-cooperation with the federal program, U.S. Secretary of Homeland Security Jeh Johnson announced that the Secure Communities program would be discontinued as of November 20, 2014.⁶³ In the same memo, however, Johnson declared that the overarching goal of Secure Communities “remains in my view a valid and important law enforcement objective.”⁶⁴ The successor to Secure Communities, the Priority Enforcement Program, still permits the FBI and ICE to check the fingerprints of every person arrested by local and state law enforcement officials.⁶⁵ The Priority Enforcement Program is still being implemented, and it remains to be seen whether it will limit the number of deportations of individuals who were arrested but not convicted of crimes.⁶⁶ Early evidence as of April 2015 suggests that, although ICE has been requesting fewer detainers from local and state law enforcement agencies, more of the detainer requests have been placed on individuals who have not been convicted of serious crimes.⁶⁷

B. Operation Streamline

Initiated by President George W. Bush and expanded by President Obama, Operation Streamline authorizes United States Customs and Border Patrol (USCBP) to file federal criminal charges against persons who entered the United States unlawfully.⁶⁸ This includes first-time offenders who were

Customs Enforcement (May 4, 2011), http://epic.org/privacy/secure_communities/sc_ill.pdf [<http://perma.cc/RU6V-B86N>].

⁶² Semple & Preston, *supra* note 61.

⁶³ Memorandum from Jeh Johnson, Sec’y Homeland Sec. on Secure Communities to Thomas S. Winkowski, Acting Dir., U.S. Immigration and Customs Enforcement, Megan Mack, Officer, Office of Civil Rights and Civil Liberties & Philip A. McNamara, Assistant Sec’y for Intergovernmental Affairs (Nov. 20, 2014), http://www.dhs.gov/sites/default/files/publications/14_1120_memo_secure_communities.pdf [<http://perma.cc/QD8F-6BEA>].

⁶⁴ *Id.*

⁶⁵ MARC R. ROSENBLUM, MIGRATION POL’Y INSTT., UNDERSTANDING THE POTENTIAL IMPACT OF EXECUTIVE ACTION ON IMMIGRATION ENFORCEMENT 18 (July 23, 2015).

⁶⁶ *Id.* at 19–20.

⁶⁷ *Further Decrease in Detainer Use: Still Not Targeting Serious Criminals*, TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, SYRACUSE UNIV. (Aug. 28, 2015), <http://trac.syr.edu/immigration/reports/402/> [<http://perma.cc/UXW5-5863>].

⁶⁸ Fernanda Santos, *Detainees Sentenced in Seconds in ‘Streamline’ Justice on Border*, N.Y. TIMES, Feb. 11, 2014, http://www.nytimes.com/2014/02/12/us/split-second-justice-as-us-cracks-down-on-border-crossers.html?_r=0.

previously allowed to voluntarily depart the country without charges.⁶⁹ Persons initially deported under Operation Streamline who are apprehended a second time can be charged with felony re-entry, an offense that, even without another criminal offense, carries a maximum sentence of two years.⁷⁰ Though this policy mostly affects individuals apprehended at the border by the U.S. Border Patrol, United States Attorney's Offices can also decide to charge unlawful entrants with criminal offenses rather than allowing immigration courts to handle matters as a violation of administrative law.⁷¹

The U.S. Marshals Service (USMS) is playing an increasing role in detaining people attempting to enter the United States without authorization. As statistics demonstrate, much of the growth in immigration detentions can be attributed to Operation Streamline. In 1994, USMS booked 8604 non-citizens on immigration charges. By 2011, the number of USMS immigration arrests rose to 84,313, representing an increase of 980% compared to a 211% increase (from 98,978 to 209,576) for all other offenses over the same time period. As with all other federal detainees facing criminal charges, individuals prosecuted because of Operation Streamline are held by USMS. In addition, those who are held for short periods for criminal immigration violations often complete their sentences under USMS custody.⁷² Between 2005 and 2011, the number of detainees held by USMS and booked on immigration charges increased by 121%, compared to the eighty-one percent increase during the previous six-year period.⁷³ Because of increased border security, the number of apprehensions by the USCBP decreased by about 72.7% (from about 1.2 million to 328,000) during the same period.⁷⁴ Therefore, the evidence suggests that USMS's enlarged detainee population was a direct result of increased criminal arrests and prosecutions rather than a rise in apprehensions by the USCBP.

