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

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AARTI KOHLI
Director of Immigration Policy

DEEPA VARMA
Fellow

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# TABLE OF CONTENTS

**EXECUTIVE SUMMARY** ........................................................................................................ 4

**INTRODUCTION** .................................................................................................................. 5

**BORDER ENFORCEMENT** .................................................................................................... 5

Infrastructure of Border Enforcement ....................................................................................... 5
  - United States Border Patrol ................................................................................................. 6
  - Voluntary Departure/Return ............................................................................................... 6
  - Expedited Removal .............................................................................................................. 7

Border Patrol Programs and Policies ......................................................................................... 8
  - Secure Border Initiative ....................................................................................................... 8
  - Operation Stonegarden ......................................................................................................... 8
  - Operation Streamline ........................................................................................................... 9

Unintended Consequences of the Border Patrol Strategy ......................................................... 10

General Concerns ...................................................................................................................... 12

**IMMIGRATION ENFORCEMENT IN THE INTERIOR** ............................................................. 12

Legal History of State and Local Involvement in Immigration Enforcement ......................... 13

ICE Enforcement Programs Today .......................................................................................... 14
  - 287(g) .................................................................................................................................. 14
  - Criminal Alien Program ....................................................................................................... 17
  - Operation Community Shield .............................................................................................. 18
  - National Fugitive Operations ............................................................................................... 20
  - Secure Communities ........................................................................................................... 23

General Concerns ...................................................................................................................... 26
# TABLE OF CONTENTS

**WORKPLACE ENFORCEMENT**

- Legal Authority ......................................................... 26
- Worksite Enforcement Programs ....................................... 27
  - Workplace Raids .................................................. 27
  - E-Verify .................................................................. 28
  - I-9 Audits ................................................................ 30
- General Concerns .......................................................... 31

**DETENTION**

- Detention Overview ...................................................... 31
- Areas of Detention Reform ............................................... 32
  - Shifting to a "Civil” Detention System .......................... 32
  - Creating Alternatives to Detention ............................... 33
  - Improving Medical Care and Safety of Inmates .............. 34
  - Decreasing Inmates’ Isolation from Family and Counsel ... 35
  - Meeting the Needs of Children in Custody .................. 36
  - Improving Conditions for Asylum Seekers and Refugees .. 37
  - Improved Legal Information and Access to Counsel ........ 38
  - Improving Procedural Fairness for Individuals with Mental Disabilities ........................................ 39
- General Concerns .......................................................... 40

**CONCLUSION** ................................................................ 40
EXECUTIVE SUMMARY

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

Overview of Immigration Enforcement Activities

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

- **Border enforcement** involves efforts to regulate migration at ports of entry and prevent unauthorized migration along the rest of the border. The vast majority of border spending today is directed toward the southwest border, in expanding the border fence, increasing numbers of Border Patrol agents, and prosecuting individuals who gain unlawful entry across the border in federal courts. This area of enforcement is largely focused on controlling and deterring unauthorized entry into the United States, rather than removing individuals who already live within U.S. borders. However, the Border Patrol has recently asserted its authority 100 miles into the interior of the U.S. by defining the border as a broad zone, as opposed to a fixed line.

- **Interior enforcement** is a newer area of enforcement activity that involves efforts within U.S. borders to capture and remove unauthorized individuals. Interior enforcement has grown from sparse, informal activities to large scale programs in the years following September 11, 2001, and now features a number of partnerships with state and local law enforcement agencies to identify deportable aliens.

- **Workplace enforcement** bears the twin goals of "reduc[ing] the demand for illegal employment, and protect[ing] employment opportunities for the nation’s lawful workforce." To this end, Immigration and Customs Enforcement (ICE) takes enforcement actions against employers as well as employees. Under the current administration, there has been an increased emphasis on workplace audits that result in mass firings of suspected unauthorized workers and penalties for employers.

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

Concerns about Enforcement Activities

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

- Scholars, advocates, and government oversight agencies alike raise issues with the efficacy of government action. Many programs lack clear objectives and standards for oversight and accountability. Even in areas where reforms have been undertaken, progress has been slow.

- Policies and programs are described as targeting dangerous individuals, but in reality they cast too wide a net. Although the first priority of DHS is to prevent terrorism and national security breaches, the government has spent a large amount of resources to target low-level offenders with no links to terrorism and no history of serious or violent crime. Even with regard to deportations of violent criminal aliens, questions remain as to the unintended consequences of this strategy, including an increase in transnational criminal activity.

- Lawful permanent residents, asylum-seekers, and unauthorized immigrants are often treated as criminal offenders. Detainees face the worst of both worlds: they are treated like criminals but not provided criminal protections because of the purported civil nature of immigration proceedings.

- The impacts of immigration enforcement reverberate beyond the individual into the communities where immigrants reside. There appears to be increased racial profiling and decreased trust between communities and police. Loss of trust may diminish cooperation with police and jeopardize community safety.

Recommendations for Programmatic Improvement

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

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

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

INTRODUCTION

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

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

BORDER ENFORCEMENT

Infrastructure of Border Enforcement

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

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

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

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


6. Although there have been concerns of spillover violence from the Mexican side of the border, crime has not increased on the U.S. side of the southwest border in recent years. See Andrew Selee, et al., “Fire Myths about Mexico’s Drug War,” WASHINGTON POST, (Mar. 28, 2010), available at http://www.washingtonpost.com/wp-dyn/content/article/2010/03/25/AR2010032502225.html.

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

United States Border Patrol

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

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

During this time, funding for the Border Patrol increased dramatically as well, to an all-time high of $3.58 billion in fiscal year (FY) 2010.\(^12\) (See Figure 2.)

Voluntary Departure/Return

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

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

**Expedited Removal**

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

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

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

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

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

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

Recommendations:

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

Border Patrol Programs and Policies

Secure Border Initiative

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

Prominent among the infrastructure changes in recent years has been the construction of a 670 mile border fence, as prescribed by the Secure Fence Act of 2006.29 After delays and changes in plans caused by hydrology concerns as well as legal concerns involving land owners, CBP announced in January, 2011 that 649 miles of fencing was completed, including 299 miles of vehicle fencing and 350 miles of primarily pedestrian fencing.30 The fence has drawn criticism from a variety of groups, who claim the barrier is damaging neighborhoods and waterways as well as disrupting the movement of individuals.31

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

Recommendations:

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

Operation Stonegarden

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

32. Id. at 5.
33. Preston, supra note 7.
34. Id.
the program lacks oversight and internal regulations for the use of funds. Indeed, some reports show the funds were used for activities that were entirely unrelated to border security, such as crowd control at sporting events, and issuing traffic citations. \textsuperscript{56} Additionally, some agencies reject the funding, in part because the program defines all undocumented immigrants as “criminal aliens,” in its operations grants. \textsuperscript{57} Finally, in one high-profile case the Otero County Sheriff’s Department used Operation Stonegarden funds to conduct immigration home raids, prompting a lawsuit based on illegal searches and seizures. \textsuperscript{58}

