



**STATEMENT OF THE AMERICAN IMMIGRATION COUNCIL**

**SUBMITTED TO THE U.S. HOUSE OF REPRESENTATIVES JUDICIARY  
COMMITTEE, SUBCOMMITTEE ON IMMIGRATION AND BORDER SECURITY**

**HEARING ON “SANCTUARY CITIES: A THREAT TO PUBLIC SAFETY”**

**July 23, 2015**

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The American Immigration Council is a non-profit organization which for over 25 years has been dedicated to increasing public understanding of immigration law and policy and the role of immigration in American society. We write to share our research and analysis regarding immigration enforcement.

The Immigration Council is saddened by the tragic murder of Kathryn Steinle, which has prompted this hearing. We share the public's and policymakers' desire to understand what happened and whether there are lessons to be learned. At the same time, we caution that anecdotes are no substitute for hard data and that our laws and policies must be grounded in analysis of the facts, thoughtful discussion, and practical solutions.

For too long, U.S. immigration laws and policies have been shaped by fear and stereotype rather than by empirical evidence. Empirical data shows that immigration is associated with *lower* crime rates and immigrants are *less likely* than the native-born to be serious criminals. Yet, we have spent billions of dollars deporting millions of people who have committed only immigration violations, and we have focused on quantity, not quality of deportations, while separating families.

There is no doubt that our nation is safer when everyone is accounted for and fully documented. A major benefit of comprehensive immigration reform is that every person in this country would get documents and be “on the grid” of U.S. life, with driver's licenses, social security numbers, and other forms of identification. Such a system would help us make smart national security decisions and differentiate those who are law-abiding from those who are not. Comprehensive immigration reform is practical policy, and more productive than finger-pointing at local officials or demonizing an entire group for the mistakes of a few.

Instead of debating the patchwork of local immigration enforcement laws that have developed over the past several years, Congress should get to the important job of passing immigration reform. Calibrating our system to get everyone on the books would go further towards securing

our communities than any other piece-meal measures currently on the table. It also would allow us all to benefit from the economic potential of immigrants.

We submit to you below (1) our recent research regarding the relationship between immigration and crime, which confirms that immigrants are less likely to commit serious crimes or be behind bars than the native-born and that high rates of immigration are associated with lower rates of violent crime and property crime; (2) our paper outlining the legal implications of detainers, and (3) our analysis regarding the failures of the “enforcement first” approach to immigration reform.

## **I. Immigrants Are Less Likely to Commit Crimes**

For more than a century, innumerable studies have confirmed two simple yet powerful truths about the relationship between immigration and crime: immigrants are less likely to commit serious crimes or be behind bars than the native-born, and high rates of immigration are associated with lower rates of violent crime and property crime. This holds true for both legal immigrants and the unauthorized, regardless of their country of origin or level of education. The Immigration Council’s report, *The Criminalization of Immigration in the United States*, by Walter A. Ewing, Ph.D., Daniel E. Martínez, Ph.D., and Rubén G. Rumbaut, Ph.D, available at [www.americanimmigrationcouncil.org](http://www.americanimmigrationcouncil.org) (Attachment A), explains the data and highlights the following:

### *Higher Immigration is Associated with Lower Crime Rates*

- Between 1990 and 2013, the foreign-born share of the U.S. population grew from 7.9 percent to 13.1 percent and the number of unauthorized immigrants more than tripled from 3.5 million to 11.2 million.
- During the same period, FBI data indicate that the violent crime rate declined 48 percent—which included falling rates of aggravated assault, robbery, rape, and murder. Likewise, the property crime rate fell 41 percent, including declining rates of motor vehicle theft, larceny/robbery, and burglary.

### *Immigrants are Less Likely than the Native-Born to Be Behind Bars*

- An analysis of data from the 2010 American Community Survey (ACS) indicates that roughly 1.6 percent of immigrant males age 18-39 are incarcerated, compared to 3.3 percent of the native-born. This disparity in incarceration rates has existed for decades, as evidenced by data from the 1980, 1990, and 2000 decennial censuses.
- The 2010 Census data reveals that incarceration rates among the young, less-educated Mexican, Salvadoran, and Guatemalan men who make up the bulk of the unauthorized population are significantly lower than the incarceration rate among native-born young men without a high-school diploma.
  - In 2010, less-educated native-born men age 18-39 had an incarceration rate of 10.7 percent—more than triple the 2.8 percent rate among foreign-born Mexican men, and five times greater than the 1.7 percent rate among foreign-born Salvadoran and Guatemalan men.

### *Immigrants are Less Likely Than the Native-Born to Engage in Criminal Behavior*

- Several studies have found that immigrants are less likely than the native-born to engage

in either violent or nonviolent “antisocial” behaviors; that immigrants are less likely than the native-born to be repeat offenders among “high risk” adolescents; and that immigrant youth who were students in U.S. middle and high schools in the mid-1990s and are now young adults have among the lowest delinquency rates of all young people.

- Immigrants are a self-selected group of people who tend to be highly motivated. They have left their homes and moved to a new country to improve their lives and the lives of their children. There is a great incentive to stay out of trouble.

## II. Detainers Raise a Host of Legal Questions

In considering state and local responses to Immigration and Custom’s (ICE) practice of issuing “detainer” requests—a request to local law enforcement to hold a noncitizen—it is important to remember that immigration detainers, as ICE practiced them until November 2014, have been ruled illegal and unconstitutional by several courts. Those rulings are a major reason why, among others, the Secretary of Homeland Security Jeh Johnson stated that the previous system wasn’t working. Returning to that system, or legislatively mandating it, is not a viable legal option.

The Immigration Council’s report, *The Faulty Legal Arguments Behind Immigration Detainers*, by law professor Christopher Lasch, available at <http://immigrationpolicy.org/perspectives/faulty-legal-arguments-behind-immigration-detainers> (Attachment B), explains how immigration detainers work and why they were unconstitutional. Put simply, a detainer must be based on probable cause of a violation—which ICE detainers were not. Localities were subjecting themselves to risk for liability for holding someone under an ICE detainer.

Under ICE’s new Priority Enforcement Program (PEP), the federal government now will request notification of release rather than a detainer for many individuals meeting its priorities. ICE has said that will provide probable cause to justify detainers in “special circumstances.” Nonetheless, many concerns persist regarding whether this program satisfies the Fourth Amendment requirements. One thing that is clear is that returning to the pre-PEP use of detainers is not an option.

## III. “Enforcement First” Has Proven to be Unsuccessful

As explained in the Immigration Council’s report, *The Fallacy of “Enforcement First”* at <http://www.immigrationpolicy.org/just-facts/fallacy-enforcement-first> (Attachment C), the United States has been pursuing an “enforcement first” approach to immigration control for more than two-and-a-half decades—and it has yet to work. The U.S. currently spends more on immigration enforcement—\$18 billion per year—than all other federal law enforcement combined.<sup>1</sup> Since the last major legalization program for unauthorized immigrants in 1986, the

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<sup>1</sup> Consolidated Appropriations Act, 2014, P.L. 113-76, 128 Stat. 5, 248-52 (Jan. 17, 2014), at <http://www.gpo.gov/fdsys/pkg/PLAW-113publ76/pdf/PLAW-113publ76.pdf>; Doris Meissner, Donald M. Kerwin, Muzaffar Chishti, and Claire Bergeron, *Immigration Enforcement in the United States: The Rise of a Formidable Machinery*, MIGRATION POLICY INSTITUTE (2013), [www.migrationpolicy.org/pubs/enforcementpillars.pdf](http://www.migrationpolicy.org/pubs/enforcementpillars.pdf).

federal government has spent over \$200 billion on immigration enforcement.<sup>2</sup> Yet during that time, the unauthorized population has tripled in size to 11 million. This is a testament that enforcement measures alone pale in the face of a strong economy where the demand for foreign workers outstrips the available visas. Meanwhile, punitive laws separate families unnecessarily despite the natural desire of immigrants to be reunited with their families.

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The American Immigration Council hopes that our research and analysis helps foster a practical, fact-based conversation about what we can do to ensure that our immigration system works for everyone. “Enforcement-only” proposals rely on stereotypes, not evidence, and ignore that this approach has proven unsuccessful. Congress has the power to make our communities safer by passing comprehensive immigration reform.

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<sup>2</sup> Marc R. Rosenblum, Migration Policy Institute, Testimony to House Judiciary Committee, *Examining the Adequacy and Enforcement of Our Nation’s Immigration Laws* (Feb. 3, 2015), p. 18, at [http://judiciary.house.gov/?a=Files.Serve&File\\_id=31971212-6FDB-4FE6-ABBB-406B7C673B21](http://judiciary.house.gov/?a=Files.Serve&File_id=31971212-6FDB-4FE6-ABBB-406B7C673B21).

ATTACHMENT A

# THE CRIMINALIZATION OF IMMIGRATION IN THE UNITED STATES

*By Walter A. Ewing, Ph.D., Daniel E. Martínez, Ph.D., and Rubén G. Rumbaut, Ph.D.*

# THE CRIMINALIZATION OF IMMIGRATION IN THE UNITED STATES

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## ABOUT THE AUTHORS

**Walter A. Ewing, Ph.D.** is Senior Researcher at the American Immigration Council. He writes on a wide range of topics pertaining to U.S. immigration policy, including the impact of immigration on the U.S. economy, the unintended consequences of U.S. border-enforcement policies, and the relationship between immigration and crime. He has published articles in the *Journal on Migration and Human Security, Society*, the *Georgetown Journal of Law and Public Policy*, and the *Stanford Law and Policy Review*. He also authored a chapter in *Debates on U.S. Immigration*, published by SAGE in 2012. He received his Ph.D. in Anthropology from the City University of New York (CUNY) Graduate School.

**Daniel E. Martínez, Ph.D.** is an Assistant Professor in the Department of Sociology and inaugural director of the Cisneros Hispanic Leadership Institute at The George Washington University. He is a co-principal investigator of the Migrant Border Crossing Study, a Ford Foundation-funded research project that involves interviewing recently deported unauthorized migrants about their experiences crossing the U.S.-Mexico border and residing in the United States. Martínez also does extensive research on undocumented border-crosser deaths along the U.S.-Mexico border. He received his Ph.D. from the School of Sociology at the University of Arizona.

**Rubén G. Rumbaut, Ph.D.** is Distinguished Professor of Sociology at the University of California, Irvine. Together with Alejandro Portes, he has directed the landmark *Children of Immigrants Longitudinal Study* and coauthored *Immigrant America: A Portrait* (4<sup>th</sup> ed., 2014) and *Legacies: The Story of the Immigrant Second Generation* (2001), which won the American Sociological Association's top award for Distinguished Scholarship. He is the founding chair of the International Migration Section of the American Sociological Association, and an elected member of the National Academy of Education and the American Academy of Arts and Sciences. He received his Ph.D. in Sociology from Brandeis University.

## ABOUT THE AMERICAN IMMIGRATION COUNCIL

The American Immigration Council's policy mission is to shape a rational conversation on immigration and immigrant integration. Through its research and analysis, the Immigration Council provides policymakers, the media, and the general public with accurate information about the role of immigrants and immigration policy in U.S. society. Our reports and materials are widely disseminated and relied upon by press and policymakers. Our staff regularly serves as experts to leaders on Capitol Hill, opinion-makers, and the media. We are a non-partisan organization that neither supports nor opposes any political party or candidate for office.

Visit our website at [www.AmericanImmigrationCouncil.org](http://www.AmericanImmigrationCouncil.org) and our blog at [www.immigrationimpact.com](http://www.immigrationimpact.com).

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# EXECUTIVE SUMMARY

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For more than a century, innumerable studies have confirmed two simple yet powerful truths about the relationship between immigration and crime: immigrants are less likely to commit serious crimes or be behind bars than the native-born, and high rates of immigration are associated with lower rates of violent crime and property crime. This holds true for both legal immigrants and the unauthorized, regardless of their country of origin or level of education. In other words, the overwhelming majority of immigrants are not “criminals” by any commonly accepted definition of the term. For this reason, harsh immigration policies are not effective in fighting crime.

Unfortunately, immigration policy is frequently shaped more by fear and stereotype than by empirical evidence. As a result, immigrants have the stigma of “criminality” ascribed to them by an ever-evolving assortment of laws and immigration-enforcement mechanisms. Put differently, immigrants are being defined more and more as threats. Whole new classes of “felonies” have been created which apply only to immigrants, deportation has become a punishment for even minor offenses, and policies aimed at trying to end unauthorized immigration have been made more punitive rather than more rational and practical. In short, immigrants themselves are being criminalized.

## **Immigrants are Less Likely to be Criminals Than the Native-Born**

### *Higher Immigration is Associated with Lower Crime Rates*

- Between 1990 and 2013, the foreign-born share of the U.S. population grew from 7.9 percent to 13.1 percent and the number of unauthorized immigrants more than tripled from 3.5 million to 11.2 million.
- During the same period, FBI data indicate that the violent crime rate declined 48 percent—which included falling rates of aggravated assault, robbery, rape, and murder. Likewise, the property crime rate fell 41 percent, including declining rates of motor vehicle theft, larceny/robbery, and burglary.

### *Immigrants are Less Likely than the Native-Born to Be Behind Bars*

- According to an original analysis of data from the 2010 American Community Survey (ACS) conducted by the authors of this report, roughly 1.6 percent of immigrant males age 18-39 are incarcerated, compared to 3.3 percent of the native-born. This disparity in incarceration rates has existed for decades, as evidenced by data from the 1980, 1990, and 2000 decennial censuses. In each of those years, the incarceration rates of the native-born were anywhere from two to five times higher than that of immigrants.
- The 2010 Census data reveals that incarceration rates among the young, less-educated Mexican, Salvadoran, and Guatemalan men who make up the bulk of the unauthorized population are significantly lower than the incarceration rate among native-born young men without a high-school diploma. In 2010,

less-educated native-born men age 18-39 had an incarceration rate of 10.7 percent—more than triple the 2.8 percent rate among foreign-born Mexican men, and five times greater than the 1.7 percent rate among foreign-born Salvadoran and Guatemalan men.

### *Immigrants are Less Likely Than the Native-Born to Engage in Criminal Behavior*

- A variety of different studies using different methodologies have found that immigrants are less likely than the native-born to engage in either violent or nonviolent “antisocial” behaviors; that immigrants are less likely than the native-born to be repeat offenders among “high risk” adolescents; and that immigrant youth who were students in U.S. middle and high schools in the mid-1990s and are now young adults have among the lowest delinquency rates of all young people.

## **Criminalizing Immigration and Expanding the Apparatus of Enforcement**

Despite the abundance of evidence that immigration is not linked to higher crime rates, and that immigrants are less likely to be criminals than the native-born, many U.S. policymakers succumb to their fears and prejudices about what they imagine immigrants to be. As a result, far too many immigration policies are drafted on the basis of stereotypes rather than substance. These laws are criminalizing an ever broadening swath of the immigrant population by applying a double standard when it comes to the consequences for criminal behavior. Immigrants who experience even the slightest brush with the criminal justice system, such as being convicted of a misdemeanor, can find themselves subject to detention for an undetermined period, after which they are expelled from the country and barred from returning. In other words, for years the government has been redefining what it means to be a “criminal alien,” using increasingly stringent definitions and standards of “criminality” that do not apply to U.S. citizens.

Of course, these increasingly punitive laws are only as effective as the immigration-enforcement apparatus designed to support them. And this apparatus has expanded dramatically over the past three decades. More and more immigrants have been ensnared by enforcement mechanisms new and old, from worksite raids to Secure Communities. Detained immigrants are then housed in a growing nationwide network of private, for-profit prisons before they are deported from the United States. In short, as U.S. immigration laws create more and more “criminal aliens,” the machinery of detention and deportation grows larger as well, casting a widening dragnet over the nation’s foreign-born population in search of anyone who might be deportable. With the technologically sophisticated enforcement systems in place today, being stopped by a police officer for driving a car with a broken tail light can culminate in a one-way trip out of the country if the driver long ago pled guilty to a misdemeanor that has since been defined as a deportable offense.