C. State Law Initiatives: Determinations of Immigrant Status

The state law initiatives in Arizona serve as an example of the state law initiatives that have led to the spike in enforcement. On April 23, 2010, Arizo-

⁶⁹ Daniel Martinez & Jeremy Slack, *What Part of "Illegal" Don't You Understand? The Social Consequences of Criminalizing Unauthorized Mexican Migrants in the United States*, 22 SOC. & LEGAL STUD. 535, 544 (2013).

⁷⁰ See 8 U.S.C. § 1326(a) (1996).

⁷¹ See Stephen Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469, 479 (2007).

⁷² CODY MASON, THE SENTENCING PROJECT, DOLLARS AND DETAINEES: THE GROWTH OF FOR-PROFIT DETENTION 3 (2012), http://sentencingproject.org/doc/publications/inc_Dollars_and_Detainees.pdf [<http://perma.cc/UQ2F-Q6Z9>].

⁷³ *Id.*

⁷⁴ Lisa Seghetti & Daniel Durak, Cong. Research Serv., *Apprehensions of Unauthorized Migrants Along the Southwest Border: Fact Sheet 1* (2014), <https://www.fas.org/sgp/crs/homesecc/R43523.pdf> [<https://perma.cc/CYS7-JCCJ>].

na's legislature enacted the Support Our Law Enforcement and Safe Neighborhoods Act, commonly known as SB 1070.⁷⁵ Over the next year, state legislatures in Georgia, Alabama, South Carolina, and Indiana enacted similar policies seeking to promote the self-deportation of unauthorized immigrants through pervasive local, state, and federal immigration policing.⁷⁶ In addition, Utah pursued its own state immigration legislation that combined restrictive measures with authorization for a state guest worker program.⁷⁷ As a policy entrepreneur, Kris Kobach authored and promoted the original Arizona measure as a centerpiece of his "attrition through enforcement" strategy to complement partnerships such as Secure Communities and criminalization efforts including Operation Streamline.⁷⁸

Although SB 1070 contains features that reflect the purposes of 287(g) agreements, Secure Communities, and Operation Streamline, the state legislation and similar legislation in other states were introduced unilaterally without the cooperation of the federal government. Calvin Lewis has argued that the second section of SB 1070, which requires that law enforcement officers "make a reasonable attempt, when practicable, to determine an individual's immigration status during the course of any police stop, detention or arrest" by checking with federal immigration enforcement authorities, is consistent with the objectives of the 287(g) agreements and Secure Communities.⁷⁹ Section 3 and Section 5 of SB 1070, which criminalize the failure to carry an alien registration document as well as the harboring of unauthorized immigrants, arguably reflect the criminalization of immigration offenses in Operation Streamline.⁸⁰ Further, SB 1070 also contains a provision (Section 6) requiring local and state law enforcement to unilaterally pursue actions that Arizona claims are not being adequately pursued by federal authorities, including authorizing officers to arrest persons suspected of unlawful presence.⁸¹

⁷⁵ See Randal C. Archibold, *Arizona Enacts Stringent Law on Immigration*, N.Y. TIMES, Apr. 24, 2010, at A1. See generally S.B. 1070, 49th Leg., 2d Reg. Sess. (Az. 2010).

⁷⁶ Muzaffar Chishti & Faye Hipsman, *As Congress Tackles Immigration Legislation, State Lawmakers Retreat from Strict Measures*, MIGRATION POL'Y INST. (May 23, 2013), <http://www.migrationpolicy.org/article/congress-tackles-immigration-legislation-state-lawmakers-retreat-strict-measures> [<http://perma.cc/H6B6-MY6V>] (noting the impact of rulings enjoining state-level immigration legislation, including SB 1070). Self-deportation is when aliens voluntarily choose to leave the United States, especially in response to heightened enforcement. See Kobach, *supra* note 26, at 162.

⁷⁷ UTAH OFFICE LEGIS. RESEARCH & GEN. COUNSEL, SUMMARY OF SELECTED IMMIGRATION-RELATED LEGISLATION (2011).

⁷⁸ See Roxane L. Doty & Elizabeth S. Wheatley, *Private Detention and the Immigration Industrial Complex*, 7 INT'L POL. SOC. 426, 431–32 (2013).