**Recommendations:**

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

**Operation Streamline**

Operation Streamline is a zero-tolerance immigration enforcement program that requires the federal criminal prosecution and imprisonment of unauthorized border-crossers. \textsuperscript{59} These migrants, who have no criminal histories, would otherwise be detained and deported through the civil immigration system, or informally removed through voluntary departure. Until 2005, U.S. Attorneys along the border had largely remained uninvolved in routine immigration cases, and focused instead on prosecuting migrants with lengthy criminal records and repeated deportations. However, under Operation Streamline, DHS partners with the Department of Justice (DOJ) to prosecute nearly all migrants for misdemeanor illegal entry or felony re-entry in the sectors where the program has been implemented in the past five years. \textsuperscript{60} Due perhaps to the shortage of resources in implementing Operation Streamline, Border Patrol attorneys have been deputized in some locations as “special assistant U.S. Attorneys” in order to prosecute these cases, raising issues of prosecutorial independence. \textsuperscript{61}

A number of concerns have been raised regarding Operation Streamline, including whether the proceedings comport with due process. Particularly controversial have been routine en masse hearings in which as many as 80 defendants are processed at once in a combined arraignment, plea, and sentencing procedure. In such hearings, defendants have routinely pleaded guilty as a group with no (or minimal) individualized representation, and no individualized discussion with the judge to determine whether the nature and consequences of the plea are understood. \textsuperscript{62} In December 2009, this practice was held to violate federal law by the Ninth Circuit, but it remains unclear how courts outside of the Ninth Circuit have changed their practices to comply with due process requirements. \textsuperscript{63}

Additionally, the sheer number of prosecutions has reportedly had other significant effects on the border courts, including: retention problems among court personnel; low morale and training among U.S. Attorneys and federal defenders; transfer of civil dockets to districts away from the border; and the spillover of drug prosecutions to state courts, causing these other court systems to be affected as well. \textsuperscript{64} An internal report by the U.S. Marshals Service also suggested that U.S. Marshals “are being forced to balance the apprehension of child predators and sex offenders against the judicial security requirements” of handling so many immigration detainees. \textsuperscript{65}

Although the financial burden to taxpayers is also significant, there is no publicly available government estimate of the total cost of the program. Costs include increased Border Patrol agents, U.S. Marshals, DOJ and court personnel, the need for additional holding and court facilities in federal courts along the border, and the increased burden on state court systems experiencing caseload overflow as a result of Operation Streamline. \textsuperscript{66}

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

\textsuperscript{56} Id.

\textsuperscript{57} “Southwest Border Security Operations,” supra note 4, at 8.

\textsuperscript{58} Id.


\textsuperscript{60} Exceptions exist for aliens released for humanitarian reasons. All others are prosecuted for illegal entry for first time border crossers under § 1325 which is usually prosecuted as a misdemeanor, but is a felony in some cases, depending on facts, or illegal re-entry under § 1326, which is a felony. See Tara Buentello, “Operation Streamline: Drowning Justice and Draining Dollars along the Rio Grande,” Green Paper, Grassroots Leadership, p. 6 (Jul. 2010).

\textsuperscript{61} 28 U.S.C. § 545.

\textsuperscript{62} Lydgate, supra note 39, at 12-13.

\textsuperscript{63} United States v. Roblero-Solis, 588 F.3d 692 (9th Cir. 2009).

\textsuperscript{64} Lydgate, supra note 39, at 9.


\textsuperscript{66} Id. at 11-12.
deterrence.47 In public statements, DHS leadership has suggested that they are targeting serious criminals, stating, “We are trying to raise the costs of coming here illegally—especially for those who come here illegally and commit additional crimes, like narcotics trafficking and gun trafficking.”48 DHS has not demonstrated, however, that Operation Streamline has had the effect of deterring serious criminals or raising costs for narcotics and gun trafficking.

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

More importantly, information released by DHS does not suggest that the program has been effective in deterring the target population of criminals committing crimes such as drug trafficking. Drug violence has risen in recent years in Mexico, with drug-related murders doubling in Mexican border cities between 2007 and 2008 alone.54 Despite these reports of drug trafficking and human smuggling, the numbers of felony alien smuggling prosecutions in federal criminal courts along the border did not increase, and drug prosecutions actually declined during this same time period.55 In contrast, misdemeanor immigration caseloads quadrupled in federal criminal courts between 2002 and 2008 under Operation Streamline, even as border crossing apprehensions declined.56 This sharp contrast between policy and practice suggests that Operation Streamline is likely draining resources away from the prosecution of serious border crimes and undermining efforts at combating the very crimes actually leading to border violence along the U.S.-Mexico border.57 Indeed, some individual Assistant U.S. Attorneys and judges have stated that the large low-level immigration caseloads have led to less time and fewer resources being spent on drug- and human trafficking cases.58

**Untended Consequences of the Border Patrol Strategy**

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

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48. Id.


52. Lydgate, supra note 59, at 7.

53. Id.


55. Id. at 2, data obtained from “Prosecutions for December 2008,” Transactional Records Access Clearinghouse, available at http://trac.syr.edu/tracreports/bulletins/overall/monthlydec08/fel. see also, “Southwest Border Security Operations,” supra note 4, at 7. (In December 2008, criminal immigration cases made up the majority of federal criminal prosecutions nationwide, outnumbering all white collar civil rights, environmental, drug-related, and other criminal cases combined. Furthermore, between 2000 and 2007, white collar prosecutions fell by 27%, weapons prosecutions by 21%, organized crime by 48%, public corruption prosecutions by 11%, and drug prosecutions by 20%.)

56. Lydgate, supra note 59, at 1, 3.

57. Id. at 1.


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

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

Decreased Circularity of Migration

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

Border Deaths

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

Increased Involvement of Human Smugglers

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

Economic Factors

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

68. Haddad, supra note 9, at 26.
69. Id.
70. Cornelius, et al., supra note 64, at 29.
71. Id. at 50. (These amounts are in 2009 dollars.)
It rises and falls with labor demand and if legitimate avenues for entry are available, migrants enter legally.  

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

Recommendations:  

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

General Concerns  

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

74. See Cornelius, et al., supra note 64, at 41-42.  
75. Id. at 2.  
local law enforcement for support and information, local law enforcement may become more reliant on ICE to punish or remove suspected criminal offenders through deportation. Because deportation is a civil proceeding there are substantially fewer protections for defendants. Unlike in criminal proceedings, illegally seized evidence or confessions may be used. Immigrants also have no right to government-provided counsel, further increasing the likelihood of a deportation. Deportations may appear to law enforcement agencies as having a similar end result as jail, in terms of removal of the individual from the community, while being substantially easier to achieve. However, fundamental due process rights are often compromised in this use of the deportation system.

**Legal History of State and Local Involvement in Immigration Enforcement**

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

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

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

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81. 8 U.S.C. §§ 1101 et seq.
85. Id.
86. Id. (California state law prohibits state police from making warrantless arrests based on the misdemeanor criminal offenses under the INA unless the offense occurred in the presence of the officer. This includes the offense of unauthorized entry into the U.S.)
87. Id. at 4.
90. AEDPA § 459, IIRIRA § 372.
91. Re-entry after deportation is a criminal offense, rather than a civil immigration offense.
93. Memorandum from the Office of Legal Counsel to the Attorney General, “Non preemption of the authority of state and local law enforcement officials to arrest aliens for immigration violations, for the Attorney General,” p. 5 (Apr. 5, 2002).
police to arrest aliens on the basis of civil deportability.” In reversing its stance, OLC relied upon prior case law that the 1996 OLC supposedly did not take into account, such as the Tenth Circuit case of United States v. Salinas Calderon, in which a state trooper was determined to have general investigatory authority to inquire into possible immigration violations.  