The scale of the federal government’s drive to criminalize immigration and expand the reach of the enforcement dragnet becomes very apparent when the proliferation of immigration laws, policies, and enforcement mechanisms is tracked over the past three decades. Two bills passed by Congress in 1996 stand as the most flagrant modern examples of laws which create a system of justice for non-U.S. citizens that is distinct from

the system which applies to citizens. And, from old-fashioned worksite raids to the modern databases which are the heart of initiatives such as Secure Communities and the Criminal Alien Program (CAP), the government's immigration-enforcement mechanisms continue to expand and reach deeper and deeper into the immigrant community. In the process, basic principles of fairness and equal treatment under the law are frequently left by the wayside.

## The “Great Expulsion”

The United States is in the midst of a “great expulsion” of immigrants, both lawfully present and unauthorized, who tend to be non-violent and non-threatening and who often have deep roots in this country. This relentless campaign of deportation is frequently justified as a war against “illegality”—which is to say, against unauthorized immigrants. But that justification does not come close to explaining the banishment from the United States of lawful permanent residents who committed traffic offenses and who have U.S.-based families. Nor does it explain the lack of due-process rights accorded to so many of the immigrants ensnared in deportation proceedings. Likewise, the wave of deportations we are currently witnessing is often portrayed as a crime-fighting tool. But, as the findings of this report make clear, the majority of deportations carried out in the United States each year do not actually target “criminals” in any meaningful sense of the word.

# INTRODUCTION

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In November 2013, NPR reported that U.S. Immigration and Customs Enforcement (ICE) had been instructed by Congress since 2009 to fill 34,000 beds in detention facilities across the country with immigrant detainees every day. It was immediately apparent that this sort of inmate quota would never fly if applied to native-born prisoners. As the NPR story puts it: “Imagine your city council telling the police department how many people it had to keep in jail each night.”<sup>1</sup> Clearly, such a concept has nothing to do with fighting crime or protecting the public. But when it comes to the detention (and deportation) of immigrants, very different standards of justice and reason are at work.

For more than a century, innumerable studies have confirmed two simple yet powerful truths about the relationship between immigration and crime: immigrants are *less* likely to commit serious crimes or be behind bars than the native-born, and high rates of immigration are associated with *lower* rates of violent crime and property crime.<sup>2</sup> This holds true for both legal immigrants and the unauthorized, regardless of their country of origin or level of education. In other words, the overwhelming majority of immigrants are not “criminals” by any commonly accepted definition of the term. For this reason, harsh immigration policies are not effective in fighting crime.

Unfortunately, immigration policy is frequently shaped more by fear and stereotype than by empirical evidence, which is partly why immigrants are often treated like dangerous criminals by the U.S. immigration system. More precisely, immigrants have the stigma of “criminality” ascribed to them by an ever-evolving assortment of laws and immigration-enforcement mechanisms. From the Immigration Reform and Control Act of 1986 (IRCA) to

Operation Streamline (launched in 2005), immigrants are being defined more and more as threats.<sup>3</sup> Whole new classes of “felonies” have been created which apply only to immigrants, deportation has become a punishment for even minor offenses, and policies aimed at trying to end unauthorized immigration have been made more punitive rather than more rational and practical. Moreover, as a growing body of “crimmigration” law has reimagined noncitizens as criminals and security risks, immigration law enforcement has increasingly adopted the securitized approach of criminal law enforcement.<sup>4</sup> In short, immigrants themselves are being criminalized.<sup>5</sup> As prominent immigration scholar Douglas Massey has written with regard to the plight of unauthorized immigrants in particular, “not since the days of slavery have so many residents of the United States lacked the most basic social, economic, and human rights.”<sup>6</sup>

This report tackles the criminalization of immigration from two angles. First, it documents the fact that immigration is not associated with “crime” as it is commonly understood. For more than two decades, rates of violent crime and property crime have fallen in the United States as the immigrant population (including the unauthorized population) has grown. Moreover, immigrants are less likely than the native-born to be behind bars or to engage in typically “criminal behaviors.” Second, the report describes the ways in which U.S. immigration laws and policies are re-defining the notion of “criminal” as it applies to immigrants, while also ramping up the enforcement programs designed to find anyone who might be deportable. More and more, a zero-tolerance policy has been applied by the federal government to immigrants who commit even the slightest offense or infraction. “Crimes” which might result in a fine or a suspended sentence for natives end up getting immigrants detained and deported. This represents a double standard of justice for immigrants in which the scale of the punishment (detention and deportation) far outweighs the severity of the crime (traffic offenses, for example). Unfortunately, this double standard has been the guiding principle behind a litany of immigration-enforcement laws and programs, such as the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), the 287(g) program, Secure Communities, and the “Consequence Delivery System” implemented by U.S. Customs and Border Protection (CBP) in 2011.

## IMMIGRANTS ARE LESS LIKELY TO BE CRIMINALS THAN THE NATIVE-BORN

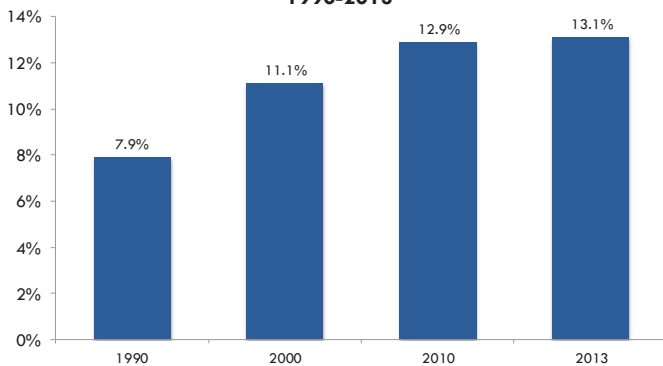
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The evidence that immigrants tend *not* to be criminals is overwhelming. To begin with, there is an inverse relationship between crime and immigration. Crime rates in the United States have trended downward for many years at the same time that the number of immigrants has grown. Second, immigrants are *less* likely to be incarcerated than the native-born. And, third, immigrants are *less* likely than the native-born to engage in the criminal behaviors that tend to land one in prison. No matter how you look at the issue, the inescapable conclusion is that immigrants are, on average, less prone to criminality than the U.S. native-born population.

## Higher Immigration is Associated with Lower Crime Rates

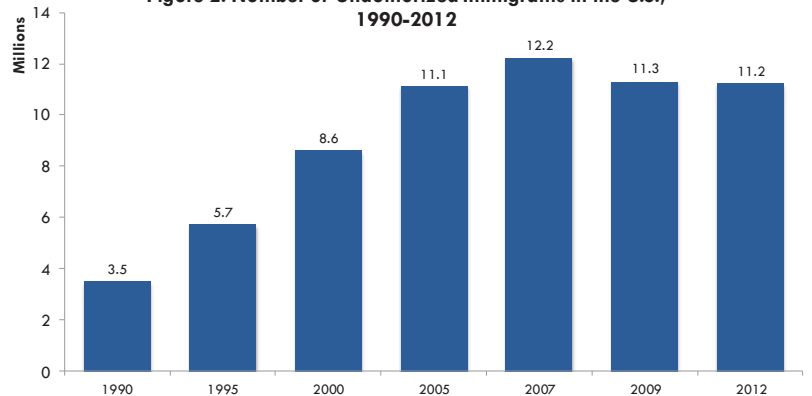
As the number of immigrants in the United States has risen in recent years, crime rates have fallen. Between 1990 and 2013, the foreign-born share of the U.S. population grew from 7.9 percent to 13.1 percent {Figure 1}<sup>7</sup> and the number of unauthorized immigrants more than tripled from 3.5 million to 11.2 million {Figure 2}.<sup>8</sup> During the same period, FBI data indicate that the violent crime rate declined 48 percent—which included falling rates of aggravated assault, robbery, rape, and murder {Figure 3}.<sup>9</sup> Likewise, the property crime rate fell 41 percent, including declining rates of motor vehicle theft, larceny/robbery, and burglary {Figure 4}.<sup>10</sup> This decline in crime rates in the face of high levels of new immigration has been a steady national trend, and has occurred in cities across the country.<sup>11</sup>

**Figure 1: Foreign-Born Share of the U.S. Population, 1990-2013**



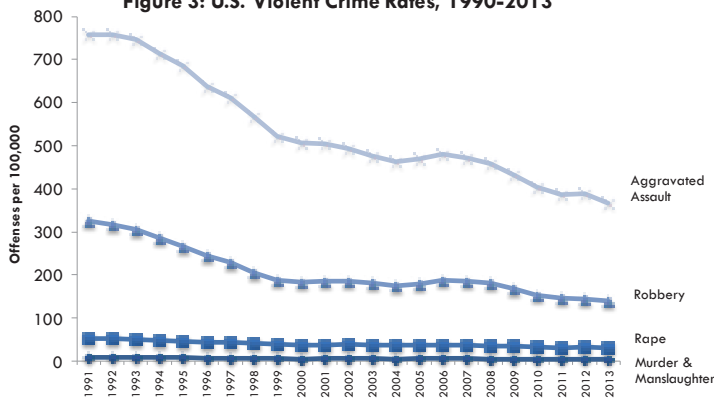
Source: Elizabeth M. Grieco, et al., *The Size, Place of Birth, and Geographic Distribution of the Foreign-Born Population in the United States: 1960 to 2010* (Washington, DC: U.S. Census Bureau, October 2012), p. 19; 2013 ACS 1-Year Estimates.

**Figure 2: Number of Unauthorized Immigrants in the U.S., 1990-2012**



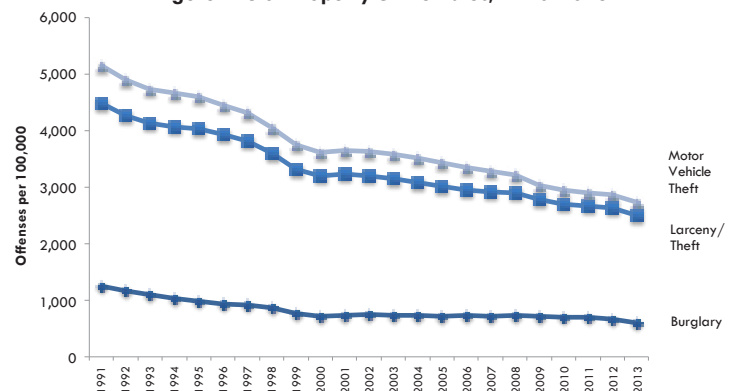
Source: Jeffrey S. Passel and D'Vera Cohn, *Unauthorized Immigrant Totals Rise in 7 States, Fall in 14* (Washington, DC: Pew Hispanic Center, November 18, 2014), Table A1.

**Figure 3: U.S. Violent Crime Rates, 1990-2013**



Source: FBI, Uniform Crime Reports.

**Figure 4: U.S. Property Crime Rates, 1990-2013**



Source: FBI, Uniform Crime Reports.

The most thoroughly studied aspect of this phenomenon has been the drop in rates of violent crime since the early 1990s in cities that have long been “gateways” for immigrants entering the United States, such as Miami, Chicago, El Paso, San Antonio, and San Diego.<sup>12</sup> However, the inverse relationship between immigration and crime is also apparent in “new” immigrant gateways, such as Austin, where rates of both violent crime and serious property crime have declined despite high levels of new immigration.<sup>13</sup> Declining rates of property crime have also been documented in metropolitan areas across the country.<sup>14</sup> Some scholars suggest that new immigrants may revitalize dilapidated urban areas, ultimately reducing violent crime rates.<sup>15</sup>

In short, to quote sociologist Robert J. Sampson, “cities of concentrated immigration are some of the safest places around.”<sup>16</sup> The reason for this is straightforward. Immigrants as a group tend to be highly motivated, goal-driven individuals who have little to gain by running afoul of the law. As law professor and public-policy expert Michael Tonry puts it: “First-generation economic immigrants are self-selected risk takers who leave their homes, families, and languages to move to a new country to improve their and their children’s lives. They have good reasons to work hard, defer gratifications, and stay out of trouble.”<sup>17</sup> Sampson and colleagues also find that immigrant communities are insulated from crime because they tend to display “social cohesion among neighbors combined with their willingness to intervene on behalf of the common good.”<sup>18</sup>

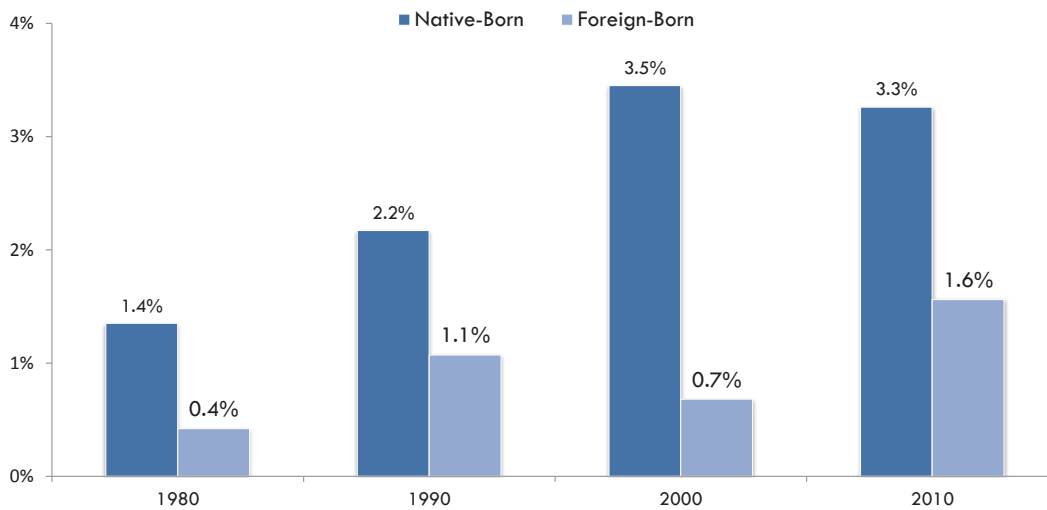
There is a sense of *déjà vu* in these modern-day findings. In the first three decades of the 20<sup>th</sup> century, during the last era of large-scale immigration, three government commissions studied the relationship between immigrants and crime and came to the same conclusion as contemporary researchers. The Industrial Commission of 1901, the [Dillingham] Immigration Commission of 1911, and the [Wickersham] National Commission on Law Observation and Enforcement of 1931 each set out to measure how immigration increases crime. But each found lower levels of criminality among immigrants than among their native-born counterparts.<sup>19</sup> A century ago, the report of the Dillingham Commission concluded:

No satisfactory evidence has yet been produced to show that immigration has resulted in an increase in crime disproportionate to the increase in adult population. Such comparable statistics of crime and population as it has been possible to obtain indicate that immigrants are less prone to commit crime than are native Americans.<sup>20</sup>

## **Immigrants are Less Likely than the Native-Born to Be Behind Bars**

Another concrete indication that immigrants are less likely than the native-born to be criminals is the fact that relatively few prisoners in the United States are immigrants. According to an original analysis of data from the 2010 American Community Survey (ACS) conducted by the authors of this report, roughly 1.6 percent of immigrant males age 18-39 are incarcerated, compared to 3.3 percent of the native-born.<sup>21</sup> This disparity in incarceration rates has existed for decades, as evidenced by data from the 1980, 1990, and 2000 decennial censuses {Figure 5}. In each of those years, the incarceration rates of the native-born were anywhere from two to five times higher than that of immigrants.<sup>22</sup>

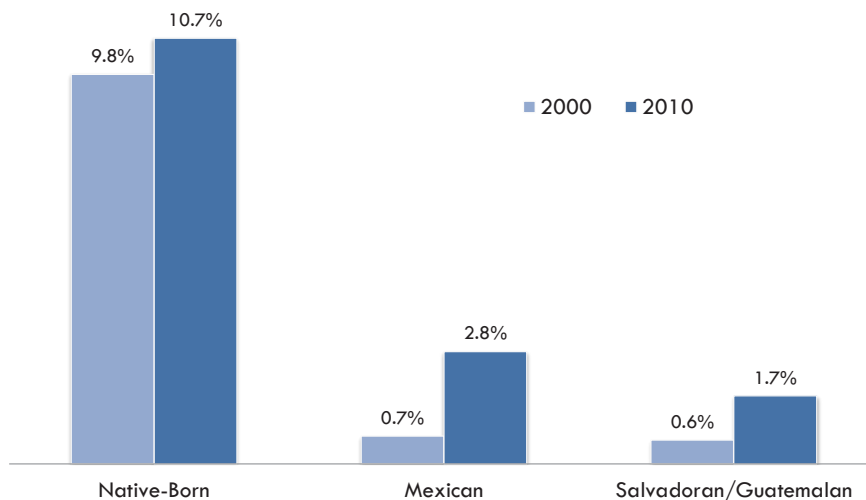
**Figure 5: U.S. Incarceration Rates of Men Age 18-39, by Nativity, 1980-2010**



Source: Kristin F. Butcher and Anne Morrison Piehl, *Why are Immigrants' Incarceration Rates so Low?* (Cambridge, MA: National Bureau of Economic Research, July 2007), Table 2; 2010 ACS.

