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Court Finds Frederick County, MD Sheriff Chuck Jenkins Illegally Detained Latina Immigrant

FOR IMMEDIATE RELEASE: August 7, 2013

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In a groundbreaking decision, a federal appeals court found that that a state or local law enforcement officer's suspicion or knowledge that an individual has committed a civil immigration violation without more information does not provide them with probable cause to suspect that the individual is engaged in criminal activity. The court said the officer may not detain or arrest the individual solely based upon a purported civil violation of federal immigration law.

Moreover, the subsequent issuance of an ICE detainer, after the illegal arrest and detention, "does not cleanse the unlawful seizure." The decision came from the U.S. Circuit Court of Appeals for the Fourth Circuit in Virginia, setting law for Maryland, Virginia, North Carolina, and South Carolina.

The decision unequivocally holds that local law and state law enforcement cannot enforce civil immigration law and found that the deputies had no legal authority to arrest or even briefly detain the plaintiff on the basis of a suspected or known civil immigration status violation.

LatinoJustice PRLDEF, CASA de Maryland and the law firm Nixon Peabody LLP in November 2009 filed a lawsuit against the Frederick County (Maryland) Board of Commissioners, Frederick County Sheriff Charles Jenkins and two deputy sheriffs for violating the civil rights of Roxana Orellana Santos who had illegally been arrested and detained by two Frederick County Deputy Sheriffs on October 7, 2008.

The complaint alleged that Santos was eating her lunch in a public area outside her workplace when two uniformed and armed deputy sheriffs approached and began questioning her. They requested that she produce identification. Upon prolonged questioning and ascertaining that she had an outstanding civil immigration removal warrant, the deputies arrested Santos and placed her in a local jail before she was transferred to the U.S. Immigration & Customs Enforcement ("ICE"). She was detained in a detention facility without any criminal charges for 35 days, away from her then one year old son and family before she was released.

In a 2012 decision, the U.S. District Court of Maryland dismissed Santos' lawsuit finding that the deputy sheriffs' initial questioning and subsequent arrest on the civil immigration warrant did not violate the Fourth Amendment, a determination that was overturned with today's ruling.

"We are extremely pleased by this ruling explicitly holding that local law enforcement cannot detain or arrest Latinos whom they may suspect of questionable immigration status," said Jose Perez, Deputy General Counsel of LatinoJustice PRLDEF. "It is apparent that the Frederick County deputies pre-textually stopped, questioned and detained Ms. Orellana Santos solely based upon her physical appearance at a time when the Fredrick County Sheriff was publicly trumpeting how many immigrants his office had arrested. This is the essence of racial profiling."

Increased attempts by local or state law enforcement to engage in federal immigration law enforcement have been accompanied by a troubling rise in racial profiling across the country as local police who are often untrained and poorly supervised seek to discriminatorily enforce federal immigration law against those they may suspect of being without status which is often impossible to discern. "Sheriff Jenkins declared war on Frederick County's immigrant community and today's decision validates the complaints of local residents who have been terrorized for simply driving to the store, taking their children to school, or, like Roxana, eating lunch," said Gustavo Torres, Executive Director of CASA de Maryland. "We hope that policing agencies across Maryland take this decision, and the liability that may flow from similar acts, very seriously."

John Hayes, lead counsel on the case and a Litigation Partner at Nixon Peabody stated: "At stake in this case is a matter of acute public importance. Law enforcement practices that target a group based solely their appearance have no place in America. It takes great courage and commitment for Ms. Orellana Santos to come forward in the name of equal justice under law to stop this discriminatory treatment for everyone who lives or works in the County."

The decision upheld dismissal of the claims against Sheriff Jenkins and the two deputies in their individual capacity determining that it was not clearly established law that local and state law enforcement officers could not detain or arrest an individual based on a civil immigration warrant at the time of the underlying October 2007 encounter. The U.S. Supreme Court in its June 2012 decision finding much of Arizona's notorious anti-immigrant law SB1070 preempted by the U.S. Constitution noted that "detaining individuals solely to verify their immigration status would raise constitutional concerns."

The decision reverses the District Court's dismissal against the municipal defendants and remanded plaintiff's official capacity claims against the County back to the District Court to determine whether the deputies' unconstitutional actions are attributable to an official policy or custom of the county or the actions of a final county policy maker.

Frederick County Sheriff Charles Jenkins upon being elected in Fall 2007 on a pro-immigrant enforcement platform entered into a 287(g) memorandum of understanding with the U.S. Department of Homeland Security permitting trained local deputies who undergo requisite training to engage in certain limited immigration enforcement. Neither of the two deputies who arrested Ms. Orellana Santos had received 287-g training and were thus not permitted to engage in any immigration enforcement. The lawsuit was filed on the heels of the Sheriffs' announcement publicizing that he had detained his 500th immigrant.

Statement for the Record

U.S. House of Representatives Committee on the Judiciary
Subcommittee on Immigration and Border Security

"The Human Toll of the Obama Administration's Reckless Immigration Policies: The Victims of Criminal Aliens Speak Out"

April 19, 2016

The National Immigration Forum (the Forum) advocates for the value of immigrants and immigration to the nation. Founded in 1982, the Forum plays a leading role in the national debate about immigration, knitting together innovative alliances across diverse faith, labor, law enforcement, veterans and business constituencies in communities across the country. Coming together under the Forum's leadership, these alliances develop and execute legislative and administrative policy positions and advocacy strategies. Leveraging our policy, advocacy and communications expertise, the Forum works for comprehensive immigration reform, sound border security policies, balanced enforcement of immigration laws, and ensuring that new Americans have the opportunities, skills, and status to reach their full potential.

Introduction

The Forum appreciates the opportunity to provide its views on immigration enforcement, the prioritization of criminal aliens, and the need for community policing. Having had the opportunity to work with leading law enforcement voices from the Law Enforcement Immigration Task Force (LEITF), the Forum appreciates the challenges state and local law enforcement agencies face in earning the trust of immigrant communities and balancing competing priorities to ensure community safety. We fully support enforcement approaches that promote safe communities and respect for the rule of law.

Immigration enforcement is a federal responsibility

Federal leadership in immigration enforcement is paramount, consistent with long-standing doctrine that immigration enforcement is primarily a federal responsibility. As the U.S. Supreme Court recently reaffirmed in *Arizona v. U.S.*, 567 U.S. ___ (2012), the federal government possesses "broad, undoubted power over the subject of immigration." At the same time, federalism principles under the U.S. Constitution limit what Congress can do to mandate that state and local law enforcement carry out federal immigration priorities and programs.[1]

[1] *See, e.g., Printz v. United States*, 521 U.S. 898 (1997); *New York v. United States*, 505 U.S. 144 (1992).

The U.S. Department of Homeland Security (DHS) has prioritized criminals for deportation, as set forth in DHS Secretary Jeh Johnson's November 2014 policy memorandum.[2], The Forum supports targeting those individuals who pose a danger to our communities for deportation, rather than otherwise law-abiding members of the community. Undocumented criminals convicted of serious crimes should be deported.

Prioritization reflects the reality that federal immigration agencies, including Immigration and Customs Enforcement (ICE), do not have the capacity or resources to remove all undocumented immigrants. By deprioritizing those who pose no threat, federal immigration agencies can allow law enforcement to focus limited resources on serious threats. Under this approach, federal immigration agencies can further intelligence-driven and risk-based policing.

Similarly, the Forum supports the goals of the Priority Enforcement Program (PEP), which it views as a good-faith effort to engage state and local law enforcement on helping DHS meet its prioritization. Given the federal government's limited ability to compel state and local participation in federal immigration enforcement initiatives and priorities, PEP can be a useful program aimed at achieving useful partnerships with state and local law enforcement.