Additionally, the 2002 OLC made vastly different conclusions on the points of law discussed in the 1996 memo. Although some consider the 2002 opinion “deeply flawed” and “unsupported by legislative history or judicial precedent,” some state and local governments have attempted to embrace this “inherent authority” reasoning in the civil immigration realm. Furthermore, other states and localities have attempted to enhance their authority by creating their own criminal immigration laws. A particularly controversial example of this has been SB 1070 in Arizona, which is currently being challenged on federal pre-emption and violation of civil rights grounds by the federal government and advocacy groups.

Recommendation:

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

ICE Enforcement Programs Today

Today, ICE collaborates with local law enforcement to enforce criminal and civil immigration laws under the umbrella of ICE ACCESS (Agreements of Cooperation in Communities to Enhance Safety and Security) programs. ICE describes this program as “a response to widespread interest from local law enforcement who have requested ICE assistance through the 287(g) program” although it now encompasses efforts in many more localities. The 287(g) program, the Criminal Alien Program, the Fugitive Operations program, and Operation Community Shield are all major components of ICE ACCESS. Secure Communities (S-Comm) is another interior enforcement program involving localities, although the federal government does not currently describe it as a collaborative effort that falls under the ICE ACCESS program.

287(g)

Background

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

Legal Authority

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

94. Id.

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

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


98. Id. at 4.


101. Id.


103. Id. § 1357(g)(2).

104. Id. § 1357(g)(1).
### FIGURE 3 | ICE Programs Involving Local Law Enforcement Activity

<table>
<thead>
<tr>
<th>287(g)</th>
<th>Criminal Alien Program (CAP)</th>
<th>Community Shield</th>
<th>Fugitive Ops</th>
<th>S-Comm</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Primary agent making enforcement decisions</strong></td>
<td>Local law enforcement agency (LEA)</td>
<td>ICE and LEA</td>
<td>ICE</td>
<td>ICE</td>
</tr>
<tr>
<td><strong>Is the program pursuant to a formal agreement with the locality?</strong></td>
<td>Yes</td>
<td>Unknown</td>
<td>Yes</td>
<td>Generally no (some ad hoc partnerships exist)</td>
</tr>
<tr>
<td><strong>Who does the program officially target?</strong></td>
<td>Individuals who are arrested for crimes in the locality who LEAs suspect to be deportable aliens</td>
<td>Arrested individuals who either the LEA, the prison, or ICE believe to be deportable aliens based on name, interview, or other information</td>
<td>Gang members and ‘affiliates’</td>
<td>Individuals who have an outstanding removal order</td>
</tr>
<tr>
<td><strong>What happens in an enforcement action?</strong></td>
<td>LEA makes an arrest based on a perceived immigration violation, or notifies ICE that a hold should be placed based on such a violation</td>
<td>Facility sends list of names to ICE, ICE selects some individuals to interview, places holds on those determined to be deportable aliens</td>
<td>LEA identifies local gang, and “associates.” ICE apprehends those individuals who are believed to be aliens</td>
<td>ICE conducts searches in homes for immigration fugitives, makes collateral arrests of other aliens encountered</td>
</tr>
<tr>
<td><strong>Can individuals with no criminal conviction be apprehended by ICE through this program?</strong></td>
<td>Yes</td>
<td>Yes</td>
<td>Yes (3,997 criminal arrests v. 7,109 administrative arrests from 2005-2008)</td>
<td>Yes (73% had no criminal conviction from 2003-2008)</td>
</tr>
<tr>
<td><strong>Racial profiling concerns?</strong></td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td><strong>Number of currently operating units or agreements</strong></td>
<td>71 MOAs with LEAs, (participation is discretionary for LEA)</td>
<td>unknown</td>
<td>unknown</td>
<td>104 Fugitive Operations Teams</td>
</tr>
</tbody>
</table>

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Program Goals

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

Concerns with the Program

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

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

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

109. “Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act,” supra note 100.
111. Letter organized by the National Immigration Law Center and signed by 521 national and local organizations to President Barack Obama calling on him to terminate 287(g) (Aug. 25, 2009), available at www.nilc.org/immlaw-policy/LocalLaw/287gLetter-2009-08-25.pdf.
113. Id. at 50.
117. See Special Order No. 40, Los Angeles Police Department (Nov. 27, 1979).
communities where immigrants reside, driving a “potential wedge between police and community” in terms of trust.\textsuperscript{120}

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

**Recommendations:**

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

**Criminal Alien Program**

**Background**

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

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

**Legal Authority**

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

**Program Goals**

The goal of CAP is to improve safety by promoting federal-local partnerships to target serious criminal offenders for deportation, particularly those who pose a threat to public safety.\textsuperscript{128} For FY 2007, ICE data indicate that approximately 164,000 charging documents were issued to “criminal aliens” under CAP, climbing rapidly to an estimated 220,000 in FY 2008.\textsuperscript{129}

**Concerns with the Program**

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


\textsuperscript{121} Stana, supra note 108, at 5.


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

\textsuperscript{124} FOIA submitted in June 2010, and re-submitted in September 2010.

\textsuperscript{125} Notes on file with author; see also Menashe and Varma, supra note 78.

\textsuperscript{126} 8 U.S.C. § 1357.

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


\textsuperscript{129} Gardener and Kohli, supra note 77, at 3.
In a 2009 report, the Warren Institute conducted an analysis of arrest data before and after the implementation of the CAP program in Irving, Texas. This study revealed that increased ICE involvement was correlated with increased arrests of Hispanics for low-level offenses. In particular, arrests of Hispanics for the lowest-level offenses tripled and misdemeanor traffic arrests of Hispanics more than doubled when local police began having round-the-clock access to ICE via phone and video teleconference. Additionally, this research revealed the inability of local law enforcement agencies to make proper immigration determinations. ICE consistently issued detainers for fewer individuals than were referred by the local police to ICE. Even more strikingly, a majority of the Hispanic individuals arrested for low-level misdemeanor arrests during the relevant time period proved to be lawfully present in the United States. This analysis raises concerns that programs such as CAP lead police to target individuals perceived to be undocumented because of their race or ethnicity.

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

Recommendations:

- Congress should order an investigation of the implementation of the Criminal Alien Program in other jurisdictions before allocating additional sums for the expansion of the program. Particularly, the investigation should concentrate on whether local law enforcement is in fact increasing its focus on high-level criminal alien offenders as a result of the CAP program.
- ICE should institute a bright-line rule prohibiting CAP screenings for individuals arrested for non-felony offenses in order to reduce racial profiling in the implementation of the Criminal Alien Program. This recommendation is in line with Congress’s mandate to focus on serious criminal offenders.
- Congress should mandate that local jurisdictions who partner with ICE without MOAs or formal agreements record stop and arrest data by race, ethnicity and level of offense.
- ICE should disclose on its website the locations in which it has implemented the Criminal Alien Program to provide full disclosure to local communities who may be impacted by police practices. ICE should furthermore provide local contact information for regional ICE offices which are responsible for CAP in each area of the country, along with a complaint procedure.