The pronounced difference between immigrants and the native-born in terms of incarceration rates also holds true in the case of those immigrants most likely to be unauthorized. The 2010 Census data reveals that incarceration rates among the young, less-educated Mexican, Salvadoran, and Guatemalan men who make up the bulk of the unauthorized population are significantly lower than the incarceration rate among native-born young men without a high-school diploma. In 2010, less-educated native-born men age 18-39 had an incarceration rate of 10.7 percent—more than triple the 2.8 percent rate among foreign-born Mexican men, and five times greater than the 1.7 percent rate among foreign-born Salvadoran and Guatemalan men {Figure 6}.<sup>23</sup>

**Figure 6: U.S. Incarceration Rates of Native-Born, Mexican, and Salvadoran/Guatemalan Men, Age 18-39, Without a High-School Diploma, 2000 & 2010**



Source: 2000 Decennial Census; 2010 ACS.

Research also indicates that such statistics are not simply the product of an effective immigration-enforcement system that removes immigrants from the country rather than holding them in U.S. prisons. According to a study by economists Kristin Butcher and Anne Morrison Piehl, the “evidence suggests that deportation and deterrence of immigrants’ crime commission from the threat of deportation are not driving the results. Rather, immigrants appear to be self-selected to have low criminal propensities and this has increased over time.”<sup>24</sup> The study begins by using data from the 1980, 1990, and 2000 Censuses to demonstrate that immigrants have had lower incarceration rates than the native-born for quite some time, and that this effect has been growing more pronounced with each passing decade.<sup>25</sup> But the study then goes on to answer the question of whether these decreasing incarceration rates are the result of harsh immigration policies enacted in the 1990s, either because more immigrants were deported or because more were deterred from criminal behavior because of the threat of deportation. The answer to this question proved to be “no.”

Nevertheless, it is clear from the ACS statistics that the incarceration rates for immigrant men rose between 2000 and 2010 (although they remained much lower than for native-born men). However, this is likely the product of changes in how immigration laws are enforced, not an indication of some immigrant predisposition towards “criminality” in the commonly understood sense of the word. The most probable explanation for the increase is that many more immigrant men were incarcerated for immigration-related offenses during the first decade of the 21<sup>st</sup> century as Congress redefined more and more immigration offenses as criminal (such as unauthorized entry or re-entry into the country),<sup>26</sup> thus triggering criminal incarceration before deportation.

These same factors also explain why immigrants are over represented in the federal prison system: while some may be there for committing a serious criminal offense, a great many more may be there because of an immigration violation. Moreover, it is important to keep in mind that the characteristics of the federal prison population do not necessarily speak to the U.S. prison population as a whole because the overwhelming majority of prisoners are not in federal prisons. According to data from the U.S. Bureau of Justice Statistics, federal inmates accounted for only 9 percent of all prisoners in 2010. Well over half (58 percent) were incarcerated in state prisons and a third (33 percent) in local jails.<sup>27</sup> So, when anti-immigrant activists and politicians trumpet the out-of-context statistic that one-quarter of the inmates in federal prisons are foreign-born,<sup>28</sup> that figure should not be taken at face value.

Although there is no reliable source of data on immigrants incarcerated in state prisons and local jails, the U.S. Government Accountability Office (GAO) sought to overcome this limitation in a 2011 study. Not only did the study examine immigrants in federal prison during the Fiscal Year (FY) 2005-2010 period, but also non-federal immigrant prisoners for whom state and local governments had sought federal reimbursement of some incarceration costs through the U.S. Department of Justice’s State Criminal Alien Assistance Program (SCAAP) during the FY 2003-2009 period.<sup>29</sup> The GAO found that, among the immigrant prisoners in its sample, 65 percent had been arrested at least once for (although not necessarily convicted of) an immigration violation, 48 percent for a drug offense, and 39 percent for traffic violations—all of which are generally non-violent acts. In compari-



son, 8 percent had been arrested at least once for homicide and 9 percent for robbery.<sup>30</sup> The GAO also analyzed data from the U.S. Sentencing Commission and found that, in FY 2009, the “federal primary conviction” for 68 percent of offenders who were immigrants was an immigration-related violation—not a violent offense or any sort of crime which could be construed as a threat to public safety.<sup>31</sup>

## **Immigrants are Less Likely Than the Native-Born to Engage in Criminal Behavior**

The available evidence indicates that immigrants are not only less likely to end up behind bars than the native-born, but that immigrants are also less likely to commit criminal acts to begin with. For instance, a 2014 study found that “immigrants to the US are less likely to engage in violent or nonviolent antisocial behaviors than native-born Americans. Notably, native-born Americans were approximately four times more likely to report violent behavior than Asian and African immigrants and three times more likely than immigrants from Latin America.”<sup>32</sup> The study analyzed data from the National Epidemiologic Survey on Alcohol and Related Conditions (NESARC) to determine how often natives and immigrants engage in a wide range of violent and nonviolent “antisocial behaviors,” from hurting another person on purpose and using a weapon during a fight to shoplifting and lying.<sup>33</sup>

In a related vein, another 2014 study tracked 1,354 “high risk” adolescents over the course of seven years and found that the immigrants in the sample were less likely than the native-born to be repeat offenders. In the words of the authors, immigrants “appear to be on a path toward desistance much more quickly than their peers.”<sup>34</sup> All of the adolescents in question had been convicted of a serious offense (usually a felony) in either a juvenile or adult court in Maricopa County, Arizona, or Philadelphia County, Pennsylvania. The study sought to determine who became a “persistent offender” and who did not.<sup>35</sup>

A 2010 study yielded similar findings based on data from the National Longitudinal Study of Adolescent Health (Add Health).<sup>36</sup> Add Health offers a “national, longitudinal account of delinquency by gender, race/ethnicity, and immigrant group from the onset of adolescence (ages 11-12) to the transition into adulthood (ages 25-26).”<sup>37</sup> The study found that “immigrant youth who enrolled in U.S. middle and high schools in the mid-1990s and who are young adults today had among the lowest delinquency rates of all youth.”<sup>38</sup> The authors conclude that the national-level data gathered by Add Health “debunk(s) the myth of immigrant criminality. Fears that immigration will lead to an escalation of crime and delinquency are unfounded.”

# CRIMINALIZING IMMIGRATION AND EXPANDING THE APPARATUS OF ENFORCEMENT

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Despite the abundance of evidence that immigration is not linked to higher crime rates, and that immigrants are less likely to be criminals than the native-born, many U.S. policymakers succumb to their fears and prejudices about what they imagine immigrants to be. As a result, far too many immigration policies are drafted on the basis of stereotypes rather than substance. These laws are criminalizing an ever broadening swath of the immigrant population by applying a double standard when it comes to the consequences for criminal behavior. Immigrants who experience even the slightest brush with the criminal justice system, such as being convicted of a misdemeanor, can find themselves subject to detention for an undetermined period, after which they are expelled from the country and barred from returning. This reality is at the core of what law professor Juliet Stumpf calls “crimmigration”—the “criminalization of immigration law.”<sup>39</sup> Stumpf argues that “as criminal sanctions for immigration-related conduct and criminal grounds for removal from the United States continue to expand, aliens become synonymous with criminals.”<sup>40</sup> In other words, for years the government has been redefining what it means to be a “criminal alien,” using increasingly stringent definitions and standards of “criminality” that do not apply to U.S. citizens.

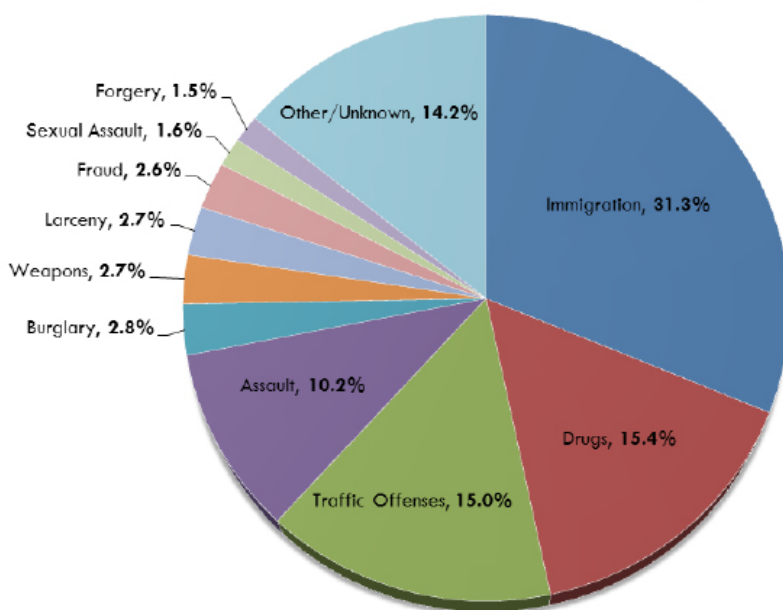
Of course, these increasingly punitive laws are only as effective as the immigration-enforcement apparatus designed to support them. And this apparatus has expanded dramatically over the past three decades.<sup>41</sup> More and more immigrants have been ensnared by enforcement mechanisms new and old, from worksite raids to Secure Communities. Detained immigrants are then housed in a growing nationwide network of private, for-profit prisons before they are deported from the United States.<sup>42</sup> In short, as U.S. immigration laws create more and more “criminal aliens,” the machinery of detention and deportation grows larger as well, casting a widening dragnet over the nation’s foreign-born population in search of anyone who might be deportable. With the technologically sophisticated enforcement systems in place today, being stopped by a police officer for driving a car with a broken tail light can culminate in a one-way trip out of the country if the driver long ago pled guilty to a misdemeanor that has since been defined as a deportable offense.

## Misleading Language in the “Official” Deportation Statistics

The definition of “criminal alien” used by the federal government is clearly inconsistent with the general public’s understanding of serious crime. The term represents a terminological sleight-of-hand used to justify a punitive approach to immigration enforcement that is based on incarceration and deportation. An important part of the government’s attempt to redefine what it means to be a “criminal alien,” with all the social and legal implications this label carries, becomes clear upon closer consideration of the data on enforcement actions that is released by the U.S. Department of Homeland Security (DHS). According to DHS, 438,421 foreign nationals were removed from the United States in FY 2013. Among those removed, roughly 45 percent (198,394) were classified as “known criminal aliens.”<sup>43</sup> (Along these lines, the director of ICE testified before Congress that “eighty-five percent of individuals removed or returned from the interior were previously convicted of a criminal offense”).<sup>44</sup>

However, a more detailed examination of the data clearly illustrates that the majority of “criminal aliens” are in fact *not* being removed for what most Americans perceive to be serious crime, such as the FBI’s eight Index Crimes, which consist of “Part I” offenses (homicide, assault, forcible rape, and robbery) and “Part II” offenses (larceny, burglary, motor vehicle theft and arson).<sup>45</sup> In fact, DHS’s FY 2013 enforcement actions indicate that serious crimes such as “Assault,” “Robbery,” “Burglary,” and “Sexual Assault” collectively make up only one-fifth of the crime categories for which “criminal aliens” were removed. Nearly one-third (31.3 percent) of “criminal aliens” were removed for “Immigration” offenses (i.e., illegal entry or reentry into the United States), followed by 15.4 percent for “Dangerous Drugs” (which includes possession of marijuana), and 15 percent for “Criminal Traffic Offenses” (including both Driving Under the Influence (DUI) and “hit and run”). Also noteworthy are an additional 14.2 percent of “criminal aliens” who were removed for “All other categories, including unknown” {Figure 7}.<sup>46</sup>

**Figure 7: Removals by Crime Category, FY 2013**



Source: John F. Simanski, *Immigration Enforcement Actions: 2013* (Washington, DC: U.S. Department of Homeland Security, September 2014), p. 7.

## Immigrant Incarceration and the Rise of the Private Prison Industry

The criminalization of immigration involves much more than the manipulation of official deportation statistics. It is also driven by a massive expansion in the infrastructure for the detention of immigrants who fit one or more of the growing list of offenses that qualify as “criminal” for immigration purposes. The immigrant-detention industry began to expand in earnest during the early 1980s following the creation of the Krome Avenue Detention Center in Miami to detain Mariel refugees from Cuba. Moreover, at the same time the immigration detention system has grown, the nation’s prison system has become increasingly privatized.<sup>47</sup> The end result is the federal government’s reliance upon private prison corporations, such as Corrections Corporation of America (CCA) and The GEO Group, to handle the burgeoning inflows of “criminal aliens.”<sup>48</sup>

As the immigrant-detention industry grew, so did the redefinition of “immigrants” as an inherently dangerous group of people. This can be attributed in part to the fact that private prison companies work actively to shape the federal and state laws governing corrections and law enforcement. The companies make sizeable campaign contributions to politicians, and lobby Congress and state legislatures on bills that affect their interests. These companies also belong to organizations such as the American Legislative Exchange Council (ALEC), which champions free markets, limited government, and public-private partnerships that bring together federal and state legislators with members of the private sector. These partnerships can wield considerable power. For instance, there are indications that ALEC and CCA may have played a major role in drafting the legislation that would become Arizona’s infamous anti-immigrant law, SB 1070.<sup>49</sup> This scenario represents a conflict of interest in which a company that has a vested financial interest in the incarceration of as many people as possible is influencing legislation that will increase the flow of prisoners into that company’s prisons. One can only wonder if this business ethic is behind the fact that ICE is now required by law “to maintain an average daily population of 34,000 detainees.”<sup>50</sup>

## **A Chronology of Criminalization and the Expansion of Immigration Enforcement**

The scale of the federal government’s drive to criminalize immigration and expand the reach of the enforcement dragnet becomes very apparent when the proliferation of immigration laws, policies, and enforcement mechanisms is tracked over the past three decades.<sup>51</sup> The 1996 laws stand as the most flagrant modern examples of laws which create a system of justice for non-U.S. citizens that is distinct from the system which applies to citizens.<sup>52</sup> And, from old-fashioned worksite raids to the modern databases which are the heart of initiatives such as Secure Communities and the Criminal Alien Program (CAP), the government’s immigration-enforcement mechanisms continue to expand and reach deeper and deeper into the immigrant community. In the process, basic principles of fairness and equal treatment under the law are frequently left by the wayside.

