



The Law That Begot the Modern US Immigration Enforcement System: IIRIRA 20 Years Later

- S11 From IIRIRA to Trump: Connecting the Dots to the Current US Immigration Crisis**
DONALD KERWIN
- S24 Immigration and the War on Crime: Law and Order Politics and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996**
PATRISIA MACIAS-ROJAS
- S49 Making Immigrants into Criminals: Legal Processes of Criminalization in the Post-IIRIRA Era**
LEISY ABREGO, MAT COLEMAN, DANIEL E. MARTINEZ, CECILIA MENJIVAR, and JEREMY SLACK
- S71 Local Immigration Enforcement and Arrests of the Hispanic Population**
MICHAEL COON
- S93 Twenty Years After IIRIRA: The Rise of Immigrant Detention and Its Effects on Latinx Communities Across the Nation**
MELINA JUAREZ, BÁRBARA GÓMEZ-AGUIÑAGA, and SONIA P. BETTEZ
- S116 Weeping in the Playtime of Others: The Obama Administration's Failed Reform of ICE Family Detention Practices**
DORA SCHRIO
- S145 The Human Cost of IIRIRA – Stories From Individuals Impacted by the Immigration Detention System**
SABA AHMED, ADINA APPELBAUM, and RACHEL JORDAN
- S168 Redefining American Families: The Disparate Effects of IIRIRA's Automatic Bars to Reentry and Sponsorship Requirements on Mixed-Citizenship Couples**
JANE LILLY LOPEZ
- S184 How the Illegal Immigration Reform and Immigration Responsibility Act of 1996 Has Undermined US Refugee Protection Obligations and Wasted Government Resources**
ELEANOR ACER and OLGA BYRNE

Executive Editor:

Donald Kerwin
Executive Director, Center for Migration Studies

Associate Editors:

John J. Hoeffner
Center for Migration Studies

Michele R. Pistone
Villanova University School of Law

Editorial Office:

Aimee Wenyue Chen
Editorial and Production Assistant, Center for Migration Studies

Editorial Board:

Edward Alden
Council on Foreign Relations

J. Kevin Appleby
Center for Migration Studies

Leonir Chiarello
Scalabrini International Migration Network

Elizabeth Ferris
Georgetown University

Elizabeth Fussell
Brown University

Anna Marie Gallagher
Maggio + Kattar

Douglas Gurak
Cornell University

Jacqueline Hagan
University of North Carolina at Chapel Hill

Donald Kerwin
Center for Migration Studies
Ex Officio

Rey Koslowski
University at Albany, State University of New York

Ellen Percy Kraly
Colgate University

Daniel E. Martínez
University of Arizona

Helen Morris
United Nations High Commissioner for Refugees

Emily Ryo
University of Southern California

Todd Scribner
United States Conference of Catholic Bishops

Lynn Shotwell
Council for Global Immigration

Margaret Stock
Cascadia Cross Border Law Group LLC

Charles Wheeler
Catholic Legal Immigration Network, Inc.

Jamie Winders
Syracuse University

Tom K. Wong
University of California, San Diego

Steve Yale-Loehr
Cornell University Law School

Information for subscribers:

The *Journal on Migration and Human Security* publishes open access papers online monthly and compiles a print volume annually. Sign up to receive electronic articles and updates at: <http://cmsny.org/mailling-list/>.

Submissions:

The *Journal on Migration and Human Security* seeks to publish rigorous and well-argued papers that can significantly inform and contribute to the US and international policy debates on migration. It particularly welcomes papers that: address timely migration-related “human security” issues, broadly defined; cover issues and research that receive insufficient attention in public policy circles; provide new information, ideas, non-traditional perspectives, comparative scholarship, or multi-disciplinary analysis; and articulate areas of agreement and disagreement on particular issues, as well as gaps in knowledge.

Guidelines for submissions are available at:
<http://cmsny.org/jmhs/submission-guidelines/>.

The *Journal on Migration and Human Security* is a publication of the Center for Migration Studies of New York, 307 E 60th Street, 4th Floor, New York, NY 10022; Telephone: 212-337-3080; Email: jmhs@cmsny.org.

ISSN 2331-5024 (Print)
ISSN 2330-2488 (Online)

© 2018 by the Center for Migration Studies of New York.

Photo credit: Shutterstock/Sherry V. Smith

The articles in this collection were originally published by the Center for Migration for Studies and the *Journal on Migration and Human Security* in 2017 and 2018. They are reproduced in this volume under new pagination with the original volume and issue number appearing in the footer of each article.

Journal on Migration and Human Security

**The Law That Begot the Modern US
Immigration Enforcement System:
IIRIRA 20 Years Later**



From IIRIRA to Trump: Connecting the Dots to the Current US Immigration Crisis

Donald Kerwin¹
Center for Migration Studies

Executive Summary

When signing into law the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA, or “the Act”),² President William J. Clinton asserted that the legislation strengthened “the rule of law by cracking down on illegal immigration at the border, in the workplace, and in the criminal justice system — without punishing those living in the United States legally” (Clinton 1996). In fact, the Act has severely punished US citizens and noncitizens of all statuses. It has also eroded the rule of law by eliminating due process from the overwhelming majority of removal cases, curtailing equitable relief from removal, mandating detention (without individualized custody determinations) for broad swaths of those facing deportation, and erecting insurmountable, technical roadblocks to asylum. In addition, it created new immigration-related crimes and established “the concept of ‘criminal alienhood,’” which has “slowly, but purposefully” conflated criminality and lack of immigration status (Abrego et al. 2017, 695). It also conditioned family reunification on income, divided mixed-status families, and consigned other families to marginal and insecure lives in the United States (Lopez 2017, 246). Finally, it created the 287(g) program that enlists state and local law enforcement agencies in immigration enforcement and drives a wedge between police and immigrant communities.

The trend of “cracking down” on immigrants did not begin with IIRIRA. The Anti-Drug Abuse Act of 1986, the Anti-Drug Abuse Act of 1988, and the 1990 Immigration Act, for example, expanded deportable offenses (Abrego et al. 2017, 697; Macías-Rojas 2018, 3–4). IIRIRA, however, significantly “ratchet[ed] up” the “punitive aspects of US immigration law already in place” (Abrego et al. 2017, 702), and erected much of the legal and operational infrastructure that underlies the Trump administration’s plan to remove millions of undocumented residents and their families, to terrify others into leaving “voluntarily,” and to slash legal immigration.

¹ The author and editors wish to thank Charles Wheeler for his superb edits to this article.

² Pub. L. No. 104-208, 110 Stat. 3009-546 (1996).

In 2016, the Center for Migration Studies of New York (CMS) issued a call for papers to examine IIRIRA's multifaceted consequences.³ Between March 2017 and January 2018, CMS published eight papers from this collection in its *Journal on Migration and Human Security* (JMHS). The papers cover the political conditions that gave rise to IIRIRA, and the Act's impact on immigrants, families, communities, and the US immigration system. This article draws on these papers — as well as sources closer to IIRIRA's passage and implementation — to describe how the Act transformed US immigration policies and laid the groundwork for the Trump administration's policies.⁴ After a brief discussion of IIRIRA's origins, the article discusses the law's effects and subsequent policies related to the growth of the US immigration enforcement apparatus, removal, asylum, detention, the criminal prosecution of immigrants, the treatment of immigrant families, and joint federal-state enforcement activities.

Historical Antecedents

How did IIRIRA come to pass? Prior to the 1990s, “crime-centered rhetoric did not dominate the public narrative on immigration” (Macías-Rojas 2018, 7). In the 1960s, for example, the Immigration and Naturalization Service (INS) commissioner attributed the rise in illegal migration not to criminality but to the inability of needed workers to enter legally

3 An expert project advisory group helped to shape the call for papers and to evaluate the submissions. This group included Aixa Cintrón-Vélez, program director, Russell Sage Foundation; Mathew Coleman, associate professor of geography, The Ohio State University; Katherine M. Donato, Donald G. Herzberg Chair in International Migration and director of the Institute for the Study of International Migration in the School of Foreign Service, Georgetown University; Megan French-Marcelin, fair hiring project coordinator, JustLeadershipUSA; Tonya Golash-Boza, associate professor of sociology, University of California, Merced; Josiah Heyman, director of the Center for Interamerican and Border Studies, professor of anthropology, and Endowed Professor of Border Trade Issues, The University of Texas at El Paso; John Hoeffner and Michele Pistone, associate editors, *Journal on Migration and Human Security*; David Dyssegaard Kallick, deputy director and director of immigration research, Fiscal Policy Institute; M. Brinton Lykes, co-director, Center for Human Rights and International Justice, and professor, Applied Developmental and Educational Psychology, Boston College; Rhonda Ortiz, managing director, Program for Environmental and Regional Equity and the Center for the Study of Immigrant Integration, University of Southern California; Manuel Pastor, professor of sociology and American Studies and Ethnicity, director of the Program for Environmental and Regional Equity (PERE), and director of the Center for the Study of Immigrant Integration (CSII), University of Southern California; Judy Rabinovitz, deputy director of the Immigrants' Rights Project, American Civil Liberties Union; Rubén Rumbaut, Distinguished Professor of Sociology, University of California, Irvine; and Tara Watson, professor of economics and chair of public health, Williams College. CMS particularly thanks Judy Rabinovitz for proposing a series of research papers along these lines.

4 Although not discussed in this article, IIRIRA laid the groundwork for the development of an automated exit-entry system to screen and track foreign visitors. Whereas the Immigration Reform and Control Act of 1986 criminalized the hiring of unauthorized workers, IIRIRA authorized three four-year pilot programs to screen employees for work eligibility. The Basic Pilot program ultimately evolved into E-Verify, the federal government's online employment verification system. IIRIRA also created the Student and Exchange Visitor Information System (SEVIS), which collects biographic information on foreign-born students, exchange visitors, and their dependents.

following termination of the Bracero Program (*ibid.*, 3).⁵ In the 1970s and 1980s, tough-on-crime and mass incarceration policies led to prison overcrowding, which politicians soon blamed on immigrants. This line of attack morphed into criticism of undocumented immigrants for crowding schools, hospitals, and other institutions, and allegedly forcing US taxpayers to bear the costs (*ibid.*, 8).

In the 1990s, President Clinton and key democratic senators attempted to appropriate Republican anticrime rhetoric by taking a “tougher stance on unauthorized immigration and crime” and by “recast[ing] unauthorized migration as a crime” (Macías-Rojas 2018, 7–8, 12). The need for greater immigration controls represented a strong theme in the 1994 federal and California state elections (Lind 2016). IIRIRA came on the heels of two other seminal pieces of legislation in 1996. The Antiterrorism and Effective Death Penalty Act (AEDPA)⁶ expanded the criminal grounds for deportation, limited relief from removal, restricted judicial review, and expanded mandatory detention. The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 restricted immigrants’ access to public benefits.⁷

Enforcement Growth

IIRIRA set the stage for the growth of the immense US immigration enforcement system by authorizing significant funding for border and interior enforcement and by establishing an interlocking set of enforcement partnerships and programs. It also restricted legal immigration, particularly by low-income applicants. US immigration enforcement funding has increased dramatically since IIRIRA’s enactment, spurred by high levels of unauthorized migration from the 1990s through the mid-2000s, the 9/11 terrorist attacks, and the creation of the US Department of Homeland Security (DHS) in November 2002. Between 1997 and 2018, the US immigration enforcement (actual) budget rose from \$1.935 billion (\$3 billion adjusted for inflation) to \$21.1 billion, a figure that conservatively counts only appropriations to Customs and Border Protection (CBP) and Immigration and Customs Enforcement (ICE) (Krouse 1998, CRS-3; US Senate Committee on Appropriations 2018), although other federal agencies participate in the enforcement system. As a result, removals increased from 114,000 in 1997 to a historic high of 419,000 in fiscal year (FY) 2012 (Passel et al. 2014, 9). In FY 2017, the United States removed 226,119 persons (ICE 2018, 12).

The Trump administration seeks a substantial increase in enforcement funding and agency staffing. The centerpiece of its enforcement strategy has been “the immediate construction” of a \$25 billion, 2,000-mile southern border wall, which is “monitored and supported by adequate personnel so as to prevent illegal immigration, drug and human trafficking, and acts of terrorism.”⁸ It has also set the goal of “operational control” of the border, defined

⁵ The Bracero Program brought millions of Mexican agricultural guestworkers to the United States between 1942 and 1964.

⁶ Pub. L. No. 104-132, 110 Stat. 1214 (1996).

⁷ Pub. L. No. 104-193, 110 Stat. 2105 (1996).

⁸ Border Security and Immigration Enforcement Improvements, Exec. Order No. 13767, 82 Fed. Reg. 8793 (Jan. 25, 2017).

as “the prevention of all unlawful entries.”⁹ Both the wall and “no unlawful entries” are politically symbolic goals, impossible to achieve, and unnecessary given multiyear decreases in border crossings.¹⁰ They might also be counterproductive because border enforcement “cages” undocumented immigrants: it largely operates as a disincentive to departure and limits cross-border circulation (Massey, Pren, and Durand 2016). The wall also fails to address the largest group of newly undocumented persons, those who enter legally and overstay temporary visas (Warren and Kerwin 2017a). In addition, it would not stop transnational criminals, traffickers, and security risks, who mostly enter through ports of entry (POEs).

As a presidential candidate, Donald Trump repeatedly attacked the Obama administration for executive overreach in creating the Deferred Action for Childhood Arrivals (DACA) program and prioritizing the removal of criminals, security risks, and recent border crossers. The Trump administration has accordingly used its discretion to terminate DACA and to depopulate the US refugee resettlement and temporary protected status programs (Kerwin 2017). Its overall goal has been the arrest and removal of all immigrants “with questionable status” (Abrego et al. 2017, 709), or a program of large-scale and indiscriminate deportations, with all its deleterious human, social, and economic consequences (Warren and Kerwin 2017b).

Removal

IIRIRA created a consolidated “removal” process and expanded the offenses leading to removal. However, following its passage, noncitizens still faced removal on two broad grounds: inadmissibility and deportability. Post-IIRIRA, the criminal grounds of inadmissibility included:

- acts that constituted “the essential element” of a crime of moral turpitude or controlled substance violation;
- multiple convictions with an aggregate sentence of five years or more;
- controlled substance trafficking; and
- prostitution-related offenses (Kerwin 1999, 1215).

Deportable crimes included:

- crimes of “moral turpitude” committed within five years of admission for which a sentence of at least one year could be imposed;
- two or more crimes of moral turpitude;
- controlled substance violations, excluding a single offense of simple possession of marijuana of 30 grams or less;

⁹ Id.

¹⁰ According to the Department of Homeland Security, “available data indicate that the southwest land border is more difficult to illegally cross today than ever before” (DHS/OIS 2017, 19).

From IIRIRA to Trump

- high-speed (over the speed limit) flight from an immigration checkpoint;
- firearms offenses; and
- “aggravated felonies,” a designation that triggers fast-track removal, mandatory detention, and permanent banishment from the country (*ibid.*, 1215).¹¹

The definition of “aggravated felony” originally included murder, trafficking in weapons, and controlled substance offenses (Morris 1997, 1324). AEDPA significantly expanded the crimes that constitute an aggravated felony, and IIRIRA added smuggling offenses (with a narrow, one-time exception for family members), money laundering of \$10,000 or more, and crimes of violence or theft “for which” the term of imprisonment is one year or more (*ibid.*, 1325).

IIRIRA also stripped immigration judges of much of their discretion to grant relief from removal (allow persons to stay) based on US ties and other equities. Prior to IIRIRA, “suspension of deportation” was granted at relatively high rates to noncitizens in deportation proceedings who had lived continuously in the United States for seven years, had good moral character, and could show that their deportation would cause “extreme hardship” to themselves or to a US citizen or lawful permanent resident (LPR) spouse, parent, or child. IIRIRA replaced suspension of deportation with cancellation of removal, which, for LPRs, requires continuous presence for seven years following admission, permanent residence for five years, and no aggravated felony convictions. For the undocumented and other non-LPRs, cancellation requires 10 years of continuous residence preceding the application date; a showing that removal would cause “exceptional and extremely unusual hardship” to a US citizen or LPR spouse, parent, or child; good moral character; and no convictions for a broad range of crimes. Even if persons in removal proceedings meet these standards, an immigration judge still has the discretion to deny relief to them.

IRIRA also further limited judicial review, requiring noncitizens to seek review from courts of appeal (not district courts), reducing the timeframe to file an appeal from 90 to 30 days, precluding additional fact-finding, and making discretionary denials of relief from removal unreviewable (ABA 2010, 4-6-4-8).

Almost as soon as IIRIRA went into effect, a steady stream of media and human rights reports began to document the removal of long-term residents, including LPRs with US citizen children, based on nonviolent crimes that they committed years (sometimes decades) in the past (CLINIC 2000, 28, 40–43; ABA 2004, 23–41). These removals proved James Madison’s well-known description of deportation as “a punishment, and among the severest of punishments” (Madison 1800). They were so disproportionate that one of the Act’s sponsors, Congressman Lamar Smith (R-TX), joined 28 members of Congress in a bipartisan letter urging the attorney general and the INS commissioner to adopt guidelines on the exercise of the “well-established” principle of prosecutorial discretion in initiating and terminating removal proceedings based on individual equities.¹² Removals of persons

¹¹ “Aggravated felony” is a term of art specific to immigration law that includes misdemeanors and nonviolent crimes.

¹² Letter from Members of Congress, to Attorney General Janet Reno and INS Commissioner Doris Meissner, on “Guidelines for Use of Prosecutorial Discretion in Removal Proceedings” (Nov. 4, 1999), available at *Interpreter Releases* 76:1730.

with strong ties to the United States have nonetheless become commonplace in the ensuing years.

Saba Ahmed, Adina Appelbaum, and Rachel Jordan (2017, 194) depict a removal system that ill-serves its stakeholders, operates outside the light of day, and has “effectively erased human stories and narrowed immigration debates to numbers and statistics.” In response, their paper offers the perspectives of five stakeholders in the removal process. A public defender laments how the criminal justice system treats his clients as “‘illegal’ by virtue of their very presence” and how the immigration system effectively punishes them a second time. An LPR and US military veteran describes his detention for 21 months in “intolerable conditions,” his wrongful removal, and his re-detention after his case was reopened. He calls the immigration system a “shame and a disgrace” as he struggles to fight deportation without legal counsel.

A nonprofit immigration attorney spends 14-hour days providing legal orientation and services to detained immigrants, but identifies the “carefully negotiated” and limited access that DHS permits to persons in immigrant detention as a barrier to effective representation. The same attorney muses about the role of legal service providers in creating a more efficient deportation pipeline. An immigration judge recounts his inability to act on the equities of the cases on his crowded docket. He describes his limited “face time” with persons in proceedings, the uneven quality of representation in the courts, and the immense difficulties of facing removal *pro se*. A woman details the detention of her future husband for overstaying a visa, the endless delays in his case, the exorbitant cost of phone calls from the detention center, and a disproven claim by an ICE attorney that her husband had committed a sexual assault. ICE finally releases her husband on bond, but his removal case continues.

Human rights reports and case studies of this kind underscore why DHS should not place certain noncitizens in the removal system. To that end, the Obama administration set enforcement priorities through the Priority Enforcement Program (PEP) in 2015 and in earlier administrative directives. During its first week, however, the Trump administration terminated the PEP program and directed that US immigration laws be executed “against all removable aliens.” It has set such broad enforcement priorities — the removal of not only convicted criminals but also people who have “committed acts that constitute a chargeable criminal offense,” like illegal entry¹³ — that it effectively has set no priorities at all. Its goal has been the arrest and removal of all immigrants “with questionable status” (Abrego et al. 2017, 709), or large-scale and indiscriminate deportations, with all their deleterious human, social, and economic consequences (Warren and Kerwin 2017b). As IIRIRA did, this goal has loosed the immense US enforcement apparatus on persons with strong ties and long tenure in the United States.

IIRIRA also “informalized” the removal process, eliminating due process for what soon became the overwhelming majority of noncitizens facing removal. The Act established a system of “expedited removal” that, in its early years, applied to noncitizens at ports of entry. In November 2002, the INS extended this program to noncitizens arriving by sea, but not admitted or paroled into the United States. In August 2004, DHS expanded the

13 Enhancing Public Safety in the Interior of the United States, Exec. Order No. 13768, 82 Fed. Reg. 8799 (Jan. 25, 2017).

From IIRIRA to Trump

process to cover noncitizens without proper documents arrested within 100 air miles of the US southwest land border who had not been continuously present in the United States for 14 days. At this writing, the administration is reportedly weighing a plan to eliminate the prior geographical limitations on the expedited removal process and to extend the process to all those who cannot prove that they have been in the United States for at least 90 days (Shepherd 2017).

IIRIRA created “reinstatement of removal” for noncitizens previously ordered removed or deported, and who left and illegally reentered the United States. Prior to 1997, most persons in this situation could apply for relief from removal before an immigration judge, with exceptions for those ordered deported for smuggling, failure to register, or falsification of documents, or on select security and criminal grounds.¹⁴ At present, persons subject to reinstatement — who are often seeking to return to family members — face summary removal unless they can establish in an interview with an asylum officer a “reasonable fear” of torture or persecution on an enumerated ground. If so, they can seek withholding of removal in immigration court.¹⁵

Since IIRIRA’s passage, expedited and reinstated removals have dramatically increased in number and as a percentage of total removals (Simansky 2014, 5). In 2013, the last year DHS publicly reported these statistics, expedited removals represented 44 percent and reinstatement 39 percent of all removals (*ibid.*). Perhaps as many as 90 percent of all removals from the United States in recent years have resulted from summary processes (ACLU 2014; MRS/USCCB and CMS 2015).¹⁶

Asylum

Expedited removal represents a substantial barrier to gaining access to the US asylum system, much less prevailing in a claim. To be able to pursue a claim, an asylum seeker must express a fear of persecution or request asylum from an immigration officer.¹⁷ Many asylum seekers cannot communicate their fear of persecution or need for asylum. Some do not understand this requirement, or they speak a language not understood by immigration officials. Others fear or distrust government officials. In addition, immigration officials often fail to inform those subject to expedited removal that the law offers the possibility of protection for persons at risk of persecution, torture, or harm (Pistone and Hoeffner 2006, 176, 178–79). They also fail to elicit asylum seekers’ fears (*ibid.*). Moreover, the US Commission on International Religious Freedom has twice found that border officials fail to refer to the asylum process a significant percentage of persons who express a fear of persecution or request asylum, which they are legally required to do (USCIRF 2016, 17–23). In recent weeks, US officials have denied asylum seekers access to the inspection

14 U.S.C. §1152(e) (repealed 1996).

15 Withholding of removal is available to persons whose “life or freedom would be threatened” due to their race, religion, nationality, membership in a particular social group, or political opinion.

16 Although not established by IIRIRA, non-lawful permanent residents whom DHS officials believe to be removable as “aggravated felons” are subject to administrative removal. In addition, immigrant detainees and others in removal proceedings often “stipulate” to their removability and waive their right to a hearing before an immigration judge. This typically occurs under pressure from immigration officials, and it is more likely to result in cases of unrepresented and detained immigrants.

17 Immigration and Nationality Act (INA) § 235(b)(1)(A)(i).

area at ports of entry, thus denying them access to the US asylum system and stranding them in dangerous Mexican border communities (Heyman and Slack 2018).

An asylum seeker who overcomes these barriers is entitled to a “credible fear” interview by an officer from the Asylum Division of US Immigration and Citizenship Services (USCIS).¹⁸ In the interview, the asylum seeker must show there is a “significant possibility” that they can demonstrate they have been persecuted or have a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion in their home state. An asylum seeker can appeal a negative credible fear determination to an immigration judge within seven days,¹⁹ or face summary removal. If deemed to have a credible fear, he or she can apply for asylum in removal proceedings, an arduous and difficult process whose outcome mostly depends on the availability of legal representation and the particular judge assigned to the case (Ramji-Nogales, Schoenholtz, and Schrag 2009). Detention makes legal representation less likely and causes many asylum seekers to abandon their claims (Acer and Byrne 2017, 364). Although eligible for release after a “credible fear” finding, there has been a “near moratorium on parole” (release) in certain locations (*ibid.*, 365). This practice may reflect the administration’s directive that parole and asylum not be “illegally exploited to prevent the removal of otherwise removable aliens.”²⁰

In addition, IIRIRA introduced the requirement that asylum seekers file their claims within one year of entry, with narrow exceptions for “extraordinary circumstances” that cause the deadline to be missed and “changed circumstances” that “materially affect” asylum eligibility.²¹ According to one study, more than 30 percent of the affirmative asylum cases filed during an 11-year period failed to meet the one-year deadline (Schrag et al. 2010, 688). This figure does not include those who have been discouraged from seeking asylum after missing the deadline.

According to Eleanor Acer and Olga Byrne, the one-year filing deadline has not reduced fraud. It has, however, significantly harmed potential asylum seekers who often struggle to gain a foothold in the United States, do not speak English well or at all, do not understand the asylum system, lack legal counsel, and try to avoid reliving past trauma (Acer and Byrne 2017, 358). The one-year requirement has also delayed the resolution of cases; shifted cases that should have been adjudicated by asylum officers “to the more costly, backlogged, and overburdened immigration court system”; and wasted USCIS and immigration court resources on a pointless technical requirement (Acer and Byrne 2017, 368; see also HRF 2010). Backlogs, in turn, cause bona fide asylum seekers to wait for years in a legal limbo and encourage persons without meritorious claims to file applications to receive employment authorization.

The decision to apply this process to the Central American children and families fleeing persecution, violence, and harsh poverty in recent years has added substantially to the affirmative asylum backlog and multiyear delays in scheduling interviews for these cases (Acer and Byrne 2017, 369). Court docketing processes, unconscionably low levels of legal

18 INA § 235(b)(1)(A)(ii).

19 INA § 235(b)(1)(B)(iii)(III).

20 Border Security and Immigration Enforcement Improvements, Exec. Order No. 13767, 82 Fed. Reg. 8793 (Jan. 25, 2017).

21 INA § 208(a)(2)(B) and (D).

representation of persons in immigration custody (Eagly and Shafer 2015, 34–36), and the lack of appointed counsel to indigent persons in removal proceedings also undermine due process and contribute to backlogs (Benson 2017, 335). Immigration court backlogs exceeded 714,000 cases by the end of May 2018 (TRAC 2018) and 311,000 cases for asylum officers as of early 2018 (USCIS 2018a).

Detention

IIRIRA also significantly expanded mandatory detention of noncitizens removable on criminal and security grounds, asylum seekers subject to expedited removal until they can establish a “credible fear of persecution,” arriving noncitizens who are inadmissible for other than document problems, and persons ordered removed for 90 days following the removal order (Kerwin and Wheeler 1998, 1434). The Trump administration seeks to end the release of nonmandatory detainees (a practice it calls “catch and release”) and to detain all “aliens apprehended for violations of immigration law pending the outcome of their removal proceedings.”²²

Since IIRIRA, the vast network of detention prisons — mostly administered by for-profit prison corporations — has expanded from fewer than 9,000 beds per night to more than 38,000 (Kerwin and Wheeler 1998; Reyes 2018). Although the undocumented population fell sharply between 2010 and 2016 (Juárez, Gómez-Aguiñaga, and Bettez 2018, 77; Warren 2018), the Trump administration plans to further expand the detention system. The administration also opposes the US Supreme Court’s decision in *Zadvydas v. Davis*,²³ which interpreted IIRIRA to preclude the indefinite detention of noncitizens ordered removed whose countries will not accept their return or who are stateless. The administration claims that this decision has led “[t]ens of thousands of removable aliens” to be “released into communities across the country, solely because their home countries refuse to accept their repatriation.”²⁴ In early 2018, the Supreme Court held that noncitizens in removal proceedings — as opposed to those with a final order of removal — can be held indefinitely without periodic bond hearings.²⁵

Dora Schriro — a special advisor to the DHS secretary during the Obama administration and the first director of ICE’s Office of Detention Policy and Planning (ODPP) — argues that the immigrant detention system operates like a penal system through its use of:

private prisons, county jails, and electronic monitoring. The razor-ribbon fences, the correctional personnel staffing the facilities, the orange jumpsuits issued to the people it detains and the manner in which they are managed — standing counts throughout the day, scheduled and unscheduled searches and shakedowns, random drug testing, personal property limitations and the like — all mirror the ways in which criminals are confined.

(Schriro 2017, 469)

22 Border Security and Immigration Enforcement Improvements, Exec. Order No. 13767, 82 Fed. Reg. 8793 (Jan. 25, 2017).

23 *Zadvydas v. Davis*, 533 US 678 (2001).

24 Enhancing Public Safety in the Interior of the United States, Exec. Order No. 13768, 82 Fed. Reg. 8799 (Jan. 25, 2017).

25 *Jennings v. Rodriguez*, 583 U.S. ____ (2018).

At DHS, Schriro (2017, 457) found that ICE “operated the largest detention and community-release programs in the country... with 378,582 migrants from 221 countries in its custody or under its supervision each year,” but was “the most ill-equipped of any agency” — in terms of expertise, experience, or interest — “to assume these responsibilities.” Her assessment pointed to the “significant tension” between ICE’s mission as the agency perceives it and its legal mandate, which encompasses “the safety and well-being” of persons in ICE custody (ibid., 471).

Ultimately, DHS committed to reform this scandal-ridden system by creating an immigrant detention system that better reflected the civil population in its custody and the civil process (removal) that detention facilitates. To establish such a system, Schriro (2017, 458) recommended that ICE:

- make custody decisions based on potential likelihood of eligibility for relief;
- make release “the rule rather than the exception”;
- develop “standards of care based upon community standards and civil case law, and not penal practices”;
- create the infrastructure and tools to “align care, custody restrictions, programs, privileges, and delivery of services consistent with individually assessed risk and need”;
- ensure meaningful access to legal materials, counsel, a grievance system, visitors, religious practice, and translation services;
- establish a credible healthcare system, akin to other government-funded systems; and
- provide for independent and rigorous oversight of these reforms.

Although certain reforms (like the development of detailed standards on conditions of confinement) came to pass, ICE’s bureaucracy resisted the overall initiative, and the Obama administration resorted to large-scale detention in response to the large numbers of Central American children and families seeking safety in the United States.

Melina Juárez, Bárbara Gómez-Aguñaga, and Sonia P. Bettez underscore the role of for-profit prisons in immigrant detention. Privatization has mostly been an immigration phenomenon, with higher rates of immigrants (than prisoners) held in detention centers (Juárez, Gómez-Aguñaga, and Bettez 2018, 78). Private detention corporations extensively lobby Congress, DHS, and state officials in favor of policies that serve their financial self-interests (ibid., 78). That the US Census Bureau counts immigrant detainees as residing in the place of their confinement gives local politicians another reason to support detention: large detention centers can potentially alter legislative districts and can lead to increases in the allocation of federal funds (ibid., 89).

Private prisons not only have unseemly incentives to increase the detained population but also too often run their prisons in a manner that evokes slave labor, paying detainees \$1 a day for services that are essential to operating their facilities (Stevens 2018). The US Commission on Civil Rights expressed the concern that whereas government-run centers also “have financial incentives to use detainee labor to cut costs,” privately run facilities

have “added pressure to coerce detainees to perform necessary labor in order to maximize profits” (US Commission on Civil Rights 2017).

Juárez, Gómez-Aguiñaga, and Bettez examine two main questions: What is the role of special interests in the criminalization of immigrants, and does the rapid increase in detention spurred by IIRIRA pose risks to democracy in the United States? To answer these questions, they created a unique dataset to examine the relationship between the criminalization of immigrants, federal immigration policies, lobbying by for-profit prisons, and immigration enforcement spending.²⁶

The authors found a strong statistical correlation between the ratio of immigrants detained, passage of IIRIRA, and increased enforcement spending (Juárez, Gómez-Aguiñaga, and Bettez 2018, 83–87), but not between private prison lobbying and the ratio of detained immigrants (*ibid.*, 86). The latter finding could be attributable to lack of information on state lobbying by private prisons and on the exact amounts spent on their immigration-related federal lobbying (*ibid.*).

Criminal Prosecutions

IIRIRA made several immigration offenses crimes: high-speed flight (defined as higher than the speed limit) from an immigration checkpoint, false claims to citizenship, voting in a federal election, not disclosing one’s role as a preparer of a false application for immigration benefits, and knowingly presenting documents that do not have a reasonable basis in law or fact (Kerwin 2001, 47). It also increased the penalties for existing immigration-related crimes — like the fraudulent use of government documents — and it made document fraud and smuggling for financial gain predicate offenses under the Racketeer Influenced Corrupt Organizations Act (Morris 1997, 1320).

Between 1996 and 2013, immigration-related prosecutions — mostly for illegal entries and reentries — increased tenfold (TRAC 2017). Spurred by Operation Streamline, a fast-track criminal prosecution program that operated in multiple border sectors, immigration-related prosecutions soon monopolized the resources of magistrate courts, federal prosecutors, and public defenders in these districts, with the predictable effect of limiting prosecutions for more serious offenses (Lydgate 2009; Kerwin and McCabe 2010). Under Operation Streamline, after entering guilty pleas en masse and serving criminal time, noncitizens are deported. Some Border Patrol sectors violated international law by referring asylum seekers for prosecution prior to affording them access to “credible fear” interviews and the asylum process (Kerwin 2015, 218).

In recent years, immigration-related criminal prosecutions have fallen, primarily due to sharp, multiyear decreases in border crossings (Abrego et al. 2017, 701; Warren and

²⁶ To measure criminalization, the study divided the average daily population of detainees by the number of noncitizens in the United States and multiplied this ratio by 1,000. To measure detention lobbying, it used data on the two largest private prison corporations from OpenSecrets.org, which measures expenditures for lobbying before Congress and federal agencies (particularly DHS and DOJ). It examined four federal immigration policies: IIRIRA in 1996, the end of “catch and release” in 2006, Secure Communities in 2008, and the “bed quota” established by Congress in 2009. Finally, it calculated DHS enforcement spending by adding CBP, ICE, and Office of Biometric Identity Management (OBIM) (formerly US-VISIT) appropriations.

Kerwin 2017a). “Fast track” sentencing continues to occur, however, even in Border Patrol sectors without Operation Streamline (Abrego et al. 2017, 701).

The Trump administration has recommitted to the prosecution of immigration-related crimes. In April 2017, Attorney General Jeff Sessions directed federal prosecutors to prioritize immigration prosecutions for unlawful entry and reentry, harboring and transporting, identity theft, document fraud, and assaulting, impeding, or resisting officers while performing their official duties (Office of the Attorney General 2017). In May 2018, the Attorney General announced that the Department of Justice (DOJ) would prosecute *all* illegal crossers at the US–Mexico border (DOJ 2018), a practice that includes asylum seekers.

US Families

Leisy Abrego, Mat Coleman, Daniel E. Martinez, Cecilia Menjivar, and Jeremy Slack (2017, 708) point out that IIRIRA and US immigration enforcement practices more broadly “separate and restructure families by removing members already in the United States, creating single-parent households or leaving children without a parent or an adult without a spouse.” As a result, they unsettle and impoverish families. The constant threat of deportation erodes families’ sense of well-being and security. Children whose parents have been deported experience fear, depression, difficulties at school, displacement, and poverty (Chaudry et al. 2010; Juárez, Gómez-Aguiñaga, and Bettez 2018).

The Trump administration has taken family separation to a troubling new low, removing children from their parents at the US–Mexico border to deter future asylum seekers and migrants from coming. Between October 2017 and June 20, 2018, immigration officials separated perhaps as many as 3,000 children from their parents, including many children younger than the age of four (Dickerson 2018). The United Nations High Commissioner for Human Rights condemned this practice as “arbitrary and unlawful interference in family life” (Cumming-Bruce 2018). Witnesses reported horrid scenes of wailing and despair as children were pulled away and kept apart from their parents. After suspending this practice in response to national and international condemnation, the administration issued an executive order which provided for the reunification of children with their parents, albeit in detention centers through the (indefinite) “pendency of criminal proceedings for improper entry or any removal or other immigration proceedings.”²⁷

IIRIRA’s impact on families is not limited to the removal process. The Act also foreclosed legal immigration for poor, mostly Latino families. As such, it sacrificed the US immigration system’s historic commitment to family unity to the goal of decreasing and discouraging legal and illegal immigration of the poor, and created a “hierarchy of mixed-citizenship families” (Lopez 2017, 237). Some families can access the benefits of citizenship, whereas others must live apart or in a perpetual state of insecurity.

First, IIRIRA required US citizen and LPR petitioners to demonstrate via an affidavit of support the ability to support their qualifying family members at an income of at least

27 Affording Congress an Opportunity to Address Family Separation, Exec. Order 13841, 83 Fed. Reg. 29435 (Jun. 25, 2018).

From IIRIRA to Trump

125 percent of the federal poverty guidelines, until they become naturalized citizens or complete 40 qualifying quarters of work. In calculating the required income, the Act includes all the members of the petitioner's household and all noncitizens and dependents sponsored by the petitioner. This effectively increases the income requirement since the federal poverty rate rises with family size. Moreover, the intending immigrants' actual or potential income cannot count toward meeting the sponsor's income requirement, unless he or she is working with USCIS's permission.

This provision is intended to prevent the admission of, and deny permanent residence to, persons who might become a public charge. In fact, it prevents "the admission of immigrants who could help support their families, and it keeps others from securing legal status and the possibility of higher-wage jobs" (CLINIC 2000, 10). In failing to measure true family income, the measure keeps families "poor, unsettled and suspended in a legal no-man's land" (Kerwin 1999, 1221), and causes US citizens to become "public charges" by "preventing them from increasing their combined family income through family reunification" (Lopez 2017, 241). US citizen children in mixed-citizenship households are the most affected; if the noncitizen parent is unable to immigrate due to a potential public charge assessment, the child will be deprived of the additional revenue that would ordinarily flow to the family.

If the sponsor cannot meet the income requirement, she can make up the difference with "significant assets." If this is not possible, the petitioner can try to find a co-sponsor with sufficient income who agrees to take on this long-term commitment.

The Trump administration plans to restrict legal immigration of the low-income even more dramatically. At present, the intending immigrant's use of three cash assistance programs – Supplemental Security Income (SSI), Temporary Assistance to Needy Families (TANF) and state general relief – can be considered when deciding if the applicant is likely to become a public charge. The administration intends to propose a rule that will also consider the *non-cash* benefits used by these applicants and their dependent family members, including US citizen children. These non-cash benefits could include subsidized health insurance, Medicaid, the Child Health Insurance Program, energy assistance, food stamps, the Special Supplemental Nutrition Program for Women, Infants and Children (WIC), and the earned income tax credit. Such a change in the definition of public charge would be a radical departure from the way the agency has defined and implemented that standard in the past. If finalized as drafted, it would not only reduce the number of low-income parents and other family members who could become LPRs, but it would scare many into removing their children from basic food, health, and nutrition programs for which they are eligible.

Those most affected initially by this rule would be the persons who have passed through the first stage in qualifying to immigrate based on a close family relationship to a US citizen or LPR. In addition, a recent policy memorandum requires USCIS to issue notices to appear (NTA), leading to removal proceedings, to noncitizens whose applications or petitions for immigration benefits have been denied (USCIS 2018). Like the proposed public charge rule, the new NTA policy will disincentivize noncitizens from seeking to regularize their status.

Second, IIRIRA made it far more difficult for previously undocumented and deported persons to secure legal status by creating multiyear bars to admission based on the accrual

of “unlawful presence.” These bars have particularly affected persons who might otherwise qualify for a family-based visa. Depending on their nationality and visa category, such persons must wait for years — at this point, up to a century in some categories — for their visa number to become current. When this occurs, most must leave the country for consular processing.²⁸ In doing so, however, they trigger the bars to reentry: three years for those with at least 180 days of unlawful presence, and 10 years for those with one year or more of unlawful presence. They can apply for a waiver to the bars based on “extreme hardship” to a US citizen or LPR spouse or parent (albeit not child), but many opt to forgo consular processing out of fear that they will not be able to return. In this way, family reunification laws can contribute to family separation, and lead to “a reorganization of families, adjustment of expectations, and changes in roles and power dynamics” (Abrego et al. 2017, 708).

The Obama administration created a process that allows persons in this situation to pre-apply for a waiver of the unlawful presence bars that, if approved, offers a reasonable assurance that if they leave for consular processing, they will be able to return (Kerwin, Meissner, and McHugh 2011; USCIS 2016).

Between 2012 and 2016, Jane Lily Lopez (2017, 241) interviewed 40 “mixed-citizenship” couples living in and outside the United States on their “day-to-day experiences” and, in particular, on how their status and the law “created opportunities for and/or placed limitations on their success as individuals and as a family.”²⁹

Lopez (2017, 242) found that mixed-citizenship couples experienced these measures in different ways. For one category consisting of 16 couples, the bars and the sponsorship requirements “had no measurable effect on their families” because the noncitizen spouses lived abroad, had already acquired status in the United States, or had overstayed a visa and could adjust status in the United States.

A second group avoided the family-based visa process because of perceived legal difficulties and cost. Of these eight couples, only two had attempted to petition for a visa; the others did not apply, given the expense and what they believed to be the low probability of success. Like the first category of couples, these couples had “planted roots in their communities, but the ever-present threat of deportation (and lower official income) kept them from creating more permanent ties to their neighborhoods, such as buying a home” (Lopez 2017, 243). They recognized the risk of deportation (most had created a “deportation plan”), but they lived their lives as other “‘normal’ families; raising children, working, and actively participating in their communities” (ibid.).

Another eight families lived outside the United States due to deportation, “voluntary removal,” or denial of the unlawful presence waiver (Lopez 2017). These couples expressed bitterness at not being able to live together in the United States, where some had previously lived. Finally, six couples were not subject to the bars to reentry, but they experienced separation during the family unity process, struggled to pay the application fee and meet

28 By contrast, undocumented parents, children, or spouses of US citizens who enter the country legally but overstay can adjust to permanent resident status in the United States.

29 Each couple included a US citizen and a non-US citizen spouse from a Spanish-speaking country in Latin America.

the income requirement for sponsorship, or needed to rely on financial support from family and friends.

Lopez concludes that the sponsorship requirements, the three- and 10-year unlawful presence bars, and the inability of past unauthorized border crossers to adjust status in the United States have effectively redefined the US family by preventing mixed-citizenship families “with less-educated, lower-income Mexican and Central American spouses” who entered without inspection from legalizing (Lopez 2017, 246). These measures have “marked some US citizens” — primarily the “female, non-white, and less-educated Americans” — “as unworthy of forming an official American family with a foreigner” (ibid.).

State and Local Immigration Enforcement

IIRIRA expanded federal, state, and local immigration enforcement partnerships, as well as data-sharing programs. In particular, it established the 287(g) program, named after the relevant section of the Immigration and Nationality Act (INA). Under the program, state and local law enforcement agencies can enter Memoranda of Agreement (MOAs) to enforce immigration law. The federal government entered its first 287(g) partnership in 2002.

The 287(g) program offers three distinct agreements. Under the task force model, federally trained state and local law enforcement officers can question persons on their immigration status in the course of their work, arrest them for immigration violations, and issue detainers (holds) to provide ICE time to assume custody of them. The 287(g) jail enforcement model allows state and local law enforcement to question individuals on their immigration status during intake at a jail post arrest, and to issue detainers. “Hybrid” agreements encompass both the task force and jail enforcement models.

The Obama administration discontinued the task force and hybrid models. However, the Trump administration has recommitted to the full program, vowing “to empower” states and localities “to perform the functions of an immigration officer...to the maximum extent permitted by law.”³⁰

A main concern with 287(g) and other federal, state, and local immigration enforcement partnerships is that they can lead to profiling of persons who “look like” undocumented immigrants, to increased arrests in targeted communities, and consequently to decreased interaction and cooperation with the police by members of these communities (Coon 2017, 647).³¹ As the Homeland Security Advisory Committee’s Secure Communities Task Force explained,

30 Enhancing Public Safety in the Interior of the United States, Exec. Order No. 13768, 82 Fed. Reg. 8799 (Jan. 25, 2017); Border Security and Immigration Enforcement Improvements, Exec. Order No. 13767, 82 Fed. Reg. 8793 (Jan. 25, 2017).

31 Abrego et al. (2017, 703) argue that the program criminalizes immigration in two ways: by devolving immigration enforcement responsibilities to state and local police, and “by leading to the deportation of individuals on a wide variety of misdemeanor as well as civil immigration grounds, and not on serious criminal grounds.”

When communities perceive that police are enforcing federal immigration laws, especially if there is a perception that such enforcement is targeting minor offenders, that trust is broken in some communities, and victims, witnesses and other residents may become fearful of reporting crime or approaching the police to exchange information. This may have a harmful impact on the ability of the police to build strong relationships with immigrant communities and engage in community policing, thereby negatively impacting public safety and possibly national security.

(HSAC 2011, 15, 24)

A 2011 report on 287(g) by the Migration Policy Institute found that political pressure, rather than law enforcement professionals, led states and localities to enter these partnerships (Capps et al. 2011, 27). The report also found evidence of “fear, distrust of police, and immigrants avoiding public spaces” in several localities with 287(g) agreements (ibid., 43).

To test for these negative consequences, Michael Coon examined arrests of Hispanics in Frederick County, Maryland, that resulted from implementation of the 287(g) program. The Frederick County Sheriff’s Office (FCSO) entered a hybrid 287(g) agreement in 2008, which allowed its officers in the county jail and its deputies in the field “to identify and begin deportation proceedings against undocumented immigrants” (Coon 2017, 650). The Frederick Police Department (FPD) was not a party to a 287(g) agreement, but those arrested by FPD were subject to immigration screening at the county jail under FCSO’s agreement. The study relied on arrest records for FCSO and FPD between January 1, 2006, and December 31, 2013, to examine whether implementation of the FCSO agreement led to different “arrest patterns by racial-ethnic groups” (ibid., 654).

The study found that both FCSO and FPD experienced a decrease in average monthly white, black, and Hispanic arrests after the 287(g) agreement went into effect, except for FPD black arrests, which increased (Coon 2017, 653). It found that 287(g) led to “differences in arrest patterns” among these three groups, including a significant decrease in arrests of Hispanics by FPD and FCSO after the program’s implementation (ibid., 654). This result is consistent with the “chill effect” hypothesis; that is, that the 287(g) jail program led Hispanics to avoid contact with the FPD and FCSO for fear of deportation (ibid., 655).

The study found evidence of “profiling” by FCSO, as indicated by different arrest patterns under the 287(g) agreement. FCSO arrests of whites and blacks “fell significantly” post implementation (Coon 2017, 663). There was also an overall decrease in Hispanic arrests by FPD and FCSO, but a significantly higher number of Hispanic arrests by FCSO “than would have been expected without the [task force] program” (ibid., 657). These findings, Coon concludes, suggest profiling or “a shift in attention by the FCSO away from the white and black communities and toward the Hispanic community” after the 287(g) program went into effect (ibid., 663).

Conclusion

This article has argued that IIRIRA represented a signal attack on due process, immigrant families, and asylum seekers. In particular, the Act enlarged the grounds for deportation, expanded the use of “administrative” rather than immigration court removals, eliminated

From IIRIRA to Trump

benefits and certain relief from removal, increased mandatory detention, established new barriers to asylum, “criminalized” many immigration-related offenses, restricted immigration of those with low income, barred reentry to the United States based on prior unlawful presence, and enlisted states and localities in immigration enforcement. Many politicians as well as human rights and advocacy groups have argued for the need to restore due process to the removal system and to strengthen the ability of immigration judges to consider and act on the full equities in individual cases. The authors of this *JMHS* special collection on IIRIRA make several important, additional policy recommendations.

Acer and Byrne (2017, 373) propose that:

- the one-year asylum-filing deadline and the expedited removal process be eliminated;
- expedited removal be limited to ports of entry and not used against Central American children and parents fleeing persecution;
- detention decisions include “independent court review,” custody hearings at least every six months, and affordable bond levels; and
- the executive branch and Congress provide sufficient resources to reduce backlogs and ensure “fair and timely” adjudication of claims by the Asylum Division and the immigration courts.

Schriro (2017, 471–72) recommends that ICE:

- end the expansion of family detention centers, opt not to renew contracts for these facilities, and release “as many families as are permitted by law”;
- detain families only if strictly necessary and “for only the briefest” periods in nonsecure, licensed, accessible, and modestly sized facilities;
- adopt a presumption against detention, particularly in the case of families, women, and asylum seekers;
- acquire a critical mass of qualified staff to “perform the unique duties associated with detention and its alternatives”; and
- implement nonpenal standards of care that “are responsive to families, women, and asylum seekers.”

Juárez, Gómez-Aguiñaga, and Bettez (2018, 90) recommend:

- increased transparency and accountability regarding the lobbying expenditures of for-profit prison corporations;
- repeal of mandatory detention laws that “criminalize” immigrants; and
- repeal of the congressional bed mandate, which requires that ICE fill a set number of detention beds each night and, thus, incentivizes detention without reference to actual need.

Lopez (2017, 247) proposes that Congress:

- repeal the bars to entry based on past unlawful presence;
- in the alternative, allow all undocumented spouses of US citizens to adjust status in the United States; and
- eliminate the minimum income requirement, or at least allow the earnings of the noncitizen spouse to count toward this threshold.

Coon (2017, 664) proposes:

- community outreach to “rebuild trust between police and citizens”;
- policies in 287(g) jurisdictions not to ask victims or witnesses about their immigration status;
- federal and civil oversight of the program to ensure nondiscrimination by law enforcement;
- monitoring arrest rates of different groups for minor crimes, as evidence of profiling and harassment; and
- research on implementation of 287(g) in other jurisdictions to learn practices that can help reduce fraud and civil rights violations.

All of these recommendations have merit. Ultimately, however, the issues raised by IIRIRA and the Trump administration’s immigration agenda run deeper than particular policy prescriptions. Forty-three million foreign-born persons live in the United States, and nearly twice that many if their US citizen children are included. As in the past, the nation’s productivity, vitality, and values are inextricably bound to the success of its foreign-born residents, their families, their US communities, and even their communities of origin. The “rule of law” has historically been a central value and guiding principle of the United States. In the immigration context, the rule of law demands enforcing the law in effective, humane ways, scrupulously upholding due process rights and protecting those fleeing persecution and violence. As constituted, the current system does not fully honor the rule of law, too often serves as an instrument of exclusion and marginalization, and has become a symbol to the world of US cruelty and injustice. It needs to be fundamentally reformed.

REFERENCES

- ABA (American Bar Association). 2004. “American Justice through Immigrants’ Eyes.” Washington, DC: Leadership Conference on Civil Rights Education Fund and ABA Commission on Immigration. https://www.americanbar.org/content/dam/aba/publications/commission_on_immigration/americanjusticethroughimmigeyes.authcheckdam.pdf.
- ABA (American Bar Association). 2010. “Reforming the Immigration System: Proposals to Promote Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Cases.” Washington, DC: ABA. <https://www>.

From IIRIRA to Trump

americanbar.org/content/dam/aba/publications/commission_on_immigration/coi_complete_full_report.authcheckdam.pdf.

- Abrego, Leisy, Coleman, Mat, Martinez, Daniel E., Menjivar, Cecilia, Slack, Jeremy. 2017. "Making Immigrants into Criminals: Legal Processes of Criminalization in the Post-IIRIRA Era." *Journal on Migration and Human Security* 5(3):694–715. <https://doi.org/10.14240/jmhs.v5i3.105>.
- Acer, Eleanor, Byrne, Olga. 2017. "How the Illegal Immigration Reform and Immigration Responsibility Act of 1996 Has Undermined US Refugee Protection Obligations and Wasted Government Resources." *Journal on Migration and Human Security* 5(2):356–78. <https://doi.org/10.14240/jmhs.v5i2.88>.
- ACLU (American Civil Liberties Union). 2014. *American Exile: Rapid Deportations That Bypass the Courtroom*. New York: ACLU. <https://www.aclu.org/report/american-exile-rapid-deportations-bypass-courtroom>.
- Ahmed, Saba, Appelbaum, Adina, Jordan, Rachel. 2017. "The Human Cost of IIRIRA — Stories from Individuals Impacted by the Immigration Detention System." *Journal on Migration and Human Security* 5(1):194–216. <https://doi.org/10.14240/jmhs.v5i1.80>.
- Benson, Lenni B. 2017. "Immigration Adjudication: The Missing 'Rule of Law.'" *Journal on Migration and Human Security* 5(2):331–55. <https://doi.org/10.14240/jmhs.v5i2.87>.
- Capps, Randy, Rosenblum, Marc R., Chishti, Muzaffar, Rodríguez, Cristina. 2011. "Delegation and Divergence: 287(g) State and Local Immigration Enforcement." Washington, DC: Migration Policy Institute. <https://www.migrationpolicy.org/research/delegation-and-divergence-287g-state-and-local-immigration-enforcement>.
- CLINIC (Catholic Legal Immigration Network, Inc.). 2000. "The Impact of Our Laws on American Families." Washington, DC: CLINIC. <http://www.ilw.com/articles/2005,1012-CLINIC.pdf>.
- Chaudry, Ajay, Capps, Randy, Pedroza, Juan Manuel, Castañeda, Rosa Maria, Santos, Robert, Scott, Molly M. 2010. "Facing Our Future: Children in the Aftermath of Immigration Enforcement." Washington, DC: Urban Institute. <http://www.urban.org/sites/default/files/publication/28331/412020-Facing-Our-Future.pdf>.
- Clinton, William J. 1996. "Statement on Signing the Omnibus Consolidated Appropriations Act, 1997." Speech, September 30. <http://www.presidency.ucsb.edu/ws/?pid=52021>.
- Coon, Michael. 2017. "Local Immigration Enforcement and Arrests of Hispanic Population." *Journal on Migration and Human Security* 5(3):645–66. <https://doi.org/10.14240/jmhs.v5i3.102>.

- Cumming-Bruce, Nick. 2018. "Taking Migrant Children from Parents Is Illegal, UN Tells US." *New York Times*, June 5. <https://www.nytimes.com/2018/06/05/world/americas/us-un-migrant-children-families.html>.
- DHS/OIS (US Department of Homeland Security, Office of Immigration Statistics). 2017. "Efforts by DHS to Estimate Southwest Border Security between Ports of Entry." Washington, DC: DHS. https://www.dhs.gov/sites/default/files/publications/17_0914_estimates-of-border-security.pdf.
- DOJ (US Department of Justice). 2018. "Attorney General Sessions Delivers Remarks Discussing the Immigration Enforcement Actions of the Trump Administration." San Diego, May 7. <https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-discussing-immigration-enforcement-actions>.
- Eagly, Ingrid V., Shafer, Steven. 2015. "A National Study of Access to Counsel in Immigration Court." *University of Pennsylvania Law Review* 164(1):1–91.
- Heyman, Josiah, Jeremy, Slack. 2018. "Blockading Asylum Seekers at US Ports of Entry at the US-Mexico Border Puts Them at Increased Risk of Exploitation, Violence, and Death." Washington, DC: Center for Migration Studies. <http://cmsny.org/publications/heyman-slack-asylum-poe/>.
- HRF (Human Rights First). 2010. "The Asylum Filing Deadline: Denying Protection to the Persecuted and Undermining Government Efficiency." New York: HRF. <https://www.humanrightsfirst.org/wp-content/uploads/pdf/afd.pdf>.
- HSAC (Homeland Security Advisory Council). 2011. "Task Force on Secure Communities Findings and Recommendations." Washington, DC: DHS. <https://www.dhs.gov/xlibrary/assets/hsac-task-force-on-secure-communities-findings-and-recommendations-report.pdf>.
- ICE (US Immigration and Customs Enforcement). 2018. "Fiscal Year 2017 ICE Enforcement and Removal Operations." Washington, DC: DHS. <https://www.ice.gov/sites/default/files/documents/Report/2017/iceEndOfYearFY2017.pdf>.
- Juárez, Melina, Gómez-Aguñaga, Bárbara, Bettez, Sonia P. 2018. "Twenty Years after IIRIRA: The Rise of Immigrant Detention and Its Effects on Latinx Communities across the Nation." *Journal on Migration and Human Security* 6(1):74–96. <https://doi.org/10.14240/jmhs.v6i1.113>.
- Kerwin, Donald. 1999. "How Our Immigration Laws Divide, Impoverish, and Undermine American Families." *Interpreter Releases* 76(31):1213–27.
- Kerwin, Donald. 2001. "Chaos on the US-Mexico Border: A Report on Migrant Crossing Deaths, Immigrant Families and Subsistence-Level Laborers." Washington, DC: CLINIC. https://www.researchgate.net/publication/284223846_Chaos_on_the_US-Mexico_Border_A_Report_on_Migrant_Crossing_Deaths_Immigrant_Families_and_Subsistence-Level_Laborers.
- Kerwin, Donald. 2015. "The US Refugee Protection System on the 35th Anniversary of the

From IIRIRA to Trump

- Refugee Act of 1980.” *Journal on Migration and Human Security* 3(2):205–54. <https://doi.org/10.14240/jmhs.v3i2.49>.
- Kerwin, Donald. 2017. “The Besieged US Refugee Protection System: Why Temporary Protected Status Matters.” Washington, DC: Center for Migration Studies. <http://cmsny.org/publications/besieged-us-refugee-protection-system-temporary-protected-status-matters/>.
- Kerwin, Donald, McCabe, Kristen. 2010. “Arrested on Entry: Operation Streamline and Prosecution of Immigration Crimes.” *Migration Information Source*. Washington, DC: Migration Policy Institute. <https://www.migrationpolicy.org/article/arrested-entry-operation-streamline-and-prosecution-immigration-crimes>.
- Kerwin, Donald, Meissner, Doris, McHugh, Margie. 2011. “Executive Action on Immigration: Six Ways to Make the System Work Better.” Washington, DC: Migration Policy Institute. <http://www.migrationpolicy.org/research/executiveaction-immigration-six-ways-make-system-work-better>.
- Kerwin, Donald, Wheeler, Charles. 1998. “The Detention Mandates of the 1996 Immigration Act: An Exercise in Overkill.” *Interpreter Releases* 75(40):1433–40.
- Krouse, William J. 1998. “Immigration and Naturalization Service’s FY 1999 Budget.” Washington, DC: Congressional Research Service. <https://www.hsdl.org/?abstract&did=485598>.
- Lind, Dara. 2016. “The Disastrous, Forgotten 1996 Law That Created Today’s Immigration Problem.” *Vox*, April 28. <https://www.vox.com/2016/4/28/11515132/iirira-clinton-immigration>.
- Lind, Dara. 2018. “The Trump Administration just Admitted it doesn’t know How Many Kids are Still Separated from their Parents.” *Vox*, July 5. <https://www.vox.com/2018/7/5/17536984/children-separated-parents-border-how-many>.
- Lopez, Jane Lilly. 2017. “Redefining American Families: The Disparate Effects of IIRIRA’s Automatic Bars to Reentry and Sponsorship Requirements on Mixed-Citizenship Couples.” *Journal on Migration and Human Security* 5(2):236–51. <https://doi.org/10.14240/jmhs.v5i2.82>.
- Lydgate, Joanna 2009. *Assembly-Line Justice: A Review of Operation Streamline*. January. Berkeley, CA: The Chief Justice Earl Warren Institute on Race, Ethnicity and Diversity, University of California, Berkeley Law School. https://www.law.berkeley.edu/files/Operation_Streamline_Policy_Brief.pdf.
- Macías-Rojas, Patrisia. 2018. “Immigration and the War on Crime: Law and Order Politics and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996.” *Journal on Migration and Human Security* 6(1):1–25. <https://doi.org/10.14240/jmhs.v6i1.110>.
- Madison, James. 1800. “The Report of 1800, [7 January] 1800.” Founders Online. Washington, DC: National Archives. <https://founders.archives.gov/documents/Madison/01-17-02-0202>.

- Massey, Douglas S., Pren, Karen A., Durand, Jorge. 2016. "Why Border Enforcement Backfired." *American Journal of Sociology* 121(5):1557–600. <https://doi.org/10.1086/684200>.
- Morris, Helen. 1997. "Zero Tolerance: The Increasing Criminalization of Immigration Law." *Interpreter Releases* 77(33):1317–26.
- MRS/USCCB (Migration Refugee Services/US Conference of Catholic Bishops) and CMS (Center for Migration Studies). 2015. "Unlocking Human Dignity: A Plan to Transform the US Immigrant Detention System." *Journal on Migration and Human Security* 3(2):159–204. <https://doi.org/10.14240/jmhs.v3i2.48>.
- Office of the Attorney General. 2017. "Renewed Commitment to Criminal Immigration Enforcement." Memorandum for All Federal Prosecutors, April 11. <https://www.justice.gov/opa/speech/file/956856/download>.
- Passel, Jeffrey S., Lopez, Mark Hugo, Cohn, D'Vera, Rohal, Molly. 2014. "As Growth Stalls, Unauthorized Immigrant Population Becomes More Settled." Washington, DC: Pew Research Center. <http://www.pewhispanic.org/2014/09/03/as-growth-stalls-unauthorized-immigrant-population-becomes-more-settled/>.
- Pistone, Michele, Hoeffner, John J. 2006. "Rules Are Made to Be Broken: How the Process of Expedited Removal Fails Asylum Seekers." *Georgetown Immigration Law Journal* 20:167–211.
- Ramji-Nogales, Jaya, Schoenholtz, Andrew, Schrag, Philip. 2009. *Refugee Roulette: Disparities in Asylum Adjudication and Proposals for Reform*. New York: New York University Press.
- Reyes, Rachel. 2018. "Immigrant Detention: Recent Trends and Scholarship." New York, NY: Center for Migration Studies. <http://cmsny.org/publications/virtualbrief-detention/>.
- Schrag, Philip G., Schoenholtz, Andrew I., Ramji-Nogales, Jaya, Dombach, James P. 2010. "Rejecting Refugees: Homeland Security's Administration of the One-Year Bar to Asylum." *William and Mary Law Review* 52(3):651–804.
- Schriro, Dora. 2017. "Weeping in the Playtime of Others: The Obama Administration's Failed Reform of ICE Family Detention Practices." *Journal on Migration and Human Security* 5(2):452–80. <https://doi.org/10.14240/jmhs.v5i2.93>.
- Shepherd, Kate. 2017. "Leaks Expand Administration's Plans to Expand Expedited Removal." *Immigration Impact*, July 18. <http://immigrationimpact.com/2017/07/18/leaks-expand-expedited-removal/>.
- Simansky, John F. 2014. "Immigration Enforcement Actions: 2013." Washington, DC: US Department of Homeland Security, Office of Immigration Statistics. https://www.dhs.gov/sites/default/files/publications/Enforcement_Actions_2013.pdf.