Operation Community Shield

Background

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

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

130. Id. at 6.
131. Id. at 7.
132. Id.
133. Id. at 8.
135. Id.
137. Operation Community Shield/ Transnational Gangs, supra note 134.
138. Id.
139. Chacon, supra note 136 at 329.
Legal Authority

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

Program Results

From the program’s inception in 2005 to September 2008, apprehensions under this program included 3,997 criminal arrests and 7,109 administrative immigration arrests for a total of 11,106 “gang members and associates.”143 Of those arrested, 1,45 were gang leaders and 2,018 were MS-13 members or “associates.”144 Also, according to ICE, 4,331 of the arrested suspects had “violent criminal histories.”145 Through this initiative, ICE has seized 388 firearms in this time period.146

Concerns with the Program

Scholars and advocates have noted several problems with Community Shield. As stated above, there is no uniform legal standard governing the identification of criminal street gang members for the purposes of immigration enforcement.147 Furthermore, there is no legal definition for an “associate” of a criminal street gang.148 Given that a large number of those arrested under the program are described as associates, questions arise as to whom the program really targets. The program does not require individuals to be criminally prosecuted. Instead, individuals can be referred by local authorities who have no basis for prosecuting them in the criminal legal system. Indeed, as of 2006, 70% of individuals deported under Operation Community Shield had not been found guilty of any crime, and were deported on immigration violations alone.149 The broad discretion allowed in identifying such individuals and the absence of federal statutory constraints may therefore lead to discriminatory practices by law enforcement agencies. For example, in the absence of due process requirements or definitions of gang association, police may rely on profiling and stereotyping as a means to identify suspects.

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

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

140. 8 U.S.C. § 1357.
142. Chacon, supra note 136, at 530.
143. Operation Community Shield Factsheet, supra note 158.
144. Id.
145. Id.
146. Id.
147. Chacon, supra note 136, at 518.
148. Id.
151. Id.
members, claim that the opposite is true, that deportations fuel international gang networks and an international cycle of violence.\textsuperscript{133} Furthermore, anecdotal evidence shows that many formerly deported gang members return to the United States, often within a few months.\textsuperscript{134} In this sense, the program not only fails to suppress gangs, it could undermine other law enforcement and community efforts to address underlying causes of the formation and spread of gangs. Furthermore, many receiving countries have dealt with increased gang violence by passing their own laws with minimal protections for criminal defendants, low standards of proof, and harsher punishments than those considered acceptable by U.S. norms.\textsuperscript{135}

Recommendations:

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

National Fugitive Operations

Background

The National Fugitive Operations Program (NFOP) is the primary federal program that conducts home raids in search of deportable aliens. NFOP’s mission is to identify, apprehend, and remove aliens who have either failed to report to ICE based on a notice or to leave the U.S. after receiving a removal order.\textsuperscript{136} These individuals are considered “fugitive aliens” by ICE. This group is notably distinct from “status offenders,” who are immigrants who have no existing order of removal but who may have entered without inspection or have an expired visa.

INS began NFOP in the wake of September 11, 2001, with the plan of increasing information sharing by entering absconder data into the National Crime Information Center (NCIC) so that local law enforcement could access the data.\textsuperscript{137} NFOP was then funded as an independent unit in 2003 under the new Department of Homeland Security.\textsuperscript{138} From this time forward, the program greatly expanded in scope, from an annual budget of $9 million in 2003 to approximately $219 million in 2008.\textsuperscript{139}

As of 2007, the program was comprised of regional fugitive operations teams (FOTs) tasked with identifying and apprehending fugitive aliens.\textsuperscript{140} Investigative work takes place largely under cover, with FOT members often wearing plain clothes, or uniforms identifying them as “POLICE.”\textsuperscript{141} FOTs obtain administrative warrants for fugitive aliens based on information from a variety of sources, such as public records, commercial records, investigations by field officers, and information contained within ICE’s Enforcement Integrated Database, which holds immigration case history, criminal history, and biographical information.\textsuperscript{142} Notably, NFOP has been criticized for using information that is outdated or inaccurate when issuing these warrants.\textsuperscript{143}

Unlike criminal warrants, which must be issued by a neutral fact finder such as a judge, these FOT warrants are issued internally. Because of the civil nature of these warrants, FOTs are not permitted to enter dwellings without consent. However, according to former Secretary of Homeland Security Michael Chertoff, individuals encountered during an operation may be questioned as to their immigration status, and if deemed to be illegally present, may be arrested without a warrant.\textsuperscript{144}

154. Id.
155. Chacon, supra note 156, at ¶4-7.
160. Id.
162. Callahan., supra note 156, at 3-4.
Legal Authority

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

Program Results

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

Past Concerns with the Program

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

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

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

In an extensive research report, the Migration Policy Institute (MPI) documented a number of other concerns regarding NFOP. In particular, the report found that the stated priorities seem to have little in common with the practice of the FOTs. From 2003 to 2008, 73% of the individuals arrested by FOTs had no criminal conviction. Meanwhile the percentage of arrests of fugitives with criminal convictions has decreased over time, from 32% of FOT arrests in 2003 to 17% in 2006 to a shocking 9% in 2007. Of these “criminal fugitives,” three-quarters had committed non-violent crimes, such as shoplifting. Ultimately, fugitive aliens “posing a threat to the community” or having a violent criminal conviction represented just 2% of all FOT arrests in 2007.
Furthermore, a growing percentage of arrests were made of individuals who were not fugitive aliens at all, but mere immigration status violators, and therefore not even the lowest priority under NFOP’s guidelines. These “collateral arrests” of ordinary status offenders made up 40% of FOT arrests in 2007. In addition, these numbers do not account for media and advocacy reports of many individuals arrested in FOT raids who are not at all subject to deportation, and who are in some cases United States citizens or lawful permanent residents.

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

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

Changes Made in 2009

In 2009, Assistant Secretary of Homeland Security John Morton issued a memorandum directing NFOP to use 70% of its resources to apprehend fugitive aliens. The memorandum further clarified two additional tiers of aliens that NFOP could target, namely previously deported individuals and individuals with criminal convictions. After complaints in which FOTs raids led to the removal of sole caretakers of minor children and nursing mothers, the 2009 memorandum instructed FOTs to refrain from detaining these categories of vulnerable individuals, as well as the mentally ill and the disabled, absent extraordinary circumstances. Furthermore, the memorandum requires Fourth Amendment training for FOTs and recommends the creation of a cold-case docket for cases without leads in the last decade, in order to focus on more reliable information. The memorandum also redefined the metric for success under the program as a reduction of the fugitive docket, rather than merely an arrest quota, and by crediting teams for locating high priority aliens based on the revised tier system. Finally, ICE now encourages FOTs to engage in partnerships with local law enforcement agencies “under the model of 287(g)” to share information.