⁷⁹ Calvin L. Lewis, *Arizona's S.B. 1070*, in DEBATES ON U.S. IMMIGRATION 177, 177–79 (Judith Gans, Elaine M. Replogle & Daniel J. Tichenor eds., 2012).

⁸⁰ See S.B. 1070, 49th Leg., 2d Reg. Sess. (Az. 2010).

⁸¹ See *id.*

The Obama Administration expressed concerns that state immigration enforcement measures would interfere with international relations. As a result, the Department of Justice brought suit, stating that SB 1070 superseded federal immigration law and enforcement priorities.⁸² On June 25, 2012, in *Arizona v. United States*, a five-member majority of the Supreme Court invalidated Sections 3, 5(C), and 6 of SB 1070 as preempted by federal immigration law.⁸³ However, the Court upheld the provision requiring state officers to “make a ‘reasonable attempt . . . to determine the immigration status’ of any person they stop, detain and arrest,” because “Congress has obligated ICE to respond to any request made by state officials for verification of a person’s citizenship or immigration status.”⁸⁴ The Court also justified this provision by stating that “[c]onsultation between federal and state officials is an important feature of the immigration system.”⁸⁵ The Supreme Court’s ruling provides Arizona and other states with support to continue to assist the federal government with its goal of detaining and removing more unauthorized immigrants from the country.

IV. LOBBYING ACTIVITIES

The current corrections system provides significant monetary incentive for private corrections corporations—institutions that make more money with larger prison populations—to lobby state and federal officials to create policies that support a rising prison population and, as a result, expand privatization contracts.⁸⁶ At a time when private prison companies are becoming further reliant on housing federal detainees, there is also a strong incentive to promote local and state immigration enforcement efforts that increase the number of non-citizen detainees. This focus on immigrant detainees is evidenced in the millions of dollars that private prison operators spent on federal lobbying following the creation of the Bureau of Immigration and Customs Enforcement (ICE) in 2003.

The Corrections Corporation of America (CCA) is an example of how private corrections corporations can benefit from a spike in the prison population, as well as how recent immigration enforcement policies have aided such corporations. The largest private prison operator that detains immigrants in the United States, CCA was on the verge of bankruptcy immediately prior to the

⁸² See Press Release, U.S. Dep’t of Justice, Citing Conflict with Federal Law, Department of Justice Challenges Arizona Law (July 6, 2010), <http://www.justice.gov/opa/pr/2010/July/10-opa-776.html> [<http://perma.cc/7BD4-HGDZ>].

⁸³ See *Arizona*, 132 S. Ct. at 2510.

⁸⁴ *Id.* at 2507–08.

⁸⁵ *Id.* at 2508.

⁸⁶ See Chris Kirkham, *Private Prison Corporation Offers Cash in Exchange for State Prisons*, HUFFINGTON POST (Feb. 14, 2012), http://www.huffingtonpost.com/2012/02/14/private-prisons-buying-state-prisons_n_1272143.html [<http://perma.cc/L9JK-URG9>].

9/11 attacks.⁸⁷ Today, CCA is a highly profitable company that has benefitted from the expansion of immigration enforcement and incarceration in the past decade. In its 2012 annual report to shareholders, the CCA reported that it derived \$206 million from its contracts with ICE for detaining immigrants, representing twelve percent of its total 2012 revenue of \$1.75 billion.⁸⁸ The same report warns shareholders that:

We currently derive, and expect to continue to derive, a significant portion of our revenues from a limited number of governmental agencies. The loss of, or a significant decrease in, business from the BOP, ICE, USMS, or various state agencies could seriously harm our financial condition and results of operations.⁸⁹

The 2012 annual report also notes that immigration reform legislation leading to the legalization of unauthorized immigrants might have an impact on “demand for our facilities and services” and revenue resulting from a small number of government contracts. In particular, CCA warns shareholders that:

For instance, any changes with respect to drugs and controlled substances or illegal immigration could affect the number of persons arrested, convicted, and sentenced, thereby potentially reducing demand for correctional facilities to house them. Immigration reform laws are currently a focus for legislators and politicians at the federal, state, and local level.⁹⁰

In 2013, in response to threats to its bottom line, CCA employed thirty-seven federal lobbyists split between five different lobbying firms as well as its own in-house political advocacy team.⁹¹ Private prison companies are also actively contributing to the re-election campaigns of officials who introduced or supported harsh immigration laws at the state level. Campaign contribution data strongly suggests that CCA and the GEO Group (the second largest private prison operator in the United States) actively shaped the creation of the anti-immigrant bill SB1070 in Arizona.⁹² Thirty of the thirty-seven sponsors of Arizona’s SB1070 received donations from prison lobbyists or private prison operators.⁹³ CCA also contributed funds to five out of the seven sponsors of

⁸⁷ See Martinez & Slack, *supra* note 69, at 538.

