The Impact of Interior Immigration Enforcement on Mixed-Citizenship Families

Michael J Sullivan
Roger Enriquez, Sr., University of Texas at San Antonio

Available at: https://works.bepress.com/roger_enriquez/1/
The Impact of Interior Immigration Enforcement on Mixed-Citizenship Families

Michael J. Sullivan and Roger Enriquez

*Graduate International Relations, St. Mary’s University, One Camino Santa Maria, San Antonio, TX, 78228, United States.*

*College of Public Policy, University of Texas at San Antonio, 501 West César E. Chávez Boulevard, San Antonio, TX, 78207, United States.*
The Impact of Interior Immigration Enforcement on Mixed-Citizenship Families

In this article, we trace the expansion of interior immigration enforcement measures since the 1990s, focusing on the period after the creation of the U.S. Department of Homeland Security (DHS) in 2003. We consider the rationale for escalation of enforcement and its expansion to include local and state law enforcement agencies during this period. We will examine who benefits economically and politically, detailing the role of local jails, private corrections corporations, and the communities that are financially dependent on the prisons industry. Throughout, we consider how the expansion of immigration enforcement has affected U.S. citizen children and spouses of unauthorized immigrants. We question whether the U.S. Immigration and Customs Enforcement (ICE) is fulfilling its mandate under the 2011 Morton Memo to de-emphasize enforcement against parents, guardians, and children given that the number of detentions and removals in these categories continue to increase. This is imposing unnecessary costs and burdens on ICE’s citizen stakeholders while benefiting private corrections corporations.

Keywords: immigration enforcement, prisons, families

Introduction

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

Texas-Mexico border are fathers and mothers of citizen-children who, prior to
detention, resided in urban areas as far away as Atlanta and Chicago. The distances to
family members, including their U.S. born children, are so great that communication is
all but impossible.\textsuperscript{2} In the absence of meaningful assistance from lawyers, family and
community members, many opt for voluntary departure. In FY 2011, 641,633 persons
were apprehended by DHS and 323,542 or 50.4\% opted for voluntary departure.\textsuperscript{3} Their
cases are hastily dispatched by an immigration judge with the predictable result of
removal. In the end, families are separated and children are left without their parents.

A U.S. born child gains citizenship at birth. But this does not mean that she will
be able to stay in the country with her parents if they are deported. The Pew Hispanic
Center estimates that 4.5 million children in the United States are in a mixed-citizenship
status family with at least one parent who is a long-term resident of the country but who
does not have authorization to remain therein as of 2010.\textsuperscript{4} The citizen-children or other
dependents that are in this situation have no right to sponsor their non-citizen parents to
remain or to return to the United States through ordinary channels.\textsuperscript{5}

The only avenue that a mixed-legal status family with non-citizen parents and
citizen-children has to remain together in the United States is to risk almost certain

\textsuperscript{2} A\textsc{LISON} P\textsc{ARKER}, \textsc{A\ COSTLY\ MOVE:\ FAR\ AND\ FREQUENT\ TRANSFERS\ IMPED\ HEARINGS\ FOR\ IMMIGRANT\ DETAINEES\ IN\ THE\ UNITED\ STATES\ (June\ 2011),
\url{http://www.hrw.org/sites/default/files/reports/us0611webwcover_0.pdf}
\textsuperscript{3} J\textsc{OHN} S\textsc{IMANKSI} & L\textsc{ESLEY} M. S\textsc{APP}, \textsc{IMMIGRATION\ ENFORCEMENT\ ACTIONS\ (2012).}
\textsuperscript{4} J\textsc{EFFREY} S. P\textsc{ASSEL} & D’V\textsc{ERA} C\textsc{OHN}, \textsc{UNAUTHORIZED\ IMMIGRANT\ POPULATION:\ NATIONAL\ AND\ STATE\ TRENDS,\ 2010\ (2011).}
\textsuperscript{5} U.S. C\textsc{ITIZENSHIP\ AND\ IMMIGRATION\ SERVICES}, \textsc{I\ AM\ A\ CITIZEN:\ HOW\ DO\ I\ HELP\ MY\ RELATIVE\ BECOME\ A\ U.S.\ PERMANENT\ RESIDENT\ (2013),
\url{http://www.uscis.gov/sites/default/files/USCIS/Resources/A1en.pdf} (A citizen-child
is not eligible to sponsor his non-citizen parents to lawfully immigrate to the United
States until he is 21 years of age. Upon filing, the parent is immediately eligible to file
for a visa to immigrate to the United States, unlike other family members who have to
wait years or decades for a visa number to become available).
deportation by entering into “relief from removal” proceedings. If the non-citizen parent is discovered by immigration enforcement personnel, and placed in deportation proceedings, she can file for relief from removal if she has been in the country for more than 10 years, and her children stand to suffer “extraordinary and extremely unusual hardship” as the result of her removal. Unlike the family-based immigration admissions process that is initiated by an adult citizen or lawful permanent resident, very few applicants ever gain the right to lawfully remain in the United States with their families. Parents are deported even if this means that their citizen-children will experience the hardship of either having to leave their country of upbringing to stay with their parents, or having to stay in foster care to remain in the United States. Some parents do not even have the choice to take their children with them, since family courts are declaring unauthorized immigrant parents unfit based solely on their immigration status.  