### *Worksite Immigration Raids*

For decades, worksite raids of businesses employing unauthorized immigrants were a mainstay of immigration enforcement in the United States. In recent times, their economic and social destructiveness are perhaps best exemplified by the case of Postville, Iowa. On May 12, 2008, 389 workers were arrested during an immigration raid at Postville’s Agriprocessors, Inc. meat-packing plant. The consequences for the community and the local economy have been dire.<sup>53</sup> According to the authors of *Postville U.S.A.*, one year after the raid, Postville “lost 40% of its pre-raid population, the economy was in shambles, the city government teetered on the brink of financial collapse, and the future of the town’s major employer grew increasingly doubtful with time.”<sup>54</sup> Long after the Agriprocessors raid, Postville was still what its leaders described as “a human and economic disaster area.”<sup>55</sup> The population loss meant steep losses for Postville in taxes and utility revenue. Local businesses closed, rental units remained empty, and the town couldn’t pay its bills. According to the book’s authors: “Attempts to come up with simple black-and-white solutions, such as arresting undocumented workers or closing down the companies that employ them, often causes a host of far more complex situations that do little to address any of the real concerns expressed by either side in the immigration debate.”<sup>56</sup>

The use of worksite raids as an enforcement mechanism has waned in recent years, although unauthorized workers are occasionally still swept up in such raids. According to ICE, in FY 2012, the agency made “520 criminal arrests tied to worksite enforcement investigations. Of the individuals criminally arrested, 240 were owners, managers, supervisors or human resources employees.” The remaining were workers who faced charges “such as aggravated identity theft and Social Security fraud.”<sup>57</sup>

## *Criminal Alien Program*

The Immigration Reform and Control Act of 1986 (IRCA) is perhaps best known for providing an avenue to legal status for most unauthorized immigrants in the country at that time. However, IRCA also spurred the creation of new immigration-enforcement programs targeting noncitizens with criminal convictions.<sup>58</sup> Among those programs were two that eventually became ICE’s Criminal Alien Program (CAP)<sup>59</sup>—a moniker which actually encompasses a number of different systems designed to identify, detain, and begin removal proceedings against deportable immigrants within federal, state, and local prisons and jails. CAP is currently active in all state and federal prisons, as well as more than 300 local jails throughout the country. It is one of several so-called “jail status check” programs intended to screen individuals in federal, state, or local prisons and jails for removability. CAP is by far the oldest and largest such interface between the criminal justice system and federal immigration authorities. CAP also encompasses other activities, including the investigation and arrest of some noncitizens who are not detained.<sup>60</sup>

Regardless of its official intent, in practice CAP encourages local police to engage in ethnic profiling. In particular, police are motivated to arrest as many Latinos as possible in order to snare as many deportable immigrants as possible. For instance, one study found:

compelling evidence that the Criminal Alien Program tacitly encourages local police to arrest Hispanics for petty offenses. These arrests represent one part of an implicit, but relatively clear logic: the higher the number of Hispanic arrests, the larger the pool of Hispanic detainees; the larger the pool of detainees, the more illegal immigrants that can be purged from the city via the CAP screening system.<sup>61</sup>

## *The War on Drugs*

Starting in the mid-1980s, the expansion of the infrastructure for detention in the United States was based not only on an escalating crackdown on immigrants, but was also a central component of the “war on drugs.” While IRCA and the Immigration Act of 1990 specifically expanded immigration detention, prisons were also filled with offenders—immigrant and native-born alike—on the basis of the Anti-Drug Abuse Act of 1988 (which created the concept of the “aggravated felony”), the Crime Control Act of 1990, and the Violent Crime Control and Law Enforcement Act of 1994, among other laws. In fact, the battles against illegal drugs and “illegal aliens” were frequently linked to each other in the political rhetoric of the time.<sup>62</sup> The result was a growing number of prisons and a growing number of offenders to fill them.

## 1996 Laws

The year 1996 was pivotal in terms of the criminalization of immigration. The Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) and the Antiterrorism and Effective Death Penalty Act (AEDPA) transformed immigration law in two profound ways. First, the laws mandated the detention and deportation of noncitizens (lawful permanent residents and unauthorized immigrants alike) who had been convicted of an “aggravated felony,” including individuals who may have pled guilty to minor charges to avoid jail time by opting for probation. Second, the laws expanded the list of offenses that qualify as “aggravated felonies” for immigration purposes, and applied this new standard retroactively to offenses committed years before the laws were enacted.<sup>63</sup>

A classic example of just how unfair these laws can be is the case of Mary Anne Gehris, who was born in Germany in 1965 but adopted by U.S.-citizen parents when she was two years old and taken to live in the United States. In 1988, she got into a fight with another woman over a boyfriend, pulled that woman’s hair, and ended up pleading guilty to misdemeanor assault. In 1999, she applied for U.S. citizenship and found herself in deportation proceedings instead because the 1996 immigration reforms defined her 1988 misdemeanor assault conviction as a “crime of violence.” Fortunately, the Georgia Board of Pardons intervened on Ms. Gehris’s behalf and pardoned her, thereby sparing her from deportation and allowing her to become a U.S. citizen.<sup>64</sup> But many other non-citizens have not been so lucky and have found themselves deported to countries they have not seen since they were children.

### 287(g) Program

Created by IIRIRA in 1996, 287(g)—which refers to the relevant section of the Immigration and Nationality Act (INA)—allows DHS to deputize select state and local law-enforcement officers to perform the functions of federal immigration agents. Like employees of ICE, so-called “287(g) officers” have access to federal immigration databases, may interrogate and arrest noncitizens believed to have violated federal immigration laws, and may lodge “detainers” against alleged noncitizens held in state or local custody. The program has attracted a wide range of critics since the first 287(g) agreement was signed more than 10 years ago. Among other concerns, opponents say the program lacks proper federal oversight, diverts resources from the investigation of local crimes, and results in profiling of Latino residents—as was documented following the entry into a 287(g) agreement with Sheriff Joe Arpaio of Maricopa County, Arizona. Following the nationwide expansion of the Secure Communities program, which has its own drawbacks but is operated exclusively by federal authorities, critics have asked whether the 287(g) program continues to offer any law-enforcement benefit.<sup>65</sup> In its budget justification for FY 2013, DHS sought \$17 million *less* in funding for the 287(g) program, and said that in light of the expansion of Secure Communities, “it will no longer be necessary to maintain the more costly and less effective 287(g) program.”<sup>66</sup>

While 287(g) may be on the way out, it is important to keep in mind that state governments have repeatedly sought to enlist their police forces in immigration enforcement without the cooperation or permission of federal authorities. Arizona’s SB 1070 and

Alabama's HB 56 are the most notorious examples of sweeping anti-immigrant laws that sought to turn police officers into immigration-enforcement agents. Although major provisions of these laws were struck down in the courts as a preemption of federal immigration-enforcement powers, other onerous provisions have survived. In Arizona, for instance, the U.S. Supreme Court upheld the provision of SB 1070 that permits police to conduct immigration status checks during law-enforcement stops.<sup>67</sup> Even if 287(g) programs eventually cease to exist, anti-immigrant laws introduced in state houses will remain a very real equivalent.

## September 11

The U.S. government responded to the attacks of September 11, 2001, in the same way it has in so many other times of national crisis: by using “national security” as a justification for incarcerating and deporting greater numbers of immigrants. “Foreigners” were broadly defined as potential threats and were detained on immigration-related charges that do not require the same standard of proof that is necessary in a criminal investigation.<sup>68</sup> Although federal authorities first targeted Arabs, Muslims, and South Asians in the aftermath of 9/11, the “war on terror” has had an impact on all immigrants regardless of ethnicity or legal status—including Latin American immigrants, particularly Mexicans, who comprise the majority of immigration detainees.<sup>69</sup> Post-9/11 policies not only increased funding for various immigration-enforcement functions as part of the broader effort to enhance national security, but fostered an “us or them” mentality in which “they” are the foreign-born.<sup>70</sup>

More precisely, the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, the Homeland Security Act of 2002, and the Enhanced Border Security and Visa Entry Reform Act of 2002 collectively “illustrate the accelerating criminalization of the immigration system.”<sup>71</sup> This intersection of criminal and immigration law has led to a notable increase in deportations.<sup>72</sup> As Stumpf notes, in the period “between 1908 and 1980, there were approximately 56,000 immigrants deported based on criminal convictions. In 2004 alone, there were more than 88,000 such deportations.”<sup>73</sup> While immigration law had been used by U.S. authorities to remove non-citizens who came into contact with the criminal justice system in the pre-9/11 era, the relationship between these two systems of law intensified after 9/11.<sup>74</sup> As law professor Teresa A. Miller notes, “After the attacks, zero-tolerance enforcement of immigration laws was extended to immigrants who had not passed through the criminal justice system, such as asylum seekers and undocumented immigrants.”<sup>75</sup> The PATRIOT Act in particular allowed federal officers to apprehend and detain “non-citizens on immigration grounds without legal review and without public disclosure of the specific charge for a period of seven days, or for a maximum of six months if the case is deemed a national security risk.”<sup>76</sup>

The “war on terror” thus had immediate implications for foreign-born individuals residing in the United States. As Miller states: “In January of 2002, Deputy Attorney General Larry Thompson announced a new initiative to ‘locate, apprehend, interview, and deport’ approximately 314,000 noncitizens who had been ordered deported, but had failed to comply with their deportation orders.”<sup>77</sup> This initiative led to the arrest of more than 1,100 Muslim and Arab men without formally charging them with a crime.<sup>78</sup> However, the

consequences of the PATRIOT Act extended beyond these individuals and into immigrant communities, ultimately being manifested through “racial profiling and scapegoating, mass detentions and mistreatment, and the government’s refusal to disclose information about those detained.”<sup>79</sup>

A prime example of the enforcement-only mindset of DHS and its component agencies in the post-9/11 era is “Operation Endgame”—the name given to the “Office of Detention and Removal Strategic Plan, 2003–2012,”<sup>80</sup> which was released on June 27, 2003, by Anthony S. Tangeman, Director of ICE’s Office of Detention and Removal Operations (DRO). Tangeman succinctly explains the rationale underlying his department’s new strategic plan:

As the title implies, DRO provides the endgame to immigration enforcement and that is the removal of all removable aliens. This is also the essence of our mission statement and the ‘golden measure’ of our success. We must endeavor to maintain the integrity of the immigration process and protect our homeland by ensuring that every alien who is ordered removed, and can be, departs the United States as quickly as possible and as effectively as practicable. We must strive for 100% removal rate.<sup>81</sup>

However, Tangeman’s assertions about how best to “protect our homeland” ring hollow given that the vast majority of immigrants aren’t criminals (let alone terrorists), and that even minor infractions can render an immigrant “deportable” under current law. Yet the Tangeman memo, and the strategic plan it introduces, treat all immigrants as potential security risks—a paranoid worldview that has become widespread not only throughout the federal government, but in many state and local governments as well.

## *Operation Streamline*

The federal government’s detention-and-deportation machine is also being fed by Operation Streamline, a program begun in 2005 in the southwest of the country under which unauthorized border-crossers are prosecuted in group trials and convicted of illegal entry into the country—a misdemeanor. If they cross again, they may be convicted of an aggravated felony and face up to two years in prison.<sup>82</sup> Although these offenses have been on the books since 1929, they are being applied under Operation Streamline more widely than they ever were before.<sup>83</sup> Yet the structure of Operation Streamline—in which up to 80 immigrants are tried at a time, and each defendant has only a few minutes to speak to an attorney—practically guarantees the violation of basic legal and human rights.<sup>84</sup>

In addition, Streamline—which currently operates in all but three southwestern Border Patrol Sectors—has fueled a surge in immigration prosecutions over the past decade, severely straining the capacities of courtrooms along the border and clogging the courts with petty immigration offenses. According to Justice Department data analyzed by the Transactional Records Access Clearinghouse (TRAC), immigration prosecutions “reached an all-time high” in FY 2013 with 97,384 (53,789 for “illegal entry” and 37,346 for “illegal re-entry”). This marks an increase of 367 percent over the number of prosecutions 10 years earlier.<sup>85</sup> Between FY 2005-2012, a “total of 208,939 people were processed



through Operation Streamline,” which represents 45 percent of the 463,051 immigration-related prosecutions in Southwest border districts during this time period.<sup>86</sup> U.S. Sentencing Commission data analyzed by the Pew Research Center finds that the “Dramatic growth over the past two decades in the number of offenders sentenced in federal courts has been driven primarily by enforcement of a particular immigration offense—unlawful reentry into the United States.”<sup>87</sup> Predictably, Operation Streamline has diverted resources away from drug and human smuggling prosecutions.<sup>88</sup> All this means that massive amounts of time, money, and manpower are being wasted on the prosecution of non-violent immigrants who do not represent a threat to public safety or national security.

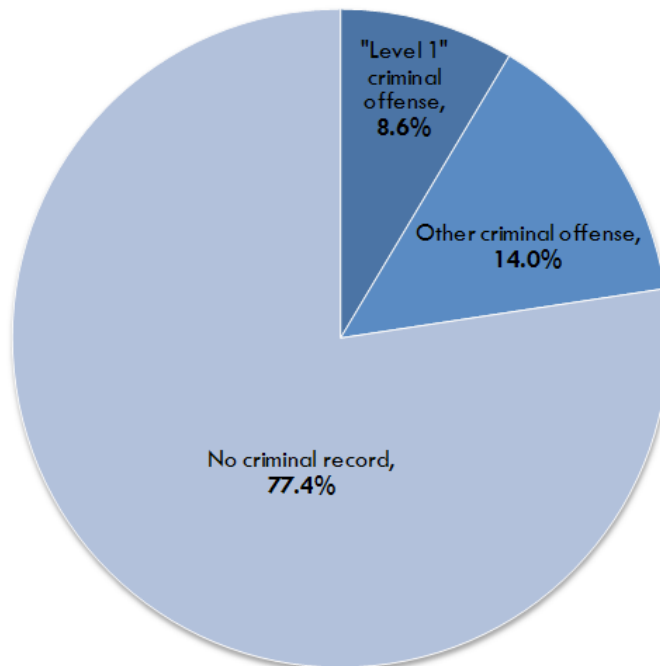
## *Secure Communities*

Although the double standards inherent in immigration law have been applied to immigrants for more than a decade and a half, they took on new meaning starting in 2008 with the launch and dramatic expansion of Secure Communities. This was (or still is, depending on one’s perspective) a DHS program, eventually activated in all 3,181 jurisdictions across the United States,<sup>89</sup> which used biometric data to screen for deportable immigrants as people were being booked into jails.<sup>90</sup> Under Secure Communities, an arrestee’s fingerprints were run not only against criminal databases, but immigration databases as well. If there was an immigration “hit,” ICE could issue a “detainer” requesting that the jail hold the person in question until ICE could pick them up.