⁸⁸ Corrections Corp. of America, Annual Report (Form 10-K) 31, 48 (2012).

⁸⁹ *Id.* at 31.

⁹⁰ *Id.* at 28.

⁹¹ See generally *Lobbyists Representing Corrections Corp of America, 2013*, CTR. FOR RESPONSIVE POLITICS, <http://www.opensecrets.org/lobby/clientlbs.php?id=D000021940&year=2013> [<http://perma.cc/AG5Q-8DR8>].

⁹² See Doty & Wheatley, *supra* note 78, at 429.

⁹³ See Laura Sullivan, *Prison Economics Help Drive Ariz. Immigration Law*, NPR (Oct. 28, 2010), <http://www.npr.org/2010/10/28/130833741/prison-economics-help-drive-ariz-immigration-law> [<http://>

Georgia's state immigration enforcement law, HB 87.⁹⁴ In total, the three largest private prison operators, including CCA, GEO Group, and Management and Training Corporation, spent at least \$45 million on campaign donations and lobbyists at the state and federal level from 2003 to 2012.⁹⁵

Private prison operators have shaped immigration enforcement legislation at the local and state levels to their advantage. They continue to lobby lawmakers at all levels of government to protect their financial interest in the expansion of local, state and federal immigration enforcement efforts that send more non-citizens to their detention facilities.

V. IMPACT OF DETENTION AND REMOVAL ON IMMIGRANT FAMILIES

Among the main reasons for the expansion of the immigration detention apparatus even before the events of September 11, 2011 was to close perceived loopholes in the enforcement of immigration laws that led to the mass settlement of unauthorized immigrants in the United States. Federal immigration enforcement partnerships with local and state law enforcement, mandatory detention, and expedited removal provisions were mostly implemented after 2003. However, they were authorized under the 1996 Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) signed into law by President Clinton. This measure grew out of frustration by policymakers that the 1986 Immigration Reform and Control Act, which legalized three million unauthorized immigrants and expanded workplace enforcement, failed to stem the growth of the unauthorized population.⁹⁶ The 287(g) local-federal immigration enforcement partnerships expanded the reach of immigration enforcement in jurisdictions with a Memorandum of Agreement with the Bureau of Immigration and Customs Enforcement (ICE) following the implementation of the program in 2002.⁹⁷

In addition to authorizing expanded enforcement initiatives, IIRIRA also limited the discretion of immigration adjudicators to release on humanitarian

perma.cc/GCM8-DA6J]; *Bill Sponsors: AZ SB1070*, LEGISCAN, <http://legiscan.com/AZ/sponsors/SB1070/2010> [<http://perma.cc/MAC6-YJXH>].

⁹⁴ See Matthew Charles Cardinale, *Prison Lobbyists Help Spread Anti-Immigrant Laws to U.S. South*, INTER PRESS SERV. (May 26, 2011), <http://www.ipsnews.net/2011/05/prison-lobbyists-help-spread-anti-immigrant-laws-to-us-south> [<http://perma.cc/M9E8-G4S9>]; *Bill Sponsors: GA HB87*, LEGISCAN, <http://legiscan.com/GA/sponsors/HB87/2011> [<http://perma.cc/7JE9-WKBG>].

⁹⁵ See Lee Fang, *How Private Prisons Game the Immigration Detention System*, NATION, (Feb. 27, 2013), <http://www.thenation.com/article/173120/how-private-prisons-game-immigration-system> [<http://perma.cc/246P-JCJS>].

⁹⁶ See ANDREW WROE, THE REPUBLICAN PARTY AND IMMIGRATION POLITICS: FROM PROPOSITION 187 TO GEORGE W. BUSH 31–36, 157 (2008) (explaining the anti-immigrant sentiment in the United States in the early 1990s).