The Department of Homeland Security has consistently insisted that its priority for interior immigration enforcement is to arrest, detain and remove criminal and fugitive aliens who constitute a threat to national security and/or the welfare of American communities. Through a failure of oversight and out of political pressure to

---

6 Illegal Immigration Reform and Immigrant Responsibility Act of 1996, §240(A) (codified at 8 U.S.C. §1229(b)).
7 In Re Francisco Javier Monreal-Aguinaga, 23 I. & N. Dec. 56 (BIA 2001); Sunny Harris Rome, Promoting Family Integrity: The Child Citizen Protection Act and its Implications for Public Child Welfare, 4 J. Pub. Child Welfare 245 (2010). (While 4.5 million citizen-children have an unauthorized immigrant parent, the number of parents eligible for cancellation of removal based on “exceptional and extremely unusual hardship” to the child resulting from the parent’s detention and removal is statutorily limited to 4,000 per year).
8 Acosta v. Gaffney, 558 F.2d 1153 (3rd Cir. 1977); Oforji v. Ashcroft, 354 F.3d 609 (7th Cir. 2003); Coleman v. United States, 454 F. Supp. 2d 757 (N.D. Ill. 2006).
produce results, federal enforcement officers and their local and state law enforcement partners have been targeting unauthorized immigrants without regard to their risk profile. This has led to residential raids in which long-term resident migrants have been separated from their families, disrupting the lives of otherwise law-abiding migrants and their citizen dependents alike. Under the Obama Administration, a larger percentage of the total number of detainees and deportees are non-citizens who committed a previous criminal offense. But with a record number of non-citizens deported every year since 2009, ordinary status violators still make up an increasing number of the total number of detainees and deportees.

In this article, we will trace the expansion of interior immigration enforcement measures since the 1990s, focusing on the period after the creation of the DHS in 2003. We will consider the rationale for escalation of enforcement and its expansion to include local and state law enforcement agencies during this period. We will examine who benefits economically and politically, detailing the role of local jails, private corrections corporations, and the communities that are financially dependent on the prisons industry. Throughout, we will consider how the expansion of immigration enforcement has had collateral consequences on US citizens, particularly the citizen children and spouses of non-citizens who are being detained and deported en masse with the expansion of interior immigration enforcement since 2003.

**Interior Immigration Enforcement and Its Impact on ICE’s Citizen Stakeholders**

The United States government’s official characterization of deportation as a civil sanction rather than a criminal punishment in particular has been subjected to intensive judicial and scholarly criticism since this justification was first offered by the U.S.
Supreme Court in *Fong Yue Ting v. United States* (1893). The civil sanction justification is controversial given the hardship that arises from an immigrant’s removal from the country. It also does not reflect justifications that citizens and officials have provided for increasing the severity and scope of immigration enforcement measures as authorized under the 1996 Illegal Immigration Reform and Immigrant Responsibility Act. For these reasons, legal scholars working at the intersection of immigration and criminal law (crimmigration) argue that immigration detention and removal constitutes a form of punishment, and detainees ought to be accorded criminal constitutional protections. We agree on the latter point.

But the severity of the consequences to the migrant arising from immigration detention and removal does not necessarily make it a form of punishment with a retributive purpose. So we need to understand why citizens and officials insist upon the detention and removal of unauthorized immigrants. What objectives do they hope to accomplish by doing so? What range of possible sanctions are available other than detention and deportation for ordinary status violators whose only offense was to enter the country unlawfully? The original legal justification for immigration enforcement through detention and removal may be obsolete. Or it may fail to reflect the true risk profile that many unauthorized migrants and settlers in removal proceedings pose to the security of the nation and the welfare of local communities. An approach that was

---

10 *Fong Yue Ting v. United States*, 149 U.S. 698 (1893).
designed to respond to an immediate threat to the security of the nation is less applicable to the typical unauthorized immigrant parent of a citizen-child who has never transgressed any non-immigration related laws or community standards. It is questionable whether the Department of Homeland Security needs to detain an ordinary status violator in order to accomplish its stated objectives and mandate to all of its stakeholders.\textsuperscript{15}

Furthermore, the U.S. courts continue to stand by their initial characterization of deportation or removal as a civil proceeding that has a remedial, non-punitive objective to the present day.\textsuperscript{16} This view is widely shared by the courts in most major destinations of immigration throughout the world today.\textsuperscript{17} We may acknowledge that we are dealing with a legal fiction that does not reflect current views on the severity of the alleged offense in question. And this legal fiction does not do justice to the consequences that are visited upon long-term settled immigrants and their families when they are detained and deported. But so long as this doctrine is in place, it is important to understand the logic and implications of the Court’s doctrine and the government’s position. This information can then be used to hold the government to account for how it chooses to enforce its immigration regulations affecting ordinary status violators.


\textsuperscript{16} Padilla v. Commonwealth of Kentucky, 559 U.S. 356, 365 (2010) (“deportation is a particularly severe penalty, but it is not, in a strict sense, a criminal sanction”).

Our argument does not hinge upon the punitive effects of the current enforcement through removal strategy in the United States. Rather, we will evaluate ICE’s enforcement actions based on what the agency stated that it hoped to accomplish in its first policy manual, *Operation Endgame*, and its impact on stakeholders identified in this document. We will further question whether ICE has fulfilled its mandate under the 2011 Morton memo to de-emphasize the detention and removal for parents, guardians, and children given that the number of detentions and removals in these categories continue to increase.\(^{18}\) We argue that interior immigration enforcement should focus on threats to national security and community safety as outlined by the Morton Memo. In this paper, we will show that this is not occurring in practice, and the result is a system that is imposing undue costs on ICE’s citizen stakeholders. In particular, we argue that private corrections corporations are benefitting from the increase in detentions of ordinary status violators at the expense of citizen stakeholders, especially citizens who depend on unauthorized immigrant family members.