The Forum is opposed to initiatives, such as 2013's Strengthen and Fortify Enforcement (SAFE) Act, H.R. 2278, which was largely reintroduced in 2015 as H.R. 1148, that would roll-back DHS's enforcement guidelines while moving additional immigration enforcement responsibilities to state and local law enforcement. We believe that this approach – shifting an inherently federal responsibility to states and localities – would divert limited resources from public safety and undermine community trust.

State and local law enforcement should focus on community policing strategies to build trust with immigrant communities

The Forum supports well-established community policing strategies, which numerous state and local law enforcement agencies have implemented in recent decades. Such policies recognize that state and local law enforcement need the trust of their communities, including immigrant communities, because that trust allows law enforcement to better understand and protect the communities they police. Successful community policing strategies are tailored to ensure that immigrant victims and witnesses of crimes cooperate with police and that community members share information about criminal or suspicious conduct. Community policing strategies are well-established and effective at fostering trust.

As with federal authorities, state and local law enforcement should spend their limited time and resources focusing on pursuing truly dangerous criminals, not otherwise law-abiding members of the community. By limiting focus to those who pose a danger to public safety and engaging in

[2] Secretary Jeh Charles Johnson, "Policies for the Apprehension, Detention and Removal of Undocumented Immigrants," Department of Homeland Security Memorandum, November 20, 2014. https://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf

trust-building efforts with immigrant communities, state and local law enforcement can earn support and confidence from immigrant communities, making everyone safer.

LEITF co-chair Tom Manger, Chief of Police in Montgomery County, Maryland, testified before the Senate Judiciary Committee on the importance of creating such trust, "To do our job we must have the trust and respect of the communities we serve. We fail if the public fears their police and will not come forward when we need them. . . . Cooperation is not forthcoming from persons who see their police as immigration agents. When immigrants come to view their local police and sheriffs with distrust because they fear deportation, it creates conditions that encourage criminals to prey upon victims and witnesses alike."[3]

This sentiment has been echoed by other leading law enforcement voices. LEITF member Richard Biehl, Chief of Police in Dayton, Ohio, stated in July 2015 testimony before this Subcommittee, "For law enforcement agencies to be effective in their public safety mission they need community support. This support is based upon trust – trust that is earned when public and law enforcement officials act fairly and treat people with dignity."[4] Chief Biehl went on to explain, "Our cities are safer when there is a sense of trust with our communities, including our immigrant communities. If families view law enforcement as a threat . . . no one benefits. Fearful communities are not cooperative communities."[5]

In a 2015 op-ed, Dallas County Sheriff Lupe Valdez, another member of LEITF, explained the need for community policing, "I don't want the community's first interaction with our officers to be a time of fear. . . . A lot of undocumented individuals came from areas where they can't trust the police. . . . Good law enforcement cannot be carried out this way. Everyone should know that they can report a crime, provide intel on crimes, be a witness, and most of all, not be in fear of the police if they are a victim of a crime."[6]

The Forum supports these well-established community policing principles, allowing state and local law enforcement to establish trust with immigrant communities and improve public safety for everybody.

State and local law enforcement cooperate with federal immigration officials

Most localities, including jurisdictions referred to as "sanctuary jurisdictions," cooperate extensively with federal immigration officials, including honoring criminal detainers accompanied by a warrant or court order, participating in federal task forces and initiatives and

[3] Testimony of Tom Manger, Chief of Police, Montgomery County (MD) Police Department, Hearing on "Oversight of the Administration's Misdirected Immigration Enforcement Policies: Examining the Impact on Public Safety and Honoring the Victims," Before the Senate Judiciary Committee, July 21, 2015, at p. 2. https://www.judiciary.senate.gov/imo/media/doc/07-21-15%20Manger%20Testimony.pdf

[4] Testimony of Richard Biehl, Chief of Police, Dayton (OH) Police Department, Hearing on "Sanctuary Cities: a Threat to Public Safety," Before the House Committee on the Judiciary, Subcommittee on Immigration and Border Security, July 23, 2015, at p. 2. https://judiciary.house.gov/wp-content/uploads/2016/02/Biehl-Testimony.pdf

[5] *Id.*

[6] Sheriff Lupe Valdez, "Broken immigration system needs repair," The Hill, April 3, 2015. http://thehill.com/blogs/congress-blog/civil-rights/237801-broken-immigration-system-needs-repair

providing notification of impending releases of convicted criminals who are undocumented. There are no "law-free zones" for immigration, even in such so-called sanctuary jurisdictions. Federal immigration laws are valid throughout the United States, including in "sanctuary" jurisdictions. Even where a particular city or law enforcement agency declines to honor an U.S. Immigration and Customs Enforcement (ICE) immigration detainer or limits involvement with federal immigration authorities, officers and agents from Customs and Border Protection and ICE can and do enforce federal immigration laws.

However, law enforcement needs are specific to each community, and local control has been a beneficial approach for law enforcement for decades. The thousands of state and local law enforcement agencies across the United States each have different priorities, challenges and concerns. A rural county sheriff's department's needs will differ from a big city police department's. A state police agency's priorities will differ from a university police department's. Different communities may face different public safety concerns. Decisions are best left to the individual state and local law enforcement agencies, which are best positioned to gauge what they need in order to build community trust and foster cooperation between law enforcement and the community.

The Forum has expressed concerns about proposals to cut important law enforcement grants or otherwise reduce funding for law enforcement agencies in connection with efforts to address so-called sanctuary cities. Such an approach is counterproductive and does nothing to advance a constructive debate over immigration reform or foster effective cooperation between federal, state and local law enforcement. We are opposed to federal efforts to establish a one-size-fits-all immigration enforcement model that would shift significant immigration enforcement responsibilities to state and local law enforcement agencies.

On the contrary, to the extent that state and local law enforcement play a role in immigration enforcement, the federal government must provide adequate funding in line with these responsibilities. In a time of limited resources and tight budgets, state and local law enforcement cannot afford to carry out unfunded and underfunded federal mandates. If the federal government is looking to partner with state and local law enforcement on immigration initiatives, it has a responsibility to work cooperatively with state and local law enforcement agencies and adequately fund such initiatives.

Conclusion

The Forum continues to support a model of immigration enforcement led by the federal government. It believes that DHS's efforts to prioritize enforcement against undocumented criminals over otherwise law-abiding undocumented immigrants is a common-sense step to make communities safer.

Through working with a broad cross-section of police chiefs and sheriffs in LEITF, the Forum has an appreciation of the need for state and local law enforcement to promote public trust in immigrant communities, and is opposed to efforts to shift additional immigration enforcement responsibilities to state and local law enforcement. Rather, the federal government, along with

states and localities, should seek to continue working cooperatively on enforcement matters. The Forum believes that PEP, is a significant effort to promote such cooperation, allowing states and localities to continue successful community policing practices that make their communities safer.

While federal, state, and local law enforcement can takes steps in these areas to promote public safety, the Forum believes that broad immigration reform is absolutely essential to safe communities. By assuaging the climate of fear that exists in many immigrant communities, immigration reform will build bridges between immigrant communities and law enforcement, supporting public safety.

STATEMENT OF THE AMERICAN IMMIGRATION COUNCIL

SUBMITTED TO THE IMMIGRATION AND BORDER SECURITY SUBCOMMITTEE OF THE U.S. HOUSE JUDICIARY COMMITTEE

HEARING ON "THE REAL VICTIMS OF A RECKLESS AND LAWLESS IMMIGRATION POLICY: FAMILIES AND SURVIVORS SPEAK OUT ON THE REAL COST OF THIS ADMINISTRATION'S POLICIES"

April 19, 2016

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The American Immigration Council is a non-profit organization which for over 28 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 analysis and research regarding the Obama Administration's removal and enforcement policies and the effect they have on communities.