From IIRIRA to Trump

- Stevens, Jacqueline. 2018. "When Migrants Are Treated Like Slaves." *New York Times*, April 4.
- TRAC (Transactional Records Access Clearinghouse). 2017. "Criminal Immigration Prosecutions Down 14% in FY 2017." Syracuse, NY: TRAC. <http://trac.syr.edu/tracreports/crim/494/>.
- TRAC (Transactional Records Access Clearinghouse). 2018. "Immigration Court Backlog Tool." Syracuse, NY: TRAC. http://trac.syr.edu/phptools/immigration/court_backlog/.
- USCCR (US Commission on Civil Rights). 2017. "US Commission on Civil Rights Concerned with Alleged Abusive Labor Practices at Immigration Detention Centers." Washington, DC: USCCR. <http://www.usccr.gov/press/2017/12-21-PR.pdf>.
- USCIRF (US Commission on International Religious Freedom). 2016. "Barriers to Protection: The Treatment of Asylum Seekers in Expedited Removal." Washington, DC: USCIRF. <http://www.uscirf.gov/sites/default/files/Barriers%20To%20Protection.pdf>.
- USCIS (US Citizenship and Immigration Services). 2018a. "USCIS to Take Action to Address Asylum Backlog." <https://www.uscis.gov/news/news-releases/uscis-take-action-address-asylum-backlog>.
- USCIS (US Citizenship and Immigration Services). 2018b. "Updated Guidance for the Referral of Cases and Issuance of Notices to Appear (NTAs) in Cases Involving Inadmissible and Deportable Aliens." Policy Memorandum PM-602-0050.1. <https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2018/2018-06-28-PM-602-0050.1-Guidance-for-Referral-of-Cases-and-Issuance-of-NTA.pdf>.
- US Senate Committee on Appropriations. 2018. "Homeland Security Appropriations Bill, 2018: Omnibus Agreement Summary." <https://www.appropriations.senate.gov/imo/media/doc/FY18-OMNI-HOMELAND-SUM.pdf>.
- Warren, Robert. 2018. "The US Undocumented Population Fell Sharply during the Obama Era: Estimates for 2016." *CMS Essays*. Washington, DC: Center for Migration Studies. <http://cmsny.org/publications/warren-undocumented-2016/>.
- Warren, Robert, Kerwin, Donald. 2017a. "The 2,000 Mile Wall in Search of a Purpose: Since 2007 Visa Overstays Have Outnumbered Undocumented Border Crossers by a Half Million." *Journal on Migration and Human Security* 5(1):124-36. <https://doi.org/10.14240/jmhs.v5i1.77>.
- Warren, Robert, Kerwin, Donald. 2017b. "Mass Deportations Would Impoverish US Families and Create Immense Social Costs." *Journal on Migration and Human Security* 5(1):1-8. <https://doi.org/10.14240/jmhs.v5i1.71>.



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

Patrisia Macías-Rojas
University of Illinois at Chicago

Executive Summary

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

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

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

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

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

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

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

The GOP, Crime Politics, and Policies of Mass Incarceration

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

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

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

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

Prison Overcrowding and the Scramble for Beds

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

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

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

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

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

Refugees and Detention Overcrowding

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

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

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

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

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

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

“Alien Felons” as New Enforcement Targets

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Crime Politics and the New Democrats

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The rhetoric of "overcrowding" in jails and prisons soon spread to the immigration arena and all aspects of public life. In Congress, undocumented immigrants were depicted as "crowding" schools and hospitals²² and were blamed for "crowding" labor markets.²³ Democrats and Republicans alike drew on a powerful language of "victim" and "criminal," to advance a political agenda, much as the conservative right had done during the presidential election campaigns of Barry Goldwater, Richard Nixon, and Ronald Reagan. The victims in this case were taxpayers, specifically a white suburban electorate (Cacho 2000, 393; McGirr 2015). The culprits were undocumented immigrants charged with "crowding" prisons, schools, and hospitals. This rhetoric of overcrowding garnered support for punitive federal and state-level anti-immigration laws, while masking the crime politics from which such measures emerged.

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

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

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

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

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

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

The 1996 Antiterrorism and Effective Death Penalty Act (AEDPA)

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

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

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

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

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

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

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

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

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

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

28 H.R.1710, 104th Cong. (1995).

29 *Id.*

30 *International Terrorism, supra* note 23, at 220.

31 Taking Back Our Streets Act of 1995, H.R. 3, 104th Cong. (1995).

32 *Removal of Criminal and Illegal Aliens: Hearing before the Subcomm. on Immigration and Claims of the H. Comm. on the Judiciary*, 104th Cong. 8 (1995).

33 H.R. 3.

34 Criminal Alien Deportation Improvements Act of 1995, H.R. 668, 104th Cong. (1995); *Criminal Alien Deportation Improvements Act of 1995: Hearing before the H. Comm. on the Judiciary*, 104th Cong. 104-122 (1995).

35 Antiterrorism and Effective Death Penalty Act of 1996, S.735, 104th Cong. (1996).

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

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

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

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

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

Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA)

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

36 S. 735.

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

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

Immigration and the War on Crime

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

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

Former President Clinton signed IIRIRA into law on September 30, 1996.⁴⁰ In his official statement, Clinton described it as a bipartisan “landmark immigration reform legislation that cracks down on illegal immigration without punishing legal immigrants” (Clinton 1996). Following IIRIRA’s enactment, Clinton’s senior policy advisor, Rahm Emanuel, remarked on the president’s success in appropriating the crime issue from the GOP. In a memo to the president, Emanuel wrote: “Since Nixon’s Law and Order campaign, crime has been a staple of the GOP platform. Over the last four years, your policies have defined the issue and allowed Democrats to achieve parity. The illegal immigration legislation provides that same opportunity. We can build a strong Administration record on immigration” (Emanuel 1996).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The attack on the World Trade Center on September 11, 2001 thwarted any efforts to repeal IIRIRA’s detention and deportation provisions. IIRIRA’s criminal provisions became entwined with counterterrorism policies. And immigration became further entangled with national security rhetoric (Johnson 2001; Chacón 2007). In fact, Attorney General John Ashcroft drew on immigration law as a pretext to target and detain members of Arab and Muslim communities as potential terrorist subjects, the majority of whom were held in

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

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

Conclusion

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

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

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

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

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

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

REFERENCES

- ACLU (American Civil Liberties Union). 1920. *Report upon the Illegal Practices of the United States Department of Justice*. Washington, DC: ACLU.
- _____. 1990. *Detention of Undocumented Aliens: Actions by the INS Prior to the Adoption of the Immigration Reform and Control Act of 1986*. Washington, DC: ACLU.
- Aleinikoff, Thomas Alexander, David A. Martin, Hiroshi Motomura, and Mary Ellen Fullerton. 2012. *Immigration and Citizenship: Process and Policy*, 7th edition. Eagan, MN: West Publishing Company.
- ABA (American Bar Association). 2004. *American Justice through Immigrants' Eyes*. Washington, DC: ABA.
- Balz, Dan. 1994. "GOP 'Contract' Pledges 10 Tough Acts to Follow." *Washington Post*, November 20.
- Beall, Jennifer A. 1997. "Are We Only Burning Witches? The Antiterrorism and Effective Death Penalty Act of 1996's Answer to Terrorism." *Indiana Law Journal* 73(2): 693.
- Beckett, Katherine. 1999. *Making Crime Pay: Law and Order in Contemporary American Politics*. Oxford: Oxford University Press.
- Bosworth, Mary, and Emma Kaufman. 2011. "Foreigners in a Carceral Age: Immigration and Imprisonment in the United States." *Stanford Law and Policy Review* 22(1): 429.
- Cacho, Lisa Marie. 2000. "'The people of California are suffering': The ideology of white injury in discourses of immigration." *Journal for Cultural Research* 4(4): 389-418. <https://doi.org/10.1080/14797580009367209>.
- Camp, Jordan T. 2016. *Incarcerating the Crisis: Freedom Struggles and the Rise of the Neoliberal State*. Berkeley: University of California Press. <https://doi.org/10.1525/california/9780520281813.001.0001>.
- Carlson, Erin. 2014. "White House Memos Reveal Emanuel's Agenda on Immigration,

Immigration and the War on Crime

- Crime.” NBC Chicago, June 20. <http://www.nbcchicago.com/blogs/ward-room/Rahm-Emanuel-memos-Bill-Clinton-library-immigration-reform-crime-264004681.html>.
- Capps, Randy, Marc R. Rosenblum, Cristina Rodríguez, and Muzaffar Chishti. 2011. *Delegation and Divergence: A Study of 287(g) State and Local Immigration Enforcement*. Washington, DC: Migration Policy Institute.
- Chacón, Jennifer M. 2007. “Unsecured Borders: Immigration Restrictions, Crime control and National Security.” *Connecticut Law Review* 39(5): 1827-93.
- Chavez, Leo R. 2001. *Covering Immigration: Popular Images and the Politics of the Nation*. Berkeley, CA: University of California Press.
- Clear, Todd R., and Natasha A. Frost. 2015. *The Punishment Imperative: The Rise and Failure of Mass Incarceration in America*. New York: New York University Press.
- CLINIC (Catholic Legal Immigration Network, Inc.). 2000. *Placing Immigrants at Risk: The Impact of Our Laws and Policies on American Families*. Washington, DC: CLINIC.
- Clinton, William Jefferson. 1996. “Statement on Signing the Omnibus Consolidated Appropriations Act, 1997.” Washington, DC: Office of the Press Secretary, White House.
- Cole, David. 2003. *Enemy Aliens: Double standards and Constitutional Freedoms in the War on Terrorism*. New York: New Press.
- Cook-Martín, David, and David FitzGerald. 2010. “Liberalism and the Limits of Inclusion: Race and Immigration Law in the Americas, 1850–2000.” *Journal of Interdisciplinary History* 41(1): 7-25. <https://doi.org/10.1162/jinh.2010.41.1.7>.
- DOJ (US Department of Justice). “International Prisoner Transfer Program.” Washington, DC: DOJ. <https://www.justice.gov/criminal-oeo/how-program-works>.
- Dow, Mark. 2007. “Designed to punish: immigrant detention and deportation.” *Social Research: An International Quarterly* 74(2): 533-46.
- Dunn, Timothy J. 1995. *The Militarization of the US-Mexico Border, 1978–1992: Low Intensity Doctrine Comes Home*. Austin, TX: University of Texas Press.
- Emanuel, Rahm. 1996. “Memorandum to the President: Domestic Policy.” Little Rock, AR: William J. Clinton Presidential Library.
- Espenshade, Thomas J., Jessica L. Baraka, and Gregory A. Huber. 1997. “Implications of the 1996 welfare and immigration reform acts for US immigration.” *Population and Development Review* 23(4): 769-801. <https://doi.org/10.2307/2137379>.
- Feeley, Malcolm M., and Jonathan Simon. 1992. “The new penology: Notes on the emerging strategy of corrections and its implications.” *Criminology* 30(4): 449-74. <https://doi.org/10.1111/j.1745-9125.1992.tb01112.x>.

- Feinstein, Dianne. 1993. "Perspective on Illegal Immigration: We Can Get a Grip on Our Borders The President must make tough enforcement a policy priority. The burden on California is overwhelming." *Los Angeles Times*, June 13.
- Fix, Michael, ed. 1991. *The Paper Curtain: Employer Sanctions' Implementation, Impact, and Reform*. Washington, DC: Urban Institute.
- GAO (US Government Accountability Office). 1989. *Prison Crowding: Issues Facing the Nation's Prison System*. United States. Washington, DC: GAO.
- García Hernández, César Cuauhtémoc. 2014. "Immigration Detention as Punishment." *UCLA Law Review* 61(5): 1346-1414. <https://doi.org/10.1057/lst.2008.2>.
- _____. 2016. "Twenty Years Ago This Week..." Crimmigration Blog, September 27. <http://crimmigration.com/2016/09/27/20-years-ago-this-week/>.
- Gottschalk, Marie. 2016. *Caught: The Prison State and the Lockdown of American Politics*. Princeton, NJ: Princeton University Press. <https://doi.org/10.1515/9781400880812>.
- Guttentag, Lucas. 1997a. "Court-Stripping in the 1996 Immigration Laws: A Dangerous Precedent." *In Defense of the Alien* 20: 213-25.
- _____. 1997b. "The 1996 Immigration Act: Federal Court Jurisdiction-Statutory Restrictions and Constitutional Rights." *Interpreter Releases* 74: 245.
- Hagan, John. 2012. *Who are the Criminals?: The Politics of Crime Policy from the Age of Roosevelt to the Age of Reagan*. Princeton, NJ: Princeton University Press.
- Helton, Arthur C. 1986. "The Legality of Detaining Refugees in the United States." *New York University Review and Law Society Change* 14: 353.
- Hernández, David Manuel. 2008. "Pursuant to deportation: Latinos and immigrant detention." *Latino Studies* 6(1-2): 35-63. <https://doi.org/10.1057/lst.2008.2>.
- Hing, Bill Ong. 1998. "The immigrant as criminal: Punishing dreamers." *Immigration. & Nationality Law Review* 19: 773.
- _____. 2006. *Deporting Our Souls: Values, Morality, and Immigration Policy*. Cambridge, MA: Cambridge University Press.
- _____. 2012. *Defining America: Through Immigration Policy*. Philadelphia, PA: Temple University Press.
- Hollifield, James F., Valerie F. Hunt, and Daniel J. Tichenor. 2008. "The Liberal Paradox: Immigrants, Markets and Rights in the United States." *Southern Methodist University Law Review* 61: 67.
- _____. 2006. "Immigrants, Markets, and the American State: The Political Economy of US Immigration." *Dialogues on Migration Policy* (2006): 91-107.
- Hopkins, Daniel J. 2010. "Politicized Places: Explaining Where and When Immigrants Provoke Local Opposition." *American Political Science Review* 104(1): 40-60. <https://doi.org/10.1017/S0003055409990360>.

Immigration and the War on Crime

- HoSang, Daniel. 2010. *Racial Propositions: Ballot Initiatives and the Making of Postwar California*. University of California Press.
- INS (US Immigration and Naturalization Service). 1969. "Budget Amendment, Additional Investigator Personnel." In *Authorization and Budget Request for the Congress, FY 1970*, Volume 1. Washington, DC: USCIS Historical Library.
- . 1988. *Criminal Alien Program (CAP) Procedures Manual*. Washington, DC: Office of the General Counsel, INS.
- Interpreter Releases*. 1996. "Final Anti-terrorism Bill Contains Major Immigration Changes." *Interpreter Releases* 73(16).
- Inda, Jonathan Xavier. 2013. "Subject to deportation: IRCA, 'criminal aliens', and the policing of immigration." *Migration Studies* 1(3): 292-310. <https://doi.org/10.1093/migration/mns003>.
- Jacobson, Robin Dale. 2008. *The New Nativism: Proposition 187 and the Debate over Immigration*. Minneapolis, MN: University of Minnesota Press.
- Johnson, Dawn Marie. 2001. "The AEDPA and the IIRIRA: Treating misdemeanors as felonies for immigration purposes." *Journal of Legislation* 27(2): 477-91.
- Johnson, Kevin R. 1995. "An Essay on Immigration Politics, Popular Democracy, and California's Proposition 187: The Political Relevance and Legal Irrelevance of Race." *Washington Law Review* 70: 629.
- . 2004. *The Huddled Masses Myth: Immigration and Civil Rights*. Philadelphia, PA: Temple University Press.
- Johnson, Kevin R., and Bernard Trujillo. 2011. *Immigration Law and the US–Mexico Border: ¿ Si Se Puede?* Tucson, AZ: University of Arizona Press.
- Johnson, Kevin R., Raquel Aldana, Bill Ong Hing, Leticia M. Saucedo, and Enid Trucios-Haynes. 2015. *Understanding Immigration Law*, 2nd edition. Durham, NC: Carolina Academic Press.
- Jonas, Susanne, and Suzanne Dod Thomas. 1999. *Immigration: A Civil Rights Issue for the Americas*. New York: Rowman & Littlefield.
- Kanstroom, Daniel. 2007. *Deportation Nation: Outsiders in American History*. Harvard University Press.
- . 2000. "Deportation, Social Control, and Punishment: Some Thoughts about Why Hard Laws Make Bad Cases." *Harvard Law Review* 113(8): 1890-935. <https://doi.org/10.2307/1342313>.
- . 2012. *Aftermath: Deportation Law and the New American Diaspora*. Oxford: Oxford University Press.

- Kessel, Alan J. 1986. "Unconstitutional Prison Overcrowding." *Annual Survey of American Law* (1986): 737.
- King, Ryan D., Michael Massoglia, and Christopher Uggen. 2012. "Employment and Exile: U.S. Criminal Deportations, 1908–2005 1." *American Journal of Sociology* 117(6): 1786-825. <https://doi.org/10.1086/664824>.
- Kubrin, Charis Elizabeth, Marjorie Sue Zatz, and Ramiro Martinez, eds. 2012. *Punishing Immigrants: Policy, Politics, and Injustice*. New York: New York University Press. <https://doi.org/10.18574/nyu/9780814749029.001.0001>.
- Lind, Dara. 2016. "The Disastrous, Forgotten 1996 Law that Created Today's Immigration Problem." *Vox Media*, April 28.
- Loescher, Gil. 1996. *Beyond Charity: International Cooperation and the Global Refugee Crisis: A Twentieth Century Fund Book*. Oxford: Oxford University Press.
- Lofgren, Zoe. 2005. "A Decade of Radical Change in Immigration Law: An Inside Perspective." *Stanford Law and Policy Review* 16: 349.
- Macías-Rojas, Patrisia. 2016. *From Deportation to Prison: The Politics of Immigration Enforcement in Post-Civil Rights America*. New York: New York University Press.
- Martin, David A. 1999. "Two Cheers for Expedited Removal in the New Immigration Laws." *Virginia Journal of International Law* 40: 673.
- _____. 2003. "Prevention Detention: Immigration Law Lessons for the Enemy Combatant Debate." *Georgetown Immigration Law Journal* 18: 305.
- _____. 2006. "Eight Myths About Immigration Enforcement." *New York University Journal of Legislation and Public Policy* 10: 525.
- _____. 2012. "A Defense of Immigration-Enforcement Discretion: The Legal and Policy Flaws in Kris Kobach's Latest Crusade." *Yale Law Journal* 122: 167.
- _____. 2014. "Resolute Enforcement is Not Just for Restrictionists: Building a Stable and Efficient Immigration Enforcement System." *Journal Law and Politics* 30: 411.
- Massey, Douglas S. 1999. "International migration at the dawn of the twenty-first century: The role of the state." *Population and Development Review* 25(2): 303-22. <https://doi.org/10.1111/j.1728-4457.1999.00303.x>.
- Massey, Douglas S., Jorge Durand, and Nolan J. Malone. 2002. *Beyond smoke and mirrors: Mexican immigration in an era of economic integration*. New York: Russell Sage Foundation.
- Massey, Douglas S., and Karen A. Pren. 2012. "Unintended Consequences of U.S. Immigration Policy: Explaining the Post-1965 Surge from Latin America." *Population and Development Review* 38(1): 1-29. <https://doi.org/10.1111/j.1728-4457.2012.00470.x>.

Immigration and the War on Crime

- Mauer, Marc. 2006. *Race to Incarcerate*. New York: New Press.
- McGirr, Lisa. 2015. *Suburban Warriors: The Origins of the New American Right*. Princeton, NJ: Princeton University Press.
- Medina, Jennifer. 2017. "Trump's Immigration Order Expands the Definition of 'Criminal.'" *New York Times*, January 26.
- Meissner, Doris. 2000. *Exercising Prosecutorial Discretion*. Washington, DC: INS.
- Meissner, Doris, Donald Kerwin, Muzaffar Chishti, and Claire Bergeron. 2013. *Immigration Enforcement in the United States: The Rise of a Formidable Machinery*. Washington, DC: Migration Policy Institute.
- Migration News. 1997a. "INS: IIRIRA and Apprehensions." *Migration News*, April.
- _____. 1997b. "Implementing Immigration Changes." *Migration News*, April.
- _____. 1997c. "IIRIRA Goes into Effect." *Migration News*, May.
- Miller, Teresa A. 2003. "Citizenship & Severity: Recent Immigration Reforms and the New Penology." *Georgetown Immigration Law Journal* 10: 611.
- _____. 2005. "Blurring the Boundaries between Immigration and Crime Control after September 11th." *Boston College Third World Law Journal* 25(1): 81.
- Morawetz, Nancy. 1998. "Rethinking Retroactive Deportation Laws and the Due Process Clause." *New York University Law Review* 73: 97.
- _____. 2000. "Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms." *In Defense of the Alien* 23: 1-30.
- _____. 2006. "Back to Back to the Future-Lessons Learned from Litigation over the 1996 Restrictions on Judicial Review." *New York Law School Law Review* 51: 113.
- Morris, Helen. 1997. "Zero Tolerance: The Increasing Criminalization of Immigration Law." *Interpreter Releases* 74(33): 1317-26.
- Muhammad, Khalil Gibran. 2011. *The Condemnation of Blackness*. Cambridge, MA: Harvard University Press.
- Nevins, Joseph. 2010. *Operation Gatekeeper and Beyond: The War on "Illegals" and the Remaking of the U.S.-Mexico Boundary*. New York: Routledge.
- Newton, Lina. 2005. "It is not a question of being anti-immigration: Categories of deservedness in immigration policy making." In *Deserving and Entitled: Social Constructions and Public Policy*, edited by Anne L. Schneider and Helen M. Ingram, 139-167. Albany, NY: State University of New York Press.
- _____. 2008. *Illegal, Alien, or Immigrant: The Politics of Immigration Reform*. New York: New York University Press.

- Ngai, Mae M. 2004. *Impossible Subjects: Illegal Aliens and the Making of Modern America*. Princeton, NJ: Princeton University Press.
- Obama, Barack. 2014. "Remarks by the President in Address to the Nation on Immigration." Washington, DC: Office of the Press Secretary, White House. <https://obamawhitehouse.archives.gov/the-press-office/2014/11/20/remarks-president-address-nation-immigration>.
- Osuna, Juan P. 1996. "The 1996 Immigration Act: Criminal Aliens and Terrorists." *Interpreter Releases* 73: 1713.
- Page, Joshua. 2012. "Punishment and the Penal Field." In *The Sage Handbook of Punishment and Society*, edited by Simon, Jonathan, and Richard Sparks. Thousand Oaks, CA: Sage.
- Perea, Juan F., ed. 1997. *Immigrants Out!: the New Nativism and the Anti-Immigrant Impulse in the United States*. New York: New York University Press.
- Pistone, Michele R., and Schrag, Philip G. 1996. "The 1996 Immigration Act: Asylum and Expedited Removal: What the INS Should Do." *Interpreter Releases* 73: 1565-79.
- Rosenblum, Marc R., and Daniel J. Tichenor. 2012. *The Oxford Handbook of the Politics of International Migration*. Oxford: Oxford University Press.
- Scalia, John. 1996. *Non-Citizens in the Federal Criminal Justice System, 1984-1994*. Washington, DC: US Bureau of Justice Statistics.
- Schrecker, Ellen. 1996. "Immigration and Internal security: Political Deportations during the McCarthy Era." *Science & Society* 60(4): 393-426.
- Schuck, Peter H. 1984. "The transformation of immigration law." *Columbia Law Review* 84(1): 1-90. <https://doi.org/10.2307/1122369>.
- Sessions, Jeff. 2017. "Attorney General Sessions Delivers Remarks on DACA." Washington, DC: DOJ.
- Skelton, George. 1993. "Feinstein Takes Immigration Out of the Closet." *Los Angeles Times*, July 12.
- Simon, Jonathan. 1998. "Refugees in a Carceral Age: The rebirth of immigration prisons in the United States." *Public Culture* 10(3): 577-607. <https://doi.org/10.1215/08992363-10-3-577>.
- _____. 2014. *Mass Incarceration on Trial: A Remarkable Court Decision and the Future of Prisons in America*. New York: New Press.
- _____. 2007. *Governing through Crime: How the War on Crime Transformed American Democracy and Created a Culture of Fear*. Oxford: Oxford University Press.
- Smith, Lamar. 1999. "Guidelines for Use of Prosecutorial Discretion in Removal Proceedings." Letter to Janet Reno, Attorney General and INS Commissioner Doris Meissner. *Interpreter Releases* 76: 1730.

Immigration and the War on Crime

- Smith, Lamar, and Edward R. Grant. 1996. "Immigration Reform: Seeking the Right Reasons." *St. Mary's Law Journal* 28: 883.
- Smolla, Rod. 1984. "Prison Overcrowding and the Courts: A Roadmap for the 1980s." *University of Illinois Law Review* (1984): 389.
- Stanley, Jason. 2017. "Who is a Criminal?" *New York Times*, May 1.
- Stumpf, Juliet. 2009. "Fitting Punishment." *Washington & Lee Law Review* 66: 1683.
- Thompson, Joel A., and G. Larry Mays, eds. 1991. *American Jails: Public Policy Issues*. Chicago: Nelson-Hall.
- _____. 2006. "The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power." *American University Law Review* 56(2): 367-419.
- Taylor, Margaret H. 1997. "The 1996 Immigration Act: Detention and Related Issues." *Interpreter Releases* 74: 209.
- Taylor, Margaret H., and T. Alexander Aleinikoff. 1998. "Deportation of Criminal Aliens: A Geopolitical Perspective." Washington, DC: Inter-American Dialogue.
- Thompson, Roger. 1983. "Prison Overcrowding." In *Editorial Research Reports 1983*, Volume II. Washington, DC: CQ Press.
- Tichenor, Daniel J. 2008. "Strange Bedfellows: the Politics and Pathologies of Immigration Reform." *Labor* 5(2): 39-60. <https://doi.org/10.1215/15476715-2007-077>.
- _____. 2009. *Dividing Lines: The Politics of Immigration Control in America*. Princeton, NJ: Princeton University Press.
- Tonry, Michael. 1995. *Malign Neglect: Race, Crime, and Punishment in America*. Oxford: Oxford University Press.
- MRS/USCCB-CMS (Migration and Refugee Services of the United States Conference of Catholic Bishops, and the Center for Migration Studies). 2015.. "Unlocking Human Dignity: A Plan to Transform the US Immigrant Detention System." *Journal on Migration and Human Security* 3(2): 159-204. <https://doi.org/10.14240/jmhs.v3i2.48>.
- US Commission on Civil Rights. 1980. "The Tarnished Golden Door." Washington, DC: US Commission on Civil Rights.
- US Congress. 1996. *Making Omnibus Consolidated Appropriations for Fiscal Year 1997*. House Report 104-863. Washington, DC: US Congress.
- Welch, Michael. 2003. "Ironies of Social Control and the Criminalization of Immigrants." *Crime, Law and Social Change* 39(4): 319-37. <https://doi.org/10.1023/A:1024068321783>.
- _____. 2012. "Panic, Risk, and Social Control." In *Punishing immigrants: Policy, Politics, and Injustice*, edited by Charis Kubrin, Marjorie S. Katz, and Ramiro

Martinez, 17-41. New York: New York University Press. <https://doi.org/10.18574/nyu/9780814749029.001.0001>.

_____. 2002. *Detained: Immigration Laws and the Expanding INS Jail Complex*. Philadelphia, PA: Temple University Press.

_____. 2000. "The role of the immigration and naturalization service in the prison-industrial complex." *Social Justice* 27(3): 73-88.

_____. 1996. "The immigration Crisis: Detention as an emerging mechanism of social control." *Social Justice* 23(3): 169-184.

White, Ahmed A. 2006. "Crime of Economic Radicalism: Criminal Syndicalism Law and the Industrial Workers of the World 1917-1927." *Oregon Law Review* 85: 649.

Zatz, Marjorie S., and Nancy Rodriguez. 2014. "The Limits of Discretion: Challenges and Dilemmas of Prosecutorial Discretion in Immigration Enforcement." *Law & Social Inquiry* 39(3): 666-89. <https://doi.org/10.1111/lasi.12083>.

_____. 2015. *Dreams and Nightmares: Immigration Policy, Youth, and Families*. Berkeley, CA: University of California Press.



Making Immigrants into Criminals: Legal Processes of Criminalization in the Post-IIRIRA Era

Leisy Abrego
University of California, Los Angeles

Mat Coleman
The Ohio State University

Daniel E. Martínez
University of Arizona

Cecilia Menjivar
University of Kansas

Jeremy Slack
The University of Texas, El Paso

Executive Summary

During a post-election TV interview that aired mid-November 2016, then President-Elect Donald Trump claimed that there are millions of so-called “criminal aliens” living in the United States: “What we are going to do is get the people that are criminal and have criminal records, gang members, drug dealers, we have a lot of these people, probably two million, it could be even three million, we are getting them out of our country or we are going to incarcerate.” This claim is a blatant misrepresentation of the facts. A recent report by the Migration Policy Institute suggests that just over 800,000 (or 7 percent) of the 11 million undocumented individuals in the United States have criminal records.¹ Of this population, 300,000 individuals are felony offenders and 390,000 are serious misdemeanor offenders — tallies which exclude more than 93 percent of the resident undocumented population (Rosenblum 2015, 22-24). Moreover, the Congressional Research Service found that 140,000 undocumented migrants — or slightly more than 1 percent of the undocumented population — are currently serving time in

1 These numbers are based on the assumption that “unauthorized immigrants and lawful noncitizens commit crimes at similar rates” (Rosenblum 2015, 22). However, there is research that provides good support that criminality among the undocumented is lower than for the foreign-born population overall (Rumbaut 2009; Ewing, Martínez, and Rumbaut 2015).

prison in the United States (Kandel 2016). The facts, therefore, are closer to what Doris Meissner, former Immigration and Naturalization Service (INS) Commissioner, argues: that the number of “criminal aliens” arrested as a percentage of all fugitive immigration cases is “modest” (Meissner et al. 2013, 102-03).

The facts notwithstanding, President Trump’s fictional tally is important to consider because it conveys an intent to produce at least this many people who — through discourse and policy — can be criminalized and incarcerated or deported as “criminal aliens.” In this article, we critically review the literature on immigrant criminalization and trace the specific laws that first linked and then solidified the association between undocumented immigrants and criminality. To move beyond a legal, abstract context, we also draw on our quantitative and qualitative research to underscore ways immigrants experience criminalization in their family, school, and work lives.

The first half of our analysis is focused on immigrant criminalization from the late 1980s through the Obama administration, with an emphasis on immigration enforcement practices first engineered in the 1990s. Most significant, we argue, are the 1996 Illegal Immigration Reform and Immigration Responsibility Act (IIRIRA) and the 1996 Antiterrorism and Effective Death Penalty Act (AEDPA). The second section of our analysis explores the social impacts of immigrant criminalization, as people’s experiences bring the consequences of immigrant criminalization most clearly into focus.

We approach our analysis of the production of criminality of immigrants through the lens of legal violence (Menjívar and Abrego 2012), a concept designed to understand the immediate and long-term harmful effects that the immigration regime makes possible. Instead of narrowly focusing only on the physical injury of intentional acts to cause harm, this concept broadens the lens to include less visible sources of violence that reside in institutions and structures and without identifiable perpetrators or incidents to be tabulated. This violence comes from structures, laws, institutions, and practices that, similar to acts of physical violence, leave indelible marks on individuals and produce social suffering. In examining the effects of today’s ramped up immigration enforcement, we turn to this concept to capture the violence that this regime produces in the lives of immigrants.

Immigrant criminalization has underpinned US immigration policy over the last several decades. The year 1996, in particular, was a signal year in the process of criminalizing immigrants. Having 20 years to trace the connections, it becomes evident that the policies of 1996 used the term “criminal alien” as a strategic sleight of hand. These laws established the concept of “criminal alienhood” that has slowly but purposefully redefined what it means to be unauthorized in the United States such that criminality and unauthorized status are too often considered synonymous

(Ewing, Martínez, and Rumbaut 2015). Policies that followed in the 2000s, moreover, cast an increasingly wider net which continually re-determined who could be classified as a “criminal alien,” such that the term is now a mostly incoherent grab bag. Simultaneously and in contrast, the practices that produce “criminal aliens” are coherent insofar as they condition immigrant life in the United States in now predictable ways. This solidity allows us to turn in our conclusion to some thoughts about the likely future of US immigration policy and practice under President Trump.

Research on the Criminalization of Immigrants

A growing body of scholarship on the merger of criminal law and civil immigration law in the United States examines the criminalization of immigrants through a number of different theoretical lenses, including “crimmigration” (García Hernández 2015; Stumpf 2006), the “criminalization of immigration” (Morris 1997; Ewing, Martínez, and Rumbaut 2015; Douglas and Sáenz 2013), and the “overcriminalization” of immigration (Chacón 2012). These approaches are conceptually and empirically rich and help to make sense of how immigration enforcement in the United States works. At the same time, we find that these approaches tend to underemphasize the context-specific mechanics of criminalizing state power in favor of broad-brush statements about the overarching logic of US immigration law and enforcement. We also note that the existing literature on immigrant criminalization is heavily focused on the discursive aspects of how states make immigrants into criminals — for example, the ways that elected officials speak about undocumented migration as a threat. In contrast, and especially in this turbulent time of extreme anti-immigrant rhetoric and policies, we think it is imperative to clearly outline and specify immigrant criminalization as an actually existing practice, and not just a legislative or perhaps policy-based speech act. In focusing squarely on the practice of immigrant criminalization, and not just on the act of naming that characterizes immigrants as criminal subjects, we hope to avoid re-naturalizing the links between criminality and immigration (see, for instance, Melossi 2015). Indeed, the difficulty in much of what has been written academically about immigrant criminalization is that it risks repeating the noun-centric logic of “criminal alienhood” at the core of immigrant criminalization, thereby reinforcing the links between criminality and immigration. In this sense, our focus on practice highlights the engineered rather than taken-for-granted nature of criminal alienhood.

Below, we examine the processes of criminalization in three contexts: the legal history that has produced the current situation, enforcement programs and practices at the border and interior, and the consequences for immigrants and their families living in the United States. In doing so, we extend the discussion of the criminalization of immigrants beyond the existing literature, on two basic counts. First, rather than discuss criminalization in the post-9/11 or War on Terror context, we focus on legislative changes that paved the way for the passage of the Illegal Immigration Reform and Immigration Responsibility Act (IIRIRA) and the Antiterrorism and Effective Death Penalty Act (AEDPA) in 1996, which we understand as a crucial year for the criminalization of immigration. Second, we document how criminalizing state power turns people and indeed whole communities into law enforcement objects through specific programs and practices, and how immigrants experience this power within families and outside the home.

We do not suggest that individuals convicted of crimes should be treated less humanely (see Negrón-González, Abrego, and Coll 2015); however, it is worth noting that a sizeable proportion of deported immigrants labeled “criminal aliens” have not been convicted of a crime, or have only committed relatively minor criminal violations, such as traffic infractions or drug offenses. For example, from 2010 to 2013, only 3 percent of the 2.6 million immigrants ICE *encountered* through the Criminal Alien Program (CAP) had been convicted of “a violent crime or a crime which the FBI [Federal Bureau of Investigation] classifies as serious” (Cantor, Noferi, and Martínez 2015, 2).² And nearly 83 percent of individuals *removed* through CAP during the same period either had no criminal conviction (27.5 percent) or had been convicted of what the FBI describes as nonviolent, non-serious offenses (55.4 percent) (Cantor, Noferi, and Martínez 2015). Even among those whom ICE classifies as “Level 1” priority offenders, nearly 64 percent had been convicted of a non-serious or nonviolent offense.³ CAP’s wide net has ensnared hundreds of thousands of immigrants, but their criminal status remains very much in doubt.

Legal Background: The 1996 Laws and Beyond

IIRIRA is an important starting point for understanding how millions of undocumented immigrants were reclassified as deportable and/or inadmissible through criminal law provisions newly built into the Immigration and Nationality Act. The law also curtailed immigrants’ rights of due process on the basis that immigration control is a civil, or administrative, legal power not subject to robust challenge in the courts (Coleman 2007; 2012). However, IIRIRA was not the first law that criminalized immigrants; instead, it was the culmination of a series of legislative actions that started in the 1980s and continued throughout the early and mid-1990s (Inda 2013; Macias-Rojas 2016).

The Immigration Reform and Control Act of 1986 (IRCA) criminalized the hiring of undocumented workers and increased the resources of the then Immigration and Naturalization Service (INS) to patrol the border (Inda 2013). IRCA also contained a provision requiring the US Attorney General to deport noncitizens convicted of removable offenses as quickly as possible. This provision set in motion the practice of targeting immigrants convicted of crimes and expanded the mechanisms for policing immigrants. Later laws, such as the 1988 Anti-Drug Abuse Act and the 1990 Immigration Act, grew the linkages between crime and immigration. For example, the 1988 law created the crime of aggravated felony, which was intended to facilitate the deportation of drug kingpins under murder, drug trafficking, and arms trafficking charges. The 1990 law built on the 1988 law by further expanding the list of deportable offenses.

However, 1996 was arguably the most important year, legislatively, in terms of the criminalization of immigration. A number of important laws were passed that year dealing with crime and immigration. The two most important laws were the Antiterrorism and Effective Death Penalty Act, signed on April 24, 1996, and the Illegal Immigration

2 The Criminal Alien Program (CAP) is an Immigration and Customs Enforcement (ICE)-based umbrella program that includes several key initiatives aimed at arresting, detaining, and removing immigrants whom ICE prioritizes, and based on supporting enforcement through the use of biometric and biographic information in shared databases. For more information, see <https://www.ice.gov/criminal-alien-program>.

3 See Rosenblum and McCabe (2014) for more evidence of similar patterns since 2003.

Making Immigrants into Criminals

Reform and Immigrant Responsibility Act, passed several months later. Together the laws significantly altered the definition of aggravated felony. The aggravated felony charge would undergo a significant expansion via the 1996 laws. By the close of that year, offenses that qualified as an “aggravated felony” would encompass a range of misdemeanors and minor offenses, crimes which are neither aggravated nor felonious — such as prostitution, undocumented entry after removal, drug addiction, shoplifting, failure to appear in court, filing a false tax return, and generally any crime warranting a sentence of one year or more. In addition, the laws restricted due process opportunities for certain classes of individuals in removal proceedings (e.g., exemption from various stays of deportation, as well as from applying for asylum) in an effort to speed up the deportation process. The 1996 laws also included provisions to enlist local law enforcement agencies in the enforcement of immigration law (Menjívar and Kanstroom 2014). The most important provision was the 287(g) program, which we examine below, in addition to the more recent Secure Communities program.⁴

On January 25th, 2017, Trump signed two immigration-related executive orders (EOs) titled “Border Security and Immigration Enforcement Improvements”⁵ and “Enhancing Public Safety in the Interior of the United States.”⁶ The EOs are intended to escalate and intensify immigrant criminalization along the US-Mexico border and in the US interior. The “Border Security and Immigration Enforcement Improvements” EO reinstates and expands the 287(g) program, allowing local law enforcement agents in certain western and southwestern states to enforce immigration law, as outlined in IIRIRA, and named after §287(g) of the Immigration and Nationality Act, for which the program was named (DHS 2017a). It allows for sheriffs and police departments, as well as state-level policing agencies — to investigate immigration cases, make immigration-related arrests, and among other things, take custody of immigrants on the basis of both criminal and civil immigration violations. The EO also expands the use of expedited removals in the border region, calls for an additional 5,000 Border Patrol agents, mandates the detention of immigrants apprehended for unlawful entry, and prioritizes criminal prosecutions for immigration offenses committed at the border (DHS 2017a). Similarly, the “Enhancing Public Safety in the Interior of the United States” EO terminates the 2014 Priority Enforcement Program, which shielded approximately 87 percent of the unauthorized population from removal (Rosenblum 2015), restores the Secure Communities program, and authorizes the hiring of an additional 10,000 Immigration and Customs Enforcement (ICE) agents (DHS 2017b). Together, these EOs effectively criminalize all unauthorized immigrants present within the United States by deeming them priorities for removal while simultaneously expanding the immigration enforcement apparatus. Under the current presidential administration, the United States has essentially regressed to the early days of the Secure Communities program, which was characterized as having high levels of collateral damage and whereby

4 Secure Communities is a federal program established under the Obama administration to allow more communication between local authorities, the Federal Bureau of Investigation (FBI), and Immigration and Customs Enforcement (ICE) agencies. For more information about Secure Communities, see <https://www.ice.gov/secure-communities>.

5 Border Security and Immigration Enforcement Improvements, Exec. Order No. 13767, 82 Fed. Reg. 8793 (Jan. 25, 2017).

6 Enhancing Public Safety in the Interior of the United States, Exec. Order No. 13768, 82 Fed. Reg. 8799 (Jan. 25, 2017).

an unauthorized immigrant's chance encounter with a local law enforcement agency could result in criminalization and removal from the United States.

The EOs signed by Trump have generally been understood — especially in the media — as an about-face for US immigration policy and practice. However, although certainly the rhetoric around undocumented migration has been ramped up since President Trump's inauguration, many of the policies that the new administration has endorsed follow from the trajectory of criminalization sketched out above. As noted, the EOs scaled back some of the limited protections enacted in the last years of the Obama administration, and reemphasized the importance of using police as immigration agents, specifically through the 287(g) and Secure Communities programs. Moreover, the administration's plan to pressure sanctuary localities and states by withholding federal block grants can be traced, at least partly, to language in IIRIRA.

This brief overview of the legal and legislative history underpinning the criminalization of immigration suggests that the latter is not a state of legal exception or legal backwardness (Schuck 1984), but instead a systematic legal violence, that is, a strategy coded into law and which uses legal language that not only permits various forms of violence against immigrants, but one that also makes abuses possible and acceptable (Menjívar and Abrego 2012). As Menjívar and Abrego (*ibid.*) note, the convergence of immigration law and criminal law has resulted in negative consequences for immigrants and their family members by impacting their everyday lives as well as their long-term incorporation into US society, affecting in particular people's interactions with social institutions such as family, work, and schools. From this perspective, the criminalization of immigrants itself constitutes a form of legal violence “because it is embedded in legal practices, sanctioned, actively implemented through formal procedures, and legitimated — and consequently seen as ‘normal’ and natural because it ‘is the law’” (*ibid.*, 1386). The next sections move beyond an exclusively legal approach to explore the lived experiences of criminalization. These practices take place inside enforcement institutions (e.g., federal courtrooms, prisons, detention centers, etc.) and within social institutions such as the family, places of employment, and in dealings with bureaucracies, among others.

Data Sources

The empirical evidence guiding our analyses stem from several research projects. We draw extensively on our research on the everyday aspects and impacts of immigration enforcement in the US-Mexico border region (Martínez and Slack 2013; Martínez, Slack, and Heyman 2013; Slack et al. 2013; 2015) and in the US interior (Abrego 2008; 2011; Coleman and Stuesse 2016; Menjívar 2013; 2016; Menjívar and Abrego 2009; 2012; Stuesse and Coleman 2014). To examine the criminalization of immigrants near the US-Mexico border, we draw on data collected through the first two waves of the Migrant Border Crossing Study (MBCS) (N = 415; N = 1,109), which consist of post-deportation surveys of repatriated Mexican migrants in five cities along Mexico's northern border and in Mexico City administered between 2007 and 2012 (see Martínez, Slack, and Heyman 2013; Slack et al. 2013; 2015; Martínez et al. 2017). Qualitative research projects in Los Angeles, Phoenix, Raleigh-Durham, and Atlanta with Latino migrants of various legal statuses allow us to uncover the everyday consequences of immigration policies (see

Abrego n.d.; Menjivar and Abrego 2012). Findings from this body of work provide greater insight into how IIRIRA and other related legislation have resulted in the criminalization of immigrants beyond a legal, abstract context.

Criminalization along the US-Mexico Border

Every day thousands of people arrive in Mexican border cities, deported after long bus rides to these unfamiliar zones. Many have accumulated notable US experience, while others are relatively recent border crossers. According to data collected through the second wave of the Migrant Border Crossing Study, the typical repatriated Mexican migrant had spent a median of 6.5 years living and working in the United States, and nearly 27 percent of respondents had lived in the country for a decade or longer. Others have only just survived the desert crossing; around 15 percent were first-time border crossers who *did not* successfully reach their desired US destination on their most recent crossing attempt (see Slack et al. 2013; 2015). People apprehended within 100 kilometers of the border for the first time are generally formally removed or returned to Mexico relatively quickly, while those apprehended in the interior of the United States often spend weeks, months, or even years in detention facilities or prisons before being released to the streets of unfamiliar Mexican border cities. Criminalization, and the complex processes that lead to removal, manifest themselves in various ways. In the past, it was generally considered easy to live and work inside the United States once migrants successfully crossed the border, meaning that only those who were “misbehaving” (i.e., violating criminal law) were removed. Although this has changed with mass removal, the stigma associating “misbehavior” with deportation remains (see Albicker and Velasco 2016; Brotherton and Barrios 2011). When combined with the vulnerability to forms of violence such as kidnapping that many migrants experience upon deportation (Slack 2016), the fact that one-in-four migrants surveyed had important identifying documents taken away and not returned (Martínez, Slack, and Heyman 2013), as well as the difficulty of finding work in Mexico, it is not surprising that many decide to cross again. Only 23 percent of MBCS respondents indicated that they would never cross the border again. Similarly, there are also high rates of remigration from northern Central American countries. These migrants will face considerable physical dangers of navigating remote and treacherous terrain, as well as intensified efforts to criminalize and incarcerate them through programs such as Operation Streamline and other zero-tolerance policies aimed at prosecuting unauthorized border crossers.

Operation Streamline and Zero-Tolerance Policies

Each time deportees attempt to cross the border and are apprehended by US authorities, the punishment for unlawful entry attempts increases. The principal drivers of this multiplier effect are Operation Streamline as well as “fast-track” federal court proceedings that systematically criminalize recent border crossers by charging and convicting them of “illegal entry”⁷ or “illegal reentry.”⁸ Currently three of the Border Patrol’s nine sectors practice Operation Streamline — Tucson, Del Rio, and Laredo. Operation Streamline can best be

7 8 U.S.C. § 1325 (1994).

8 8 U.S.C. § 1326 (1994).

described as a federal program carried out in federal district courts that systematically charges and convicts for federal immigration crimes up to 70 recent border crossers *en masse* on a daily basis.

Due to recent decreases in unauthorized migration and Border Patrol apprehensions, the Yuma, El Paso, and Rio Grande Valley sectors have discontinued Operation Streamline (OIG 2015). Nevertheless, recent border crossers caught in these sectors can also be prosecuted in federal court through individual “fast-track” proceedings. Fast-track sentencing programs effectively “allow a federal prosecutor to offer a below-Guidelines sentence in exchange for a defendant’s prompt guilty plea and waiver of certain pretrial and post-conviction rights” (Gorman 2010, 479). Although fast-track sentencing has likely reduced sentence lengths associated with criminal immigration cases, it has also allowed district courts to process more cases and secure more guilty pleas. This drastically increases the total number of “criminal aliens.” Any future contact by these individuals with law enforcement will result in much longer sentences.

Typically, in both Operation Streamline and fast-track proceedings, people without criminal records or a history of formal removals are convicted of “illegal entry,” given time served, and immediately deported to Mexico.⁹ However, they do receive a misdemeanor immigration conviction, and should they be apprehended again upon trying to enter the United States, they risk being charged with “illegal reentry.” Depending on prior convictions, penalties range from a fine and a three-month sentence to a maximum of 20 years in prison, although the latter is rarely, if ever, given.¹⁰ Regardless of whether they were convicted of “illegal entry” or “illegal reentry,” 15 percent of MBCS respondents processed through Operation Streamline stated that they would cross the border again within the next week following their most recent deportation, while 47 percent indicated that it was possible that they would cross again sometime in the future. In these cases, individuals must avoid encounters with US officials or risk subsequent incarceration.

Operation Streamline has drawn heavy criticism from immigrant rights activists and academics because it greatly contributes to immigration criminal convictions in federal courts. Prior to Operation Streamline, the vast majority of people apprehended on the US southern border were given a Voluntary Return, an administrative violation that carried no criminal charge. By expanding the use of criminal remedies, Operation Streamline has raised the stakes of apprehension. In 1992, only 1,753 individuals were convicted of federal criminal immigration offenses, by 2012, this number had increased thirteen-fold to 23,250 (Light, Lopez, and Gonzalez-Barrera 2014). In fiscal year 2011, immigration crimes were the most common federal crimes (29,717 cases), surpassing drug crimes for the first time (USSC 2016b). The consequences are severe and ongoing. Once convicted, subsequent interactions with law enforcement and the court system will almost certainly result in a prison sentence.

Moreover, the prevalence of other forms of removal, such as expedited removal which count as a formal removal but do not require review by a judge, as well as the generally confusing nature of immigration proceedings, further complicate people’s understanding of how their removals might affect them in the future.

⁹ While there are parallels with other national origin groups, MBCS data only includes Mexican deportees.

¹⁰ Current sentencing guidelines for illegal reentry have recently been amended (USSC 2016a).

Making Immigrants into Criminals

Furthermore, unauthorized migrants processed through Operation Streamline experience forms of *social* criminalization, especially those who had never been tried and convicted in a formal court setting. Because immigrants prosecuted through the program are typically held in short-term detention facilities or federal prisons, and are shackled at the hands, waist, and feet, many report being treated as serious, violent, or chronic offenders. Some even began to internalize these labels. For example, an older, more experienced migrant from Michoacán, Mexico, Benjamín, stated “I felt bad when it happened (the court proceeding) . . . that has never happened to me, I have never been chained up like that . . . now they treat you like an animal” (Martínez and Slack 2013, 11). Javier, a young man from Chiapas, Mexico, expressed a similar sentiment, “We all went in a big group in front of the judge . . . they put the chains on us really tight . . . the whole time there they made me feel like I killed someone” (ibid.). This dehumanizing experience feels especially grave for people convicted in a formal court setting, leading some to internalize the negative labels as “criminal alien.” In the midst of broader social criminalization of immigrants, especially under President Trump’s rhetoric and executive actions, the consequences for immigrants are likely to be dire.

Criminalization in Detention

Unauthorized migrants also experience criminalization when they are sent to long-term detention or prison. Many migrants convicted of federal immigration crimes express fear and insecurity while being incarcerated alongside other more serious offenders. For instance, Mercedes expressed concern about her time in detention by stating “. . . there is a lot of violence, drugs and weapons inside . . . people smoke weed there openly . . . someone even got stabbed right before I left” (Martínez and Slack 2013, 13). But the consequences of long-term detention extend much further (for instance, see Ryo 2016). Many are exposed for the first time to illicit social networks, including prison gangs and drug trafficking organizations. Octavio, a 19-year-old from Chiapas, Mexico, notes “[t]here are more Sureños (a Mexican/Mexican-American gang) in jail than any other group. They protect us because we are all ‘paisanos’ [countrymen]. You have to join with them and they make sure no one touches you” (Martínez and Slack 2013, 12-13). With social and economic pressures mounting to provide for one’s family or to be reunited with loved ones, we found that some detainees explore opportunities offered through these new social networks (e.g., human smuggling or drug smuggling), which could lead to further criminalization and stigmatization (Martínez and Slack 2013).

Criminalization through Interior Enforcement

To reiterate, IIRIRA is best understood not as a watershed event with respect to the criminalization of immigration but rather as a significant ratcheting up of punitive aspects of US immigration law then already in place. However, the 1996 law did inaugurate new practices related to the criminalization of immigration.

Prior to IIRIRA, with the exception of the mid-1950s when more than a million Mexican nationals (and American citizens) were rounded up with assistance from non-federal authorities, immigration enforcement was understood as a strictly federal power operative

principally at the US-Mexico and US-Canada borders. Indeed, there was a widespread legal and practical consensus among government and legal officials that immigration enforcement was an exclusively federal authority. As a result, even immediately subsequent to the passage of IIRIRA, well over 90 percent of deportation cases originated with the Border Patrol in California, Arizona, New Mexico, and Texas (INS 1999, 209-10, Tables 59 and 60).

Written into IIRIRA, the 287(g) program emerged as a legally straightforward way to deputize state and local authorities to enforce immigration law (Valdez, Coleman, and Akbar 2017). Although initially very few localities expressed interest in 287(g), later the practice took shape in the form of “street” and “jail” programs; the former gives police the power to ask about immigration status during routine policing, whereas the latter’s check for status was incorporated into the jail intake process.

Given the prominent place that the 287(g) program occupied in discussions of homeland security after 9/11, it is important to note that the program has had a relatively narrow reach. By 2010, the peak year for 287(g) operations, there were but 70 programs in effect across the country, and by 2012, the program had been scaled back to some 30 core agencies. This said, a very large number of individuals have been identified as deportable as a result of 287(g) — some 400,000 as of 2016 (ICE 2016). It is also important to stay focused on the larger policing landscape to see how 287(g) helped spawn arguably a much more significant role for state and local law enforcement in federal immigration enforcement efforts. The key program here is the Secure Communities program, inaugurated in 2008. Secure Communities is a “287(g) lite,” which operates strictly as part of the jail intake process, but like 287(g), greatly increases the chances that people who encounter state and local law enforcement on an everyday basis will have their immigration status checked. Importantly, the reach of Secure Communities is much larger. By 2012, Secure Communities was extended nationwide to all 3,100 county sheriff’s offices in the country, and by the time Secure Communities was shelved in 2014, the program had identified an astounding 2.4 million people as deportable (ICE 2015).

The link between 287(g) and the criminalization of immigration is not merely about state and local police helping to deport individuals arrested and convicted on serious criminal grounds. Rather, 287(g) criminalizes immigrants by leading to the deportation of individuals on a wide variety of misdemeanor as well as civil immigration grounds, and not on serious criminal grounds. The program also attaches additional consequences to police-civilian interactions for communities of color across the United States, with respect to their already routinized contact with both state and local authorities. The hyper-policing of communities of color is compounded by the fact that even when no criminal charges are brought, individuals can be detained for suspected immigration violations and even removed.

On the one hand, despite executive orders and memoranda directing authorities to focus only on serious felony offenders, both the 287(g) and Secure Communities programs have not focused narrowly on individuals arrested and convicted on serious criminal grounds. For instance, of the global number of individuals detained and deported under Secure Communities between 2009 and 2015, 33 percent (or 135,000 cases) concern so-called “level one” offenders — that is, cases involving serious felony crimes. The remainder of

convicted individuals — some 50 percent of all cases — fall into categories of individuals who were not supposed to get deported through the program, including “level two” offenders (for example, misdemeanor-level drug and property offenses with less than a year of jail time imposed or served) and “level three” offenders (for example, basic traffic offenses and various other minor infractions). Another 18 percent of deportees under Secure Communities are considered noncriminal. Indeed, together “level three” offenders and noncriminal cases constitute nearly half of all deportations processed under the program. The data on 287(g) — which is not readily available except through federal records requests — suggests a similar pattern, although more skewed towards non-serious and ultimately noncriminal cases. For example, published research on 287(g) shows that the program typically works by stopping suspected immigration violators on the road, while driving, for basic traffic offenses (Stuesse and Coleman 2014; Coleman and Kocher 2011; Coleman and Stuesse 2016; Coleman 2012).

A second aspect in which programs such as 287(g) and Secure Communities (which were later rolled into the Criminal Alien Program, or CAP) relate to the criminalization of immigration involves “social control” of immigration. By this term we mean the ways that the attachment of new immigration consequences to a pre-existing landscape of police-civilian contacts results in newly disproportionate risks for communities of color, such that undocumented immigrants face the threat of deportation as a result of basic noncriminal activities related to work and social reproduction (Coleman and Stuesse 2014; Coleman and Stuesse 2016; Stuesse and Coleman 2014). From this standpoint, criminalization is based on the active presumption that immigrant communities are criminal enclaves and as such somehow legitimate objects of disproportionate policing. Immigrants, therefore, run significant risks when they are in public due to the likelihood of a routine encounter with a police officer, which may result in an immigration query (Menjívar 2013). Criminalization also refers to the knock-on effects of this process, as undocumented communities are driven underground, out of fear that being public will increase the chances of being deported. In short, the context created through these programs heightens fear, insecurity, and unpredictability among people in vulnerable legal statuses. The following section outlines, in a series of vignettes, the struggles people face in different public and private contexts while living in the shadow of removal.

The Consequences of Criminalization in Immigrants’ Lives Outside of the Home

Education

Criminalization is evident in the experiences of immigrants, their relatives, and communities, within the home and as they interact with central social institutions in their everyday lives. For young undocumented immigrants, the structural challenges that arise from criminalization powerfully shape their experiences with education and with the labor market. When they learn that their undocumented status will block them from opportunities for higher education, many young people struggle to stay motivated. Eighteen-year-old David, for example, had stopped attending school early in his junior year when he felt

constricted by the lack of options due to his undocumented status. Despite his mother's pleas to stay and finish high school, he got a job at a warehouse, moving packaged seafood eight hours per day, six days per week, making only \$8 per hour. He hated his mind-numbing job but could not find motivation to pursue other goals.

Employment

As they enter the workplace, young undocumented immigrants struggle with the harsh realities of illegality that make them especially vulnerable. Sisters Flor and Fabiola, arrived in the United States from Oaxaca, Mexico at the ages of three and five, respectively. They excelled in school. When they were old enough to work, they wished to help their single mother, Fara, so they worked at the swapmeet where employers do not request social security numbers. Working conditions were harsh. They were paid \$45 daily for 9- or 10-hour days. On most days, they got only one 15-minute break, which they had to forgo if customers happened to have questions about the merchandise at that time. Worst of all, their employer was verbally abusive. Under these working conditions, the sisters did not earn enough to notably improve the family's financial situation. Instead, they toiled for hours, during time that they would have preferred to be studying or better using their language and intellectual skills in other jobs.

Licenses and Dealing with Bureaucracies

Twenty-four-year-old Eva is Salvadoran and a college graduate. She describes the stress her undocumented father experiences when he drives:

My dad has been stopped twice and both times they have taken his car. I know he has a lot of trauma because of that He just had an accident last month and he was in a really bad accident, like the car is just gone. When I got there, the first thing he told me was, "the police is going to come and I don't know what they are going to say." I was crying . . . you feel so powerless . . . You just had this huge accident. It could've been worse and the first thing he was thinking was, they are going to ask me for my license . . .

Eva, who was a Deferred Action for Childhood Arrival (DACA) recipient, had also driven without a license for years.¹¹ Although she received an official driver's license through DACA, she continued to act in ways that were permeated with fear she had learned:

[D]riving, you learn a lot of things, like you see a cone up ahead like, "[H]ey, what's that? Let me turn here.]" You see a light up ahead and all these things that you automatically switch on when you are driving without a license and I still do it. Like this month, I was still doing it and [my partner] was like, "Hey, you have a license now. Relax." I would be like, "What's

11 Deferred Action for Childhood Arrivals (DACA) is a program that President Obama established in June 2012 through executive action. It grants a subset of 1.5 generation undocumented immigrants access to a work permit, state-issued identification, and makes them low priority for deportation. For more information about DACA, see <https://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-daca>. At the time of this writing, President Trump announced the end of the DACA program.

Making Immigrants into Criminals

that cone over there? Do you see a retén [sobriety checkpoint]?” She’s like, “You have a license.” I’m like, “oh, yeah,” but you still feel like, I shouldn’t go through there. I’m going to turn here, because you have internalized it for so many years.

Similarly, there are numerous stories of people arriving late to school, work, and other important appointments because their journeys required them to deviate from direct routes to avoid checkpoints and police officers.

Internalized fear similarly applies to licenses to practice an occupation, which can have far reaching negative effects for a person who is denied such benefits. DACA recipients were especially vulnerable in states that did not recognize DACA as a legal status and thus refused to issue these recipients licenses. A young DACA recipient in Phoenix enrolled in an 18-month vocational program to become a respiratory technician in lieu of the medical career she had dreamed about. After her family had spent a considerable sum of money for her to attend a for-profit school to obtain her training, the Arizona licensing board informed her that she was ineligible because Arizona did not recognize her status as legal. In tears, she noted, “I have been left in debt and without a job. Now I have to go back to working at the restaurant [where she worked with her mother] even though I now have an education. All that effort for nothing.”

Beyond fear, anxiety, and strategies to avoid situations that can risk detention,¹² temporary and uncertain statuses such as DACA or Temporary Protected Status (TPS) present multiple everyday life challenges for those who hold them (Abrego and Lakhani 2015; Menjívar 2011). For instance, while DACA and TPS holders have the benefit of a work permit and a stay of deportation provided they meet other requirements, including a clean criminal record, their immigration statuses are not always understood in bureaucracies. Bureaucrats and employers tend to be more used to the black and white classification of documented and undocumented, and are familiar with “green cards” but not with temporary statuses (Menjívar 2017). Thus, immigrants who live in temporary statuses often face blocked access to employment or to a service to which they rightfully have access because officials or employers do not understand their status. For instance, a Honduran TPS holder who fell into a coma in a Phoenix hospital was nearly deported, in comatose state, because the hospital personnel could not understand her status and assumed she was undocumented. No other healthcare facility would accept her as a patient either, due to her “financial and complicated immigration status” (Kiefer 2008). Her family had to hire an immigration lawyer to explain to hospital administrators that the woman was “documented” in the country and not deportable even when she could not produce a “green card.”

Today’s enforcement context overwhelmingly targets Latinos, and moreover conflates Latinos and undocumented immigrant status. As a result, even US-born Latinos may suffer negative consequences in the form of discriminatory treatment, denial of services, and infringement of their rights.

12 DACA recipients have protections from deportation if they are caught in a workplace raid, for instance, but with the recent change in administration in Washington, DC, it appears that the days are numbered for these protections.

The Consequences of Criminalization in Immigrants' Lives within the Family

Inequalities across Siblings with Different Statuses

Hector is a 23-year-old community college student and a worker at a community organization. His parents migrated from Mexico to Los Angeles leaving behind him and his brother, who were a baby and a toddler, respectively. When the parents got to the United States, they had one more child. It took the family nine years to gather the financial resources to reunite the family. Although they tried to avoid treating the children differently, the legal status distinctions became more evident as they got older. One summer, US-born Heidi had an opportunity to visit family in another state. Hector and his brother wanted to go on this trip, as well, but they were not allowed. They were confused about the unequal treatment:

So my dad explained to us, "You guys are different. Even though you go to the same school and do the same thing, you guys are different. You cannot go to places that she can go. You can't do what she can do." And the way he explained it, he was really messed up in a way, but it was the most honest way to say it. Pretty much *nos dijo* [he said], "*Ella nació aquí y tú no naciste aquí. Tú no tienes los mismos derechos.*" [She was born here and you were not. You don't have the same rights.] I perfectly understood, but it was messed up.