Why should it matter to ICE or its political overseers if front-line enforcement officials and their state and local partners are overstepping their mission priorities by arresting large numbers of non-criminal aliens? More importantly, why should ICE and its local and state law enforcement partners change their strategy? After all, a large part of their mission is to remove unauthorized immigrants from the United States. But even ICE has acknowledged that its authority is constrained by whether it fulfills its intended purpose on behalf of the stakeholders identified by *Operation Endgame* for whom immigration enforcement is intended to serve. The internal legitimacy and effectiveness

of ICE’s enforcement operations as defined by Operation Endgame is predicated on the
development of “cooperative relationships and effective partnerships with our internal
and external stakeholders” in order to “fulfill the demands of the President, the
Congress and the American people.”\textsuperscript{19} This means coordinating enforcement priorities
with the interests of “critical stakeholders” including law enforcement, community
leaders, and U.S. Senators and Congressmen, which are not always in alignment or best
served by maximizing arrests, detentions and removals. And since ICE also defines
immigrant rights groups, non-citizens and their families as stakeholders in the process,
this also means that ICE and its 287(g) partners has an interest in ensuring that the
human and legal rights of migrants and their families are respected in any enforcement
operation.\textsuperscript{20} This helps to ensure that the overall mission priorities are not compromised
by negative publicity, political pressure, or adverse litigation.

**Historical Context**

For most of the twentieth century, most migrants were content to return to a country and
community of origin that they still regarded as home. Their partners (usually their wife)
and children remained there, received remittance money, and expected their migrant
family member (usually husbands and fathers) to return instead of following to the U.S.
Their other important relationships of interdependence were rooted in their communities
in Mexico and they had few ties in the United States beyond their workplace.\textsuperscript{21} This is
still the case for many unauthorized immigrants who see themselves as guest workers
and enter, make use of existing ties and develop new ones in the U.S. to earn money and

\textsuperscript{19} TANGEMAN, *supra* note 12 at iii.
\textsuperscript{20} *Id.* at §1-4.
\textsuperscript{21} DEBORAH COHEN, *BRACEROS: MIGRANT CITIZENS AND TRANSNATIONAL SUBJECTS IN
THE POSTWAR UNITED STATES AND MEXICO* 89-112, 142 (2010).
save or send it home. But there was always a counter-narrative of settlement that prompted further network-based migration and the development of far-reaching ties in adopted American communities. This trend accelerated after “Operation Hold the Line” in 1994 with increased border enforcement that raised the costs and risks of seasonal migration. As a result, more migrants settled in the United States and sent for their families to join them. This led to a rapid increase in the unauthorized immigrant population in the United States, from 5.7 million in 1995 to a peak of 12.2 million in 2007.

As return migration became more difficult, adaptation and integration became a greater priority among migrants who had previously been focused on returning home. The transition in migration that has brought women and entire families north, coupled with the necessity of settlement in the face of more rigorous border enforcement has increased the probability that migrants will give birth and/or raise their children in the United States. The impact of settlement and family formation by unauthorized immigrants is evidenced by the number of children with undocumented parents in the public school system, which was estimated at 6.8 percent of all K-12 students in the U.S. in 2009.

---

The growth in the settled unauthorized immigrant population in the United States was one of the factors that led to the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996. This measure made it considerably more difficult for unauthorized immigrant parents facing deportation to file for an appeal based on hardship to citizen-children. It also authorized the 287(g) agreements providing for cooperation between state and local law enforcement and federal immigration authorities. The first of these agreements was instituted in 2003 after the reorganization of the interior enforcement arm of the INS into ICE. The 287(g) agreements dramatically expanded the reach of immigration enforcement into local communities. These agreements later became a key component of a broader strategy of “attrition through enforcement” developed by legal scholar and Kansas Secretary of State Kris Kobach as a model for both partnership-based enforcement and state immigration ordinances including SB 1070. Kobach argues that local and state police are essential to the success of the “attrition through enforcement” as a strategy. Their role in the “attrition through enforcement” strategy is to arrest suspected unauthorized immigrants within and beyond the parameters of a 287(g) agreement in order to pressure their families and community members to self-deport. Kobach views local

27 Id. at §133 (Codified at 8 U.S.C. 1357(g).)
and state law enforcement officials as “force multipliers” for ICE that can more effectively reach into local communities to target ordinary status violators.\textsuperscript{30}

The new Bureau of Immigration and Customs Enforcement (ICE)’s Office of Detention and Removal (DRO) also drafted a new strategic plan, \textit{Operation Endgame}, designed to “thwart and deter continued growth in the illegal alien population” by “moving toward a 100 percent rate of removal for all removable aliens.”\textsuperscript{31} To achieve this objective, the DRO instituted enforcement quotas in 2006 that no longer prioritized the detention of “criminal aliens” over “ordinary status violators” whose only offense was unlawful entry.\textsuperscript{32} This priority shift led to an increase in arrests of ordinary status violators as a percentage of total aliens apprehended by Fugitive Operation Teams from 22 percent in 2005 to 40 percent in 2007. The proportion of security threats and criminal non-citizens diminished from 32 percent in 2005 to 9 percent of total arrests in 2007.\textsuperscript{33} This shift in the operational mission of ICE’s National Fugitive Operations Program prompted Fugitive Operations Teams to conduct night-time residential raids that involved breaking into homes and arresting everyone who could not prove that they were a U.S. citizen, causing parents to be separated from citizen-children without any provision for their short-term care and long-term custody. The number of parents separated from their citizen-children during detention and removed from the U.S.


\textsuperscript{31}TANGEMAN, \textit{supra} note 12 at §2-2.