⁹⁷ Katharine M. Donato & Leslie Ann Rodriguez, *Police Arrests in a Time of Uncertainty: The Impact of 287(g) on Arrests in a New Immigrant Gateway*, 58 AM. BEHAV. SCIENTIST 1696, 1699–1700 (2014).

grounds non-Mexicans apprehended at the border. This measure was designed to close a perceived escape clause whereby unauthorized immigrant families with young children could be released into the community instead of being subject to immediate detention or removal. IIRIRA also curtailed a practice whereby immigration judges could suspend the deportation of long-term unauthorized immigrant residents if this would cause hardship to citizen-children.⁹⁸ This provision was meant to respond to the belief that unauthorized immigrant parents could gain immigration benefits simply by giving birth in the United States.⁹⁹ Together, IIRIRA's mandatory detention, expedited removal, and the end of "suspension of deportation" decreased the likelihood that unauthorized immigrant parents could be released or could successfully appeal their removal.

A. Impact on Unauthorized Immigrant Families

On May 15, 2006, then-Assistant Secretary of ICE, Julie Myers, announced the opening of a new detention facility operated by the Corrections Corporation of America in Hutto, Texas.¹⁰⁰ Under the Inter-Governmental Service Agreement contract between Williamson County, Texas and the Department of Homeland Security (DHS), the Corrections Corporation of America (CCA) was provided with \$2.8 million dollars a month to house 512 detainees at the Hutto facility.¹⁰¹ In turn, CCA was tasked with housing "illegal alien families" apprehended while crossing the border or in the course of immigration raids, many of which apprehended immigrant families in their own homes and neighborhoods.¹⁰² The facility was also designed to close a gap in the implementation of the "expedited removal" policy authorized under IIRIRA. This policy requires immigration authorities to detain every unauthorized migrant apprehended within 100 miles of the border for up to fourteen days after their entry.¹⁰³

⁹⁸ See Elwin Griffith, *The Transition Between Suspension of Deportation and Cancellation of Removal for Nonpermanent Residents Under the Immigration and Nationality Act: The Impact of the 1996 Reform Legislation*, 48 DRAKE L. REV. 79, 81–82, 84 (1999).

⁹⁹ See CHRISTINA GERKEN, MODEL IMMIGRANTS AND UNDESIRABLE ALIENS: THE COST OF IMMIGRATION REFORM IN THE 1990S, at 122–23 (2013).

¹⁰⁰ See Press Release, U.S. Dep't of Homeland Sec., DHS Closes Loophole by Expanding Expedited Removal to Cover Illegal Alien Families: New Facility in Texas Opens Today for Illegal Alien Families (May 15, 2006).

¹⁰¹ See Ralph Blumenthal, *U.S. Gives Tour of Family Detention Center That Critics Liken to a Prison*, N.Y. TIMES, (Feb. 10, 2007), http://www.nytimes.com/2007/02/10/us/10detain.html?_r=0 [<http://perma.cc/VM5A-67QP>]; Inter-Governmental Service Agreement, Modification No. 0001, Inter-Governmental Service Agreement Between the U.S. Department of Homeland Security and Williamson County, Texas (Apr. 28, 2006).

¹⁰² See Press Release, U.S. Dep't. of Homeland Sec., *supra* note 100.

¹⁰³ Joanna Jacobi Lydgate, *Assembly-Line Justice: A Review of Operation Streamline*, 98 CAL. L. REV. 481, 489–90, n.45 (2010).

Before the creation of the DHS and the implementation of ICE's Operation Endgame, unauthorized immigrant parents with young children were often released into the community with a "Notice to Appear" in immigration court.¹⁰⁴ In ending the practice of supervised release on humanitarian grounds, Operation Endgame led to the separation of non-citizen parents and children subsequent to their detention.¹⁰⁵ In this context, ICE Secretary Myers advertised the new family detention center in humanitarian terms as a policy of "deterrence with dignity by allowing families to remain together, while sending the clear message that families entering the United States illegally will be returned home."¹⁰⁶