The Immigration Council is saddened by the tragic deaths of Sarah Root and Josh Wilkerson, whose families are sharing their grief at this hearing. We share the families', public's, and policymakers' condemnation of senseless acts of violence. At the same time, we caution that individual cases 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.

There is abundant evidence that immigration is not linked to higher crime rates, as is explained in our publication *The Criminalization of Immigration in the United States* (Attachment A). Empirical data shows that immigration is associated with *lower* crime rates and immigrants are *less likely* than the native-born to be serious criminals. As our report details, high rates of immigration are associated with lower rates of violent crime and property crime. Our analysis of population and FBI data indicates that between 1990 and 2013, the violent crime rate in the United States declined 48 percent. This 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.

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. The enforcement apparatus designed to support these laws has grown dramatically in the last three decades; we have spent billions of dollars deporting millions of people who have committed only immigration violations. Such enforcement actions focus 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. Our communities would benefit from policies designed to update our immigration system, policies that would ensure every person in this country is "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. Working toward such practical policies is a benefit to all Americans, and more productive than demonizing an entire group of people for the actions of a few.

* * *

We continue to urge Congress to work to comprehensively reform our outdated immigration system and to provide individuals, families, and communities across America a functional system that meets our needs and reflects our proud history as a nation of immigrants.

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.

American Immigration Council

Special Report | July 2015

THE CRIMINALIZATION OF IMMIGRATION IN THE UNITED STATES

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.

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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* (4th 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* and our blog at *www.immigrationimpact.com*.

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EXECUTIVE SUMMARY

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

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."[1] 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.[2] 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.[3] 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.[4] In short, immigrants themselves are being criminalized.[5] 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."[6]

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

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}[7] and the number of unauthorized immigrants more than tripled from 3.5 million to 11.2 million {Figure 2}.[8] 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}.[9] Likewise, the property crime rate fell 41 percent, including declining rates of motor vehicle theft, larceny/robbery, and burglary {Figure 4}.[10] 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.[11]

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

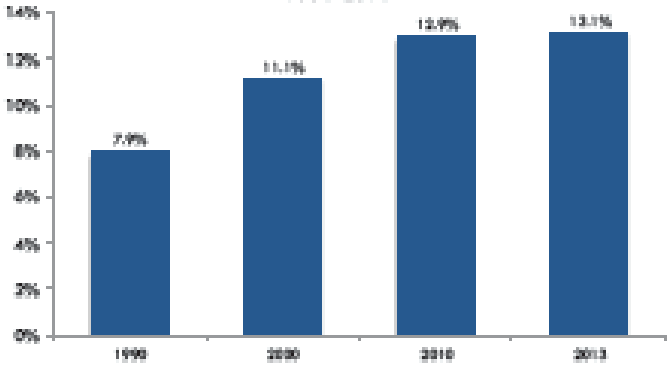


Figure 2: Number of Unauthorized Immigrants in the U.S., 1990-2012

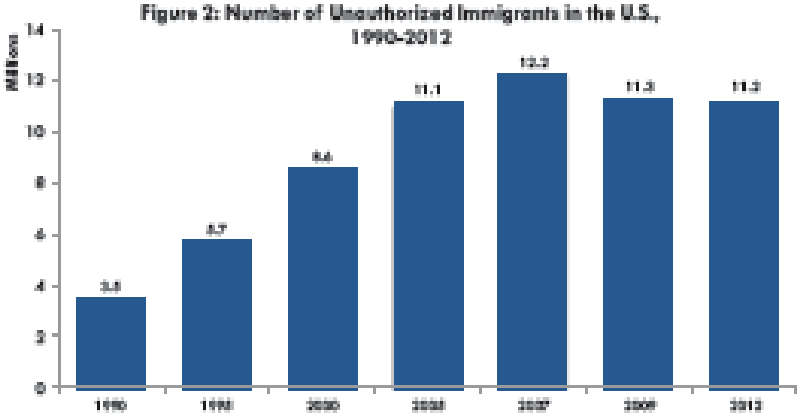


Figure 3: U.S. Violent Crime Rates, 1990-2013

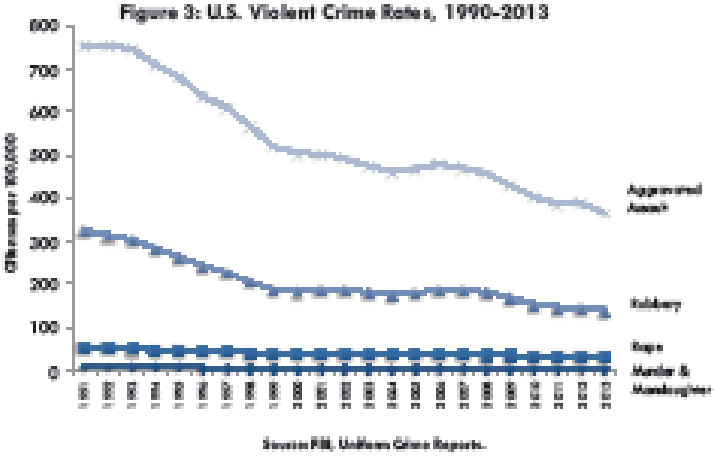
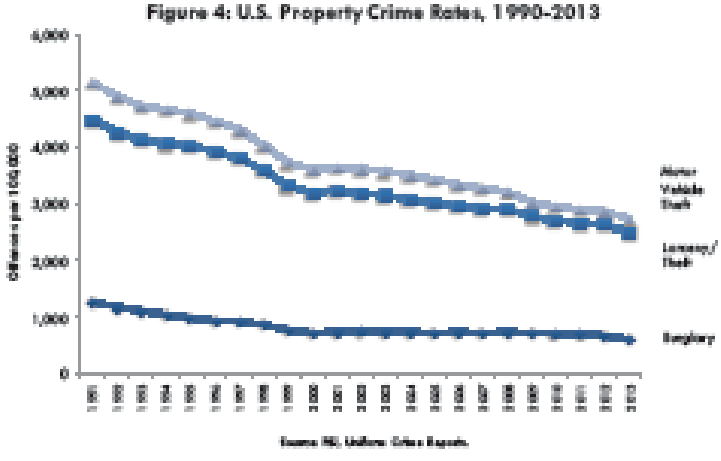


Figure 4: U.S. Property Crime Rates, 1990-2013



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.[12] 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.[13] Declining rates of property crime have also been documented in metropolitan areas across the country.[14] Some scholars suggest that new immigrants may revitalize dilapidated urban areas, ultimately reducing violent crime rates.[15]

In short, to quote sociologist Robert J. Sampson, "cities of concentrated immigration are some of the safest places around."[16] 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."[17] 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."[18]