\textsuperscript{32}JOHN P. TORRES, \textit{Memo: 1000 Arrests Annual Goal for Fugitive Operations Teams}, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, http://law.shu.edu/ProgramsCenters/PublicIntGovServ/CSJ/upload/ICE-Memos.pdf

\textsuperscript{33}MARGOT MENDELSON, SHAYNA STROM AND MICHAEL WISHNIE, \textit{Collateral Damage: An Examination of ICE’s Fugitive Operations Program} 1-2 (2009).
increased with the expansion of enforcement actions including home raids in Latino neighborhoods.\(^{34}\)

Under the Obama Administration, residential raids have been scaled back in favor of new enforcement initiatives such as ICE’s “Secure Communities” partnership with local and state officials. This program allows ICE to place a detainer on non-citizens arrested by local and state law enforcement, leading to possible removal even if they are not convicted of the crime for which they were originally charged. 39 percent of persons apprehended through this initiative report that they have a U.S. citizen child or spouse.\(^{35}\) Through this and other enforcement initiatives, the deportation rate has increased to new highs under the Obama Administration.\(^{36}\) Of these deportees, ICE reported that it deported 204,810 parents of citizen-children between 2010 and 2012 in response to a Freedom of Information Act request.\(^{37}\) Changes in enforcement strategies have not made mixed-status families any less susceptible to separation through the detention and removal of their parents.

**Immigration Policy Changes under the Obama Administration**

In the absence of Congressional action, the Obama Administration has taken an active role setting priorities for the implementation of existing immigration policy. Some of

---

\(^{34}\) Ajay Chaudry et al., *Paying the Price: The Impact of Immigration Raids on America’s Children* 13-26 (2010).

\(^{35}\) Aarti Kohli, Peter L. Markowitz & Lisa Chavez, *Secure Communities by the Numbers: An Analysis of Demographics and Due Process* 5 (2011), [http://www.draftinghumanrights.berkeley.edu/files/Secure_Communities_by_the_Numbers.pdf](http://www.draftinghumanrights.berkeley.edu/files/Secure_Communities_by_the_Numbers.pdf)


these changes were designed to shift the priority from ordinary status violators whose only offense was entering the country unlawfully to non-citizens who committed criminal offenses. To this end, the Obama Administration began as early as 2009 to redirect enforcement efforts towards workplace enforcement. In June 2011, ICE Assistant Secretary John Morton issued a memo directing agents not to detain ordinary status violators “who are disabled, elderly, pregnant, or nursing, or demonstrate that they are primary caretakers of children or an infirm person, or whose detention is otherwise not in the public interest.”

In June 2012, the Department of Homeland Security Secretary Janet Napolitano issued a directive authorizing “deferred action for childhood arrivals” (DACA) allowing unauthorized immigrants to apply for a status that would shield them from removal for two years.

In January 2013, the DHS also allowed non-citizens seeking to stay together with their citizen family members to appeal the provision of the 1996 Illegal Immigration Reform and Immigrant Responsibility Act that requires them to return to their country of origin for 10 years prior to applying for an immigration benefit.

In November 2013, the Obama Administration agreed to halt the removal of non-citizen family members of citizen armed forces personnel while they are serving overseas.

Using its discretionary power

38 MORTON, supra note 15 at 3.
over the enforcement of legislative mandates, the Obama Administration has in effect instituted its own immigration policy agenda that contains many progressive features.

At the same time, the enforcement arm of the DHS remains committed to aggressive immigration enforcement tactics aimed at increasing the number of deportations. To this end, ICE reported a new record number of deportations every year during the Obama Administration, culminating in 409,849 removals during FY2012. While John Morton has shifted ICE’s enforcement priorities to emphasize the removal of criminal non-citizens, the agency is still removing record numbers of ordinary status violators. To accomplish its deportation objectives, ICE continues to employ key elements of the “attrition through enforcement” strategy outlined by Kris Kobach, including new state and local partnerships (Secure Communities) and criminalizing and prosecuting unlawful entries (Operation Streamline). ICE continues to work with state and local partners that are implementing their own enforcement measures, even as the Obama Administration challenged Arizona’s unilateral approach (SB 1070) in federal court.

Secure Communities

Like the 287(g) agreements authorized under the Illegal Immigration Reform and Immigrant Responsibility Act, Secure Communities relies on integrated databases and collaborations with local and state jailers to enhance domestic deportation capacity. The goals of Secure Communities are to: “1) Identify criminal aliens through modernized information sharing; 2) Prioritize enforcement actions to ensure apprehension and removal of dangerous criminal aliens; and 3) Transform criminal

\[\text{Secure Communities}\]

43 Id.
alien enforcement processes and systems to achieve lasting results.”

But the scope and impact of Secure Communities on local policing is far more expansive than the 287(g) agreements. The 287(g) agreement model was voluntary and required the federal government and the subnational jurisdiction in question to agree on their terms of cooperation. Secure Communities is mandatory and nationwide in scope.

While Secure Communities was piloted in the last months of the George W. Bush administration in 2008 with 14 jurisdictions, it was dramatically expanded under the Obama Administration. As of 22 January 2013, ICE reports that “biometric information sharing capability” mandated by Secure Communities has been “activated in 3,181 jurisdictions in 50 states, U.S. territories and Washington D.C.” For ICE, the success of the program is measured by the removal of convicted criminal aliens as a percentage of the total number of deportations. But even as the program approached full activation in 2012, 45 percent, or 184,459 of the record 409,849 non-citizens removed in FY 2012 were not convicted criminal aliens.