Not surprisingly, given the new classes of “criminals” created by IIRIRA, most of the immigrants scooped up by Secure Communities were non-violent and not a threat to anyone. In fact, one report found that in Los Angeles County, “the vast majority of those deported through Secure Communities have merely had contact with local law enforcement and have not committed serious crimes.”<sup>91</sup> Moreover, as the program metastasized throughout every part of the country, more and more people were thrown into immigration detention prior to deportation, which led to mounting financial costs.<sup>92</sup> In FY 2013, 306,622 immigrants convicted of crimes were removed from the United States after identification through Secure Communities.<sup>93</sup>

More broadly, regardless of whether they were identified through Secure Communities or not, the overwhelming majority of people receiving ICE detainers while in the custody of local, state, and federal law-enforcement officials had no criminal record.<sup>94</sup> For instance, among the nearly one million detainers issued by ICE during a 50-month period during FY 2008-2012, over 77 percent consisted of individuals who “had no criminal record—either at the time the detainer was issued or subsequently.”<sup>95</sup> Records from this same time period illustrate that for “the remaining 22.6 percent that had a criminal record, only 8.6 percent of the charges were classified as a Level 1 offense” {Figure 8}.<sup>96</sup>

**Figure 8: Targets of ICE Detainers, by Criminal Record, FY 2008-2012**



**Source: Transactional Records Access Clearinghouse, "Who Are the Targets of Ice Detainers?" (Syracuse, NY: Syracuse University, February 20, 2013).**

Secure Communities was not a practical or responsible approach to public safety. It undermined community policing by creating distrust of local law enforcement within immigrant communities, which in turn made community members less likely to report crimes or cooperate with local authorities in on-going investigations due to fear of deportation. This had negative consequences for public safety.<sup>97</sup> Secure Communities, along with other programs of its kind, also led to the separation of U.S.-citizen children from their parents.<sup>98</sup> These were issues that could not be fixed by simply altering the program. Further, one study found that "ICE's failure to adhere to its own stated priorities is a feature rather than a reparable flaw of the program" and "has led to increased use of racial profiling in policing."<sup>99</sup>

The current status of Secure Communities is somewhat murky. In February 2013, ICE stated that it would transfer "full responsibility" for the day-to-day management of Secure Communities to CAP, and began to redirect Secure Communities funding towards CAP.<sup>100</sup> But Homeland Security Secretary Jeh Johnson announced in a November 20, 2014, memo that, due to widespread opposition to the program by law-enforcement officers and elected officials, "the Secure Communities program, as we know it, will be discontinued."<sup>101</sup> It is to be replaced by the "Priority Enforcement Program" (PEP), under which ICE can "issue a request for detention" to state or local law-enforcement agencies if it can "specify that the person is subject to a final order of removal or there is other sufficient probable cause to find that the person is a removable alien."<sup>102</sup> It remains to be seen how substantively different PEP will be from Secure Communities.

## *CBP's Consequence Delivery System*

The systematic criminalization of unauthorized immigrants in particular has intensified along the U.S.-Mexico border. In 2011, CBP, in collaboration with ICE, rolled out a program described as the Consequence Delivery System (CDS). Rooted in the notion of specific deterrence, CDS is designed “to break the smuggling cycle and deter a subject from attempting further illegal entries or participating in a smuggling enterprise.”<sup>103</sup> The program “guides management and agents through a process designed to uniquely evaluate each subject and identify the ideal consequences to deliver to impede and deter further illegal activity.”<sup>104</sup> Possible “consequences” under this initiative include, but are not limited to, being processed through the Alien Transfer and Exit Program (commonly referred to a “lateral repatriation,” often resulting in people being sent to unfamiliar and dangerous Mexican border towns plagued with drug war violence), being repatriated to Mexico in the middle of the night, or being charged with “unauthorized entry” (a misdemeanor) or “unauthorized re-entry” (an aggravated felony), which commonly occurs through Operation Streamline. Not only has CDS contributed to the further criminalization of immigration, but it has also needlessly contributed to the increased vulnerability of the already vulnerable unauthorized population.

## *Executive Action*

With Congress perennially deadlocked over comprehensive immigration reform legislation, the Obama administration eventually took matters into its own hands. On November 20 and 21, 2014, President Obama announced a series of “executive actions” that would grant a temporary reprieve from deportation, and work authorization, to as many as 5.3 million unauthorized immigrants (5.8 million remain ineligible).<sup>105</sup> This would be accomplished through expansion of the already functioning 2012 Deferred Action for Childhood Arrivals (DACA) program, as well as the creation of a new deferred action program called Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA). DACA offers temporary relief from deportation (and temporary work authorization) to qualified young adults who were brought to the United States as children. DAPA would grant temporary relief from deportation, as well as temporary work authorization, to some unauthorized parents of U.S. citizens or lawful permanent residents.<sup>106</sup> However, neither DAPA nor the expansion of DACA can get off the ground until the legal challenges to them are resolved in court. So it remains to be seen how the President’s “executive action” will impact the drive to deportation that still permeates the U.S. immigration system.<sup>107</sup> Moreover, the rhetoric used by the Obama administration in justifying executive action—such as saying that immigration authorities will now target only “felons, not families”<sup>108</sup>—fails to account for the fact that there are a great many “felons” who have committed only immigration offenses and pose a threat to no one.

# CONCLUSION

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There are many signs that the U.S. immigration-enforcement system has run amok. Deportations during the Obama Administration have exceeded the two-million mark.<sup>109</sup> Families and communities have been and are being needlessly torn apart in the process.<sup>110</sup> And each year, billions upon billions of dollars are spent on border and interior enforcement, while hundreds of migrants die in the deserts and mountains of the southwest trying to cross into the country from Mexico—sometimes while trying to reach their families in the United States.<sup>111</sup> These are tragedies that could be prevented—if only Congress would choose to inject proportionality, discretion, and a little humanity back into the immigration system.

While lawmakers repeatedly justify their crackdown on immigrants as a means of fighting crime, the reality is that crime in the United States is not caused or even aggravated by immigrants, regardless of their legal status. This is hardly surprising since immigrants come to the United States to pursue economic and educational opportunities not available in their home countries and to build better lives for themselves and their families. As a result, they have little to gain and much to lose by breaking the law. Unauthorized immigrants in particular have even more reason to not run afoul of the law given the risk of deportation that their lack of legal status entails. But the terminological sleight-of-hand inherent in the government’s definition of “criminal alien” perpetuates and exacerbates the fallacy of a link between immigration and crime.

Public policies must be based on facts, not anecdotes or emotions. And the fact is that the vast majority of immigrants are *not* “criminals” in any meaningful sense of the word. The bulk of the immigration-enforcement apparatus in this country is not devoted to capturing the “worst of the worst” foreign-born criminals. Rather, as Secure Communities exemplifies all too well, the detention-and-deportation machine is designed primarily to track down and expel non-violent individuals, including legal residents of the United States who have worked and raised families here for many years. This brand of immigration policy is cruel, pointless, shortsighted, and counterproductive. And it is not an effective substitute for immigration reform which makes our immigration system responsive to the economic and social forces which drive migration in the first place.

The United States is in the midst of a “great expulsion” of immigrants, both lawfully present and unauthorized, who tend to be non-violent and non-threatening and who often have deep roots in this country.<sup>112</sup> This relentless campaign of deportation is frequently justified as a war against “illegality”—which is to say, against unauthorized immigrants.<sup>113</sup> But that justification does not come close to explaining the banishment from the United States of lawful permanent residents who committed traffic offenses and who have U.S.-based families. Nor does it explain the lack of due-process rights accorded to so many of the immigrants ensnared in deportation proceedings. Likewise, the wave of deportations we are currently witnessing is often portrayed as a crime-fighting tool. But, as the findings of this report make clear, the majority of deportations carried out in the United States each year do not actually target “criminals” in any meaningful sense of the word.

Policymakers who look at the entire foreign-born population of the United States through a law-enforcement lens are seeing things that aren't really there. As renowned psychologist Abraham H. Maslow wrote many years ago, "it is tempting, if the only tool you have is a hammer, to treat everything as if it were a nail."<sup>114</sup> The blunt weapon that is the U.S. immigration-enforcement apparatus is being wielded against a widening swath of the immigrant community, regardless of their ties to this country, regardless of whether or not they are actually criminals. It is long past time for U.S. immigration policies to accurately reflect the diversity and complexity of immigration to this country, based not on a reflexive politics of fear and myth, but on sound analysis and empirical evidence.

# ENDNOTES

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- <sup>113</sup> Michael Jones-Correa and Els de Graauw, “The Illegality Trap: The Politics of Immigration & the Lens of Illegality,” *Dædalus* 142, no. 3 (Summer 2013): 186.
- <sup>114</sup> Abraham H. Maslow, *The Psychology of Science: A Reconnaissance* (Chapel Hill, NC: Maurice Bassett Publishing, 2002 [1966]), p. 15.

ATTACHMENT B



# The Faulty Legal Arguments Behind Immigration Detainers

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by Christopher Lasch, Esq.

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# THE FAULTY LEGAL ARGUMENTS BEHIND IMMIGRATION DETAINERS

By Christopher Lasch, Esq.

## ABOUT PERSPECTIVES ON IMMIGRATION

The Immigration Policy Center's *Perspectives* are thoughtful narratives written by leading academics and researchers who bring a wide range of multi-disciplinary knowledge to the issue of immigration policy.

## ABOUT THE AUTHOR

**Christopher Lasch** is Assistant Professor at the University of Denver Sturm College of Law. Professor Lasch's scholarship focuses generally on the intersection of immigration and criminal law, and particularly on the legal validity of immigration detainer practices. This paper is adapted with permission from [Federal Immigration Detainers After Arizona v. United States](#), 46 Loy. L.A. L. Rev. 629 (forthcoming 2013). Other works by the author on immigration detainers include [Enforcing the Limits of the Executive's Authority to Issue Immigration Detainers](#), 35 William Mitchell L. Rev. 164 (2008) (invited symposium), [Preempting Immigration Detainer Enforcement Under Arizona v. United States](#), 3 Wake Forest J. L. & Pol'y 281 (2013); [Rendition Resistance](#), 92 N.C. L. Rev. 101 (forthcoming 2013); and [Litigating Immigration Detainer Issues](#), chapter in COLORADO BAR ASSOCIATION, IMMIGRATION LAW FOR THE COLORADO PRACTITIONER (2012).

## ABOUT THE IMMIGRATION POLICY CENTER

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## Introduction

In late June 2012, the Supreme Court struck down three provisions of Arizona’s SB 1070 and left a fourth vulnerable to future legal challenge. As has been well documented, the Court’s rejection of SB 1070 tipped the balance in favor of federal enforcement and away from state and local enforcement of the immigration laws. But this essay explores a less obvious consequence of the Court’s decision: its implications for the viability of a critical federal enforcement mechanism: the immigration “detainer.”

An immigration detainer is a piece of paper that federal immigration officials send to state and local jails requesting that they continue holding an individual for up to 48 business hours *after* he or she would otherwise be released, so that agents of U.S. Immigration and Customs Enforcement (ICE) can investigate the person’s status and assume custody if necessary. Also known as immigration “holds,” detainers are the key enforcement mechanism behind federal enforcement initiatives like the Criminal Alien Program and Secure Communities.

There has been considerable confusion as to whether a detainer is a mere request that ICE be notified of a suspected immigration violator’s impending release, or a command by ICE that state or local officials hold a prisoner for ICE beyond the time the prisoner would otherwise be released.<sup>1</sup> Independent of that question, however, the Court’s decision in *Arizona v. United States* identifies a more fundamental problem: that detainers may violate the Constitution and federal statutes even when honored on a voluntary basis.

Indeed, detainers are invalid in many instances for the same reason the Supreme Court struck down numerous parts of SB 1070—they permit law enforcement action inconsistent with laws enacted by Congress. Moreover, as Justice Anthony Kennedy’s majority opinion also makes clear, the use of immigration detainers raises serious problems under the Fourth Amendment, which requires state and local law enforcement officials to have “probable cause” that a person has violated the law before placing him or her under arrest or extending the period of custody. Ironically, then, even as the *Arizona* decision trumpeted the supremacy of the federal government over immigration enforcement, it also cast doubt on the validity of ICE’s central mechanism for obtaining custody of individuals targeted for removal proceedings.

Due to these underlying legal problems, many of the “anti-detainer” measures enacted around the country are well founded. For example, numerous municipalities—including Chicago, New York, and San Francisco—now prevent local jails from honoring immigration detainers unless an arrestee has been charged with or convicted of certain criminal offenses. However, to the extent jurisdictions believe they can selectively honor immigration detainers, they may yet be exposed to civil liability. While legally sound in resisting the notion that the federal government can impose any binding obligation on state and local officials,<sup>2</sup> even selective enforcement of detainers may violate the Constitution and the Immigration and Nationality Act (INA).

Jurisdictions can avoid legal liability by following the lead of Cook County, Illinois, which does not honor immigration detainers under any circumstances. Alternatively, jurisdictions can attempt to enact detainer policies crafted to avoid the aforementioned legal problems, such as requiring probable cause that the subject of a detainer has committed a federal crime. Selective enforcement policies, however, could be preempted as efforts to hijack federal enforcement discretion.<sup>3</sup>

## Background

### *How Immigration Detainers Work*

Immigration detainers are the principle mechanism for ICE to obtain custody of suspected immigration violators who are initially arrested by state or local law enforcement officials. When ICE learns a suspected immigration violator is in a state prison or local jail, the agency sends a detainer—or “Form I-247”—requesting that the individual be held in custody for an additional 48 hours after he or she would otherwise be released, excluding weekends and holidays.<sup>4</sup> Thus, once suspected immigration violators are entitled to release (e.g. after posting bail or being acquitted of the charges against them), local agencies that choose to honor detainers continue to hold them in custody.

Unlike criminal arrest warrants, which are based upon probable cause and must be issued by a neutral magistrate, detainers can be issued by virtually any ICE officer and without any proof that an inmate is removable from the country. For years, the Form I-247 itself (see excerpt of December 2011 Form I-247 below) allowed federal immigration officials to issue a detainer after merely “[i]nitiat[ing] an investigation” into whether an arrestee is removable.<sup>5</sup> A complaint alleging detainer illegalities in Los Angeles estimated that 78% of detainers issued to the Los Angeles County Sheriff’s Department had the “[i]nitiating an investigation” box checked.<sup>6</sup> (As discussed below, ICE issued revised detainer guidance, accompanied by a new detainer form, following the *Arizona* decision.)

DEPARTMENT OF HOMELAND SECURITY IMMIGRATION DETAINER - NOTICE OF ACTION	
Subject ID: Event #:	File No: Date:
TO: (Name and Title of Institution - OR Any Subsequent Law Enforcement Agency)	FROM: (Department of Homeland Security Office Address)
<b>MAINTAIN CUSTODY OF ALIEN FOR A PERIOD NOT TO EXCEED 48 HOURS</b>	
Name of Alien: _____	
Date of Birth: _____	Nationality: _____ Sex: _____
<b>THE U.S. DEPARTMENT OF HOMELAND SECURITY (DHS) HAS TAKEN THE FOLLOWING ACTION RELATED TO THE PERSON IDENTIFIED ABOVE, CURRENTLY IN YOUR CUSTODY:</b>	
<input type="checkbox"/> Initiated an investigation to determine whether this person is subject to removal from the United States.	
<input type="checkbox"/> Initiated removal proceedings and served a Notice to Appear or other charging document. A copy of the charging document is attached and was served on _____ (Date)	
<input type="checkbox"/> Served a warrant of arrest for removal proceedings. A copy of the warrant is attached and was served on _____ (Date)	
<input type="checkbox"/> Obtained an order of deportation or removal from the United States for this person.	

Although detainers have been issued for decades, their use has become increasingly common since 2008 due to the launch and expansion of the Secure Communities program, which routes to ICE all fingerprints taken by local police. When the fingerprints of a local arrestee generate a “match” in federal databases, ICE determines whether to send a detainer to the arresting agency. From less than 15,000 detainers issued in fiscal year 2007, after the implementation of Secure Communities, immigration officials now issue some 250,000 detainers each year.<sup>7</sup>

As the Secure Communities program has expanded across the country, detainers have become the mechanism by which people arrested for minor offenses—such as traffic violations—are held for

transfer to ICE agents. As a result, concerns have been raised that the detainer “tail” will wag the street-level enforcement “dog,” encouraging profiling by police.<sup>8</sup> In addition, due to flawed databases on which ICE agents rely, U.S. citizens have been mistakenly held on immigration detainers.<sup>9</sup> And, although the detainer form only purports to authorize continued detention for 48 hours (excluding weekends and holidays), numerous lawsuits have been filed by arrestees who have been detained beyond this period.