Concerns Remain

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

Recommendations:

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

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

179. Id. at 11.
182. Id. at 6.
183. Id. at 14.
184. Id. at 20.
186. Id.
187. Id. at 3-4.
188. Id. at 4.
189. Id.; see also Gardener and Kohli, supra note 77, at 6; “National Fugitive Operations Program: Priorities, Goals, and Expectations,” supra note 166, at 1.
192. Id.; see also Chiu, et al., supra note 166, at 14.
• If entries of homes do continue to occur, FOTs should be trained in their obligation to obtain consent. FOTs should also properly identify themselves when seeking consent.

• Only targeted houses should be approached and targeted individuals should be apprehended by the program. No FOT resources should be used to apprehend bystanders or ordinary status offenders.

• Funding should be scaled back and the program should be tailored to its original purpose of investigating national security threats. In this capacity, database accuracy is critical, and resources should be directed towards assuring accuracy.

Secure Communities

Background

There is significant debate as to whether Secure Communities (S-Comm) is an ICE enforcement program that impacts local policing or merely a program that facilitates data sharing between ICE and local law enforcement. Specifically, fingerprints taken at the time of arrest at local booking facilities are sent to a state agency which automatically forwards the fingerprints to the Federal Bureau of Investigation and the DHS. DHS checks the fingerprints against the Automated Biometric Identification System, also known as IDENT, which is a fingerprint repository containing over 91 million individual fingerprints for legitimate travelers, immigration benefit seekers and immigration violators. IDENT also contains a “watchlist” of suspected fugitives, criminals, sexual offenders, military detainees and other “persons of interest.” After matching the fingerprints in IDENT, ICE faxes “detainers” (also known as “ICE holds”) to the local facilities, requesting that police notify ICE when the individual’s criminal case is resolved or dismissed, and further requesting that the jail continue to detain the suspect until ICE is able to assume custody. With a $1.9 billion budget in 2009, S-Comm was active in 969 counties by mid January, 2011. ICE has widely reported its plans to expand to nationwide coverage by 2013.

Legal Authority

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

• Immigration and Nationality Act (INA) provisions regarding identification, detention, arrest and removal of aliens, namely 8 U.S.C. § 1226(c) (regarding the Attorney General’s power to detain aliens);

• 8 U.S.C. § 1226(d) (allowing information sharing with localities regarding individuals guilty of “aggravated felonies” with the limited exception of sharing immigration information based on the request of a state governor);

• 8 U.S.C. § 1226(e) (limiting judicial review of Attorney General actions); 8 U.S.C. § 1227(a)(2) (defining which crimes, e.g., crimes of moral turpitude, lead aliens to become deportable);

• 8 U.S.C. § 1228 (creating special removal proceedings in local detention facilities for aliens convicted of crimes leading them to become deportable); and


196 Id.

197 “Activated Jurisdictions,” supra note 106.

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

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

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

Program Goals

ICE’s primary goals are to: (1) identify aliens using technology and information sharing; (2) prioritize removal of those individuals who are the greatest public threat; and (3) long term transformation of the criminal alien immigration enforcement system. Secure Communities stated goal is to “identify and remove the most dangerous criminal aliens from the United States.”

When ICE began S-Comm in 2008, it also established a controversial three-tier system to determine threat levels of various criminal aliens based on whether an individual had been convicted of or charged with particular crimes. Level 1 crimes were ostensibly the most violent, dangerous crimes, although they did include nonviolent misdemeanor offenses such as resisting arrest. A memo issued in June 2010 by ICE Assistant Secretary John Morton changed this definition of Level 1 offenses to refer to individuals convicted of “aggravated felonies” under § 101(a) (43) of the INA, or two or more other felonies. Level 2 includes individuals convicted of misdemeanors, and Level 3 consists of individuals convicted of other offenses subject to police discretion, with the example given of particularly minor misdemeanors.

To date, the program has identified more than 262,900 aliens in jails and prisons who have been charged with or convicted of criminal offenses. Of those, more than 39,000 have been charged with or convicted of Level 1 offenses, which include “major violent or drug offenses.” Furthermore, according to DIHS, “through Secure Communities, over 34,600 convicted criminal aliens have been removed from the United States, including more than 9,800 convicted of major violent or drug offenses (Level 1 offenses).”

Concerns with the Program

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

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

As with other immigration enforcement programs, advocates and even law enforcement officials have noted that adding immigration to the list of local police duties threatens to undermine community policing efforts. Although Secure Communities does not authorize local police to enforce immigration law, it has the same result as other partnership programs, creating the impression that local police are...
working with ICE. Although ICE asserts that its presence is merely technological, communities may not know the difference when low-level offenders are increasingly being deported as a result of local arrests.

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

Indeed, in the first year that Secure Communities was operational, ICE reported identifying more than 111,000 undocumented immigrants who have been charged with or convicted of crimes; however, only 11,000 of these immigrants were charged with or convicted of Level 1 crimes. The remaining 90% of individuals were charged with or convicted of Level 2 or 3 crimes including lesser crimes such as minor drug offenses, forgery, and traffic offenses. In recent numbers released in August 2010, 262,900 individuals were identified as “criminal aliens” by ICE in that they were charged with or convicted of crimes, but other data indicate that only 9,800 individuals actually convicted of violent crimes were deported from the United States in the same time period. In addition, the information released does not indicate whether Secure Communities was necessary or even helpful in removing those 9,800 individuals. Some researchers have tried to investigate the underlying criminal convictions of “criminal aliens” deported by ICE. ICE, however, has responded by claiming that it was impossible to track everyone in their system from apprehension to removal or release. Despite such problems with accessing detailed data, the limited information available suggests that the overwhelming majority of individuals identified by Secure Communities do not fit the profile of “dangerous criminal aliens.”

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

207. “Secretary Napolitano and ICE Assistant Secretary Morton announce that the Secure Communities Initiative identified more than 111,000 aliens charged with or convicted of crimes in its first year.” News Release. U.S. Department of Homeland Security, ICE Website (Nov. 12, 2009), available at http://www.dhs.gov/ynews/releases/pr_1258044387951.shtm.


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

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

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


213. Id.

214. See discussion infra, pp. 13-14.
Recommendations:

- ICE should consider re-focusing Secure Communities on violent high-level offenders only.
- The program should cease using fingerprints collected at the time of arrest or booking and instead operate the fingerprint checks in prisons where individuals are serving sentences based upon conviction.
- ICE should recognize the impact on local policing and engage local law enforcement partners in its design of Secure Communities. Ideally, the program should not be implemented without an affirmative request by a local agency.
- ICE should make publically available all records regarding detainers placed since the program began. These data should include the bases for the holds issued, the breakdown of Level 1-5 charges and convictions, the specific crimes charged in each instance, and the outcome of the criminal and immigration cases. To the extent some aspects of this data do not exist in ICE’s control, ICE should begin tracking and sharing such data immediately. Furthermore ICE should explain why any such data is missing, and should be subject to an independent review.
- ICE should ask Secure Communities jurisdictions to keep stop and arrest data by race and ethnicity to ensure that racial profiling is not taking place as a result of the program.