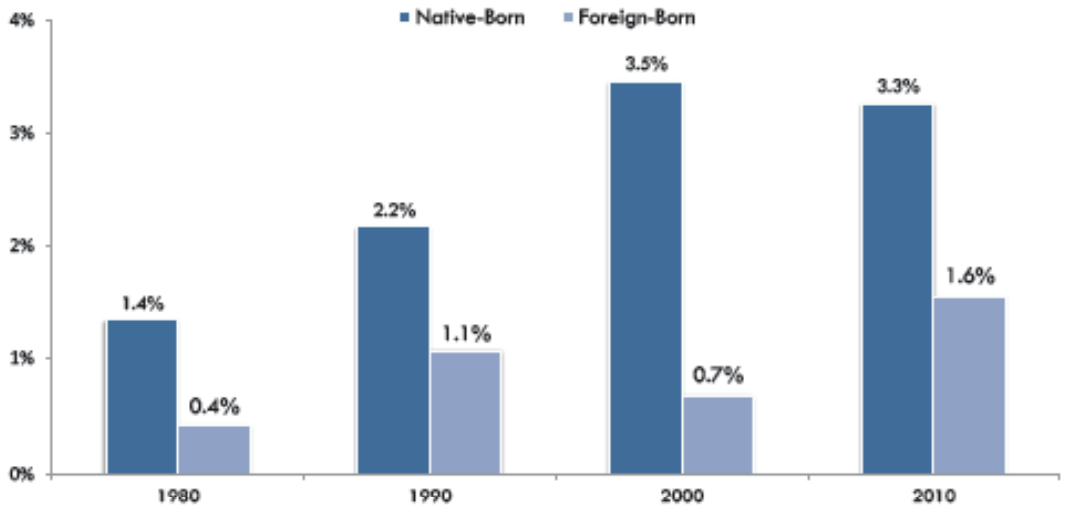
There is a sense of déjà vu in these modern-day findings. In the first three decades of the 20th century, during the last era of large-scale immigration, three government commissions studied the relationship between immigrants and crime and came to the same conclusion as contemporary researchers. The Industrial Commission of 1901, the [Dillingham] Immigration Commission of 1911, and the [Wickersham] National Commission on Law Observance 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.[19] 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.[20]

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.[21] 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. [22]

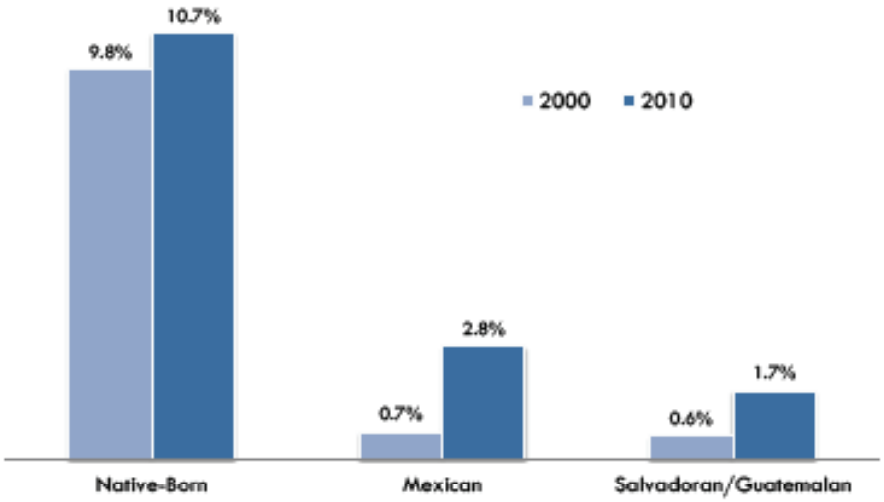
Figure 5: U.S. Incarceration Rates of Men Age 18-39, by Nativity, 1980-2010



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}.[23]

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."[24] 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.[25] 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 21st century as Congress redefined more and more immigration offenses as criminal (such as unauthorized entry or re-entry into the country),[26] 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.[27] 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,[28] 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.[29] 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.[30] 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.[31]

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."[32] 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.[33]

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."[34] 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.[35]

A 2010 study yielded similar findings based on data from the National Longitudinal Study of Adolescent Health (Add Health).[36] 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)."[37] 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."[38] 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

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."[39] 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."[40] 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.

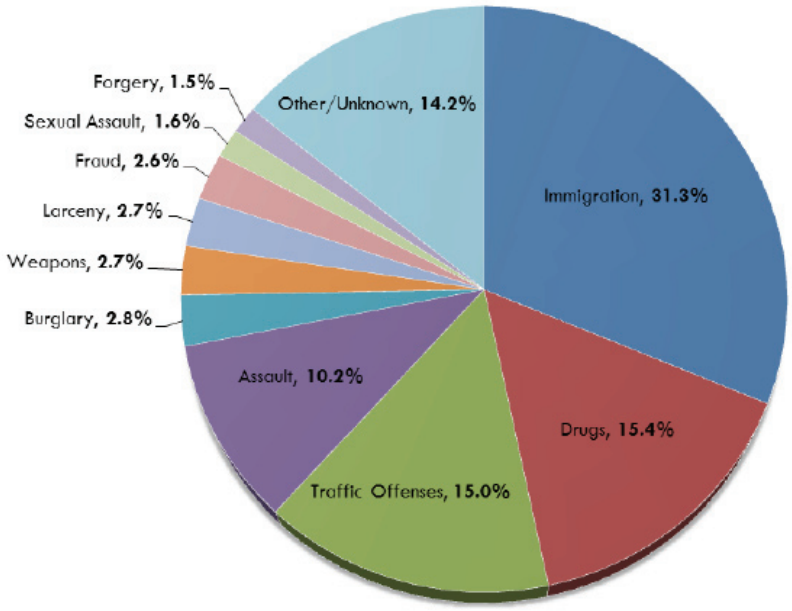
Of course, these increasingly punitive laws are only as effective as the immigration-enforcement apparatus designed to support them. And this apparatus has expanded dramatically over the past three decades.[41] More and more immigrants have been ensnared by enforcement mechanisms new and old, from worksite 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.[42] 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."[43] (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").[44]

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).[45] 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}.[46]

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.[47] 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."[48]

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.[49] 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."[50]

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.[51] 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.[52] 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. meatpacking plant. The consequences for the community and the local economy have been dire.[53] 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."[54] Long after the Agriprocessors raid, Postville was still what its leaders described as "a human and economic disaster area."[55] 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."[56]

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."[57]

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.[58] Among those programs were two that eventually became ICE's Criminal Alien Program (CAP)[59]—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.[60]

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.[61]

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.[62] 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.[63]

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.[64] 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.[65] 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."[66]

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.[67] 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.[68] 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.[69] 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.[70]

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."[71] This intersection of criminal and immigration law has led to a notable increase in deportations.[72] 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."[73] 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.[74] 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."[75] 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."[76]

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."[77] This initiative led to the arrest of more than 1,100 Muslim and Arab men without formally charging them with a crime.[78] 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."[79]

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,"[80] 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.[81]

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.[82] Although these offenses have been on the books since 1929, they are being applied under Operation Streamline more widely than they ever were before.[83] 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.[84]

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.[85] 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.[86] 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."[87] Predictably, Operation Streamline has diverted resources away from drug and human smuggling prosecutions.[88] 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.

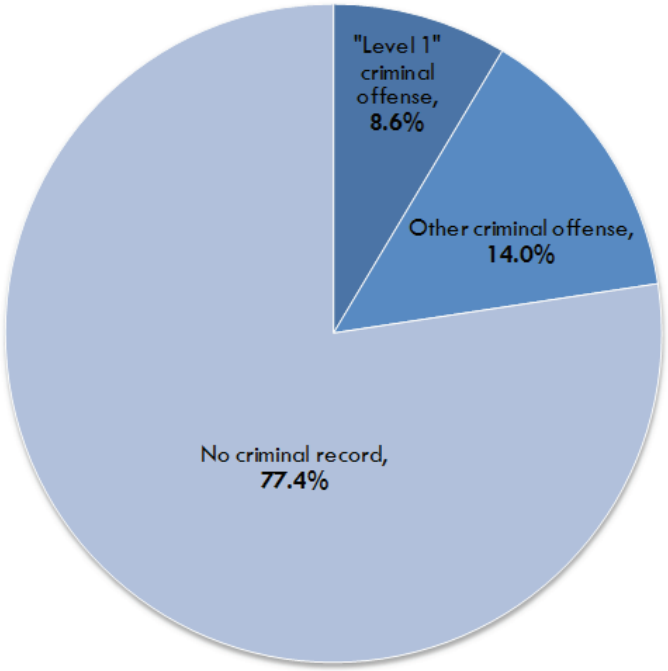
Secure Communities

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,[89] which used biometric data to screen for deportable immigrants as people were being booked into jails.[90] 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."[91] 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.[92] As of September 30, 2013, 306,622 immigrants convicted of crimes had been removed from the United States after identification through Secure Communities.