Hardship for US Citizen Children in Mixed-Status Families

Twenty-one-year-old Cesar is a US citizen by birth. Both of his parents and his older brother were undocumented throughout his childhood. At the time of the interview, Cesar's parents had both been able to legalize their status and his brother, Camilo, had obtained DACA. Reflecting on his experiences as a US citizen in this family, Cesar shares:

I always lived with that same fear of everything, as if I were the target. I never felt immune to what happens to immigrants . . . because we are a close family . . . I never felt completely like a citizen until now, now that nothing and nobody can kick them out . . . As a child, I'd be in the car with my father and we'd see the police and I felt the same fear he felt. We'd be in the car and my father drove perfectly so that no one would stop him.

Even without verbal cues, parents' body language can communicate fear to their children. As evident in Cesar's reflections, undocumented status and the fear of deportation and family separation is felt palpably by all members of a family, even those who are not directly targeted by immigration laws.

While families may try to compensate for the fear and instability associated with their status, the consequences are pervasive and long-lasting. Twenty-year-old Nayeli who grew up with an undocumented father and a US citizen mother understood early on that her father was vulnerable and she must keep their secret. Reflecting on why this was difficult, she expressed, "It's hard for me to even admit that my father is undocumented. I've kept

it a secret for so long, and I feel like it's my secret and I don't want to tell people about it. It's the way I internalize it. We do it to protect my dad." She shared that she had difficulty telling even close friends, making it difficult to develop close relationships in other realms of her life.

Inability to Reunite with Family

A major negative consequence of the enforcement regime for immigrants today is family separation, which infringes on the fundamental human right to live with and have a family. Through detention and deportation, in conjunction with family reunification laws, immigrant families are fundamentally altered in composition and dynamics. Enforcement practices separate and restructure families by removing members already in the United States, creating single-parent households or leaving children without a parent or an adult without a spouse. At the same time, in a twist of irony, family reunification laws in the context of bars to readmission, contribute to maintaining families separated, leading to a reorganization of families, adjustment of expectations, and changes in roles and power dynamics. In the case of immigrants in temporary statuses, they are barred by law from petitioning for family members, which in practice contributes to institutionalizing family separations (Enchautegui and Menjivar 2015). Members of a mixed-status family in Phoenix have only witnessed their family in El Salvador change — births, marriages, deaths — through photos because in 16 years of TPS status they have been “stuck” in the United States and unable to take part in person of any of those moments that redefine their family life.

Discussion and Conclusion

We have outlined here only a few of the specific mechanisms of criminalization and their impacts on people's lives. Our analysis emphasizes that the census-like counts of “criminal aliens” obfuscate the active process of criminalization that underpins US immigration policy. Our work, therefore, makes visible the processes of lawmaking and enforcement practices that produce the notion of “criminal aliens.” By connecting programs such as Operation Streamline that exponentially increase the number of people who fall into the “criminal” category, with interior enforcement programs such as 287(g), Secure Communities, and the Criminal Alien Program, it clearly demonstrates how people are located, labeled, and removed by agents of the state. These programs in turn have distinct impacts in terms of day-to-day mobility, as many people are unable to drive to and from work or school. Families become disposable units to the monolithic criminal label as people with tenuous legal status, such as DACA, must constantly negotiate their removal or the removal of a family member for an increasingly subjective list of mostly benign infractions.

At the time of authorship, President Trump's regime has quickly made good on his anti-immigrant campaign promises and there are important indications that the United States is entering a new phase of hypercriminalization (see Chishti and Bolter 2017). The executive orders of January 25, 2017 will largely alter the immigration enforcement landscape and increase immigrant criminalization. At the beginning of the Trump administration, arrests on civil immigration charges increased by 38 percent compared to the same time frame one

year earlier (Duara 2017). Furthermore, the 287(g) and Secure Communities programs, both shelved during the Obama administration, have been revived through the executive orders, which perversely make no mention of the tense legal debates over these programs as well as the Department of Justice lawsuits, and other civil rights lawsuits, brought against prominent 287(g) agencies in North Carolina and Arizona. In this rapidly changing and dynamic context, in which recent legal histories are getting quickly forgotten, we urge scholars to remain focused not just on the big picture of criminalization but, we think more importantly, on carefully tracing the mechanisms and programs used to locate, arrest, and prosecute immigrants under the umbrella of criminalization, as well as the direct impact criminalization has on people while in the United States and post-deportation in their countries of origin. This means understanding which policies have been accelerated through the same mechanisms discussed here, and which are new. This also entails a keen focus on the continuities and discontinuities of US immigration enforcement across multiple administrations, from Reagan through Obama, and in particular on a greater understanding of the role of the Obama administration both in eroding migrants' rights and providing new protections, sometimes both, simultaneously.

One example of this was the Priority Enforcement Program (PEP), which went into effect on July 1, 2015 to increase the number of people who would potentially receive relief from deportation. The new PEP redefined how the Department of Homeland Security (DHS) would allocate its detention and deportation resources. It allowed DHS supervisors and officers to exercise prosecutorial discretion to not remove certain people even if they fell within one of the "enforcement priority categories" (Rosenblum 2015, 1). Perhaps most important, the new changes in prosecutorial discretion made "it unlikely that unauthorized immigrants who would qualify for DACA or DAPA [Deferred Action for Parents of Americans] [would] be deported" (Rosenblum 2015, 3). Moreover, Rosenblum (ibid.) estimated that nearly 87 percent of the 11 million unauthorized immigrants who were residing in the United States when PEP was enacted would have fallen outside of the enforcement priorities. However, the enforcement priorities focused heavily on recent arrivals, particularly border crossers, amplifying the impact of border enforcement programs in the criminalization of immigrants.

The new executive actions effectively terminated PEP, returning us to the previous system whereupon all immigrants with questionable status are arrested, criminalized, and removed. Because PEP was relatively low profile, as opposed to DACA, there has been little outcry about its removal. These changes that are occurring behind the scenes and often with little fanfare must also garner the attention of scholars and policymakers. Perhaps most damaging of all has been the attacks on visa holders and legal permanent residents, with 100,000 visas revoked as a result of Trump's Muslim ban (Jouvenal, Weiner, and Marimow 2017). It is important to note that some of the more extreme criminalization elements of the EOs, such as the provision that would charge the parents of unaccompanied minors for human smuggling as well as the infamous "Muslim ban," have either been held up in court or have not been fully enacted at the time of writing. Regardless of whether or not the EOs stand up in court, they have a chilling effect, one that is similar to, but much greater than the social stigmas and stress described in this article.

Making Immigrants into Criminals

The EOs could indirectly accomplish what H.R. 4437,¹³ the so-called “Sensenbrenner Bill,” attempted to do — to make criminals out of unauthorized immigrants. The Sensenbrenner Bill, which passed the US House of Representatives but failed in the US Senate, included several provisions that would have criminalized “violations of federal immigration law, including illegal presence” (NCSL 2017, paragraph 2). The bill also would have given local law enforcement agencies the authority to enforce federal immigration law (NCSL 2017). The implications of the Sensenbrenner Bill were quite straightforward and understood by immigrants, immigrant rights activists, and their allies. This resulted in mass mobilization and protests, culminating in the 2006 immigration marches throughout the country, ultimately leading to the bill’s demise in the US Senate and serving as a catalyst for the DREAM movement.

Although Trump’s EOs do not explicitly criminalize unauthorized presence, they do strip away the few protections unauthorized immigrants gained during the Obama administration, prioritize unauthorized immigrants for removal, and expand the immigration enforcement apparatus by re-instituting and expanding 287(g) and the Secure Communities programs as well as by increasing Border Patrol and ICE staffing.

We acknowledge that there are many steps in the path to becoming a “criminal alien” under the EOs, but this process is in fact playing out on a daily basis throughout the United States, albeit slowly. The slow pace and hidden nature of this criminalization process may partially explain why Trump’s EOs did not mobilize protests to the same extent as the Sensenbrenner Bill. It is likely that the immediate and long-term implications of the EOs are difficult for the public to comprehend given their complexities, which may help explain why people have not mobilized to the same extent as they did a decade ago. In other words, the blurring of immigration law, criminal law, and deportation obfuscates the criminalization process inherent within the EOs. To us, this makes Trump’s EOs much more ominous, daunting, and dangerous than the Sensenbrenner Bill.

Understanding the full scope of this impact will require a critical examination of all associations between immigration and crime, including terminology such as “crimmigration” that can serve to normalize the linkages between human mobility and crime. This will be paramount in the weeks, months, and years ahead.

REFERENCES

- Abrego, Leisy J. 2008. “Legitimacy, Social Identity and the Mobilization of Law: The Effects of Assembly Bill 540 on Undocumented Students in California.” *Law & Social Inquiry* 33(3):709-34. <https://doi.org/10.1111/j.1747-4469.2008.00119.x>.
- . 2011. “Legal Consciousness of Undocumented Latinos: Fear and Stigma as Barriers to Claims-Making for First and 1.5 Generation Immigrants.” *Law & Society Review* 45 (2): 337-69. <https://doi.org/10.1111/j.1540-5893.2011.00435.x>.

13 Border Protection, Anti-terrorism and Illegal Immigration Control Act of 2005, H.R. 4437, 109th Cong. (2005).

- . n.d. “Mobility and Independence: DACA’s Consequences for Latino Recipients and Their Families in Los Angeles.” Unpublished manuscript.
- Abrego, Leisy J., and Sarah M. Lakhani. 2015. “Incomplete Inclusion: Legal Violence and Immigrants in Liminal Statuses.” *Law & Policy* 37(4): 265-93. <https://doi.org/10.1111/lapo.12039>.
- Albicker, Sandra Luz, and Laura Velasco. 2016. “Deportation and Stigma on the Mexico-US Border: Trapped in Tijuana.” *Norteamérica, Revista Académica del CISAN-UNAM* 11(1): 99-129.
- Brotherton, David, and Luis Barrios. 2011. *Banished to the Homeland: Dominican Deportees and Their Stories of Exile*. New York: Columbia University Press.
- Cantor, Guillermo, Mark Noferi, and Daniel E. Martínez. 2015. *Enforcement Overdrive: A Comprehensive Assessment of ICE’s Criminal Alien Program*. Washington, DC: American Immigration Council.
- Chacón, Jennifer M. 2012. “Overcriminalizing Immigration.” *The Journal of Criminal Law and Criminology* 102(3): 613-52.
- Chishti, Muzaffar, and Jessica Bolter. 2017. “The Trump Administration at Six Months: A Sea Change in Immigration Enforcement.” Washington, DC: Migration Policy Institute.
- Coleman, Mathew. 2007. “Immigration Geopolitics Beyond the Mexico-US Border.” *Antipode* 38(2): 54-76. <https://doi.org/10.1111/j.1467-8330.2007.00506.x>.
- . 2012. “The ‘Local’ Migration State: the Site-Specific Devolution of Immigration Enforcement in the U.S. South.” *Law & Policy* 34(2):159-90. <https://doi.org/10.1111/j.1467-9930.2011.00358.x>.
- Coleman, Mathew, and Angela Stuesse. 2014. “Policing Borders, Policing Bodies: The Territorial and Biopolitical Roots of U.S. Immigration Control.” In *Placing the Border in Everyday Life*, edited by Reece Jones and Corey Johnson, 33-63. Farnham: Ashgate.
- . 2016. “The Disappearing State and the Quasi-Event of Immigration Control.” *Antipode* 48(3): 524-43. <https://doi.org/10.1111/anti.12209>.
- Coleman, Mathew, and Austin Kocher. 2011. “Detention, deportation, devolution and immigrant incapacitation in the U.S., post 9/11.” *Geographical Journal* 177(3): 228-37. <https://doi.org/10.1111/j.1475-4959.2011.00424.x>.
- DHS (US Department of Homeland Security). 2017a. “Fact Sheet: Executive Order: Border Security and Immigration Enforcement Improvements.” Washington, DC: DHS. <https://www.dhs.gov/news/2017/02/21/fact-sheet-executive-order-bordersecurity-and-immigration-enforcement-improvements>.
- . 2017b. “Fact Sheet: Enhancing Public Safety in the Interior of the United States.” Washington, DC: DHS. <https://www.dhs.gov/news/2017/02/21/fact-sheet-enhancing-public-safety-interior-united-states>.

Making Immigrants into Criminals

- Douglas, Karen M., and Rogelio Sáenz. 2013. "The Criminalization of Immigrants & the Immigration-Industrial Complex." *Daedalus* 142 (3):199-227. https://doi.org/10.1162/DAED_a_00228.
- Duara, Nigel. 2017. "Arrests on civil immigration charges go up 38% in the first 100 days since Trump's executive order." *Los Angeles Times*, May 17. <http://www.latimes.com/nation/la-na-ice-deport-trump-20170517-story.html>.
- Enchautegui, Maria E. and Cecilia Menjívar. 2015. "Paradoxes of Family Reunification Law: Family Separation and Reorganization under the Current Immigration Regime." *Law & Policy* 37(1-2): 32-60. <https://doi.org/10.1111/lapo.12030>.
- Ewing, Walter, Daniel E. Martínez, and Rubén G. Rumbaut. 2015. *The Criminalization of Immigration in the United States*. Washington, DC: American Immigration Council.
- García Hernández, Cesar Cuauhtemoc. 2015. *Crimmigration Law*. Chicago: American Bar Association.
- Gorman, Thomas E. 2010. "Fast-Track Sentencing Disparity: Rereading Congressional Intent to Resolve the Circuit Split." *University of Chicago Law Review* 77(1): 479-519.
- ICE (US Immigration and Customs Enforcement). 2015. "ICE's use of IDENT/IAFIS Interoperability, Monthly Statistics through February 28 2015." Washington, DC: ICE. https://www.ice.gov/sites/default/files/documents/FOIA/2015/sc_stats_YTD2015.pdf.
- . 2016. "Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act." Washington, DC: ICE. <https://www.ice.gov/factsheets/287g>.
- Inda, Jonathan Xavier. 2013. "Subject to Deportation: IRCA, 'Criminal Aliens,' and the Policing of Immigration." *Migration Studies* 1(3): 292-310. <https://doi.org/10.1093/migration/mns003>.
- INS (US Immigration and Naturalization Service). 1999. *1998 Yearbook of Immigration Statistics*. Washington, DC: INS.
- Jouvenal, Justin, Rachel Weiner, and Ann E. Marimow. 2017. "Justice dept. lawyer says 100,000 visas revoked under travel ban; State Dept., says about 60,000." *Washington Post*, February 3. https://www.washingtonpost.com/local/public-safety/government-reveals-over-100000-visas-revoked-due-to-travel-ban/2017/02/03/7d529ecc-ea2c-11e6-b82f-687d6e6a3e7c_story.html.
- Kiefer, Michael. 2008. "Hospital Will Keep Honduran." *The Arizona Republic*, May 24 <http://www.azcentral.com/news/articles/2008/05/24/20080524coma0524.html>.
- Light, Michael T., Mark Hugo Lopez, and Ana Gonzalez-Barrera, A. 2014. *The Rise of Federal Immigration Crimes*. Hispanic Trends Project, March. Washington, DC: Pew Research Center.

- Lydgate, Joanna Jacobbi. 2010. "Assembly-line justice: A review of Operation Streamline." *California Law Review* 98(2): 481-544.
- Macias-Rojas, Patrisia. 2016. *From Deportation to Prison: The Politics of Immigration Enforcement in Post-Civil Rights America*. New York: New York University Press.
- Martínez, Daniel E., and Jeremy Slack. 2013. "What Part of 'Illegal' Don't You Understand? The Social Consequences of Criminalizing Unauthorized Mexican Migrants in the United States." *Social & Legal Studies* 22(4): 535-51. <https://doi.org/10.1177/0964663913484638>.
- Martínez, Daniel E., Jeremy Slack, and Josiah Heyman. 2013. *Bordering on Criminal: The Routine Abuse of Migrants in the Removal System*. Washington, DC: American Immigration Council.
- Martínez, Daniel E., Jeremy Slack, Kraig Beyerlein, Prescott Vandervoet, Kristin Klingman, Paola Molina, Shiras Manning, Melissa Burham, Kylie Walzak, Kristen Valencia, and Lorenzo Gamboa. 2017. "The Migrant Border Crossing Study: A Methodological Overview." *Population Studies* 71(2): 249-64. <https://doi.org/10.1080/00324728.2017.1306093>.
- Meissner, Doris, Donald M. Kerwin, Muzaffar Chishti, and Claire Bergeron. 2013. *Immigration Enforcement in the United States: The Rise of a Formidable Machinery*. Washington, DC: Migration Policy Institute.
- Menjívar, Cecilia. 2011. "The Power of the Law: Central Americans' Legality and Everyday Life in Phoenix, Arizona." *Latino Studies* 9(4): 377-95. <https://doi.org/10.1057/1st.2011.43>.
- . 2013. "Central American Immigrant Workers and Legal Violence in Phoenix, Arizona." *Latino Studies* 11(2): 228-52. <https://doi.org/10.1057/1st.2013.6>.
- . 2016. "Immigrant Criminalization in Law and the Media: Effects on Latino Immigrant Workers' Identities in Arizona." *American Behavioral Scientist* 60(5-6): 597-616. <https://doi.org/10.1177/0002764216632836>.
- . 2017. "Spaces of Legal Ambiguity: Central American Immigrants, 'Street-level Workers,' and Belonging." In *Within and Beyond Citizenship: Borders, Citizenship, and Belonging*, edited by Nando Sigona and Roberto Gonzales, 36-52. New York: Routledge.
- Menjívar, Cecilia, and Leisy J. Abrego. 2012. "Legal Violence: Immigration Law and the Lives of Central American Immigrants." *American Journal of Sociology* 117(5): 1380-421. <https://doi.org/10.1086/663575>.
- Menjívar, Cecilia, and Daniel Kanstroom, eds. 2014. *Constructing Immigrant "Illegality": Critiques, Experiences, and Responses*. New York: Cambridge University Press.
- Morris, Helen. 1997. "Zero Tolerance: The Increasing Criminalization of Immigration Law." *Interpreter Releases* 74: 1317-26.

Making Immigrants into Criminals

- NCSL (National Conference of State Legislatures). 2017. "Border Protection, Antiterrorism and Illegal Immigration Control Act of 2005." Immigrant Policy Project. Washington, DC: NCSL. <http://www.ncsl.org/research/immigration/summary-of-the-sensenbrenner-immigration-bill.aspx>.
- Negrón-Gonzales, Genevieve, Leisy J. Abrego, and Kathleen Coll. 2015. "Immigrant Latina/o Youth and Illegality: Challenging the Politics of Deservingness." *Association of Mexican American Educators Journal* 9(3): 7-10.
- OIG (US Office of Inspector General). 2015. *Streamline: Measuring Its Effect on Illegal Border Crossing*. Washington, DC: OIG.
- Rosenblum, Marc. 2015. *Understanding the Potential Impact of Executive Action on Immigration Enforcement*. Washington, DC: Migration Policy Institute.
- Rosenblum, Marc, and Kristen McCabe. 2014. *Deportation and Discretion: Reviewing the Record and Options for Change*. Washington, DC: Migration Policy Institute.
- Rumbaut, Rubén G. 2009. "Undocumented Immigration and Rates of Crime and Imprisonment: Popular Myths and Empirical Realities." In *The Role of Local Police: Striking a Balance Between Immigration Enforcement and Civil Liberties*, edited by Anita Khashu, 119-39. Washington, DC: Police Foundation.
- Ryo, Emily. "Detained: A Study of Immigration Bond Hearings." *Law & Society Review* 50(1): 117-53. <https://doi.org/10.1111/lasr.12177>.
- Schuck, Peter. H. 1984. "The Transformation of Immigration Law." *Columbia Law Review* 84 (1):1-90. <https://doi.org/10.2307/1122369>.
- Slack, Jeremy. 2016. "Captive Bodies: Migrant Kidnapping and Deportation in Mexico." *Area* 48(3): 271-77. <https://doi.org/10.1111/area.12151>.
- Slack, Jeremy, Martínez, Daniel E., Scott Whiteford, and Emily Peiffer. 2013. *In the Shadow of the Wall: Family Separation, Immigration Enforcement and Security*. Tucson, AZ: University of Arizona.
- . 2015. "In Harm's Way: Family Separation, Immigration Enforcement Programs and Security on the US-Mexico Border." *Journal on Migration and Human Security* 3(2): 109-28. <https://doi.org/10.14240/jmhs.v3i2.46>.
- Solbakken, Lisa C. 1997. "The Anti-Terrorism and Effective Death Penalty Act: Anti-Immigration Legislation Veiled in an Anti-Terrorism Pretext." *Brooklyn Law Review* 63: 1381-410.
- Stuesse, Angela, and Mathew Coleman. 2014. "Automobility, Immobility, Altermobility: Surviving and Resisting the Intensification of Immigrant Policing." *City & Society* 26(1): 51-72. <https://doi.org/10.1111/ciso.12034>.
- Stumpf, Juliet. 2006. "The Crimmigration Crisis: Immigrants, Crime and Sovereign Power." *American University Law Review* 56(2): 367-419.

- USSC (US Sentencing Commission). 2016a. "Amendments to the Sentencing Guidelines." Washington, DC: USSC.
- . 2016b. *Overview of Federal Criminal Cases: Fiscal Year 2015*. Washington, DC: USSC.
- Valdez, Inés, Mathew Coleman, and Amna Akbar. 2017. "Missing in Action: Practice, Paralegality, and the Nature of Immigration Enforcement." *Citizenship Studies* 21(5): 547-69. <https://doi.org/10.1080/13621025.2016.1277980>.
- Waslin, Michele. 2010. "Immigration Enforcement by State and Local Police: The Impact of the Enforcers and Their Communities." In *Taking Local Control: Immigration Policy Activism in U.S. Cities and States*, edited by Monica W. Varsanyi, 97-114. Stanford, CA: Stanford University Press.



Local Immigration Enforcement and Arrests of the Hispanic Population

Michael Coon¹
University of Tampa

Executive Summary

Section 287(g) of the Immigration and Nationality Act (INA), which was added to the INA by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), allows the federal government to enter into voluntary partnerships with state and local law enforcement agencies to enforce immigration law. Upon entering these agreements, law enforcement officers are trained by Immigration and Customs Enforcement (ICE) and receive delegated authority to enquire about an individual's immigration status and, if found to be removable, to detain the individual while ICE makes a determination of whether to initiate deportation proceedings. In some instances, this inquiry about immigration status takes place as part of the intake process when a criminal defendant is arrested and placed into a criminal jail. In other instances, task force officers are trained to inquire in the field about immigration status and enforce immigration law against people who have not committed any criminal offense. The key difference between the two models is that task force agents can arrest for immigration violations undocumented individuals who have not committed any criminal offense, whereas in the jail model individuals must be arrested on some other criminal charge before immigration status can be determined.

The 287(g) program has raised several concerns regarding its implementation and results. First, the program could lead to racial and ethnic profiling. In particular, given that the majority of undocumented immigrants hail from Latin American countries, it is highly plausible that Hispanics, regardless of immigrant status, might be disproportionately affected by this program. That is, in a jurisdiction that participates in the jail model, an officer might arrest a Hispanic individual for a very minor offence in order to process them through the jail and determine their immigration status, when perhaps without the program they may have only issued a citation. Another concern with the program is that it may lead to tensions between state and local law enforcement and the local community. If the program creates an atmosphere of suspicion and distrust by community members toward state

¹ This research was supported by a McCardell Grant from the Hood College Board of Associates. The author would like to thank participants of the National Economic Association/American Society of Hispanic Economists 2nd Annual Freedom and Justice Conference for helpful comments.

and local law enforcement agents, even law abiding individuals may choose to avoid interaction with law enforcement agents. This can make victims and witnesses hesitant to come forward, for fear that their undocumented status will be uncovered. Such a situation inhibits law enforcement's ability to do its job and can, ironically, make communities less safe.

This study explores the effects of implementation of the 287(g) program in Frederick County, Maryland on the arrests of Hispanics. Using data from individual arrest records from the Frederick County Sheriff's Office, which has a 287(g) agreement with ICE, and the Frederick Police Department, which does not, I analyze the changes in arrests between the two agencies before and after the 287(g) program was implemented in 2008. I find that overall, the arrests of Hispanics fell, suggesting that the Hispanic community avoided interaction with law enforcement when the program began. However, I also find that the program led to a significantly higher number of arrests of Hispanics by the Sheriff's Office than would have occurred in its absence, indicating that attention was focused toward the Hispanic community as a result of the program. These results suggest that, if the program is to continue, additional safeguards are needed to prevent abuses and civil rights violations.

I. Introduction

Enforcement of US immigration law falls primarily under the purview of the federal government. However, in recent years a number of laws and programs have aimed at expanding state and local participation in immigration enforcement. In some instances, state governments have attempted to circumvent the federal government by passing legislation authorizing police to enforce immigration law (e.g., Arizona SB 1070 and Alabama HB 56). In other cases, the federal government and local agencies enter into cooperative agreements. Currently, ICE operates 13 ICE Agreements of Cooperation in Communities to Enhance Safety and Security (ACCESS) that provide "local law enforcement agencies an opportunity to team with ICE to combat specific challenges in their communities" (ICE 2008). While the purposes of the individual programs vary, three of the programs — the Criminal Alien Program, Secure Communities, and the 287(g) program — are aimed at enlisting local agencies as "force multipliers" in identifying and apprehending deportable aliens.

One of the oldest and perhaps most widely known program is the Criminal Alien Program, which is designed to identify deportable aliens who are incarcerated in federal, state, and local prisons, and have them deported prior to completion of their sentences, so that they are not released back into the local community (ICE 2008). Secure Communities builds upon the Criminal Alien Program by cross-referencing biometric data against a Federal Bureau of Investigation (FBI) database when arrestees are booked into local jails. Under this program, deportable aliens need not be convicted of the crime for which they are arrested in order for deportation proceedings to begin. If they are arrested for any offence, and are in the database as having a prior criminal record, then ICE is notified and can choose

Local Immigration Enforcement and Arrests of the Hispanic Population

to initiate deportation proceeding. Under both of these programs, however, determining the individual's immigration status remains the responsibility of the federal government.

A lesser-known program aimed at allowing local agencies to cooperate with federal authorities in enforcing immigration law is the 287(g) program. Established by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), the 287(g) program allows state and local law enforcement agencies to voluntarily enter into a joint Memorandum of Understanding (MOU) with ICE to receive delegated authority for immigration enforcement within their jurisdictions. Upon entering the program, law enforcement officers are trained and given authority to interview potential immigrants in order to ascertain an individual's immigration status and refer them for deportation. In some instances, local law enforcement is empowered to make arrests for immigration violations, whereas under the Criminal Alien Program and Secure Communities programs, the individuals would have to be arrested for some other crime before any inquiry into their immigration status would take place.

While these three programs are aimed at identifying and removing individuals who may pose a threat to public safety, delegating authority to enforce immigration laws to local law enforcement fundamentally changes the relationship between law enforcement and the communities they police, which may lead to multiple adverse effects. A primary concern with such a program is the potential to lead to racial profiling. That is, law enforcement agents wishing to identify and remove undocumented immigrants may specifically target individuals who “look like immigrants.” Given that a 2012 US Department of Homeland Security (DHS) report estimated that 75 percent of the 11.4 million undocumented immigrants in the United States hail from five Latin American countries (Mexico, El Salvador, Guatemala, Honduras, and Ecuador) (Baker and Rytina 2012), it is not unreasonable to believe that implementation of a program to identify and remove undocumented immigrants would lead to an increase in arrests within the Hispanic community. Additionally, if Hispanics feel targeted — regardless of their immigration status — they may avoid interaction with law enforcement. When victims and witnesses are fearful of reporting crimes, communities become less safe.

Under mounting concerns of abuse and questions over the effectiveness of these programs, the Obama administration took actions to curtail them. Secure Communities was discontinued in 2014, and replaced by the Priority Enforcement Program. The Priority Enforcement Program limited the offenses for which ICE would pursue deportations, thus limiting the scope of the 287(g) program in the process. However, an executive order signed on January 25, 2017 has effectively reversed the Obama administration's actions by ending the Priority Enforcement Program, reinstating Secure Communities, and expanding the 287(g) program.² Given these changes to immigration policy, it is critical to understand how individuals living in communities where these programs are implemented are affected.

This study explores the impact of interior immigration enforcement on local communities by examining the effects on the arrests of Hispanics in Frederick County, Maryland that resulted from the implementation of the 287(g) program in 2008. The results indicate that

² Enhancing Public Safety in the Interior of the United States, Exec. Order No. 13768, 82 Fed. Reg. 8799 (Jan. 25, 2017).

following the implementation of the 287(g) program, arrests of Hispanics county-wide decreased, suggesting that members of the Hispanic community took steps to avoid contact with law enforcement. However, changes in arrest rates were smaller in jurisdictions policed by partner agencies participating in the program than in jurisdictions policed by agencies not participating, suggesting enforcement efforts were redirected toward the Hispanic community as a result of the program.

II. The 287(g) Program

A. General Structure and History

SECTION 287(G) AGREEMENTS

INA § 287(g) allows the federal government to enter into voluntary partnerships with state and local law enforcement agencies to enforce immigration law. Participating agencies negotiate a joint MOU with ICE outlining the terms of the agreement. Upon completion of training, officers of the partner agency receive delegated authority to enforce immigration law. Trained officers are then authorized to inquire into an individual's immigration status. If an individual is deemed to be in the country illegally, then the agency can issue a detainer allowing them to hold the individual for up to 48 hours before transferring them into ICE custody (Capps et al. 2011, 13-14).

The program can be implemented in three models. The first is the Jail Enforcement Model. Under this model, 287(g) officers inquire into an arrestee's immigration status as part of the intake process. The key feature of the Jail Enforcement Model is that individuals must be arrested for some other crime or civil offense in order to start the process. The second model is the Task Force Model. In the Task Force Model, officers are trained to inquire about immigration status in the field, and can issue arrest warrants for immigration violations even when the individual is not suspected of any criminal offense. The third model is the Hybrid Model, which combines both the Jail Enforcement Model and the Task Force Model (Capps et al. 2011, 14-15; Armenta 2012).

Although legislation authorized the 287(g) program in 1996, the first partnership was not established until 2002, when Florida entered into an agreement with ICE under the auspices of fighting terrorism in the wake of 9/11. Since then the number of partnerships has grown substantially. Currently, there are 37 agreements in place (ICE 2017), but this number has fluctuated over time. One of the key reasons for the fluctuation is that some participating agencies have had their agreements revoked (Duda 2012), while others have decided not to renew their agreements. A series of changes under the Obama administration contributed to agencies choosing not to renew.

In 2009, DHS announced a new standardized agreement that would provide for more federal oversight and focus enforcement priorities toward "dangerous" criminals (Capps et al. 2011). In 2011, ICE Director John Morton issued two memos urging ICE attorneys to exercise prosecutorial discretion in immigration matters, allowing the agency to exercise

their discretion in deciding whether or not enforce immigration laws against certain individuals. In particular, the memos directed the agency to focus resources on individuals who posed a serious threat to public safety or national security, and made it ICE policy not to deport victims and witnesses of crimes, except under special circumstances (Wadhia 2011). These changes, however, were somewhat ambiguous and allowed for wide discretion in enforcement priorities.

In 2014, enforcement priorities were codified in a memo by DHS Secretary Jeh Johnson that rescinded the Morton memos and established the DHS-wide Priority Enforcement Program. In outlining the enforcement priorities, the Secretary set the highest priority (Priority 1) to cases involving aliens who were apprehended at the border, were engaged in or suspected of terrorism or espionage, active in street gangs, or convicted of serious felonies. The memo indicated that removal of these aliens “must be prioritized” unless there were “compelling or exceptional factors” indicating that these should not be priorities. Language for Priority 2 violators, those with multiple or significant misdemeanors, and Priority 3, other immigration violations, was decidedly less strong. According to the memo, these immigrants “should be removed” unless in “the judgement” of certain DHS officials, “there are factors indicating the alien is not a threat to national security, border security, or public safety” (Johnson 2014). Taken together, these actions substantially limited the number of immigrants whose removal would be prioritized, thus limiting the effect of local agencies’ participation in the 287(g) program.

SECURE COMMUNITIES

In 2008, DHS began the rollout of Secure Communities. Under the Secure Communities program, biometric information of anyone arrested in participating jurisdictions would be forwarded to ICE to determine immigration status. If an arrestee were determined not to be a US citizen, ICE would evaluate the case and make a determination regarding whether to deport based on legal status and criminal history. The implementation of Secure Communities in a jurisdiction made many of the functions of the 287(g) program redundant. With Secure Communities expected to be implemented nationwide by 2013, in 2012 ICE announced that it would not renew any 287(g) agreements with state or local agencies. However, under mounting legal pressure, Secure Communities was discontinued in 2014. After Secure Communities was discontinued, ICE continued to renew previous 287(g) agreements and enter into new agreements with state and local agencies. The executive order signed January 25, 2017, however, reinstated Secure Communities and called for a further expansion of the 287(g) program. Thus, it is expected that more jurisdictions will participate in the 287(g) program in the future.

B. Frederick County, Maryland

Frederick County Sheriff’s Office (FCSO) implemented the 287(g) program on August 1, 2008.³ According to the county government website, FCSO “is 1 of only 6 Sheriff’s

³ The Frederick County government website indicates that the jail enforcement program began in April 2008. However, in a personal communication with the Frederick County Sheriff’s Office, the author was told both programs began on August 1, 2008. Results of the empirical exercise below are robust to using April 2008 as the start date. Results are available upon request.

Offices nationwide” to participate in the Hybrid Model of the 287(g) program, under which 16 correctional officers from the jail and 10 law enforcement deputies who work in the field are trained to identify and begin deportation proceedings against undocumented immigrants (Frederick County Government 2016). The use of the Hybrid Model expands the reach of the 287(g) program beyond that of the Task Force Model. Although FCSO is the only law enforcement agency operating in Frederick County with an MOU with ICE, since FCSO operates the county jail, anyone arrested by any agency in Frederick County that is processed into the jail is subject to immigration screening as part of the jail intake process. In fact, at a public meeting of the 287(g) steering committee in June, 2015, FCSO reported that of the 1,348 detainees issued by FCSO between 2008 and 2015, only 328 were issued to individuals arrested by FCSO. The remaining detainees were issued to individuals arrested by the Frederick Police Department (780), the Maryland State Police (170), and other local agencies (70) (Jenkins 2015).

In addition to being one of the few sheriff’s offices to participate in the Hybrid Model, what also makes FCSO’s participation in the 287(g) program stand out is that Frederick County does not have a particularly large immigrant population. In the 2010 census, only 8.9 percent of the county’s population was reported as foreign-born. This is well below the national average of 12.7 percent, and even further below other counties which have participated in the program, such as Maricopa County, Arizona (15.9 percent) and Harris County, Texas (25 percent) (US Census 2016). Yet despite the low immigrant population, and the fact that undocumented immigrants arrested (as determined by the number of detainees issued) represent less than two percent of total arrests, Frederick County was, until 2016,⁴ the only jurisdiction in Maryland to participate in the program, and renewed its MOU in 2016.

III: Interior Immigration Enforcement and the Chill Effect

Interior immigration enforcement programs are often promoted as being designed to improve public safety. In fact, Executive Order No. 13768, which ended the Priority Enforcement Program, reinstated Secure Communities, and called for expansion of the 287(g) program, is titled, “Enhancing Public Safety in the Interior of the United States.” While it is understandable that removing individuals with serious criminal records would improve public safety, there is no evidence that programs like Secure Communities and 287(g), which are aimed at general immigration enforcement, improve public safety. Furthermore, there is mounting evidence that these programs may, in fact, make communities less safe.

The underlying assumption in the public safety argument is that immigrants are prone to crime, so removing immigrants will reduce crime. This premise, however, has been shown to be false. Numerous studies have shown that immigrants are less likely than natives to engage in criminal behavior (e.g., Hagan and Palloni 1999) and less likely to be incarcerated (e.g., Butcher and Piehl 1998; Landgrave and Nowrasteh 2017). Furthermore, there is resounding evidence that neighborhoods and cities with more immigrants have lower crime rates (Kubrin [2014] cites 15 studies that confirm this point).

If immigrants are, on average, less likely to be criminals than natives, it stands to reason that

⁴ Harford County, Maryland entered into an agreement with ICE in October 2016.

interior enforcement would have little impact on reducing crime. Indeed, several studies examining the Secure Communities program found that there was no discernable effect on public safety (Treyger, Chalflin, and Loeffler 2014; Cox and Miles 2013).

Perhaps even more problematic is the fact that mounting evidence suggests that local immigration enforcement may make communities less safe. As local police increase immigration enforcement efforts, members of the community may begin to distrust and avoid law enforcement altogether. If victims and witnesses are afraid to report crimes to law enforcement, this will lead to a net reduction in public safety. Previous studies have documented evidence of this “chill effect,” with some Hispanics, regardless of legal status, reporting that they stop driving to prevent being stopped for a traffic violation, and some who go so far as to avoid leaving the house (Nguyen and Gill 2016; ACLU 2009). Additionally, Theodore and Habans (2016) found that substantial portions of the Latino community, both immigrant and non-immigrant, were reluctant to voluntarily report crimes to police when jurisdictions participated in immigration enforcement programs, such as Secure Communities and the 287(g) program. They find that non-immigrant reluctance to contact police is more likely when individuals have undocumented associates. However, there is also evidence that ICE has arrested US citizens under Secure Communities (Martinez and Iwama 2014).

Furthermore, in communities with multiple law enforcement agencies, participation by one agency may also lead to growing mistrust of all local agencies. In some cases, this may be because individuals might not be able to differentiate between the agencies that can and cannot enforce immigration laws (Nguyen and Gill 2010). In other cases, like the 287(g) program in Frederick County, all arrestees may be subject to immigration screening as part of the jail intake process, regardless of the arresting agency.

IV. Model and Data

The data used in this analysis were compiled from individual arrest records for all arrests made by the Frederick Police Department (FPD) and the Frederick County Sheriff’s Office for the period between January 1, 2006 and December 31, 2013. The data were obtained through a series of Public Information Act requests. Data were also gathered from several surrounding jurisdictions; however, all of these reporting agencies either did not record Hispanic ethnicity for the entire period of interest or had too few arrests to be useful. Thus, the data used in this study allow only for a partial control of the treatment. Figures 1 and 2 illustrate the monthly arrests by ethnicity for each agency. The red vertical line indicates when the 287(g) program was implemented. From these figures it can be seen that whites represent the largest share of arrests for both agencies, followed by blacks, then Hispanics.⁵ However, the share of black and Hispanic arrests, relative to white arrests is much smaller for FCSO than FPD. Table 1 provides summary statistics of the arrest data. The average number of monthly arrests across all races and ethnicities is similar between the two agencies, but the FCSO arrests more whites, on average, than the FPD, and the FPD arrests

⁵ Arrest records for both jurisdictions record race as either white, black, or Asian, and ethnicity as Hispanic or non-Hispanic. For the purposes of this study, white and black refer to non-Hispanic populations, whereas Hispanic includes both white and black Hispanics.

more black and Hispanic people than FCSO. This difference largely reflects the differences in demographics between the city and county populations, i.e., the city is more diverse than the rest of the county. According to the 2010 census, the city of Frederick's population is 63.9 percent white, 18.6 percent black, and 14.4 percent Hispanic. Frederick County (excluding the city) is 88.4 percent white, 4.8 percent black, and 4.6 percent Hispanic (see Table 2).

Figure 1. Monthly Arrests by Race/Ethnicity, Frederick County Sheriff's Office

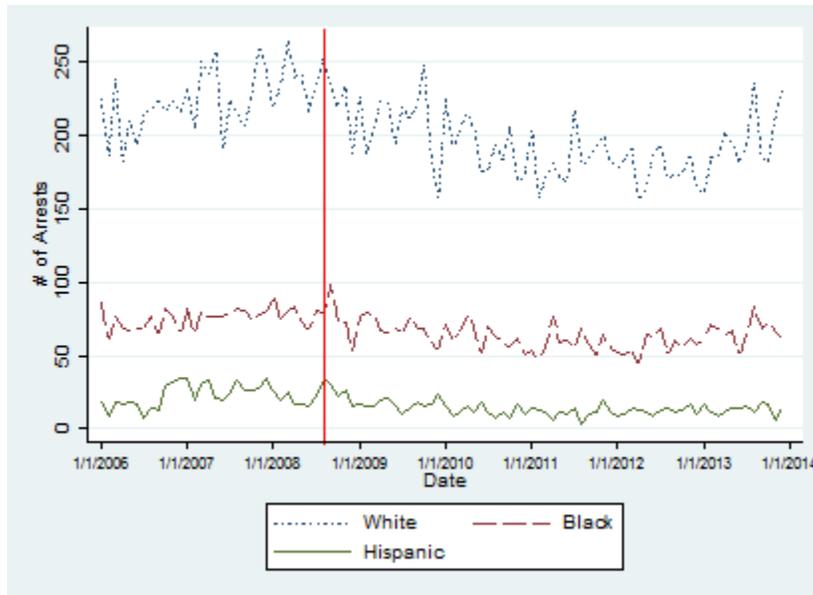


Figure 2. Monthly Arrests by Race/Ethnicity, Frederick Police Department

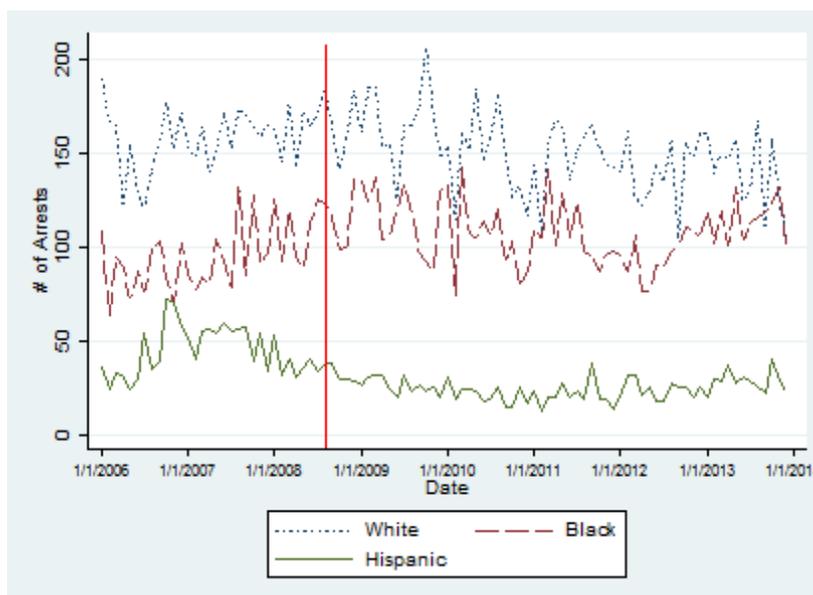


Table 1. Average Monthly Arrests

	FCSO		FPD	
	Pre-287g	Post-287g	Pre-287g	Post-287g
Total	323.97	274.09	300.42	286.92
White	223.94	193.96	157.42	149.66
Black	75.42	63.87	94.87	108.09
Hispanic	22.55	14.12	45.13	25.57

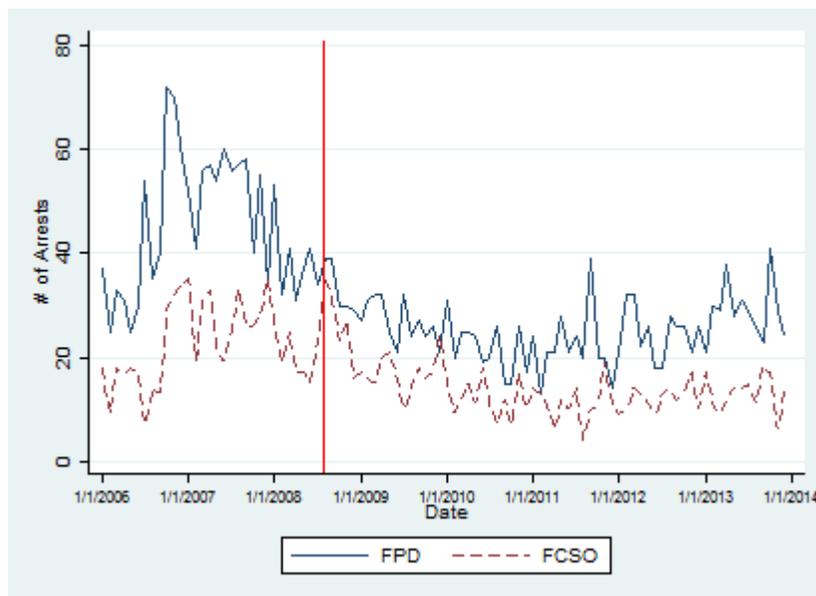
Table 2. Frederick County Demographics

	Frederick County	Frederick (City)	County (excluding city)
Population	233,385	65,293	168,146
Foreign-born (%)	8.9	15.2	6.5
Foreign-born, noncitizen (%)	4.8	8.9	3.3
White (%)	81.5	63.9	88.4
Black (%)	8.6	18.6	4.8
Hispanic (%)	7.3	14.4	4.6

Data: US Census Bureau 2010 Decennial Census. See US Census Bureau (2015).

For both agencies, average monthly arrests fell in the period following the implementation of the 287(g) program by the FCSO, both in total and across demographic groups, with the exception that black arrests by the FPD increased. Figure 3 shows only Hispanic arrests across the two jurisdictions. In addition to showing that FPD arrests more Hispanics than FCSO, on average, Figure 3 also highlights that the arrests between the two jurisdictions follow similar trends, both before and after implementation of the 287(g) program.

Figure 3. Hispanic Arrests by Agency



The primary empirical question is whether implementation of the 287(g) program led to differences in arrest patterns among the various racial-ethnic groups in Frederick County, both overall and between arresting agencies. This question is addressed through the use of a difference-in-difference estimator. Difference-in-difference estimators are commonly used in public finance and other economic literature to identify effects of policy changes (St. Clair and Cook 2015). The general concept of a difference-in-difference model is to examine differences in an outcome variable, in this case the number of arrests, between a treatment and control group before and after a policy is implemented. After controlling for individual and time fixed effects, the remaining difference is ascribed to the policy change (Angrist and Pischke 2009). The model for this study takes the following form:

$$arrests_{it} = \alpha + \beta_1 FCSO + \beta_2 287(g) + \beta_3 (FCSO) * (287(g)) + \Gamma X + \epsilon$$

The dependent variable, $arrests_{it}$, is the number of arrests of people from racial/ethnic group i in month t . The model is estimated separately for each racial/ethnic group. The independent variables include: 1) an agency fixed effect, $FCSO$, equal to one if the arresting agency was the Frederick County Sheriff's Office, 2) a time fixed effect, $287g$, equal to one if the month occurred after the program was implemented, and 3) an interaction between these two variables. The vector X represents a series of control variables which include a time trend variable and the city and county unemployment rates, and ϵ is a random error term. The coefficient estimate for β_1 represents the average difference in arrests between the two agencies across the entire period of study. The coefficient estimate for β_2 is a change in arrests common to both jurisdictions following the implementation of the 287(g) program. Finally, the coefficient estimate of β_3 is the change in arrests specific to the Frederick County Sheriff's Office following the implementation of the 287(g) program.

Given the nature of the 287(g) program in Frederick County and the nature of the data, the model above allows for testing of two separate effects of the 287(g) program. Since FCSO operates a hybrid model 287(g) program, the effects can be separated between the jail and task force functions of the program. Since all arrestees are processed in the Frederick County Jail, the jail enforcement function of the hybrid model affects both jurisdictions. Hence, the estimated results of β_2 can be interpreted as the effect of the jail enforcement function. However, since the task force function of the program applies only to FCSO, this would not be expected to have an effect on the arrest behavior of the FPD. Thus, the estimates of β_3 , which are specific to FCSO, can be interpreted as the effect of the task force function of the program.

The first hypothesis is that implementation of the 287(g) program creates a distrust between the Hispanic community and the police. If this is true, then we would expect to see a decrease in arrests by both agencies after the program goes into effect. Thus, we expect the coefficient estimate for the post-287(g) indicator variable, β_2 , to be negative. The second hypothesis is that the program leads to racial profiling by the participating agency. If this is true, then we expect the coefficient estimate on the interaction term, β_3 , to be positive.

V. Results

A. Main Results

Table 3 presents baseline estimates of the effects of the 287(g) program on arrests of Hispanics across several lengths of time following the implementation of the program.⁶ For all specifications, the data begin in January 2006. Columns 1, 2, and 3 present results for arrests with the data ending one, two, and three years after the program went into effect, respectively. Column 4 presents results for the entire data set. In general, all four sets of results follow the same pattern. The negative coefficient for FCSO indicates that, on average, the Frederick County Sheriff's Department arrests fewer Hispanics per month than the Frederick Police Department. This result is as expected, given the demographic differences between the city and the county. The negative coefficient for post-287(g) indicates a decrease in arrests across both agencies following the implementation of the 287(g) program. There are two factors that could be driving this result. First, the arrests of Hispanics could have fallen because Hispanics as a share of the population has fallen. While there is some evidence that the Hispanic, noncitizen population fell immediately following the implementation of the 287(g) program (Capps et al. 2011), by 2013 the Hispanic population, both native and foreign-born, had increased in both absolute and relative terms (US Census Bureau 2016). Thus, if this were the driving factor, we would expect this effect to decline as the Hispanic population rose. However, this effect is persistent across all of the estimates, and grows as the length of time following the 287(g) program's implementation increases. Thus, these results are more consistent with the hypothesis of a "chill effect," in which the Hispanic population is more hesitant to interact with law enforcement, resulting from the jail enforcement portion of the 287(g) program in Frederick County. The positive and significant coefficient for the interaction term between the policy variable and FCSO, however, indicates that the fall in arrests was not uniform across jurisdictions. That is, the rate at which arrests declined by FCSO was significantly slower than that of FPD following the implementation of the program.

While it is tempting to ascribe this result strictly to the task force portion of the 287(g) program, there are, however, two ways to interpret this result. The first is that the FCSO more aggressively targeted the Hispanic community. The second is that the FPD, knowing that arrestees would be subject to the program upon intake into the county jail system, exercised more discretion in arrests and reduced the number of arrests they would have otherwise made.

⁶ To control for potential bias resulting from serial correlation (Bertrand, Duflo, and Mullianathan 2004), reported standard errors are obtained using a vector error correction model.

Table 3. Difference-in-Difference Estimates, Dependent Variable: Monthly Arrests of Hispanics

	(1)	(2)	(3)	(4)
	One year	Two year	Three year	Full sample
Post-287g	-14.546*** (2.771)	-17.921*** (2.602)	-20.018*** (2.551)	-19.560*** (2.457)
FCSO	-22.581*** (2.750)	-22.581*** (2.736)	-22.581*** (2.727)	-22.581*** (2.714)
(Post-287g)*(FCSO)	12.581** (3.728)	13.164*** (3.232)	13.025*** (3.096)	11.134*** (2.903)
Constant	45.129*** (2.364)	45.129*** (2.351)	45.129*** (2.343)	45.129*** (2.333)
<i>N</i>	86	110	134	192
F	27.889	36.861	47.401	81.341
P(f > F)	0.000	0.000	0.000	0.000
R ²	0.554	0.592	0.618	0.643

Robust standard errors in parentheses

* $p < 0.05$, ** $p < 0.01$, *** $p < 0.001$

Two additional pieces of evidence can help shed light on which of these two interpretations best fits our results. First, we can compare the number of detainees issued for arrestees by the two agencies. As noted above, FCSO reported that between 2008 and 2015, 780 detainees were issued for individuals arrested by the FPD, whereas 328 were issued for individuals arrested by the FCSO. Given the relative arrest numbers between the two agencies, both total numbers and for demographic splits, if the FPD was reducing its rate of arrest, we would expect to see a much smaller number of detainees being issued for FPD arrestees. For further evidence, we can compare the outcomes for Hispanics to other demographic groups. Tables 4 and 5 present results of estimating the difference-in-difference model on arrests for whites and blacks, respectively. In Table 4 the coefficient for the post-287(g) period is not significant, indicating no uniform impact on whites across jurisdictions following the implementation of the program. However, in three of the four specifications, the coefficient for the interaction term is negative and significant. This result implies FCSO arrested fewer whites following the implementation of the program, but FPD did not. In Table 5 the coefficient for the post-287(g) period is positive and significant, indicating that more blacks were arrested, on average, while the program was in place. However, the sign and magnitude of the coefficient for the interaction term shows that this increase was due to increases in arrests by FPD and, in fact, arrests of blacks by FCSO fell during the 287(g) period. Taken together, this suggests a shift in attention by the FCSO away from the white and black community toward the Hispanic community following the implementation of the 287(g) program, which is most likely attributable to the implementation of the task force program.

Thus, the overall results suggest that while the implementation of the 287(g) program in the jail system led to a “chill effect” across the county among the Hispanic community, the task force program resulted in the FCSO arresting 11 to 13 more Hispanics per month than would be expected without the program. As noted above, the majority of undocumented immigrants hail from five Latin American countries. And, in fact, 88 percent of detainees issued in Frederick County were issued to immigrants from Mexico, El Salvador, Honduras, and Guatemala (Jenkins 2015). It is reasonable to expect that in the course of identifying and arresting undocumented immigrants, the task force would lead to some increase in Hispanic arrests. However, the effect identified above is disproportional to the number of detainees issued to individuals arrested by the FCSO. Between 2008 and 2015, detainees were issued for FCSO arrestees at an average of 3.9 per month. This represents roughly one-third of the increase in Hispanic arrests identified above.

Table 4. Difference-in-Difference Estimates, Dependent Variable: Monthly Arrests of Whites

	(1)	(2)	(3)	(4)
	One year	Two year	Three year	Full sample
Post-287g	5.747 (6.142)	4.581 (5.111)	-1.392 (4.737)	-7.758 (3.965)
FCSO	66.516*** (4.821)	66.516*** (4.796)	66.516*** (4.780)	66.516*** (4.757)
(Post-287g)*(FCSO)	-12.933 (9.237)	-19.849* (8.013)	-22.572** (7.375)	-22.224*** (6.174)
Constant	157.419*** (2.963)	157.419*** (2.947)	157.419*** (2.937)	157.419*** (2.924)
<i>N</i>	86	110	134	192
<i>F</i>	79.369	81.756	86.306	112.947
<i>P</i> (<i>f</i> > <i>F</i>)	0.000	0.000	0.000	0.000
<i>R</i> ²	0.742	0.684	0.641	0.633

Robust standard errors in parentheses

* $p < 0.05$, ** $p < 0.01$, *** $p < 0.001$

Table 5. Difference-in-Difference Estimates, Dependent Variable: Monthly Arrests of Blacks

	(1)	(2)	(3)	(4)
	One year	Two year	Three year	Full sample
Post-287g	24.296*** (5.220)	19.087*** (4.852)	17.018*** (4.380)	13.221*** (3.815)
FCSO	-19.452*** (3.484)	-19.452*** (3.466)	-19.452*** (3.454)	-19.452*** (3.438)
(Post-287g)*(FCSO)	-26.715*** (6.213)	-25.048*** (5.429)	-26.687*** (4.895)	-24.779*** (4.205)
Constant	94.871*** (3.236)	94.871*** (3.219)	94.871*** (3.208)	94.871*** (3.194)
<i>N</i>	86	110	134	192
F	43.365	48.686	69.583	122.982
P(f > F)	0.000	0.000	0.000	0.000
R ²	0.584	0.597	0.630	0.663

Robust standard errors in parentheses

* $p < 0.05$, ** $p < 0.01$, *** $p < 0.001$

Since crime rates can fluctuate both seasonally and with other economic conditions (Andresen 2015), Table 6 estimates the model on the full sample for all racial/ethnic groups, and introduces controls for the unemployment rate and a time trend. In Column 1, the coefficient for the post-287(g) period is negative and significant, but smaller than that of the baseline model. However, the interaction term is approximately the same size as in the baseline model and highly significant. Thus, after controlling for other factors, we find a somewhat smaller “chill effect” associated with the jail enforcement program, while the effects of the task force program are robust to the inclusion of controls. In Column 2, we find that the results for black arrests are robust to inclusion of controls, with the number of arrests by FPD increasing in the period following implementation of the 287(g) program, but falling for FCSO. Finally, in Column 3, after controls are included, the coefficient for the post-287(g) period is now significant, indicating an increase in arrests of whites. However, the negative and significant coefficient for the interaction term indicates a shift in attention away from whites by the FCSO.

Table 6. Difference-in-Difference Estimates, Dependent Variable: Monthly Arrests

	(1) Hispanic	(2) Black	(3) White
Post-287g	-7.438* (3.160)	18.984** (6.945)	21.265* (8.558)
FCSO	-21.899*** (2.492)	-19.679*** (3.327)	67.688*** (4.520)
(Post-287g)*(FCSO)	11.604*** (2.637)	-24.936*** (4.004)	-21.416*** (5.625)
Unemployment Rate	-2.933*** (0.751)	0.979 (2.002)	-5.047 (2.651)
T	0.789*** (0.223)	1.916*** (0.430)	2.105** (0.659)
t ²	-0.021*** (0.005)	-0.054*** (0.010)	-0.054** (0.017)
t ³	0.0001*** (0.00003)	0.0003*** (0.0001)	0.0003** (0.0001)
Constant	47.355*** (4.022)	76.273*** (8.676)	154.658*** (12.434)
N	192	192	192
F	75.391	81.411	66.414
P(f > F)	0.000	0.000	0.000
R ²	0.729	0.726	0.719

Robust standard errors in parentheses

* $p < 0.05$, ** $p < 0.01$, *** $p < 0.001$ ***B. Robustness Checks***

This section explores the robustness of the results by introducing a series of falsification tests. The falsification tests are designed to rule out the possibility that the results presented above are the result of the implementation of the 287(g) program and not some other underlying causal factor. Three separate falsification tests are conducted below.

First, the data are examined to determine if there is a difference in arrest trends prior to the implementation of the program. The absence of a preexisting trend indicates the number of arrests for the two jurisdictions followed parallel paths prior to the implementation of the 287(g) program. It is assumed that without the introduction of the program that the arrest patterns would have remained parallel. Thus, the observed difference above is attributable to the implementation of the 287(g) program.

The second falsification test is the nonequivalent dependent variable test. That is, the dependent variable is replaced with another variable that is related to the number of arrests, but should not be affected by the policy change. For this exercise, the dependent variable of Hispanic arrests is replaced with the unemployment rates in Frederick County and the city of Frederick. Since crime and unemployment are correlated, if we find the difference-in-difference coefficient to be significant, this would indicate that some other factor is affecting both the unemployment and arrest rates. If not, this provides further evidence of the validity of the results above.

The final falsification test is to choose a different “random” policy date to test for a placebo effect. This tests whether the results above may be a result of some other policy that could have gone into effect after the 287(g) program was implemented. In this test the policy date is chosen to be February 2012.⁷

1. PREEXISTING TREND

A key assumption in performing a difference-in-difference analysis is that the two jurisdictions followed parallel trends prior to the policy change. This section uses two methods to test that assumption. For both tests, the data are restricted to include only the time period prior to the policy change, January 2006 to July 2008. The first test follows the method used by Finkelstein (2002) and introduces discrete policy change variable to separate the data into “before” and “after” periods, and repeats the difference-in-difference technique above. The test is repeated for three different policy dates at each quarter of the data. Since choice of a policy date can be somewhat arbitrary in a test of this type, an additional test introduces a continuous time trend variable to examine the overall trend in the data. In all cases, if the assumption of parallel trends holds, it is expected that the coefficient estimates for the interaction term between FCSO, and the policy dates and trend variable will be insignificant. Results of these tests are presented in Table 7. For all four specifications, the interaction term coefficient estimates are insignificant. Thus, while there were changes in arrests in the period prior to the implementation of the 287(g) program, as evidenced by the significant coefficients of the policy variable in Columns 1 and 3, these changes were common to both FCSO and FPD.

⁷ In this case, the “policy” that took effect was that the author was applying for a job in Frederick County.

Table 7. Preexisting Trend Tests

	(1)	(2)	(3)	(4)
	Q1	Q2	Q3	Continuous trend
Post-policy	15.337*** (4.037)	0.783 (4.722)	-8.655* (3.951)	
FCSO	-19.000*** (3.499)	-23.250*** (4.474)	-23.875*** (3.343)	-24.439*** (5.922)
(Post-policy)*(FCSO)	-4.826 (4.541)	1.383 (5.475)	5.732 (4.599)	
Trend				0.124 (0.259)
(Trend)*(FCSO)				0.116 (0.295)
Constant	33.750*** (3.159)	44.750*** (3.816)	47.083*** (2.848)	43.148*** (5.267)
<i>N</i>	62	62	62	62
F	48.637	25.031	30.020	25.097
P(f > F)	0.000	0.000	0.000	0.000
R ²	0.671	0.536	0.563	0.545

Robust standard errors in parentheses

* $p < 0.05$, ** $p < 0.01$, *** $p < 0.001$ **II. NONEQUIVALENT DEPENDENT VARIABLE**

The next falsification test explores the possibility of some other coincident factor influencing the crime rate. Returning to the full data set, the dependent variable is replaced with a variable that is related to the number of arrests, but should be unaffected by the policy change. For this exercise, the chosen dependent variable is the unemployment rate. As shown in the results above, the unemployment rate is significantly related to the number of arrests of Hispanics, but not a significant predictor of the number of white or black arrests. It is possible that some other factor, which happened around the same time as the policy change, is affecting both variables. For example, the timing of the implementation of the 287(g) program coincides with the beginning of the Great Recession. Thus, it is possible that other macroeconomic factors may influence both the unemployment rate and the observed number of arrests. If this is the case, it is expected that the difference-in-difference estimator would be significantly related to the unemployment rate. However, if the difference-in-difference estimator is not significantly related to the unemployment

rate, this provides further evidence that the results presented above are due to the policy change, and not some other external shock. Results of this test are presented in Column 1 of Table 8. While the coefficient estimates indicate that the unemployment rate was higher following the policy change, and the unemployment rate was higher in the county than the city, the interaction term is insignificant, indicating that the unemployment rates in the two areas followed the same trend in the post-policy period.