General Concerns

ICE’s prominent initiatives to increase interior enforcement of immigration laws all identify community safety as a goal. However, in each of these programs, data indicate that safety is only a nominal priority. Indeed, the resulting arrests and deportations do not appear to be focusing on major offenders. Rather, anecdotal evidence suggests that these programs may instead increase community distrust of police, increase racial profiling, and, ultimately, reduce community safety. Moreover, ICE’s programs consistently lack essential guidelines or standards to ensure that the proper suspects are targeted or that local partners are not misusing or abusing their authority. The goals of immigration enforcement remain contentious; if the government maintains that it is targeting threats to our society, then it should fashion its enforcement programs to more effectively achieve that goal.

If, however, the government determines that it wants to identify and remove all undocumented residents, then it should openly acknowledge that ambition as well as understand and acknowledge the collateral impacts of its enforcement programs.

WORKPLACE ENFORCEMENT

Introduction

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

Legal Authority

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

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

215. Harris, supra note 205, at 37.
218. Id. at § 102(a)-(b), codified at 8 U.S.C. § 1324(b).
219. Id. at § 103(a).
220. Id. at § 101(b).
221. Id. at § 102(a)-(b), codified at 8 U.S.C. § 1324(b).
public information campaign. In addition, the National Labor Relations Act (permitting collective bargaining and unions) and the Fair Labor Standards Act (wage and hour protections as well as workplace safety), as well as federal laws prohibiting employment discrimination apply to all workers, authorized or not. Safeguards are extended to unauthorized workers because of concerns that substandard jobs and conditions for these workers can “seriously depress wage scales and working conditions of citizens and legally admitted aliens . . . .” Furthermore, the rationale for these safeguards includes the concern that “employment of illegal aliens under such conditions can diminish the effectiveness of labor unions.”

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

Second, internal immigration policies, first under INS Operating Instruction 287.3(a) and now under ICE Special Agents Field Manual 33.14(h), exist to prevent immigration enforcement officials from becoming involved in labor disputes. The original policy, first initiated in 1996, states that “(w)hen information is received concerning the employment of undocumented or unauthorized aliens, consideration should be given to whether the information is being provided to interfere with labor rights.” Specific components of the instruction include: 1) that authorities will look closely at information from any source that raises an issue about whether immigration status is being used to retaliate against workers; 2) whenever there are concerns that a labor dispute may be involved, the agency must make specific inquiries into the details of the information received; 3) discussion and approval from specified higher level officials must take place before any enforcement action takes place; and 4) that the agency should assist victims of labor violations with remaining in the United States to pursue their claims.

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

Worksite Enforcement Programs

Workplace Raids

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

Along with other ICE programs, worksite enforcement raids increased sharply since FY 2002, from 25 criminal arrests and 485 administrative arrests to 1,105 criminal arrests and
5,184 administrative arrests in FY 2008. These administrative arrests were of workers for immigration violations, while the criminal arrests of workers were based on identity theft and Social Security fraud, and, in much smaller numbers, employers and managers for harboring or knowingly hiring unauthorized workers. In 2009, however, workplace raids decreased dramatically to 1,644 administrative arrests, a 70% drop. Indeed, in April 2009, priorities were refocused to target employers rather than employees, although ICE maintained that it would still arrest unauthorized employees caught during an investigation. However, small scale workplace raids have not ended altogether, and it remains unclear what types of information lead to arrests at workplaces.

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

Recommendations:

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

E-Verify

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

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

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237. Aizenman, supra note 235.
239. See Id.
240. See generally Id.
241. Id. at 10-11.
242. See Id. at 44.
employers were using the system. The system was then extended to the Internet and to all states in 2004. Subsequent changes to the system’s technology and underlying databases continue to be made every week. As of May 2010, 200,000 employers were using E-Verify with as many as 1,000 new businesses using the database each week. The program has also become politically popular. Some states, such as Mississippi and Arizona, mandate the use of E-Verify under state law, and others, including Colorado, Georgia, Idaho, Minnesota, Mississippi, North Carolina, Oklahoma, Rhode Island, Tennessee, and Utah, have passed some legislation mandating the use of E-Verify for a subset of employers, such as state contractors. Many businesses have reported satisfaction with the efficiency and the lack of burden on the employer when using the system. Proposals have been raised to make E-Verify mandatory for all employers.

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

The program has some guidelines in place to limit abuse by employers. For example, the screening process is applied to all newly hired employees of participating employers. Selective screening or pre-screening before employment is prohibited, although it is difficult to police. Reports in 2007 found that 47% of employers were screening employees before the first day of work, in violation of this rule. The Westat report suggests that in 2009 a significant amount of pre-screening continues to take place, and these instances are widely underreported by employers.

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

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

Recommendations:

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

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248. Id.


251. “What is E-Verify?” supra note 246.


254. Id. at xxxx.

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


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

I-9 Audits

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

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

Concerns have been raised about several aspects of these I-9 audits. First, there appears to be little transparency in the process by which businesses are chosen for investigation. While ICE states that these businesses were identified based on leads and information obtained through other investigative means, public information is scarce on how these leads or methods are prioritized. ICE has stated that there is an investigative priority on those employers who "knowingly" hire undocumented workers.\textsuperscript{264} Elsewhere, ICE has stated that it focuses on companies connected to public safety and national security like utilities and military contractors, rather than retailers and manufacturers of nonessential goods.\textsuperscript{260} However, American Apparel, a garment manufacturer known for good working conditions as well as a public campaign supporting the legalization of undocumented immigrants, was recently investigated in an I-9 audit by ICE resulting in the termination of nearly 2,000 workers, a quarter of its workforce.\textsuperscript{266} The targeting of American Apparel over other garment manufacturers raised questions as to how ICE chooses which companies to investigate. According to an analysis by the Associated Press, over 250 of the 430 I-9 audits of companies that took place between July 2009 and January 2010 had no suspect forms.\textsuperscript{267} Such numbers suggest there may be problems with the methods used by ICE to target specific employers. Some concerns have been raised that I-9 audits may encourage discrimination by employers. Fear of audits and fines could create a chilling effect where employers avoid hiring workers they perceive to be immigrants.\textsuperscript{268}

Recommendations:

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

261. Id.
262. Id.
263. Id. (See fine schedules provided.)
268. Anna Gorman, “L.A. employers face immigration audits,” Los Angeles Times, (Jul. 2, 2009) available at http://articles.latimes.com/2009/jul/02/local/mn-immigemploy2/2 (describing the audit of American Apparel in which fines were expected to exceed 100,000 though there was no exploitation or intention to violate immigration law found through the audit, and many workers were dismissed.)
General Concerns

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

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

DETENTION

Detention Overview

The number of individuals detained for immigration reasons has increased dramatically over the last few decades due to changes in the law as well as intensified enforcement efforts. Today, ICE’s Office of Enforcement and Removal Operations (ERO) operates the largest detention and supervised release program in the United States. In 2010, the U.S. will have detained close to 400,000 individuals at an annual cost of around 1.77 billion dollars, while thousands of others participate in Alternatives to Detention programs. These numbers are particularly striking because ICE has no authority to detain aliens for criminal violations, but only detains individuals subject to removal based on violations of administrative immigration law.