The program has received considerable scrutiny from its state and local partners in part because ICE officials misrepresented who should be detained and what is required from law enforcement partners. Moreover, no rules were disseminated to administer the program’s implementation. Some state and local partners to the program

__________________________

45 Adam B. Cox & Thomas Miles, Policing Immigration, 80 U. CHI. L. REV. 87, 93.
have also criticized it because of its detrimental effects on community policing.\textsuperscript{49} In a June 2011 letter, Massachusetts Governor Deval Patrick informed the acting director of Secure Communities that the state would not be entering into a memorandum of agreement with ICE. Governor Patrick justified the state’s refusal to participate based on “resident concerns about racial profiling,” law enforcement fears “that the program is overly broad and may deter the reporting of criminal activity,” and the apprehensions of mayors that “the program will deteriorate relationships with communities that have been cultivated with years of hard work.”\textsuperscript{50} New York and Illinois also attempted to withdraw from Secure Communities in 2011.\textsuperscript{51} In response, ICE rescinded all of its joint agreements with state and local officials in August 2011 and proceeded to implement the program unilaterally with no provision for jurisdictions to opt-out.\textsuperscript{52}

\textit{Operation Streamline}

Operation Streamline authorizes U.S. Customs and Border Patrol to file federal criminal charges against persons who entered the United States unlawfully. This includes first-time offenders who previously were allowed to voluntarily depart without charges.\textsuperscript{53}

Persons deported under Operation Streamline who are apprehended a second time can

\textsuperscript{49}Chapin Jones & Stanley B. Supinski, Policing and Community Relations in the Homeland Security Era, 7 J. HOMELAND SECURITY AND EMERGENCY MANAGEMENT 1, 10 (2010).
\textsuperscript{50}Mary Elizabeth Heffernan, Letter to Marc Rapp, Acting Director, Secure Communities on behalf of Deval Patrick, Governor of Massachusetts (Jun. 3, 2011), \url{http://epic.org/privacy/secure_communities/sc_ma.pdf}
\textsuperscript{51}\textit{PAT QUINN, LETTER TO MARC RAPP, ACTING ASSISTANT DIRECTOR OF SECURE COMMUNITIES} (May 4, 2011), \url{http://epic.org/privacy/secure_communities/sc_ill.pdf} ; Kirk Semple & Julia Preston, Deal to Share Fingerprints is Dropped, Not Program, \textit{NEW YORK TIMES} (Aug. 6, 2011), \url{http://www.nytimes.com/2011/08/06/us/06immig.html/}
\textsuperscript{52}Kirk Semple & Julia Preston, Deal to Share Fingerprints is Dropped, Not Program, \textit{NEW YORK TIMES} (Aug. 6, 2011), \url{http://www.nytimes.com/2011/08/06/us/06immig.html/}
be charged with felony re-entry, carrying a maximum sentence of 2 years even without another criminal offense. 54 This policy mostly affects individuals apprehended by the U.S. Border Patrol. But ICE and U.S. Attorney’s Offices can also decide to charge unlawful entrants with criminal offenses, rather than allowing immigration courts to handle matters as a violation of administrative law. 55

The U.S. Marshals Service (USMS) is playing an increasing role in detaining people attempting to enter the United States without authorization. Much of the growth in immigration detentions can be attributed to Operation Streamline. In 1994, USMS booked 8,604 non-citizens on immigration charges. By 2011, the number of USMS immigration arrests rose to 84,313, representing an increase of 980 percent compared to a 211 percent increase (from 98,978 to 209,576) for all other offenses (U.S. Department of Justice, 2013). Individuals prosecuted because of “Operation Streamline” are held by USMS, like all other federal detainees facing criminal charges. In addition, those who are being held for short periods for criminal immigration violations often complete their sentences under USMS custody. Between 2005 and 2011, the number of USMS detainees booked on immigration charges increased 121 percent, compared to 81 percent during the previous six year period (Mason, 2012, p. 3). Because of stepped up border security, the number of apprehensions by the U.S. Border Patrol decreased by 71.3 percent (from 1,189,075 to 340,252) during the same period (US Border Patrol, 2011). Therefore, the evidence suggests that USMS’ enlarged detainee population was a direct result of increased criminal arrests and prosecutions rather than a rise in apprehensions by the US Border Patrol.

State Law Initiatives – Determinations of Immigrant Status

On 23 April 2010, Arizona’s legislature enacted the “Support Our Law Enforcement and Safe Neighborhoods Act,” commonly known as SB 1070. Over the next year, similar policies at promoting the self-deportation of unauthorized immigrants through pervasive local, state and federal immigration policing were enacted by state legislatures in Georgia, Alabama, South Carolina and Indiana. Utah pursued its own state immigration legislation that combined restrictive measures with authorization for a state guest worker program. As a policy entrepreneur, Kris Kobach authored and promoted the original Arizona measure as a centerpiece of his “Attrition through Enforcement” strategy to complement partnerships such as “Secure Communities” and criminalization efforts including “Operation Streamline.”

The second section of SB 1070 requiring law enforcement officers to “make a reasonable attempt, when practicable, to determine an individual’s immigration status during the course of any police stop, detention or arrest” by checking with federal immigration enforcement authorities is arguably consistent with the objectives of the 287(g) agreements and Secure Communities. Section 3 and Section 5C of SB 1070 making failing to carry an alien registration document and harboring unauthorized

56 S.B. 1070, 49th Leg., 2d Reg. Sess. § 1 (Az. 2010).
immigrants state crimes are arguably in keeping with the goal of criminalizing immigration offenses in Operation Streamline.\textsuperscript{61} SB 1070 also contains a provision (Section 6) requiring local and state law enforcement to unilaterally pursue actions that Arizona claims are not being adequately pursued by federal authorities, including authorizing officers to arrest persons suspected of unlawful presence.\textsuperscript{62} But unlike Secure Communities and Operation Streamline, SB 1070 and similar legislation in other states were introduced unilaterally without the cooperation of the federal government.