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.[94] 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."[95] 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}.[96]

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.[97] Secure Communities, along with other programs of its kind, also led to the separation of U.S.-citizen children from their parents.[98] 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."[99]

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.[100] 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."[101] 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."[102] 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."[103] 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."[104] 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" (a 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).[105] 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.[106] 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.[107] 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"[108]—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

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.[109] Families and communities have been and are being needlessly torn apart in the process.[110] 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.[111] 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.[112] This relentless campaign of deportation is frequently justified as a war against "illegality"—which is to say, against unauthorized immigrants.[113] 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."[114] 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.

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[99] Edgar Aguilasocho, David Rodwin, and Sameer Ashar, *Misplaced Priorities: The failure of Secure Communities in Los Angeles County* (Immigration Rights Clinic, University of California, Irvine School of Law, January 2012), p. 2.

[100] U.S. Immigration and Customs Enforcement, *Salaries and Expenses, Fiscal Year 2014 Congressional Justification*, p. 57.

[101] Memorandum from Homeland Security Secretary Jeh Charles Johnson Regarding Secure Communities, November 20, 2014.

[102] Ibid.

[103] U.S. Department of Homeland Security, "Testimony of Michael J. Fisher, Chief, U.S. Border Patrol, U.S. Customs and Border Protection, before the House Committee on Homeland Security, Subcommittee on Border and Maritime Security: 'Does Administrative Amnesty Harm our Efforts to Gain and Maintain Operational Control of the Border'?" (October 4, 2011), accessed January 31, 2014.

[104] Ibid.

[105] Jens Manuel Krogstad and Jeffrey S. Passel, *Those from Mexico will benefit most from Obama's executive action* (Washington, DC: Pew Research Center, November 20, 2014).

[106] American Immigration Council, *A Guide to the Immigration Accountability Executive Action* (Washington, DC: American Immigration Council, November 2014), p. 1.

[107] Walter A. Ewing, *The Growth of the U.S. Deportation Machine: More Immigrants are being "Removed" from the United States than Ever Before* (Washington, DC: Immigration Policy Center, American Immigration Council, updated March 2014).

[108] Jim Acosta and Stephen Collinson, "Obama: 'You can come out of the shadows'," CNN, November 21, 2014.

[109] U.S. Department of Homeland Security, *Yearbook of Immigration Statistics: 2013*, Table 39.

[110] Immigration Policy Center of the American Immigration Council and First Focus, *Falling Through the Cracks: The Impact of Immigration Enforcement on Children Caught Up in the Child Welfare System* (Washington, DC: December 2012); Ajay Chaudry, et al., *Facing Our Future: Children in the Aftermath of Immigration Enforcement* (Washington, DC: Urban Institute, February 2010).

[111] Walter A. Ewing, *The Cost of Doing Nothing: Dollars, Lives, and Opportunities Lost in the Wait for Immigration Reform* (Washington, DC: Immigration Policy Center, American Immigration Council, updated September 2013).

[112] *The Economist*, "The Great Expulsion: America's Deportation Machine," February 8, 2014.

[113] 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.

[114] Abraham H. Maslow, *The Psychology of Science: A Reconnaissance* (Chapel Hill, NC: Maurice Bassett Publishing, 2002 [1966]), p. 15.

CWS Statement to Subcommittee on Immigration and Border Security of the U.S. House of Representatives Judiciary Committee, pertaining to its hearing on Tuesday, April 19, 2016

As a 70-year old humanitarian organization representing 37 Protestant, Anglican, and Orthodox communions and 33 refugee resettlement offices across the country, Church World Service (CWS) urges all Members of Congress to support the long-standing efforts of law enforcement officials to foster trusting relationships with the communities they protect and serve. As we pray for peace and an end to senseless acts of violence that are too prevalent in this country, CWS encourages the U.S. Congress to refrain from politicizing tragedies or conflating the actions of one person with an entire community of our immigrant brothers and sisters.

Communities are safer when they pursue policies that strengthen trust and cooperation between local law enforcement, community leadership and institutions, and immigrant residents. The Federal government should not hurt intentional, community-based policing efforts that are vital in communities across the country. Many cities already recognize how requests by Immigration and Customs Enforcement (ICE) to hold individuals beyond their court-appointed sentences violate due process and have been found unconstitutional by federal courts.[1] Local police that opt out of enforcing ICE detainer requests – especially when they are made without probable cause or a signed warrant from a judge – see an increase in public safety due to improved trust in its police force. It is precisely this trust that enables community members to report dangerous situations without the fear of being deported and separated from their families. When local police honor ICE detainer requests, more crimes go unreported because victims and witnesses are afraid of being deported if they contact the police.[2] CWS supports the 320+ jurisdictions across the United States that limit collaboration with ICE, and we strongly oppose legislation that would punish or attempt to stop states, cities, localities and police departments from regulating how they interact with ICE.

Federal, state, and local policies that focus on deportation do not reduce crime rates. Indeed, individuals who are not enforcement priorities are routinely detained and deported. These individuals often present no risk to public safety, and are long-standing community members and parents with young children. For example, in March 2015, ICE engaged in a week-long raid during which officials stole over two thousand immigrants from their homes. More than two-thirds of the individuals picked up were convicted of merely nonviolent offenses.[3] U.S. immigration and deportation policies are not only ineffective at reducing crime, but are also prohibitively costly to taxpayers. In 2013, the United States spent more than $18 billion on immigration enforcement, more than all other federal law enforcement agencies combined.[4]

The immigrant population comes to this country to reunite with family, work, and make meaningful contributions that enrich their communities. Several studies over the last century have affirmed that all immigrants, regardless of nationality or immigration status, are less likely than American citizens to commit violent crimes.[5] A recent report found a correlation between the increase in the undocumented immigrant population in the United States, and the sharp decline in violent and property crime rates.[6] Instead, immigration is correlated with significantly higher employment growth and a decline in the unemployment rate,[7] and immigrants have high business formation rates, creating successful businesses that hire immigrant and U.S. citizen employees.[8]

CWS urges all Members of Congress to support immigration policies that treat our neighbors with the dignity and respect that all people deserve, and to affirm local law enforcement officer's efforts to build trust with their communities.

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[1] Miranga-Olivares v. Clackamas County, Case No. 3:12-cv-02317-ST (D. Ore. 2014), https://scholar.google.com/scholar_case?case=7183853698243436215&hl=en&as_sdt=20006.
[2] Anita Kashu, *The Role of Local Police: Striking a Balance Between Immigration Enforcement and Civil Liberties*, The Police Foundation (April 2009), http://www.policefoundation.org/wp-content/uploads/2015/06/The-Role-of-Local-Police-Narrative.pdf.
[3] Mennonite Central Committee, *"Worst of the Worst?" March 2015 Report*, http://mcc.org/sites/mcc.org/files/media/common/documents/worstoftheworstreport-march242015_0.pdf.
[4] The Migration Policy Institute, *Immigration Enforcement in the United States: The Rise of a Formidable Machinery*, http://www.migrationpolicy.org/pubs/enforcementpillars.pdf.
[5] Jason L. Riley, *The Mythical Connection Between Immigrants and Crime*, The Wall Street Journal, July 14, 2015, http://www.wsj.com/articles/the-mythical-connection-between-immigrants-and-crime-1436916798.
[6] Walter A. Ewing, Daniel E. Martínez, Rubén G. Rumbaut, *The Criminalization of Immigration in the United States*, American Immigration Council (July 2015), http://immigrationpolicy.org/special-reports/criminalization-immigration-united-states.
[7] Jack Strauss & Hailong Qian, Immigrants or Jobs: Which Comes First to a Metro?, Jan. 23, 2014, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2339192.
[8] Robert W. Fairlie, Ph.D., SBA Office of Advocacy, *Immigrant Entrepreneurs and Small Business Owners, and their Access to Financial Capital* (May 2012), https://www.sba.gov/sites/default/files/rs396tot.pdf.