Table 8: Falsification Tests

Dependent Variable	(1) Unemployment Rate	(2) Hispanic Arrests
Post-policy	1.984*** (0.283)	3.330 (2.466)
County	0.232** (0.087)	
(Post-policy)*(County)	0.160 (0.137)	
FCSO		-14.313*** (1.334)
(Post-policy)*(FCSO)		0.988 (1.916)
Unemployment Rate		-2.835*** (0.713)
t	-0.066*** (0.011)	0.774*** (0.197)
t ²	0.003*** (0.000)	-0.021*** (0.004)
t ³	-0.000*** (0.000)	0.000*** (0.000)
Constant	3.339*** (0.108)	43.439*** (3.217)
N	192	192
F	523.420	51.613
P(f > F)	0.000	0.000
R ²	0.898	0.687

Robust standard errors in parentheses

* $p < 0.05$, ** $p < 0.01$, *** $p < 0.001$

III. UNRELATED FUTURE EVENT

The final falsification test examines whether the observed difference-in-differences may be due to some other event that occurred in the post-policy period. Similar to the test for preexisting trends, this test involves creating an alternative policy variable and performing a difference-in-difference estimation to determine if there is a placebo effect. For this test, the alternative policy date of February 2012 is chosen. Results of this test are presented in Column 2 of Table 8. As expected, the coefficient for FCSO is negative and significant, indicating that FCSO arrests fewer Hispanics than FPD, on average. However, the coefficients for the post-policy variable and the interaction term are both insignificant. That is, this test fails to find a placebo effect in the post-policy period, further supporting the claim that the results found above are due to the implementation of the 287(g) program.

VI. Concluding Remarks

This study examines the effects of the implementation of the 287(g) program in Frederick County, Maryland. The nature of the implementation allows for the testing of two distinct effects. The first is whether the implementation in the jail system led to a “chilling effect,” in which Hispanics, regardless of immigrant status, began to distrust and avoid law enforcement. The second is whether implementation of the field program led to an increase in arrests by the FCSO. The results presented above find evidence of both effects. Following the implementation of the 287(g) program, arrests of Hispanics fell substantially across both jurisdictions. This drop in arrests was specific only to the Hispanic community, with no change occurring among whites and an increase in arrests of blacks, which suggests that there was a “chill effect” occurring in the Hispanic community. However, the decrease in arrests fell much more slowly for the FCSO than for the FPD. This fact combined with the finding that arrests of whites and blacks by the FCSO fell significantly following the implementation of the 287(g) program suggests a shift in resources by the FCSO directed toward the Hispanic community. This shift in resources led to an increase in arrests which was disproportional to the number of detainers issued against undocumented immigrants. Thus, rather than acting as a surgical tool to identify and deport undocumented immigrants, the 287(g) program led to a biased increase in the arrests of Hispanics, regardless of immigrant status.

The results of this study suggest that many of the concerns associated with the 287(g) program indeed have merit. The increased arrests of Hispanics are consistent with worries that local immigration enforcement will lead to profiling among the Hispanic population. In addition to being a potential violation of civil liberties, this also creates tension between the community and law enforcement. Creating and fostering distrust between law enforcement and the community that they are responsible for serving and protecting results in an unwillingness of the community to cooperate with law enforcement. This “chill effect” can actually undermine public safety by allowing criminals to flourish when victims and/or witnesses are fearful of interacting with police (Kirk et al. 2012). Thus, it is possible that the 287(g) program is making communities less safe, rather than safer.

While it had appeared that the 287(g) program was in decline in previous years, Executive Order No. 13768 has called for an expansion of the program. Furthermore, the executive order also discontinued the Priority Enforcement Program, which substantially limited the

circumstances for which undocumented immigrants would be deported. By focusing on immigrants who pose serious threats to national security or committed a limited number of serious offences, the Priority Enforcement Program reduced the likelihood of immigrants being arrested for minor traffic offenses or other petty crimes for the sole purpose of processing them through the 287(g) program. Removing these safeguards increases the likelihood of racial profiling and harassment by law enforcement. In turn, this increased enforcement will undoubtedly lead to growing mistrust between the Hispanic community and law enforcement, ultimately leading to a reduction in public safety.

There are a number of safeguards that can be implemented in order to mitigate the adverse effects of the Priority Enforcement Program. First, community outreach can help rebuild trust between police and citizens. Ensuring that victims and witnesses will not be interrogated over their immigration status can help improve the likelihood that they will come forward to report crimes. Further, federal and civil oversight can help ensure that law enforcement is not targeting specific groups. Monitoring the rate at which different demographic groups are being arrested for minor crimes is one possible method of identifying evidence of racial profiling and harassment. While this study focuses on a single jurisdiction participating in the 287(g) program, it is highly likely that the results presented above would be similar in other participating jurisdictions. Thus, if the program is to be expanded, it will be necessary to study its implementation in other jurisdictions to determine which practices by participating law enforcement agencies can help reduce the potential for abuse and civil rights violations.

REFERENCES

- ACLU (American Civil Liberties Union). 2009. *Examining 287(g): The Role of State and Local Enforcement on Immigration Law*. Washington, DC: ACLU.
- Andresen, Martin A. 2015. "Unemployment, GDP, and Crime: The Importance of Multiple Measurements of the Economy." *Canadian Journal of Criminology & Criminal Justice* 57(1): 35-58. <https://doi.org/10.3138/CJCCJ.2013.E37>.
- Angrist, Joshua, and Jorn-Steffen Pischke. 2009. *Mostly Harmless Econometrics: An Empiricists Companion*. Princeton, NJ: Princeton University Press.
- Armenta, Amada. 2012. "From Sheriff's Deputies to Immigration Officers: Screening Immigrant Status in a Tennessee Jail." *Law & Policy* 34(2): 191-210. <https://doi.org/10.1111/j.1467-9930.2011.00359.x>.
- Baker, Bryan, and Nancy Rytina. 2013. *Estimates of the Unauthorized Immigrant Population Residing in the United States: January 2012*. Washington, DC: DHS (US Department of Homeland Security). https://www.dhs.gov/sites/default/files/publications/ois_ill_pe_2012_2.pdf.

Local Immigration Enforcement and Arrests of the Hispanic Population

- Bertrand, Marianne, Esther Duflo, and Sendhil Mullianathan. 2004. "How Much Should We Trust Difference-in-Difference Estimates?" *Quarterly Journal of Economics* 119(1): 249-75. <https://doi.org/10.1162/003355304772839588>.
- Butcher, Kristin, and Anne Piehl. 1998. "Recent Immigrants: Unexpected Implications for Crime and Incarceration." *Industrial & Labor Relations Review* 51: 654-79. <https://doi.org/10.1177/001979399805100406>.
- Capps, Randy, Marc R. Rosenblum, Christina Rodriguez, and Muzaffar Chishti. 2011. *Delegation and Divergence: A Study of 287(g) State and Local Immigration Enforcement*. Washington, DC: Migration Policy Institute.
- Cox, Adam, and Thomas Miles. 2013. "Policing Immigration." *The University of Chicago Law Review* 80: 87-136.
- Duda, Jeremy. 2012. "Homeland Security revokes 287(g) agreements in Arizona." *Arizona Capital Times*, June 25.
- Finkelstein, Amy. 2002. "The Effect of Tax Subsidies to Employer-Provided Supplementary Health Insurance: Evidence from Canada." *Journal of Public Economics* 84(3): 305-39. [https://doi.org/10.1016/S0047-2727\(00\)00155-9](https://doi.org/10.1016/S0047-2727(00)00155-9).
- Frederick County Government. 2016. *287(g) Program*. <https://frederickcountymd.gov/4130/287g-Program>.
- Hagan, John, and Alberto Palloni. 1999. "Sociological Criminology and the Mythology of Hispanic Immigrant Crime." *Social Problems* 46: 617-32. <https://doi.org/10.2307/3097078>.
- ICE (US Immigration and Customs Enforcement). 2008. "ICE Agreements of Cooperation in Communities to Enhance Safety and Security (ICE ACCESS) Fact Sheet." Washington, DC: ICE. <https://www.ice.gov/doclib/news/library/factsheets/pdf/access.pdf>.
- . 2017. *Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act*. Washington, DC: ICE. <https://www.ice.gov/factsheets/287g>.
- Jenkins, Charles A. 2015. "Immigration and Customs Enforcement 287(g) Program." Public hearing of 287(g) Steering Committee, Frederick, MD. <https://frederickcountymd.gov/4130/287g-Program>.
- Johnson, Jeh. 2014. "Policies for the Apprehension, Detention and Removal of Undocumented Immigrants." Memorandum, November 20. Washington, DC: DHS.
- Kirk, David S., Andrew V. Papachristos, Jeffrey Fagan, and Tom R. Taylor. 2012. "The Paradox of Law Enforcement in Immigrant Communities: Does Tough Immigration Enforcement Undermine Public Safety?" *The Annals of the American Academy of Political and Social Science* 641: 79-98. <https://doi.org/10.1177/0002716211431818>.

- Kubrin, Charis. 2014. "Secure or Insecure Communities." *Criminology & Public Policy* 13(2): 323-38. <https://doi.org/10.1111/1745-9133.12086>.
- Landgrave, Michelangelo, and Alex Nowrasteh. 2017. *Criminal Immigrants: Their Numbers, Demographics, and Countries of Origin*. Immigration Research and Policy Brief No. 1. Washington, DC: Cato Institute.
- Martinez Jr., Ramiro, and Janice Iwama. 2014. "The Reality of the Secure Communities Program." *Criminology & Public Policy* 13(2): 339-44. <https://doi.org/10.1111/1745-9133.12084>.
- Nguyen, Mai Thi, and Hannah Gill. 2010. *The 287(g) Program: The Costs and Consequences of Local Immigration Enforcement in North Carolina Communities*. Chapel Hill, NC: The Latino Migration Project, University of North Carolina at Chapel Hill.
- . 2016. "Interior Immigration Enforcement: The Impacts of Expanding Local Law Enforcement Authority." *Urban Studies* 53(2): 302-23. <https://doi.org/10.1177/0042098014563029>.
- St. Clair, Travis, and Thomas D. Cook. 2015. "Difference-in-Difference Methods in Public Finance." *National Tax Journal* 68(2): 319-38. <https://doi.org/10.17310/ntj.2015.2.04>.
- Theodore, Nik, and Robert Habans. 2016. "Policing Immigrant Communities: Latino Perceptions of Police Involvement in Immigration Enforcement." *Journal of Ethnic and Migration Studies* 42(6): 970-88. <https://doi.org/10.1080/1369183X.2015.1126090>.
- Treyger, Elina, Aaron Chalfin, and Charles Loeffler. 2014. "Immigration Enforcement, Policing, and Crime: Evidence from the Secure Communities Program." *Criminology & Public Policy* 13(2): 285-322. <https://doi.org/10.1111/1745-9133.12085>.
- US Census Bureau. 2015. "2010 Census Data." Washington, DC: US Census Bureau. <https://www.census.gov/2010census/data/>.
- . 2016. *American Fact Finder*. Washington, DC: US Census Bureau. <https://factfinder.census.gov/>.
- Wadhia, Shoba Sivaprasad. 2011. *The Morton Memo and Prosecutorial Discretion: An Overview*. Washington, DC: Immigration Policy Center, American Immigration Council.



Twenty Years After IIRIRA: The Rise of Immigrant Detention and Its Effects on Latinx Communities Across the Nation

Melina Juárez
University of New Mexico

Bárbara Gómez-Aguiñaga
University of New Mexico

Sonia P. Bettez
University of New Mexico

Executive Summary

This paper studies the dynamics of detention, deportation, and the criminalization of immigrants. We ground our analyses and discussion around the Illegal Immigration Reform and Immigrant Responsibility Act of 1996's (IIRIRA's) detention mandate, the role of special interest groups and federal policies. We argue that these special interest groups and major federal policies have come together to fuel the expansion of immigrant detention to unprecedented levels. Moreover, we aim to incite discussion on what this rapid growth in detention means for human rights, legislative representation and democracy in the United States. This study analyzes two main questions: What is the role of special interests in the criminalization of immigrants? And does the rapid increase in detention pose challenges or risks to democracy in the United States? Our study is grounded within the limited, yet growing literature on immigrant detention, government data, and “gray” literature produced by nonprofits and organizations working on immigration-related issues. We construct a unique dataset using this literature and congressional reports to assess what factors are associated with the rise of immigrant detention. A series of correlations and a time series regression analysis reveal that major restrictive federal immigration policies such as IIRIRA, along with the increasing federal immigration enforcement budget, have had a significant impact on immigrant detention rates.

Based on these findings, we recommend three central policy actions. First, the paper recommends increased transparency and accountability on behalf of the Department of Homeland Security, Immigration and Customs Enforcement, and on lobbying expenditures from for-profit detention

corporations. Second, it argues for the repeal of mandatory detention laws. These mandatory laws have led to the further criminalization and marginalization of undocumented immigrants. And lastly, it argues that repeal of the Congressional bed mandate would allow for the number of detainees to mirror actual detention needs, rather than providing an incentive to detain. However, we anticipate that the demand for beds will increase even more given the current administration's push for the criminalization and increased arrests of undocumented individuals. The rhetoric used by the present administration further criminalizes immigrants.¹

Introduction

The events of September 11, 2001 have been widely seen as the catalysts for the draconian shifts in immigration policy that led to the creation of the Department of Homeland Security (DHS) and one of its main enforcement agencies, the US Immigration and Customs Enforcement (ICE) (Meissner et al. 2013). Trends towards tougher and more repressive forms of immigration enforcement, however, predate the creation of either agency. Repressive immigration and immigrant policies are not new. Scholars have outlined earlier developments in immigration policy tying them to notions of “otherness” and to the view of immigrants as posing threats of foreign invasion (Douglas and Saenz 2013).

Beginning in the mid-1990s, federal immigration policies began tapping into local resources to aid in enforcement. In 1996, the Clinton administration passed three instrumental pieces of legislation that greatly curbed immigrant rights and set precedence for local-federal partnerships: the 1996 Anti-terrorism and Effective Death Penalty Act (AEDPA); the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA); and the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA), which also set boundaries for immigrant access to social services and public benefits.

Moreover, IIRIRA is also a key milestone in contemporary immigration policy. First, IIRIRA founded one of the cornerstone programs for current immigration policy enforcement, the 287(g) program. Section 287(g) of the Immigration and Nationality Act allows for local law enforcement agencies to partner with ICE and essentially deputizes local police officers as ICE agents with the ability to investigate the immigration status of any person detained in that jurisdiction (Michaud 2010). As of October 2017, there were 60 local law enforcement agencies across 18 states with 287(g) agreements (ICE 2017). Secondly, along with codifying federal-local partnerships, IIRIRA expanded the list of crimes set by the AEDPA that required mandatory detention (Hines 2006; ACLU 2017).

1 As reflected in the January 25, 2017 executive order from the White House: “Tens of thousands of removable aliens have been released into communities across the country, solely because their home countries refuse to accept their repatriation. Many of these aliens are criminals who have served time in our Federal, State, and local jails. The presence of such individuals in the United States, and the practices of foreign nations that refuse the repatriation of their nationals, are contrary to the human interest” (Enhancing Public Safety in the Interior of the United States, Exec. Order No. 13768, 82 Fed. Reg. 8799 [Jan. 25, 2017]).

Twenty Years After IIRIRA

The two aspects of IIRIRA explained above coalesced to increase the participation of localities in immigration enforcement and helped to fuel the incentives and profits for localities to buy into the nascent immigrant detention complex. For example, in their study of the immigrant detention complex, Doty and Wheatley (2013) found important economic interests at play that involved not only localities, but also corporations. They mention, for example, the case of Eloy, Arizona, a small desert town, and its partnership with CoreCivic (formerly known as Corrections Corporation of America, or CCA):

In fiscal year (FY) 2008-2009, approximately \$95 million in revenue passed through Eloy, from Immigration and Customs Enforcement (ICE) to CCA. ICE does not contract directly with the CCA for the Eloy Detention Center, but uses a “pass-through” contract with the city of Eloy, which in turn contracts with the CCA. Eloy receives 25 cents per day for each inmate held at the center.

(Doty and Wheatley 2013, 427)

Although the locality’s logic for pursuing federal agreements or memorandum of agreements (MOAs) could be primarily economic, communities affected by the increase in detentions and deportations argue that there are grander sociopolitical externalities that go beyond economic profit.

For example, the immigrant community, with the Latinx² community at the forefront, has pointed to the conditions detained immigrants face. Detainees have recounted their experiences of rampant abuse (both sexual and psychological), inadequate facilities, and even rape and murder in detention centers across the nation. These conditions have been attributed to the privatization of detention centers where DHS and ICE have contracted private corporations for the management of detention facilities (Friedman 2015; Project South 2017).

While IIRIRA provided the foundation for the detention of immigrants, a slew of enforcement programs allowed for the growth in detentions as well. The most well-known of these are 287(g) and Secure Communities. As stated, the 287(g) program allows local law enforcement to act as federal immigration agents. The deputizing of local police officers gives ICE the ability to penetrate deeper into communities without increasing their own manpower. Secure Communities (S-COMM) (2008-2014 and 2017-today) works in tandem with 287(g). S-COMM is an information sharing system between the Federal Bureau of Investigation (FBI), DHS, and federal, state, local, and tribal enforcement agencies. Under this program, the FBI automatically shares fingerprints with DHS for all individuals in the booking process. For persons deemed undocumented or otherwise removable in DHS databases, ICE issues a detainer and assumes custody of the individual (ICE 2009).

Along with the implementation of new programs that increased the number of detainees, policies that went counter to the detention of immigrants were also repealed. In 2005, the Bush administration sought to end the practice of “catch and release,” which allows

² We chose to utilize the gender-neutral term “Latinx” in lieu of the gendered “Latino” or “Latino/a.” This term captures the great heterogeneity within the Latinx community that includes differences in gender, sex, race, ethnicity, national origin, and language, among others. Additionally, given the issues surrounding the detention of LGBTQI Latinxs (to be expanded upon in the paper), it is appropriate to utilize a term that does not discriminate against this minority within this population.

noncriminal undocumented immigrants to await their removal hearings outside of detention facilities. DHS Secretary Michael Chertoff (2005-2009) announced that due to increased bed space and detention capabilities of DHS and ICE, all undocumented immigrants awaiting removal proceedings would be detained (Gavett 2011). This meant that even noncriminal undocumented immigrants would be placed in detention centers regardless of their noncriminal histories. Thus, although IIRIRA provided the foundation for the detainment of immigrants, the confluence of privatization and federal immigration policy fueled the growth of immigrant detention centers to unprecedented levels.

This paper studies the dynamics of detention, deportation, and the criminalization of immigrants. We ground our analyses and discussion around IIRIRA's detention mandate, the role of special interest groups and federal policies. This paper seeks to incite discussion around two main questions: What is the role of special interests in the criminalization of immigrants? And does the rapid increase in detention pose challenges or risks to democracy in the United States?

Our study is grounded within the limited, yet growing literature on immigrant detention, government data, and "gray" literature produced by nonprofits and organizations working in immigration-related issues. We construct a unique dataset through this literature and congressional reports to assess the factors associated with the rise of immigrant detention. A series of correlations and a time series regression analysis reveal that restrictive federal immigration policies such as IIRIRA, along with the increasing federal immigration enforcement budget, have had a significant impact on immigrant detention rates.

This paper begins with a discussion of the economic and political context surrounding the growth of immigrant detention. A section on the costs of immigrant detention then follows. This section also provides an overview of the conditions of detention and their psychosocial effects on individuals and communities. It next presents data, analyses and findings. The discussion then focuses on the implications of these results for human rights, legislative representation, and democracy. It concludes with a discussion of alternatives to detention and policy approaches to immigration enforcement.

The Rise of Criminalization and Detention

Immigrant detention has skyrocketed over the past three decades. For example, immigrant detention centers in 1980 had the capacity to hold just over 4,000 detainees, by 1994 the capacity increased to 6,785 detainees per day, by 2009 the number of detention beds had reached 33,400 (Flynn 2014; Tonry, 2014; Gruberg 2015), and by 2016 the number of detainees in private facilities reached 37,000 (Takei, Tan, and Lin 2016). These rates and growth, however, have not been due to a rise in undocumented immigration. The estimated number of undocumented immigrants in the United States has dropped to 11.045 million in 2015, down from an estimated 12.2 million in 2007 (Krogstad, Passel, and Cohn 2016; Warren 2017).

There are currently over 200 immigrant detention centers (IDCs) across the nation (Gruberg 2015; Community Initiatives for Visiting Immigrants in Confinement 2017). Over two thirds of these are located in nine states: Texas, California, Arizona, Georgia, New Jersey,

Louisiana, Florida, Washington, and Pennsylvania (Kerwin 2015). ICE does not directly operate many of these facilities, but instead contracts for bed space with the Federal Bureau of Prisons (BOP), for-profit prison corporations, the US Marshals Service (USMS), and states and localities, which subcontract the operation of their facilities to third parties. In 2015, 59 percent of IDCs were run by state and local entities, 90 percent of which were subcontracted to private corporations (Kerwin 2015). In the first three months of the Trump administration, interior arrests related to immigration increased by 38 percent or 41,318 individuals, or more than 400 per day, “reflect[ing] the president’s commitment to enforce our immigration laws fairly and across the board” as stated by the acting director of ICE, Thomas Homan in May 2017 (Dickerson 2017).

The growth of immigrant detention has been characterized by large-scale privatization. In 2015, the two largest IDC corporations — CoreCivic,³ formerly known as the Corrections Corporation of America (CCA), and the GEO Group — operated nine out of the 10 largest immigrant detention centers in the country (MRS/USCCB and CMS 2015). In 2014, the CoreCivic and Geo Group housed 45 percent of all detained immigrants (14,149 per day) (Carson and Diaz 2015; MRS/USCCB and CMS 2015). The privatization of IDCs far outpaces that of prisons for persons serving criminal sentences Gruberg (2015) reports that while 8 percent of the prison population is held in privately run facilities, 62 percent of immigrant detainees are housed in private IDCs.

We argue that corporate interests have helped to fuel the growth of immigrant detention and to convert the criminalization of immigrants into a profitable industry. Although it is difficult to make a direct association between lobbying by these firms and the number of immigrants detained, multiple data sources show there is an indirect relationship between these two (Gruber 2015; Ewing, Martínez, and Rumbaut 2015). It is telling that the news of President Trump’s election led to a nearly 58 percent raise in the stock of CoreCivic (Demefack 2016).

CoreCivic and GEO Group have a long history of business with the federal government on immigrant-related operations. The first CoreCivic immigrant detention contract dates to 1984 when it contracted with the (now defunct) Immigration and Naturalization Services (INS) for a 350-bed IDC. The GEO Group (under its previous name, the Wackenhut Corporation) first contracted with INS in 1987 (MRS/USCCB and CMS 2015).-

Both groups directly lobbied federal officials for increases in DHS and ICE budgets and for the “bed mandate” — which was passed by Congress in 2009. Under this requirement, ICE must hold a minimum of 34,000 immigrants per night in detention, although the number of detainees has averaged over 44,000 since 2016 (Chen 2017). According to Carson and Diaz (2015), since 2010, CoreCivic has spent 75 percent of its total lobbying expenditures on the DHS appropriations subcommittee (the entity with the power to sustain or revoke the bed mandate). Gruberg (2015) finds that between 2006 and 2015, CoreCivic and GEO Group spent over \$10 million in lobbying on DHS appropriations.

Growing detention rates of noncitizens in the past three decades have spurred the criminalization of immigrants (Ewing, Martínez, and Rumbaut 2015). Although scholars

3 The CCA rebranded as CoreCivic in 2016, as announced on October 28, 2016. See www.cca.com/insidecca/corrections-corporation-of-america-rebrands-as-corecivic.

have found that immigrants are less likely to commit crimes than their native-born counterparts, and cities with higher percentages of immigrants have been associated with lower crime rates (Grieco et al. 2012; Passel and Cohn 2014; Sampson 2008), federal policies have applied a double standard to noncitizens in regard of the consequences of criminal behavior or even encounters with law enforcement agents. When non-naturalized immigrants are in touch with the criminal justice system for insignificant issues, such as misdemeanors or traffic violations, they are subject to detention, removal, and even banishment from the country (Cincotta 2010). Additionally, while DHS reports portray large shares of deported immigrants as “known criminal aliens,” scholars have found that the majority of the criminal offenses committed by deported immigrants are minor in nature, such as previous immigration offenses, possession of marijuana, and criminal traffic offenses (Ewing, Martínez, and Rumbaut 2015; Simanski and Sapp 2013; Simanski 2014).

Despite the decrease in the undocumented immigrant population since the Great Recession, Congress increased the bed mandate from 33,400 to 34,000 in 2012 (Carson and Diaz 2015). This increase coincided with a dramatic rise in the DHS immigrant detention budget, from \$700 million in 2005 to over \$2 billion in 2015 (Gruberg 2015). The increase in the detention budget together with the bed mandate has translated into a dramatic increase in immigrant detainees, from 230,000 detained in 2005 to 440,600 in 2013 (Gruberg 2015, 4).

ICE contracts stipulate that payment to for-profit prison corporations will cover a minimum number of beds per night, regardless of whether the beds are filled (Kerwin 2015).

Table 1. Total Profits For CoreCivic and GEO Group, 2007 and 2014

Year	CoreCivic Profit	GEO Group Profit
2007	\$133,373,000	\$41,848,000
2014	\$195,022,000	\$143,840,000
Total	\$328,395,000	\$185,688,000

Source: Carson and Diaz (2015).

These stipulations have led to handsome profits for both the CoreCivic and GEO Group as Table 1 illustrates. In 2014 CoreCivic received 44 percent of its total revenue from contracts with the BOP, ICE, and the USMS. And the GEO Group saw a dramatic 244 percent increase in profits for the same year (Carson and Diaz 2015).

Costs of Immigrant Detention on Immigrants and Their Communities

Profits are only one dimension of the costs of increased immigrant detention. Immigrants, their families, and their communities suffer socioeconomic and psychological effects because of toughened enforcement of federal immigration laws. The effects of detention and ultimately deportation start at the individual level but reverberate to the family and

community levels. The repressive manner by which these policies are enforced contributes to the disruption of family ties and exacerbates already high stress levels in families and communities (Hagan, Castro, and Rodriguez 2010).

Studies focused on the effects of deportation found that even knowing someone who has been deported can have a negative effect on that person's health (Vargas et al. n.d.). Additionally, living in anti-immigrant environments can also affect the health and well-being of individuals (Vargas, Sanchez, and Juarez 2017; Salas, Ayon, and Gurrola 2013; Hacker et al. 2011; Cavazos-Rehg, Zayas, and Spitznagel 2007). Moreover, children who have witnessed the detention or deportation process of their parents are more prone to stress, anxiety, and depressive disorders (Hendricks 2007; Capps, Hagan, and Rodriguez 2004; Chaudry et al. 2010).

Along with the often-traumatic experience of being apprehended by ICE or a deputized local officer, detained individuals are often exposed to physical and mental abuse through isolation, solitary confinement, or the opposite — overcrowded facilities. Limited or no access to basic necessities such as clean clothing, bedding, hygiene, or healthcare is rampant. Detainees have reported having to wait over 15 hours between meals, which are often of poor quality and past its expiration date. Many detainees also report instances of physical and/or psychological abuse such as solitary confinement (Cole 2012). One formerly detained immigrant commented:

After twenty months away from home, you lose faith, you feel worthless, this place breaks you, it is made to break your soul. The constant screaming and verbal abuse the guards inflict on the detainees is just made to break your soul and handicap you.

(Cole 2012)

These issues are especially salient for transgender and LGBTQI individuals whose gender identity is not respected and are often put in facilities with the opposite sex, exposing them to abuse, harassment, and rape by other detainees as well as prison guards (Anderson 2010; Carson and Diaz 2015; Gruberg 2015). The above conditions have led to countless immigrant detainee deaths, deaths that are often inadequately investigated or reported.⁴

Multiple studies and reports (Cole 2012; Cho and Shah 2016; Project South 2017) have documented the inhumane, substandard conditions detained immigrants face in privately run detention centers, specifically those IDCs in the south. The American Civil Liberties Union (ACLU) detailed the conditions in one of the most infamous of these southern IDCs — the Stewart Detention Center in Lumpkin, Georgia which has been under CoreCivic (at that time CCA) management since 2006 (Cole 2012). Among the litany of detainee abuse claims, CoreCivic was charged with violating the detainees' due process rights. Some detainees were found to be in custody six months or more *after* their deportation orders, in violation of a 2003 Supreme Court decision holding that detainees could be held a maximum of only six months following their removal order (MRS/USCCB and CMS 2015).

⁴ Nina Bernstein of the *New York Times* has reported on this facet of immigrant detention. A collection of her articles can be found at: http://topics.nytimes.com/top/reference/timestopics/subjects/i/immigration_detention_us/incustody_deaths/index.html.

The report also documents the “voluntary” labor required of detainees. Some detainees are paid from \$1 to \$3 per day for full-time kitchen or general cleaning duties. Detainees have declared that they took on kitchen duties in order to have access to food. This pay is far below minimum wage and is tantamount to prison labor. Some detainees are also forced to take on cleaning and laundry duties without pay. These conditions persist years later, as documented in the 2016 Southern Poverty Law Center (Cho and Shah 2016) and 2017 Project South (Project South 2017) reports.

Although we focus exclusively on immigrant detention centers, it is also important to note the existence of a parallel system of immigrant detention being run by the Bureau of Prisons (BOP). Criminal Alien Requirement (CAR) prisons are operated under the discretion of the BOP and used to hold immigrants serving short-term prison sentences. The 13 CAR prisons presently active are privately run but with little to no oversight by the BOP. In a multiyear study looking at five CAR prisons in Texas, the Texas ACLU found gross violations of human rights against immigrant detainees (2014).

Because of the lack of mechanisms for redress, detainees have often used extralegal means to fight against mistreatment. In 2010, at the Reeves CAR near Pecos, Texas undocumented detainees rioted after learning about the death of a fellow detainee Jesus Manuel Galindo. Galindo died in solitary confinement due to a seizure. An epileptic, Galindo was denied medical treatment and his pleas to be removed from solitary confinement went unheard. A month later, fears of another inmate death prompted a second riot. This time, detainees caused \$20 million in damages and held two officials hostage (ACLU 2014).

On February 20, 2015, undocumented immigrants being held at the Willacy County CAR prison near Raymondville, Texas, rioted over barbaric detention conditions. Nicknamed “Ritmo” or Raymondville’s Guantanamo, the prison under private management by Management and Training Corporation has been accused of housing detainees in squalid and inhumane conditions. These conditions led detainees to protest and riot, which prompted closure of the detention center (Lewis 2015). After the riots, local officials worried about the financial impact of the prison’s closure on the local economy. According to reports, Willacy County receives approximately \$2.8 million from the federal government for the prison, roughly \$2.50 per day per detainee. The riot and closure of the prison is expected to cost the county \$2 million of those federal funds (KRGV 2015).

Methods and Data

To analyze the relationship between the growing criminalization of immigrants, federal immigration policies, lobbying, and immigration enforcement budget, we collected data from multiple sources, including various Congressional Research Service (CRS) reports, US Census Bureau foreign-born data tables, INS service budgets, and DHS yearly reports. Due to data limitations, primarily scarce lobbying reports, the analysis of this study is limited to data from 1995 to 2013.

The dependent variable of the study is the criminalization of immigrants. This variable is measured through a ratio of average daily population of detained immigrants divided by the total number of noncitizens residing in the United States; this ratio was multiplied by 1,000

for clearer interpretation of the results. While the average daily population of detained immigrants was obtained from various CRS reports, the total number of noncitizens in the United States was obtained from the various US Census Bureau foreign-born data tables. The ratio has an increasing growth, ranging from 0.4425×10^{-3} in 1995, to 1.6067×10^{-3} in 2013.

We make use of multiple independent variables. We obtained data from OpenSecrets.org to measure federal lobbying expenditures of CoreCivic and GEO Group in both Congress and federal agencies such as the Department of Justice and DHS; although the available data does not provide the exact expenditures on immigration-related campaigns, it serves as a proxy of lobbying on immigrant detention because CoreCivic and GEO Group operate a large share of the immigrant detention centers in the United States (MRS/USCCB and CMS 2015). Additionally, scholars have reported that these two corporations have spent a large share of their total lobbying expenditures on DHS appropriations (Carson and Diaz 2015; Gruberg 2015).⁵

The next set of independent variables include various federal immigration policies that have been implemented since 1996. We account for IIRIRA in 1996, the end of the “catch and release” in 2006,⁶ the “bed quota” mandate in 2009, and Secure Communities in 2008. These policies are dichotomous variables measured yearly, with zero representing the absence of each policy, and one representing its implementation.

Our final independent variable is federal immigration enforcement spending, which is measured year by year. Due to the termination of INS and the implementation of DHS, we collected data from the Department of Justice, measuring the INS budget from fiscal year (FY) 1995 to 2003, as well as various budget reports from DHS. In order to measure the immigration enforcement budget of DHS specifically, we followed the methodology of Meissner et al. (2013), exclusively accounting for the budgets⁷ of the following DHS agencies: US Customs and Border Protection (CBP), US Immigration and Customs Enforcement (ICE), and the US Visitor and Immigrant Status Indicator Technology (US-VISIT) program, which was replaced by the Office of Biometric Identity Management (OBIM) in March 2013.⁸ The budgets were adjusted to 2016 dollars, following the Consumer Price Index (CPI) estimate from the Bureau of Labor Statistics to account for inflation. The immigration enforcement budget grew from \$3.4 billion in 1995 to \$18.2 billion in 2013, peaking in 2009 with \$19.7 billion. Table 2 provides the descriptive statistics of all the variables used in this study.

5 “CCA and GEO operated 45% of total ICE detention beds and 72% of privately contracted ICE detention beds . . . and together, they spent \$11,020,000 in federal lobbying . . . on immigration issues from 2008-2014” (Carson and Diaz 2015).

6 Although the “Catch and Release” policy ended in 2006 under President George W. Bush, CBP and ICE memos, along with ICE metrics, have shown that while a significant proportion of the number of encounters end in arrests or detainers, a proportion of those caught in violation of immigration laws are released after having encounters with ICE or CBP (Vaughan 2014).

7 The budgets refer to the fiscal year budgets that were revised enacted per agency; they come from various DHS *Fiscal Year Budgets in Brief*. See <https://www.dhs.gov/publication/dhs-budget>.

8 The US-VISIT program was launched in 2004 but was replaced by OBIM in March 2013. We make use of DHS’s *Budget in Brief Fiscal Year 2015* to account for OBIM’s fiscal year 2013 revised enacted budget. This report is available at <https://www.dhs.gov/sites/default/files/publications/FY15BIB.pdf>.

Table 2. Summary Statistics of Variables

Variables	Mean	SD	Min - Max
Ratio of detained immigrants	1.098	0.3389	0.4425 – 1.6067
Lobbying CoreCivic	1,254,444	904,792.6	140,000 – 3,380,000
Lobbying GEO Group	333,333.3	169,723.5	80,000 - 660,000
IIRIRA	0.6667	0.4797	0 - 1
Bed mandate	0.2333	0.4302	0 - 1
End of catch and release	0.3667	0.4901	0 - 1
Secure Communities	0.2667	0.4498	0 - 1
Immigration enforcement budget	9,121.556	6,880.683	1,262.94 – 19,714.53

** $p < 0.01$, * $p < 0.05$

Notes: The detained immigrant measure is a ratio of the average daily population of detained immigrants, as reported by various congressional reports, divided by the total non-naturalized immigrant population residing in the United States, as reported by the US Census Bureau. This ratio was multiplied by 1,000 to make interpretation of the table easier.

The measure of immigration enforcement budget is reported in millions, and was adjusted to 2016 dollars following the Department of Labor’s Consumer Price Index (CPI) Inflation Calculator.

We first created a series of bivariate correlations between the dependent and the independent variables. Through Pearson correlations conducted in Stata 14, we found that five out of seven independent variables were statistically correlated with the yearly ratio of detained immigrants. Then we conducted a time series regression and tested for autocorrelation using the Durbin-Watson test statistic and Breusch-Godfrey LM test to verify any autocorrelation issues.

Results

The results of the series of bivariate Pearson correlations show that all federal immigration policies are statistically correlated with the ratio of immigrants detained. As observed in Table 3, IIRIRA, the “bed mandate,” the end of “catch and release,” and Secure Communities are statistically significant.

Table 3. Correlation Coefficients

	Ratio of detained immigrants
Lobbying CoreCivic	-0.2087
Lobbying GEO	0.0109
IIRIRA	0.4681*
Bed mandate	0.7646**
End of catch and release	0.6939**
Secure Communities	0.8385**
Immigration Enforcement Budget	0.8729**

** $p < 0.01$, * $p < 0.05$

Sources: Various Congressional Research Service reports, US Census Bureau foreign-born data tables, INS service budgets, DHS budgets in brief, and data from OpenSecrets.org.

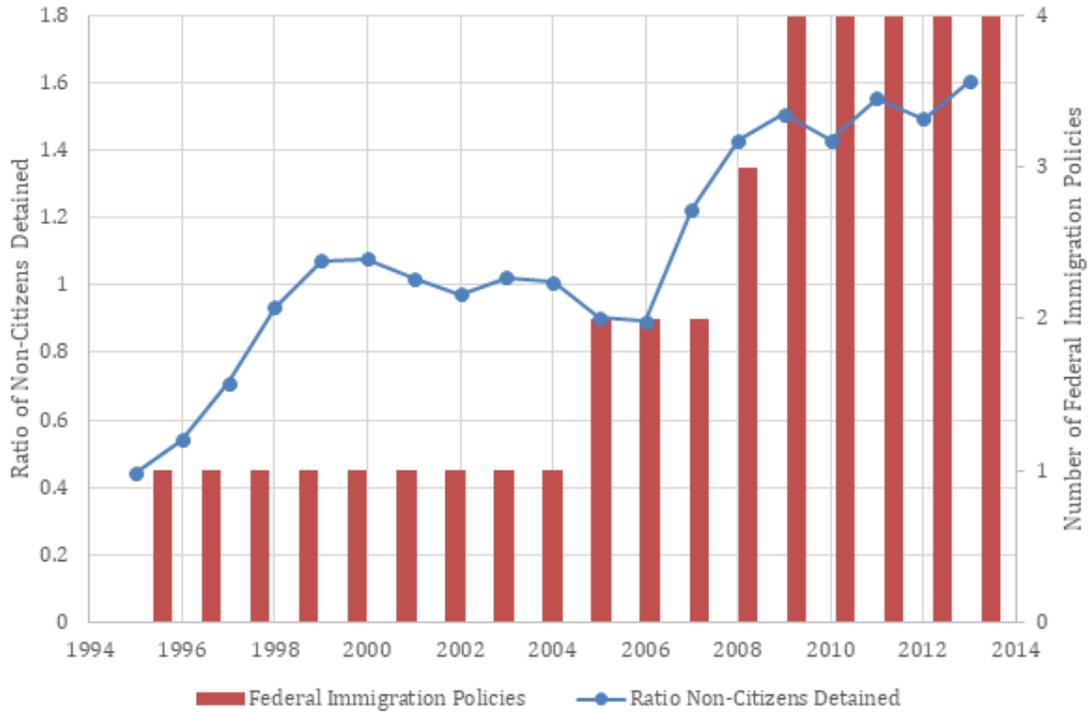
Notes: The detained immigrant measure is a ratio of the average daily population of detained immigrants, as reported by various congressional reports, divided by the total non-naturalized immigrant population residing in the United States, as reported by the US Census Bureau. This ratio was multiplied by 1,000 to make interpretation of the table easier.

The measure of immigration enforcement budget is reported in millions, and was adjusted to 2016 dollars following the Department of Labor’s CPI Inflation Calculator.

Figure 1 shows the parallel increase of federal immigration enforcement policies and the ratio of non-naturalized immigrants who are detained. The number of federal immigration policies of this study ranges from zero to four. There were zero policies analyzed in this study in 1995. In Figure 1, a value of 1 represents the existence of IIRIRA; 2 the parallel existence of IIRIRA and end of “catch and release;” 3 IIRIRA, end of “catch and release” and Secure Communities; and 4 IIRIRA, end of “catch and release,” Secure Communities and the “bed mandate.” See Figure A for further details.

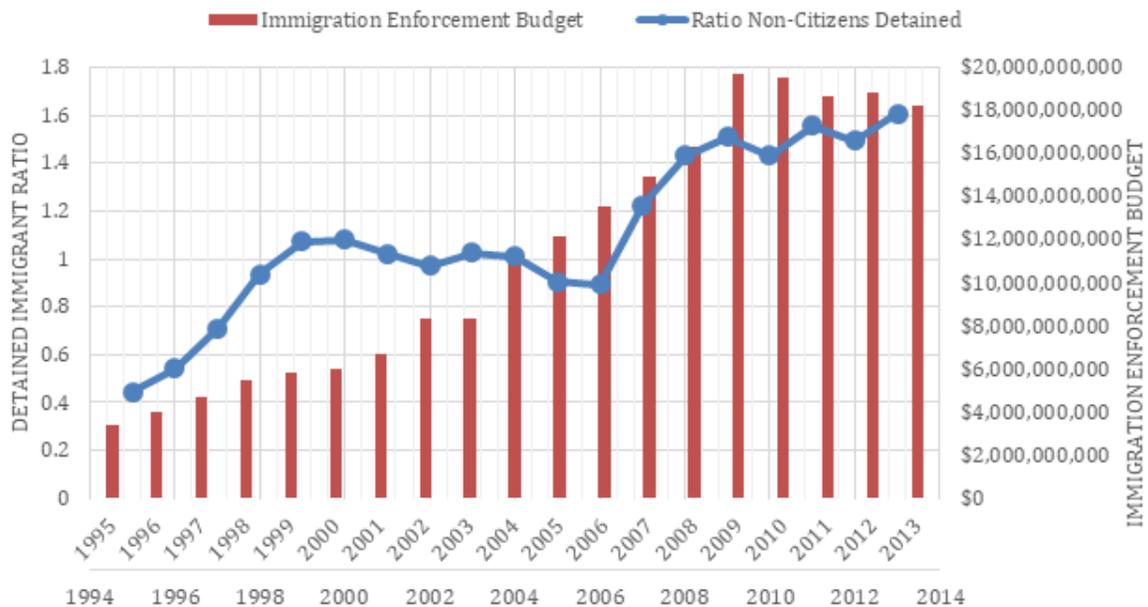
The results of Table 3 also show that the federal immigration enforcement budget is statistically correlated with the ratio of detained immigrants at the $p < 0.01$ level. With a positive coefficient of 0.8729, the results suggest that for every million dollar increase in the federal immigration enforcement budget, there is an increase of the ratio of immigrants detained of 0.8729×10^{-3} ; in other words, for every one million dollar increase in the federal immigration enforcement budget, there is an increase of 87 immigrants detained for every 100,000 noncitizens. Figure 2 shows the immigration enforcement budget growth from 1995 to 2013, along with the ratio of average daily population of detained immigrants.

Figure 1. Number of Federal Immigration Enforcement Policies, and Ratio of Noncitizens Detained, 1995-2013



Sources: Various Congressional Research Service reports and US Census Bureau foreign-born data tables.

Figure 2. Immigration Enforcement Spending Adjusted to 2016 Dollars, and Ratio of Noncitizens Detained, 1995-2013



Sources: Various Congressional Research Service reports, US Census Bureau foreign-born data tables, INS service budgets, and DHS budgets in brief.

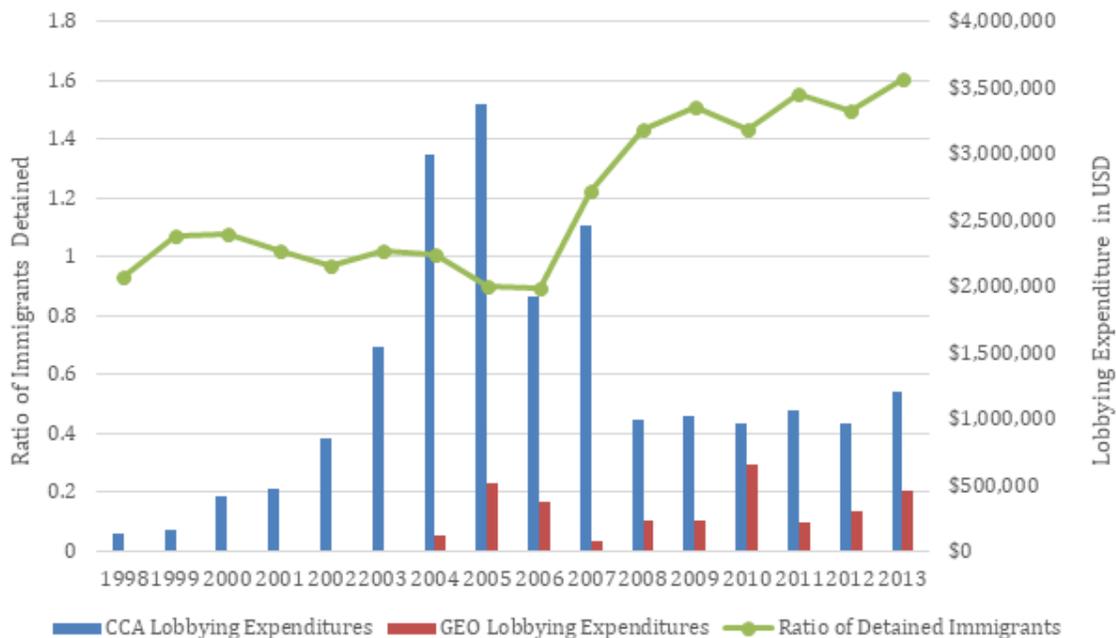
Twenty Years After IIRIRA

Notes: The detained immigrant measure is a ratio of the average daily population of detained immigrants, as reported by various congressional reports, divided by the total non-naturalized immigrant population residing in the United States, as reported by the US Census Bureau. This ratio was multiplied by 1,000 to make interpretation of the table easier.

The measure of immigration enforcement budget is reported in millions, and was adjusted to 2016 dollars following the Department of Labor's CPI Inflation Calculator.

On the other hand, the results of Table 3 show that neither CoreCivic nor GEO Group lobbying expenditures are statistically correlated with the ratio of detained immigrants, as visually shown in Figure 3. As previously indicated, we used these measures as proxies for further immigration-related lobbying primarily because they do not show the exact amounts that were dedicated to immigration efforts at the federal level.⁹ Additionally, these variables are not constantly increasing over time, given that there are decreases and increases in expenditures occurring during or before major political events (e.g., 2005 after the creation of DHS, and a year before the two latest presidential elections).

Figure 3. CoreCivic and GEO Lobbying Expenditures, and Ratio of Noncitizens Detained



Sources: Various Congressional Research Service reports, US Census Bureau foreign-born data tables, and data from OpenSecrets.org.

Notes: The detained immigrant measure is a ratio of the average daily population of detained immigrants, as reported by various congressional reports, divided by the total non-naturalized immigrant population residing in the United States, as reported by the US Census Bureau. This ratio was multiplied by 1,000 to make interpretation of the table easier.

⁹ The authors recognize that a proportion of the immigration lobbying expenditures occurs at the state level; however, the authors only account for federal lobbying expenditures due to lack of data at state and local levels.

Table 4. Time Series Regression Analysis

Variables	Ratio of Detained Immigrants
IIRIRA	0.3279* (0.163)
Bed mandate	-0.0407 (0.163)
End of catch and release	0.2511 (0.171)
Secure Communities	0.2895 (0.172)
Immigration enforcement budget (in millions)	4.82x10 ⁻⁵ ** (2.1x10 ⁻⁵)
Constant	0.2781* (0.157)
Observations	19

Standard errors in parentheses.

** $p < 0.05$, * $p < 0.1$

Notes: The detained immigrant measure is a ratio of the average daily population of detained immigrants, as reported by various congressional reports, divided by the total non-naturalized immigrant population residing in the United States, as reported by the US Census Bureau. This ratio was multiplied by 1,000 to make interpretation of the table easier.

The measure of immigration enforcement budget is reported in millions, and was adjusted to 2016 dollars following the Department of Labor's CPI Inflation Calculator.

The results of the time series regression analysis¹⁰ indicate that the enactment of IIRIRA, along with the federal immigration enforcement budget, has a statistically significant relationship with the ratio of noncitizens detained for immigration purposes. The enactment of IIRIRA, for example, led to an increase of 33 detained persons out of 100,000 noncitizens per year (0.3279×10^{-3}). The rest of the federal immigration policies were not significantly associated with the ratio of detained immigrants, suggesting that the enactment of IIRIRA was so consequential in the detention of immigrants that it decreased the effects of other restrictive policies at the national level.

¹⁰ We conducted two autocorrelation tests to detect non-randomness in our data set. While the Durbin-Watson test statistic are inconclusive (d-statistic of 1.392636 was located between the dL and dU), the results of the Breusch-Godfrey LM test for autocorrelation suggest that there is no autocorrelation.

Table 4 also shows that the federal immigration enforcement budget was significantly associated with the detention of noncitizens for immigration enforcement purposes. The results show that an increase of a million dollars in the federal enforcement budget is associated with an increase of the ratio of noncitizens detained of 4.82×10^{-5} . In other words, for every million-dollar increase, there is an expected increase of 48 immigrant detainees for every million noncitizens.

Implications for Democracy

Corporate influence on policymaking undoubtedly affects democracy (Parenti 1995). As discussed previously, corporate influences have helped inflate the detention center industry far beyond the actual needs for such facilities. As Parenti (*ibid.*, 205) states, “the question is not only who governs, but whose interests and whose agenda are served by who governs — who benefits and who does not.” Miriam J. Wells (2004) speaks to the structural nature of federalism, and argues that our federalist system is disjunctured. These disjunctions create access points for a variety of actors to influence policymaking. The saturation of these access points by moneyed interests pose a direct challenge to the legitimacy of the democratic process. However, the influence of corporate monies on the creation and implementation of policy is only one factor in this story. The growth of the immigrant detention center complex also affects aspects of representation given that Congressional representation is apportioned based on Census counts.

The Census not only helps to provide a more accurate picture of the changing demographic diversity in the United States, but it primarily provides a mechanism for representation and fiscal allocation. Michelle Alexander (2011) has described the way by which prisoners have been exploited through census counts. Similarly, undocumented immigrants being held in detention centers suffer from even greater exploitation in this sense. Undocumented immigrants and legal residents are barred from voting and face limited access to services rendered to citizens. Federal legislation, such as IIRIRA and PWRORA along with state laws, regulate the services and benefits that legal residents can access. Yet, undocumented immigrants are counted in the Census and their numbers are reported as being part of the locality in which they are detained. According to Census residence rules, people in correctional residential facilities, federal detention centers, federal and state prisons, local jails, and other municipal confinement facilities are to be counted at the facility.¹¹

This is extremely problematic for several reasons. First, many of those detained are being housed in detention centers outside of their hometowns. The Georgia ACLU report found that one third of the detainees they interviewed were from out of state (Cole 2012). Considering that many detention centers are located in rural areas, the population counts of those towns are inflated and can therefore claim higher federal budget appropriations. In fiscal year 2008, the federal government appropriations from the census count averaged \$1,469 per person (Valdes 2010).

Federal money to localities is used for subsidizing public works, such as roads and schools. As Kevin Sieff (2010) reported for the *Texas Observer*,

¹¹ <https://www.census.gov/2010census/about/how-we-count.php#>.

Four hundred billion dollars in federal funding over the next 10 years will be distributed based on the count, making detainees worth thousands of dollars to cities, counties, and states where they are briefly detained. The government will allocate more than \$100 million in additional funds to places where immigrants are detained.

These localities then are profiting from detained undocumented immigrants without making any contribution to these immigrants' families or their communities. The real communities of those detained miss out on such funds once ICE removes the person.

Second, all persons are counted in the Census for purposes of apportionment. Citizens, green card holders, the undocumented, and all those falling in more complicated legal statuses are included in the counts to decide apportionment for the US House of Representatives (Camarota 2013). There are long-standing debates on whether to count only citizens, only citizens and residents, or to count all persons in the United States during the Census. Legal action has been used in these debates since the 1980 Census when plaintiffs argued that counting all persons including undocumented immigrants would benefit only certain states over others and, as a consequence, would be unconstitutional (Woodrow-Lafield 2001). The courts, however, have ruled in favor of counting all individuals, including the undocumented.

Because of the inflated census numbers due to the counting of detained undocumented immigrants, political representation is then possibly skewed in favor of jurisdictions that would support stricter enforcement of immigration policies — stricter enforcement that necessitates the expansion of the immigrant detention complex. As Sieff (2010) writes,

This year's population count points to an often ignored irony: The country's detention facilities are concentrated in districts represented by some of Congress' most outspoken advocates of reform — including several South Texas congressmen who will benefit from counting immigrant detainees.

Counting individuals at the detention center where they are being held does not necessarily imply a gain for conservatives over liberals, both parties benefit from this system. As one of the states with the largest undocumented immigrant population and home to 13 ICE detention centers and five CAR prisons, Texas is an interesting case in point. Just north of Laredo, the small town of Dilley is home to the largest immigrant detention center in the country with a capacity of approximately 2,400 individuals. William Hurd, a Republican, represents Dilley. A few miles east in Corpus Christi, Solomon Ortiz, a Democrat, has been criticized by supporters and opponents alike for his “two-faced” stance on immigration. Ortiz has been a strong proponent for immigration reform; yet, his district is home to approximately 5,000 detention beds bringing in millions in extra federal funds (ibid.).

Policy Recommendations and Conclusion

In this paper we document and analyze the effects that IIRIRA has had in the criminalization of immigrants. We begin to unravel how the federalist system was used to undermine the democratic process in several ways. First, the immigration detention system has resulted in large part from the influence of special monetary interests in shaping federal policies. The

paper documents how immigrant detention policies had a great deal more to do with profit-making for a few private corporations than with an increase in undocumented immigration. Second, it argues that democracy is compromised when the human rights of thousands of immigrants and their families are violated. Third, counting immigrants in detention centers as part of the population of small communities with large detention centers results in unfair representation and allocation of monies for services.

In our research we uncovered the difficulties in finding accurate data due to lack of transparency and reporting, which contributes to obscuring undue influences in policy. Additionally, we describe the unnecessary expenditures created by unfair policies that divert public money for private gain in ever-increasing amounts.

Based on our findings and research we have identified three key recommendations that would aid in addressing the issues we have uncovered with the immigrant detention system. Our first recommendation is for the increased transparency and data management from ICE, and increased transparency in lobbying expenditures. A major issue we encountered during our research process was the availability of data on the number of people detained in immigrant detention centers. Data was often only available for certain years and different sources provided vastly different numbers.

Additionally, the influence of money and lobbying on policy was difficult to trace. We obtained much of our information from third-party studies that also only provided data for certain years or conflicting amounts. This issue of transparency and data availability has been noted as an issue by other researchers as well (Kerwin 2015; Velez and Brenner 2011).

Secondly, we propose the repeal of all mandatory detention legislation. Mandatory detention has contributed to the criminalization of undocumented immigrants. As the Migration and Refugee Services of the US Conference of Catholic Bishops and the Center for Migration Studies (2015) note, undocumented immigrants are subject to a civil process. Yet mandatory detention means they are being processed and housed as if they are criminals. According to Kerwin (2015), on a particular night in 2012 only 10 percent of those immigrants detained had committed violent crimes. Chishti and Mittelstadt (2016) find that only 820,000 (or 7 percent) of the estimated 11 million undocumented immigrants living in the United States have criminal convictions. Moreover, mandatory detention has led to a tremendous backlog in removal proceedings. The Transaction Records Access Clearinghouse (TRAC) (2017a,b) at Syracuse University reports that as of September 2017 immigration courts were facing a backlog of nearly 630,000 cases, with an average wait time for a removal hearing of 691 days. Ending mandatory detentions means that DHS and ICE must ensure that detention is used only when the US government has proven that none of the effective, but less restrictive alternatives to detention are appropriate.

Finally, we argue for the repeal of the bed mandate. The bed mandate provides a direct incentive for detaining undocumented immigrants who otherwise do not pose any real danger to society at large. As the data provided above shows, a large number of undocumented immigrants do not have criminal convictions that would require detention. Moreover, the bed mandate only serves to increase business for private detention corporations. The increase in the bed quota does not reflect an increase in crimes or in the number of undocumented immigrants residing in the United States. Data shows that undocumented

immigration has decreased over the past several years, while the number of detentions and deportations has continued to rise.

REFERENCES

- ACLU (American Civil Liberties Union). 2014. *Warehoused and Forgotten: Immigrants Trapped in Our Shadow Private Prison System*. New York: ACLU. <https://www.aclu.org/sites/default/files/assets/060614-aclu-car-reportonline.pdf>.
- . 2016. “Secure Communities (“S-COMM”).” New York: ACLU. <https://www.aclu.org/other/secure-communities-s-comm>.
- . 2017. “Analysis of Immigration Detention Policies.” New York: ACLU. Accessed: <https://www.aclu.org/other/analysis-immigration-detention-policies>.
- Alexander, Michelle. 2011. *The New Jim Crow*. New York: The New Press.
- Anderson, Laurel. 2010. “Punishing the Innocent: How the classification of male-to-female transgender individuals in immigration detention constitutes illegal punishment under the Fifth Amendment.” *Berkeley Journal of Gender, Law, & Justice* 25(1): 1-31.
- Borjas, George J., Jeffrey Grogger, and Gordon H. Hanson. 2008. *Imperfect Substitution between Immigrants and Natives: A Reappraisal*. National Bureau of Economic Research Working Paper No. 13887. <http://www.nber.org/papers/w13887.pdf>.
- Camarota, Steven A. 2013. “How the Gang of Eight Bill and Immigration Generally Shift Seats in the House of Representatives.” Washington, DC: Center for Immigration Studies. <https://cis.org/Shifting-Balance>.
- Carson, Bethany, and Eleana Diaz. 2015. *Payoff: How Congress Ensures Private Prison Profit with an Immigrant Detention Quota*. Charlotte, NC: Grassroots Leadership. http://grassrootsleadership.org/sites/default/files/reports/quota_report_final_digital.pdf.
- Capps, Randy, Jacqueline Hagan, and Nestor Rodriguez. 2004. “Border residents manage the U.S. immigration and welfare reforms.” In *Immigrants, Welfare Reform, and the Poverty of Policy*, edited by Philip Kretsedemas and Ana Aparicio, 229-50. Westport, CT: Praeger.
- Cavazos-Rehg, Patty, Luis H. Zayas, and Edward L. Spitznagel. 2007. “Legal Status, Emotional Well-Being and Subjective Health Status of Latino Immigrants.” *Journal of the National Medical Association* 99(10): 1126-31.
- Chaudry, Ajay, Randy Capps, Manuel J. Pedroza, R. Maria Castaneda, Robert Santos, and Molly M. Scott. 2010. *Facing Our Future: Children in the Aftermath of*

Twenty Years After IIRIRA

- Immigration Enforcement*. Washington, DC: Urban Institute. <http://www.urban.org/sites/default/files/alfresco/publication-pdfs/412020-Facing-Our-Future.PDF>.
- Chen, Jennifer. 2017. "Immigrant Detention Bed Quota Timeline." Chicago : National Immigrant Justice Center. <https://www.immigrantjustice.org/staff/blog/immigration-detention-bed-quota-timeline>.
- Chishti, Muzaffar, and Michelle Mittelstadt. 2016. "Unauthorized Immigrants with Criminal Convictions: Who Might Be a Priority for Removal?" Washington, DC: Migration Policy Institute. <http://www.migrationpolicy.org/news/unauthorized-immigrants-criminal-convictions-who-might-be-priority-removal>
- Cincotta, Caroline. 2010. *Criminalizing Immigrants: Unlawful and Harmful to the Public*. New York: ACLU. <https://www.aclu.org/blog/speakeasy/criminalizing-immigrants-unlawful-and-harmful-public>.
- Cho, Eunice Hyunhye, and Paromita Shah. 2016. "Shadow Prisons: Immigrant Detention in the South." Montgomery, AL: Southern Poverty Law Center. https://www.splcenter.org/sites/default/files/ijp_shadow_prisons_immigrant_detention_report.pdf.
- Cole, Alexandra. 2012. "Prisoners of Profit: Immigrants and Detention in Georgia." Atlanta, GA: ACLU of Georgia. http://www.acluga.org/files/2713/3788/2900/Prisoners_of_Profit.pdf.
- CIVIC (Community Initiatives for Visiting Immigrants in Confinement). 2017. "Immigrant Detention Map and Statistics." San Francisco, CA: CIVIC. <http://www.endisolation.org/resources/immigration-detention/>.
- Demefack, Serges. 2016. "DHS is Reviewing Private Immigration Detention; What Will That Mean Under a Trump Presidency? Truthout News Analysis." *Truth Out*, November 28. <http://www.truth-out.org/news/item/38505-dhs-is-reviewing-private-immigration-detention-what-will-that-mean-under-a-trump-presidency>.
- Dickerson, Caitlin. 2017. "Immigration Arrests Rise Sharply as a Trump Mandate is Carried Out." *New York Times*, May 17. <https://www.nytimes.com/2017/05/17/us/immigration-enforcement-ice-arrests.html>.
- Donato, Katharine M., Jorge Durand, and Douglas S. Massey. 1992. "Changing conditions in the US labor market: Effects of the Immigration Reform and Control Act of 1986." *Population Research and Policy Review* 11(2): 93-115. <https://doi.org/10.1007/BF00125533>.
- Doty, Roxanne Lynne, and Elizabeth Shannon Wheatley. 2013. "Private Detention and the Immigration Industrial Complex." *International Political Sociology* 7(4): 426-43. <https://doi.org/10.1111/ips.12032>.
- Douglas, Karen M., and Rogelio Saenz. 2013. "The Criminalization of Immigrants and the Immigrant-Industrial Complex." *Daedalus* 142(3): 200-27. https://doi.org/10.1162/DAED_a_00228.