The Obama Administration also expressed concern that state immigration enforcement measures would interfere with international relations. For these reasons, the Department of Justice brought suit, stating that SB 1070 superseded federal immigration law and enforcement priorities.\textsuperscript{63} On 25 June 2012, a five member majority of the Supreme Court in \textit{Arizona v. United States} invalidated Sections 3, 5C and 6 of SB 1070 as preempted by federal immigration law.\textsuperscript{64} But the Court upheld the provision requiring state officers to “make a reasonable attempt to determine the immigration status of any person they stop, detain and arrest,” since “Congress obligated ICE to respond to any request made by state officials for verification of a person’s citizenship or immigration status.”\textsuperscript{65} The Court also justified this provision as “consultation between federal and state officials is an important feature of the immigration system.”\textsuperscript{66} This provides Arizona and other states with a mandate to continue to assist the federal

\textsuperscript{61} S.B. 1070, \textit{supra} note 54 at §3, 5C.
\textsuperscript{62} \textit{Id.}, §6.
\textsuperscript{63} U.S. Department of Justice, Citing Conflict With Federal Law, Department of Justice Challenges Arizona Law (Jul. 6, 2010), \url{http://www.justice.gov/opa/pr/2010/July/10-opa-776.html}
\textsuperscript{64} \textit{Arizona v. United States}, 132 S. Ct. 2492 (2012)
\textsuperscript{65} \textit{Id.} at 2507-2508.
\textsuperscript{66} \textit{Id.}, at 2508.
government towards its goal of detaining and removing more unauthorized immigrants from the country.

**Lobbying Activities**

Private corrections corporations’ profits rely on a large prison population, which provides an incentive for corrections corporations to lobby state and federal officials to ensure a rising prison population and expanding privatization contracts. At a time when private prison companies are becoming further reliant on housing federal detainees, there is also a strong incentive to promote local and state immigration enforcement efforts that increase the number of non-citizen detainees. This focus on immigrant detainees is evidenced in the millions of dollars that private prison operators spent on federal lobbying following the creation of ICE in 2003.

The largest private prison operator that detains immigrants in the United States, the Corrections Corporation of America (CCA), was on the verge of bankruptcy immediately prior to the 9/11 attacks. Today, the CCA is a highly profitable company that has benefitted from the expansion of immigration enforcement and incarceration in the past decade. In its 2012 annual report to shareholders, the CCA reported that it derived $206 million from its contracts with the U.S. Bureau of Immigration and Customs Enforcement (ICE) for detaining immigrants, representing 12% of its total 2012 revenue of $1.75 billion. The same report warns shareholders that:

> We currently derive, and expect to continue to derive, a significant portion of our revenues from a limited number of governmental agencies. The loss of, or a significant decrease in, business from the BOP, ICE,

---


68 Martinez & Slack, supra note 51 at 538.

USMS, or various state agencies could seriously harm our financial condition and results of operations.\textsuperscript{70}

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

For instance, any changes with respect to drugs and controlled substances or illegal immigration could affect the number of persons arrested, convicted, and sentenced, thereby potentially reducing demand for correctional facilities to house them. Immigration reform laws are currently a focus for legislators and politicians at the federal, state, and local level.\textsuperscript{71}

To respond to these threats to its bottom line, in 2013, the Corrections Corporation of America (CCA) employed 37 federal lobbyists split between five different lobbying firms as well as its own in-house political advocacy team.\textsuperscript{72} Private prison companies are also actively contributing to the re-election campaigns of officials who introduced or supported harsh immigration laws at the state level. The CCA and the GEO Group (the second largest private prison operator in the United States) actively shaped the creation of the anti-immigrant bill SB1070 in Arizona.\textsuperscript{73} 30 of the 37 sponsors of Arizona’s SB1070 received donations from prison lobbyists or private prison operators.\textsuperscript{74} CCA also contributed funds to five out of the seven sponsors of Georgia’s state immigration enforcement law, HB 87.\textsuperscript{75} In total, the three largest private

\begin{flushleft}
\textsuperscript{70} Id., at 30.
\textsuperscript{71} Id., at 28.
\textsuperscript{73} Doty & Wheatley, supra note 57 at 429.
\textsuperscript{75} LEGISCAN. BILL SPONSORS: GA HB87 (2011), \url{http://legiscan.com/GA/sponsors/HB87/2011}
\end{flushleft}
prison operators including CCA, GEO Group, and Management and Training Corporation spent at least $45 million on campaign donations and lobbyists at the state and federal level from 2003 to 2012. In short, private prison operators have shaped immigration enforcement legislation at the local and state levels to their advantage. They continue to lobby lawmakers at all levels of government to protect their financial interest in the expansion of local, state and federal immigration enforcement efforts that send more non-citizens to their detention facilities.