Friends Committee on National Legislation
A Quaker Lobby in the Public Interest

The Friends Committee on National Legislation's Statement for the Record as it pertains to the U.S. House of Representatives' Judiciary Committee hearing,

The Real Victims of a Reckless and Lawless Immigration Policy: *Families and Survivors Speak Out on the Real Cost of This Administration's Policies*

April 19, 2016

The Friends Committee on National Legislation (FCNL) is a Quaker lobby in the public interest committed to pursuing policies that build just societies, peaceful communities and right relationship among all peoples. We call on Congress to reform the U.S. immigration system so that it is in line with the Quaker principle to answer to that of God in everyone and ensures we live up to our legacy as a country that thrives because we are a nation of immigrants. Congress has the opportunity to enact practical solutions for comprehensive reform that includes clear and workable processes for legal entry and eventual citizenship. This is a fundamental policy change we need to help American communities truly prosper.

Extreme interior enforcement proposals that require state and local law enforcement officials to implement federal immigration policies will burden communities that are home to immigrants and undermine community safety. Effective policing depends on trust between police officers and the communities they serve. When Congress created the Secure Communities program, it blurred the lines between federal immigration enforcement and local police. Far from making communities more secure, the program actually resulted in fewer reported crimes and made communities with large immigrant populations more vulnerable. Perpetrators of crime, assault, and abuse know that these communities are less likely to report the crime if they legitimately fear it will result in the deportation or detention of an immigrant neighbor, a loved one, or themselves. Many law enforcement officials, including the Major Cities Chiefs Association,[1] have already come out against legislative proposals that would mandate programs that force local police to serve as federal immigration officials. Local police departments should not face penalties for prioritizing community safety over federal immigration enforcement – we ask that Congress not require otherwise.

Furthermore, criminalizing entire immigrant communities based on the senseless actions of a few individuals tears at the moral fabric of our society and will not make our communities safer. Individuals should not be required to check the immigration papers of any neighbor, church member, client, or program participant before offering any neighborly or humanitarian assistance; our call as Quakers to welcome the stranger does not rest on the legal status of any individual. Imposing new mandatory minimum requirements for re-entry, or decreasing legal protections and immigration relief for certain migrant groups will only fuel the brokenness of our system, which is already heavy-handed on indefinite detention and dangerous deportations at great expense to U.S. taxpayers. Enforcing the system as is – without ensuring that the accompanying need for legal aid and visa reforms is met – results in further family hardship through separation. Expediting the removal of asylum seekers to deter further migration will continue to return individuals to deadly situations and will not remedy the root causes of displacement or meet the calls for reform from border communities.

FCNL looks instead for legislation that proceeds from a recognition of the inherent worth of all individuals, as acknowledged in our Quaker faith, as well as in our shared Constitution, laws, and American values. We look forward to partnering on such efforts.

[1] http://www.aila.org/infonet/letter-county-sheriffs-opposing-s-2146

FRIENDS COMMITTEE ON NATIONAL LEGISLATION
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Statement of the Fair Immigration Reform Movement "FIRM"
Submitted to the House Subcommittee on Immigration and Border Security
Tuesday, April 19, 2016
10:00 a.m.

We submit this statement for the record on behalf of the Fair Immigration Reform Movement, a national coalition of 44 grassroots organizations from 32 states around the country committed to promoting and preserving the rights of immigrants at the local, state and federal level.

The vast majority of immigrants, like the vast majority of all Americans, are hardworking people trying to take care of their families and help their kids succeed. In fact, research shows that immigrants are *less* prone to commit crime than native-born Americans.[1] Data also shows high concentrations of immigrants are also associated with *lower crime rates*.[2] For example, in Chicago, New York and Los Angeles, the crime rate has dropped the fastest in neighborhoods with the highest immigrant concentrations.[3] Research also shows immigrants benefit communities by revitalizing struggling local economies.[4] The arrival of immigrants has helped revive many blighted cities and towns across America.[5]

Despite these facts, some politicians continue to engage in fear mongering as justification for their politically driven attacks. They seize on any opportunity to promote false stereotypes and misinformation about the immigrant community. They block any effort at reform while refusing to offer real solutions to fixing our broken immigration system.

Targeting hardworking immigrant families for deportation won't reduce crime, but it will increase their fear of law enforcement, making crime prevention and community policing more difficult. When local police are involved in immigration enforcement, people are less likely to report crimes or become active members of their communities for fear of deportation. Many state and local law enforcement leaders have been vocal in opposing

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[1] *See* Immigration Policy Center, available at: http://immigrationpolicy.org/special-reports/criminalization-immigration-united-states
[2] *See* Immigration Policy Center, available at: http://www.immigrationpolicy.org/just-facts/anecdotes-evidence-setting-record-straight-immigrants-and-crime-0
[3] *Id*.
[4] The Atlantic, *Immigrants Injecting Life Into the Rust Belt*, (2013); available at: http://www.theatlantic.com/politics/archive/2013/10/immigrants-injecting-life-into-the-rust-belt/430314/; Partnership for New American Economy, *Immigration and the Revival of American Cities,* (2013); available at: http://www.renewoureconomy.org/wp-content/uploads/2013/09/revival-of-american-cities.pdf.
[5] *Id*.

their entanglement with immigration authorities for this reason. **The Major Cities Chiefs Police Association** has argued that local immigration enforcement undermines community trust and cooperation and significantly diverts resources from the core mission of police to create safe communities.[6]

The real solution is broad and humane immigration reform, which would place undocumented immigrants on a workable and earned path to citizenship, thereby allowing them to contribute even more to their families, communities, and our country. FIRM stands ready to work with the Subcommittee to pass comprehensive immigration reform legislation that keeps families together and protects the rights and safety of all community members.

[6] *Available at*: https://majorcitieschiefs.com/pdf/news/immigration_position112811.pdf

National Task Force
to End Sexual and
Domestic Violence Against Women

April 18, 2016

Dear Representative,

As the Steering Committee of the National Taskforce to End Sexual and Domestic Violence (NTF), comprising national leadership organizations advocating on behalf of sexual and domestic violence victims and women's rights, we represent hundreds of organizations across the country dedicated to ensuring **all** survivors of violence receive the protections they deserve. For this reason, we write to express our deep concerns about the potential impact that proposals that seek to undermine Community Trust policies will have. Proposals that weaken community trust policies will be dangerous for all victims of sexual assault, domestic violence, and trafficking, and in particular, for immigrant victims, and communities at large.

Undermining policies that local jurisdictions have determined are Constitutionally sound and appropriate for their respective communities decreases the ability of law enforcement agencies to respond to violent crimes and assist ***all*** victims of crime, U.S. Citizens, and immigrants alike. As recognized in the bipartisan Violence Against Women Act (VAWA), law enforcement plays a critical role in our coordinated community response to domestic and sexual violence.