- Ewing, Walter A., Daniel E. Martinez, and Rubén G. Rumbaut. 2015. "The criminalization of immigration in the United States." Washington, DC: American Immigration Council.
- Flynn, Michael. 2014. "There and Back Again: On the Diffusion of Immigrant Detention." *Journal on Migration and Human Security* 2(3): 165-97. <https://doi.org/10.14240/jmhs.v2i3.31>.
- Friedman, Alex. 2015. "32 Deaths at CCA-Operated Immigrant Detention Facilities Include at Least 7 Suicides." *Prison Legal News*, June 20. <https://www.prisonlegalnews.org/news/2015/jun/20/32-deaths-cca-operated-immigration-detention-facilities-include-least-7-suicides/>.
- Gavett, Gretchen. 2011. "Map: The U.S. Immigration Detention Boom." *Frontline*, October 18. <http://www.pbs.org/wgbh/pages/frontline/race-multicultural/lost-in-detention/map-the-u-s-immigration-detention-boom/>.
- Grieco, Elizabeth M., Edward Trevelyan, Luke Larsen, Yesenia D. Acosta, Christine Gambino, Patricia De La Cruz, Tom Gryn, and Nathan Walters. 2012. "The size, place of birth, and geographic distribution of the foreign-born population in the United States: 1960 to 2010." Population Division Working Paper No. 96. Washington, DC: US Census Bureau.
- Gruberg, Sharita. 2015. "How For-Profit Companies Are Driving Immigration Detention Policies." Washington, DC: Center for American Progress. <https://cdn.americanprogress.org/wp-content/uploads/2015/12/17121556/ForProfitDetention-briefDec.pdf>.
- Hacker, Karen A., Jocelyn Chu, Carolyn Leung, Robert Marra, Alex Pirie, Mohamed Brahim, Margaret English, Joshua Beckmann, Dolores Acevedo-Garcia, and Robert P. Marlin. 2011. "The Impact of Immigration and Customs Enforcement on Immigrant Health: Perceptions of Immigrants in Everett, Massachusetts, USA." *Journal of Social Science and Medicine* 73: 586-94. <https://doi.org/10.1016/j.socscimed.2011.06.007>.
- Hagan, Jacqueline, Brianna Castro, and Nestor Rodriguez. 2010. "The Effects of U.S. Deportation Policies on Immigrant Families and Communities: Cross-Border Perspectives." *North Carolina Law Review* 88(5): 1799-823.
- Hartney, Christopher, and Caroline Glesman. 2012. *Prison Bed Profiteers: How Corporations Are Reshaping Criminal Justice in the U.S.* Madison, WI and Oakland, CA: National Council on Crime and Delinquency. http://www.nccdglobal.org/sites/default/files/publication_pdf/prison-bed-profiteers.pdf.
- Hendricks, Tyche. 2007. "The Human Face Of Immigration Raids In Bay Area / Arrests Of Parents Can Deeply Traumatize Children Caught In The Fray, Experts Argue." *San Francisco Chronicle*, April 27. <http://www.sfgate.com/news/article/The-human-face-of-immigration-raids-in-Bay-Area-2598853.php#photo-2088080>.

Twenty Years After IIRIRA

- Hines, Barbara. 2006. "An Overview of US Immigration Law and Policy Since 9/11." *Texas Hispanic Journal of Law and Policy* 12(9): 9.
- Hotchkiss, Julie L., and Myriam Quispe-Agnoli. 2013. "The expected impact of state immigration legislation on labor market outcomes." *Journal of Policy Analysis and Management* 32(1): 34-59. <https://doi.org/10.1002/pam.21664>.
- ICE (US Immigration and Customs Enforcement). 2009. "Secure Communities: Crash Course 2009." Washington, DC: ICE. https://www.ice.gov/doclib/foia/secure_communities/securecommunitiespresentations.pdf.
- . 2014. "Delegation of Immigration Authority Section 287(g) and Immigration and Nationality Act." Washington, DC: ICE. <http://www.ice.gov/factsheets/287g>.
- . 2017. "Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act." Washington, DC: ICE. <https://www.ice.gov/287g>.
- Kerwin, Donald. 2015. "Piecing Together the US Immigrant Detention Puzzle One Night at a Time: An Analysis of All Persons in DHS-ICE Custody on September 22, 2012." *Journal on Migration and Human Security* 3(4): 330-76. <https://doi.org/10.14240/jmhs.v3i4.55>.
- Krogstad, Jens Manuel, Jeffrey S. Passel, and D'Vera Cohn. 2016. "5 Facts About Illegal Immigration in the U.S." Washington, DC: Pew Research Center. <http://www.pewresearch.org/fact-tank/2016/11/03/5-facts-about-illegal-immigration-in-the-u-s/>.
- KRGV. 2015. "Prison riot could prove costly to Willacy County: Millions at stake as prisoners are transferred away." <http://www.krgv.com/news/local-news/Prison-Riot-Could-Prove-Costly-for-Willacy-County/31458932>.
- Lewis, Renee. 2015. "Inmates riot at for-profit Texas immigrant detention facility." *Al Jazeera America*, February 23. <http://america.aljazeera.com/articles/2015/2/23/Texas-prison-riot.html>.
- Meissner, Doris, Donald M. Kerwin, Muzaffar Chishti, and Claire Bergeron. 2013. *Immigration Enforcement in the United States: The Rise of a Formidable Machinery*. Washington, DC: Migration Policy Institute.
- Michaud, Nicholas D. 2010. "From 287(g) to SB 1070: The Decline of the Federal Immigration Partnership and the Rise of State-Level Immigration Enforcement." *Arizona Law Review* 52: 1082-133.
- MRS/USCCB (Migration and Refugee Services/United States Conference of Catholic Bishops) and CMS (Center for Migration Studies). 2015. "Unlocking Human Dignity: A Plan to Transform the US Immigrant Detention System." *Journal on Migration and Human Security* 3(2): 159-204. <https://doi.org/10.14240/jmhs.v3i2.48>.
- Parenti, Michael. 1995. *Democracy for the Few*. Belmont, CA: Wadsworth Publishing.

- Passel, Jeffrey S., and D’Vera Cohn. 2014. *Unauthorized immigrant totals rise in 7 states, fall in 14: Decline in those from Mexico fuels most state decreases*. Washington, DC: Pew Research Center.
- Peri, Giovanni, and Chad Sparber. 2011. “Highly educated immigrants and native occupational choice.” *Industrial Relations* 50(3): 385-411. <https://doi.org/10.1111/j.1468-232X.2011.00643.x>.
- Project South. 2017. *Imprisoned Justice: Inside Two Georgia Immigrant Detention Centers*. Atlanta, GA: Project South. http://projectsouth.org/wp-content/uploads/2017/06/Imprisoned_Justice_Report-1.pdf.
- Salas, Lorraine, Cecilia Ayon, and Maria Gurrola. 2013. “Estamos Traumados: The Effect of Anti-Immigrant sentiment and policies on the mental health of Mexican immigrant families.” *Journal of Community Psychology* 41(8): 1005-20. <https://doi.org/10.1002/jcop.21589>.
- Sampson, Robert J. 2008. “Rethinking crime and immigration.” *Contexts* 7(1): 28-33. <https://doi.org/10.1525/ctx.2008.7.1.28>.
- Sieff, Kevin. 2010. “Down for the Count: The profitable game of including immigrants in the census, then deporting them.” *Texas Observer*, March 25. <http://www.texasobserver.org/down-for-the-count/>.
- Simanski, John F., and Lesley M. Sapp. 2013. “Immigration enforcement actions: 2012.” Washington, DC: Office of Immigration Statistics, DHS.
- Simanski, John F. 2014. “Immigration Enforcement Actions: 2013.” Washington, DC: Office of Immigration Statistics, DHS.
- Takei, Carl, Michael Tan, and Joanne Lin. 2016. *Shutting Down the Profiteers: Why and How the Department of Homeland Security Should Stop Using Private Prisons*. New York: ACLU.
- Tonry, Michael. 2014. “Race, Ethnicity, Crime and Immigration.” In *The Oxford Handbook of Ethnicity, Crime and Immigration*, edited by Sandra M. Bucerios and Michael Tonry. New York, NY: Oxford University Press. <https://doi.org/10.1093/oxfordhb/9780199859016.013.031>.
- TRAC (Transactional Records Access Clearinghouse). 2017a. “Average Time Pending Cases Have Been Waiting in Immigration Courts as of October 2017.” Syracuse, NY: TRAC. http://trac.syr.edu/phptools/immigration/court_backlog/apprep_backlog_avgdays.php.
- . 2017b. “Backlog of Pending Cases in Immigration Courts as of October 2017.” Syracuse, NY: TRAC. http://trac.syr.edu/phptools/immigration/court_backlog/apprep_backlog.php.
- Valdes, Manuel. 2010. “Detainees help pad census counts.” *The Spokesman-Review*, June 1. <http://www.spokesman.com/stories/2010/jun/01/detainees-help-pad-census-counts/>.

Twenty Years After IIRIRA

- Vargas, Edward, Gabriel R. Sanchez, and Melina Juarez. 2017. "Fear by Association: Perceptions of Anti-Immigrant Policy and Health Outcomes." *Journal of Health Politics, Policy and Law* 42(3): 459-83. <https://doi.org/10.1215/03616878-3802940>.
- Vargas, Edward, Gabriel R. Sanchez, Melina Juarez, and Maria Livaudais. n.d. "Latinos' Connections to Immigrants: How Knowing a Deportee Impacts Latino Health." Working paper.
- Vaughan, Jessica. 2014. "Catch and Release, Interior Immigration Enforcement in 2013." Washington, DC: Center for Immigration Studies. <https://cis.org/Catch-and-Release>
- Velez, Leslie E., and Megan Bremer. 2011. *Unlocking Liberty: A Way Forward for U.S. Immigration and Refugee Service*. Baltimore, MA: Lutheran Immigration and Refugee Service. <http://lirs.org/wp-content/uploads/2012/05/RPTUNLOCKINGLIBERTY.pdf>.
- Warren, Robert. 2017. "Zero Undocumented Population Growth is Here to Stay and Immigration Reform Would Preserve and Extend These Gains." *Journal on Migration and Human Security* 2(2017): 491-508. <https://doi.org/10.14240/jmhs.v5i2.95>.
- Wells, Miriam, J. 2004. "The Grassroots Reconfiguration of U.S. Immigration Policy." *International Migration Review* 38(4): 1308-47. <https://doi.org/10.1111/j.1747-7379.2004.tb00239.x>.
- Woodrow-Lafield, Karen A. 2001. "Implications of immigration for apportionment." *Population Research and Policy Review* 20(4): 267-89. <https://doi.org/10.1023/A:1011890722111>.



Weeping in the Playtime of Others: The Obama Administration's Failed Reform of ICE Family Detention Practices

Dora Schriro¹

Executive Summary

The United States has long struggled with the practice of detaining immigrant families and over time, most reform efforts have flagged, if not failed. This paper examines the impact of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) through an exploration of the evolution of the family residential center (FRC) for families in immigration custody, established prior to the 9/11 terrorist attack by the Immigration and Naturalization Service (INS), and expanded by Immigration and Customs Enforcement (ICE) in its aftermath. The paper provides an inside look at how policymakers, at various points in the Obama administration, sought to roll back its most infirm practices and the fate of those efforts. It begins with a brief history of family detention in the United States, continues with a summary of the reforms undertaken both early and late in the Obama administration, and examines the significant challenges it faced and the less progressive positions it adopted during its first and second terms in office.

The paper concludes with a discussion of reasons for the rapid reversal of its previous reforms and provides recommendations to achieve a *civil*, civil system of immigration enforcement for families and all others, which means nothing less than the transformation of the immigrant detention system from a criminal to a civil paradigm, consistent with the population and legal authorities.² The need for such an effort is all the more urgent in light of executive actions taken in the early days of the Trump administration and their initial outcomes. Among those thwarting admissions are orders to Customs and Border Protection (CBP) and US

1 Dora Schriro served as senior advisor to US Department of Homeland Security (DHS) Secretary Janet Napolitano and then as US Immigration and Customs Enforcement's (ICE) first director of the Office of Detention Policy and Planning (ODPP) at the beginning of President Obama's first term. During the latter part of the administration's second term, Secretary Jeh Johnson formed the DHS Advisory Committee on Family Residential Facility (ACFRC) and selected her as a subject matter expert in detention to serve as a member. Schriro has also served as a commissioner on both the American Bar Association's Commission on Immigration and the Women's Refugee Commission.

2 For further discussion of the concept of a civil, civil system of immigration enforcement, see Schriro (2009).

Weeping in the Playtime of Others

Citizenship and Immigration Services (USCIS) to seal the US borders, shun refugees fleeing from war-torn regions until “extreme vetting” measures are put into place, and reassess others who have already been issued visas. Additional orders issued to ICE expanded and expedited the removal of persons whose conduct could result in charges or convictions as well as those with criminal charges or convictions, resulting in a 38 percent increase in arrests by ICE agents within the first 100 days of the Trump administration (Dickerson 2017b; Duara 2017).

Do ye hear the children weeping, O my brothers,
Ere the sorrow comes with years?
They are leaning their young heads against their mothers,
And that cannot stop their tears.
The young lambs are bleating in the meadows,
The young birds are chirping in the nest,
The young fawns are playing with the shadows,
The young flowers are blowing toward the west -
But the young, young children, O my brothers,
They are weeping bitterly!
They are weeping in the playtime of the others,
In the country of the free.³

A Brief History of Family Detention

The First Family Detention Facilities

Our nation’s history is imperfect, our views of new and recent arrivals are peppered with prejudice, and our commitment to inalienable rights is conditional. A part of our past, and present, is both the government’s displacement of families and its incapacitation of families outside the criminal process. US history includes the internment of Native American families⁴ and the detention of immigrant families from Europe on Ellis and Angel Islands (see NPR 2010; PBS, n.d.). It incorporates the displacement of Asian and other families of US citizens and immigrants during World Wars I and II (PBS 2015; Gonzalez 2015), and the detention of Cuban and Haitian families in Florida and at Guantánamo Bay (Dastyari and Effeney 2012).

More recent family detention practices occurred in the 1980s when the numbers of refugees from Cuba, Haiti, and Central America, among them unaccompanied and accompanied

3 “The Cry of the Children” by Elizabeth Barrett Browning is a poem about children workers, published in *Blackwoods Edinburgh Magazine* in 1842. Kenneth Wooten used the next to last line in the first of 13 stanzas as the title of his book, *Weeping in the Playtime of Others: America’s Incarcerated Children*, published by Ohio University Press in 1976.

4 The government interned Native American families in military forts during the Removal of 1838–39. Their experience is also relevant to the immigrant experience because the United States did not recognize many Native Americans as citizens until the 1924 Indian Citizenship Act (see LoC, n.d.).

children, dramatically increased. Initially, the government responded by releasing children to a parent or legal guardian and then holding any remaining children in border detention facilities and tent shelters (Olivas 1990). For a time, it also housed entire families of Central American migrants in large American Red Cross camps along the Texas-Mexico border (Bolton 1994; *Lodi News-Sentinel* 1989).

In 1996, Congress passed both the Antiterrorism and Effective Death Penalty Act and the Illegal Immigration Reform and Immigrant Responsibility Act,⁵ markedly changing US immigration law. Among the amendments adversely affecting families were the creation of an expedited removal process and the significant expansion of categories of persons subject to mandatory detention. In March 2001, INS, the precursor to the US Department of Homeland Security (DHS), converted a county nursing home in Berks County, Pennsylvania, into the Berks County Family Residential Center (Berks), the nation's first "modern" facility to temporarily detain migrant families undergoing administrative immigration proceedings or who were otherwise subject to mandatory detention (BFRC 2009). Berks County owns the then 84-bed facility and operated it for the INS initially, and for ICE subsequently, pursuant to a contract.

For a time, Berks was the government's only detention center for families with under-aged children (families).⁶ The facility was secure but smaller and the grounds greener than the family residential centers (FRC) that followed and its programs were generally more progressive than were those at adult detention centers. Still, ICE routinely separated older children from their parents and assigned them to rooms with non-familial adults of the same sex. Until recently, it was the only licensed FRC; now, none of the three currently in operation are licensed.⁷ In early 2016, the Pennsylvania Department of Human Services Berks revoked Berks' license.

In 1997, the *Flores v. Meese* lawsuit, concerning the rights of unaccompanied children in immigration custody, resulted in a Stipulated Settlement Agreement (*Flores* Agreement) setting out nationwide policy.⁸ The *Flores* Agreement addressed the children's placement in the "least restrictive setting" — indeed, a licensed, non-secure facility — only when necessary, and then for no more than several days,⁹ in order to make an informed determination of removal or relief to protect their rights and ensure their well-being (see DOJ 2001).

5 Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996); Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 (1996).

6 Since its opening through spring 2016, Berks accepted fathers as well as mothers and their children. ICE has always restricted the use of Karnes and Dilley (as well as Artesia before it closed) to mothers and their children. It separated the majority of fathers from their children, assigning most of them instead to a detention facility for single, adult males and releasing the remainder.

7 The states, not the US government, licenses facilities operating within their jurisdictions. Licensing practices vary widely by state; there is no one set of minimum expectations to which all states adhere.

8 Stipulated Settlement Agreement, *Flores v. Meese*, No. CV 85-4544-RJK (Px) (C.D. Cal. 17 January 1997). For cases culminating in the settlement agreement, see *Flores v. Meese*, No. 85-4544- RJK(Px)(CD Cal. 30 November 1987); *Flores v. Meese*, No. 85-4544-RJK(Px) (CD Cal. 25 May 1988); *Flores v. Meese*, 934 F.2d 991 (1990); *Flores v. Meese*, 942 F.2d 1352 (1992); and *Reno v. Flores*, 507 U.S. 292 (1993).

9 The Agreement stipulated release would occur within three days, if the minor was apprehended in an INS district in which a licensed program is located and had space available; and otherwise within five days pursuant to Paragraph 19 (*ibid.*).

Under the *Flores* Agreement, the government would release unaccompanied minors to the care of their parents or other family members whenever possible; otherwise, it would place them in foster homes or licensed facilities providing age-appropriate programs. In 2002, Congress transferred the care of unaccompanied minors as prescribed in the *Flores* Agreement¹⁰ legislatively to the US Department of Health and Human Services (DHHS), Office of Refugee Resettlement (ORR).¹¹ The custody of families continues to be ICE's responsibility.

Detention Policy Changes after 9/11

In the aftermath of the September 11, 2001 terrorist attacks (9/11), the government fortified immigration law enforcement, resulting in further changes to family detention policies. Congress passed the Homeland Security Act¹² in 2002, creating the DHS, absorbing INS and subdividing it into three new agencies within DHS: ICE, USCIS, and CBP.¹³ Soon afterwards, the expedited removal process was expanded to encompass some asylum seekers and other migrants crossing US land borders (DHS 2004), which resulted in detention, the preferred management strategy, and disproportionately affected families. The US largely abandoned its pre-9/11 policies of either releasing families or detaining them in family units and, instead, separated parents from their children and one another, detaining the adults and sending the children including infants and toddlers, to facilities operated by ORR. The involuntary separation of parents from their children had the effect of rendering the children “unaccompanied” for legal purposes (see WRC and LIRS 2007; LIRS 2014).

Congress took notice. In 2005, the House Appropriations Committee directed DHS to stop separating families: “The Committee expects DHS to release families or use alternatives to detention such as the Intensive Supervised Appearance Program whenever possible. When detention of family units is necessary, the Committee directs DHS to use appropriate detention space to house them together.”¹⁴

The Berks and Hutto Family Residential Centers

DHS did not release more families or increase its use of alternatives to detention; instead, it expanded secure capacity to detain more families. In May 2006, ICE opened a second and larger facility, the 512-bed T. Don Hutto Family Residential Center (Hutto) in Taylor, Texas,¹⁵ to detain mothers and their children. Neither its physical plant and programs nor its policies and practices were age-appropriate or family-friendly. The cinderblock facility had no windows, the corridors were long, and metal bars on windows and solid steel doors

10 See footnote 8.

11 The Homeland Security Act (HSA) of 2002, § 462, Pub. L. 107–296, 116 Stat. 2135, was enacted on 25 November 2002 (codified as amended at 6 U.S.C. §§ 101-613 (2011)).

12 Homeland Security Act, Pub. L. 107–296, 116 Stat. 2135 (2002).

13 ICE is responsible for immigration enforcement. USCIS handles all matters pertaining to immigration benefits and the granting of citizenship to non-nationals. CBP secures the borders whereas the US Coast Guard patrols and protects the coastline (see <https://www.dhs.gov/>).

14 H.R. Rep. 109-79, at 38 (2005).

15 ICE operates Hutto under an Intergovernmental Service Agreement with Williamson Co., Texas, which contracts with Corrections Corporation of America for the facility's day-to-day operations (ICE 2011).

still remained in place from the time that the facility housed adult male sheriff's prisoners. Movement within the facility and access to the grounds were severely restricted and age-appropriate programs were negligible. There were reoccurring reports of questionable medical and mental health care resulting in weight loss, depression, and other documented conditions.¹⁶

Congress soon concluded that Hutto, a former medium security prison for adult male inmates, still operated as an adult correctional facility, and criticized both Berks and Hutto, noting that although Berks was more "homelike" than Hutto, it also failed to afford children the least restrictive setting, as required per the *Flores* Agreement.¹⁷

In March 2007, the American Civil Liberties Union (ACLU) and others challenged ICE's enforcement practices, arguing that using Hutto to detain families violated the rights of the detained minors. The lawsuit charged that ICE impermissibly separated children from their parents, detained them illegally, and treated them as prisoners, contrary to the *Flores* Agreement.¹⁸ Plaintiffs also asserted ICE's actions violated Congress's repeated instructions to DHS to: (1) keep families together whenever possible; (2) release families together whenever possible; (3) employ the least restrictive alternatives to detention; and (4) when detention was necessary, place families in normalized settings. In August 2007, ICE entered into a settlement agreement with the plaintiffs,¹⁹ concurring in part to: use Hutto as a placement of last resort; improve the physical plant and its policies and procedures so it was less prison-like; professionalize the workforce; routinely review detained individuals' eligibility for reassignment to less restrictive settings; and adopt transparent operating standards.

Late in 2007, ICE promulgated Family Residential Standards for the operation of Berks and Hutto (see ICE, n.d.) its stated purpose was to set minimum expectations for those facilities' safety and security, staff selection and training, program services, and medical care. In fact, ICE used standards created by the American Correctional Association (ACA) to guide jailors. The ACA premised its standards upon adult corrections case law specific to pre-trial adult defendants. ICE did not recognize the standards for what they were or intended to do and kept them largely intact after a limited window for public comment closed. As such, it afforded families only a few personal possessions, restricted their movement in the facility and on the grounds, and curtailed their access to counsel. The standards were also advisory, with limited provision for sanctions and only a few penalties for non-compliance in place. ICE delegated to others the monitoring of the facilities for compliance with the standards.²⁰ Amongst the limited and ill-advised instruction it provided, ICE directed the monitors to announce their inspections in advance and to conduct their tours only during business hours. Even under these favorable conditions, FRC operators and ICE administrators alike often argued for the adjustment of the monitors' final scores before they released them, and

16 Compl. for Declaratory and Injunctive Relief, *In re Hutto Family Detention Ctr.*, No. 07-cv-164-SS (W.D. Tex. 6 March 2007), ECF No. 1.

17 H.R. Rep. 109-476, at 43 (2006).

18 Compl. for Declaratory and Injunctive Relief at 2-4, *In re Hutto Family Detention Ctr.*, No. 07-cv-164-SS.

19 Settlement Agreement, *In re Hutto Family Detention Ctr.*, (26 August 2007), ECF No. 92-1.

20 ICE entered into agreements with the Counties of Berks, Pennsylvania, and Williamson, Texas, for both facilities. Berks County operated its facility for ICE whereas Williamson County contracted with the private sector. ICE also contracted with the private sector to ascertain both facilities' compliance with FRC standards.

typically senior managers at headquarters capitulated. Without checks and balances and with only negligible consequences in place, Berks and Hutto usually received favorable reviews. In those infrequent instances that a monitor documented a deficiency, ICE rarely imposed penalties or cancelled a contract.

Reforms to Detention Policy and Practice in 2009

Early in 2009, shortly after President Obama took office, DHS undertook a comprehensive assessment of detention policy and practice, with the goals of reducing reliance on detention and improving the efficiency and effectiveness of ICE. DHS Secretary Napolitano appointed me to the newly established position of special advisor on ICE to focus on the significant growth in immigration detention and ICE arrest priorities (DHS 2009). I commenced a national study including the inspection of more than 25 of the most problematic facilities and immediately began making changes. Among the first steps taken, ICE removed all of the families at Hutto (Bernstein 2009). As many families as possible were released; the rest were transferred to Berks. In September 2009, after ICE removed the last of the families — lowering the total number of FRC beds from 384 to its original capacity of 84 — it re-commissioned Hutto as an all-female, adult-only facility.

I also wrote a report about the system-wide assessment of the country's detention practices, released by DHS in October 2009 (Schriro 2009). The report included recommendations that laid the groundwork for a number of reforms that DHS announced around the time of its release to improve conditions for all detained individuals including special populations — notably women, families, and asylum seekers — and to expand appreciably community-based alternatives to detention. Other recommendations realized during this time included the detainee locator database, death-in-detention notifications, an objective risk assessment instrument normed specifically for the ICE population, and assigned, independent on-site contract monitors.

Among the report's findings, none was more important than this: In federal fiscal year (FFY) 2008, ICE operated the largest detention and community-release programs in the country — larger than the US Federal Bureau of Prisons or any of the biggest states' correctional systems — with 378,582 migrants from 221 countries in its custody or under its supervision during the year. It was also the most ill-equipped of any agency to assume these responsibilities. ICE consisted primarily of law enforcement personnel whose orientation and expertise centered on enforcing immigration law but not in the execution of detention activities and community-based alternatives. The agency lacked the organizational infrastructure, the will and the way, needed to execute this critical component of its mission (Schriro 2009). The widespread lack of interest and expertise in matters other than enforcement, coupled with policy shifts towards increased reliance upon detention, consistent with the workforce's disdain for the population and its preference for punitive practices, accelerated and exacerbated ICE's reliance on contractors.²¹ Inside the administration, the champions for change diminished in number and soon redirected to other pressing issues of the day. Today, ICE is still the nation's largest system of incapacitation with 783,454 migrants from

21 One of the few changes that ICE initiated after the release of the report was to change the name of the unit that performed ICE's detention activities from Detention and Removal Operations (DRO) to Enforcement and Removal Operations (ERO), reasserting its view of its core mission.

178 countries in its custody or under its supervision annually (ACFRC 2016, 25), and it is no more adept now than when DHS released the report. During its last year in office, ICE deported 240,255 immigrants.²² Between the administration's first year in office and its last, ICE increased its capacity to detain families from 84 beds in 2009 to 3,750 beds in 2016.

The report identified several significant steps that the administration could take to transform ICE from a substantively penal to a civil system. One, it argued that ICE should premise decision making upon the likelihood of eligibility for relief and a presumption of release to the community as the rule rather than the exception. Two, ICE should establish clear standards of care based upon community standards and civil case law, and not penal practices. Three, it should put an organizational infrastructure in place with the requisite management tools and informational systems that included objective assessment instruments and classification tools to continuously inform and align care, custody restrictions, programs, privileges, and delivery of services consistent with individually assessed risk and need. Four, it must ensure meaningful access to legal materials and counsel, to a viable grievance mechanism, as well as to visitation, religious practice, and translation services. Five, it must establish a health care system comparable to other government-funded programs and extend its coverage through release to the community or removal from the United States. Six and last, it must implement a system of rigorous and independent oversight by expert federal officials to monitor conditions for compliance, to timely publish objective findings, to take remedial steps, and to impose proportionate sanctions for non-compliance.

In short, the report urged ICE to put in place an informed plan of action to improve decision making, activities, and outcomes. Adoption would commit the agency to full transparency, to increase its accountability to others and most fundamentally, to comply with the law.²³ DHS adopted the report in its entirety and published it on its website where it remained throughout the Obama administration. ICE agreed to temper its use of detention and it imposed excessive supervision requirements on those released to the community. For a time, the momentum was palpable. ICE put a number of plans into place to lower cost and yield better results, among them establishing the Office of Detention Policy and Planning (ODPP) within ICE to oversee the implementation of the remaining recommendations in the 2009 report.²⁴ ODPP took substantive steps to enhance oversight and improve accountability during the first year of the first term but overall, reform of the system faltered. It was not among the administration's top priorities and countervailing enforcement policies quickly overtook this initiative.

The Road to Hell Was Paved with Good Intentions

Most fundamentally, DHS's core mission is emergency preparedness and preparation for all manner of incursions, both natural and manufactured, foreign and domestic. Specific to immigration, adoption of this posture would ensure that in the event of an increase

²² During 2016, the last year of the Obama administration, immigration deportation rose another 2 percent (Jordan 2016).

²³ In 2001, the US Supreme Court held the government could not hold civil detained individuals indefinitely and that detention is permissible only to facilitate deportation (see *Zadvydas v. Davis*, 533 U.S. 678 [2001]). In 2015, a district court ruled that detention cannot be used to deter mass migrations (see footnotes 29 and 30).

²⁴ See footnote 2.

in arriving asylum seekers, for example, the government would be ready to respond — lawfully, efficiently, and effectively. Despite DHS’ best intentions in 2009 to make civil detention more civil for families and others in its custody, ICE failed to take many of the needed steps to that end. Specific to immigration detention, appropriate action would have entailed ensuring that the family residential facilities comply with the *Flores* Agreement that INS reached in 1997 and in which ICE is still embroiled, and ensuring that families are detained only when absolutely necessary, for the briefest time necessary and then, only in non-secure, family-friendly, licensed child care facilities.²⁵ Instead, ICE continues to defend the egregious practices that caused so much difficulty for INS, among them using unlicensed and secure facilities, the very antitheses to the principles, policies, and practices that DHS embraced in the *Flores* Agreement. Lacking all manner of strategic thinking and age-appropriate responses, the likelihood that an enforcement agency would continue to default to enforcement strategies in an emergency was great. Similarly, the government’s repeated failure to make good faith and sustained efforts to comply with that agreement, ultimately limited its options to successfully manage the humanitarian crisis that was about to unfold.

The Influx in Migrant Families at the Southwestern US Border in the Summer of 2014

The arrival of families and children seeking the protection of the US government along the southwest US border from Central America in the summer of 2014 triggered an immediate and severe response by the administration (Preston and Randal 2014). Unlawful crossings at the border were at an historic low, but the increased number of children and families presented unique challenges. The women and children were fleeing highly organized, transnational gang activity and various forms of violence and extreme poverty in Honduras, Guatemala, and El Salvador (also known as the Northern Triangle) and they were seeking safety, protection, and family reunification in the United States.²⁶ Thousands of families, mostly children and their mothers, traveled north from Central America, fleeing gang murders and pervasive violence, to the southwest border of the United States in search of protection.²⁷ In FFY 2014, CBP apprehended 68,445 parents and children traveling together at the US-Mexico border (CBP, n.d.).

25 See footnote 8.

26 For the first time since record keeping began in 1992, fewer than half were migrating from Mexico (see CBP, n.d.; Castillo 2014).

27 Under US law, most families could apply for protection in the form of asylum while others would qualify only to apply for a related form of relief known as “withholding of removal” (see INA §§ 208, 241[b][3][B]). In either case, the applicant for relief must meet the international law definition of “refugee” to receive legal recognition of their need for protection and the right to remain in the United States indefinitely (see INA §§ 101[a][42][A], 208[b][1], 241[b][3][B]). The international refugee definition is set forth in the UN Convention relating to the Status of Refugees (Geneva, Jul. 28, 1951) 189 U.N.T.S. 150, extended by the Protocol relating to the Status of Refugees, (New York, Jan. 31, 1967) 19 U.S.T. 6223, 606 U.N.T.S. 267, and in effect for the United States on November 1, 1968, through accession to the Refugee Protocol. “Refugee” status requires a showing of persecution because of race, religion, nationality, political opinion, or membership in a particular social group. Additionally, some of the children and/or their parents may also qualify for other forms of relief such as U visas for victims of certain crimes committed in the United States and Special Immigrant Juvenile Status for children who have been abandoned, abused or neglected by a parent (see INA §§ 101[a][15][U], 101[a][27][J]).

Characterizing this humanitarian situation as a threat to national security, the administration responded with a statement from DHS Secretary Johnson, who emphasized the need for marked increases in detention and deportation in order to send a “message” to deter future migration (DHS 2014).

Reasons for the Increase in Migrants from Central America in Summer 2014

It was primarily increased transnational criminal organization activity,²⁸ violence from other sources, extreme poverty, and the desire for family reunification that led to the increase in border crossings by mothers with their children and by unaccompanied minors from the Northern Triangle in 2014 (Kennedy 2014). Violence seemed to be the single greatest motivation, even when considering all of the other factors (AIC 2014). In interviews with unaccompanied children, boys and girls alike cited crime, gang threats, and violence as reasons for leaving home (Kenney 2014).²⁹ Children and adolescents were particularly at risk of transnational gangs’ attention, with boys targeted for involuntary recruitment and girls to service its members (UNHCR 2014). Mothers and their children also fled domestic and gender-based persecution, both common in the Northern Triangle, and often linked to gang and societal violence (Equiziba et al. 2015).³⁰

The number of mothers and children arriving from the Northern Triangle countries slowed by late fall 2015, then began to rise again. A public relations campaign in Central America funded by the US government intended to deter immigration, and US training and assistance intended to increase deportations by Mexico (WOLA 2015; Ortega 2015) made it more difficult for families to reach the US border. Through it all, DHS continued to expand its family detention capacity by, first, repurposing a federal training barrack in Artesia, New Mexico, as the Artesia FRC (Artesia), and shortly afterwards by closing the controversial facility; by converting Karnes, an adult male detention center to the Karnes FRC (Karnes); by enlarging both Dilley and Berks FRCs; and by hardening community release. During the first four months of FFY 2016, CBP apprehended 24,616 Central American families at the US-Mexico border, a significant drop from FFY 2014. When ICE released families from detention, it increasingly conditioned release upon electronic supervision (PRI 2016).

28 Frequently referred to as “gangs,” they are, in fact, transnational criminal organizations — highly organized, powerful, transnational entities with complex hierarchies at a cellular level operating across borders.

29 Notably, there was no significant pattern of arrivals to the United States of families from Nicaragua, which had not experienced the same level of violence as the countries of the Northern Triangle, despite its geographic proximity to Honduras, Guatemala, and El Salvador and even higher levels of poverty (see CBP 2012; *Economist* 2012).

30 In Guatemala, the second most common category of crime was violence against women. Abuse and femicide, defined as murder for gender-related motives, were most often the result of misogyny, a part of gang rituals, and within intimate relationships. Homicide rates in the Northern Triangle are among the highest in the world, with Guatemala, El Salvador, and Honduras consistently reporting three of the five highest national murder rates.

The Obama Administration's Response

The Obama administration was conflicted and its response was confusing. In the summer of 2014, it designated the Federal Emergency Management Agency (FEMA), another agency of DHS, to organize and coordinate a federal response to the increase in arrivals of unaccompanied children and families at the US-Mexico border (White House 2014a), many of whom appeared to be eligible for asylum and related protections under US law. Even as it struggled to address the rapidly unfolding humanitarian crisis, the White House was responding to calls to stop unlawful migration with enhanced enforcement measures.

President Obama asked Congress for approximately \$4 billion in emergency funds (Rogers 2014), intending to use some of it to increase the capacity of the immigration courts to adjudicate more claims faster and the rest, to expand ICE's detention and supervision capacities (White House 2014b). Although the administration did not receive these monies, it still increased the detention of families of Central American asylum seekers. However, it did not request, nor did Congress allocate, funds for legal counsel for minors or additional immigration judges to handle the influx. Instead, Vice President Biden sought to engage the legal community in discussions about its obligation to respond to the immigration crisis along the border, urging them to increase their collective efforts to provide counsel to the population.

Changes at Berks

ICE relocated Berks to a larger building on the grounds of the county compound in 2012 and raised the capacity from 84 to 96 secure beds. In 2014, when the administration changed its detention policy, remanding more families and holding them longer, Berks — the only FRC at the time — filled up quickly. Whereas ICE had only detained families briefly up to that point, time in detention rose precipitously. Longer stays resulted in a need for more beds; the third floor of the building was renovated, doubling its capacity (Orozco and Turner 2015; HRF 2015a). Just about that time, the State of Pennsylvania revisited the county's authority to license the facility as a family residential center and determined it could only be licensed to house children, and not children with their parents, under state law. The county appealed and the state responded. The state permitted Berks to continue to operate during the pendency of the process, but prohibited any use of the recently added beds.³¹ At the time of publication, the appeal was still pending.

The Opening and Closing of Artesia

Late in June 2014, ICE opened the Artesia Family Residential Center (Artesia) in Artesia, New Mexico. Located in the state's far southeastern corner, ICE repurposed a CBP training barracks to function as a secure facility with a capacity of 672 beds, for mothers and their children. Appreciably larger than either Berks or Hutto and every bit as ill-suited, ICE added Artesia with the goal of quickly moving Central American families through the removal process to expedite their deportation (Burnett 2014; Lorca 2014).

31 The Pennsylvania Department of Human Services gave Berks County until February 21, 2016, to operate as a child residential facility, a charge exceeding the scope of its statutory mandate (see Juntos, n.d.).

Artesia attracted an onslaught of criticism (Redmon 2014; DWN 2014). Amongst its many problems, there were no immigration lawyers in the community and none nearby when it opened. When counsel did arrive, ICE impeded their access to the population by practices that appeared to affirm a growing concern that the policies and practices it had put in place accelerated the deportation of families, without regard to their eligibility for asylum. The passage rate for credible fear screening interviews was significantly below the national average (see USCIS 2014; ICE, n.d.) and bond amounts were set five times above the national average (Lorca 2014).

Within months, amidst increasing negative publicity about significant due process delays and concerns about conditions of confinement, ICE closed Artesia in mid-December 2014 (Manning 2014). ICE insisted that the facility had been opened on a temporary basis and, with fewer families entering the country; it was time to transition to less isolated and better-designed facilities (Redmon 2014). ICE reassigned any of the families remaining at Artesia at the time of its closure to Karnes and Dilley (McCabe 2014).

The Conversion of Karnes Adult Detention Center to a Family Facility and Its Expansion

At the beginning of August 2014, ICE repurposed a county-owned secure facility in Karnes City, Texas, that it had been using to detain adult males in immigration proceedings, largely asylum seekers, to hold mothers and their children (ICE 2012, 2014). In both iterations, ICE contracted with the Karnes County Commission (Commission), which in turn contracted with the GEO Group, Inc., the country's second largest private prison corporation. ICE changed the name of the facility from the Karnes Civil Detention Center to the Karnes Family Residential Center (Karnes), but little else changed. It continues to operate on a rigid schedule with set times for meals and lights on and out, frequent head counts and room checks throughout the day and night, and its guards are ill-equipped to interact appropriately with mothers and children, many of whom are trauma survivors, seeking asylum.³²

Initially, Karnes' capacity was 532 mothers and children (ICE 2012). In December 2014, after a contentious debate, the Commission approved a 626-bed expansion, increasing its capacity to 1,158, ICE's largest FRC to date. When the work was completed late in 2015 (GEO Group 2014), it was still a secure facility and it still was not licensed by the state for families (Waslin 2016).

The Development of Dilley

In December 2014, DHS opened its third, and even larger, secure facility to replace Artesia (ICE 2014) — the South Texas Family Residential Center (Dilley) in Dilley, Texas, with a capacity for 2,400 women and children. In its announcement, DHS stated Dilley would “provide invaluable surge capacity should apprehensions of adults with children once again rise.” The Corrections Corporation of America, the country's largest for-profit prison

32 Memorandum in Support of Motion to Enforce Settlement of Class Action at 14, *Flores v. Johnson*, Case No. 2:85-cv-04544-RJK (C.D. Cal. 2 February 2015).

corporation, owns and operates Dilley (Waslin 2016). As is the case with the other FRCs, Dilley is not licensed to detain families (see CCA, n.d.; HRF 2015b).

The Impact of the Deterrence Rationale on Family Detention Policies

In June 2014, the administration announced that it would pursue wide-scale detention of mothers and children to deter other families from seeking asylum in the United States. DHS Secretary Johnson told Congress, “Our message is clear to those who try to illegally cross our borders: You will be sent back home.” Underscoring the department’s resolve, he added that the government was “building additional space to detain these groups and hold them until their expedited removal orders are effectuated” (DHS 2014b). It was, he said, “. . . [a]n aggressive deterrence strategy focused on the removal and repatriation of recent border crossers.”³³ Immediately thereafter, when ICE agents apprehended families at the border, they assigned them to a FRC for expedited processing.³⁴

In keeping with this rationale, DHS insisted on continued detention during proceedings *after* families received a favorable decision following the “credible fear” screening interviews. Between June 2014 and February 2015, ICE denied release to nearly all detained families in its initial custody determination, even those who had passed their screening interviews.³⁵ When families sought reviews of decisions to continue detention before immigration judges, ICE attorneys opposed release, arguing that a “no bond” or “high bond” policy was necessary to “significantly reduce the unlawful mass migration of Guatemalans, Hondurans and Salvadorans.”³⁶ Notwithstanding ICE’s position, when families were able to secure counsel and proceed to a full bond hearing in court, the judges often ordered that bond be set at a level enabling families to achieve release. ICE’s policy of detaining for deterrence achieved one of its intended results — imposition of lengthy delays for families, even after they had established viable asylum claims.

33 Declarations of high-ranking immigration officials filed in court proceedings affirmed that it implemented “no bond” or “high bond” policies to reduce the migration of Guatemalans, Hondurans, and Salvadorans to the United States (see DHS 2014c).

34 Only in the summer of 2015 did the government begin to place some detained families immediately into full-fledged proceedings before the immigration courts, rather than placing them into expedited removal. These proceedings are termed “expedited removal” under the Immigration and Nationality Act (INA) Section 235 and “reinstatement of removal” under INA Section 241 for individuals with prior deportation orders.

35 R.I.L-R v. Johnson, No. 1:15-cv-00011, 2015 U.S. Dist. LEXIS 20441, at *11–12 (D.D.C., 20 February 2015).

36 See Immigration Court Declaration of Philip T. Miller, ICE Assistant Director of Field Operations for Enforcement and Removal Operations (“Miller Decl.”) at ¶ 9 (7 August 2014), <http://www.aila.org/content/default.aspx?docid=49910>; Immigration Court Declaration of Traci A. Lembke, ICE Assistant Director over Investigation Programs for HSI and ICE (“Lembke Decl.”) at ¶ 20 (7 August 2014) (stating “[i]mplementing a ‘no bond’ or ‘high bond’ policy would help. . . by deterring further mass migration.”).

In December 2014, advocates brought class-action litigation challenging DHS' categorical detention of asylum-seeking families to deter future migrants.³⁷ In February 2015, a federal district court issued a preliminary injunction prohibiting DHS from using deterrence as a rationale for detaining families or as a factor in custody determinations.³⁸ The court emphatically reaffirmed the premise that immigration detention is civil in nature and as such, it *must* be justified by a legitimate government interest and not as a form of punishment. It held that depriving a family of liberty to deter another potential migrant, was an impermissible use of detention, and further, that deterrence was unlikely to mitigate any national security threat.

In May 2015, DHS acquiesced, agreeing to individualize custody determination decisions, but still asserting it had the legal authority to detain for deterrence purposes (ICE 2015). To that end, DHS also announced another process, new in name only, to “. . . further focus immigration enforcement resources on high priority cases,” top among them, families who were not part of recent border crossings.

In August 2015, a federal district court held all minors in custody are protected individuals, whether or not accompanied by a parent, and have a right to release.³⁹ The court ordered DHS to release accompanying mothers to secure the rights of their children to be free from detention; prohibited the use of secure facilities; and required any non-secure facility used by ICE to be licensed.⁴⁰ DHS petitioned the court to reconsider its decision but within a month, the court ordered the agency to implement these remedies forthwith.⁴¹ ICE released some families on bond but also expedited the removal of others, many of whom had sought asylum prior to the exhaustion of their appeals. ICE also pursued, unsuccessfully, licensure for Berks, Dilley, and Karnes under the infirm assertion that they are non-secure facilities.⁴² In sum, DHS continued to pursue the narrowest aims of the court orders, detaining as many families as possible under conditions that had not materially improved.

The Final Months of the Obama Presidency: DHS Advisory Committee on Family Residential Centers

In June 2015, Secretary Johnson announced the formation of the Advisory Committee on Family Residential Centers (ACFRC). He explained, “(ICE) Director Saldana and I understand the sensitive and unique nature of detaining families, and we are committed

37 See DHS (2014d) stating that the repurposing of Karnes to house families was part of DHS' sustained and aggressive campaign to stem the tide of illegal migration from Central America; and ICE (2014c) stating that Dilley was part of a policy aimed at “detering others from taking the dangerous journey and illegally crossing into the United States”); First Amended Complaint for Injunctive and Declaratory Relief at P5, R.I.L-R V, Johnson, No. 1:15-cv-0001 (D.D.C 6 January 2015), <https://www.aclu.org/cases/rilr-v-johnson>.

38 See R.I.L-R v. Johnson, No. 1:15-cv-00011, 2015 U.S. Dist. LEXIS 20441 (D.D.C. 20 February 2015).

39 The August ruling was the result of a July 2015 order to show cause, to which the government responded and asked the court to reconsider their decision, which the court deemed improper.

40 Notice of Motion and Motion to Enforce Settlement of Class Action, Case No.CV 85-4544-RJK (Px) (2 February 2015). In Chambers — Order Re Plaintiffs' Motion To Enforce Settlement Of Class Action And Defendants' Motion To Amend Settlement Agreement [100, 120], CV 85-4544 DMG (AGRx) (24 July 2015).

41 No later than October 23, 2015.

42 A non-secure facility is one in which detained individuals move without restriction indoors and outside. A secure facility is one where policy and practice regulates their movement (LIRS 2014).

to continually evaluating it. We have concluded that we must make substantial changes to our detention practices when it comes to families” (DHS 2015). Its mandate was “to provide advice and recommendations” on matters concerning ICE’s family residential centers including detention management and reform.⁴³ The venue for providing the advice and recommendations was a report due October 2016.⁴⁴

DHS selected 14 subject matter experts (SME) with expertise in primary education, immigration law, physical and mental health, trauma-informed services, family and youth services, detention management, and detention reform, to serve on the committee. I was among the 14 committee members and over the next year, co-chaired one of the three subcommittees. Between October 2015 and October 2016, the ACFRC met three times in person, and following our tasking in March 2016, usually once a week by phone. With just six months to produce a report of consequence, communication among subcommittee members and across the subcommittees was critical but curtailed. ICE policy required all discussion be on the record, precluding *ex parte* communication amongst the members. As a result, ICE scheduled the calls at times when designated ICE personnel were available to participate, and permitted email exchanges among committee members when the phone calls were insufficient if they also copied ICE personnel. The committee encountered other and more formidable obstacles to the realization of its charge. Of great consternation, initially ICE narrowed the committee’s charge, prohibiting discussion about detention management and reform. The three subcommittees wrote two additional chapters to address those concerns. Additionally, ICE limited the committee’s access to the material it had requested to make the informed assessments that DHS had asked us to make. The committee received few of the documents it had requested, and most of them came late. Many of the documents that ICE withheld (for example, executed contracts) are documents routinely placed by state and local governments on their websites.

Notwithstanding these setbacks, within a year of its formation and six months of its charge, on October 7, 2016, the ACFRC unanimously adopted the 166-page report that it had produced, consisting of seven chapters, five appendixes, and 282 recommendations, most notably Recommendation 1-1, which provides in part:

DHS’ immigration enforcement practices should operationalize the presumption that detention is generally neither appropriate nor necessary for families — and that detention or the separation of families for purposes of immigration enforcement or management are never in the best interest of children. DHS should discontinue the general use of family detention, reserving it for rare cases when necessary following an individualized assessment of the need to detain because of danger or flight risk that cannot be mitigated by conditions of release.⁴⁵

ICE posted the ACFRC’s final report on the DHS website in December 2016, without comment.⁴⁶

43 See ICE (2015) for the committee charter (n.b., the government changed the name of the committee at some point between its inception and completion of its task.)

44 See ACFRC (2016, 25).

45 *Ibid.*, 6.

46 The report is available at <https://www.ice.gov/acfrc>.

The Homeland Security Advisory Council Subcommittee on Privatized Immigration Detention Facilities

Several months prior to the ACFRC's submission of its report and recommendations to Secretary Johnson and Director Saldana, Secretary Johnson formed a subcommittee of the Homeland Security Advisory Council to look at ICE's use of privatized immigration detention facilities. The impetus for the tasking was an August 18, 2016, announcement by the US Department of Justice: the attorney general directed the Bureau of Prisons (BOP) to reduce and ultimately end its use of private prisons. Initially, the secretary rejected the suggestion that DHS follow suit with a comparable reexamination of ICE's use of private prisons to hold civil detained individuals including families. He dismissed the suggestion outright, stating the situations were not comparable because the time spent by federal prisoners in BOP facilities is longer than that spent by federal detained individuals in ICE facilities. Within a week however, he had reconsidered his position, directing in part that a subcommittee of the Homeland Security Advisory Council "... address ICE's current policy and practices concerning the use of private immigration detention facilities and evaluate whether this practice should be eliminated."⁴⁷ The subcommittee completed its report on December 1, 2016 (see HSAC 2016).

Top among its core recommendations, but its placement appreciably diminished by the dissent of 17 of its 24 members who dissented from the conclusion that reliance on private prisons should, or inevitably must, continue was this:

Fiscal considerations, combined with the need for realistic capacity to handle sudden increases in detention, indicate that DHS's use of private for-profit detention continue but continuation should come with improved and expanded ICE oversight, and with further exploration of other models to enhance ICE control, responsiveness, and sense of accountability for daily operations at all detention facilities.

(*ibid.*, 2)

Of note are several related and recent dates. On November 3, 2016, a month after the ACFRC submitted its report that contained a number of recommendations to curtail outsourcing, and a month before the subcommittee released its report, ICE extended its contract with CoreCivic⁴⁸ until 2021, to operate Dilley as a FRC. On December 3, 2016, two days after the release of the subcommittee's report, the 250th District Court issued its final ruling preventing the Texas Department of Family and Protective Services from issuing licenses to CoreCivic to operate Dilley and the GEO Group to operate Karnes as FRCs. The impact of the ruling is clear — until Dilley and Karnes achieve stature as non-secure and licensed facilities, pursuant to the *Flores* Agreement, ICE may not use them to detain families. The Texas attorney general is appealing (see Crowther, n.d.).

It is unlikely that the Trump administration will call upon the ACFRC or even read its report. However, given the considerable and conscientious effort that the committee made to provide meaningful, implementation-worthy recommendations to DHS, its members

47 See volume 81 of the Federal Register, page 60,713 (Sept. 2, 2016).

48 CoreCivic was formerly CCA.

have been particularly disheartened to learn that conditions at the facilities slipped, rather than improved, during the final days of the Obama administration and the first days of the Trump administration.

ICE's Intentions and Activities: *Incarcergration*

I joined DHS at the beginning of the Obama administration. Before then, I worked primarily in large city jail and state correctional systems in senior management positions.⁴⁹ Upon appointment, my primary assignment was to document ICE's detention and removal policies and practices, and in its place oversee implementation of a *civil*, civil system of oversight for individuals awaiting determinations of relief or removal (DHS 2009).

Throughout my tenure in Washington, DC, I spent much of the time in the field. I toured the facilities that ICE used in every part of the country and spoke with its enforcement agents and attorneys, sheriffs' staff and private prison personnel, the people ICE had detained as well as released, and their attorneys and advocates. I gathered agency data, reviewed reports by government agencies and human rights organizations, and analyzed the information. The impressions that I formed about ICE's activities and its operation during the first facility tours stayed with me to the last. Everything that I have seen or heard since then, fortifies those findings. Reminiscent of an article that I had read as an undergraduate — *Body Ritual of the Nacirema* (Miner 1956) — it struck me that ICE approached detention of immigrants in much the same manner as had the fictitious anthropologist who came upon the Nacirema.⁵⁰ His observations of the Nacirema people were without context. His lack of knowledge about and empathy for the actors he observed and his inability to understand their actions left him clueless. I thought it strikingly similar to our government's handling of foreign-born persons in its custody.

César Cuauhtémoc García Hernández, publisher of the blog *crImmigration.com*, argues persuasively that policymakers likely turned to criminal law and procedure — *crImmigration* as it is now known (García Hernández 2014) — to legitimize the exclusion of the foreign-born deemed to be undesirable. In the same way, correction policy and practice has been used to manage the foreign-born in civil custody. Anil Kalhan, chair of the International Human Rights Committee of the New York City Bar Association, effectively makes the case that for many noncitizens, the experience of detention is as punitive as incarceration and a deprivation as severe as removal. Kalhan posits that if the overall convergence has given rise to *crImmigration* law,⁵¹ then excessive immigration detention practices as those described in my report (Schriro 2009) have also morphed into a para-punitive system, *immcarceration* (Kalhan 2010; see also Kalhan 2014).

49 I served as warden and later, commissioner of the St. Louis jail system, assistant commissioner of the New York City Department of Correction and department director of both the Missouri and Arizona Departments of Correction prior to joining DHS. Immediately after leaving DHS, I was the commissioner of the New York City Department of Correction. Since 2014, I have held the positions of commissioner of the Connecticut Department of Emergency Services and Public Protection and the state's homeland security advisor.

50 *Nacirema* is America spelled backwards.

51 See also *crImmigration.com*.

My perspective as practitioner, errant ethnographer, and non-practicing attorney, is similar to those of García Hernández and Kalhan, but it is not at all the same. I am particularly interested in the conflation of what should be clear distinctions within and between the criminal and civil justice systems and the many people under its control. The following facets are especially illustrative of the inclination to see the populations as interchangeable, and predictive of the ways in which we respond to both of them. They are: (1) the administrative purposes of each form of incapacitation; (2) the case law that governs the criminal and civil systems; (3) the needs and risks that each population presents; (4) the extent to which the public, press, and policymakers are aware of these differences; (5) the unique sensibilities and skills sets each workforce needs to satisfy its system's minimum requirements; and (6) the requisite infrastructure to support each system's goals and objectives.

If I were to give the criminalization of immigration a name, I would call it *incarcergration*. Pervasive points of view and prejudices conflate the roles and responsibilities of decision-makers, the legal bases and limitations for the decisions they make, the inferences drawn from detention and its trappings, the rights really afforded the accused, and the wholesale adoption of one set of strategies for a wholly different set of circumstances.

There are statutory distinctions between the administrative purposes of civil detention and criminal incarceration. They are noteworthy but widely unknown. Many people, including those who work in these facilities and members of the press corps, believe both suspects are remanded to jail and the guilty are sentenced to prison *for* punishment. They also believe the foreign-born in ICE detention facilities and FRCs *are* guilty, and that there are *no* mitigating circumstances and detention *should* be punitive. In fact, neither pre-trial criminal detention nor civil detention may ever be for a punitive purpose. Only after a plea or conviction may the criminal court impose a sentence of incarceration *as* punishment.

The public is also largely unaware of the extent to which the protections afforded the accused vary. The criminal justice system has many decision makers, each with distinct duties at every decision point and each one acting independently of the others. In marked contrast, to varying degrees, both CBP and ICE determine who to stop, question, and take into custody, who to release and under what conditions, who to detain and how long, and where to detain persons in its custody and under what conditions. In sum, DHS is short on checks and balances. The criminal justice system assures that the accused — citizens and noncitizens alike — receive the “Miranda” warning and are provided counsel if they cannot afford representation under most circumstances. The civil justice system does not.

The case law concerning the care that government must afford persons in criminal and civil custody also differs widely. The development of correction law over the past number of years has measurably improved conditions of confinement for both pre-trial and sentenced prisoners. The correction case law is also the basis for correctional standards. In combination, corrections case law and correctional standards set a basis for minimum operating expectations, a basis for that which is constitutional. On the other hand, there is little case law specific to civil detention. Where it exists, it primarily concerns ICE's family residential centers (FRCs), but ICE has failed to incorporate any of the provisions in *Flores* into its FRC standards.⁵² As inadequate and inappropriate as correctional standards are for

⁵² See footnote 8.

anyone in ICE's custody, if, in fact, ICE adhered to those standards, then conditions would improve markedly and immediately.

There is also considerable hyperbole about the risk that immigrants present. ICE has long asserted that it goes after only the “worst of the worst.” In 2009, the report demonstrated this was not the case. Most detainees had no criminal record and among those who did, just over 10 percent were Uniform Crime Reporting Part I crimes. The majority were traffic offenses, simple assault, and larceny (Schriro 2009, 6). DHS recently announced it would release weekly declined detainer outcome reports that would include “notable criminal activity” (ICE 2017). DHS released just three weekly reports then suspended publication due to numerous complaints by state and local jurisdictions that ICE had mischaracterized their actions as “uncooperative.” Although the information released by DHS is limited, it suggests a significant shift in focus from the removal of persons with final dispositions to those with dropped charges, another complementary finding to a comprehensive study conducted at the midpoint of the Obama administration (Kerwin 2015).

As both García Hernández and Kalhan have suggested, our fear of persons who do not look like us, speak our language, or worship as we do, is advanced through legal policy and practice. I am concerned that these beliefs harden with ICE's continued use of private prisons, county jails, and electronic monitoring. The razor-ribbon fences, the correctional personnel staffing the facilities, the orange jumpsuits issued to the people it detains and the manner in which they are managed — standing counts throughout the day, scheduled and unscheduled searches and shakedowns, random drug testing, personal property limitations and the like — all mirror the ways in which criminals are confined. Adoption of the correctional principles of care, custody, and control imposes more restrictions and incurs more cost than are necessary to manage effectively the vast majority of this particular population. In fact, the majority of people that ICE encounters are contributing members of intact families; they have job skills and are employed or employable; they own or owned homes; they pay taxes; and they vote in the countries that permitted participation. There is no basis in fact to treat the vast majority of persons subject to mandatory detention as ICE treats them, but for the medium it selected to use to detain them.

ICE is composed primarily of law enforcement personnel with extensive expertise performing removal functions, but not in the design and delivery of non-secure facilities and community-based alternatives. ICE's inclination to approach everyone in its custody as a hazard to the homeland is consistent with its enforcement orientation. This is why ICE's agents and attorneys should not be its primary decision makers, and, to the extent that ICE must detain or place anyone on community supervision, it should call upon individuals with expertise in these areas to assume these responsibilities.

ICE continues to expand its capacity to monitor and confine persons in its custody but not to put into place the systems needed to sustain lawfully and humanely such an undertaking. ICE operates the largest system of incarceration in the country and it does so without the policies and practices imbedded in the case law that have advanced the field of corrections and the incarceration of pre-trial defendants and sentenced prisoners. It does so without any of the organizational infrastructure necessary to operate a system of *any* size effectively and efficiently, and without mastering the most basic management tools to provide adequately for children, adults, the ill, infirm and elderly, persons whose primary language

is other than English, or asylum seekers. ICE's current, rapid expansion of enforcement activities is not a basis to relax or relinquish the gains realized over the past several years. It pays a significant sum for the beds that it buys. There is no reason not to demand as much, or more, in exchange from those with which it contracts. Instead, ICE should build upon these reforms, employing the management tools and informational systems now in place, affirming its relationships with the legal community and community partners, and accurately conveying its activities to Congress and the country.

Conclusions and Recommendations

I wrote most of this article in the final months of the Obama administration. At that time, my perspective of the past two terms was something of a glass half-full point of view. My thought at the time was that the policy and practice of incarcerating families are infirm but when families are held, the FRCs must meet the court's minimum expectations. Instead of steady progress, ICE was stuck if not backsliding, as the Obama administration ended.⁵³ Among its many deficiencies, access to counsel was more erratic than earlier in the president's tenure. ICE made it more difficult for pro-bono counsel to access the attorney-client consultation rooms and for law students and support staff to accompany the lawyers. Attorneys also encountered greater difficulty meeting with their clients at Dilley and Karnes. Reports also began to surface again of CBP agents not permitting asylum seekers to enter the United States as is required by law. Episodic reports of CBP agents telling asylum seekers who presented themselves at ports of entry that they could not do so, they had to come back another day, or they had to make an appointment with Mexican authorities rose once again (Partlow 2016).

Prior to publication, I was able to review and refresh the paper after the first several months of the Trump administration. During that time the policy and practice of ICE detention has become so egregious that the existence, expansion, and operation of FRCs seemed benign by comparison. The glass is now half-empty. The case law that has come about since the inception of FRCs, largely by means of *Flores*, has come undone. Now CPB is separating children from their parents at the border, rendering the minor children "unaccompanied," remanding the older children to adult detention facilities as adults, but not with their adult family members (see CSSP 2017; KTLA 5 2017a,b; WRC, LIRS, and KIND 2017).

In any administration — indeed, in every administration — DHS's main mission is national emergency planning and preparedness. Influxes of individuals at our borders, seeking safety and freedom, are an integral part of our history. In all instances, it is essential that DHS adequately anticipate *and* lawfully address these periodic increases in families with children and others. History teaches that these influxes are certain to happen in response to onerous conditions that prompt people in other countries to migrate. While marked changes in policy from one administration to the next is an integral part of our nation's history, DHS must put in place competent and comprehensive policies and practices that address the unique needs of families — a critical undertaking that requires a commitment to continuous

53 Oversight of United States Immigration and Customs Enforcement, Hearing Before the Committee on the Judiciary, House of Representatives, 114th Congress, Second Session, September 22, 2016, Serial No. 114–94. U.S. Government Publishing Office, Washington: 2016. The purpose of the hearing was to “. . . examine how our immigration laws are enforced and how this enforcement affects our communities” (ibid., 2).

improvement, well-reasoned and thoroughly researched solutions, and hard work. This is what any administration should do. This is what we should hold them accountable to do.

Specific Remedies: Karnes, Dilley, and Berks Family Residential Centers

The *Flores* Agreement established binding standards for the detention and treatment of immigrant children in government custody in 1997. Nearly 20 years has passed and the US government continues to resist compliance with *Flores* when it should embrace its tenets in full. To this end, ICE should immediately cease the expansion of the Karnes, Dilley, and Berks RFCs and release as many families as are permitted by law. Further, ICE should provide timely notice that it will not renew any of its family detention contracts. To the extent that ICE needs beds for only the briefest detention of any families, DHS must use only non-secure and licensed facilities, all of them small in scale and situated in easily assessable communities.