**Impact of Detention and Removal on Immigrant Families**

Among the main reasons for the expansion of the immigration detention apparatus even before the events of September 11 was to close perceived loopholes in the enforcement of immigration laws that led to the mass settlement of unauthorized immigrants in the United States. Federal immigration enforcement partnerships with local and state law enforcement, mandatory detention and expedited removal provisions were mostly implemented after 2003. But they were authorized under the 1996 Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) signed into law by President Clinton. This measure grew out of frustration by policymakers that the 1986 Immigration Reform and Control Act which legalized 3 million unauthorized immigrants and expanded workplace enforcement failed to stem the growth of the unauthorized population. The 287(g) local-federal immigration enforcement

---


partnerships expanded the reach of immigration enforcement after they were implemented by ICE in 2002.\textsuperscript{78}

In addition to authorizing expanded enforcement initiatives, IIRIRA also limited the discretion of immigration adjudicators to release non-Mexicans apprehended at the border on humanitarian grounds. This measure was designed to close a perceived escape clause whereby unauthorized immigrant families with young children could be released into the community instead of being subject to immediate detention or removal. IIRIRA also curtailed a practice whereby immigration judges could suspend the deportation of long-term unauthorized immigrant residents if this would cause hardship to citizen-children.\textsuperscript{79} This provision was meant to respond to the belief that unauthorized immigrant parents could gain immigration benefits simply by giving birth in the United States.\textsuperscript{80} Together, IIRIRA’s mandatory detention, expedited removal, and the end of “suspension of deportation” decreased the likelihood that unauthorized immigrant parents could be released or could successfully appeal their removal.

\textit{Impact on Unauthorized Immigrant Families}

On 15 May 2006, then-Assistant Secretary of ICE Julie Myers announced the opening of a new detention facility operated by the Corrections Corporation of America in Hutto, Texas.\textsuperscript{81} Under the Inter-Governmental Service Agreement contract between

\textsuperscript{78} Katharine M. Donato and Leslie Ann Rodriguez, Police Arrests in a Time of Uncertainty: The Impact of 287(g) Arrests in a New Immigrant Gateway. AMERICAN BEHAVIORAL SCIENTIST 1, 3-5 (early view), http://abs.sagepub.com/content/early/2014/06/11/0002764214537265
\textsuperscript{80} CHRISTINA GERKEN, MODEL IMMIGRANTS AND UNDESIRABLE ALIENS 122-123 (2013)
\textsuperscript{81} U.S. DEPARTMENT OF HOMELAND SECURITY, NEWS RELEASE - DHS CLOSES LOOPHOLE BY EXPANDING EXPEDITED REMOVAL TO COVER ILLEGAL ALIEN FAMILIES, (May 15, 2006),
Williamson County, Texas and the DHS, the CCA was provided with $2.8 million dollars a month to house 512 detainees at the Hutto facility. In turn, CCA was tasked with housing “illegal alien families” apprehended while crossing the border or in the course of immigration raids, many of which apprehended immigrant families in their own homes and neighborhoods. The facility was also designed to close a gap in the implementation of the “expedited removal” policy authorized under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996. This policy requires immigration authorities to detain every unauthorized migrant apprehended within 100 miles of the border for up to 14 days after their entry.

Before the creation of the DHS and the implementation of ICE’s *Operation Endgame*, unauthorized immigrant parents with young children were often released into the community with a “Notice to Appear” in immigration court. *Endgame* ended the practice of supervised release on humanitarian grounds, leading to the separation of non-citizen parents and children subsequent to their detention. In this context, ICE Secretary Myers advertised the new family detention center in humanitarian terms as a policy of “deterrence with dignity allowing families to remain together, while sending

---

83 U.S. DEPARTMENT OF HOMELAND SECURITY, supra note 79.
85 Lauren Martin, Catch and Remove: Detention, Deterrence and Discipline in U.S. Non-Citizen Family Detention Practice. 17 GEOPOLITICS 312, 319 (2011).
86 Id., 320.
the clear message that families entering the United States illegally will be returned home.”\(^87\)

Over the next year, human rights groups that visited the prison found that Corrections Corporation of America officials was operating the facility as a “medium-security prison.” The children housed there were treated as ordinary inmates by prison officials who ignored medical, educational and other welfare standards as required by *Flores v. Reno* (1993).\(^88\) In response, the ACLU brought suit against then-DHS Secretary Michael Chertoff on behalf of 16 children detained in Hutto. The lawsuit alleged that the CCA personnel operating Hutto on ICE’s behalf “show a pattern of officially sanctioned behavior that establishes a credible threat of future injury” to the children housed there, ranging from separating parents from children for misbehavior to the denial of medical care.\(^89\) After ICE settled with the ACLU in August 2007, children were guaranteed at least five hours of schooling a day, and the right to wear their own clothing in their cells.\(^90\) During the first year of the Obama Administration, on 6 August 2009, ICE Assistant Secretary John Morton announced plans to discontinue family detention at Hutto.\(^91\) But with a surge in new unauthorized immigration from Central America, ICE once again began to send immigrant families detained by Border Patrol to

---


private detention facilities in Texas on August 1\textsuperscript{4}, 2014, this time operated by the GEO Group in Karnes County.\textsuperscript{92}

**Impact on Mixed-Citizenship Status Families**

Unlike the Hutto and Karnes detainees who were apprehended shortly after entering the United States, many immigrant families have lived in the United States for an extended period prior to their detention. Most unauthorized immigrants that are in the United States today have been in the United States since 2005.\textsuperscript{93} In March 2013, the Department of Homeland Security released estimates that 9.89 million persons representing 86.5 percent of the 11.43 million unauthorized immigrants living in the U.S. as of January, 2011 entered before 2005.\textsuperscript{94} The Pew Hispanic Center estimates that 4.7 million unauthorized immigrants are the parents of minor children.\textsuperscript{95} A small percentage of these children were born abroad, but 4.5 million children who are citizens because they were born in the United States have an unauthorized immigrant parent.\textsuperscript{96}

Having a citizen-child does not prevent immigration officials from detaining or removing an unauthorized immigrant parent from the United States. Nor does it provide most applicants with a legal basis to appeal their detention or removal. Before 1996, U.S. immigration judges had expansive discretionary powers to “suspend the deportation” of unauthorized immigrant parents residing in the United States for more than 7 years based on their character, hardship to their children, and other connections.