Community trust policies are critical tools for increasing community safety. Laws that seek to intertwine the immigration and law enforcement systems will undermine the Congressional purpose of protections enacted under VAWA and will have the chilling effect of pushing immigrant victims into the shadows and allow criminals to walk on our streets. As VAWA recognizes, immigrant victims of violent crimes often do not contact law enforcement due to fear that they will be deported. According to a study conducted by the National Domestic Violence Hotline and the National Latin@ Network: Casa de Esperanza, 45% of the foreign-born callers expressed fear of calling and/or seeking help from the police or courts.[1] Furthermore, 12% of US-Born callers expressed fear of seeking help due to the current wave of anti-immigrant policies. Immigrants are already afraid of contacting the police and these policies will only exacerbate this fear. The result is that perpetrators will be able to continue to harm others, both immigrant and U.S. Citizen victims alike.

Perpetrators use fear of deportation as abuse. Local policies that minimize intertwining of local law enforcement with ICE help bring the most vulnerable victims out of the shadows by creating trust between law enforcement and the immigrant community, which in turn help protect ***entire***

[1] http://www.nationallatinonetwork.org/images/files/HotlineReport_2_2015_Final.pdf; http://m.huffpost.com/us/entry/7112130?; http://nomore.org/nomas/

communities.[2] Abusers and traffickers use the fear of deportation of their victims as a tool to silence and trap them. Not only are the individual victims harmed, but their fear of law enforcement leads many to abstain from reporting violent perpetrators or coming forward, and, as a result, dangerous criminals are not identified and go unpunished. These criminals remain on the streets and continue to be a danger to our communities.

Harsh criminal penalties for reentry will harm victims of trafficking, sexual assault, and domestic violence. Immigrant victims are vulnerable to being arrested and prosecuted for crimes directly connected to their victimization. For example, victims of domestic violence are arrested and convicted of domestic violence related crimes, even when they are not the primary perpetrator of violence in the relationship, due to language and cultural barriers. In addition, victims of sex trafficking are often arrested and convicted of prostitution-related offenses. Often, victims are desperate to be released, and in some cases, reunited with their children upon arrest and/or during trial. These factors–combined with poor legal counsel, particularly about the immigration consequences of criminal pleas and convictions—have in the past and will likely continue to lead to the deportation of wrongly accused victims who may have pled to or been unfairly convicted of domestic violence charges.[3]

For these reasons, we urge you to affirm the intent and spirit of VAWA and oppose ***S.2146*** and other similar legislative proposals that may be introduced. Thank you very much for taking this important step to protect and support immigrant survivors of domestic violence, trafficking, and sexual assault.

For more information, please contact Grace Huang, Asian Pacific Institute on Gender-Based Violence at ghuang@api-gbv.org, (206) 420-7369 , or Andrea Carcamo, National Latin@ Network: Casa de Esperanza, at acarcamo@casadeesperanza.org, (703) 942-5582.

Sincerely,
The National Task Force to End Sexual and Domestic Violence

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[2] A study conducted by the University of Illinois- Chicago found that increased involvement of local police and immigration enforcement eroded trust between the police and immigrants, undocumented and documented. 45% of documented immigrants were less likely to report a crime while 70% of undocumented immigrants responded similarly. http://www.motherjones.com/politics/2015/07/sanctuary-cities-public-safety-kate-steinle-san-francisco

[3] http://www.nationallatinonetwork.org/images/files/Quote_Sheet_for_Hill_Visits_-_Service_Providers.pdf

WASHINGTON
LEGISLATIVE OFFICE

March 15, 2016

Bruce Friedman
Senior Policy Advisor
Office for Civil Rights and Civil Liberties
Department of Homeland Security
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Re: Unsuitability of Renewal of Jurisdictions for the 287(g) Immigration Enforcement Program

Dear Mr. Friedman:

On behalf of the American Civil Liberties Union (ACLU), a nonpartisan public interest organization dedicated to protecting the principles of liberty and equality set forth in the Constitution and in our nation's civil rights laws, and its more than a million members, activists, and supporters, we write to express our deep concerns about renewal of the 287(g) program in 32 jurisdictions. This letter supplements and updates our December 14, 2012 letter to you, which raised concerns about jurisdictions that were being considered for 287(g) renewal agreements at the time.[1]

The ACLU urges Immigration and Customs Enforcement (ICE) to terminate the 287(g) program in all 32 jurisdictions in 16 states that have existing agreements. This letter raises specific concerns, including civil rights violations and bias based on immigration status, race, or ethnicity, in six of the proposed jurisdictions. That we do not address the remaining jurisdictions does not indicate our support for those renewals, or the absence of jurisdiction-specific concerns. Along with leading law-enforcement voices[2] we object in principle to the entanglement of immigration enforcement with state or local policing. Continuing 287(g) in these jurisdictions will only perpetuate the program's record of encouraging racial profiling – as seen starkly in the Department of Justice's findings regarding sometime 287(g) partners Maricopa County (AZ) and Alamance County (NC) – to the detriment of public safety and community trust in law enforcement.

[1] Letter from American Civil Liberties Union to Bruce Friedman, Senior Policy Advisor, Office for Civil Rights and Civil Liberties, Department of Homeland Security (Dec. 14, 2012), https://www.aclu.org/aclu-letter-dhs-crcl-opposing-new-287g-applications.
[2] Statement of Chief J. Thomas Manger, Chairman of the Legislative Committee for the Major Cities Chiefs Association, "Examining 287(g): The Role of State and Local Law Enforcement in Immigration Law." House Committee on Homeland Security (Mar. 4, 2009), *available at* https://www.gpo.gov/fdsys/pkg/CHRG-111hhrg49374/html/CHRG-111hhrg49374.htm.

Frederick County Sherriff's Office, Frederick County, Maryland

Frederick County has participated in the 287(g) program since August 1, 2008.[3] Frederick County Sheriff Chuck Jenkins claims that participation in the 287(g) program is about protecting public safety and security.[4] Yet his claim is belied by statistics showing that the program has overwhelmingly resulted in the deportation of individuals apprehended for minor offenses such as traffic violations. Over 80 percent of all arrests made under the 287(g) program in Frederick County were for low-level offenses, including over 60 percent for traffic violations.[5] According to the Frederick County Sheriff's Office's own numbers, of the 995 detainers the sheriff's office lodged from when it joined the 287(g) program in 2008 until 2011, 902—over 90%—were for immigrants arrested for misdemeanor offenses.[6] Community advocates also cite numerous instances of arbitrary and baseless stops of Latino citizens and immigrants by officers[7] and news reports document complaints of racial profiling by the sheriff's office.[8] The most tangible effect the program has had is a marked mistrust of police among the Latino community.[9]

In October 2008, two deputy sheriffs in Frederick County detained an El Salvadorian woman on the sole basis that they believed she was undocumented.[10] Roxana Orellana Santos was sitting in a public area on her lunch break when two deputy sheriffs in Frederick County surrounded her and demanded identification. When she tried to go back to work, they arrested her and brought her to the sheriff's office, with no justification except that she was undocumented. The Fourth Circuit found that the 287(g) agreement did not give the two deputies the authority to detain Ms. Santos on the basis of her suspected immigration status, and therefore detaining her on that basis violated her Fourth Amendment rights. Although Frederick County had just started their 287(g) program a few months prior the incident,[11] neither of the two deputy sheriffs who detained her was participating in the program, and therefore had no authority to detain Ms. Santos.