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

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

A variety of circumstances may render an immigrant deportable: entering the United States without inspection at a port of entry, overstaying a visa, being convicted of a crime (even legal permanent residents are subject to deportation under many circumstances), and being denied asylum, etc.
The formal deportation process begins when ICE institutes removal proceedings against an individual. Often, the immigrant will sign a Stipulated Order of Removal which waives his right to a hearing before an immigration judge but allows him to be deported immediately and therefore released from detention. Others will present their case before an immigration judge (IJ) in an immigration court hearing, which may be held at a detention facility or prison. In such cases, an ICE attorney will also be present, opposing the immigrants’ cases to remain. Despite the name, immigration courts are not part of the judicial branch, rather they are under the jurisdiction of the Executive Office of Immigration Review (EOIR) within the Department of Justice. There are no court-appointed lawyers for persons challenging their removal, and data shows that only 39% of respondents whose immigration cases were completed in 2009 had representation.279

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

**Areas of Detention Reform**

**Shifting to a “Civil” Detention System**

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

Following Dr. Schriro’s report, ICE has taken several actions towards a new civil model. Among efforts to create uniformity in the detention system, ICE centralized detention facility contracts, consolidated the Alternatives to Detention programs under one provider, and trained detention service managers.283 To improve standards, ICE began a process of:

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

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

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


284. Id.

285. Id.

286. Id.


288. Id. at 18, 25.

289. Schriro, supra note 269, at 12.
of immigration arrests in 2010. As discussed earlier, these numbers are misleading because these programs result in widespread apprehension of aliens with no criminal record, or minor criminal records. However, the efforts of ICE to target “criminal aliens” are clear. Equating removable aliens with criminals may justify the existence of jail-style immigration detention in the public eye. The conflation between detained immigrants and criminals may therefore reduce the political will to shift towards a civil detention system.

**Recommendations:**

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

**Creating Alternatives to Detention**

While primarily relying upon incarceration, ICE already utilizes two main Alternatives to Detention (ATD) programs: the Intensive Supervision Assistance Program (ISAPI) in which individuals make regular visits or phone calls to the ICE subcontractor operating the program, and the Electronic Monitoring Program (EMP) which uses GPS and ankle bracelets. Currently, ICE supervisors decide who may be released into an alternative program on a case-by-case basis. There is no screening system in place to determine who is eligible for these programs, although such a system has reportedly been developed, and was scheduled to be rolled out in late 2010. This new process, however, will continue to have a presumption of detention unless an individual can prove eligibility for release.

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

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

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

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290. *Id.* at 15.
291. *See discussion of criminal aliens, supra, pp. 12-13*
293. *Id.* at 11-12, 25.
295. *Id.*
300. “Community-Based Alternatives to Immigration Detention,” *supra* note 270, at 5.
301. *Id.* at 9.
302. *Id.*
303. *Id.* at 1.
Community ATD participants have shown a fairly high rate of appearance for court cases in test programs, at around 93%. These community based programs, like the ATDs currently in practiced, are a fraction of the cost of detention. According to ICE, the cost of detention facilities per immigration detainee is $122 per day and rising, while the cost of a community based ATD program by the Vera Institute was found to be $12 per participant per day.

Recommendations:

- ERO should shift priorities such that ATDs are the default means to supervise individuals. ERO should continue detention only in cases where ICE demonstrates a legitimate government objective, such as based on flight risk or danger to the community based on risk assessment screening. Even these considerations should be weighed against factors such as age, health, and family needs, and access to counsel.

- DHS should redirect funding from bed space in detention facilities to expand ATDs to all areas that have ICE offices.

- ERO should create two tiers of ATD’s to serve those that require electronic monitoring as well as case management and assistance with services, and those that need only a community model of ATDs.

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

Improving Medical Care and Safety of Inmates

According to multiple reports, immigrants in detention have been subject to inadequate medical care. ICE patients do not have the option of using their own private insurance and must rely on inadequately funded, poorly managed care. Reports note instances of refused treatments, incorrect medications, denial of post-operative prescribed medications, delayed care, and harassment by detention personnel when treatment is requested. The physically disabled do not receive the systematic routine care they need while in immigration detention. Eye care was not even mentioned in the medical standards in 2009, while dental care was limited to emergency treatment during the first six months of detention. Reports have also noted an increase of deaths in custody.

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

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

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

504. Id.
506. Derived in part from “Community-Based Alternatives to Immigration Detention,” supra note 270, at 2-3.
511. Id. at 31.
512. Id. at 33; “Detained and Dismissed,” supra note 308.
513. Schriro, supra note 269, at 25.
515. Id.
516. Schriro, supra note 269, at 25.
518. “Dying for Decent Care,” supra note 308, at 29
is comprised of contract employees who face more relaxed credentialing standards than regular employees. However, a report by the Florida Immigrant Advocacy Center suggests that poor care is related to cost-cutting measures by ICE which appear to prioritize financial goals over sound medical principles.

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

Recommendations:

- ICE should create a single medical records system for all detainees and develop a method to access complete medical histories of those in custody.
- Denials of medical procedures or medication should be made only by treating physicians.
- ICE should implement preliminary mental health and medical screenings to ensure detainee placements are consistent with medical need.
- ICE detention facilities should be held, at a minimum, to national standards for health care in federal correctional facilities.
- Health concerns, including mental health and reproductive health concerns as well as physical disability, should be a factor in parole determinations, and ATD placements.
- ICE should create a comprehensive training regarding medical care in custody, as well as periodic assessments in order to improve standards of care.
- The President should appoint a permanent director of the Division of Immigration Health Services (DIHS) with particular expertise in meeting health needs of detainees.

Decreasing Inmates’ Isolation from Family and Counsel

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

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

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

325. Id.
332. Id. at 1.
333. Id. at 6.
335. “Year One Report Card,” supra note 287, at 24, (noting that this requirement implicates legal considerations and allows ICE to circumvent its responsibility to prove place of birth in immigration proceedings).
Recommendations:

- Detention should be as geographically close as possible to the location of the individual’s apprehension, and Notices to Appear should be filed by ICE at the nearest immigration court to the location of apprehension, unless the individual moves for a transfer.

- ICE and EOIR should both create a policy to avoid all transfers unless the detainee requests one, or medical or security risks require a transfer. These guidelines should be particularly enforced in instances where the detainee is represented by counsel, or before a bond hearing is conducted by the immigration judge.

- When detainees are transferred, prior notice should be given in writing to counsel of record, and, where no counsel exists, to any next of kin whose contact information is provided by the detainee.

- ICE should create a telephone locator system in order for information to be available to family members who do not have access to the Internet, and remove place of birth as a required field to obtain information on detainee location.

- Where transfers do occur, immigration attorneys should be allowed to make court appearances by telephone or video to maintain continuity of representation.

- Resources should be dedicated to providing pro-bono legal counsel when detainees are transferred to remote locations.

- Alternatives to Detention should be used wherever possible to avoid problems of custody altogether.

Meeting the Needs of Children in Custody

The federal government has recognized that children have unique needs in the immigration context. In a 1996 case, the government agreed that the least restrictive setting should be used for detention of minors and that no detention should be used if alternatives are available. However, prior to reforms in 2003, ICE was criticized for holding unaccompanied minors in immigration detention facilities, shackling and locking them in cells, and co-mingling them in some facilities with juveniles in custody for criminal offenses. In 2003, the newly created Division of Unaccompanied Children’s Services (DUCS) in the Department of Health and Human Services assumed the primary responsibility for the care and custody of unaccompanied children. DUCS uses less restrictive means of confinement than traditional immigration detention, including home placements with relatives when possible and “child friendly” shelters when family members are not available to care for the children. ICE appears to retain custody of some children based on criminal records, though this practice was proscribed in the Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA). Trainings to identify victims of trafficking have led to some successful identification of child victims of trafficking by DUCS employees.