Overall Reform of Detention Policies and Practices Affecting Families and Children

My experiences working at ICE at the beginning of the Obama administration's first term and serving in a volunteer capacity as a member of the ACFRC at the end of its second term reaffirmed several significant observations about making change happen. First, the inclination of organizations to resist change is deeply ingrained, more so when there is significant tension between its perceived mission and its mandate. This is certainly the case with ICE, which is expert in enforcement but is also responsible for the safety and well-being of detained individuals, despite its lack of affinity for and expertise in this area, from their apprehension through adjudication to removal or relief. Second, individual change agents acting under the auspices of authority can find and fix any number of deficiencies, but a critical mass of like-minded agents in the field is necessary to keep the processes on course and to sustain what the several change agents achieve. Establishing the Office of Detention Policy and Planning (ODPP) to diagnose problems and develop solutions but not to authorize it to undertake the implementation and enforcement of those reforms is a significant — and likely an insurmountable — impediment. On the other hand, anything that an organization fails to do or undoes, the administration can fix, if it so chooses. The Obama administration did not. The 2009 report was its roadmap to reform the detention system and although adopted in full in the end, it chose not to prioritize its implementation. ODPP was the means by which the Obama administration would accomplish its recommendations. Within the first 100 days of the Trump administration, DHS announced ODPP would close, shuttering for now any executive branch efforts to ensure those in its custody are afforded basic protections (Dickerson 2017a; see also Schriro 2017).

The decision to detain foreign-born persons is sometimes necessary as a matter of law, but more often than not, it is discretionary. Less discretion by government actors and clearer direction and more oversight by the government would produce better results more quickly. As suggested by recent reports of CBP agents along the border exercising impermissible discretion, the government should immediately provide clearer direction and more oversight,

not less, to ensure compliance with law by its agents as well as asylum seekers. Likewise, the government should ensure ICE agents afford foreign-born families all of the protections provided by law. Although the pre-election posture of the Trump administration suggests this is unlikely to occur, it should not approach the following obligations as optional.

First, case law prohibits deterrence-based detention policies. Rather than pursue nominal changes, such as licensing FRCs that have not met minimum requirements and insisting secure facilities are non-secure, ICE should adopt a presumption against detention, particularly in the case of families, women, and asylum seekers. ICE should also make every effort to mitigate impediments to community placement. When timely release into the community is not feasible, ICE should release families intact on their own recognizance or on parole. To ensure its decisions are informed and uniform, ICE should use validated instruments to individualize determinations of the least restrictive means to ensure court appearances. ICE should make these assessments, and not delegate these important decisions to vendors, who will likely act in their own financial self-interest. Where detention is required, it should not be lengthy. When alternatives suffice, individual circumstances should serve as the basis for their formulation. The least restrictive means is always the preferred option. ICE should only employ electronic monitoring, cash bond, and other more restrictive means when demonstrably necessary.

Secondly, to realize these results, ICE must acquire the expertise within its ranks to create and maintain the infrastructure necessary to perform all of the unique duties associated with detention and its alternatives. These skill sets include the writing and revision of written instruction, the training and retraining of personnel, and the selection and replacement of providers. Imbued in everything that it does, ICE must establish and adhere to clear standards of care that do not follow a penal model and are responsive to families, women, and asylum seekers. This involves, in part, establishing a system of informed immigration enforcement, including management tools and informational systems capable of building and maintaining a continuum of care for those who must remain in ICE custody.⁵⁴ Absent this infrastructure, it is unlikely that ICE will base its community placements or detention strategies on objective, individually assessed risk and need or utilize the least restrictive means to achieve compliance. If the Trump administration is unwilling or unable to make this happen, then Congress or the courts should expand the charge of ODPP (Dickerson 2017a) to include executing all decisions regarding detention and alternatives to detention or relocate ODPP to the Office of the DHS Secretary. In either case, operating independently from ICE would position ODPP to mirror the criminal justice system's checks and balances in the civil system's decision making.

Lastly, there must be a commitment to excellence, transparency, and accountability within DHS and throughout the three branches of the government. There are many examples of strong and appropriate agency efforts, court involvement, and Congressional oversight but none of them has been sufficiently swift or sustained to achieve their intended outcomes. Meaningful reform will also require the active and on-going participation by its partners,

⁵⁴ Given the government's renewed emphasis on raids to achieve more rapid removals, families placed in expedited removal proceedings should receive an individualized custody assessment immediately after a credible or reasonable fear finding, taking into account the family's individual circumstances and the specific likelihood that they pose a flight risk or danger to the community.

notably, the legal community and advocacy organizations. It will “take a village” to undertake an endeavor as comprehensive as this one, but this village will have the capacity to create a smarter, stronger, and sustainable state. To ensure that the United States realizes its commitment to continuous improvement leadership should ensure that an effective complaint mechanism is in place, that performance metrics are collected, and outcomes published to inform decision making and assure stakeholders that there is sufficient accountability within the system.

The Trump Challenge: Truth or Consequences

Depending upon one’s policy and politics, the first 100 days of the Trump administration have been either very dark or bright. Many have said the same of the Obama administration. At one time or another, all of us may be tempted to tamp back our efforts, let go of higher expectations, wait for the next administration, or push back and soldier on. Whatever our position, our collective time may be better served looking for common ground, core values, and a shared sense of our higher selves, proud to be the nation known for taking in the tired and the weary, a country committed to fresh starts and second chances.

In the end, our government consists of three branches, each with its own standing and strength. The executive branch can only do that which the legislative and judiciary branches allow, and the legislative and judicial branches can undo some of what the executive does. Then, of course, there are all of us, the citizenry. That gives all of us many opportunities in every administration to unite and get it right, to make and sustain sufficient improvements, so that in our country there are *no longer* children weeping in the playtime of the others.

REFERENCES

- ACFRC (DHS Advisory Committee on Family Residential Centers). 2016. *Report of the DHS Advisory Committee on Family Residential Centers*. <https://www.ice.gov/sites/default/files/documents/Report/2016/ACFRC-sc-16093.pdf>.
- ACLU (American Civil Liberties Union). 2017. “ACLU and Other Groups Challenge Trump Immigration Ban After Refugees Detained at Airports Following Executive Order.” <https://www.aclu.org/blog/speak-freely/aclu-and-other-groups-challenge-trump-immigration-ban-after-refugees-detained>.
- AIC (American Immigration Council). 2014. *Children in Danger: A Guide to the Humanitarian Challenge at the Border*. Washington, DC: AIC.
- Bernstein, Nina. 2009. “US to Reform Policy on Detention for Immigrants.” *New York Times*, August 5. http://www.nytimes.com/2009/08/06/us/politics/06detain.html?_r=0.
- BFRC (Berks Family Residential Center). 2009. *Bi-annual Compliance Review Report*. <https://www.ice.gov/doclib/foia/dfra-ice-dro/compliancereportberksfamilyresidentialcenter0714172008.pdf>.

- Bolton, Gretchen. 1994. *Research Paper for the U.S. Commission on Immigration Reform: Immigration Emergencies — Learning from the Past, Planning for the Future* 30-32.
- Browning, Elizabeth Barrett. 1842. "The Cry of the Children." *Blackwoods Edinburgh Magazine*.
- Burnett, John. 2014. "Immigrant Advocates Challenge the Way Mothers are Detained." *NPR*, October 15. <http://www.npr.org/2014/10/15/356419939/immigrant-advocates-challenge-way-mothers-are-detained>.
- Caldwell, Alicia A. 2014. "U.S. to Close Family Detention Center in New Mexico." *Boston Globe*, November 19. <http://www.bostonglobe.com/news/nation/2014/11/18/close-family-detention-center-new-mexico/OATfFcz RA0PzRGRn5i6590/story.html>.
- Castillo, Mariano. 2014. Immigration: More Central Americans Apprehended Than Mexicans." *CNN*, November 19. <http://www.cnn.com/2014/12/19/us/dhs-immigration-statistics-2014/>.
- CBP (US Customs and Border Protection). 2017. "Protecting the Nation from Foreign Terrorist Entry into the United States." <https://www.cbp.gov/border-security/protecting-nation-foreign-terrorist-entry-united-states>.
- CCA (Corrections Corporation of America). (n.d.). "South Texas Family Residential Center." <https://www.cca.com/facilities/south-texas-family-residential-center>.
- . n.d. "Southwest Border Sectors: Family Unit and Unaccompanied Alien Children (0-17) Apprehensions FY14 Compared to FY13." http://www.cbp.gov/sites/default/files/documents/BP%20Southwest%20Borderpercentage20Familypercentage20Units%20and%20UAC%20Apps%20FY13%20-%20FY14_0.pdf.
- Churchill, Winston. 1905. *The Life of Reason. Winston S. Churchill: His Complete Speeches, 1897-1963*. London: Chelsea House Publishers.
- Crowther, Jake. (n.d.). *Texas Prison Bid'ness* (blog). <http://www.texasprisonbidness.org/tags/corecivic-formerly-cca>.
- CSSP (Center for the Study of Social Policy). 2017. "Dividing Families: The Department of Homeland Security's Plan to Separate Children from Parents." Washington, DC: CSSP. <http://www.cssp.org/publications/documents/DHS-Family-Separation.pdf>.
- Dastyari, Azadeh, and Libbey Effenev. 2012. "Immigration Detention in Guantánamo Bay (Not Going Anywhere Anytime Soon)." *Shima: The International Journal of Research into Island Cultures* 49. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2245419.
- DHS (US Department of Homeland Security). 2004. "Designating Aliens for Expedited Removal." 69 Federal Register 48877.

Weeping in the Playtime of Others

- . 2009. “Secretary Napolitano Appoints Dora Schriro as Special Advisor on ICE and Detention and Removal.” Press release.
- . 2014a. “Fact Sheet: Artesia Temporary Facility for Adults with Children in Expedited Removal.” <http://www.dhs.gov/news/2014/06/20/fact-sheet-artesia-temporary-facility-adults-children-expedited-removal>.
- . 2014b. “Statement by Sec. of Homeland Security Jeh Johnson before the Senate Committee on Appropriations.” Washington, DC: DHS Press Office. <http://www.dhs.gov/news/2014/07/10/statement-secretary-homeland-security-jeh-johnson-senate-committee-appropriations>.
- . 2014c. “Department of Homeland Security’s Submission of Documentary Evidence.” AILA InfoNet Doc. No. 4080799. <http://www.aila.org/infonet/dhs-blanket-policy-no-release>.
- . 2014d. “So. Texas ICE Detention Facility to House Adults with Children.” Press release, July 31. <http://www.dhs.gov/news/2014/07/31/south-texas-ice-detention-facility-house-adults-children>.
- . 2015. “Statement by Sec. Jeh C. Johnson on Family Residential Centers.” Press release, June 24. Washington, DC: DHS Press Office. <https://www.dhs.gov/news/2015/06/24/statement-secretary-jeh-c-johnson-family-residential-centers>.
- . 2017. “Weekly Declined Detainer Outcome Report for Recorded Declined Detainers.” <https://www.ice.gov/declined-detainer-outcome-report>.
- . n.d. “Administration’s Announcement Regarding a New Process to Further Focus Immigration Enforcement Resources on High Priority Cases.” <https://www.ice.gov/repatriation-faq>.
- Dickerson, Caitlin. 2017a. “Trump Plan Would Curtail Protections for Detained Immigrants.” *New York Times*, April 13. <https://www.nytimes.com/2017/04/13/us/detained-immigrants-may-face-harsher-conditions-under-trump.html>.
- . 2017b. “Immigration Arrests Rise Sharply as a Trump Mandate Is Carried Out.” *New York Times*, May 17. <https://www.nytimes.com/2017/05/17/us/immigration-enforcement-ice-arrests.html>.
- DOJ (US Department of Justice). 2001. Unaccompanied Juveniles in INS Custody, Report No I-2001-009, Exec. Summary. <https://oig.justice.gov/reports/INS/e0109/exec.htm>.
- Duara, Nigel. 2017. “Arrests on Civil Immigration Charges Go up 38% in the First 100 Days Since Trump’s Executive Order.” *Los Angeles Times*, May 17. <http://www.latimes.com/nation/la-na-ice-deport-trump-20170517-story.html>.
- DWN (Detention Watch Network). *Expose and Close Artesia Family Residential Center, New Mexico*. Washington, DC: DWN. <https://www.detentionwatchnetwork.org/sites/default/files/reports/DWN%20Expose%20and%20Close%20Artesia%20Report.pdf>.

- Eguizábal, Cristina, Matthew C. Ingram, Karise M. Curtis, Aaron Korthuis, Eric L. Olson, and Nicholas Phillips. 2015. *Crime and Violence in Central America's Northern Triangle: How U.S. Policy Responses are Helping, Hurting, and Can Be Improved*. Washington, DC: Wilson Center, Latin America Program. http://www.wilsoncenter.org/sites/default/files/FINAL%20PDF_CARSI%20REPORT_0.pdf.
- Erney, Rosalynd. 2017. *Dividing Families: The Department of Homeland Security's Plan to Separate Children from Parents*. Washington, DC: Center for the Study of Social Policy. <http://www.cssp.org/media-center/blog/dividing-families-dhs-plan-separate-children-from-parents>.
- García Hernández, César Cuauhtémoc. 2014. *Creating CrImmigration Legal Research Paper Series*. Working Paper No. 14-12. Denver: University of Denver, Sturm College of Law.
- GEO Group. 2014. "The GEO Group Announces 626-Bed Expansion of the Karnes County Residential Center in Texas." Press release. <http://www.businesswire.com/news/home/20141219005408/en/GEO-Group-Announces-626-Bed-Expansion-Karnes-County>.
- Gonzalez, Daniel. 2016. "ICE Planning More Immigration Raids to Target Central Americans." *Arizona Republic*, May 13. <http://www.azcentral.com/story/news/politics/immigration/2016/05/12/report-ice-immigration-raids-central-americans-families/84295612/>.
- Gonzalez, Jaime. 2015. "The Japanese-Peruvians Interned in the U.S. during WW2." *BBC Mundo*, February 22. <http://www.bbc.com/news/world-latin-america-31295270>.
- Henneberger, Melinda. 2014. "When an Immigration Detention Center Comes to a Small Town." *Washington Post*, October 1. <http://www.washingtonpost.com/news/storyline/wp/2014/10/01/when-an-immigration-detention-center-comes-to-a-small-town/>.
- HRF (Human Rights First). 2015a. *Family Detention in Berks County, Pennsylvania*. <https://www.humanrightsfirst.org/sites/default/files/HRF-Family-Det-Penn-rep-final.pdf>
- . 2015b. "Human Rights First Tours Dilley Detention Facility, Calls for Administration to End Family Detention." Press release, May 12. <http://www.humanrightsfirst.org/press-release/human-rights-first-tours-dilley-detention-facility-calls-administration-end-family>.
- HSAC (Homeland Security Advisory Council). 2016. *Report of the Subcommittee on Privatized Immigration Detention Facilities*. <https://www.dhs.gov/sites/default/files/publications/DHS%20HSAC%20PIDF%20Final%20Report.pdf>.
- IACP (International Association of Chiefs of Police). 2017. "IACP Statement on Immigration Related Executive Orders." <https://theiacpblog.org/2017/01/30/iacp-statement-on-immigration-related-executive-orders/>.

- ICE (US Immigration and Customs Enforcement). 2007. "Family Residential Standards, U.S. Immigration and Customs Enforcement." <http://www.ice.gov/detention-standards/family-residential>.
- . 2011. "T. Don Hutto Residential Center Fact Sheet."
- . 2012. "ICE Opens its First-Ever Designed and Built Civil Detention Center." <http://www.ice.gov/news/releases/ice-opens-its-first-ever-designed-and-built-civil-detention-center#>.
- . 2014a. "S.Tex. ICE Detention Facility to House Adults with Children." <http://www.ice.gov/news/releases/south-texas-ice-detention-facility-house-adults-children>.
- . 2014b. "ICE's New Family Detention Center in Dilley, Texas to Open in December." <https://www.ice.gov/news/releases/ices-new-family-detention-center-dilley-texas-open-december>.
- . 2014c. "ICE's New Family Detention Center in Dilley, TX to Open in December." <https://www.ice.gov/news/releases/ices-new-family-detention-center-dilley-texas-open-december>.
- . 2015. "ICE Announces Enhanced Oversight for Family Residential Centers." Press release. <https://www.ice.gov/news/releases/ice-announces-enhanced-oversight-family-residential-centers>.
- . n.d. "Family Residential Standards." <https://www.ice.gov/detention-standards/family-residential>.
- Jordan, Miriam. 2016. "U.S. Says Deportations Rose 2% in the Latest Year." *New York Times*, December 30. <https://www.wsj.com/articles/u-s-says-deportations-rose-2-in-the-latest-year-1483140519>.
- Juntos. n.d. "Shut Down Berks." Philadelphia: Sheller Center for Social Justice, Temple University Beasley School of Law.
- Kalhan, Anil. 2010. "Rethinking Immigration Detention." *Columbia Law Review Sidebar* 110: 42-58.
- . 2014. "Immigration Surveillance." *Maryland Law Review* 74: 1-78.
- Kennedy, Elizabeth. 2014. *No Childhood Here: Why Central American Children are Fleeing Their Homes*. Washington, DC: AIC. http://www.immigrationpolicy.org/sites/default/files/docs/no_childhood_here_why_central_american_children_are_fleeing_their_homes_final.pdf.
- Kerwin, Donald. 2015. "Piecing Together the US Immigrant Detention Puzzle One Night at a Time: An Analysis of All Persons in DHS-ICE Custody on September 22, 2012." *Journal on Migration and Human Security* 3(4): 330-76. <https://doi.org/10.14240/jmhs.v3i4.55>.

- KTLA 5. 2017a. "U.S. Is Considering Separating Children From Parents at Border, DHS Secretary Confirms." *KTLA 5*, March 6. <http://ktla.com/2017/03/06/dhs-secretary-john-kelly-says-agency-is-considering-separating-children-from-parents-at-border/>.
- . 2017b. "Homeland Security Secretary Says Mothers and Children Won't Be Separated at U.S. Border." *KTLA 5*, March 29. <http://ktla.com/2017/03/29/homeland-security-secretary-says-mothers-and-children-wont-be-separated-at-u-s-border/>.
- LIRS (Lutheran Immigration and Refugee Service). 2014. "Flores Settlement Agreement and DHS Custody." <https://lirs.org/wp-content/uploads/2014/12/Flores-Family-Detention-Backgrounder-LIRS-WRC-KIND-FINAL1.pdf>.
- LoC (Library of Congress). n.d. "Indian Citizenship Act." <http://memory.loc.gov/ammem/today/jun02.html>.
- Lodi News-Sentinel*. 1989. "Group Claims U.S. Violating Civil Rights." *Lodi News-Sentinel*, July 3. <https://news.google.com/newspapers?nid=2245&dat=19890703&id=84MzAAAAIBAJ&sjid=yzIHAAAAIBAJ&pg=6024,315636&hl=en>.
- Lorca, Juan Carlos. "Immigrant Detention Center in New Mexico Criticized As 'Deportation Mill.'" *Huffington Post*, October 6.
- Manning, Stephen. 2015. *Ending Artesia*. Portland, OR: Innovation Law Lab. <http://innovationlawlab.org/the-artesia-report/>.
- McCabe, David. 2014. "Administration to Close Immigration Detention Center at Month's End." *The Hill*, November 18. <http://thehill.com/news/administration/224626-administration-to-close-immigrant-detention-center>.
- Miner, Horace. 1956. "Body Ritual among the Nacirema." *The American Anthropologist* 58: 503-07. <https://doi.org/10.1525/aa.1956.58.3.02a00080>.
- NPR (National Public Radio). 2010. "Angel Island: Ellis Island of the West." NPR, October 6. <http://www.npr.org/templates/story/story.php?storyId=130380169>.
- Orozco, Anthony. 2016. "Officials, Immigration Advocates in a Legal Brawl over Berks County Residential Center's License." *Reading Eagle*, February 29. <http://www.readingeagle.com/news/article/officials-immigration-advocates-in-a-legal-brawl-over-berks-county-residential-centers-license>.
- Orozco, Anthony, and Ford Turner. 2015. "Berks County Residential Center: 'Family Friendly' or 'Bad?'" *Reading Eagle*, June 19. <http://readingeagle.com/news/article/berks-county-residential-center-family-friendly-or-bad>.
- Ortega, Bob. 2014. "Flood of Border Crossings Becomes a Trickle — for Now." *Arizona Republic*, December 9. <http://www.azcentral.com/story/news/politics/immigration/2014/10/21/flood-border-crossings-becomes-trickle-now/17649589>.
- . 2015. "Mexico Now Detains More Central American Migrants than the United States." Press release. Washington, DC: Washington Office on Latin America.

http://www.wola.org/news/mexico_now_detains_more_central_american_migrants_than_the_united_states.

Partlow, Joshua. 2016. "U.S. Border Officials Are Illegally Turning Away Asylum Seekers, Critics Say." *Washington Post*, January 16. https://www.washingtonpost.com/world/the_americas/us-border-officials-are-illegally-turning-away-asylum-seekers-critics-say/2017/01/16/f7f5c54a-c6d0-11e6-acda-59924caa2450_story.html.

PBS (Public Broadcasting Service). 2015. "Children of the Camps: Internment History." <http://www.pbs.org/childofcamp/history>.

———. (n.d.). "Immigration and Deportation at Ellis Island." http://www.pbs.org/wgbh/amex/goldman/peoplevents/e_ellis.html.

Preston, Julia, and Randal C. Archibold. 2014. "U.S. Moves to Stop Surge in Illegal Immigration." *New York Times*, June 21. http://www.nytimes.com/2014/06/21/us-plans-to-step-up-detention-and-deportation-of-migrants.html?_r=0.

Redmon, Jeremy. 2014. "ICE to Close Controversial Immigration Detention Center in New Mexico." *Atlanta Journal-Constitution*, November 18. <http://www.ajc.com/news/news/state-regional-govt-politics/ice-to-close-controversial-immigration-detention-c/nh9T9>.

Rinaldi, Tiziana. "Many Women Seeking Asylum in the U.S. Have Been Released from Detention but with Ankle Monitors." Public Radio International, March 10. <http://www.pri.org/stories/2016-03-10/many-women-asylum-seekers-have-been-released-detention-ankle-monitors>.

Rogers, David. 2014. "Obama Asks \$3.7B for Child Migrants." *POLITICO*, July 8. <http://www.politico.com/story/2014/07/barack-obama-congress-child-migrants-108657>.

Santanaya, Georga. 1904. *The Life of Reason*. New York: George Scribner and Sons.

Schriro, Dora. 2009. *Immigration Detention Overview and Recommendations*. Washington, DC: DHS. <https://www.ice.gov/doclib/about/offices/odpp/pdf/ice-detention-rpt.pdf>.

———. 2017. "Don't Make Immigration Custody Part of the Criminal Justice System." *The Hill*, April 27. <http://thehill.com/blogs/pundits-blog/immigration/330933-dont-conflate-the-two-immigration-custody-is-not-the-criminal>.

The Economist. 2012. "A Surprising Safe Haven: How Central America's Poorest Country Became One of Its Safest." *The Economist*, January 28. <http://www.economist.com/node/21543492>.

UNHCR (United Nations High Commissioner for Refugees). 2014. *Children on the Run: Unaccompanied Children Leaving Central America and Mexico and the Need for International Protection*. Geneva: UNHCR. http://www.unhcrwashington.org/sites/default/files/1_UAC_Children%20on%20the%20Run_Full%20Report.pdf.

- USCIS (US Citizenship and Immigration Services). 2014. "Fact Sheet: Artesia Temporary Facility for Adults With Children in Expedited Removal." <http://www.dhs.gov/news/2014/06/20/fact-sheet-artesia-temporary-facility-adults-children-expedited-removal>.
- . 2015. "Citizenship and Immigration Servs., Asylum Division, Family Facilities Credible/Reasonable Fear."
- Waslin, Michele. 2016. "Texas Judge Continues to Delay the Licensing of State Detention Centers as Childcare Facilities." *Immigration Impact* (blog). <http://immigrationimpact.com/2016/05/16/texas-judge-continues-delay-licensing-texas-detention-facilities-childcare-facilities/>.
- White House. 2014a. "The Obama Administration's Government-Wide Response to Influx of Central American Migrants at the Southwest Border." Press release, August 1. Washington, DC: White House Office of the Press Secretary. <https://www.whitehouse.gov/the-pressoffice/2014/08/01/obama-administration-s-government-wide-response-influx-central-american->
- . 2014b. "Emergency Supplemental Request to Address the Increase in Child and Adult Migration from Central America in the Rio Grande Valley Areas of the Southwest Border." Press release, July 8. Washington, DC: White House Office of the Press Secretary. <https://www.whitehouse.gov/the-press-office/2014/07/08/fact-sheet-emergency-supplemental-request-address-increase-child-and-adu>.
- WOLA (Washington Office on Latin America). 2015. "Mexico Now Detains More Central American Migrants than the United States." Press release, June 11. Washington, DC: WOLA. http://www.wola.org/news/mexico_now_detains_more_central_american_migrants_than_the_united_states.
- WCR (Women's Commission for Refugees) and LIRS (Lutheran Immigration and Refugee Service). 2007. *Locking Up Family Values: The Detention of Immigrant Families*. http://lirs.org/wp-content/uploads/2014/11/LIRSWRC_LockingUpFamilyValuesAgain_Report_141114.pdf.
- WRC (Women's Refugee Commission), LIRS (Lutheran Immigration and Refugee Service), and KIND (Kids in Need of Defense). 2017. *Betraying Family Values*. <https://www.womensrefugeecommission.org/rights/gbv/resources/1450-betraying-family-values>.



The Human Cost of IIRIRA — Stories From Individuals Impacted by the Immigration Detention System

Saba Ahmed, Esq.

Adina Appelbaum, Esq.

Rachel Jordan, Esq.

Executive Summary

The 1996 passage of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) has had a devastating impact on immigrants who are detained, indigent, and forced to face deportation proceedings without representation (*pro se*). In the past 20 years, immigration detention has grown exponentially and a criminal–immigration detention–deportation pipeline has developed as a central function of the immigration system. Despite the growing specter of the “criminal alien” in the American psyche, there is little public knowledge or scrutiny of the vast immigration detention and deportation machine. Enforcement of IIRIRA has effectively erased human stories and narrowed immigration debates to numbers and statistics.

The five vignettes below tell the stories of individuals who have personally experienced the impact of IIRIRA. Part 1 describes the on-the-ground reality of a state public defender’s obligations and struggles to defend immigrants from harsh consequences of criminal convictions. Part 2 provides the perspective of an indigent immigrant fighting his deportation *pro se*. Part 3 describes a nonprofit immigration attorney’s challenges in providing legal services to detained immigrants. Part 4 is a glimpse into the brisk pace of an immigration judge’s detained docket. Part 5 tells the story of a detained immigrant’s family member and the many hoops she must jump through to ensure he has a fighting chance in immigration court. Collectively, these vignettes provide a realistic picture of the immigration detention experience, revealing the human cost of IIRIRA.

Introduction

Since its passage in 1996, the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) has had a devastating impact on immigrants who are indigent, detained,

© 2017 by the Center for Migration Studies of New York. All rights reserved.

and forced to face deportation proceedings without representation (*pro se*). IIRIRA's criminalization of the immigration system has funneled millions of immigrants through a massive criminal immigration deportation pipeline. IIRIRA expanded the number of criminal offenses that trigger deportation, detain immigrants without possibility of bond, and bar them from legal defenses against deportation. As a result, the United States now operates the world's largest immigration detention system (Global Detention Project 2016). Over 40,000 immigrants are detained by the Department of Homeland Security (DHS) on any given day (Barrett 2016). They are detained under conditions set by Immigration and Customs Enforcement (ICE) and by Customs and Border Protection (CBP), with little review from outside entities.

Despite increased public awareness of the civil rights violations undergirding the mass criminal incarceration epidemic in America, stories of detained immigrants, the overburdened legal service providers and judicial employees who work to ensure their due process rights, and the impact of detention on the family members of detainees remain largely hidden from the public. Meanwhile, the institutional foundation of IIRIRA has spurred public discourse that embraces the criminalization of immigration, recently culminating in the 2016 election of a president whose campaign explicitly centered on portraying immigrants as criminals and carrying out mass deportations.

This article reveals the daily toll IIRIRA takes on individuals who play a role in the detention-deportation pipeline. It presents five separate vignettes that illustrate important systemic challenges and reveal the viewpoints of different actors within the system: a public defender who must defend immigrant clients against the deportation consequences of criminal charges; a detained, indigent immigrant who must navigate the complex system from a remote jail without the assistance of a lawyer; a nonprofit legal service provider who serves as the sole source of legal information for immigrants who cannot afford private representation; an immigration judge who adjudicates the fates of detained immigrants in an overburdened immigration court; and a detained immigrant's family member who faces permanent separation from a loved one. In light of the new administration's alarmingly anti-immigrant stance, these human costs of IIRIRA can no longer be ignored.

Part I: The Public Defender

In 2010, 14 years after IIRIRA, the US Supreme Court issued the landmark decision *Padilla v. Kentucky*, in which it acknowledged the explosive increase in deportations based on criminal convictions.¹ The Court recognized that deportation is more than a mere "collateral consequence" of a criminal conviction, stating that "[d]eportation is an integral part — indeed, sometimes the most important part — of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes."² Because of the severity of deportation, the Court found that an immigrant in criminal proceedings is entitled to accurate legal advice from her criminal defense attorney about the immigration consequences of her criminal charges.

Padilla accommodates the post-IIRIRA joining of the immigration and criminal justice systems by laying the duty on criminal defense attorneys to understand and alleviate the

¹ *Padilla v. Kentucky*, 559 U.S. 356 (2010).

² *Id.*, 364.

The Human Cost of IIRIRA

disproportionate impact of criminal convictions on immigrants. Public defenders and court-appointed attorneys are already overburdened by gross inequities in the criminal justice system, and have few resources to bear the additional obligation of providing accurate and specific advice about the immigration consequences of criminal pleas. Such advice requires ongoing training on the complicated nexus of federal immigration and state criminal law. Most states have yet to implement a system providing training or resources on immigration law for indigent defense providers, leaving many defense attorneys without the necessary infrastructure to fulfill their *Padilla* obligations.

Even where indigent criminal defense attorneys are provided immigration law training, there is often little they can do to protect their clients against deportation. IIRIRA categorized a broad variety of crimes as triggers for deportation and mandatory detention (Torrey 2015). Defense attorneys are tasked with explaining to their clients that simple misdemeanor offenses like shoplifting or marijuana possession can lead to grossly disproportional consequences under immigration law, such as mandatory and indefinite detention and possible banishment from their communities.

Below, a public defender recounts these tensions in indigent criminal defense.

As a public defender,³ I witnessed firsthand the incredible power of the government and the inequity of enforcement. The jurisdiction in which I practiced was very diverse; I met and represented people from almost every ethnic background and most corners of the globe.

Yet, despite crime statistics consistently showing that each demographic group has roughly the same incidence of criminality (except for immigrants, who are actually less likely to commit crimes), the majority of my docket was filled with minority clients. Most of them had been beaten down and targeted by the “justice” system for most of their lives. My minority clients were all too often stripped of individuality and treated by judges and prosecutors as mere symbols of poverty and dysfunction.

Most vulnerable among my clients were those not born in this country. With or without lawful status, they were at the bottom of the totem pole, deemed “illegal” by virtue of their very presence. The scorn of the state, from the bench or the prosecution, is enflamed when dealing with noncitizens. This biased treatment magnifies the consequences of IIRIRA and creates a system in which immigrants are punished twice for a single offense.

Thankfully, my office was fairly progressive in training and implementing the *Padilla* standards. We learned about the unequal impact a conviction has on a noncitizen, and sought to mitigate those consequences. We were at the nascent stages of this pursuit, despite the consequences of criminal convictions being well-known in the immigration world since 1996. This disconnect spawned from previous rulings of the Supreme Court that held that immigration consequences were collateral, civil consequences, either not important enough or too complex to be considered integral to the criminal case.⁴ The 2010

³ Ashley R. Shapiro is an immigration resource attorney with the Virginia Indigent Defense Commission who advises public defender offices throughout Virginia on the immigration consequences of criminal convictions. Prior to that, she worked for four years as a public defender in Virginia and Maryland.

⁴ *Fong Yue Ting v. United States*, 149 U.S. 698 (1893).

Padilla decision rocked the defense world and marked a sea change in criminal defense. Panic ensued when the ruling came out. How could we learn enough immigration law to understand what would happen to our clients after they left our care in criminal court? Suddenly the advice “you should talk to an immigration attorney, this conviction might have consequences,” was, by itself, woefully inadequate, even malpractice.

Because the majority of people caught in the criminal system are indigent, this burden fell heavily on public defenders and court-appointed attorneys with already demanding caseloads. The expansion of the criminal grounds of deportability disproportionately affected our indigent clients, people already targeted by our prejudiced system and now subject to vastly disparate consequences. I was fortunate to practice in a metropolitan area, and was trained repeatedly in immigration consequences. But most attorneys do not have such resources available to them and are ill-prepared to deal with noncitizen clients, even if they have the best intentions. Some attorneys are recalcitrant to expand their existing duties, and still don't think it should be their job to investigate and learn about an entirely new set of laws. Some are just so overloaded with cases that they believe they don't have the time to learn or can do just the bare minimum. Many indigent clients simply end up deported, never realizing they had a right to be advised about the dire immigration consequences in advance of taking a criminal plea. IIRIRA changed the landscape of criminal defense, and it has been a slow process getting defense attorneys to live up to their legal obligations.

Immigration law is complex, with harsh consequences for something as minor as petty shoplifting. I believe *Padilla* was correctly decided and brought much-needed changes, but that doesn't diminish the immense pressure it placed on criminal defense attorneys to learn the wide array of consequences their clients could face. The intricate web of triggers and bars can baffle even a practicing immigration attorney. Together with the lack of a right to counsel in immigration court, this makes the duty of a criminal defense attorney all the more burdensome. It is daunting to be responsible for a whole area of law outside your general practice. It is even more daunting to recognize that even the hardest-fought plea deal in criminal court cannot avoid devastating immigration consequences for a noncitizen defendant.

As public defenders, we learned as much as we could about immigration consequences in the hopes of negotiating better outcomes for our clients, or at least fully explaining *all* of the consequences of a plea offer so that they could make an informed decision about their criminal case. Explaining these complex consequences to a client, especially with a language barrier, is a difficult task. The client must be given sufficient information to be able to weigh the short-term effect of the criminal case against the long-term immigration impact. Clients all too often have to choose between whether to give up their right to trial in a case they could perhaps win, or the surety of a plea offer. They might have to choose a longer jail sentence than is appropriate for their crime, in order to stay in the country with their family. Public defenders must bear witness to our clients' heartache in making these choices, for which there is often no right answer. These were some of the hardest conversations I had to have as a public defender, and they are a direct consequence of IIRIRA greatly expanding the criminal triggers for immigration consequences.

It is our duty as public defenders to use knowledge of immigration consequences to seek more favorable plea offers for our clients, but this is easier said than done. I would often

run into a familiar refrain from prosecutors: “Why should I treat your client different than a citizen?” or “Why should I care what happens to your client; he shouldn’t be here anyway?” These myopic views ignore the fact that consequences of a criminal punishment are doubly magnified for a noncitizen. Over time some prosecutors opened up to the idea of negotiating cases in light of the broader immigration consequences. But many still refuse to consider them, which leaves the client with an impossible choice and reveals the fundamental unfairness of the system. An immigrant’s future rests almost solely on the luck of the draw — which prosecutor is assigned the case, and will they be willing to consider the full picture?

The same holds true for the bench. Some judges entertain sentencing pleas designed to mitigate immigration consequences, and others won’t. Judges are not often trained in the complexities of immigration consequences, and their knowledge depends on the defense presenting the information to them. Again, the burden falls on the defense attorney to mitigate the immigration consequences for a noncitizen by educating the judge on them in order to seek a sentence that properly addresses those consequences.

We defense attorneys are not seeking preferential treatment for our noncitizen clients. We don’t just want to get all the cases dismissed and let immigrants get a free pass, although this is what many on the government side believe. Rather, it is to level the playing field, to not let what is viewed as a small mistake in the criminal system result in catastrophic immigration penalties. IIRIRA did not just change the immigration system; together with *Padilla*, it changed indigent defense and the way we practice. By placing the burden to defend against immigration consequences onto defense attorneys, *Padilla* thankfully added a layer of protection that helped to mitigate the heavy impact of IIRIRA. But that impact continues to be borne by noncitizens, and the indigent defense attorneys seeking to protect them, every day.

Part II: The Immigrant Detainee

IIRIRA exacerbates the isolation of detained indigent immigrants by limiting access to counsel and other due process protections in a civil system of law that has long operated on the presumption that noncitizens merit fewer due process protections. The US Supreme Court has long declined to enumerate exactly which due process protections attach to immigration proceedings; in fact, in many cases, due process is whatever the federal government has decided it is.⁵ The Court has called deportation a deprivation of “all that makes life worth living”⁶ and a “the equivalent of banishment or exile.”⁷ Nevertheless, the Court has affirmed that, although deportation is “intimately related” to the criminal process, it remains a civil process distinct from, and exempt from the same standards as, criminal proceedings.⁸ Consequently, despite functioning similarly, immigration proceedings do not benefit from the wealth of advocacy and litigation that has secured due process procedural protections in criminal proceedings.

5 *Ekiu v. U.S.*, 142 U.S. 651, 660 (1892).

6 *Ng Fung Ho v. White*, 259 U.S. 276, 287 (1922).

7 *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948).

8 *Padilla v. Kentucky*, 559 U.S. 356 (2010), *Fong Yue Ting v. United States*, 149 U.S. 698 (1893).

Perhaps the most important protection lacking in the immigration system is the right to appointed counsel. Decades ago, the Supreme Court recognized that due process cannot exist in the adversarial criminal justice system without the Sixth Amendment's guarantee of counsel. The Court upheld this fundamental right for indigent defendants, stating that the "noble ideal" of "fair trials before impartial tribunals in which every defendant stands equal before the law . . . cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him."⁹ By contrast, immigration law does *not* require court-appointed counsel for indigent immigrants, as counsel is considered a "privilege" afforded to a noncitizen, not a right.¹⁰ Accordingly, 63 percent of immigrants in immigration court are unrepresented (Eagly and Shafer 2015, 19). When detained, only 14 percent of immigrants secure counsel, leaving 86 percent with no option but to defend against their deportation *pro se* in opposition to a trained government lawyer (ibid,30). Detention itself has a significant impact on an individual's ability to afford and access counsel: Non-detained immigrants are five times more likely to have lawyers than detained immigrants (ibid, 32).

Considering the recent mass expansion of the detention system, the numbers of *pro se* detained immigrants are growing exponentially (Barrett 2016). With so few of them represented, the vast majority cannot even protect their most basic, limited rights in immigration court, and will be deported without a fair hearing.¹¹

Below, a longtime legal permanent resident recounts his ongoing fight against deportation without representation.

After being detained for over 21 months¹² by immigration authorities in deplorable conditions while fighting my deportation, placed in solitary confinement, forcibly removed from the country, and redetained after my case was reopened, I can personally say that the immigration system I have experienced is a shame and disgrace for people who are caught in it.

The United States has been my home for 20 years. I have only lived here lawfully. When I was a young child, I came to the United States as a lawful permanent resident with my family. I graduated high school with honors. My commitment to this nation and its values runs deep. I am a US war veteran. I fought and sacrificed for this country in Iraq during Operation Enduring Freedom and Operation Iraqi Freedom.

My troubles began years ago after I made some wrong decisions in my life, and I was convicted for possessing with intent to distribute a small amount of cocaine and possessing

9 *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).

10 8 U.S.C.A. §§ 1229a(b)(4)(A).

11 *Bridges v. Wixon*, 326 U.S. 135, 154 (1945), recognizing that deportation "visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom" and cautioning that "care must be exercised lest the procedure by which he is deprived of that liberty not meet the essential standards of fairness."

12 This is an account written in collaboration with a *pro se* individual who is a longtime lawful permanent resident of the United States. His name is not disclosed for confidentiality purposes, as his legal case is ongoing.

The Human Cost of IIRIRA

a firearm. ICE placed me in removal proceedings and told me that I was in mandatory detention without eligibility for bond. I did not have the option to both fight my deportation and enjoy my right to liberty.

Unable to work while detained, I had no money to hire a private attorney. The immigration judge gave me a list of organizations that supposedly provided legal representation at low or no cost for indigent respondents like me. I called every single organization listed, desperate to find a lawyer to fight my case. Not a single one was able to help me. Most of them did not answer my calls. For those who answered, none of them would take my case *pro bono*. The list was useless. Because of my extensive efforts to access a *pro bono* lawyer from detention, my immigration case and my detention were prolonged for over a year. I had no option but to fight my case by myself while detained, against a trained government attorney. Compared to many detainees I was fortunate, because I speak English and had some education from finishing high school. But I lacked any legal training or knowledge of US immigration laws.

The very few materials that the immigration detention center in Farmville, Virginia provided for people forced to represent themselves were outdated. Access to state law materials are essential to mount any defense against deportation triggered by a conviction, and most detainees at my detention center were being deported because of a Virginia conviction and would have benefitted from access to Virginia state legal materials. However, the detention center law library did not have a single state law book or statute. I felt helpless against the ICE attorney, who could cite the latest case law to support the argument to deport me. There was almost no point in defending myself. I was at a complete disadvantage.

The law told me I was not in detention to be punished. But I was forced to live in the most intolerable conditions imaginable. The food was disgusting and there was never enough, forcing us to go hungry and spend any money we had in our detainee accounts to buy products from the commissary store. Phone calls to our family members were insanely expensive — we were charged a dollar per minute to call outside the center's area code.

Once, along with other detainees, I refused to eat in protest of the deplorable conditions. As a result of my peaceful protest I was taken to a holding cell where I was kept for days without a shower. Then I was placed into solitary confinement for 30 days for “inciting a demonstration.” I did not deserve those horrid days in solitary.

At one point I was transferred to Rappahannock County Jail, a facility with even crueller conditions. The staff treated us like animals. We faced lockdowns for at least 20 hours daily. During lockdown I had no ability to leave the small cell I shared with another detainee. The cell had a toilet inside, and during lockdown we were forced to go without showers and eat our meals in the same place we went to the bathroom. I truly believe the food was not meant for human consumption. If we complained about the conditions, we faced punishment of lockdown for 72 hours. When I tried to communicate with my deportation officer, the facility put me on suicide watch, where I was stripped naked before being forced to wear heavy, confining clothes, then abandoned to the living hell of a small, bare cell with no toilet, sink, or bed. There was nothing inside it but a hole in one corner where I was supposed to go to the bathroom. There was no way to flush or wash my hands, though I had to eat with my hands because they gave me no utensils. I had to sleep like a dog on the concrete floor.

I was not a human being. No human being in modern civilization is meant to endure these conditions. Certainly not in the United States of America, whose freedom I had proudly fought for.

I lost my case. The judge failed to correctly apply the complex and fast-evolving criminal immigration law, which changes by the day in higher courts. I appealed to the Board of Immigration Appeals (BIA), knowing the decision was legally wrong, and lost again. I filed a motion to reconsider, but while it was pending the government deported me to a place where I knew no one.

After being exiled, I learned that the Board had reconsidered and sent my case back to the immigration judge for further analysis. Desperate to attend my hearing to fight for my rights, I attempted to reenter at the border checkpoint seven times and explain my situation to officials, though I knew doing so would mean being detained again upon entry. On the seventh attempt, a fellow US Army veteran working for US Border Patrol agreed to let me in to be detained and continue fighting my case.

For months I stayed detained again, struggling to navigate the complex area of criminal immigration law without access to counsel or legal resources. Throughout this entire time, I remained separated from my family. Finally, I was able to get bond to be released from detention.

To this day, I continue to fight my case *pro se*, hoping for the opportunity to have the law applied fairly. Refusing to give up, I have submitted numerous briefs to the immigration court explaining how the law does not permit my deportation. At any moment the courts can order me deported again. Each day, when I feel the tightness of the ankle bracelet that ICE has forced me to wear, I am reminded of the grave uncertainty of my future, my liberty, and my ability to remain with my family in the only place I have ever called home.

Most detainees are not as lucky as I have been to get this second chance. Every day, numerous people are deported to places where they face persecution and death. The United States government praises itself on providing a fair and just opportunity for immigrants to defend ourselves against removal. But that system is a sham. Most of us face detention without access to counsel, inhumane detention conditions, and permanent separation from our families and our homes.

Part III: The Nonprofit Immigration Attorney

As the number of detained immigrants has grown exponentially in the past two decades, one of the largest challenges of the detention system has been access to counsel. While accessing legal services is difficult for anyone in detention, immigration advocates nationwide face the added challenge of accessing detained immigrants. Over the past two decades, advocates and attorneys have fought just to access immigration detention centers. The access they have gained has been closely monitored and regulated by ICE, such that the services they can provide are limited.

Currently, some nonprofit legal service organizations have access to some, but not all, immigration detention centers. They are able to conduct know-your-rights presentations

The Human Cost of IIRIRA

inside detention centers, distilling complicated law and procedure into easily communicable, bite-size pieces of information in a matter of minutes for detainees. These nonprofit attorneys and other service providers then help identify immigrants in need of legal representation and, if possible, connect them with *pro bono* attorneys. An immigrant's access to *pro bono* counsel depends on the strength of each local nonprofit organization's efforts to cultivate a network of *pro bono* attorneys, as well as the location of the detention center. While know-your-rights presentations provide a measure of legal access, they stop short of providing representation to detained immigrants in immigration court — the single most important factor affecting an immigrant's chances of winning relief in removal proceedings. Detained immigrants who cannot afford private immigration attorneys are particularly impacted by the lack of access to legal information. Former Attorney General Eric Holder declared in 2010 that immigrant access to attorneys should be recognized as part of an “indigent defense crisis” and, in the same breath, hailed the provision of general legal information as “a great success story” (Holder 2010) .

Immigrants' rights advocates are torn about the limited access to detention centers for which they have fought for the past two decades. Know-your-rights presentations may be the only form of legal access for tens of thousands of immigrants, especially those in remote detention facilities. Nonprofit attorneys who provide this service know that such well-intentioned efforts usually do not lead to *pro bono* representation, may actually encourage immigrants to accept deportation if their case is winnable but difficult, and may impede the growing movement for universal representation in immigration court by serving as a stopgap of due process that legitimizes a broken system.

Below, a nonprofit attorney describes the struggle and challenge of providing legal services to detained immigrants.

*The Visit*¹³

The heavy metal door slams shut behind me and I am trapped, automatic doors surrounding me on either side. I wait patiently in full view of the security camera, hoping to hear the telltale click and buzz that will allow us to push our way out of this claustrophobic hallway. I follow the correctional officer down the hall to the first block. A ring of theatrically oversized jail keys jangles at his hip. It is already hot and humid this morning and the temperature will soar to well over 100 degrees this afternoon in the jail. The administrative offices are cool, but I'm told that air conditioning is just not an option in the cells — it would cost too much.

An automated door of metal bars slides open to let me into Block 1. In front of me are two levels of cells, each cell guarded by its own metal door. To my right, a row of metal bars leads me into the day room: a small TV in one corner and four metal picnic benches bolted down the middle. Massive, industrial-size fans futilely blow hot air, adding to the noise and frustration of the 20 men in front of me.

13 Saba Ahmed is a staff attorney with a nonprofit organization that provides limited legal services on a *pro bono* basis to detained immigrants.

I launch into my rehearsed introduction: *I'm an immigration attorney but I'm not here to represent you. I'm only here to provide information about immigration law and the deportation process and orient you to your case.* Rapt attention. *You are here because the government is trying to deport you. Sometimes there are ways to fight against a deportation. If you do not have an attorney, we can speak with you to see if you qualify for a legal defense against deportation.* I look down at my list of four names of new detainees that ICE gave us earlier this week, then up at all the men in front of me. Per usual, our information is incomplete and our attempts to plan out the precious time we have in each block are thwarted. I spend a few minutes organizing the men into two groups — those we've spoken with before and those who have not yet heard my know-your-rights presentation. Our group of four — one attorney and some volunteer law students — springs into action, taking people aside individually to deliver pamphlets simplifying complex immigration laws.

I begin the know-your-rights presentation. *This jail, despite what it looks like and feels like, is an immigration detention center; it is not a criminal jail.* Scoffs, disbelief, incomprehension. *Criminal convictions may affect a person's case in many ways: maybe they're not eligible for bond, maybe the judge will set a bond unattainably high, maybe a person won't be eligible for certain defenses, maybe the conviction is so serious that there's only a small chance that a person will actually win a defense against their deportation.* Hope drains and attention begins to wander. I'm careful to always use the third-person "they" or "a person" and not the second-person "you" because this is not legal advice; it's merely a general orientation. By the time I've finished explaining requirements for the limited defenses against deportation, few people are hopeful, but they still want to speak with an attorney who can explain the details of their case.

Each member of our team has five to 10 minutes to speak with a detained immigrant who doesn't already have an attorney. We want to see as many people as we can in the limited time we're allowed today. I speed through our intake form, knowing I must be thorough because it may be weeks before I have a chance to speak with a person again and a single missing fact could affect their eligibility for relief. I run through biographical info, how the person entered the United States, past arrests or convictions, family members and community in the United States, and if and why a person is afraid to go back to their country. I am always impressed and sometimes overwhelmed by the level of faith each person puts in me, speaking candidly of past persecution and harm in their home country or criminal convictions in the United States. I'm not sure I could muster the same faith or courage to bare such things to a stranger in a few minutes.

Having spoken with hundreds of detained immigrants and honed my five-minute intake skills, I am adept at cutting people off if they start describing horrific details of their persecution (I don't need to know how it happened, only that it happened) or that their children at home are crying and asking for them (because their children likely won't help them qualify for a defense against deportation). I've developed a callous conscience over the past two years. On the one hand, I am constrained by the minutes we have in each block; on the other hand, I am relieved that I don't have the time to listen because I don't know if I can bear any more painful stories.

We trudge from block to block in the jail, repeating this performance five or more times through the day. We take a 20-minute lunch and push on. Just one more block to go —

The Human Cost of IIRIRA

we've saved the smallest for last. We walk in expecting to see the eight people on our list. The officer tells me that there are 26 more immigrants who arrived at the jail a few days earlier, but they are not on our list and we can't meet them because there's not enough time. In a desperate attempt to provide some form of legal access, I shout down the halls at the closed metal doors: *We are immigration attorneys! We don't have time to talk to you today, but give us a call so we can talk about your case! I'm leaving papers with our phone number!* I hand over legal guides and information to the officer but know this is a shot in the dark. The free legal hotline that connects immigrant detainees to our office is complicated to dial and I know that many won't be able to reach us. Most of them will be gone by the time we visit again next month.

Followup

Out through the loud metal doors and into the sunshine. We breathe a collective sigh of relief and climb into the car, ready for the three-hour drive home. On a good day, the visit and drive takes about 14 hours. Our volunteers fall asleep in the back seat, exhausted by the pace of the visit. I am energized, the adrenaline rush that started at 5:00 am and kept me going through the day will last a few more hours — I'll crash when I get home. Next week, we'll be off to another county jail *cum* immigration detention center and another one the week after that. For now, there's no sense of accomplishment, only exhaustion. I'm mentally running through the people I met today — who had a strong case? How many days do I have to follow up? Will it be possible to find a *pro bono* attorney?

The next day we begin the breakdown of our jail visit. We meet and review every person's options under immigration law. We sort through the cases one by one, debating each other and debating our consciences on how to proceed with each case. The lucky ones are put on a fast track to find a *pro bono* attorney, a process that generally takes several weeks. The unlucky ones — the majority of those we review — are closed with a message: *We're sorry, we see no viable legal relief in your case. You are welcome to consult with another attorney.* In between, there are the cases which require meticulous fact-gathering to assess if there is a chance to fight deportation. We spend the next few days calling family members, digging into the facts of a criminal conviction, and gathering evidence. Our reviews and follow-ups are always completed with a sense of urgency as it's impossible to ignore the looming risk of deportation. This process is made more difficult by lack of access to the detainees. In many cases, we encounter people after they have been detained for weeks or have had several court hearings, too late in the process to stop or slow down a deportation.

In between our jail visits, detained immigrants are frustrated in detention and are seeking a way to get out. They'll ask for a bond and, when they are denied or can't pay the amount set, they'll ask for a deportation. It's heartbreaking to go back to jail after following up on a case and see someone with a deportation order because they just could not bear any more detention.

Fallout

The pace of the jail visit cycles hasn't allowed me much time for reflection on my role in the detention-deportation pipeline. I've heard nonprofit attorneys who visit detention centers

described as the public defenders of the immigration system because we are the last line of defense for indigent immigrants facing deportation. But this characterization is inaccurate because public defenders have far more access to their clients and, more importantly, the ability to represent them in court. In contrast, I have very limited access to immigrant detainees. Our access is always carefully negotiated with DHS to fit the agency's limited conception of legal access and due process for immigrants. At any time, DHS can limit the length or number of our visits to jail, restrict telecommunication access, or refuse to let us know who or how many people are being detained — all of which exacerbate an already challenging job.

Then there is the moral quandary I grapple with. There is a growing movement for universal representation of indigent immigrant adults and children. I can't help but think that the limited and general legal services are a band-aid put on this great need — a measure of legal access that stops short of actual legal representation, the one thing that actually makes a difference in an immigrant's chance of winning their case. Instead, I add efficiency to the clogged immigration courts. This means that *pro se* detainees may get a bond or win their case, but more likely they accept a deportation or ask for voluntary departure, making bed space for the next detained immigrant and opening up a slot for a hearing on the immigration judge's detained docket. Most days I feel like a glorified case manager, not a zealous advocate as lawyers should be, but a prop for due process, moving people through the pipeline. If I see a case that's a stretch — maybe there is a legal argument to make that this crime does not make a person deportable, or maybe the good and bad equities are on balance — I can't take on the case and fight. The most I can do is tell the person that if they want a fighting chance, they need to pay \$5,000, \$10,000, or more, for an attorney willing to make creative legal arguments. What kind of legal access is that?

There is also the emotional fallout of the job. Completing a jail visit means receiving calls from desperate immigrant detainees and desperate families. There's a relief I feel when someone's family scrapes together the thousands of dollars for a private attorney, or when someone is no longer detained. Whether they're out on a bond or they were deported, the weight of responsibility is lifted; that's one less person for me to track. I am worn down with telling people over and over that there is “no relief” for them, that there is just no room for them in our laws or in our country — it doesn't matter that they fear death in the most violent country in the world; it doesn't matter that they have young children here. There is just no way to fight their deportation. I absorb their anger with the immigration system and their grief at losing their family — after all, who else can they talk to; who else will listen to their story?

All of this, over and over, hundreds of “cases,” hundreds of lives, leads to a slow burnout. Our will and desire to help detained immigrants can only take us so far, no matter how young, idealistic, and optimistic we start out. The unpredictable case load, the early morning visits, the late evenings, the effects on our partners and families — all of it weighs on me. This job is a constant effort to strike the right balance between hope, despair, and the motivation to go on.

Part IV: The Immigration Judge

There is widespread consensus that immigration courts are overwhelmed with immense caseloads, inadequate staffing, and lengthy backlogs (Arnold & Porter 2010). Non-detained immigrants in removal proceedings often wait two to three years to have their cases adjudicated. Cases on the detained docket move much faster. Despite the considerable time it takes to access counsel, determine eligibility for defenses to deportation, and gather evidence, the average life of a *pro se* detained immigrant's case totals a mere 23 days (Eagly and Shafer 2015, 63).

In addition to facing institutional pressure to quickly move cases while immigrants are detained at government expense, judges are overburdened with the number of detained cases that must be efficiently adjudicated (Lustig et al. 2008). In 2015, immigration judges adjudicated and completed 51,005 detained cases, constituting 28 percent of all immigration cases completed that year (EOIR 2016, figure 11). Judges have very little face time with immigrants in their courtroom, and about half the time spent with *pro se* detainees involves requests for continuances to seek counsel (Eagly and Shafer 2015, 61). Furthermore, as administrative law judges, immigration judges have obligations to the respondents who appear *pro se* and are often required to step into the role of counsel in order to fully develop the record through interrogating, examining, and cross-examining an immigrant and any witnesses.”¹⁴

Below, a former immigration judge provides a snapshot of a few minutes on the detained docket.

*Prelude*¹⁵

Wednesday afternoon, detained master calendar. Feeling love and dread. Love: Fast-paced, meaningful, live audience, prepared attorneys, challenging legal questions, teamwork, mediation, problem solving, saving lives, teaching, performing, drama, positive messages, mentoring, full range of life and legal skills in use and on display. Dread: Hopeless cases, sobbing families, watching goodbyes, “not-quite-ready-for-primetime” (“NQRFPPT”) attorneys, bad law, missing files, missing detainees, lousy televideo picture of respondent, equipment failures, claustrophobic courtroom, clogged dockets, imprisoned by the system, due process on the run, stress.

Pregame Warm-up

“How many today, Madam Clerk?”

14 Immigration and Nationality Act (INA) § 240(b)(1).

15 This account is written by Hon. Paul Wickham Schmidt, who served as the chairman of the Board of Immigration Appeals before being appointed to the Arlington Immigration Court in May 2003, where he served as an immigration judge for 13 years before recently retiring from that position. While the names he has provided in this account are entirely fictional, the situations he describes are based on his own wealth of experience adjudicating cases in immigration court.

“Fourteen, five bonded, two continued.”

“Thanks, Madam Clerk. Let’s make it happen!”

Showtime.

Politeness, patience, kindness. Listen.

“Please rise, the United States Immigration Court at Arlington Virginia, is now in session, Honorable Paul Wickham Schmidt, presiding.”

Jam-packed with humanity. Live. Uncomfortably hot. Bandbox courtroom. Ratcheting tensions. America’s most important, most forgotten courts. Lots of moving pieces. Put folks at ease. Performance begins.

The Damned

“We’re on the record. This is Judge Paul Wickham Schmidt at the United States Immigration Court in Arlington, Virginia; we’re on a televideo hookup with the DHS Farmville Detention Center, the date is . . . , and this is a master calendar removal hearing in the case of Ricardo Caceres, file number A123 456 789. Counsel, please identify yourselves for the record.”

“Bonnie Baker for the respondent, Mr. Caceres.”

“April Able for the DHS.”

“What are we here for Ms. Baker?”

“Your Honor, we’re seeking a reasonable bond for my client, who has been in the United States for more than two decades. He’s a family man, the sole support of his wife and four US citizen children, who are sitting right behind me. He’s a skilled carpenter with a secure job. He pays his taxes. He’s a deacon at his church. His employer is here this afternoon and is willing to post bond for him. The respondent’s wife is out of work, and the family is on the verge of being evicted from their apartment. The oldest son and daughter are having trouble in school ever since their father was detained. The baby has developed asthma and cries all night.”

“I assume he’s in detention for a reason, Ms. Baker. What is it?”

“Well, Your Honor, he had a very unfortunate incident with one of his co-workers that resulted in his one and only brush with the law. I think he probably got some questionable legal advice, too.”

“What’s the conviction?”

“Aggravated assault with a deadly weapon.”

“Sentence?”

“18 months, with all but three months suspended, Your Honor.”

The Human Cost of IIRIRA

“Hmmm. Doesn’t sound very promising. What’s your take, Ms. Able?”

“He’s an aggravated felon, Your Honor, under the BIA and Fourth Circuit case law. Therefore, he’s a mandatory detainee. May I serve the records of conviction?”

“Yes, thank you Ms. Able. Isn’t Ms. Able right, Ms. Baker? He’s mandatory detained under the applicable law, isn’t he?”

“Well, Your Honor, technically that might be right. But we’re asking you to exercise your humanitarian discretion in this extraordinary situation.”

“As you know, Ms. Baker, I’m not a court of equity. The law gives me no discretion here. So, based on what you’ve presented, no bond. What’s next? Are you admitting and conceding removability and filing for relief?”

“The family wanted me to ask for bond, Your Honor.”

“You did, Ms. Baker. What’s the next step?”

“Well, the respondent has instructed me that if you didn’t grant a bond, he just wants a final order to go back to Mexico. He’s been in detention for some time now, and he just can’t wait any longer.”

“You’re sure that’s what Mr. Caceres wants to do?”

“Yes, Your Honor.”

“Mr. Caceres, this is Judge Schmidt, can you hear me?”

“Yes.”

“Because of the crime you committed, the law doesn’t permit me to set a bond for you. Your lawyer, Ms. Baker, tells me that you have decided to give up your rights to a full hearing and be removed to Mexico. Is that correct?”

“Yes, Your Honor. I can’t stand any more detention.”

“You understand that this is a final decision, and that once I enter the order you will be removed as soon as DHS can make arrangements.”

“Yes, judge, I understand.”

“And, you’ve discussed this with your family, sir?”

“I just want to go — no more detention. Can I go tomorrow?”

“Probably not. But the assistant chief counsel and DHS officer in court are noting that you want to go as soon as can be arranged.”

“Your Honor, may his wife and children come up and see him for a moment?”

“Yes, of course, Ms. Baker. Please come on up folks.”

“Your Honor, the respondent’s wife would like to make a statement to the court.”

“I don’t think that’s prudent, Ms. Baker. She’s already hysterical, and there is nothing I can do about the situation, as I’m sure you’ll explain to her. We have lots of other people waiting to see me this afternoon.”

“Understood. Thanks, Your Honor.”

“You’re welcome, Ms. Baker. You did the best you could. Take care folks. I’m sorry you’re in this situation. Mr. Caceres, good luck to you in Mexico. Please stay out of trouble. The clerk will issue the final order. Who’s next, Madam Clerk?”

The “Not-Quite-Ready-For-Prime-Time” (“NQRPT”) Lawyer

“Mr. Queless, we’re here for your filing of the respondent’s asylum application.”

“Um, Your Honor, I’m sorry I don’t have it with me. I didn’t have a chance to get to it.”

“Why’s that, Mr. Queless? Your client has been in detention for some time now, and I gave you a generous continuance to get this done.”

“That’s very true, Your Honor, but the power was off at our office for a day, and my son crashed his car and I had to take care of the insurance and the repairs.”

“All right, come back in three weeks with your filing, without fail.”

“Can I come back next week, Your Honor? My client has been in detention a long time.”

“I know that, counsel. That’s why I wanted you to file *today*, so we could set an individual date. I’m already overbooked for next week, and I can’t justify putting you in front of others who are prepared.”

“Ah, could we just set an individual date now, Your Honor, and I’ll promise to file within a week?”