Over the next year, human rights groups that visited the prison found that CCA officials were operating the facility as a "medium-security prison." The children housed there were treated as ordinary inmates by prison officials who ignored medical, educational and other welfare standards as required by *Reno v. Flores*.¹⁰⁷ In response, the ACLU brought suit against then-DHS Secretary Michael Chertoff on behalf of sixteen children detained in Hutto. The lawsuit alleged that the CCA personnel operating Hutto on ICE's behalf "show a pattern of officially sanctioned behavior that . . . establish a credible threat of future injury" to the children housed there, ranging from separating parents from children for misbehavior to the denial of medical care.¹⁰⁸ After ICE settled with the ACLU in August 2007, children were guaranteed at least five hours of schooling a day and the right to wear their own clothing in their cells.¹⁰⁹ During the first year of the Obama Administration, on August 6, 2009, ICE Assistant Secretary John Morton announced plans to discontinue family detention at Hutto.¹¹⁰ But with a surge in new unauthorized immigration from Central America, ICE once again began to send immigrant families detained by Border

¹⁰⁴ See Lauren Martin, *Catch and Remove: Detention, Deterrence and Discipline in U.S. Non-Citizen Family Detention Practice*, 17 *GEOPOLITICS* 312, 319 (2012).

¹⁰⁵ See *id.* at 319–20.

¹⁰⁶ Press Release, U.S. Dep't. of Homeland Sec., *supra* note 100.

¹⁰⁷ See *Reno v. Flores*, 507 U.S. 292, 298 (1993) (discussing what the detention facility must provide to juvenile detainees); LUTHERAN IMMIGRATION AND REFUGEE SERV. & WOMEN'S COMMISSION FOR REFUGEE WOMEN & CHILDREN, LOCKING UP FAMILY VALUES: THE DETENTION OF IMMIGRANT FAMILIES 7, 36–44 (2007). *Reno v. Flores* was a class action lawsuit brought by juvenile aliens apprehended by the then Immigration and Naturalization Service. 507 U.S. at 292. The juvenile aliens challenged their detention pending their deportation proceedings, arguing they should be released into the custody of a responsible adult. *Id.* at 294. The Supreme Court discussed the Service's policy and upheld the regulation allowing for the juvenile alien's detention. *Id.* at 298, 315.

¹⁰⁸ See Complaint for Declaratory and Injunctive Relief at 25, *Blanco v. Chertoff*, No. 1:07-CV-00309-SS (W.D. Tex. Apr. 20, 2007).

¹⁰⁹ See Settlement Agreement at 4, 29, *In re Hutto Family Detention Ctr.*, No. A-07-CA-164-SS (W.D. Tex. Aug. 26, 2007).

¹¹⁰ Press Release, U.S. Dep't of Homeland Sec., ICE Announces Major Reforms to Immigration Detention System (Aug. 6, 2009) (on file with author).

Patrol to private detention facilities in Texas on August 1, 2014, this time operated by the GEO Group in Karnes County.¹¹¹

B. Impact on Mixed-Citizenship Status Families

Unlike the above discussed Hutto and Karnes detainees who were apprehended shortly after entering the United States, many immigrant families have lived in the United States for an extended period prior to their detention. Most unauthorized immigrants that are in the United States today have been in the United States since at least 2005.¹¹² In March 2013, DHS released estimates that 9.89 million persons representing eighty-seven percent of the 11.43 million unauthorized immigrants living in the United States as of January 2011 entered before 2005.¹¹³ The Pew Hispanic Center estimates that 4.7 million unauthorized immigrants are the parents of minor children.¹¹⁴ A small percentage of these children were born abroad, but 4.5 million children who are citizens because they were born in the United States have an unauthorized immigrant parent.¹¹⁵

Having a citizen-child does not prevent immigration officials from detaining or removing an unauthorized immigrant parent from the United States. Nor does it provide most applicants with a legal basis to appeal their detention or removal. Before 1996, United States immigration judges had expansive discretionary powers to “suspend the deportation” of unauthorized immigrant parents residing in the United States for more than seven years based on their character, hardship to their children, and other connections to the community.¹¹⁶ IIRIRA curtailed this discretionary power, replacing it with a “cancellation of removal” provision limited to only 4000 applicants per year, which represents less than a tenth of a percent of the total number of unauthorized immigrant parents in the United States.¹¹⁷

To be eligible for cancellation of removal, unauthorized immigrant parents must prove that their citizen-children would suffer “exceptional and extremely unusual hardship” far exceeding the harm experienced by other fami-

¹¹¹ See Joy Diaz, *A Private Prison Group Runs Texas' New Detention Center*, KWBU: HEART OF TEXAS PUBLIC RADIO (Aug. 6, 2014), <http://kwbu.org/post/private-prison-group-runs-texas-new-immigrant-detention-center> [<http://perma.cc/9KEU-W9MJ>].