\textsuperscript{94} Id.

\textsuperscript{95} Paul Taylor et al., Unauthorized Immigrants: Length of Residency, Patterns of Parenthood 5 (2011).

\textsuperscript{96} Passel & Cohn, supra note 2 at 13.
to the community. The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 curtailed this discretionary power, replacing it with a “cancellation of removal” provision limited to 4,000 applicants per year representing a less than a tenth of a percent of the total unauthorized immigrant parents in the United States. To be eligible for cancellation of removal, unauthorized immigrant parents must prove that their citizen-children would suffer “exceptional and extremely unusual hardship” far exceeding the harm experienced by other families facing deportation (8 U.S.C. 1229(b)(B)(1). Under this standard, the Board of Immigration Appeals (BIA) deemed that an applicant, Francisco Javier Monreal-Aguinaga, who resided in the United States from age 14 to 34, with a full-time job, two school aged citizen-children who have never been to Mexico, and responsibility for caring for elderly parents is ineligible for relief from removal. In their decision, the majority acknowledged that Monreal-Aguinaga’s children would suffer “extreme hardship” that would have been sufficient to justify allowing him to remain in the country under the pre-1996 standard.

The U.S. born citizen-children of unauthorized immigrants have a constitutional right to remain in the United States under a longstanding interpretation of the Fourteenth Amendment’s citizenship clause. But minor citizen-children cannot use this status as a basis for sponsoring their unauthorized parents for immigration benefits, or appealing their parents’ deportation order. The claim that a child’s right to enjoy the benefits of their citizenship is contingent upon being able to remain in the United States under the care of their parents or guardians was rejected by the Third Circuit Court of

---

99 In Re Francisco Javier Monreal-Aguinaga, 23 I. & N. Dec. 56, 64-65 (BIA 2001)
100 Id., at 65.
Appeals in *Acosta v. Gaffney* (1977). This decision was upheld in a high-profile 2006 challenge by an unauthorized immigrant mother and head of the civil rights group *La Familia Latina Unida*, Elvira Arellano. In both cases, the majority ruled that children did not lose their rights as citizens when their parents were deported, since they could remain under the care of an alternative guardian, or return as adults. According to this argument, parents facing deportation do not necessarily lose their parental rights, since they have the choice to take their citizen-children with them or to leave them in foster care.

But state family courts are now challenging even this limited parental right, by declaring that unauthorized immigrants in immigration detention are unfit parents for their citizen-children. In areas where local law enforcement signed a 287(g) agreement with ICE to enforce immigration laws at the local level, children in foster care were on average 29 percent more likely to have an unauthorized immigrant parent than in other counties. They are often detained hundreds of miles from their children in remote detention facilities, limiting access to legal counsel, family members and immigrant assistance agencies. While they are detained, state courts have declared unauthorized immigrants to be unfit parents and stripped them of their parental rights. As a practical matter, parents who are in ICE custody or removed to a foreign country face insurmountable obstacles to challenging this decision regardless of the merits of their case. If no other U.S. relatives come forward to claim their citizen-children, they can

102 Acosta v. Gaffney, 558 F.2d. 1153, 1157 (3rd Cir. 1977).
105 PARKER, supra note 2 at 13.
become wards of the state.\textsuperscript{107} According to a study by the Applied Research Center in 2011, an estimated 5,100 citizen-children are in foster care as the result of their parent’s detention or removal from the United States.\textsuperscript{108} Apart from parental rights considerations and the interests of children in remaining in their communities under the care of their parents, taxpayers are forced to bear the costs of raising citizen-children in foster care while detaining immigrant parents. And so, state interests may be harmed in the pursuit of an immediate perceived benefit to the state resulting from removing deportable parents without exception.

\textbf{Conclusion: Towards Alternatives}

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

\begin{footnotesize}
\begin{itemize}
  \item \textsuperscript{108} WESSLER, supra note 102 at 21.
\end{itemize}
\end{footnotesize}
dependents. Private corrections corporations are continuing to benefit from the increase in detentions of ordinary status violators at the expense of citizen stakeholders.

We are not making a case for amnesty, or that interior immigration enforcement actions directed at ordinary status violators should cease outright to avoid hardship to them and their citizen family members. This article was limited to exposing ICE’s failure to implement the mandate of the Morton Memo to redirect detention and deportation resources on national security threats and aliens convicted of serious criminal offenses. But we also suggest that the objectives of the Morton Memo’s targeted enforcement strategy would be better served by pursuing alternatives to the detention of ordinary status violators. We are willing to accept that violations of U.S. immigration law, however minor, need to be accounted for. As a short-term solution, alternatives to detention subsequent to apprehension such as community supervision and electronic monitoring should be used whenever possible as a cost-effective strategy to allow low-risk ordinary status violators to remain in their community with their citizen-dependents. A 2013 report by the National Immigration Forum notes that it costs ICE a minimum of $122 a day to detain a non-citizen as compared to a maximum of $14 a day for alternatives to detention including electronic monitoring and telephonic reporting of non-violent detainees released into the community.\textsuperscript{109} As a longer-term response, future research that takes citizen objections to unauthorized immigration seriously as crimes should consider whether ordinary status violations warrant sanctions that crimmigration scholars insist are retributory, deterrent, and incapacitory.\textsuperscript{110} We suggest that a restorative justice approach requiring ordinary status violators to provide


\textsuperscript{110} Stumpf, \textit{supra} note 10 at 71.
restitution in their communities could effectively balance accountability for unlawful entry against the community’s interest in allowing them to remain in a productive role as caregivers and workers.