“That sounds like a *really* bad idea, Mr. Queless, in light of actual performance to date. I want to see the completed filing *before* I assign the individual date. That’s how we do things around here. You’ve been around long enough to know that.”

“Excuse me, Your Honor, but may I be heard?”

“Yes, you may, Ms. Able.”

“With due respect, Your Honor, at the last master calendar you said *this* would be the *final* continuance. This detained case has been pending for months, and you have given counsel a more than reasonable opportunity to file for relief. At this point, the DHS must request that you deny any further continuance and move that you enter an order of removal.”

“Well, I sympathize with your position, Ms. Able. I did say this would be the last continuance, and I’m as frustrated as you are. But I note that the respondent is from a country where we routinely grant asylum, often by agreement or with no objection from your office. Therefore, I feel that we must get to the merits of his claim. Let’s do this. Mr. Queless, I’m going to give you an ‘incentive’ to get this filed. If the I-589 is not complete

The Human Cost of IIRIRA

and ready to file at the next hearing — no more excuses, no more ‘dog ate my homework’ — I’m going to agree with Ms. Able, grant her motion, and enter an order of removal against your client. Do you understand?”

“Yes, Your Honor. I’ll have it here at the master in three weeks.”

“Anything further from either counsel?”

“Nothing from the DHS, Your Honor.”

“Nothing from the respondent, Your Honor.”

“Hearing is continued.”

The Skeptic

“How are you this afternoon, Mr. Garcia?”

“Okay.”

“Spanish your best language?”

“Yes.”

“Is this your first appearance before me?”

“Yes.”

“You’re going to look for a lawyer before we proceed with your case?”

“Do I need a lawyer, judge?”

“Depends on what you want, Mr. Garcia. I can send you back to Guatemala at government expense or give you voluntary departure if you wish to pay your own way and avoid having a formal removal order on your record. Is that what you want?”

“Oh, no, judge. I don’t want to go back.”

“Then, you need a lawyer, sir. Officer, please give Mr. Garcia the legal services list. Mr. Garcia, this is a list of organizations in Virginia that might be willing to represent you at little or no charge if you can’t afford a lawyer. You should also check with family and friends to see if they can help you find a free or low-cost lawyer to take your immigration case. I’ll set your case over for three weeks to give you a chance to look.”

“Can I come back next week?”

“You won’t be able to find a lawyer by then, sir. Take the three weeks. If you don’t have a lawyer by then, we’ll go forward without one.”

“Okay, Your Honor.”

“Good luck in finding a lawyer, Mr. Garcia. The clerk will issue the notices. Who’s next, Madam Clerk?”

Postlude

Out of court. Satisfied. Tired. Drained — like a Steph Curry three-pointer. Find my colleagues. Fresh air. Walk in the park. Talk sports, politics, weather. Visit Starbucks. Final refill. Recharge batteries. Master tomorrow morning. Fifty non-detained. Too many. The beat goes on. Walking free. Not an “alien.” Glad. Lucky. Thankful.

Part V: The Family Member

Beyond individual immigrants, IIRIRA has a rippling effect on the families of immigrants. The detention and deportation system treats the children, spouses, parents, brothers, and sisters of immigrants as a mere afterthought, collateral damage to the mission of enforcing immigration laws. But the impact of losing a loved one through this system is harshly felt by family members and its social effects reverberate throughout the larger community.

The heaviest impact is borne by the children of immigrant parents, who are primarily apprehended through the criminal justice system. In addition to the many US citizen children of lawful permanent residents facing deportation, an estimated 4.5 million US citizen children have an undocumented parent at risk of detention and deportation (Koball et al. 2015, 1). These children are more likely to drop out of school, rely on welfare, and require foster care if a parent is deported. Children who are separated from one or both parents due to deportation face emotional devastation and an increased risk of dropping out of school or ending up within the criminal justice system, which have lifelong implications for earning potential and welfare costs (Vasquez 2011, 669-670; New York Immigrant Family Unity Project 2013, 12). For indigent families, particularly those with young children, deportation forces reliance on public welfare benefits.

For family members trying to support loved ones in immigration detention, the task is bewildering, especially for indigent families whose situation is exacerbated by the detention of the family’s primary breadwinner. Many families exhaust their limited resources hiring private criminal defense attorneys and then cannot pay for immigration attorneys. Phone calls from remote, rural immigration detention centers are exorbitantly expensive, preventing basic communication between detainees and their families. For prolonged periods, families are faced with the imminent threat of being torn apart. This is the most heartbreaking consequence of IIRIRA.

Below, an immigrant’s wife provides her experience with a loved one detained thousands of miles away.

Omar and I¹⁶ met over a year ago, when I was visiting Washington, DC for work. Omar was working at a store I happened to wander into, and we instantly connected. From first sight, our chemistry was electrifying, and after spending more time together we learned we had so much in common. Omar told me he had recently moved to the United States after

16 This account was written by the US citizen fiancée (now wife) of an immigrant detainee who chose not to reveal her name or that of her spouse, as his immigration case is ongoing. Throughout the account pseudonyms have been used to protect their identities.

The Human Cost of IIRIRA

working in Dubai, though he was originally from Morocco. He wanted to stay in the United States permanently for education and career opportunities, and was living with his brother, a lawful permanent resident, in Washington, DC. He was thrilled to be in America, with all of its opportunities, and wanted to go to school for engineering. Over the next several months our bond grew stronger and I was amazed at how quickly Omar adapted to US culture. He made friends everywhere he went — he just had that effect on people. He was so kind and smart, it wasn't long before I fell in love with him. At some point, we started to discuss our future together and getting married one day. We knew it wouldn't be easy. We come from completely different cultural identities — he is a Moroccan Muslim and I am African American, raised in a Christian household. We knew it might be a challenge for our families to believe in our bond, but we had no doubt that if they saw our love, they would get on board.

Many months later, Omar was arrested at his job. This horrible news was not delivered to me until a few weeks after it happened. I was in Los Angeles, at work, when I got the call one day from Omar's brother. I hadn't heard from Omar in a couple of weeks, which was unlike him. His brother kept me in the dark. He said Omar would call me later that night and told me to make sure I was available to answer. I was furious Omar would wait this long to update me. I was also incredibly worried about him. I waited and waited for his call — so long, in fact, that I fell asleep and missed his first call, which went to voicemail. Thankfully he quickly called again. My anger dissipated as we spoke, replaced by desperation. He told me he was in an immigration detention center in Farmville, Virginia, after being arrested two weeks ago under suspicion for using a credit card that wasn't his. He was innocent and planned to fight the charge, a case of mistaken identity. But the moment he paid bail and was released from county jail, two immigration officials were waiting for him in the waiting room. They rearrested him and took him to immigration detention because he had overstayed his entry visa. Now, he was waiting in detention until he could see the immigration judge. They were trying to deport him. His brother was looking for an immigration lawyer to fight his case.

I was full of questions, trying to make sense of the situation and not sure what it meant. Omar didn't know what it meant himself, but he was calm and loving, trying to stay strong and comfort me. He promised that even if they deported him, he was determined for us to stay together — he would marry me in another country if he couldn't come back to this one. We discussed our faith in God and in each other. I knew that one way or another, I would marry this man. The phone call dropped and cut our time together frustratingly short.

I had so many emotions, but I wasn't worried anymore — I knew Omar would get through this and we would be together, somehow. Omar sounded so confident that he would soon be released from immigration detention and that the false criminal charge against him would be dropped. In hindsight, it is clear that we were both so very naïve about the system he had become trapped in.

Omar's brother hired an immigration attorney to represent him in a bond hearing. None of us was prepared for what happened at that first immigration hearing — Omar still gets upset when he talks about it. The immigration attorney that his brother hired to represent Omar filed a bond motion, and then the government attorney suddenly claimed that Omar had sexually assaulted someone. Omar was shocked. He had been charged with credit card

theft, which he was sure was a case of mistaken identity. At the time of his arrest, the police had asked him about a sexual assault case and he even took a DNA test. The test came back negative, which cleared him of any guilt of sexual assault, and he was never charged for it. Omar knew he could prove his innocence for credit card theft in criminal court once he was released from immigration detention. But the ICE attorney only told the judge Omar had been investigated for sexual assault, not that he was innocent based on the result of the investigation. Even more shocking was that the attorney representing Omar did not say a word in his defense. The judge denied bond, saying that ICE's allegations showed that Omar was dangerous to the community.

Omar was stuck in immigration detention. We were desperate — his brother was paying for a defense attorney to represent Omar on the criminal charge and didn't have any money left for an immigration attorney now that the bond had failed. I was living with my parents, and looking for a new job, so I could not afford to pay for a lawyer. Weeks and then months went by, and Omar remained in detention. Phone calls were hugely expensive. I couldn't call him, he could only call me. Days would pass and I wouldn't hear from him because there was no money on his jail account. Each time we were able to talk on the phone, it was a blessing. We tried to make the most of those phone calls; it was our only time together. We would always comfort each other, but as time stretched on, we got less hopeful. It was depressing for Omar, being in detention — not only the lack of freedom, but the endless waiting and the horrible uncertainty. He was especially upset about being accused of a crime he never committed, and then being denied any chance to prove his innocence. He was sure he would be deported. Regardless, we still had faith. I was prepared to do whatever was necessary to stay together, even if that meant moving to Morocco.

We didn't know how to move forward or the steps to take for Omar's immigration case now that bond had been denied, or what was even happening with his criminal case. Worst yet, we had no idea where to look for concrete information. I started to do some research online and found various organizations focused on relief for detained immigrants. I contacted an organization based in Washington, DC and explained Omar's situation. One week later, I got a call from an immigration attorney from that organization who was familiar with Omar's case. She explained that Omar's criminal case could not go forward without him physically present at the court, and neither ICE nor the criminal prosecutor would take responsibility for transferring Omar to criminal court. She explained that if Omar was married to a US citizen, he could file a family petition to remain in the United States.

Omar and I wanted to get married, but on our own terms — not to keep him from being deported, and not while he was in detention for a crime he didn't commit. When the attorney explained the complicated and costly process for getting married in detention, it became clear I couldn't do it even if we wanted to — I was dependent on my parents, I didn't have the support or resources to travel to Virginia, or pay the thousands of dollars in fees to apply for Omar to get status. I had to be honest — the only way we could get married on such short notice was if Omar got released on an immigration bond, moved to Kansas City, met my parents, and got their blessing. I felt like the chance of me climbing Mount Everest was greater than us getting married anytime soon.

Thankfully, that immigration attorney took on Omar's bond case *pro bono*, though she warned us that chances were slim for Omar to be granted bond. By that point, I had received

The Human Cost of IIRIRA

a position as a literacy tutor for a nonprofit and had funds to travel. I visited Omar at the detention center in Farmville, Virginia. I also met other women and families who were visiting loved ones. We shared the same feelings: sad but stubbornly optimistic. It was the first time in months Omar and I had seen each other. All weekend, we discussed our life and future together.

A few days later, Omar's immigration attorney was able to prove to the immigration judge that Omar had never been charged with sexual assault. She explained that he deserved a chance to prove his innocence on the credit card theft charge in criminal court. When the judge received all the evidence, he changed his mind. Finally, after six months in immigration detention, Omar was granted release on bond. Thank God.

Today Omar and I are married and living together in Kansas City. We have a one-bedroom apartment and are in the process of filing for his adjustment of status. Meanwhile, his criminal case keeps getting continued, though we're hopeful it will soon be dismissed — Omar will continue to fight to clear his name and I will continue to support him. Every day is still a challenge, but we are so blessed. Every night is also a reminder that, unlike the majority of people whose partners have been detained, I can come home to the man I love. We cherish every moment and realize how quickly it can be taken away. There is so much in the system that we cannot control, but we refuse for it to control our relationship or make us feel helpless. While we may not have faith in the system, we have faith in God, and in each other. Inshallah, love will prevail.

Conclusion

These five vignettes provide a snapshot of the current state of the immigration detention and deportation system 20 years post-IIRIRA. IIRIRA laid the legal framework for the easy disposal of immigrants who are primarily indigent and people of color. In providing the federal government broad leeway in criminalizing and detaining immigrants, IIRIRA has cast its net over all immigrants, encouraging their public characterization as objectionable and disposable.

The enforcement of these laws has entrenched the myth of the “criminal alien” who is deserving only of societal ire and deportation. On November 20, 2014, the criminalization of immigrants that IIRIRA had woven into the fabric of federal law over the years pushed its way forcefully into the public consciousness with three words from President Barack Obama: “Felons, not families” (Obama 2014). Obama coined this phrase when he issued an executive order with the intention of simultaneously appeasing conservatives lobbying for more deportations and advocates lobbying for limits on deportations. This concept of “felons, not families” cemented IIRIRA's false delineation of immigrants as either criminal convicts or family members, ignoring the obvious reality that almost all individuals have families, including those who have been convicted in criminal court and were born outside the United States.

The growing category of individuals legally defined as criminal aliens under IIRIRA, and the subsequent psychosocial dehumanization of immigrants as disposable, threatening, and categorically excludable, has led to where we are in America today. What were once

legally fictionalized constructs have created new and frightening political realities. Taking IIRIRA from law to the next level of intentional, overt discrimination, President Trump ran a presidential campaign centered on fear of the criminal alien caricature, a crude and bigoted generalization that quickly caught on with millions of Americans. In his speech announcing his campaign, Trump accused Mexican immigrants of embodying the criminal alien: “They’re bringing drugs. They’re bringing crime. They’re rapists. And some, I assume, are good people” (Lee 2015). After winning the election, Trump echoed the message: “What we are going to do is get the people that are criminal and have criminal records, gang members, drug dealers, where a lot of these people, probably 2 million — it could be even 3 million — we are getting them out of our country or we are going to incarcerate” (CBS 2016). Harping on the fear of the depraved “other” that IIRIRA set out to exclude and expel helped Trump to rise to power and fortified the fear of this specter.

Perhaps IIRIRA’s greatest damage has been shifting blame to the vulnerable population that it detains and deports, absolving the deporters of any responsibility. In the eyes of the “lawful,” criminal immigrants lose any claim to membership in society, deserve only punishment, and are owed no empathy for permanent separation from their families. The Trump administration, so outspokenly driven to dehumanize millions of immigrants, is the culmination of this 20-year trajectory. Under IIRIRA, the foundation was built, and now the ugly underbelly has been exposed. These are the stories of the human cost of IIRIRA that we ignore at our own social and moral peril.

REFERENCES

- Arnold & Porter LLP. 2010. “Reforming the Immigration Systems: Proposals to Promote Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Cases.” Washington, DC: American Bar Association, Commission on Immigration. http://www.americanbar.org/content/dam/aba/publications/commission_on_immigration/coi_complete_full_report.authcheckdam.pdf.
- Barrett, Devlin. 2016. “Record Immigrant Numbers Force Homeland Security to Search for New Jail Space.” *Wall Street Journal*, October 21. <http://www.wsj.com/articles/record-immigrant-numbers-force-homeland-security-to-search-for-new-jail-space-1477042202>.
- CBS. 2016. “Interview with Donald Trump.” *60 Minutes*, November 13. <http://www.cbsnews.com/news/60-minutes-donald-trump-family-melania-ivanka-lesley-stahl/>.
- Eagly, Ingrid and Steven Shafer. 2015. “A National Study of Access to Counsel in Immigration Court.” *University of Pennsylvania Law Review* 164(1).
- EOIR (US Executive Office for Immigration Review). 2016. “FY 2015 Statistics Yearbook.” Washington, DC: DOJ. <http://www.justice.gov/eoir/page/file/fysb15/download>.
- Global Detention Project. 2016. “United States Immigration Detention Profile.” <https://www.globaldetentionproject.org/immigration-detention-in-the-united-states>.

The Human Cost of IIRIRA

- Holder, Eric. 2010. "Attorney General Eric Holder Addresses the Pro Bono Institute." Speech, Washington, DC, March 19. <https://www.justice.gov/opa/speech/attorney-general-eric-holder-addresses-pro-bono-institute>.
- Koball, Heather, Randy Capps, Krista Perreira, Andrea Campetella, Sarah Hooker, Juan Manuel Pedroza, William Monson, and Sandra Huerta. 2015. "Health and Social Service Needs of US-Citizen Children with Detained or Deported Immigrant Parents." Washington, DC: Urban Institute and Migration Policy Institute. https://cdn.thinkprogress.org/wp-content/uploads/2015/09/21085242/Revised_ImmEnfandChildWellBeing_final.pdf.
- Lee, Michelle Ye Hee. 2015. "Donald Trump's False Comments Connecting Mexican Immigrants and Crime." *Washington Post*, July 8. <https://www.washingtonpost.com/news/fact-checker/wp/2015/07/08/donald-trumps-false-comments-connecting-mexican-immigrants-and-crime/>.
- Lustig, Stuart L, Niranjana Karnik, Kevin Delucchi, Lakshika Tennakoon, Brent Kaul, Dana Leigh Marks, and Denise Slavin. 2008. "Inside the Judges' Chambers: Narrative Responses from the National Association of Immigration Judges on Stress and Burnout Survey." *Georgetown Immigration Law Journal* 23(1): 57-83.
- New York Immigrant Family Unity Project. 2013. "The New York Immigrant Family Unity Project: Good for Families, Good for Employers, and Good for All New Yorkers." http://populardemocracy.org/sites/default/files/immigrant_family_unity_project_print_layout.pdf.
- Obama, Barack. 2014. "Remarks by the President in Address to the Nation on Immigration." Speech, Washington, DC, November 20. <https://www.whitehouse.gov/the-press-office/2014/11/20/remarks-president-address-nation-immigration>.
- Torrey, Philip. 2015. "Rethinking Immigration's Mandatory Detention Regime: Politics, Profit and the Meaning of Custody." *University of Michigan Journal of Law Reform* 48(4): 879-913.
- Vazquez, Yolanda. 2011. "Perpetuating the Marginalization of Latinos: Incorporation of Immigration Law into the Criminal Justice System." *Howard Law Journal* 54(3): 640-74.



Redefining American Families: The Disparate Effects of IIRIRA's Automatic Bars to Reentry and Sponsorship Requirements on Mixed-Citizenship Couples

Jane Lilly López¹

University of California, San Diego

Executive Summary

With passage of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), the goal of discouraging illegal immigration and the legal immigration of the poor triumphed over the longstanding goal of family unity in US immigration policy. This shift resulted in policy changes that prevent some mixed-citizenship families from accessing family reunification benefits for the immigrant relatives of US citizens. Two specific elements of IIRIRA — (1) the three- and 10-year bars to reentry, and (2) the minimum income thresholds for citizen sponsors of immigrants — have created a hierarchy of mixed-citizenship families, enabling some to access all the citizenship benefits of family preservation and reunification, while excluding other, similar families from those same benefits. This article details these two key policy changes imposed by IIRIRA and describes their impact on mixed-citizenship couples seeking family reunification benefits in the United States. Mixed-citizenship couples seeking family reunification benefits do not bear the negative impacts of these two policies evenly. Rather, these policies disproportionately limit specific subgroups of immigrants and citizens from accessing family reunification. Low-income, non-White (particularly Latino), and less-educated American families bear the overwhelming brunt of IIRIRA's narrowing of family reunification benefits. As a result, these policy changes have altered the composition of American society and modified broader notions of American national identity and who truly “belongs.” Most of the disparate impact between mixed-citizenship couples created by the IIRIRA would be corrected by enacting minor policy changes to (1) allow the undocumented spouses of US citizens to adjust their legal status from within the United States, and (2) include the noncitizen spouse's income earning potential toward satisfying minimum income requirements.

¹ This research was supported by the National Science Foundation and the University of California Institute for Mexico and the United States (UC MEXUS).

Introduction

Since the earliest laws regulating immigration into the United States were enacted in the late nineteenth century, preserving family unity and facilitating the reunification of families have been central tenets of immigration legislation (Colon-Navarro 2007; Lee 2013). Historically, this focus on maintaining and restoring family unity enabled American citizens' immigrant spouses (regardless of their legal status) to adjust their status while maintaining residence in the United States. The family reunification precedent also led to provisions facilitating the reunification of US citizens and permanent residents with their immediate family members, regardless of personal income. But in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), the goals of discouraging illegal immigration and the legal immigration of the poor overpowered the longstanding prioritization of family unity. To achieve these goals, the IIRIRA created rules that (a) require citizen sponsors of immigrant relatives to meet a minimum income standard, and (b) mandate deportation and other severe penalties for any immigrants who entered the United States without inspection, regardless of their relationships with US citizens (Gimpel and Edwards 1999; Chacón 2007a; Hagan et al. 2008; Hwang and Parreñas 2010). Two specific elements of IIRIRA — the three- and 10-year bars to reentry and the minimum income thresholds for citizen sponsors of immigrants — have created a hierarchy of mixed-citizenship families, enabling some to access all the citizenship benefits of family preservation and reunification while preventing other families from enjoying those same benefits (Enchautegui & Menjívar 2015).

This article details these two key policy changes imposed by IIRIRA and describes their impact on mixed-citizenship couples seeking family reunification benefits in the US. These couples, living both within and outside the United States — some “winners” and others “losers” — exemplify the real and lasting effects of the law in practice (Abrego 2015). The position of these families along the spectrum of “legal statuses, as created through immigration laws, determine[s their] access to goods and services while also shaping their sense of belonging in US society” (Menjívar et al. 2016, 28). Family reunification benefits enabled some couples to ensure that all family members acquired legal status in the United States. These families have overwhelmingly thrived in the United States, integrating economically, politically, and socially into their communities and the broader national fabric. For many US citizens, as they have seen the promises of their citizenship play out in their families' lives, the experience of sharing US citizenship with their spouses has made them feel “more American” than ever before (López 2017). But other families have not fared so well. Some continue to live in the shadows in the United States, clinging to hope that relief will come before they are detected and deported (Fix and Zimmerman 2001; Chacón 2007b; Krikorian 2007). Others have either chosen or been forced to leave the United States for 10 or more years, with citizen spouses and children suffering exile alongside immigrant relatives deemed unwelcome (DHS 2009; López 2015). And still other families endure long-term separation or dissolve altogether as the stresses, suffering, and pain of deportation and prolonged separation overwhelm family bonds (Dreby 2012).

Mixed-citizenship couples seeking family reunification benefits do not bear the negative impacts of these two policies evenly. Rather, these policies only limit specific subgroups of mixed-citizenship couples from accessing family reunification: (1) those whose noncitizen

spouse crossed the border without inspection at a port of entry,² and (2) those whose citizen spouse has low economic capital.³ This unequal distribution of family reunification benefits has disproportionately impacted non-White (especially Latino), low-income, and less-educated American mixed-citizenship families. These changes reach beyond the lives of mixed-citizenship couples to American society as a whole, reshaping the composition of society and altering broader notions of national identity and “belonging” in American society (Demleitner 2004; Ngai 2004; Hawthorne 2007; Lee 2013).

IIRIRA Bars to Reentry and Minimum Income Thresholds

Bars to Reentry. In the twenty years since the passage of IIRIRA, citizens and noncitizens alike have experienced the drastic and often devastating effects of the IIRIRA’s three- and 10-year bars to reentry imposed upon undocumented immigrants who leave the United States (Lofgren 2005; Lundstrom 2013; Martínez de Castro 2013; Enchautegui and Menjívar 2015). Any individual who has lived without legal authorization in the United States for more than six months but less than one year faces a three-year ban from applying for legal permission to enter the United States; any individual who has lived without legal authorization in the United States for more than one year faces a 10-year ban from applying. The bar is automatically imposed when the individual leaves the physical territory of the United States (Cianciarulo 2015).

While this harsh penalty of IIRIRA seemingly punishes visa overstayers and those who entered the United States without inspection equally — subjecting all to the automatic bars — one subgroup of undocumented immigrants receives disparate treatment under the law: the undocumented spouses of US citizens (Cianciarulo 2015).⁴ Immigration law enacted prior to IIRIRA allows visa-overstaying spouses of US citizens — undocumented immigrants who had previously been admitted to the United States through an official port of entry — to adjust to legal immigrant status from within the United States. The ability to adjust status from within the United States allows the undocumented (visa-overstaying) spouse in these marriages to obtain legal permanent residency without triggering the automatic bars to reentry. Undocumented spouses of US citizens never processed at a US port of entry must return to their countries of origin to complete their adjustment to legal status. Upon leaving the United States to attend the consular interview, the undocumented spouse triggers the automatic bars to reentry and thus becomes ineligible for a visa for the duration of the three- or 10-year period, whether or not she would otherwise qualify for legal entry.⁵ Prior to IIRIRA, this distinction between families may have caused some

2 These undocumented immigrants tend to be lower income and less educated; also, they are almost exclusively immigrants from Mexico and Central America (Henderson 2014; Migration Policy Institute 2016).

3 Low-income workers are disproportionately less educated, female, and non-White (US Census Bureau 2016c).

4 A recent opinion of the Ninth Circuit Court of Appeals confirms that “nonimmigrants” with Temporary Protected Status (TPS) — including those who entered the US without inspection — should be considered legally admitted (not undocumented) for the purposes of adjustment to permanent legal immigration status and can adjust their status from within the United States (*Ramirez v. Brown* No. 14-35633 (9th Cir. 2017)).

5 IIRIRA does allow for couples facing the multiyear bars to reentry to apply for an “extreme hardship waiver,” which waives the bars to reentry for waiver recipients. In order to qualify for a waiver, couples

temporary hardship for those couples required to return to the immigrants' home country to complete the adjustment process, but did not generally impact one group more than the other over the long term. But the automatic bars imposed through IIRIRA have significantly altered the trajectories of these different mixed-citizenship families (Mercer 2008; Kelly, and Dalmia 2011; Cianciarulo 2015). Some families continue to easily adjust to legal status, permanently establish their homes in the United States, and enjoy the rights and privileges of formal membership in society. Others must choose either to maintain their precarious position as undocumented families within the United States or leave the country and likely face a three- or 10-year (or, in some cases, permanent⁶) bar to legal re-entry to the United States.

The profile of undocumented immigrants who overstayed a visa differs significantly from that of undocumented immigrants who crossed the border without inspection. Immigrants seeking tourist, student, or other temporary visas are required to prove “sufficient funds to cover expenses in the United States . . . [permanent] residence [in the home country] . . . and other binding ties that will ensure their departure from the United States at the end of the visit” (Bureau of Consular Affairs 2015, 2; emphasis added). Thus, visa overstayers generally belong to their countries' middle and upper classes and “tend to be better educated and more fluent in English” than undocumented immigrants who entered the United States without inspection (Murray 2013, 1). Visa overstayers are also more likely to be nationals of European, Asian, African, and South American countries (Murray 2013). In contrast, due to geographic proximity and physical access to the US border, undocumented immigrants who entered the country without inspection almost exclusively hail from Mexico and Central America and, at the time of migration, generally did not have the financial and social “binding ties” necessary to qualify for a visa (Warren and Kerwin 2017; Menjívar et al. 2016). These undocumented migrants are also disproportionately male (Baker and Rytina 2013).

The incongruent profiles of these two types of undocumented immigrants, combined with their disparate treatment under the law, results in vastly different outcomes for mixed-citizenship families seeking family preservation and reunification benefits. US citizens who marry immigrants with legal immigrant status or those who overstayed a visa easily access family reunification benefits and the right to legally establish their family within US territory. Citizens who marry immigrants who crossed the border without documentation do not. This discrepancy in the law rewards some citizens for marrying the “right” kind of undocumented immigrant (higher-class, better-educated, non-Latino, female) and punishes others for loving the “wrong” kind of undocumented immigrant (lower-class, less-educated, Latino, male) (Golash-Boza and Hondagneu-Sotelo 2013).

must prove significant hardship for the US citizen spouse and children above and beyond the financial and emotional costs of deportation (Fix and Zimmerman 2001). The Obama Administration implemented a policy to allow couples to apply for the waiver *before* leaving the United States for the consular interview, which has eliminated some of the risk of applying for the waiver (Skrentny and López 2013). But for families whose waiver application is denied, they must either remain undocumented and at risk of deportation within in the United States or leave the United States and wait out the multiyear bar to reentry.

⁶ Undocumented spouses of US citizens who have been convicted of an “aggravated felony,” as defined in the IIRIRA, are often subject to additional penalties to legal reentry and, in some cases, are permanently disqualified from obtaining any legal authorization to enter the United States (Coonan 1998).

Minimum income thresholds. IIRIRA also introduced new minimum income requirements for US citizens seeking to sponsor a spouse for legal permanent residency. These thresholds have placed new limitations on mixed-citizenship families, disproportionately affecting lower educated, female, and disabled citizens — as well as citizens with children — seeking to sponsor a noncitizen spouse for legal immigrant status (Hwang and Parreñas 2010). Before the IIRIRA, citizen spouses were not required to prove a certain level of income in order to successfully sponsor a noncitizen spouse for permanent residency in the United States. The minimum income threshold imposed by IIRIRA — proven income of at least 125 percent of the poverty level⁷ — prevents otherwise qualified citizens with insufficient income from sponsoring a spouse for permanent residency in the United States (Hayes 2001).⁸

This inequity stems primarily from the fact that only the US citizen spouse's income may be considered in meeting the minimum income threshold. Despite the fact that the noncitizen spouse would have permission to work once granted lawful permanent residency, a sponsor must satisfy the minimum income requirement without considering the ability of her spouse, once inside the United States, to contribute to the family's income. A single minimum-wage earner working full time could not meet the minimum income requirement, but a family income composed of two minimum-wage salaries could (ASPE 2016; Center for Poverty Research 2016). This means many citizen sponsors earning minimum wage (who tend to have lower levels of education) could not qualify for family reunification benefits. Furthermore, women are more likely to fall below the required income threshold, given that they only earn 80 cents for every dollar a man earns (US Census Bureau 2016b). Blacks and Latinos are also at a disadvantage, as their median household income falls \$20,000 and \$11,000, respectively, below the national median income (\$56,516), decreasing their odds of satisfying the minimum income threshold (US Census Bureau 2016a). The minimum income requirement also penalizes citizens with disabilities or other health issues that prevent them from working full time. Finally, the minimum income threshold is determined based on family size; citizen sponsors with children from their current or previous marriage must meet a higher income threshold than those without children. US citizens with one or more of these traits who seek to sponsor a spouse for lawful permanent residency face additional barriers to accessing family reunification benefits. Preventing consideration of the noncitizen spouse's earning potential in satisfying the minimum income threshold further exaggerates these inequalities.

While this policy may seem a logical safeguard to ensure that visa recipients will not become “public charges,” it ultimately punishes citizens for having limited financial resources and potentially prevents those citizens from rising out of poverty through the financial support

7 This is a sliding scale based on family size. A sponsor who is single or married with no children would have to meet the income thresholds for a household of two (the citizen sponsor plus the immigrant spouse/fiancé); sponsors with children and/or other dependents must prove sufficient income for a household that includes themselves, all of their dependents, and the immigrant spouse being sponsored.

8 While a third party could step in as financial sponsor of the noncitizen spouse in the case that the citizen's income is insufficient, the third party must be willing to accept legally enforceable financial responsibility for the visa applicant for the duration of her stay within the United States (even if the marriage dissolves). Financial responsibility remains in force until the immigrant (a) becomes a citizen, (b) accrues forty quarters (ten years) of employment history in the United States, or (c) returns to her country of citizenship (USCIS 2013). Securing an outside sponsor under these conditions can be very difficult.

of their noncitizen spouses (LeMay 2007; Hayes 2001). This policy may *not* only not keep out potential “public charges,” but it could actually cause US citizens to become “public charges” themselves (through the use of social welfare benefits) by preventing them from increasing their combined family income through family reunification.

The Effects of IIRIRA on Mixed-Citizenship Couples

Many immigrants in the United States form part of a mixed-citizenship family. The 2011 American Communities Survey data suggest that 7.8 percent of all married couple households in the United States — approximately 4.1 million households — are “mixed-nativity” couple households (one US-born spouse, one foreign-born spouse) (Larsen and Walters 2013). This includes couples with different immigration statuses — foreign-born spouses could have legal permanent residency, temporary legal immigration status, undocumented status, or US citizenship through naturalization.⁹ Millions of mixed-status couples composed of a US citizen spouse and an immigrant with legal status (legal permanent residency, student/work visa, etc.) are living throughout the United States, with their ranks growing by more than 250,000 each year (Monger and Yankay 2012). An additional nine million people — roughly three percent of the US population — form part of an “unauthorized” mixed-citizenship family, with both undocumented immigrant and US citizen family members (Taylor et al. 2011). Many other mixed-citizenship families live outside of the United States, often as a result of harsh immigration laws that prevent these families from living together within the United States. Recent data from the Migrant Border Crossing Study show that about one-half of Mexican deportees have a US citizen family member, such as a spouse, child, and/or sibling (Slack et al. 2015).

Between 2012 and 2016, I conducted in-depth, semi-structured interviews with 40 mixed-citizenship couples living within and outside the United States. The interviews focused on these couples’ day-to-day experiences, with a particular interest in how their mixed-citizenship status and the laws governing mixed-citizenship families created opportunities for and/or placed limitations on their success as individuals and as a family. In order to capture some of the similarities and differences in mixed-citizenship families’ experience that could be affected by the immigrant spouse’s home country while minimizing the influence of cultural and linguistic differences, I limited my participant pool to mixed-citizenship couples with one US-citizen spouse and one non-US citizen spouse¹⁰ from any (Spanish-speaking) Latin American country. Any such couple was eligible to participate, regardless of both spouses’ age, race, ethnicity, gender, or current place of residence. Twenty-eight of the mixed-citizenship couples were living in various regions of the United States, including the Midwest, South, West, and Southwest, at the time the interviews were conducted; 12 of the couples were living outside the United States (in Mexico and Guatemala) when they were interviewed for the study. To recruit participants, I directly

⁹ Larsen and Walters (2013) report that 61.3 percent of foreign-born spouses have naturalized, while 38.6 percent remain noncitizens (due to choice or legal impediments to their ability to naturalize). Female foreign-born spouses of male US-born citizens naturalize at higher rates than male foreign-born spouses of female* US-born citizens (63% vs. 59%).

*At the time the data were collected, same-sex foreign-born spouses could not be legally sponsored by their citizen spouses for permanent residency or citizenship.

¹⁰ At the time of marriage.

contacted individuals in my social networks who met study criteria or who I believed could help me identify potential participants.¹¹ Additionally, many of the interviewees identified through this process recommended other interview candidates. The US citizens in the couples interviewed included 17 males and 23 females married to immigrants from various Latin American countries including Mexico, Colombia, Guatemala, Argentina, El Salvador, and Chile.¹² Two-thirds of the citizen participants' spouses were undocumented at the time they married, having either entered the United States without inspection or overstayed a visa.

Documentable Families

Documented, Formerly Documented, and Documentable. For many mixed-citizenship couples, the two statutory changes enacted through IIRIRA detailed above had no measurable effect on their families. Because the noncitizen spouses (a) had not yet immigrated to the United States, (b) already had legal immigrant status in the United States (even if temporary), or (c) had overstayed a visa, the three- and 10-year bars did not apply to them. Furthermore, because the US citizen spouses earned sufficient income to meet the minimum income threshold, these families were able to acquire lawful permanent residency status relatively easily. This was the case for 16 couples I interviewed. These couples agreed that acquiring permanent residency for the noncitizen spouse was an involved and often expensive process, but they generally lauded the fact that “the system works.” All of these couples had established strong relationships in their communities, secured regular employment, and confidently declared that they were living exactly where they wanted to be (whether inside or outside the United States). For these families, immigration law accomplished its goal of preserving family unity. These immigrant families also integrated well into their new local and national communities. This was especially the case for Lola, whose husband died unexpectedly a few years after their marriage. Despite the tragic loss of her husband — her only family member with US citizenship — Lola continued to feel at home in the United States and was in the process of acquiring citizenship for herself when we met. She expressed a strong sense of belonging to her new country and a commitment to continue to build her life there as an active member of the community. The other couples conveyed similar satisfaction with their communities and felt strongly that they each belonged as an American family.

Undocumentable Families

Never Documented. Other families currently residing within the United States faced a less certain future. With an undocumented spouse subject to the bars to reentry (should she leave the country), most of these couples chose inaction with regard to seeking legal immigration status (combined with hope that their inaction would be reciprocated by immigration authorities). Eight of the families I interviewed were living within the United

¹¹ I was acquainted with approximately one-third of the interviewees prior to their involvement in the study.

¹² All couples participating in this study were married, heterosexual couples. Because unmarried couples cannot access any family reunification benefits, it was necessary to limit study participants to married couples. While same-sex couples were eligible to participate, I was unable to identify any same-sex couples meeting the other study criteria.

States with one undocumented spouse subject to the bars to reentry. Of these couples, only two had even attempted to apply for family reunification (and an extreme hardship waiver); the others cited the low probability of a successful application and the costly nonrefundable application fee as primary drivers behind their decision not to apply. In many ways, these families mirrored those who had received family reunification benefits. They also worked hard, though many of the noncitizen spouses struggled to secure jobs with steady hours and income. They also planted roots in their communities, but the ever-present threat of deportation (and lower “official” income) kept them from creating more permanent ties to their neighborhoods, such as buying a home. Most of these families had a “deportation plan” and knew more-or-less where they would go and what they would do if US law enforcement deported the noncitizen spouse. But, at the time they were interviewed, most couples considered deportation a highly unlikely outcome.¹³ Rather than dwelling on the looming possibility of deportation, they lived their lives as other “normal” families: raising children, working, and actively participating in their communities. They pushed forward in good faith and hoped for a legal solution that would allow them to acquire legal permanent residency without being forced to live apart or leave the United States for a decade. While they acknowledged certain limits to their ability to progress without a family-level legal status, most of these families preferred undocumented life in the United States to establishing a new life outside of the United States. And, as long as no one prevented them from pursuing their life as a family in the United States, they would do their best to make it work. These families generally feel like they belong in their communities and that they are “American” families, but the lack of official legal status looms large as they build a life in the United States together as a family.

Rejected. For thousands of mixed-citizenship families, though, deportation is their reality. Eight of the couples I interviewed were living outside the United States as a result of deportation, “voluntary removal,” or the denial of the extreme hardship waiver during the consular interview. All of these couples wanted to live as a family in the United States; many of them had already lived in the United States as a family for a significant amount of time before the deportation.¹⁴ All of these couples also faced the 10-year bar before becoming eligible to apply for legal immigrant status within the United States. These families expressed frustration, bitterness, and anger at a system that purports “preserving family unity” as its primary goal but forced their family to move outside the United States if they wanted to remain together. Some of these families were able to establish a cross-border life along the US-Mexico border, maintaining ties to the United States even while living outside it. Others felt completely disconnected from the United States and their extended family members left behind. Camille, Sandra, and Angelica spoke of the fear and sadness they experienced while giving birth to children in the United States alone, as their husbands could not cross the border to support them during labor. Deportees, like Edgar and Joaquin, cited the pain of being a part of only half their children’s memories — the half that doesn’t take place in the United States. Even when these families found a way to stay together outside the United States by moving abroad as a family unit, they continued to experience the pain of separation from, for example, extended family living in the United States with whom they now have only limited contact. Despite relocating together outside the United States and trying their best to survive as a family, the strain of deportation

13 The interviews for this study were conducted before Donald Trump was elected president.

14 One couple met in Mexico after the noncitizen spouse had been deported.

resulted in divorce for at least two of these eight families. In both cases, the couples cited their forced removal from the United States and inability to return as a family to the United States as the primary reason their marriages dissolved.

Table 1. Types of (and Access to) Legal Status Among Mixed-Citizenship Couples

Status (No. in Sample)	Description	Legal Outcome
D O Documented C (6) U	Noncitizen spouse had legal immigrant status or nonimmigrant status (such as tourist or student visa or TPS) when couple married; citizen spouse had sufficient income or support from others to sponsor spouse for visa	Noncitizen spouse granted lawful permanent residency by US government
M E Formerly Documented N (6) T	Noncitizen spouse entered the United States with a valid visa, but visa expired (rendering spouse undocumented) before the couple married; citizen spouse had sufficient income or support from others to sponsor spouse for visa	Noncitizen spouse granted lawful permanent residency by US government
A B Docu- L mentable (4) E	Noncitizen spouse was living outside the United States with no immigration experience to the United States when couple married; citizen spouse had sufficient income or support from others to sponsor spouse for visa	Noncitizen spouse granted lawful permanent residency by US government
U N Never Documented D (8) O	Noncitizen spouse entered the United States without crossing through a port of entry (“entered without inspection,” or EWI); even a citizen spouse with sufficient income could not successfully sponsor spouse for visa without receiving emergency hardship waiver (EHW) or waiting out 10-year ban	Noncitizen spouse living in United States remains in limbo with no official legal status and no access to official legal status without leaving the United States for 10+ years
U M Rejected (8) E N	Noncitizen spouse entered the United States without crossing through a port of entry (EWI); spouse was later deported or “voluntarily removed” herself from the United States and became subject to 10+ year bar to reentry	Noncitizen spouse is not allowed to legally enter the United States for at least 10 years; citizen must either acquire an EHW, be separated from her spouse or live outside the United States with spouse for the duration of the bar (or dissolve the marriage)
T A B Too Poor to Document L (6) E	Noncitizen spouse has no immigration history in United States and qualifies for spousal visa; citizen spouse does not have sufficient income or support from others to sponsor spouse for visa	Noncitizen spouse is not allowed to legally enter the United States

Too Poor to Document. Other couples whose spouses did not face the bars to reentry still struggled to access family reunification benefits due to the minimum income thresholds and the costs of applying for a visa. Six of the couples I interviewed had experienced significant struggles in their efforts to acquire lawful permanent residency. Some endured prolonged separation before and during the visa application process (which usually takes at least one year). The need to earn sufficient income forced Carlos to miss the birth of his daughter and the first 10 months of her life while he worked to meet the income threshold necessary to sponsor his wife. Other couples had to rely on the generosity of family members or friends, who legally assume financial responsibility for them, in order to qualify for the visa. Nicole, a doctoral student, could not sponsor her fiancé for the visa because her income as a teaching assistant was insufficient to meet the income threshold. Luckily, her mother accepted legal responsibility for the couple so their application could move forward. Oscar does not have family in the United States who can act as financial sponsor for his wife, and they cannot qualify on his income. So he continues to commute weekly from a Mexican border town to southern California, a world completely unknown to his wife and daughter who wait for him just a few miles away in Mexico. Otherwise eligible mixed-citizenship families unable to meet the IIRIRA-imposed income thresholds find themselves excluded from family reunification benefits or, at best, forced to experience extended family separation before they can qualify. In these cases, the US citizens' low-income status yields their families unworthy of the benefits of US citizenship.

As Table 1 summarizes, the law differentiates mixed-citizenship couples into five different groups, based on (a) the citizen spouses' financial status, and (b) the noncitizen spouses' original mode of entry into the United States (if any). Based on those statuses, the law then declares families either "documentable" or "undocumentable."¹⁵ All citizen spouses must demonstrate sufficient income (or find a friend or family member with sufficient income and willing to accept legal financial responsibility for the noncitizen spouse) in order to qualify for family reunification benefits. Any couples unable to meet minimum income requirements will remain "undocumentable" until their financial circumstances change. Furthermore, even families with sufficient income — but with a history of "never documented" status in the United States — are also labeled by the law as "undocumentable." This includes "never documented" families living within the United States and "rejected" families forced to live outside the US. The law prevents these families from becoming an "official" American family and enjoying the benefits and freedoms associated with that status. As described above, the hardships "undocumentable" families experience as a result of their status have significant and long-term negative impacts on the affected families and their relationship to the US.

But these extreme hardships are not necessary. Two couples I interviewed who had married before the implementation of IIRIRA did not experience such drastic outcomes from the family reunification process, despite the fact that both of the noncitizen spouses had lived "never documented" in the United States before marriage. Rather than having to choose between a life in the shadows or a 10-year exile, both of these couples applied for a visa, traveled to the US consulate in Ciudad Juárez, Mexico, for their interview and, within a few

¹⁵ Although "undocumentable" status is not permanent, transitioning out of this status requires (1) acquiring an exception to decade-long bars to reentry, (2) waiting out the 10-year bar outside the United States, and/or (3) demonstrating an increase in income sufficient to meet minimum income standards. Thus, families deemed "undocumentable" by the law generally experience this status as long-term.

weeks, received the visa for permanent residency in the United States. These couples have thrived in their communities, raised children who played in marching band and took ballet lessons, coached soccer teams, and served in parent-teacher organizations. They are proud American families who have worked hard to establish a good life for themselves and their children in the United States. Their experiences align with those of the “documentable” mixed-citizenship couples who have benefitted from family reunification post-IIRIRA. And their success as families suggests that the policies imposed by IIRIRA punishing some mixed-citizenship families are neither necessary nor productive.

Redefining the American Family

In addition to directly impacting the lives of tens of thousands of mixed-citizenship families, IIRIRA also altered the definition of which kinds of couples and families qualify for official membership in American society. Through the bars to reentry, IIRIRA has redefined the American family by effectively excluding mixed-citizenship families in which one partner entered the United States without inspection from realizing the benefits of a married family life in the United States. Given the economic and social thresholds required to qualify for a tourist or other visa to the United States, this new definition of the “un-American” family is generally limited to mixed-citizenship families in which the immigrant spouse came to the United States with fewer economic resources and less formal education. Furthermore, due to the physical and geographic realities of crossing the border without passing through an official port of entry, the new “un-American” family is almost exclusively limited to mixed-citizenship couples with immigrant spouses born in Mexico or Central America. The disproportionate burden placed upon mixed-citizenship families by the bars to reentry has marked families with less-educated, lower-income Mexican and Central American spouses as unworthy of membership in an official American family. Furthermore, the IIRIRA-imposed minimum income thresholds marked some US citizens as unworthy of forming an official American family with a foreigner. The IIRIRA effectively declared poor Americans undeserving of family reunification benefits in that it declared female, non-white, and less-educated Americans — those most likely to earn below 125 percent of poverty level — unworthy of forming an official American family with a noncitizen.

This new, narrower definition of the American family — wealthier, whiter, better educated, non-Latino, and headed by a US citizen male — has not only precipitated the othering of some immigrants, but also their citizen family members. The IIRIRA has marked all of them as less-than and unqualified to enjoy the benefits of American citizenship as a family. This new definition of the “American” family also shapes broader notions of who “belongs” in the United States (Lee 2013; Bunting 2015; Darian-Smith 2015). Preventing some families from accessing family reunification benefits has ripple effects. Initially, it redefines which families are “American enough” to qualify for family reunification. Then, by extension, it also prevents the immigrant spouses who were denied family reunification benefits from sharing those same benefits with their noncitizen parents, siblings, and children (Hawthorne 2007). This burden is not spread proportionally across nations of origin, socio-economic classes, and racial and ethnic backgrounds, altering the composition of American citizenry toward a richer, whiter, better-educated membership and further narrowing the definition of both who “deserves” to be American and which Americans “deserve” to enjoy the full benefits of their citizenship.

Policy Solutions

Numerous policy solutions could easily resolve this devastating disparity in the treatment of mixed-citizenship American families.

Bars to Reentry. One option — though its effects would reach far beyond mixed-citizenship couples — is to repeal the multiyear bars to legal reentry currently applied to almost all undocumented immigrants upon leaving the United States. Though the bars to reentry were designed to discourage undocumented immigrants from attempting to settle in the United States, they have had little effect as a deterrent (Lofgren 2005; Lundstrom 2013). Repealing the bars to reentry would help many mixed-citizenship families adjust to legal immigration status without facing the severe penalties currently imposed. A more limited approach would involve changing current law to allow all undocumented spouses of US citizens to adjust to legal status from within the United States. If readmission through a port of entry remains a necessary bureaucratic or symbolic step, arrangements could be made to allow such processing at international airports based within the United States once applicants receive final visa approval, satisfying the letter of the law without invoking the bars to reentry. Either of these policy solutions would also provide a quick and easy way of reducing the size of the undocumented immigrant population residing in the United States by allowing the undocumented spouses of US citizens to adjust to legal status. Including the spouses of US citizens in any future DAPA-esque executive action would provide at least temporary relief for most mixed-citizenship couples in the United States, should political opposition render other, permanent policy changes impossible to enact.¹⁶

Minimum Income Thresholds. The minimum income thresholds should be repealed. Failing that, the potential earnings of the noncitizen spouse being sponsored should be included toward meeting the minimum income thresholds. Disqualifying American citizens from family reunification because they earn low wages perpetuates income inequality and punishes US citizens for circumstances that are often beyond their control. It also prevents them from increasing their family income and economic opportunities by prohibiting their reunification with an additional wage earner.

The effects of IIRIRA have proven similar to many other US immigration laws that, intentionally or not, marked specific kinds of immigrants — based on their race, national origin, and/or class — as unwelcome (Luibhéid 2002; Ngai 2004; Kanstroom 2007; Lee 2013). The discriminatory effects of these policies reach far beyond individual immigrants to their families and communities. As policymakers consider every policy option — including the continuation of IIRIRA and associated laws in their current form — they must remember that laws targeting immigrants affect citizens, too (Menjívar et al. 2016). As the undocumented population in the United States continues to drop, policymakers should shift their attention away from punishing undocumented immigrants and toward supporting and preserving American families, including those with an undocumented spouse and/or low incomes (Warren 2016). Developing policies that provide opportunities for mixed-citizenship American families to succeed will reduce the undocumented immigrant population while generating significant benefits for these families and the communities in which they live (de Graauw and Bloemraad 2017).

¹⁶ Under Obama's proposed executive action, Deferred Action for Parents of Americans (DAPA), only the parents of citizens and permanent residents qualified for relief.

REFERENCES

- Abrego, Leisy J. 2015. "Immigration Law and Immigrants' Lived Experiences." In *The Handbook of Law and Society*, edited by Austin Sarat and Patricia Ewick. Chichester, UK: Wiley Blackwell. <https://doi.org/10.1002/9781118701430.ch17>.
- ASPE (Office of the Assistant Secretary for Planning and Evaluation). 2016. *Poverty Guidelines*. Washington, DC: US Department of Health and Human Services. <https://aspe.hhs.gov/poverty-guidelines>.
- Baker, Bryan, and Nancy Rytina. 2013. *Estimates of the Unauthorized Immigrant Population Residing in the United States: January 2012*. Washington, DC: Office of Immigration Statistics, Department of Homeland Security.
- Bunting, Annie. 2015. "Domains of Policy: Law and Society Research on the Family." In *The Handbook of Law and Society*, edited by Austin Sarat and Patricia Ewick. Chichester, UK: Wiley Blackwell. <https://doi.org/10.1002/9781118701430.ch13>.
- Bureau of Consular Affairs. 2015. "U.S. Visas." Washington, DC: US Department of State. https://travel.state.gov/content/dam/visas/VisaFlyer_B1B2%20March%202015.pdf.
- Center for Poverty Research. 2016. "What are the Annual Earnings for a Full-Time Minimum Wage Worker?" Davis, CA: Center for Poverty Research, University of California, Davis. <http://poverty.ucdavis.edu/faq/what-are-annual-earnings-full-time-minimum-wage-worker>
- Chacón, Jennifer. 2007a. "Commentary — Unsecured Borders: Immigration Restrictions, Crime Control and National Security." *Connecticut Law Review* 39(5): 1827-91.
- . 2007b. "Loving Across Borders: Immigration Law and the Limits of Loving." *Wisconsin Law Review* 2007: 345-78.
- Cianciarulo, Marisa S. 2015. "Seventeen Years Since the Sunset: The Expiration of 245(i) and Its Effect on U.S. Citizens Married to Undocumented Immigrants." *Chapman Law Review* 18(2): 451-79.
- Colon-Navarro, Fernando. 2007. "Familia e Inmigracion: What Happened to Family Unity?" *Florida Journal of International Law* 19(August): 491-509.
- Coonan, Terry. 1998. "Dolphins Caught in Congressional Fishnets — Immigration Law's New Aggravated Felons." *Georgetown Immigration Law Journal* 12: 589-620.
- Darian-Smith, Eve. 2015. "The Constitution of Identity: New Modalities of Nationality, Citizenship, Belonging and Being." In *The Handbook of Law and Society*, edited by Austin Sarat and Patricia Ewick. Chichester, UK: Wiley Blackwell. <https://doi.org/10.1002/9781118701430.ch23>.
- de Graauw, Els, and Irene Bloemraad. 2017. "Working Together: Building Successful Policy and Program Partnerships for Immigrant Integration." *Journal on Migration and Human Security* 5(1): 105-23. <https://doi.org/10.14240/jmhs.v5i1.76>.

Redefining American Families

- Demleitner, Nora V. 2004. "How Much Do Western Democracies Value Family and Marriage? Immigration Law's Conflicted Answers." *Hofstra Law Review* 32(1): 273-311.
- DHS (US Department of Homeland Security). 2009. Removals Involving Illegal Alien Parents of United States Citizen Children. Washington, DC: Department of Homeland Security. https://www.oig.dhs.gov/assets/Mgmt/OIG_09-15_Jan09.pdf.
- Dreby, Joanna. 2012. "The Burden of Deportation on Children in Mexican Immigrant Families." *Journal of Marriage and Family* 74: 829-45.
- Enchautegui, Maria E., and Cecilia Menjivar. 2015. "Paradoxes of Family Immigration Policy: Separation, Reorganization, and Reunification of Families under Current Immigration Laws." *Law and Policy* 37(1-2): 32-60. <https://doi.org/10.1111/lapo.12030>.
- Fix, Michael, and Wendy Zimmerman. 2001. "All Under One Roof: Mixed-Status Families in an Era of Reform." *International Migration Review* 35(2): 397-419. <https://doi.org/10.1111/j.1747-7379.2001.tb00023.x>.
- Gimpel, James G., and James R. Edwards. 1999. *The Congressional Politics of Immigration Reform*. Boston: Allyn and Bacon.
- Golash-Boza, Tanya, and Pierrette Hondagneu-Sotelo. 2013. "Latino Migrant Men and the Deportation Crisis: A Gendered Racial Removal Program." *Latino Studies* 11(3): 271-92. <https://doi.org/10.1057/lst.2013.14>.
- Hagan, Jacqueline, Karl Eschback, and Nestor Rodriguez. 2008. "U.S. Deportation Policy, Family Separation, and Circular Migration." *International Migration Review* 42(1): 64-88. <https://doi.org/10.1111/j.1747-7379.2007.00114.x>.
- Hawthorne, Monique Lee. 2007. "Family Unity in Immigration Law: Broadening the Scope of 'Family.'" *Lewis and Clark Law Review* 11(3): 809-32.
- Hayes, Helene. 2001. *U.S. Immigration Policy and the Undocumented: Ambivalent Laws, Furtive Lives*. Westport, CT: Praeger.
- Henderson, Nia-Malika. 2014. "Seven Charts that Explain the Undocumented Migrant Population." *Washington Post*, November 21. <https://www.washingtonpost.com/news/the-fix/wp/2014/11/21/7-charts-that-explain-the-undocumented-immigrant-population/>.
- Hwang, Maria Cecilia, and Rhacel Solazar Parreñas. 2010. "Not Every Family: Selective Reunification in Contemporary US Immigration Laws." *International Labor and Working-Class History* 78(Fall): 100-09. <https://doi.org/10.1017/S0147547910000153>.
- Kanstroom, Daniel. 2007. *Deportation Nation: Outsiders in American History*. Cambridge, MA: Harvard University Press.

- Kelly, Claudia Smith, and Sonia Dalmia. 2011. "Immigration Reforms, Marriage and Legal Permanent Residence Status." *Journal of Applied Business and Economics* 12(2): 64-79.
- Krikorian, Mark. 2007. "Shortfalls of the 1996 Immigration Reform Legislation." Statement before the Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law, April 20.
- Larsen, Luke J., and Nathan P. Walters. 2013. *American Community Survey Briefs: Married-Couple Households by Nativity Status, 2011*. Washington, DC: US Department of Commerce.
- Lee, Catherine. 2013. *Fictive Kinship: Family Reunification and the Meaning of Race and Nation in American Migration*. New York: Russell Sage Foundation.
- LeMay, Michael C. 2007. *Illegal Immigration*. Santa Barbara, CA: ABC-CLIO, Inc.
- Lofgren, Zoe. 2005. "A Decade of Radical Change in Immigration Law: An Inside Perspective." *Stanford Law and Policy Review* 16(2): 349-78.
- López, Jane Lilly. 2015. "Impossible Families: Mixed-Citizenship Status Couples and the Law." *Law and Policy* 37(1-2): 93-118. <https://doi.org/10.1111/lapo.12032>.
- . 2017. "'Til Deportation Do Us Part: The Effect of US Immigration Law on Mixed-Status Couples' Experience of Citizenship." In *Within and Beyond Citizenship*, edited by Nando Sigona and Roberto Gonzales. Abingdon-on-Thames, UK: Routledge (BSA Sociological Futures Series).
- Luibhéid, Eithne. 2002. *Entry Denied: Controlling Sexuality at the Border*. Minneapolis, MN: University of Minnesota Press.
- Lundstrom, Kristi. 2013. "The Unintended Effects of the Three- and Ten-Year Unlawful Presence Bars." *Law and Contemporary Problems* 76(3&4): 389-412.
- Martínez de Castro, Clarissa. 2013. "Strong Families: An Economic and Social Imperative for Successful Immigration Reform." Testimony submitted to the US Committee on the Judiciary Subcommittee on Immigration and Border Security, Washington, DC.
- Menjívar, Cecilia, Leisy Abrego, and Leah C. Schmalzbauer. 2016. *Immigrant Families*. Cambridge, UK: Polity.
- Mercer, Julie. 2008. "Comment: The Marriage Myth: Why Mixed-Status Marriages Need an Immigration Remedy." *Golden Gate University Law Review* 38(Winter): 293-325.
- Migration Policy Institute. 2016. *Unauthorized Immigrant Population Profiles*. Washington, DC: Migration Policy Institute. <http://www.migrationpolicy.org/programs/us-immigration-policy-program-data-hub/unauthorized-immigrant-population-profiles>.

- Monger, Randall, and James Yankay. 2012. *Office of Immigration Statistics: Annual Flow Report*. Washington, DC: US Department of Homeland Security.
- Murray, Sara. 2013. "Many People in U.S. Illegally Overstayed Their Visas." *Wall Street Journal*, April 7. <http://www.wsj.com/articles/SB10001424127887323916304578404960101110032>.
- Ngai, Mae. 2004. *Impossible Subjects: Illegal Aliens and the Making of Modern America*. Princeton, NJ: Princeton University Press.
- Skrentny, John D., and Jane Lilly López. 2013. "Obama's Immigration Reform: The Triumph of Executive Action." *Indiana Journal of Law and Social Equity* 2(1): 62-79.
- Slack, Jeremy, Daniel E. Martínez, Scott Whiteford, and Emily Peiffer. 2015. "In Harm's Way: Family Separation, Immigration Enforcement Programs and Security on the US-Mexico Border." *Journal on Migration and Human Security* 3(2): 109-28. <https://doi.org/10.14240/jmhs.v3i2.46>.
- Taylor, Paul, Mark Hugo Lopez, Jeffrey S. Passel, and Seth Motel. 2011. *Unauthorized Immigrants: Length of Residency, Patterns of Parenthood*. Washington DC: Pew Research Center.
- US Census Bureau. 2016a. "Figure 1: Real Median Household Income by Race and Hispanic Origin: 1967-2015." Washington, DC: US Census Bureau. <http://www2.census.gov/programs-surveys/demo/visualizations/p60/256/figure1.pdf>.
- . 2016b. "Figure 2: Female to Male Earnings Ratio and Median Earnings of Full-Time, Year-Round Workers 15 Years and Older by Sex: 1960-2015." Washington, DC: US Census Bureau. <http://www2.census.gov/programs-surveys/demo/visualizations/p60/256/figure2.pdf>.
- . 2016c. "Income and Poverty in the United States: 2015." Washington, DC: US Census Bureau. <http://www.census.gov/library/publications/2016/demo/p60-256.html>.
- USCIS (US Citizenship and Immigration Services). 2013. "Affidavit of Support." Washington, DC: US Department of Homeland Security. <https://www.uscis.gov/green-card/green-card-processes-and-procedures/affidavit-support>.
- Warren, Robert. 2016. "US Undocumented Population Drops Below 11 Million in 2014, with Continued Declines in the Mexican Undocumented Population." *Journal on Migration and Human Security* 4(1): 1-15. <https://doi.org/10.14240/jmhs.v4i1.58>.
- Warren, Robert, and Donald Kerwin. 2017. "The 2,000 Mile Wall in Search of a Purpose: Since 2007 Visa Overstays have Outnumbered Undocumented Border Crossers by a Half Million." *Journal on Migration and Human Security* 5(1): 124-36. <https://doi.org/10.14240/jmhs.v5i1.77>.



How the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 Has Undermined US Refugee Protection Obligations and Wasted Government Resources

Eleanor Acer
Human Rights First

Olga Byrne
Human Rights First

Executive Summary

Seeking asylum is a human right, enshrined in the Universal Declaration of Human Rights. The 1951 Convention relating to the Status of Refugees (“Refugee Convention”) and its 1967 Protocol relating to the Status of Refugees (“1967 Protocol”) prohibit the United States from returning refugees to persecution, and the 1980 Refugee Act set up a formal process for applying for asylum in the United States. However, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) created a barrage of new barriers to asylum. These impediments have blocked many refugees from accessing asylum in the United States and inserted additional layers of technicalities, screening, and processing, undermining the effectiveness of the US asylum system.

The barriers imposed by IIRIRA are significant. They include a filing deadline on asylum applications, which prevents genuine refugees from receiving asylum if they cannot prove they have filed the application within one year of arriving in the United States. IIRIRA also established summary deportation procedures, including “expedited removal” and “reinstatement of removal,” which block asylum seekers from even applying for asylum or accessing an immigration court removal hearing, unless they first pass through a screening process. Finally, IIRIRA imposed “mandatory detention” on certain immigrants, including asylum seekers who are placed in expedited removal proceedings upon their arrival at a US port of entry.

Each of these provisions imposed new processes and procedures that have contributed to an increasingly ineffective immigration system. The current backlog in the immigration courts has reached a record high, surpassing

half a million cases, while the backlog of affirmative asylum cases before the Asylum Division of US Citizenship and Immigration Services (USCIS) has increased by a factor of six in just three years. Backlogs, which lead to long delays in adjudication, undermine system integrity as bona fide asylum seekers wait for years in legal limbo — some with families waiting abroad in dangerous and life-threatening situations — and individuals without meritorious claims may be encouraged to file applications to receive a work permit during the lengthy waiting period.