¹¹² See BRYAN BAKER & NANCY RYTINA, U.S. DEP'T OF HOMELAND SEC., ESTIMATES OF THE UNAUTHORIZED IMMIGRANT POPULATION RESIDING IN THE UNITED STATES: JANUARY 2012, at 1 (2013).

¹¹³ See *id.* at 3.

¹¹⁴ PAUL TAYLOR ET AL., PEW RESEARCH CTR., UNAUTHORIZED IMMIGRANTS: LENGTH OF RESIDENCY, PATTERNS OF PARENTHOOD 5 (2011).

¹¹⁵ See PASSEL & COHN, *supra* note 5, at 13.

¹¹⁶ *In re Marin*, 16 I. & N. Dec. 581, 582, 584–85 (B.I.A. 1978).

¹¹⁷ See Illegal Immigration Reform and Immigrant Responsibility Act of 1996 § 240A, 8 U.S.C. § 1229b(b) (2012).

lies facing deportation.¹¹⁸ Under this standard, the Board of Immigration Appeals (BIA) deemed that an applicant, Francisco Javier Monreal-Aguinaga, who resided in the United States from age fourteen to thirty-four, with a full-time job, two school aged citizen-children who have never been to Mexico, and responsibility for caring for elderly parents as ineligible for relief from removal.¹¹⁹ In their decision, the majority acknowledged that Monreal-Aguinaga's children would suffer "extreme hardship" that would have been sufficient to justify allowing him to remain in the country under the pre-1996 standard.¹²⁰

The U.S. born citizen-children of unauthorized immigrants have a constitutional right to remain in the United States under a longstanding interpretation of the Fourteenth Amendment's citizenship clause.¹²¹ However, minor citizen-children cannot use this status as a basis for sponsoring their unauthorized parents for immigration benefits, or for appealing their parents' deportation orders. In *Acosta v. Gaffney*, the Third Circuit Court of Appeals rejected the claim that a child's right to enjoy the benefits of his or her citizenship is contingent upon being able to remain in the United States under the care of his or her parents or guardians.¹²² Following this decision, an unauthorized immigrant mother and head of the civil rights group *La Familia Latina Unida*, Elvira Arellano, initiated a high-profile challenge that was rejected in 2006.¹²³ In both cases, the majority ruled that children did not lose their rights as citizens when their parents were deported because they could remain under the care of an alternative guardian or leave with their parents and then return as adults. According to this argument, parents facing deportation do not necessarily lose their parental rights because they have the choice to take their citizen-children with them or to leave them with a relative or guardian or in foster care.

However, state family courts are now challenging even this limited parental right, declaring that unauthorized immigrants in immigration detention are unfit parents of their citizen-children. State courts have declared unauthorized immigrants that are detained to be unfit parents and stripped them of their parental rights.¹²⁴ In areas where local law enforcement signed a 287(g) agreement with ICE to enforce immigration laws at the local level, children in foster care were on average twenty-nine percent more likely to have an unauthorized

¹¹⁸ *Id.* § 240A(b)(1)(D).

¹¹⁹ *In re Monreal-Aguinaga*, 23 I. & N. Dec. 56, 64–65 (B.I.A. 2001).

¹²⁰ *See id.* at 64.

¹²¹ *See Wong Kim Ark v. United States*, 169 U.S. 649, 705 (1898).

¹²² *See Acosta v. Gaffney*, 558 F.2d 1153, 1157 (3d Cir. 1977).

¹²³ *See Coleman v. United States*, 454 F. Supp. 2d 757, 759 (N.D. Ill. 2006).