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

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

356. Adapted from “Locked up Far Away,” supra note 331, at 8-11.
342. Id. at 8.
343. Id.
344. Id. at 7.
345. Id.
346. Id. at 8.
347. Id.
348. Id. at 10-11.
Although DUCS custody was designed for children and is a significant improvement over ICE confinement in prior years, a report by the Women’s Refugee Commission indicates that the conditions in DUCS facilities continue to be inadequate. Higher than anticipated numbers of unaccompanied children have lead to overcrowding in facilities, and has created a more institutional setting for the children in custody, with many reporting that they believed they were in jail. Inadequate mental health services have led to the placement of children with mental health needs, behavioral problems, or suicidal tendencies in secure facilities rather than therapeutic settings.

Recommendations:

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

Improving Conditions for Asylum Seekers and Refugees

Advocates have criticized the immigration detention system for being particularly harmful for asylum seekers. In 2003, a bipartisan U.S. commission found that the jail-like confinement of immigration detention was overly restrictive, and inappropriate for asylum seekers. Even so, these conditions persist, and in fact, have become more widespread. Although ICE has not provided complete information on the numbers of asylum seekers in detention, reports show that there was at least a 62% increase in the use of prison style detention for asylum seekers between 2003 and 2009. In 2007, over 10,000 asylum seekers were placed in immigration detention at a cost exceeding $300,000. Ironically, asylum seekers on average remain in detention longer than most immigration detainees.

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

As in the case of other immigrant detainees, detainees’ physical and mental health suffers from the same problems that have been described throughout this paper.

349. Id. at 1.
350. Id. at 15, 19.
351. Id. at 15.
354. Id. at 1.
359. INA § 235(b)(1)(B)(v); 8 C.F.R. § 208.30(e)(2); see also “What is a Credible Fear of Persecution or Torture?” U.S. Citizenship and Immigration Services Website, available at http://www.uscis.gov/portal/site/uscis/mainmenu.5a9b b95919255e66f147654f64da/5gnextoid=dd90f952efc110VgnVM1000 004718190aRCRD&kgnextchannel=5f5d3e4d77d7210VgnVM10000082ca 60aRCRD, (last visited Nov. 1, 2010).
The parole system has also come under attack. Grants of parole for asylum seekers dropped from 66.6% in 2004 to 4.5% in 2007, showing that far fewer applicants succeeded in their applications for legal admission into the United States. Advocates proposed that part of the problem may be the arbitrary and unilateral control of parole decisions by local ICE officials, rather than an independent body, such as a court.  

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

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

**Recommendations:**

- An independent body should review parole reforms to determine if asylum seekers are in fact being paroled in higher numbers.
- ERO should reduce the detention of asylum seekers to the most extreme cases, when medically necessary, or when essential to public safety.
- ERO should reduce the use of remote detention facilities, and ensure that credible fear hearings take place in person, unless video conference is medically necessary.
- Immigration judges should make bond amounts for asylum seekers commensurate with available resources.
- ERO should expand ATDs to incorporate the needs of asylum seekers recovering from trauma.

**Improved Legal Information and Access to Counsel**

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

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

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

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

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566. Id. at 2; “Locked up Far Away,” supra note 551, at 42-43.
(LOP). LOP provides information about potential legal relief to newly admitted detainees. The program was in place in 50 facilities in late 2009, and early reports suggest that it has been successful in helping detainees move more quickly through the immigration court system.571 ICE has also taken steps to dismiss cases where there are obvious avenues of relief. Such policies may reduce program costs, as well as human costs of detention and deportation. In September 2009, ICE issued a directive for its attorneys to grant a stay of removal and dismiss cases against aliens who are prima facie eligible for relief based on having been the victim of a crime.572 Despite these efforts however, many immigrants continue to face challenges in obtaining representation.

Recommendations:

• Expand the LOP to provide greater access to low-cost or pro-bono counsel.

• ERO should provide access to additional resources within detention facilities, including law libraries and LOP materials in various languages.

Improving Procedural Fairness for Individuals with Mental Disabilities

Individuals with mental disabilities face particular challenges in representing themselves. In the criminal court system, there is a basic requirement for individuals to understand the nature proceedings against them in order to be subjected to punishment. However, no such limitations exist in the immigration system. A 2010 report describes the lack of safeguards or consideration of mental competence in immigration proceedings.573 The report estimates that 15% of immigrants facing deportation in 2008 had a mental disability, totaling 57,000 individuals.574

The problems faced by the mentally disabled included lack of care in custody as well as lack of standards to measure the adequacy of a hearing.575 While judges are sometimes willing to handle issues of competency on a case by case basis, they rely on limited observation of the individual, the information provided by the individual themselves, and information volunteered by ICE.576 Because ICE has no incentive to draw attention to factors that could delay deportation and immigration hearings are often very short, many individuals may never be identified by judges as needing additional assistance. Finally, even when mentally disabled individuals are identified, judges can do very little; the only support provided by law is that the “custodian” of the individual may appear on their behalf. If the person is detained, the custodian is ICE, which presents a direct conflict of interest.577 Furthermore, any investigation of competence results on a hold or adjournment of the case during which detainees are simply subject to further detention.578

These effects combine to raise doubts about the outcomes and accuracy of many immigration hearings. This concern has been heightened by several high profile cases in which U.S. citizens with mental disabilities were mistakenly deported after being unable to adequately present their case in immigration court.579 ICE has since conducted a workshop on competency and mental health issues to explore a pilot project to provide greater access to counsel and services.

ICE has also recognized that it has no authority to detain or deport U.S. citizens, mentally disabled or not, and has instituted new guidelines to “ensure that this does not occur.”580 Such guidelines include the prioritization of investigation of claims of U.S. citizenship and the new policy that probative evidence of U.S. citizenship should prevent individuals from being taken into custody although further investigation of their immigration case may continue.581 However, nothing in this guideline addresses the difficulty that the mentally disabled may have in demonstrating probative evidence.

Recommendations:582

• Competency standards should be developed for immigration proceedings.

• Immigration judges should be trained in competency standards, as well as in recognizing individuals that require competency investigations.

571. Schirto, supra note 269, at 13.


574. Id. at 3.

575. Id. at 2.

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


578. Observation conducted by Deepa Varma, supra note 766; see also id. at 6.

579. “Deportation by Default,” supra note 855, at 4-5.


582. Adapted from “Deportation by Default,” supra note 855, at 9.
• Anyone determined to be incompetent to proceed in immigration hearings should be exempted from mandatory detention, and be appointed counsel.

• ICE should de-prioritize immigration enforcement against the mentally incompetent, and when applicable, use prosecutorial discretion to dismiss proceedings. In all instances where incompetency is suspected, ICE should be required to inform the immigration judge.

• Mental health services and access to caseworkers should be provided in ATD programs.

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

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