### **The Supreme Court’s Decision in *Arizona v. United States***

The law known as Arizona SB 1070 was enacted and signed by Gov. Jan Brewer in April 2010. Its legality was quickly challenged in federal court, first by a coalition of civil and immigrants’ rights groups, and later by the Obama administration. The administration’s challenge eventually made its way to the Supreme Court, which agreed to consider whether four provisions of SB 1070 were in conflict with—and therefore “preempted” by—federal immigration laws.

Of the four provisions the Supreme Court agreed to review, two have particular relevance to the validity of federal immigration detainers: Section 2(B), which was upheld by the Court, and Section 6, which was struck down. Although the Court reached different conclusions about their legality, the discussion of each provision revolved around a common theme: namely, that law enforcement officers are constrained by Congress’s enactments and the Constitution when detaining and arresting suspected immigration law violators.

#### **Section 2(B) of SB 1070**

Section 2(B), also known as the “show me your papers” provision, imposes two distinct obligations on Arizona law enforcement officers. First, it requires officers to attempt to determine the immigration status of any person they have stopped or detained if “reasonable suspicion” exists that the person is unlawfully present in the United States.<sup>10</sup> Second, it requires officers to determine the immigration status of all persons arrested before they are released, regardless of whether they are suspected of being in the country unlawfully.<sup>11</sup> In both circumstances, officers are required to contact federal immigration authorities to determine whether a person is unlawfully present, not make their own determination.<sup>12</sup>

In upholding Section 2(B), the Court emphasized that on its face, the provision required nothing more than communication between state and federal officials, which it described as “an important feature of the immigration system.”<sup>13</sup> In practice, however, Justice Kennedy recognized that Section 2(B) could potentially result in persons being detained “for no reason other than to verify their immigration status.”<sup>14</sup> If officers subjected arrestees to “prolonged detention”<sup>15</sup> to determine their immigration status, the majority made clear that such detentions would violate the Fourth Amendment, which prohibits law enforcement officers from arresting individuals unless they have probable cause to believe they have broken the law. The Court thus left open the door to future legal challenges to Section 2(B) based on how it is applied in practice.<sup>16</sup>

#### **Section (6) of SB 1070**

Meanwhile, Section 6 would have authorized Arizona officers to arrest immigrants *without* a warrant if probable cause existed that they had committed a public offense making them removable from the United States.<sup>17</sup> In other words, the provision would have authorized Arizona officers to make warrantless arrests based solely on the suspicion of a civil immigration violation.

In striking down Section 6, the Court held that the provision exceeded the careful statutory structure put in place by Congress in the INA, and was therefore preempted. That statutory structure, the Court observed, included explicit allocation of civil immigration arrest authority to state officials—but in carefully limited circumstances. The Court noted that Congress has authorized “287(g)” agreements whereby state and local officers may be authorized to make civil immigration arrests, but only after adequate training in immigration enforcement.

The Court found that not only did Section 6 exceed the specific civil enforcement ability conferred by Congress upon state and local officers, but also the enforcement ability conferred by Congress on *federal* immigration agents to make warrantless arrests. As Justice Kennedy explained in the majority opinion, the INA generally requires immigration officers to obtain an administrative warrant before making an arrest,<sup>18</sup> unless they have reason to believe a suspected immigration violator is “likely to escape before a warrant can be obtained.”<sup>19</sup> Because Section 6 would have given Arizona officers more authority to make immigration arrests than Congress granted even federal agents, the Supreme Court found it to be inconsistent with the system Congress created, and struck Section 6 down as preempted.<sup>20</sup>

### **The Effect of *Arizona v. United States* on Federal Immigration Detainers**

Although the Supreme Court’s ruling in *Arizona v. United States* did not directly address the legality of detainers, the majority opinion nonetheless makes clear that honoring immigration detainers often violates both the Constitution and the INA. Like Section 6 of SB 1070, detainers are inconsistent with the statutory enactments of Congress. And like Section 2(B), detainers raise substantial Fourth Amendment concerns because of the possibility of prolonged detention based on suspected civil immigration violations. Detainers raise additional constitutional concerns not discussed in the *Arizona* decision because they cause individuals to be held in custody for more than 48 hours without an independent probable cause determination, which is a separate violation of the Fourth Amendment.

### **How Immigration Detainers Violate Federal Immigration Law**

Immigration detainers are inconsistent with the statutory system Congress enacted for immigration enforcement. As noted above, the Court in striking down Section 6 of SB 1070 found that Congress had carefully delineated the civil arrest powers of state and local officers, and of federal immigration officials. Today, federal immigration officials often issue detainers in a manner that exceeds Congress’s grant of arrest authority.

As the *Arizona* Court discussed, federal immigration officials may take persons into custody either (1) pursuant to an immigration arrest warrant or (2) when the person is “likely to escape before a warrant can be obtained.”<sup>21</sup> Although holding an individual in custody solely because of an immigration detainer amounts to a warrantless arrest,<sup>22</sup> federal officials frequently issue detainers without regard to the individual’s likelihood of escape. Indeed, ICE’s practice has included filing immigration detainers that are not accompanied by arrest warrants against individuals who are not scheduled to be released for days, weeks, or even months.

Some might argue that persons in the custody of a law enforcement agency should be presumed flight risks, and therefore likely to escape before a warrant can be obtained. While this argument might have force in a particular case, it sweeps too broadly to justify the issuance of detainers in circumstances where immigration officials clearly *can* obtain a warrant before the prisoner’s release. Indeed, a strong case can be made for the opposite presumption, because individuals who are already in the custody of



law enforcement officials are much less likely to be able to flee than those who have not yet been arrested.

Additionally, the issuance of a detainer results in prolonged detention not by federal officials, but by state and local officials. Congress has not authorized state and local officials to arrest suspected immigration violators, except in the narrow circumstances the Court noted in *Arizona*. Just as Section 6 purported to authorize state and local officials to effectuate civil immigration arrests beyond any power Congress had delegated to them or even to federal immigration officials, the issuance of immigration detainers exceeds Congress's carefully crafted statutory structure.

### How Immigration Detainers Raise Substantial Constitutional Questions

Under the Fourth Amendment, state and local law enforcement officials generally cannot take a person into custody without probable cause to believe he or she has committed a crime. As importantly, a person subjected to a warrantless arrest is entitled to a reasonably prompt hearing—generally within 48 hours—before a neutral magistrate.

The Supreme Court's discussion of Section 2(B) makes clear that holding a prisoner under the sole authority of an immigration detainer implicates the Fourth Amendment's probable cause requirement. It must be noted that Section 2(B), like an immigration detainer, applies generally to circumstances in which the prisoner is already lawfully in state custody. The Fourth Amendment concern is triggered in both instances when it is proposed that state officials prolong detention on the basis of a suspected civil immigration violation. As noted above, in the case of Section 2(B) the *Arizona* Court avoided this constitutional concern by construing Section 2(B) as requiring an inquiry into immigration status only "during the course of an authorized, lawful detention or after a detainee has been released." With this construction of Section 2(B), the Court found it need not even consider whether prolonged detention would be justifiable if state officials had reasonable suspicion (or probable cause) to believe an immigration *crime* had occurred.

Like Section 2(B), immigration detainers call for prolonged detention by state and local officials even in the absence of proof that an individual is removable. While DHS's most recent detainer guidance states that immigration officials "should" place a detainer only where there is "reason to believe" an individual is subject to removal,<sup>23</sup> this guidance cannot eliminate the substantial Fourth Amendment concern. First, the guidance is expressed not as a legal position of DHS, but as an enforcement priority. The guidance contains an express disclaimer stating that it does not "limit the legal authority of ICE or its personnel" and does not "create any right ... enforceable at law by any party ...." The guidance also excludes U.S. Customs and Border Protection (CBP) from its ambit, further emphasizing the document's function as an enforcement priority policy position as opposed to a legal position. The guidance also calls for a six-month review, whereupon "ICE will consider whether modifications, if any, are needed."

There is no guarantee, in other words, that ICE will not continue its practice over the past three decades of issuing detainers based upon nothing more than an *initiated investigation* into whether an individual is subject to removal. Notwithstanding the new detainer guidance, detainers allow state and local officials to do precisely what the Supreme Court said *Arizona* officers could not do when enforcing Section 2(B): subject individuals to "prolonged detention" solely to determine their immigration status.<sup>24</sup>

A second reason the detainer guidance cannot cure this Fourth Amendment problem is that it requires only "reason to believe" the target of a detainer is removable. Because there is no requirement of reasonable suspicion or probable cause that a *crime* has been committed, the detainer guidance

continues to put state and local officials in the position of enforcing federal *civil* immigration law. Blocking Indiana’s SB 1070 “copycat” legislation, a federal district court held Indiana’s law, authorizing its law enforcement officials to arrest and detain persons subject to immigration detainers, likely violated the Fourth Amendment because it “authorizes the warrantless arrest of persons for matters and conduct that are not crimes.”<sup>25</sup> (The *Arizona* decision additionally makes clear that unlawful presence itself is not a crime, and state officials cannot enforce civil immigration law except in the narrow circumstances Congress has authorized.)

Furthermore, even aside from the Fourth Amendment’s probable cause requirement, continued custody under the authority of an immigration detainer may violate the Fourth Amendment for a separate reason. The Fourth Amendment requires the subject of a warrantless arrest to be brought before a neutral magistrate within 48 hours of the arrest—including weekends and holidays—for an independent probable cause determination.<sup>26</sup> By contrast, the detainer regulation flatly contradicts this requirement, authorizing prolonged detention for longer than 48 hours (indeed, up to five days over a holiday weekend) without any provision whatsoever for an independent probable cause determination by a neutral magistrate.<sup>27</sup>

### Detainer Resistance and its Limitations

In recent years, some jurisdictions have sought to indirectly “opt out” of Secure Communities by limiting the circumstances in which local jails may honor immigration detainers.<sup>28</sup> The foregoing discussion demonstrates the legal validity of this resistance; detainers often exceed Congress’s grant of authority,<sup>29</sup> raise substantial constitutional questions, and provide no legal authority for state and local officials to prolong detention of suspected immigration violators. But the majority of anti-detainer ordinances enacted around the country appear to have been motivated not by the legal issues, but by civil rights concerns stemming from the expansion of Secure Communities. Contrary to its stated purpose,<sup>30</sup> Secure Communities does not focus on the removal of noncitizens who have committed serious crimes.<sup>31</sup> Opponents of Secure Communities argue that the program instead encourages racial profiling, diverts local resources from crime control, and makes communities less safe by discouraging immigrants from reporting crimes or cooperating with police.<sup>32</sup>

Resistance to detainers was rooted in these criticisms. For example, years before California adopted statewide legislation limiting detainer compliance, the Santa Clara County, California Board of Supervisors passed a resolution urging the disentanglement of local law enforcement from federal immigration enforcement.<sup>33</sup> The resolution indicated a clear concern for the civil rights of immigrants in Santa Clara County. Its opening paragraph described the county as “home to a diverse and vibrant community of people representing many races, ethnicities, and nationalities, including immigrants from all over the world.” The resolution also expressed the belief of the Board of Supervisors that “laws like Arizona’s SB 1070 ... subject individuals to racial profiling” and affirmed the county’s commitment to protect all of its residents from “discrimination, abuse, violence, and exploitation ...”<sup>34</sup>

Ultimately, the county adopted a measure prohibiting jails from honoring detainers unless the federal government agreed to pay the costs of detention, and then only if the arrestee was convicted of a felony classified as violent or serious under California law.<sup>35</sup> Likewise, the District of Columbia adopted an ordinance that, among other things, would only allow jails to honor detainers filed against arrestees convicted of dangerous and violent crimes.<sup>36</sup> Similar measures or policies have been enacted in Amherst, Berkeley, Chicago, Los Angeles, New Orleans, New York, and San Francisco, and in several counties as well, such as King County, Washington. On the state level, resistance has occurred in Connecticut and California,<sup>37</sup> and has been proposed in Florida, Massachusetts, and Washington.

The civil rights roots of detainer resistance were rendered visible in Cook County, Illinois, which voted in September 2011 to stop complying with detainers altogether.<sup>38</sup> The ordinance in question appeared to be legally rooted in the Constitution's "unfunded mandate" doctrine, allowing the sheriff to honor detainers only if the federal government agreed to reimburse the county for all associated costs.<sup>39</sup> Yet, when ICE Director John Morton offered to reimburse the county for any costs associated with honoring immigration detainers,<sup>40</sup> County Board President Toni Preckwinkle told the press: "Equal justice before the law is more important to me than the budgetary considerations."<sup>41</sup>

Unlike Cook County, which honors no detainers,<sup>42</sup> other jurisdictions that have resisted wholesale compliance with detainers have claimed discretion to honor some detainers and not others. Santa Clara County and the District of Columbia are examples of jurisdictions that have indicated they may honor detainers when they target serious criminal offenders. In December 2012, California's Attorney General Kamala D. Harris issued guidance to law enforcement agencies stating: "Immigration detainer requests are not mandatory, and each agency may make its own decision about whether or not to honor an individual request."<sup>43</sup> Subsequently, California's TRUST Act ratified the idea that California officials have discretion to honor immigration detainers, while limiting the exercise of that discretion.

But jurisdictions that claim a power to honor detainers selectively still confront many of the same legal problems that render immigration detainers invalid under federal law. Local officers honoring detainers are making what amount to civil immigration arrests, in circumstances beyond those specifically authorized by Congress. Even where there is an administrative arrest warrant, state or federal law may be violated by, for example, reliance upon a warrant that is not issued by a judge and not issued upon oath or affirmation.<sup>44</sup> Further, local officers honoring detainers may violate the Fourth Amendment, by prolonging detention without probable cause of a crime having been committed,<sup>45</sup> and by failing to provide prompt judicial review.<sup>46</sup>

To avoid incurring legal liability, jurisdictions can follow the lead of Cook County by declining to honor immigration detainers in all circumstances. Alternatively, state and local jurisdictions can attempt to craft policies preventing local jails from honoring detainers unless authorized by Congress and in compliance with the Fourth Amendment and local law. Selective enforcement policies, however, may be subject to preemption if they interfere with federal immigration enforcement policy.<sup>47</sup>

## Conclusion

In *Arizona v. United States*, the Supreme Court made clear that states may not enforce civil immigration law unless explicitly authorized by Congress. But while generally providing a ringing endorsement of federal power, *Arizona* also limits the power of the federal executive to pursue immigration enforcement objectives. The executive branch, like the states, has an obligation to implement "the system Congress created" and none other. The *Arizona* opinion leaves little doubt that immigration detainers do not comport with the system Congress created.

Detainers also raise substantial constitutional questions, including the Fourth Amendment issue raised by prolonged detention—the precise concern raised by the justices concerning implementation of Section 2(B) of SB 1070. It is clear that such detention must comply with the Fourth Amendment; it must be supported by probable cause and meet the independent requirement of prompt neutral review.

Federal immigration detainers cannot support prolonged detention. Those jurisdictions that have resisted immigration detainers have done so with sound legal justification. But some of these

jurisdictions simultaneously assert a power to selectively comply with detainers. Given the legal problems attendant to the use of detainers, jurisdictions wanting to honor immigration detainers in some cases must do more than focus on the seriousness of the offense of which arrestees are accused. At a minimum, they must be sure that honoring a detainer in a particular case complies not only with “the system Congress created” for immigration enforcement, but also with state and federal constitutional requirements. By honoring immigration detainers that do not meet these threshold legal requirements, local officials and localities risk civil liability.