¹²⁴ Vinita Andrapalliyal, *The CPS Took My Baby Away: Threats to Immigrant Parental Rights and a Proposed Federal Solution*, 7 HARV. L. & POL'Y REV. 173, 174–75 (2013).

immigrant parent than in other counties.¹²⁵ They are often detained hundreds of miles from their children in remote detention facilities, limiting access to legal counsel, family members, and immigrant assistance agencies. As a practical matter, parents who are in ICE custody or removed to a foreign country face insurmountable obstacles to challenging this decision regardless of the merits of their case. If no other U.S.-based relatives come forward to claim their citizen-children, the children can become wards of the state.¹²⁶

Removing parents from their citizen-children can have a significant negative impact on the citizen-children. According to a study by the Applied Research Center in 2011, an estimated 5100 citizen-children are in foster care as the result of their parents' detention or removal from the United States.¹²⁷ Apart from parental rights considerations and the interests of children in remaining in their communities under the care of their parents, taxpayers are forced to bear the costs of raising citizen-children in foster care while the immigrant parents are detained. As a result, state interests may be harmed in the pursuit of the immediate perceived benefit to the state of removing deportable parents without exception.¹²⁸

CONCLUSION: TOWARDS ALTERNATIVES

Changes in interior immigration enforcement priorities instituted by the Obama Administration under ICE Assistant Secretary John Morton in 2011 were meant to shift the focus of enforcement away from ordinary status violators with U.S. citizen dependents and towards criminal aliens and national security threats. However, although the most highly publicized abuses at the hands of private corrections corporations were curtailed under the Obama Administration, the number of ordinary status violators with citizen-children detained and deported continues to rise. New initiatives such as Secure Communities and its successor, the Priority Enforcement Program, have broadened the reach of interior immigration enforcement into immigrant communities by requiring all local law enforcement agencies to check the immigration status of every person arrested, even if they are not ultimately convicted. Thus, the problem that the Morton Memo was meant to address is still with us. Unauthorized immigrants whose only offense was entering the United States without authorization are being detained and deported in record numbers, impacting hundreds of thousands of citizen-dependents. Further, private corrections

¹²⁵ SETH WESSLER, APPLIED RESEARCH CTR., SHATTERED FAMILIES: THE PERILOUS INTERSECTION OF IMMIGRATION ENFORCEMENT AND THE CHILD WELFARE SYSTEM 4 (2011).

¹²⁶ See Hall, *supra* note 15, at 1489.

¹²⁷ WESSLER, *supra* note 125, at 6.

¹²⁸ See Michael J. Sullivan, *Conditional Residence for Unauthorised Immigrant Parents*, 22 INT'L J. CHILD. RTS. 776, 793 (2014).

corporations are continuing to benefit from the increase in detentions of ordinary status violators at the expense of citizen stakeholders.

We are not making a case for amnesty, or that interior immigration enforcement actions directed at ordinary status violators should cease outright to avoid hardship to them and their citizen family members. This article was limited to exposing ICE's continued failure to redirect detention and deportation resources to national security threats and aliens convicted of serious criminal offenses. The article also suggests that a targeted enforcement strategy would be better served by pursuing alternatives to the detention of ordinary status violators. We are willing to accept that violations of United States immigration law, however minor, need to be accounted for. As a short-term solution, alternatives to detention subsequent to apprehension, such as community supervision and electronic monitoring, should be used whenever possible as a cost-effective strategy to allow low-risk ordinary status violators to remain in their communities with their citizen-dependents.

A 2013 report by the National Immigration Forum notes that it costs ICE a minimum of \$159 a day to detain a non-citizen as compared to a maximum of seventeen dollars a day for alternatives to detention, which includes electronic monitoring and telephonic reporting of non-violent detainees released into the community.¹²⁹ As a longer-term response, future research that takes citizen objections to unauthorized immigration seriously as crimes should consider whether ordinary status violations warrant sanctions that crimmigration scholars insist are retributory, deterrent, and incapacitory.¹³⁰ We suggest that a restorative justice approach requiring ordinary status violators to provide restitution in their communities could effectively balance accountability for unlawful entry against the community's interest in allowing them to remain in a productive role as caregivers and workers.

¹²⁹ See NAT'L IMMIGRATION FORUM, *THE MATH OF IMMIGRATION DETENTION: RUNAWAY COSTS FOR IMMIGRATION DETENTION DO NOT ADD UP TO SENSIBLE POLICIES 2* (2013).

¹³⁰ See Stumpf, *supra* note 38, at 71 (explaining the three emphases of immigration law specifically in regards to the expansion of deportation).