Twenty years later, as the world faces the largest global refugee crisis since World War II, the asylum barriers injected into the US system under IIRIRA have proven harmful to refugees, and detrimental to the US asylum system. This paper highlights recent research, litigation, and advocacy efforts that have further brought to light the rights violations and systemic inefficiencies generated by IIRIRA. It concludes with a series of recommendations, calling on the US government to eliminate these counterproductive barriers and to take steps to assure access to asylum.

I. IIRIRA has Undermined US Protection of Refugees and US Treaty Obligations

The Refugee Convention prohibits countries from returning refugees to places where their “life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion” (the principle of *non-refoulement*), and bars countries from penalizing refugees who enter a country illegally in search of protection. The Convention also details the rights that countries should provide to refugees. When the United States chose to accede to the Convention’s Protocol relating to the Status of Refugees, it committed to comply with the substantive requirements of the 1951 Refugee Convention.¹ Yet various provisions of IIRIRA have led the United States to deport refugees at risk of persecution and to penalize them due to their manner of entry. Moreover, IIRIRA’s harsh detention policies and efforts to block access to immigration court hearings violate US legal obligations under the International Covenant on Civil and Political Rights (ICCPR). This section describes how three major changes to the US asylum and immigration system imposed by IIRIRA — the asylum filing deadline, the screening process used in summary removal proceedings, and the use of so-called “mandatory detention” — undermine both refugees’ access to protection in the United States and US treaty obligations.

A. Filing Deadline

The filing deadline is a procedural hurdle that can bar refugees — who by definition have suffered persecution or have well-founded fears of persecution if returned to their countries — from being eligible to access the asylum adjudication process in the United States if, subject to some exceptions, they do not file an application for asylum within

¹ Convention relating to the Status of Refugees, IV(B), arts. 31, 33, July 28, 1951, 189 U.N.T.S. 150.

one year of their last arrival in the United States. While the deadline was initially viewed by its proponents as a tool for weeding out fraudulent asylum cases, the US asylum and immigration system has many tools that are better tailored to identify and deny relief to fraudulent cases.² Indeed, the one-year deadline has failed to effectively identify fraud and has in fact served to block or delay protection to many legitimate asylum seekers.

Article 33 of the Refugee Convention prohibits the return of refugees to persecution, and Article 34 calls on signatories to facilitate the assimilation and naturalization of refugees. The UN High Commissioner for Refugees (UNHCR) Executive Committee, of which the United States is a member, has stated that the failure to comply with technical requirements such as filing deadlines “should not lead to an asylum request being excluded from consideration” (UNHCR 1979). In fact, António Guterres, former UN High Commissioner for Refugees, speaking at a March 2010 event marking the 30th anniversary of the US Refugee Act of 1980, described the filing deadline as “diverg[ing] from international standards” and noted that it “makes it more difficult for many asylum seekers to establish their need for protection” (Guterres 2010).

The deadline harms a range of refugees, who often have good reasons for not applying for asylum within one year of their arrival. Many refugees struggle to survive after arriving in this country, many do not speak English, and most have little to no familiarity with the complexities of the US immigration system. Some refugees do not know that they may be eligible for asylum status, and given the substantial gaps in legal representation for indigent asylum seekers, many cannot find legal representation to assist them with their applications (Human Rights First 2010; Pistone and Schrag 2001). Refugees who suffer additional challenges, such as social stigmas and fears of raising incidents of rape or persecution due to sexual or gender identity, often face additional difficulties accessing asylum due to the filing deadline bar. And some are not even aware that persecution for sexual orientation or gender identity can be a basis for asylum (Neilson and Morris 2005).

In a 2010 report, “The Asylum Filing Deadline: Denying Protection to the Persecuted and Undermining Governmental Efficiency,” Human Rights First found that the filing deadline has barred refugees who face religious, political, and other forms of persecution from receiving asylum in the United States (Human Rights First 2010). Among these refugees were a Chinese woman who faced persecution due to her help to North Korean refugees, an Eritrean woman tortured due to her Christian religion, and a gay man tortured in Peru. An academic analysis of US Department of Homeland Security (DHS) data, published in 2010, found that the filing deadline prevented DHS from granting 15,000 asylum applications, corresponding to over 21,000 refugees, between 1998 and 2009 alone (Schrag et al. 2010, 651, 753-54). More recent figures from the USCIS Asylum Office indicate that 4,221 cases were referred by the Asylum Office to the immigration courts between January and December 2016 alone.³

2 See Acer (2015) on providing a list of mechanisms in the US asylum and immigration systems for identifying potential fraud and ensuring the integrity of the system, including for example mandatory biographical checks, mandatory biometric checks, fraud detection and national security teams, supervisory review, interpreter monitors, and legal penalties for applicants who file frivolous or fraudulent applications.

3 The Asylum Division publishes quarterly statistical information, including the number of affirmative asylum applications adjudicated, granted, referred to the immigration court, and referred due to a one-year filing deadline issue, on its website. See, for example USCIS (2016a).

How IIRIRA Has Undermined US Refugee Protection Obligations

Refugees who are unable to prove that they filed their asylum applications within one year of their arrival are either returned to their home countries, where they may face persecution, or may be eligible for another temporary form of protection called withholding of removal, which is less desirable than asylum for several reasons. Ironically, withholding of removal requires a higher burden of proof to qualify but fails to provide the same protections as asylum. For one, it does not provide a path to permanent residence, keeping refugees at risk of deportation, detention, and prolonged instability. Withholding of removal also does not allow refugees to petition for their spouse and children to join them in the United States, dividing refugee families and leaving many family members stranded in dangerous circumstances abroad. Article 23 of the ICCPR — to which the United States is party — states that “[t]he family is the fundamental and natural group unit of society and is entitled to protection by society and the State,”⁴ and the Executive Committee of the UNHCR has repeatedly emphasized the importance of ensuring the unity of refugee families and urged states to adopt legislation protecting family unity.⁵

While IIRIRA provided limited exceptions to the filing deadline for “changed circumstances” or “extraordinary circumstances,”⁶ Human Rights First found in its 2010 report that these exceptions have not prevented the denial of protection to genuine refugees (Human Rights First 2010, 29-39).⁷ Even DHS itself concluded and stated publicly at a Georgetown University Law Center symposium in 2011 that the filing deadline results in the denial of asylum to genuine refugees, does little to uncover or deter fraud, and makes the overall adjudication process more difficult. In connection with the 50th anniversary of the Refugee Convention in 2011, the United States government, under the Obama administration, pledged to work with Congress to eliminate the one-year filing deadline, though, as discussed below, the deadline remains and the United States continues to return genuine refugees to countries where they face persecution.

4 International Covenant on Civil and Political Rights art. 23, Dec. 16, 1966, 999 U.N.T.S. 171. The United States ratified the ICCPR on June 8, 1992.

5 UNHCR Executive Committee, Establishment of the Sub-committee and General, Conclusion No. 1 (XXVI), ¶ f (1975); UNHCR Executive Committee, Family Reunion, Conclusion No. 9 (XXVIII) (1977); UNHCR Executive Committee, Refugees Without an Asylum Country, Conclusion No. 15 (XXX), ¶ e (1979); UNHCR Executive Committee, Family Reunification, Conclusion No. 24 (XXXII) (1981); UNHCR Executive Committee, Refugee Children, Conclusion No. 47 (XXXVIII), ¶ d (1987); UNHCR Executive Committee, Conclusion on Refugee Children and Adolescents, Conclusion No. 84 (XLVIII), ¶ b(i) (1997); UNHCR Executive Committee, Conclusion on International Protection, Conclusion No. 85 (XLIX), ¶¶ u-x (1998); UNHCR Executive Committee, Conclusion on the Protection of the Refugee’s Family, Conclusion No. 88 (L) (1999); UNHCR Executive Committee, Conclusion on Local Integration, Conclusion No. 104 (LVI), ¶ n(iv) (2005).

6 Immigration and Nationality Act § 208(a)(2)(D); 8 U.S.C. § 1158(a)(2)(D) (2000).

7 For example, Human Rights First (2010) found that “refugees who were denied exceptions to the filing deadline include: refugees who suffered from post-traumatic stress disorder (PTSD) or depression following their traumatic experiences; refugees whose cases involved gender, sexual orientation, or potential social stigma; refugees who were waiting for conditions to improve so that they could return home; refugees who lacked knowledge of asylum law; refugees who lacked effective representation; and refugees who otherwise qualified for an exception to the filing deadline but were considered to have not filed within a ‘reasonable period’ of time after that exception occurred.”

B. Summary Removal Procedures Fail to Effectively Screen for Protection Needs

IIRIRA included provisions allowing immigration enforcement officers — rather than judges — to order the removal of certain individuals through processes called “expedited removal” and “reinstatement of removal.” These summary removal orders carry severe consequences and penalties, including a minimum five-year bar to reentering the United States, with limited options for administrative review or appeal. Prior to the enactment of IIRIRA, only an immigration judge could order a person removed from the United States, with only some minor exceptions (ACLU 2014).

Expedited removal blocks individuals from even applying for asylum unless they first pass through a screening process. Congress created this screening process as it recognized the importance of assuring access to refugee protection — and *non-refoulement* — for asylum seekers who have credible fears of persecution. When an individual who is subjected to expedited removal indicates an intention to apply for asylum or a fear of persecution and/or torture, the immigration officer must refer that individual for a “credible fear interview,” an interview with an asylum officer within USCIS. In the credible fear interview, the individual must convince the asylum officer that a “significant possibility” exists that he or she will be able to demonstrate eligibility for asylum. If the asylum seeker receives a positive result from the credible fear interview, she or he will be referred to regular removal proceedings, a process under section 240 of the Immigration and Nationality Act (INA), and may present his or her asylum claim before an immigration judge (Siskin and Wasem 2015). Those who are not found to have a credible fear of persecution are subject to immediate removal. Individuals with prior removal orders, who are therefore subject to reinstatement of removal, are not eligible to seek asylum and must meet a higher standard by demonstrating a “reasonable fear” of persecution in the interview with the asylum officer. Upon a positive finding, the individual will be permitted to apply for withholding of removal under the Refugee Convention and/or the Convention Against Torture (CAT), as well as deferral of removal under CAT (ACLU 2014). During fiscal year (FY) 2016, in the midst of the refugee and displacement crisis stemming from the Northern Triangle countries of Central America — El Salvador, Guatemala, and Honduras — USCIS conducted 92,990 credible fear interviews and 9,446 reasonable fear interviews (USCIS 2016b).

Multiple reports have identified a range of due process and implementation concerns with respect to summary deportation (Kerwin 2015). For example, in a comprehensive report issued in 2005, the bipartisan US Commission on International Religious Freedom (USCIRF) identified a number of serious deficiencies in the implementation of expedited removal, including the failure to effectively follow procedures to identify and safeguard individuals expressing a fear of return. For example, in more than half of the 354 interviews observed by USCIRF researchers, officers failed to read required information relating to asking for protection and in 72 percent of cases, asylum seekers were not allowed to review and correct the form before signing it. In addition, the commission found that in 15 percent of cases observed involving an arriving alien who expressed fear of return to the inspector (12 out of 79), the individual was ordered removed without being referred for a credible fear interview. The commission recommended that DHS not expand expedited removal beyond its initial creation as a port of entry program before addressing the systemic

How IIRIRA Has Undermined US Refugee Protection Obligations

flaws that undermined protections for asylum seekers (USCIRF 2005; USCIRF 2007). Subsequent reports in 2007, 2013, and 2016 reinforced these findings and recommended further reforms to the expedited removal process (USCIRF 2007; USCIRF 2013; USCIRF 2016).

In its 2016 report on expedited removal, USCIRF found “continuing and new concerns about the processing and detention of asylum seekers in expedited removal” including concerns about CBP’s interviewing practices, inadequate quality assurance, and the skepticism or hostility of some officers towards asylum claims. USCIRF also found that most of its 2005 recommendations had not been implemented. USCIRF recommended a number of reforms including that DHS “reiterate to all agencies and officers implementing Expedited Removal that their law enforcement mandate includes fully implementing U.S. laws and regulations governing the protection of individuals seeking refuge from return to persecution or torture,” and that CBP “retrain all officers and agents on their role in the Expedited Removal process, the proper procedures for interviewing non-citizens, and the special needs and concerns of asylum seekers and other vulnerable populations” (USCIRF 2016).

USCIRF findings were confirmed by the American Civil Liberties Union (ACLU) in 2014. The ACLU found that 55 percent of the 89 individuals interviewed for its report, all of whom had received a summary removal order, indicated that they were never asked by immigration border officials whether they had a fear of persecution (ACLU 2014). Others who were asked and indicated a fear were, according to the report, nevertheless removed from the United States without being referred for a credible fear screening interview.

Research conducted by Human Rights Watch (HRW) similarly revealed that Central American asylum seekers had been deported during the expedited removal process — in some cases, multiple times — despite having expressed a fear of persecution to border officials and presented seemingly meritorious claims consistent with reports of violence in the region, which, if the rules were being followed, should have led authorities to refer their cases for closer scrutiny by an asylum officer (HRW 2014). HRW’s review of government data also showed that only 1.9 percent of Hondurans placed in summary proceedings were referred for credible fear interviews, despite growing recognition of a regional refugee crisis stemming from violence perpetrated by transnational criminal organizations and other forms of persecution, particularly in Honduras (ibid. 8; UNHCR 2015).

Among refugees who were wrongfully deported and deprived of their right to seek asylum were individuals like “Carla”,⁸ a transgender woman from a Central American country, who initially came to the United States in October 2014 after suffering rape and sexual violence in her home country. Due to US immigration officials’ failure to respond to Carla’s requests for asylum, she was removed to Honduras through the expedited removal process, without ever being permitted to apply for asylum before an immigration judge. Carla returned to the United States in June 2015, was apprehended upon entry, and prosecuted for illegal reentry. After serving her criminal sentence, she was transferred to the custody of US Immigration and Customs Enforcement (ICE) and placed in reinstatement of removal proceedings. Carla passed a reasonable fear interview, and while ineligible to apply for

⁸ Names of asylum seekers have been changed to protect privacy.

asylum due to her prior order of removal, she applied for and was granted withholding of removal with the assistance of pro bono counsel secured by Human Rights First.

Those who pass the initial border screening and are referred by immigration border officials to an asylum officer for a credible or reasonable fear screening can face further challenges as these interviews sometimes fail to identify individuals with refugee claims. At the time expedited removal was enacted, Senator Orrin Hatch (R-UT), who served on the Senate Judiciary Committee, noted that the credible fear screening was meant to be “a low screening standard for admission into the usual full asylum process.” (US Senate 1996). However, in early 2014, USCIS issued a new lesson plan for asylum officers on conducting fear screenings, which eliminated the above-mentioned language of Senator Hatch and, according to a report by USCIRF, reemphasized “the requirement that asylum seekers must show a nexus between their personal fear claims and a protected ground” (USCIRF 2016).

In interviews with asylum officers, USCIRF reported that while it found certain aspects of the revised lesson plan, such as a new checklist, to be helpful in increasing knowledge of an asylum seeker’s claim, it said that “the checklist leads them to develop a fuller analysis and record of the claim, bringing it close to the point of a full adjudication on the merits” (USCIRF 2016). In a 2014 report, Human Rights First expressed concern that the new plan, along with an accompanying memorandum, appeared to signal that asylum officers should apply a higher standard in credible fear interviews, treat credible fear interviews like full-blown asylum interviews and require production of evidence that would be difficult or impossible for a recently detained unrepresented asylum seeker to produce at credible fear interviews (Human Rights First 2014).

Notwithstanding the more stringent guidelines, there are many other reasons why asylum officers may incorrectly determine that an asylum seeker with a bona fide protection claim does not meet the relevant screening standards. US asylum law has become exceedingly complicated over the years, and many asylum cases involve legally complex and factually detailed histories. Yet, asylum officers are making these difficult determinations in a screening process with traumatized individuals who are overwhelmingly unrepresented. Many asylum seekers do not speak English, and have great difficulty communicating through interpreters, often in interviews that are conducted telephonically. Many are recovering from difficult journeys and still suffering from the effects of their persecution. The overwhelming majority of asylum seekers do not have legal representation during credible fear interviews, and have only limited access to legal information that can help them to prepare.⁹

For example, “Toni” was initially found to not meet the credible fear standard — a mistake that was only rectified because Toni, unlike the vast majority of asylum seekers subjected

9 There is no recent, publicly available data on representation rates for credible fear or reasonable fear interviews and, to the authors’ knowledge, no analysis has been conducted recently to ascertain such representation rates. However, based on Human Rights First’s interviews and interactions with nonprofit attorneys working with detained asylum seekers across the country, it is clear that the vast majority are unrepresented at this initial — but critical — stage in the process of seeking asylum. Moreover, overall rates of representation in detention — where the vast majority of fear interviews are conducted — are exceedingly low. A recent national study on access to counsel found that from 2007 to 2012, only 14 percent of detained immigrants had legal representation (Eagly and Shafer 2015).

to credible fear screenings, was able to secure pro bono legal representation. Toni is a gay man with a female gender identity from El Salvador who suffered severe physical and mental harm at the hands of the Salvadoran government and other persecutors. In El Salvador, Toni had worked with a human rights organization to improve the plight of the LGBT community. Toni was beaten by the police and eventually forced to flee El Salvador due to death threats. After seeking protection at the US southern border in 2014, Toni was put into immigration detention. Toni was nearly deported under expedited removal without being allowed to apply for asylum. The Asylum Office initially denied Toni's credible fear interview, without examining any of the country conditions evidence documenting the extreme violence perpetrated against the LGBT community in El Salvador. An immigration court failed to vacate this decision despite letters from LGBT human rights organizations explaining the risks Toni would face if returned. After the intervention of pro bono counsel and a reconsideration request, Toni was finally allowed to apply for asylum (Acer 2015).

The lack of sufficient safeguards on the use of expedited removal leaves genuine asylum seekers and refugees who meet US and international law refugee standards at risk of mistaken deportation. In pending federal litigation, 28 asylum-seeking mothers who have been in prolonged detention at the Berks County Residential Center — one of three family immigration detention facilities in the country — are seeking federal judicial review of their credible fear determinations.¹⁰ The mothers, whose claims include cases of severe physical and sexual abuse at the hands of persecutors, and threats of abductions and violence by members of international criminal gangs, were interviewed for credible fear while held in family detention with their children (ACLU 2016a).

Given the many deficiencies in the expedited removal process, including those outlined above, it is clear that refugees have been turned away from the United States in violation of the prohibition of *refoulement*. Indeed, over the years, various studies and media reports have documented cases of individuals who were mistakenly returned under expedited removal (Musalo et al. 2001; Schmitt 2001). Moreover, the nature of summary proceedings in itself may amount to a type of “penalty” which is imposed on asylum seekers due to their manner of entry. As James C. Hathaway (2005, 408) concluded: “The case is strong that the assignment of refugees who arrive without proper documentation to abbreviated procedures is in essence a penalty inflicted for irregular entry. When a summary procedure is resorted to not on the grounds of the substantive insufficiency of a claim, but rather to sanction a refugee for his or her mode of entry, such procedures take on a decidedly punitive character.”

C. Mandatory Detention and Other Policies Undermine Access to Asylum and Contravene US Treaty Obligations

The US government's detention of asylum seekers presents many barriers to asylum. Detention isolates asylum seekers, often in facilities that are distant from urban centers, where it is often exceedingly challenging to find legal counsel, particularly for indigent individuals given the limited availability of pro bono legal services. Moreover, expedited removal, as well as other US detention policies and practices, violate US human rights

¹⁰ *Castro v. U.S. Department of Homeland Security*, No. 16-1339, (3d Cir. 2016).

treaty obligations. Where asylum seekers are initially detained for a limited purpose — such as to verify identity — international standards require that detention be for the shortest time possible, with procedures in place to review custody decisions and to allow for release.¹¹ Detention beyond such a limited time frame often violates Article 31 of the Refugee Convention as well as Article 9 of the ICCPR, as it can be “arbitrary in the absence of particular reasons specific to the individual, such as an individualized likelihood of absconding, a danger of crimes against others or a risk of acts against national security” (UNHRC 2014).

The passage of IIRIRA in 1996 marked the beginning of a massive expansion of immigration detention. IIRIRA imposed “mandatory detention” on certain broad categories of immigrants, including “arriving” asylum seekers, who were subject to “expedited removal” processing. From 1994 to 2013, the immigrant detention system grew more than five-fold, as the daily detention population grew from 6,785 to more than 34,000 (MRS/USCCB and CMS 2016, 162). According to reports from the *Wall Street Journal*, as the Obama administration neared the end of its term, the US immigrant detention system had reached a historic high, with an average daily population of approximately 45,000 (Barrett 2016).

The widespread use of expedited removal, which invokes initial “mandatory detention,” raises questions as to how immigration officers assess the need to detain to begin with. In 2015, the Inter-American Commission on Human Rights expressed its “deep concern that some of the responses” to the increased arrival of children and families seeking protection at the US border had included both the use of expedited removal against families and “the application of generalized and automatic detention” (IACHR 2015, 56). The broad nature of DHS’s application of expedited removal as a blanket policy at the border results in a similar blanket policy of detention, which violates Article 9 of the ICCPR as well as the prohibition against penalizing refugees for their manner of entry into a country. The Refugee Convention recognizes that asylum seekers often have no choice but to arrive at or enter a country of refuge without immigration documentation and should not be penalized as a result.¹²

Detention itself impedes access to asylum. As USCIRF noted in its most recent report on the barriers imposed by expedited removal, “[t]he rural locations of many of the facilities where asylum seekers are detained continue to make it very difficult, as a practical matter, for individuals to obtain legal advice” (USCIRF 2016, 52). A national study on access to counsel, which analyzed government data on over 1.2 million immigration removal proceedings over a six-year period from 2007 to 2012, found that while only 14 percent of detained immigrants were represented, 69 percent of those who had been released from detention obtained counsel (Eagly and Shafer 2015). This disparity has a tremendous impact on both access to the asylum system itself as well as the likelihood of a successful case outcome. Eagly and Shafer reported that the odds were 15 times greater that immigrants

11 Convention relating to the Status of Refugees, arts. 31, 26, July 28, 1951, 189 U.N.T.S. 150; International Covenant on Civil and Political Rights art. 9, Dec. 16, 1966, 999 U.N.T.S. 171.

12 A report developed during the drafting of the Convention stated, “A refugee whose departure from his country of origin is usually a flight, is rarely in a position to comply with the requirements for legal entry (possession of national passport and visa) into the country of refuge” (Goodwin-Gill 2001, 57; ECOSOC 1950, annex I-II).

How IIRIRA Has Undermined US Refugee Protection Obligations

with representation, as compared to those without, sought relief, and five-and-a-half times greater that they received it (Eagly and Shafer 2015). Finding medical experts to conduct evaluations to confirm torture or trauma may also be exceedingly challenging when detention centers are located in remote, rural areas (Human Rights First 2015a).

Once asylum seekers pass out of expedited removal processing (after passing their credible fear screening), and into regular removal proceedings under INA section 240, they are no longer subject to “mandatory detention.” However, the procedural and practical barriers to release often subject asylum seekers to prolonged detention. Those who have been placed into expedited removal proceedings after crossing the US border can request release through an immigration court bond hearing. But those who request protection at formal ports of entry are barred under current regulatory language from immigration court custody review. They can only potentially, if they meet the relevant criteria, be released on “parole” — a mechanism that allows DHS to release some noncitizens from detention while their removal proceedings are pending. Since the early 1990s, US immigration authorities have laid out criteria that should be followed in assessing whether to continue to detain an asylum seeker who requests protection at a US airport or other formal border entry point (referred to as an “arriving asylum seeker”) or whether to release that asylum seeker on parole after passing a screening interview. These criteria have generally included sufficiently establishing identity, demonstrating community ties or lack of flight risk, and posing no danger to the community. However, the criteria have been specified in a series of memoranda and policy directives, rather than in binding regulations.¹³ The former Immigration and Naturalization Service (INS) and the DHS have declined to put release safeguards for arriving asylum seekers into regulations despite repeated recommendations made in 2005, 2007, and 2013 by the bipartisan USCIRF, as well as others (USCIRF 2005, 8; USCIRF 2007; USCIRF 2013, 1-2, 10).

Through research conducted in 2016, Human Rights First found that many asylum seekers are held for the duration of their asylum cases, despite meeting criteria for release on parole upon a positive credible fear finding (Human Rights First 2016a). Asylum seekers who sought protection at a port of entry — known as “arriving” asylum seekers — are often held in detention for the duration of their cases despite meeting criteria for release detailed in a 2009 ICE memorandum entitled “Parole of Arriving Aliens Found to Have Credible Fear of Persecution or Torture” (ICE 2009). Nonprofit attorneys who assist arriving asylum seekers reported to Human Rights First that ICE often fails to properly apply the Asylum Parole Directive, with 91 percent stating that ICE denies parole in cases where asylum seekers appear to meet all the criteria for release. Only 47 percent of the 3,505 reported parole decisions were granted in the first nine months of 2015, according to data released by ICE in response to a Freedom of Information Act (FOIA) request by the ACLU and the Center for Gender and Refugee Studies. By contrast, 80 percent of arriving asylum seekers found to have a credible fear were granted parole from detention in FY 2012 (a period fairly soon after the directive went into effect in early 2010), according to government data provided to USCIRF (USCIRF 2013, 9).

In certain parts of the country, there appears to be a near moratorium on parole. For example, the Stewart Detention Center in Georgia, which is the largest immigration

13 See McNary (1992), Pearson (1998a), Pearson (1998b), Cerda (2004), and ICE (2007).

detention center in the United States, has become “a detention center for asylum seekers” according to a local nonprofit attorney (Human Rights First 2016b). According to one data source, there were zero grants of parole at both Stewart and the Irwin County Detention Center in Georgia in all of FY 2015 despite the fact that the Asylum Parole Directive requires automatic review of all arriving asylum seekers who have been found to have a credible fear, and immigrants held in Georgia detention centers are much less likely to be released on bond than immigrants who are detained elsewhere (Human Rights First 2016b; Southern Poverty Law Center 2016). The immigration court located at the Stewart Detention Center also has one of the lowest legal representation rates in the country, with a recent study finding that only six percent of 41,674 detained immigrants secured legal representation between 2007 and 2012 (Eagly and Shafer 2015). Similarly in New Jersey, Human Rights First found that arriving asylum seekers face tremendous challenges seeking parole and most appear to be detained for the duration of their proceedings. Among 80 arriving asylum seekers detained in New Jersey detention centers who were represented by American Friends Service Committee between February 2015 and September 2016, only three were granted parole. Of the 40 cases that had been resolved favorably at the time of the report, asylum seekers spent an average of six months in detention. All 40 of these individuals were forced to remain in detention for the duration of their immigration court cases (Human Rights First 2016c).

The Supreme Court heard arguments regarding the prolonged detention of asylum seekers and other immigrants who are barred from court custody review in November 2016 in *Jennings v. Rodriguez*.¹⁴ In that case, the Court is assessing whether it violates the Constitution and the immigration laws to subject immigrants in deportation proceedings to long-term detention without individualized bond hearings. The case challenges the government’s practice of detaining immigrants facing deportation proceedings for months or years without due process, including many long-term lawful permanent residents and asylum seekers. The US Court of Appeals for the Ninth Circuit had ruled that the government must provide individualized bond hearings to assess danger and flight risk when detention exceeds six months, and every six months thereafter. The court’s ruling could affect thousands of immigration detainees across the country.

Asylum seekers — like all individuals — have a right to a presumption of liberty and generally should not be placed in detention. Seeking asylum from persecution is a human right enshrined in the Universal Declaration of Human Rights. The Refugee Convention recognizes that asylum seekers often have no choice but to arrive at or enter a country of refuge without immigration documentation and should not be penalized as a result (Goodwin-Gill 2001).¹⁵ Where asylum seekers are initially detained for a limited purpose — such as to verify identity — international standards require that detention be for the shortest time possible, with procedures in place to review custody decisions and to allow for release (Acer 2010; International Detention Coalition 2011).¹⁶ Detention beyond such a

14 *Jennings v. Rodriguez*, No. 15-1204, (9th Cir., filed Oct. 17, 2016).

15 A report developed during the drafting of the Convention stated, “A refugee whose departure from his country of origin is usually a flight, is rarely in a position to comply with the requirements for legal entry (possession of national passport and visa) into the country of refuge” (Goodwin-Gill 2001; ECOSOC 1950).

16 Convention relating to the Status of Refugees, arts. 39, 26, July 28, 1951, 189 U.N.T.S. 150; International Covenant on Civil and Political Rights art. 9, Dec. 16, 1966, 999 U.N.T.S. 171.

limited time frame would be “arbitrary in the absence of particular reasons specific to the individual, such as an individualized likelihood of absconding, a danger of crimes against others or a risk of acts against national security” (UNHRC 2014).

The US practice of detaining asylum seekers, often without access even to immigration court custody hearings and for prolonged periods, violates the ICCPR, a multilateral treaty that the United States has ratified. Article 9(1) of the ICCPR provides that every person “has the right to liberty” and “[n]o one shall be subjected to arbitrary arrest or detention.” Article 9(4) of the ICCPR provides that anyone deprived of liberty by arrest or detention “shall be entitled to take proceedings before a court.” In October 2016, the UN Working Group on Arbitrary Detention, in preliminary findings issued at the end of its visit to the United States, stated that “[m]andatory detention of migrants, especially asylum-seekers, is against international law standards, and detention should be the result of individual assessment and the reasons for detention duly notified to the migrant and given the opportunity to challenge the detention while the detention should remain reasonable in term of its length” (OHCHR 2016). Other human rights authorities, including the UN Special Rapporteur on the Human Rights of Migrants and the Inter-American Commission on Human Rights, have also concluded, after earlier missions to the United States, that the United States should provide immigration detainees with access to immigration court custody hearings (UNGA 2008; IACHR 2010).

The Refugee Convention provides that the United States “shall not impose penalties” on arriving refugees “on account of their illegal entry or presence” in the country or restrict “the movements of such refugees” unless such restriction is “necessary.”¹⁷ The Convention prohibits the use of detention as a penalty or sanction for illegal entry or presence in a country (UNHCR 2012). Moreover, as refugee law scholar James C. Hathaway (2005, 421-23) has explained, Article 31(2) of the Refugee Convention prohibits “other than minimalist detention” to verify identity and circumstances of arrival and enjoins states “from detaining refugees on the basis of general rules that authorize prolonged detention as a response to unauthorized entry.”

II. IIRIRA Has Created and Contributed to Systemic Inefficiencies

In addition to undermining access to asylum, the barriers imposed by IIRIRA — the filing deadline, summary removal proceedings and increased use of detention — have injected substantial inefficiencies into the US asylum and immigration system by inserting additional layers of technicalities and processing into the system and increasing the use of the costly tool of detention. As detailed below, these barriers have led to the waste, and diversion, of limited governmental staffing resources and the sharp escalation in detention expenditures despite the availability of more cost-efficient alternatives.

¹⁷ United Nations Convention relating to the Status of Refugees art. 31(1), (2), July 28, 1951, 189 U.N.T.S. 137. Articles 2 through 34 of the Refugee Convention became binding on the United States through our accession to the United Nations Protocol relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 267.

A. The One-Year Filing Deadline Undermines Efficiency

The filing deadline undermines the efficiency of the asylum and immigration court adjudication systems in a number of ways. In its 2010 report, Human Rights First found that the deadline (1) delayed the resolution of asylum cases, (2) led thousands of cases that could have been resolved at the asylum office level to be shifted to the more costly, backlogged, and overburdened immigration court system, and (3) diverted time and resources at both the asylum office and the immigration courts, expending limited government resources litigating a technicality when those resources could instead be used to evaluate the actual merits of asylum cases or for other matters (Human Rights First 2010).

Likewise, an independent study conducted by academic experts found that the deadline caused many cases that could have been granted by the DHS-USCIS Asylum Division instead to be referred into the immigration court removal system. The study, which analyzed DHS's own data, concluded that the filing deadline bar prevented the Asylum Division from granting 15,000 asylum applications between 1998 and 2009 alone (Schrag et al. 2010, 753-55, 761). Instead, due to the deadline, additional litigation at the already overstretched immigration court level was required for these and other cases. The resulting staff time and resources used could have been directed to other cases or needs. More recent figures from the Asylum Office confirm that filing deadline cases make up a large percentage of those cases that are referred to the immigration court. From July to December 2016, 34 percent of all cases referred to the immigration courts were one-year filing deadline cases (USCIS 2016a). Data from the Executive Office for Immigration Review shows that once in immigration court, between 67 and 80 percent of cases referred by asylum officers were granted asylum from FY 2011 through FY 2015 (EOIR 2016, K3).

DHS ultimately concluded that the filing deadline makes the overall adjudication process more difficult, and a provision to eliminate the filing deadline was included in the Obama administration's January 2013 blueprint for immigration reform, a series of proposed statutory reforms to improve the efficiency of the immigration adjudication system (Acer and Magner 2013, 452). A provision to eliminate the filing deadline was also included in the 113th Congress' bipartisan Senate immigration reform bill (S. 744), though that bill was not ultimately enacted (Magner 2016), and in an earlier bipartisan bill, entitled The Refugee Protection Act of 2011, which was introduced in the US Senate in August 2001 by Senator Patrick Leahy (D-Vt) with a number of Republican and Democratic cosponsors (Acer and Magner 2013).

B. Expanded Use of Summary Removal Undermines Efficiency and Contributes to Growing Backlogs

The use of summary removal processes, including the expanded use of expedited removal, has injected multiple inefficiencies into the asylum adjudication system, creating an entire additional layer of preliminary screening in many cases. The decision to apply expedited removal to families who crossed the southern border after fleeing Central America also diverted asylum officers and contributed to the growth of a substantial backlog in affirmative asylum cases.

How IIRIRA Has Undermined US Refugee Protection Obligations

For many years after the enactment of IIRIRA, the use of expedited removal was limited to formal ports of entry. Beginning in 2002, the INS and then DHS began, step by step, to expand the use of this summary deportation tool. Now, expedited removal is used not only at formal ports of entry, but also by Border Patrol when migrants encountered within 100 miles of the border cannot establish physical presence in the United States during the 14-day period preceding the encounter (CBP 2004). The total number of expedited removals increased from 34,624 in 2002 to 193,032 in 2013 (Kerwin 2015, 217). In 2014, the Obama administration further expanded expedited removal by applying it to families who crossed the southern border and sought US protection with their children — a practice that DHS had avoided in prior years. Instead, DHS had typically placed families directly into regular (non--expedited) removal proceedings before an immigration judge (Human Rights First 2015a).

This massive increase in the use of expedited removal, along with an escalation in the numbers fleeing persecution and violence in the Northern Triangle, led to a sharp rise in the number of credible fear interviews, as well as the number of reasonable fear interviews stemming from the invocation of reinstatement of removal. From FY 2009 to FY 2016, the increasing number of credible fear and reasonable fear claims referred to USCIS created a significant burden on the Asylum Division, which is responsible for the protection components of expedited removal and reinstatement of removal. During FY 2012, the Asylum Division adjudicated 13,880 credible fear interviews and 5,053 reasonable fear interviews (USCIS 2016b). By FY 2016, those numbers rose to 92,990 credible fear and 9,446 reasonable fear interviews (*ibid.*).

The resulting need to devote Asylum Division staff to expedited removal and reinstatement of removal cases contributed to the significant backlog, and resulting delays, in affirmative asylum cases (USCIS Ombudsman 2015).¹⁸ The number of cases pending before the eight asylum offices increased by nearly a factor of six, from 32,560 in 2013 to 194,986 in September 2016 (Human Rights First 2016d). The growing backlog has led to delays in asylum adjudications across the country. As of September 2016, the asylum office in Los Angeles, California was scheduling interviews for asylum applications filed in August of 2011 — over five years ago. All the eight asylum offices across the country are scheduling interviews for applications filed over two years ago.¹⁹ For example, the Miami asylum office scheduled interviews in September 2016 for individuals who applied for asylum in May 2013 (Human Rights First 2016d). Therefore, all asylum officers are processing cases at a rate slower than the 180-day statutory period for full initial adjudication of an asylum claim and far beyond the requirement that an initial interview be scheduled within 45 days (Schrag et al. 2010, 651, 753-54).

18 Growth may also be attributed to a rise in the number of affirmative asylum cases filed. The number of new affirmative asylum applications grew from 44,446 in 2013 to nearly 57,000 in FY 2014 and 83,254 in 2015 (*ibid.*), which, according to the UNHCR, is part of a global trend that reflects the increase in displaced people fleeing persecution, war, and deteriorating security. The Asylum Division received more than 115,000 affirmative asylum applications in FY 2016 (USCIS 2016a).

19 USCIS, Affirmative Asylum Scheduling Bulletin. In April 2015, USCIS began publishing a monthly bulletin to report on the progress of scheduling interviews for affirmative asylum applications. For each asylum office the bulletin reports in which month and year the individuals currently being scheduled for interviews applied.

Moreover, as the Asylum Division has injected additional requirements and assessments into its credible fear screening process through its 2014 lesson plan and checklist. As a result, as discussed above, these screening interviews are approaching full-blown asylum interviews, albeit interviews where asylum seekers generally cannot obtain either legal counsel or evidence in support of their claims, given the short screening time frame. This increasingly duplicative expenditure of adjudicatory time is particularly wasteful given that expedited removal is now being used largely against a population that is fleeing severe persecution and brutal violence. As UNHCR has concluded, many of the women and children fleeing from the Northern Triangle have legitimate claims to protection (UNHCR 2015).

C. Over-Detention is Costly and Inefficient

In the years since the enactment of IIRIRA and its “mandatory detention” provisions, the use of immigration detention in the United States has skyrocketed. This escalation in immigration detention has led to a number of inefficiencies. For one, detention is not a cost-effective migration management tool. Alternative to detention (ATD) programs, which cost far less, have been proven effective in assuring immigrants’ compliance with court appearance obligations, making institutional detention, with its high costs, even more questionable — and less efficient — as a policy choice. Second, due to the lack of safeguards in the system and the increasing overreliance on detention as a default tool, ICE often wastes its existing detention space. Instead of releasing individuals who do not warrant continued detention, ICE often inefficiently holds many asylum seekers and other immigrants in costly detention facilities, and then asserts a lack of sufficient beds to detain other immigrants.

The costs of immigration detention have risen dramatically since 1996. Congress has annually appropriated the funds to sustain and expand the immigration detention system — from \$864 million in 2005 to over \$2 billion today. These dramatic increases have continued — and been maintained — even as criminal justice systems across the country are striving to transform the way they approach detention to reduce costs, improve efficiency and effectiveness, avoid detaining individuals unnecessarily, and make detention itself more humane.

The United States is now detaining a record number of immigrants, with an October 2016 media report indicating the average daily population would reach 45,000 — a historic high — in late 2016 (Barrett 2016). By the summer of 2017, ICE may be detaining as many as 47,000 immigrants daily. This unprecedented jump — more than 50 percent in less than a year — should cause concern even among fervent proponents of detention and certainly begs questions as to whom the government is detaining and why.

Much of the recent increase in detention appears to be fueled by a sharp increase in detention of asylum seekers since 2014, which corresponds to the expanded use of expedited removal in border areas and its application to Central Americans fleeing persecution and violence in the Northern Triangle. Human Rights First has documented this increase in US detention of asylum seekers in a series of reports (Human Rights First 2016a; Human Rights First 2016b; Human Rights First 2016c). The number of asylum seekers sent to and held in

How IIRIRA Has Undermined US Refugee Protection Obligations

immigration detention increased nearly threefold in recent years, from 15,683 in 2010 to 44,228 in 2014. The number of asylum seekers to pass through immigration detention in 2016 is believed to be much higher, and exceed 100,000 for 2016 alone given USCIS protection screening statistics.²⁰ The exact numbers are unknown because, despite repeated requests for information and a statutory obligation to provide annual reports on asylum seekers in detention, DHS and ICE have failed to release more recent statistics on their detention of asylum seekers.

The growing population of incarcerated adults and children has made ICE the biggest federal client of the private prison industry. Approximately 73 percent of immigrants are held in detention facilities operated by private, for-profit prison corporations, despite evidence that private prison companies provide lower quality services and present higher safety and security risks than facilities run by the government (ACLU 2016b). At a cost of \$2.2 billion annually to maintain 31,000 beds, this system costs taxpayers on average \$194 per day to detain an immigrant.

In many cases, detention is not necessary to secure high rates of appearance by asylum seekers. Government data shows that 98 percent of 11,426 cases involving adults with children whose cases were initiated in 2014 and who had obtained legal counsel were still in compliance with their court appearance obligations two years later (Human Rights First 2015b). Another analysis of individuals who had been released from detention pursuant to an immigration judge's custody decision showed that 86 percent of 13,485 cases were in compliance with their appearance obligations in 2015 (TRAC 2016).

Much less costly ATDs have proven successful in ensuring appearance for immigration obligations. For example, the Vera Institute of Justice piloted a program funded by the former INS that provided services to over 500 noncitizens, and found that 93 percent of asylum seekers who received intensive supervision services appeared at all of their hearings (Golden et al. 1998). In 2015, Lutheran Immigration and Refugee Service and the US Conference of Catholic Bishops' Migration and Refugee Services piloted community-based case management models, which showed promising initial results, achieving compliance rates of 96 percent (44 out of 46 participants) and 97 percent (38 out of 39 participants) (Human Rights First 2015a). Case management-based programs may cost only about 20 percent the cost of detention (Root 2000). However, ICE devotes only a small fraction of its budget to alternative to detention programs and, within that budget allocation, case management programs have received modest, or no, government funding. Instead, ICE has relied almost entirely on technology-based ATD programs, which often involve placing GPS monitoring devices on individuals, and which have been criticized as an infringement on human dignity and liberty (MRS/USCCB and CMS 2016).

By contrast, in the criminal justice system, critical attention has been focused on reducing unnecessary detention costs. For instance, the Texas Public Policy Foundation, home to the criminal justice reform coalition Right on Crime, has advocated for expanded use of

²⁰ As noted in the previous section, in FY 2016, the Asylum Division conducted 92,990 credible fear interviews (USCIS 2016a). Since individuals in expedited removal are typically detained, one can assume that the vast majority of these interviews were related to a detained asylum seeker. In addition, ICE detains asylum seekers who are seeking asylum defensively in regular 240 removal proceedings, as well as a small number of affirmative asylum seekers.

alternatives like pretrial services for years, citing cost savings (Human Rights First 2014, 15). Various states, such as South Carolina, Kentucky, Alabama, Kentucky, and Washington have cut costs in recent years by providing increased community supervision, instead of prison time, for certain controlled-substance offenses (Henrichson and Delaney 2012).

The lack of safeguards in the US detention system, such as independent court review and the now systemic overreliance on detention, have led to an inefficient use of existing detention space. In many cases, as detailed in Human Rights First's reports, ICE officers continue to detain asylum seekers who do not need to be detained. In these cases, asylum seekers appear to merit release under existing ICE policy directives, for instance, because they have sufficiently established their identities and do not present a safety or flight risk (Human Rights First 2016a). As so many beds in detention facilities are filled with individuals who should not be detained, ICE then does not have sufficient space for others who should be higher enforcement priorities (Barrett 2016).

In some cases, DHS and ICE have overused detention based on assumptions that are not backed up by hard data or evidence-based practice. For instance, DHS officials have used detention with the expectation that broad detention practices would serve as a deterrent and discourage other asylum seekers from seeking US protection. For example, as DHS Secretary Jeh Johnson stated before the Senate Committee on Appropriations on July 10, 2014, "[O]ur message to this group [of adults who brought their children with them] is simple: we will send you back. We are building additional space to detain these groups and hold them until their expedited removal orders are effectuated" (Johnson 2014). There is, however, little evidence that immigration detention is an effective deterrent to migration. In an amicus brief to the Ninth Circuit in *Flores v. Lynch*, 31 academics and social scientists — including several well-known scholars in the migration field — maintained that the detention of refugee families cannot be said to significantly impact any changes in future migration of families.²¹ Other experts on global migration have similarly documented the lack of evidence that detention deters asylum seekers (International Detention Coalition 2015). Therefore, not only does such an approach fail to comport with due process and US treaty obligations, it also is ineffective and inefficient in achieving its main objective of deterrence.

Ultimately, the expedited removal provisions of IIRIRA paved the way for blanket detention decisions that have contributed to the swelling of the US immigration detention system. Twenty years after the enactment of the law, the United States is detaining record numbers of immigrants, with little evidence that these policies promote immigration policy goals such as deterring unauthorized migration or ensuring appearances at court hearings.

IV. Conclusion and Recommendations

Ultimately legislative reform will be necessary to eliminate the onerous barriers that are undermining the efficiency of the US asylum system and leading refugees to be denied asylum or treated in ways that are inconsistent with US treaty commitments. The one year filing deadline bar should be eliminated given its counterproductive impact on the US asylum system and its harmful impact on refugees with well-founded fears of persecution.

²¹ Brief for Appellant, *Flores v. Lynch*, No. 15-56434 (9th Cir. 2016).

How IIRIRA Has Undermined US Refugee Protection Obligations

Expedited removal should be eliminated by statute, and its use limited in the meantime, in particular against families with children and in areas outside of formal US ports of entry. The use of immigration detention should always be subject to safeguards that protect liberty and limit arbitrary detention and the wasteful overuse of detention. These safeguards should include independent court review, and at the very least, access to immigration court custody hearings — both initially and after six months of detention — and reasonable bond levels that indigent asylum seekers can afford to pay.

Instead of erecting costly, wasteful, and ultimately counterproductive barriers that make the asylum system more complex and difficult for refugees to navigate, the executive branch and Congress should focus on investing in the necessary staff and resources to assure fair and timely adjudications by the Asylum Division and the immigration courts. There is bipartisan support for addressing the backlogs and delays plaguing the asylum and immigration court systems. An investment in timely decision-making will ultimately benefit the system overall, advancing its integrity as well as protecting the lives of refugees and their families.

REFERENCES

- Acer, Eleanor. 2010. “Reaffirming Rights: Human Rights Protections of Migrants, Asylum Seekers, and Refugees in Immigration Detention.” *Georgetown Immigration Law Journal* 24: 507-31.
- . 2015. “Statement for the Record of Eleanor Acer, Director, Refugee Protection, Human Rights First, Hearing before the House Judiciary Subcommittee on Immigration and Border Security, ‘Interior Immigration Enforcement Legislation.’” Testimony, February 11, Washington, DC.
- Acer, Eleanor, and Tara Magner. 2013. “Restoring America’s Commitment to Refugees and Humanitarian Protection.” *Georgetown Immigration Law Journal* 27: 445-84.
- ACLU (American Civil Liberties Union). 2014. *American Exile: Rapid Deportations That Bypass the Courtroom*. New York: ACLU. https://www.aclu.org/files/assets/120214-expeditedremoval_0.pdf.
- . 2016a. “Castro v. Department of Homeland Security.” New York: ACLU. <https://www.aclu.org/cases/castro-v-department-homeland-security>.
- . 2016b. *Shutting Down the Profiteers: Why and How the Department of Homeland Security Should Stop Using Private Prisons*. New York: ACLU. https://www.aclu.org/sites/default/files/field_document/white_paper_09-30-16_released_for_web-v1-opt.pdf.
- Barrett, Devlin. 2016. “Record Immigrant Numbers Force Homeland Security to Search for New Jail Space.” *Wall Street Journal*, October 21. <https://www.wsj.com/articles/record-immigrant-numbers-force-homeland-security-to-search-for-new-jail-space-1477042202>.

- CBP (US Customs and Border Protection). 2004. "Designating Aliens For Expedited Removal." Doc. No. FR 28-04. Washington, DC: DHS. <https://www.uscis.gov/ilink/docView/FR/HTML/FR/0-0-0-1/0-0-0-94157/0-0-0-94177/0-0-0-94493.html>.
- Cerda, Victor X. "ICE Memorandum, Expedited Removal Guidance 3 (Sept. 14, 2004) from Victor X. Cerda, ICE DRO Acting Director." Washington, DC: DHS.
- Eagly, Ingrid, and Steven Shafer. 2015. "A National Study of Access to Counsel in Immigration Court." *University of Pennsylvania Law Review* 164(1): 1-91.
- ECOSOC (UN Economic and Social Council). 1950. "Ad Hoc Committee on Statelessness and Related Problems, First Session: Summary Record of the Twentieth Meeting Held at Lake Success, New York, on Wednesday, 1 February 1950, at 2.30 p.m." UN doc. E/AC.32.L.38. New York: ECOSOC. <http://www.refworld.org/docid/3ae68c1c0.html>.
- EOIR (US Executive Office for Immigration Review). 2016. *FY 2015 Statistics Yearbook*. Washington, DC: Department of Justice. <https://www.justice.gov/eoir/page/file/fysb15/download>.
- Golden, Megan, Oren Root, and David Mizner. 1998. *The Appearance Assistance Program: Attaining Compliance with Immigration Laws Through Community Supervision*. New York: Vera Institute of Justice. <http://archive.vera.org/sites/default/files/resources/downloads/aap.pdf>.
- Goodwin-Gill, Guy S. 2001. "Article 31 of the 1951 Convention relating to the Status of Refugees: Non-penalization, Detention and Protection." Geneva: UNHCR. <http://www.unhcr.org/3bcfdf164.pdf>.
- Guterres, António. 2010. "Renewing U.S. Commitment to Refugee Protection: The 30th Anniversary of the Refugee Act." Keynote address, symposium of Human Rights First and Georgetown University Law Center, Washington, DC, March 16.
- Hathaway, James C. 2005. *The Rights of Refugees Under International Law*. New York: Cambridge University Press. <https://doi.org/10.1017/CBO9780511614859>.
- Henrichson, Christian, and Ruth Delaney. 2012. *The Price of Prisons: What Incarceration Costs Taxpayers*. New York: Vera Institute of Justice. https://storage.googleapis.com/vera-web-assets/downloads/Publications/the-price-of-prisons-what-incarceration-costs-taxpayers/legacy_downloads/price-of-prisons-updated-version-021914.pdf.
- Human Rights First. 2010. "The Asylum Filing Deadline: Denying Protection to the Persecuted and Undermining Government Efficiency." New York: Human Rights First. <http://www.humanrightsfirst.org/resource/asylum-filing-deadline-denying-protection-persecuted-and-undermining-government-efficiency>.
- . 2014. *How to Protect Refugees and Prevent Abuse at the Border: Blueprint for U.S. Government Policy*. New York: Human Rights First. <http://www.humanrightsfirst.org/sites/default/files/Asylum-on-the-Border-final.pdf>.

How IIRIRA Has Undermined US Refugee Protection Obligations

- . 2015a. *U.S. Detention of Families Seeking Asylum*. New York: Human Rights First. <https://www.humanrightsfirst.org/sites/default/files/hrf-one-yr-family-detention-report.pdf>.
- . 2015b. *Myth v. Fact: Immigrant Families' Appearance Rates in Immigration Court*. New York: Human Rights First. <http://www.humanrightsfirst.org/sites/default/files/MythvFact-Immigrant-Families.pdf>.
- . 2016a. *Lifeline on Lockdown: Increased U.S. Detention of Asylum Seekers*. New York: Human Rights First. http://www.humanrightsfirst.org/sites/default/files/Lifeline-on-Lockdown_0.pdf.
- . 2016b. “Detention of Asylum Seekers in Georgia.” New York: Human Rights First. <http://www.humanrightsfirst.org/sites/default/files/HRF-Georgias-Detention-of-Asylum-Seekers.pdf>.
- . 2016c. “Detention of Asylum Seekers in New Jersey.” New York: Human Rights First. <http://www.humanrightsfirst.org/sites/default/files/hrf-detention-asylum-seekers-nj-nov2016.pdf>.
- . 2016d. “Asylum Office Backlog and Delays.” New York: Human Rights First. <http://www.humanrightsfirst.org/resource/asylum-office-backlog-and-delays>.
- HRW (Human Rights Watch). 2014. “You Don’t Have Rights Here: US Border Screening and Returns of Central Americans to Risk of Serious Harm.” New York: HRW. <https://www.hrw.org/report/2014/10/16/you-dont-have-rights-here/us-border-screening-and-returns-central-americans-risk>.
- IACHR (Inter-American Commission on Human Rights). 2010. *Report on Immigration in the United States: Detention and Due Process*. Washington, DC: OAS (Organization of American States). <https://www.oas.org/en/iachr/migrants/docs/pdf/Migrants2011.pdf>.
- . 2015. *Refugees and Migrants in the United States: Families and Unaccompanied Children*. Washington, DC: OAS. <https://www.oas.org/en/iachr/reports/pdfs/Refugees-Migrants-US.pdf>.
- ICE (US Immigration and Customs Enforcement). 2007. “Parole of Arriving Aliens Found to Have a Credible Fear of Persecution or Torture.” Washington, DC: ICE. https://www.ice.gov/doclib/dro/pdf/11002.1-hd-parole_of_arriving_alien_found_credible_fear.pdf.
- . 2009. “Parole of Arriving Aliens Found to Have a Credible Fear of Persecution or Torture.” Washington, DC: ICE. https://www.ice.gov/doclib/dro/pdf/11002.1-hd-parole_of_arriving_alien_found_credible_fear.pdf.
- International Detention Coalition. 2011. *Legal Framework and Standards Relating to the Detention of Refugees, Asylum Seekers and Migrants: A Guide*. Melbourne: International Detention Coalition. http://idcoalition.org/wp-content/uploads/2011/07/IDC-Legal-Detention-Framework-Guide_Final.pdf.

- . 2015. *There Are Alternatives: A handbook for preventing unnecessary immigration detention (revised)*. Melbourne: International Detention Coalition. <http://idcoalition.org/publication/view/there-are-alternatives-revised-edition/>.
- Johnson, Jeh. 2014. "Statement by Secretary of Homeland Security Jeh Johnson Before the Senate Committee on Appropriations." Washington, DC: DHS. <https://www.dhs.gov/news/2014/07/10/statement-secretary-homeland-security-jeh-johnson-senate-committee-appropriations>.
- Kerwin, Donald. 2015. "The US Refugee Protection System on the 35th Anniversary of the Refugee Act of 1980." *Journal on Migration and Human Security* 3(2): 205-54. <https://doi.org/10.14240/jmhs.v3i2.49>.
- Magner, Tara. 2016. "Refugee, Asylum, and Related Legislation in the US Congress: 2013-2016." *Journal on Migration and Human Security* 4(4): 166-89. <https://doi.org/10.14240/jmhs.v4i4.67>.
- McNary, Gene. 1992. "INS Memorandum from Gene McNary, INS Commissioner, Parole Project for Asylum Seekers at Ports of Entry and in INS Detention." Washington, DC: Immigration and Naturalization Services (INS).
- MRS/USCCB and CMS (Migration and Refugee Services / United States Conference of Catholic Bishops, and the Center for Migration Studies). 2015. "Unlocking Human Dignity: A Plan to Transform the US Immigrant Detention System." *Journal on Migration and Human Security* 3(2): 159-204. <https://doi.org/10.14240/jmhs.v3i2.48>.
- Musalo, Karen, Lauren Gibson, Stephen Knight, and J. Edward Taylor. 2001. "*The Expedited Removal Study: Report on the First Years of Implementation of Expedited Removal*." *Notre Dame Journal of Law, Ethics, and Public Policy* 15(2): 1-155.
- Neilson, Victoria, and Aaron Morris. 2005. "The Gay Bar: The Effect of the One-Year Filing Deadline on Lesbian, Gay, Bisexual, Transgender, and HIV-Positive Foreign Nationals Seeking Asylum or Withholding of Removal." *New York City Law Review* 8: 233-82.
- OHCHR (UN Office of the High Commissioner for Human Rights). 2016. "Working Group on Arbitrary Detention: Preliminary findings from its visit to the United States of America (11-24 October 2016)." <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20746&LangID=E>.
- Pearson, Michael A. 1998a. "INS Memorandum, Expedited Removal: Additional Policy Guidance (Dec. 30, 1997) from Michael A. Pearson, Executive Associate Commissioner for Field Operations, Office of Field Operations, to Regional Directors, District Directors, Asylum Office Directors, reproduced in 75 Interpreter Releases 270." Washington, DC: INS.
- . 1998b. "INS Memorandum, INS Detention Use Policy, (Oct. 7, 1998) from Michael A. Pearson, Executive Associate Commissioner for Field Operations, reproduced at 75 Interpreter Releases 1505, 1523." Washington, DC: INS.

How IIRIRA Has Undermined US Refugee Protection Obligations

- Pistone, Michele R., and Philip G. Schrag. 2001. "The New Asylum Rule: Improved but Still Unfair." *Georgetown Immigration Law Journal* 16(1): 1-104.
- Root, Oren. 2000. "The Appearance Assistance Program: An Alternative to Detention for Noncitizens in U.S. Immigration Removal Proceedings." New York: Vera Institute of Justice. http://archive.vera.org/sites/default/files/resources/downloads/aap_speech.pdf.
- Schmitt, Eric. 2001. "When Asylum Requests Are Overlooked." *New York Times*, August 15.
- Schrag, Philip G., Andrew I. Schoenholtz, Jaya Ramji-Nogales, and James P. Dombach. 2010. "Rejecting Refugees: Homeland Security's Administration of the One-Year Bar To Asylum." *William and Mary Law Review* 52(3): 651-804.
- Siskin, Allison, and Ruth Ellen Wasem. 2005. *Immigration Policy on Expedited Removal of Aliens*. Washington, DC: Congressional Research Service. <http://trac.syr.edu/immigration/library/P13.pdf>.
- Southern Poverty Law Center. 2016. *Shadow Prisons: Immigrant Detention in the South*. Montgomery, AL: Southern Poverty Law Center. https://www.splcenter.org/sites/default/files/leg_ijp_shadow_prisons_immigrant_detention_report.pdf.
- TRAC (Transactional Records Access Clearinghouse). 2016. "What Happens When Individuals Are Released On Bond in Immigration Court Proceedings?" Syracuse, NY: TRAC. <http://trac.syr.edu/immigration/reports/438/>.
- UNGA (UN General Assembly). "Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development." U.N. Doc. A/HRC/7/12. New York: UNGA. <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G08/109/74/PDF/G0810974.pdf?OpenElement>.
- UNHCR (UN High Commissioner for Refugees). 1979. "Refugees Without an Asylum Country, Conclusion No. 15." <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3ae68c960>.
- . 2012. *Detention Guidelines: Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*. Geneva: UNHCR. <http://www.unhcr.org/refworld/docid/553e0f984.html>.
- . 2015. *Women on the Run: First-Hand Accounts of Refugees Fleeing El Salvador, Guatemala, Honduras, and Mexico, A Study Conducted by the United Nations High Commissioner for Refugees*. Geneva: UNHCR. <http://www.unhcr.org/en-us/publications/operations/5630f24c6/women-run.html>.
- UNHRC (UN Human Rights Committee). 2014. "General Comment No. 35: Article 9 (Liberty and Security of Person)." CCPR/C/GC/35. Geneva: UNHRC. <http://www.refworld.org/docid/553e0f984.html>

- USCIRF (US Commission on International Religious Freedom). 2005. *Report on Asylum Seekers in Expedited Removal*. Washington, DC: USCIRF.
- . 2007. *Expedited Removal Study Report Card: Two Years On*. Washington, DC: USCIRF. <http://www.uscirf.gov/reports-briefs/special-reports/report-asylum-seekers-in-expedited-removal>.
- . 2013. *Special Report: Assessing the U.S. Government's Detention of Asylum Seekers: Further Action Needed to Fully Implement Reforms*. Washington, DC: USCIRF.
- . 2016. *Barriers to Protection: The Treatment of Asylum Seekers in Expedited Removal*. Washington, DC: USCIRF.
- USCIS (US Citizenship and Immigration Services) Ombudsman. 2015. *Annual Report 2015*. Washington, DC: DHS. https://www.dhs.gov/sites/default/files/publications/2015%20CISOMB%20Annual%20Report_508.pdf.
- . 2016a. "Asylum Division Quarterly Stakeholder Meeting." Washington, DC: USCIS. <https://www.uscis.gov/outreach/asylum-division-quarterly-stakeholder-meeting-3>.
- . 2016b. "USCIS Credible Fear and Reasonable Fear Workload Report Summary: FY 2016 Total Caseload." Washington, DC: USCIS. <https://www.uscis.gov/sites/default/files/USCIS/Outreach/Upcoming%20National%20Engagements/CredibleFearReasonableFearStatisticsNationalityReports.pdf>.
- US Senate. 1996. "Congressional Record: September 27, 1996, 104th Congress, 2nd Session." Washington, DC: US Senate. <https://www.congress.gov/congressional-record/1996/9/27/senate-section/article/S11533-1>.

The *Journal on Migration and Human Security (JMHS)* is a peer-reviewed, public policy publication of the Center for Migration Studies of New York devoted to the US and international policy debates on migration. The journal draws upon the knowledge, expertise, and perspectives of scholars, public officials, faith communities, community-based organizations, nongovernmental organizations, corporate leaders, and others. The journal's theme of "human security" is meant to evoke the widely shared goals of creating secure and sustaining conditions in migrant sending communities; promoting safe, legal migration options; and developing immigration and integration policies that benefit sending and receiving communities and allow newcomers to lead productive, secure lives.

The Center for Migration Studies of New York (CMS) is an educational institute/think tank devoted to the study of international migration, to the promotion of understanding between immigrants and receiving communities, and to public policies that safeguard the dignity and rights of migrants, refugees, and newcomers (www.cmsny.org). CMS was established in 1964 and formally incorporated in 1969 by the Congregation of the Missionaries of St. Charles, Scalabrinians, an international community of Catholic priests, nuns, and lay people dedicated to serving migrants and refugees. CMS is a member of the Scalabrini International Migration Network (SIMN), a global network of more than 270 entities that provide services to migrants, including shelters along migrant corridors and welcoming (integration) centers in receiving communities. In fulfillment of its mission, CMS publishes journals, including the *International Migration Review* and the *Journal on Migration and Human Security*, books, conference proceedings, and other papers; sponsors conferences, meetings, briefings, symposia, and dialogues; produces evidence-based, policy-relevant research; provides expert support to local, national, and international institutions, particularly faith-based institutions; and maintains extensive archives on the history of immigration in the United States.



**Journal on Migration
and Human Security®**

<http://jmhs.cmsny.org>

Center for Migration Studies

307 East 60th Street, 4th Floor

New York, NY 10022 USA