## ENDNOTES

<sup>1</sup> See generally, Kate M. Manuel, *Immigration Detainers: Legal Issues 11-14* (Congressional Research Service, Aug. 31, 2012) (detailing authorities in support of position that detainer is a request and authorities in support of position that detainer is a command); *Rios-Quiroz v. Williamson County*, Slip Copy, 2012 WL 3945354 at \*4 (M.D. Tenn.) (holding that use of “shall” in 8 CFR § 287.7(d) renders the regulation mandatory). The Third Circuit appears poised to become the first federal court of appeal to decide the question of whether immigration detainers can be mandatory on state officials, in *Ernesto Galarza v. County of Lehigh*, No. 12-3991, which was argued on October 10, 2013. The plaintiff in *Galarza*, a United States citizen, sued the County of Lehigh, Pennsylvania for detaining him based on an immigration detainer. *Galarza v. Szalczyk*, No. 10-cv-06815, 2012 WL 1080020, at \*1–2 (E.D. Pa. Mar. 30, 2012). The district court held the county could not be held liable because the county’s policy of honoring all immigration detainers was “consistent with” the federal regulation stating that a local law enforcement agency “shall” prolong detention pursuant to a detainer. *Id.* at \*18–19 (citing 8 CFR § 287.7(d)).

<sup>2</sup> For a thorough discussion of the anti-commandeering argument, see generally Brief of Law Professors as Amici Curiae in Support of Appellant & in Support of Reversal, *Galarza v. Cnty. of Lehigh*, No. 12-3991 (filed March 26, 2013), available at <http://portfolio.du.edu/downloadItem/252013>; Lasch, *Rendition Resistance*, 92 N.C. L. REV. 101 (forthcoming 2013).

<sup>3</sup> Lasch, *Preempting Immigration Detainer Enforcement Under Arizona v. United States*, 3 WAKE FOREST J. L. & POL’Y 281, 301-11 (2013).

<sup>4</sup> The form detainer has been in existence since at least 1983. Immigration Forms, 54 Fed. Reg. 39336-02, 39337 (Sept. 26, 1989) (to be codified at 8 C.F.R. pt. 299) (referring to Form I-247 with date of Mar. 1, 1983); Form I-247 (March 1, 1983) (on file with the author). Historically, federal immigration officials would also lodge a copy of the immigration charging documents with jail or prison officials, and these documents would be considered the equivalent of a detainer. *E.g.*, *Fernandez-Collado v. I.N.S.*, 644 F. Supp. 741, 742 (D. Conn. 1986); see Jonathan E. Stempel, *Custody Battle: The Force of U.S. Immigration and Naturalization Service Detainers over Imprisoned Aliens*, 14 FORDHAM INT’L L.J. 741, 742 n.11 (1990–1991).

<sup>5</sup> Form I-247 (March 1, 1983); Form I-247 (April 1997); Form I-247 (August 2010); Form I-247 (June 2011) (all on file with the author).

<sup>6</sup> Complaint, *Roy v. County of Los Angeles et al.*, No. CV12-9012, Complaint ¶¶ 25-26.

<sup>7</sup> ICE placed 14,803 immigration detainers in fiscal year 2007 and 20,339 in fiscal year 2008. United States Department of Homeland Security, *Budget-in-Brief: Fiscal Year 2008* at 36, available at [http://www.dhs.gov/xlibrary/assets/budget\\_bib-fy2008.pdf](http://www.dhs.gov/xlibrary/assets/budget_bib-fy2008.pdf); United States Department of Homeland Security, *Budget-in-Brief: Fiscal Year 2009* at 35, available at [http://www.dhs.gov/xlibrary/assets/budget\\_bib-fy2009.pdf](http://www.dhs.gov/xlibrary/assets/budget_bib-fy2009.pdf). In fiscal years 2009 and 2010, ICE issued 234,939 and 239,523 detainers respectively, or approximately 20,000 per month – through its Criminal Alien Program alone. United States Department of Homeland Security, *FY11 Budget in Brief* at 63, available at [http://www.dhs.gov/xlibrary/assets/budget\\_bib\\_fy2011.pdf](http://www.dhs.gov/xlibrary/assets/budget_bib_fy2011.pdf); United States Department of Homeland Security, *FY12 Budget in Brief* at 79, available at <http://www.dhs.gov/xlibrary/assets/budget-bib-fy2012.pdf>. Other ICE programs may make the number of detainers issued even greater. See Complaint, *Jimenez Moreno v. Napolitano*, No. 1:2011cv05452 (N.D. Ill., filed Aug. 11, 2011) at ¶ 28 (alleging 270,988 detainers were issued in fiscal year 2009).

<sup>8</sup> See Trevor Gardner II & Aarti Kohli, *The C.A.P. Effect: Racial Profiling in the ICE Criminal Alien Program* (Sept. 2009), available at [http://www.law.berkeley.edu/files/policybrief\\_irving\\_FINAL.pdf](http://www.law.berkeley.edu/files/policybrief_irving_FINAL.pdf) (observing correlation between issuance of detainers and profiling of Latinos in Irving, Texas).

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<sup>9</sup> See Molly F. Franck, *Unlawful Arrests and Over-Detention of America's Immigrants: What the Federal Government Can Do to Eliminate State and Local Abuse of Immigration Detainers*, 9 HASTINGS RACE & POVERTY L. J. 55, 65 (2011) (reporting 5 percent of individuals targeted for immigration enforcement through the "Secure Communities" program between October 2008 and October 2009 were U.S. citizens); Julia Preston, *Immigration Crackdown Also Snares Americans*, N.Y. TIMES, Dec. 13, 2011, at A20; see also Brian Bennett, *Fingerprinting Program Ensnarers U.S. Citizen; He's Suing the FBI and Homeland Security After Being Flagged as an Illegal Immigrant and Held in Prison*, L.A. TIMES, July 6, 2012, at A9 (describing U.S. citizen's claim that he was wrongfully detained for two months due to database error); Complaint, *Vohra v. United States*, No. SA CV 04-00972 DSF (RZx) (C.D. Cal. Feb. 4, 2010) (alleging plaintiff to be a U.S. citizen held pursuant to immigration detainer); *Henry v. Chertoff*, 317 F. App'x 178, 179 (3d Cir. 2009) (discussing habeas petition alleging prisoner subject to immigration detainer was a U.S. citizen).

<sup>10</sup> ARIZ. REV. STAT. ANN. § 11-1051(B) (2011) (West).

<sup>11</sup> *Id.*

<sup>12</sup> ARIZ. REV. STAT. ANN. § 11-1051(E) (2011) (West).

<sup>13</sup> *Arizona v. United States*, 132 S. Ct. 2492, 2508 (2012). (citing INA § 287(g)(10), 8 U.S.C. § 1357(g)(10))

<sup>14</sup> *Id.* Although Justice Kennedy referred only to "constitutional concerns," the cases cited in support of the argument dealt with the Fourth Amendment. In particular, Justice Kennedy quoted the Court's previous decision in *Illinois v. Caballes*, 543 U. S. 405, 407 (2005), which stated that a traffic stop "that is justified solely by the interest in issuing a warning ticket to the driver can become unlawful if it is prolonged beyond the time reasonably required to complete that mission." In their dissenting opinions, Justice Scalia and Justice Alito also recognized that prolonged detention of individuals while their immigration status was under investigation would raise Fourth Amendment concerns.

<sup>15</sup> *Arizona v. United States*, 132 S. Ct. 2492, 2509 (2012).

<sup>16</sup> *Id.* 2492, 2510 (2012) ("This opinion does not foreclose other preemption and constitutional challenges to the law as interpreted and applied after it goes into effect.").

<sup>17</sup> ARIZ. REV. STAT. ANN. § 13-3883(A)(5) (2011) (West).

<sup>18</sup> *Arizona v. United States*, 132 S. Ct. 2492, 2505-06 (2012) (citing INA § 236, 8 U.S.C. § 1226(a)). The administrative arrest warrants authorized by INA § 236 are not the equivalent of criminal arrest warrants. The statute sets forth no standard for the issuance of such warrants. Nor is there any requirement that such warrants be based upon sworn testimony, or issued by a neutral magistrate.

<sup>19</sup> *Id.* 2492, 2506 (2012) (citing INA § 287(a)(2), 8 U.S.C. § 1357(a)(2)).

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* (quoting INA § 287(a)(2), 8 U.S.C. § 1357(a)(2)). The Court did not explicitly note the other important requirement of § 287(a)(2)—that an immigration official making a warrantless arrest have "reason to believe" the arrestee has violated federal immigration law. See *id.* Courts have construed the "reason to believe" requirement as importing a probable cause requirement in order to satisfy the Fourth Amendment's prohibition against unreasonable seizures. See Jennifer M. Chacón, *A Diversion of Attention? Immigration Courts and the Adjudication of Fourth and Fifth Amendment Rights*, 59 DUKE L.J. 1563, 1608 & n.229 (2010).

<sup>22</sup> See *Cervantez v. Whitfield*, 776 F.2d 556, 560 (5th Cir. 1985) (former Immigration and Naturalization Service stipulating to proposition that "[a]n immigration hold is an arrest without warrant made pursuant to 8 U.S.C. § 1357(a)(2). As such, an immigration hold may only be authorized by an officer of the INS and only when the officer has determined that there is probable cause to believe that the person to be held (a) is an alien, (b) is in the United States in violation of the immigration laws, and (c) is likely to escape before a warrant can be obtained for his arrest.").

<sup>23</sup> Simultaneous with its December 2012 guidance, DHS released a new version of the Form I-247 detainer, which eliminates the "initiated an investigation" checkbox and replaces it with a checkbox indicating DHS has "reason to believe" the target of the detainer is "an alien subject to removal." Form I-247 (Dec. 2012) (on file with author).

<sup>24</sup> *Arizona v. United States*, 132 S. Ct. 2492, 2509 (2012).

<sup>25</sup> *Buquer v. City of Indianapolis*, 797 F.Supp.2d 905, 919 (S.D. Ind. 2011).

<sup>26</sup> *County of Riverside v. McLaughlin*, 500 U.S. 44, 56-57 (1991).

<sup>27</sup> 8 C.F.R. § 287.7(d).

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<sup>28</sup> See generally Lasch, *Rendition Resistance*, 92 N.C. L. REV. 101 (forthcoming 2013).

<sup>29</sup> The federal detainer regulation exceeds Congress's limitations on immigration arrests and is therefore *ultra vires*. See generally Lasch, *Federal Immigration Detainers After Arizona v. United States*, 46 LOY. L.A. L. REV. 629 (forthcoming 2013). Compliance with detainers by state and local officials exceeds Congress's limitations as well and is therefore preempted. Lasch, *Preempting Immigration Detainer Enforcement Under Arizona v. United States*, 3 WAKE FOREST J. L. & POL'Y 281 (2013), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2253001](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2253001).

<sup>30</sup> Press Release, Dep't of Homeland Sec., *ICE unveils sweeping new plan to target criminal aliens in jails nationwide: Initiative aims to identify and remove criminal aliens from all U.S. jails and prisons*, ICE (Mar. 28, 2008), available at <http://www.ice.gov/news/releases/0803/080328washington.htm>.

<sup>31</sup> National Day Laborer Organizing Network, et al., *Briefing Guide to "Secure Communities" – ICE's Controversial Immigration Enforcement Program – New Statistics and Information Reveal Disturbing Trends and Leave Crucial Questions Unanswered at 2*, available at [http://www.cardozo.yu.edu/uploadedFiles/Cardozo/Profiles/immigrationlaw-741/NDLON\\_FOIA\\_Briefing%20guide\\_final.pdf](http://www.cardozo.yu.edu/uploadedFiles/Cardozo/Profiles/immigrationlaw-741/NDLON_FOIA_Briefing%20guide_final.pdf) (reporting 79% of people apprehended through Secure Communities were "non-criminals or were picked up for low-level offenses ...."); see also Transactional Records Access Clearinghouse, *Few ICE Detainers Target Serious Criminals* (Sept. 17, 2013), available at <http://trac.syr.edu/immigration/reports/330> (noting that during the 16-month period under study, "no more than 14 percent of the 'detainers' issued ... met the agency's stated goal of targeting individuals who pose a serious threat to public safety or national security" and nearly half targeted people with no criminal conviction whatsoever, not even a minor traffic conviction).

<sup>32</sup> E.g., Violeta R. Chapin, *¡Silencio! Undocumented Immigrant Witnesses and the Right to Silence*, 17 MICH. J. RACE & L. 119, 152–54 (2011); *Secure Communities*, NAT'L IMMIGRATION FORUM (2009), [http://www.immigrationforum.org/images/uploads/Secure\\_Communities.pdf](http://www.immigrationforum.org/images/uploads/Secure_Communities.pdf); More Questions than Answers about Secure Communities, NAT'L IMMIGR. L. CTR. (Mar. 2009), <http://v2011.nilc.org/immlawpolicy/LocalLaw/securecommunities-2009-03-23.pdf>.

<sup>33</sup> Resolution No. 2010-316 (enacted June 22, 2010), available at <http://sccgov.ig2.com/Citizens/FileOpen.aspx?Type=4&ID=10621>.

<sup>34</sup> *Id.*

<sup>35</sup> Santa Clara County Board of Supervisors Policy Manual, available at <http://www.sccgov.org/sites/bos/legislation/bos-policy-manual/documents/bospolicychap3.pdf>.

<sup>36</sup> Hearing Notice on Immigration Detainer Compliance Amendment, available at <http://www.dccouncil.us/hearing-notices/immigration-detainer-compliance-amendment>.

<sup>37</sup> Perhaps responding to litigation, see Petition for Writ of Habeas Corpus, *Brizuela v. Feliciano*, No. 3:12-cv-00226-JBA (D. Conn. Feb. 13, 2012), the Connecticut Department of Correction limited its compliance with detainers to instances in which the Department determines the prisoner's release would pose an "unacceptable risk to public safety." CONN. DEP'T OF CORR., ADMIN. DIRECTIVE 9.3: INMATE ADMISSIONS, TRANSFERS AND DISCHARGES ¶¶ 9–10 (2012), available at <http://www.ct.gov/doc/LIB/doc/PDF/AD/ad0903.pdf>. In June 2013, the Connecticut General Assembly passed and the governor signed into law a bill that will expand the limitations on detainer compliance beyond the Department of Correction to other state and local law enforcement agencies. Act of June 25, 2013, 2013 Conn. Acts 13-155, available at <http://www.cga.ct.gov/2013/act/pa/pdf/2013PA-00155-R00HB-06659-PA.pdf> (concerning civil immigration detainers). The California "TRUST (Transparency and Responsibility Using State Tools) Act," aimed at limiting the state's compliance with federal immigration detainers, was signed into law by the California governor on October 5, 2013. See Assemb. B. 4, 2013–2014 Reg. Sess. (Cal. 2013), available at [http://leginfo.ca.gov/faces/billNavClient.xhtml?bill\\_id=201320140AB4](http://leginfo.ca.gov/faces/billNavClient.xhtml?bill_id=201320140AB4) (bill history) and [http://www.leginfo.ca.gov/pub/13-14/bill/asm/ab\\_0001-0050/ab\\_4\\_bill\\_20130624\\_amended\\_sen\\_v97.pdf](http://www.leginfo.ca.gov/pub/13-14/bill/asm/ab_0001-0050/ab_4_bill_20130624_amended_sen_v97.pdf) (text of bill).

<sup>38</sup> Cook County Ordinance 11-O-73, available at [http://cookcountygov.com/ll\\_lib\\_pub\\_cook/cook\\_ordinance.aspx?WindowArgs=1501](http://cookcountygov.com/ll_lib_pub_cook/cook_ordinance.aspx?WindowArgs=1501).

<sup>39</sup> See Lasch, *Federal Immigration Detainers After Arizona v. United States*, 46 LOY. L.A. L. REV. 629, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2178524](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2178524).

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<sup>40</sup> Letter from John Morton, Director, U.S. Immigration and Customs Enforcement, to Toni Preckwinkle, President, Cook County Board of Supervisors, February 13, 2012, available at <http://www.immigrationpolicy.org/sites/default/files/docs/Morton-Letter-to-Preckwinkle-02-13-12.pdf>.

<sup>41</sup> Hal Dardick, *Preckwinkle Ices ICE proposal: Rejects Call For Working Group to Resolve Issues*, CHI. TRIB., (April 10, 2012), available at [http://articles.chicagotribune.com/2012-04-10/news/ct-met-tonipreckwinkle-0411-20120411\\_1\\_preckwinkle-detainersimmigration-status](http://articles.chicagotribune.com/2012-04-10/news/ct-met-tonipreckwinkle-0411-20120411_1_preckwinkle-detainersimmigration-status).

<sup>42</sup> Champaign County, Illinois also refuses to honor any immigration detainers. See Letter from Champaign County Sheriff Dan Walsh to U.S. Immigration and Customs Enforcement, March 8, 2012, available at [http://d3n8a8pro7vhmx.cloudfront.net/progressivemajorityaction/pages/92/attachments/original/1369418919/C\\_hampaign\\_IL\\_Policy\\_Letter.pdf?1369418919](http://d3n8a8pro7vhmx.cloudfront.net/progressivemajorityaction/pages/92/attachments/original/1369418919/C_hampaign_IL_Policy_Letter.pdf?1369418919) (“This office will not hold inmates based on a routine detainer.”).

<sup>43</sup> Information Bulletin 2012-DLE-01, “Responsibilities of Local Law Enforcement Agencies under Secure Communities” at 3 (Dec. 4, 2012), available at [https://www.aclunc.org/docs/immigration/ag\\_info\\_bulletin.pdf](https://www.aclunc.org/docs/immigration/ag_info_bulletin.pdf).

<sup>44</sup> See *State v. Rodriguez*, 317 Or. 27, 854 P.2d 399 (1993) (suggesting that administrative warrant issued by federal immigration officials did not satisfy state constitutional analogue to the Fourth Amendment).

<sup>45</sup> See *Buquer*, *supra*.

<sup>46</sup> See *County of Riverside*, *supra*.

<sup>47</sup> A DHS memorandum relied on by the *Arizona* Court insists that “DHS must have exclusive authority to set enforcement priorities,” and insists that state and local officials must “conform to and effectuate” those priorities. Dept. of Homeland Security, Guidance on State and Local Governments' Assistance in Immigration Enforcement and Related Matters 8 (2011), online at <http://www.dhs.gov/xlibrary/assets/guidance-state-local-assistance-immigration-enforcement.pdf>, cited in *Arizona* at 2507. On DHS’s view, a locality’s “mandatory set of directives to implement the [jurisdiction]’s own enforcement policies ... would serve as an obstacle to the ability of individual state and local officers to cooperate with federal officers administering federal policies ...” *Id.*

ATTACHMENT C



May 2013

**THE FALLACY OF “ENFORCEMENT FIRST”:  
Immigration Enforcement Without Immigration Reform Has Been Failing for Decades**

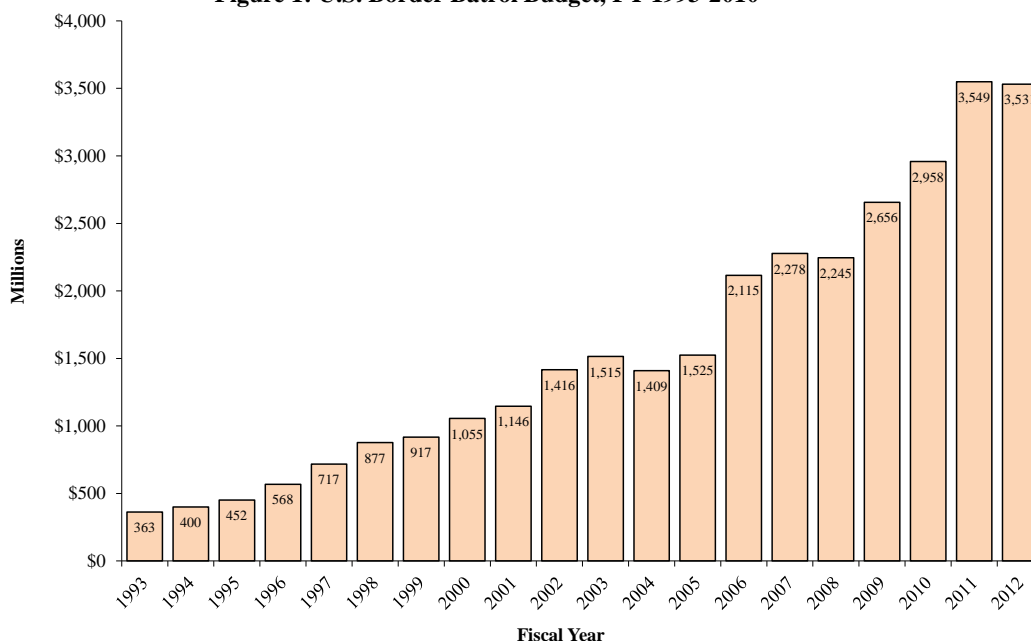
Opponents of a new legalization program for unauthorized immigrants living and working in the United States frequently claim that we must try “enforcement first.” That is to say, we must adequately enforce the laws on the books before we can contemplate the formulation of more reasonable laws. This stance is nonsensical for two reasons. First of all, it ignores the fact that the unworkable nature of our immigration laws is itself facilitating unauthorized immigration; so it is illogical to hope that stronger enforcement of those unworkable laws will somehow lessen unauthorized immigration. Secondly, the “enforcement first” perspective conveniently overlooks the fact that the United States has been pursuing an “enforcement first” approach to immigration control for more than two-and-a-half decades—and it has yet to work.

Since the last major legalization program for unauthorized immigrants in 1986, the federal government has spent an estimated \$186.8 billion on immigration enforcement.<sup>1</sup> Yet during that time, the unauthorized population has tripled in size to 11 million.<sup>2</sup> This did not occur because \$186.6 billion was not enough to get the job done. It occurred because this money was spent trying to enforce immigration laws that have consistently failed to match either the U.S. economy’s demand for workers or the natural desire of immigrants to be reunited with their families. As a result, we keep throwing good money after bad, ignoring the old adage that “insanity” is doing the same thing over and over again and expecting different results. More concretely, the federal government has met nearly every “metric” for border security that appeared in the 2006, 2007, and 2010 immigration-reform bills in the Senate, yet new metrics are continually created to replace the old ones, and the finish line keeps moving further away.<sup>3</sup> The “enforcement first” approach to unauthorized immigration would more accurately be called “enforcement forever,” because there is no end in sight.

**The U.S. Border Patrol budget has increased nearly 10-fold since 1993.**

- Since 1993, when the current strategy of concentrated border enforcement was first rolled out along the U.S.-Mexico border, the annual budget of the U.S. Border Patrol has increased from \$363 million to more than \$3.5 billion {Figure 1}.<sup>4</sup>
- Since 2001, the Border Patrol budget has more than tripled in size {Figure 1}.<sup>5</sup>

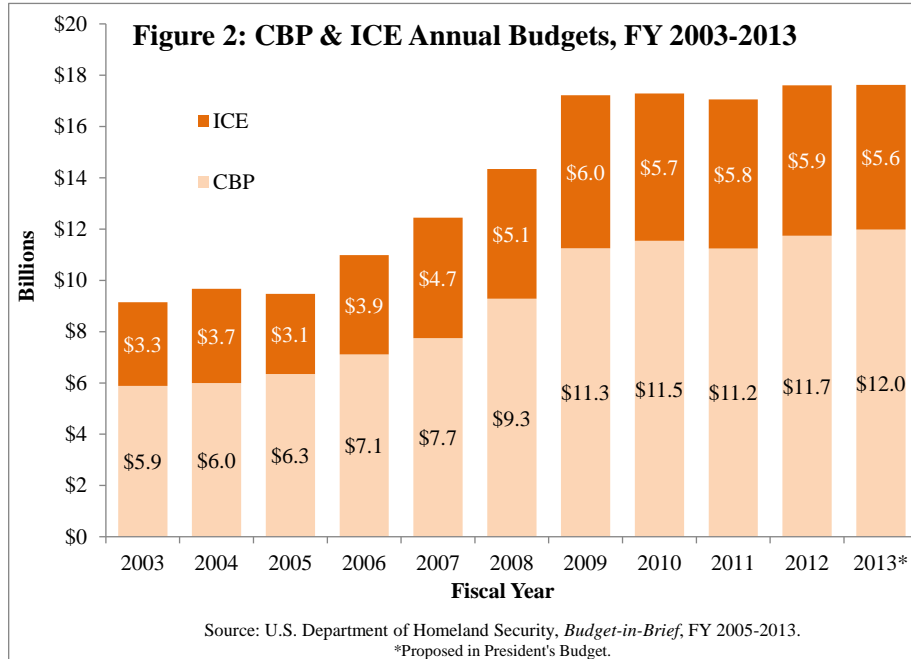
**Figure 1: U.S. Border Batrol Budget, FY 1993-2010**



Source: U.S. Border Patrol, "Enacted Border Patrol Program Budget by Fiscal Year," February 2013.

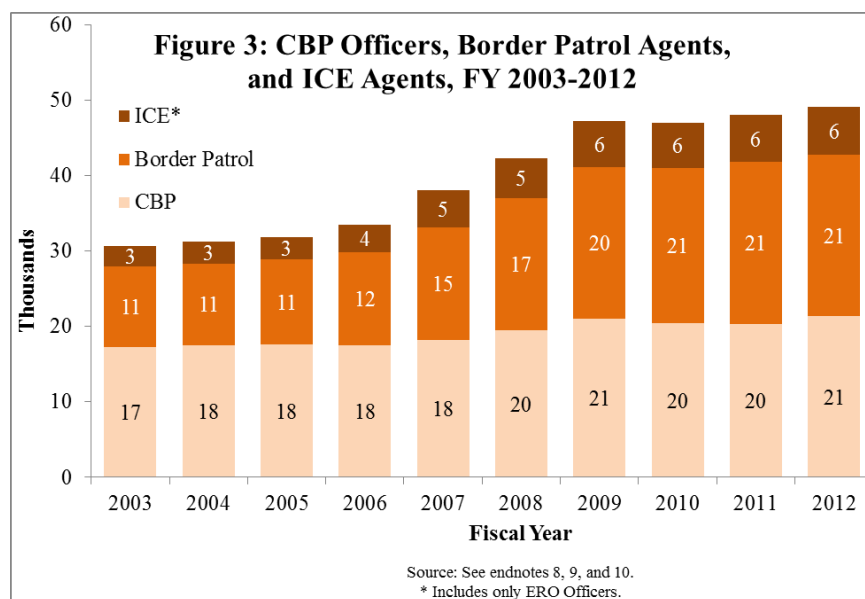
**Since 2003, the budget of U.S. Customs and Border Protection (CBP) has doubled, while the budget of Immigration and Customs Enforcement (ICE) has increased by 73 percent.**

- Since the creation of the Department of Homeland Security (DHS) in 2003, the budget of U.S. Customs and Border Protection (CBP)—the parent agency of the Border Patrol within DHS—has increased from \$5.9 billion to \$12 billion per year {Figure 2}.<sup>6</sup>
- On top of that, spending on U.S. Immigration and Customs Enforcement (ICE), the interior-enforcement counterpart to CBP within DHS, has grown from \$3.3 billion since its inception to \$5.6 billion today {Figure 2}.<sup>7</sup>



**The number of border and interior enforcement personnel now stands at more than 49,000.**

- The number of Border Patrol agents doubled from 10,717 in FY 2003 to 21,394 in FY 2012 {Figure 3}.<sup>8</sup>
- The number of CBP officers staffing ports of entry (POEs) grew from 17,279 in FY 2003 to 21,423 in FY 2012 {Figure 3}.<sup>9</sup>
- The number of ICE agents devoted to Enforcement and Removal Operations increased from 2,710 in FY 2003 to 6,338 in FY 2012 {Figure 3}.<sup>10</sup>



## **The federal government has already met the border-security benchmarks laid down in the immigration-reform bills introduced in the Senate since 2006.**

- As the American Immigration Lawyers Association points out in a January 2013 analysis, the “benchmarks” for border security specified in the 2006, 2007, and 2010 immigration-reform bills in the Senate have been largely met.<sup>11</sup>
- The requirements in the bills for more border-enforcement personnel, border fencing, surveillance technology, unmanned aerial vehicles, and detention beds have been fulfilled.<sup>12</sup>

## **“Enforcement first” has been the law of the land for decades.**

- As the Migration Policy Institute concluded in a comprehensive report in January 2013:  
  
“...a philosophy known as ‘enforcement first’ has become *de facto* the nation’s singular response to illegal immigration, and changes to the immigration system have focused almost entirely on building enforcement programs and improving their performance. Enforcement-first proponents argue that effective immigration enforcement should be a precondition for addressing broader reform and policy needs. In fact, the nation’s strong, pro-enforcement consensus has resulted in the creation of a well-resourced, operationally robust, modernized enforcement system...”<sup>13</sup>

## **Conclusion**

“Enforcement first” is just more of the same; more of the same enforcement-without-reform approach to unauthorized immigration that has consistently failed to work for 27 years and counting. Trying to enforce a dysfunctional immigration system as a prerequisite for reforming that system is a fool’s errand. Immigration reform that includes a pathway to legal status for unauthorized immigrants already living in the country, coupled with the creation of flexible avenues for future immigration, would enhance border security and help bring unauthorized immigration under control. Enforcement *with* reform is the only effective way to repair a broken immigration system.

## **Endnotes**

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<sup>1</sup> Doris Meissner, Donald M. Kerwin, Muzaffar Chishti, and Claire Bergeron, [\*Immigration Enforcement in the United States: The Rise of a Formidable Machinery\*](#) (Washington, DC: Migration Policy Institute, January 2013), p. 3.

<sup>2</sup> Jeffrey S. Passel and D’Vera Cohn, [\*Unauthorized Immigrant Population: National and State Trends, 2010\*](#) (Washington, DC: Pew Hispanic Center, February 1, 2011), p. 23.

<sup>3</sup> Greg Chen and Su Kim, [\*Border Security: Moving Beyond Past Benchmarks\*](#) (Washington, DC: American Immigration Lawyers Association, January 2013).

<sup>4</sup> U.S. Border Patrol, [“Enacted Border Patrol Program Budget by Fiscal Year,”](#) February 2013.

<sup>5</sup> Ibid.

<sup>6</sup> U.S. Department of Homeland Security, [\*Budget-in-Brief\*](#), FY 2005-2013.

<sup>7</sup> Ibid.

<sup>8</sup> U.S. Border Patrol, [“Border Patrol Agent Staffing by Fiscal Year,”](#) February 2013.

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<sup>9</sup> U.S. Customs and Border Protection, Communications Management Office, November 2012.

<sup>10</sup> U.S. Immigration and Customs Enforcement, Enforcement and Removal Operations, May 28, 2013.

<sup>11</sup> Greg Chen and Su Kim, [\*Border Security: Moving Beyond Past Benchmarks\*](#) (Washington, DC: American Immigration Lawyers Association, January 2013).

<sup>12</sup> Ibid.

<sup>13</sup> Doris Meissner, Donald M. Kerwin, Muzaffar Chishti, and Claire Bergeron, [\*Immigration Enforcement in the United States: The Rise of a Formidable Machinery\*](#) (Washington, DC: Migration Policy Institute, January 2013), p.

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