In 2012, Frederick County Sheriff's Office stopped a vehicle for speeding in which a family was traveling to visit a friend in Frederick County. The first officer held a drawn gun toward the driver until another officer arrived. The driver and two adult passengers were pulled from the

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[3] *See* Fact Sheet: Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act, *available at* https://www.ice.gov/factsheets/287g

[4] Statement of Sheriff Charles A. Jenkins, Sheriff, Frederick County, Maryland, before the House Committee on Homeland Security, March 4, 2009.

[5] RANDY CAPPS ET AL., MIGRATION POLICY INSTITUTE, DELEGATION AND DIVERGENCE: A STUDY OF 287(G) STATE AND LOCAL IMMIGRATION ENFORCEMENT 21, 19,24 (2011), *available at* http://www.migrationpolicy.org/pubs/287g-divergence.pdf.

[6] Frederick County Sheriff's Office, Law Enforcement Bureau 2011 Annual Report 17 (2012), available at https://frederickcountymd.gov/documents/16/41/FINAL%202011%20Annual%20Report%206%2020%2012_201207251046271720.pdf . (Note that the FCSO does not keep track of how many individuals were actually convicted of those charges.)

[7] Statement of Antonio Ramirez, Frederick, Maryland Community Advocate, before the Joint Hearing on the Public Safety and Civil Rights Implications of State and Local Enforcement of Federal Immigration Laws, April 2, 2009.

[8] Nicholas C. Stern, *Group to sue Frederick County Sheriff for racial profiling*, Frederick News Post, Nov. 9, 2009, *available at* http://www.fredericknewspost.com/archive/group-to-sue-frederick-county-sheriff-for-racial-profiling/article_0faf5116-e7bc-526d-9159-e90264b05a03.html.

[9] *Delegation and Divergence*, supra, 38-47; *Joint Hearing on the Public Safety and Civil Rights Implications of State and Local Enforcement of Federal Immigration Laws Before the H. Comm. on the Judiciary*, 111th Cong. (April 2, 2009) (statement of Antonio Ramirez, Frederick, Maryland Community Advocate); *see also* Kelsi Loos, , *Frederick County Sheriff's Office promote immigration partnership*, FREDERICK NEWS POST, June 17. 2015 *available at* http://www.fredericknewspost.com/news/crime_and_justice/cops_and_crime/ice-federick-county-sheriff-s-office-promote-immigration-partnership/article_8c88bc4b-a40a-58d0-b77c-b470c92e6d95.html

[10] *Santos v. Frederick Cty. Bd. of Comm'rs*, 725 F.3d 451 (4th Cir. 2013).

[11] *Santos v. Frederick Cty. Bd. of Comm'rs*, 884 F. Supp. 2d 420, 430 (D. Md. 2012) *aff'd in part, vacated in part, remanded*, 725 F.3d 451 (4th Cir. 2013).

vehicle, searched, cuffed and seated on the ground while officers searched the vehicle that contained a 5-year-old child and an infant. The search yielded nothing. The family believes they were racially profiled.

In 2013, a prisoner at the Frederick County Adult Detention Center complained to the ACLU generally about the detention of immigrants there under the 287(g) program; he spoke of friends that were arrested and detained under this policy that had been in detention for about a year and lived in fear of deportation. The prisoner objects to the sheriff's justification for participating in this program and the violation of immigrant detainees' rights.

In 2014, a man suspected by police of drug involvement was stopped by Frederick County officers. He heard the police give a command, but before he was able to respond, an officer threw him to the ground and began to beat him with his fists and knees, causing a fracture below his eye discovered by an x-ray. The man was taken first to central booking before being transported to the hospital for treatment. The reporting officer claimed that the man resisted arrest, but he disputes this.

In 2012, about 104 of the 257 detainers the office issued were against people charged solely with driving without a license (DWL), driving with a suspended license (DWS) and/or driving with a revoked license (DWR). Most of those were simple driving without a license. Another 16 were issued for Failure to Appear (FTA) on an underlying charge of DWL, DWS, or DWR (FTA-DWL, etc.).

Roughly 40 percent of detainers the office issued under the 287(g) program were for driving without a license or with a revoked or suspended license. If we add in the FTA-DWL numbers, that brings the rate closer to 47 percent (46.6). And this doesn't even factor in all the other traffic offenses and other minor charges (false statement, for example, appears repeatedly, as does possession of a false ID, leaving the scene of an accident, etc.).

It appears that in 2013, the pattern in the Sheriff's office did not change. 36 out of 82 (roughly 44%) of individuals processed under the 287(g) program were for DWL (including a few FTA-DWL). However, ICE more frequently either lifted the detainer, granted prosecutorial discretion, or instructed the sheriff's office not to issue a detainer for those cases.

In June 2015, the Sheriff's office stated that of the people they stopped with immigration detainers, 28 were granted prosecutorial discretion, 11 were charged with misdemeanors and only five were charged with felonies.[12]

Frederick County Sheriff Chuck Jenkins is an openly anti-immigrant official. In 2013, two of his deputies killed a young man with Down Syndrome after trying to forcibly remove him from a movie cinema. This came two days after other deputies killed a 19 year old in a home raid.[13]

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[12] Kelsi Loos, *Frederick County Sheriff's Office promote immigration partnership*, FREDERICK NEWS POST, June 17, 2015 *available at* http://www.fredericknewspost.com/news/crime_and_justice/cops_and_crime/ice-federick-county-sheriff-s-office-promote-immigration-partnership/article_8c88bc4b-a40a-58d0-b77c-b470c92e6d95.html.

[13] Michael Rosenwald, *Frederick County Sheriff Chuck Jenkins is loathed and loved after Down syndrome death*, WASHINGTON POST, Aug. 3, 2013, *available at* https://www.washingtonpost.com/local/frederick-county-sheriff-chuck-jenkins-is-loathed-and-loved-after-down-syndrome-death/2013/08/03/8494e170-f54c-11e2-aa2e-4088616498b4_story.html.

Sheriff Jenkins has since made it clear that regardless of ICE's priorities, he wants to "run this [287(g)] program the right way" and arrest individuals regardless of how ICE prioritizes the cases after the sheriff's office hands the case over.[14] "If you're arrested for any crime in my county," Jenkins has said, "we put you in handcuffs and we ask you two simple questions: 'What country were you born in?' and 'What country are you a citizen of?' Everybody is treated the same."[15] After conducting a fact-finding mission to Weslaco, Texas through the Federation for American Immigration Reform, an organization that the Southern Poverty Law Center calls an anti-immigrant hate group, Sheriff Jenkins asserted that the best way to stop the influx of migrants across the border would be through militarization.[16]

Las Vegas Metropolitan Police Department, Clark County, Nevada

On July 14, 2014, then Clark County Sheriff Doug Gillespie announced that Las Vegas Metro would stop detaining individuals solely based on immigration-detainer requests from Immigration and Customs Enforcement.[17] MSNBC called the announcement "a major win for immigration advocates."[18] Advocacy efforts and litigation calling into question the constitutionality of enforcement led to Sheriff Gillespie's decision.[19]

The long and vigorous fight against enforcement of Las Vegas Metro's 287(g) agreement began in 2009. The initial agreement was signed by Sheriff Gillespie on August 13, 2008 and renewed each year of his tenure as sheriff.[20] The ACLU of Nevada and partner agencies received complaints that individuals were questioned about their immigration status regardless of the type of crime committed or their innocence or guilt. Individuals who had not been arrested and booked in the country jail claimed they were questioned about their status, such as witnesses and victims of crime and persons stopped on the street.

The Nevada Immigrant Coalition worked tirelessly to educate law enforcement and the community about the serious concerns raised by 287(g) agreements. Most notably, the coalition argued that the enforcement of immigration laws is the responsibility of the federal government; that there is serious risk to the community as enforcement of the law could have a chilling effect on immigrants who may hesitate to report crimes out of fear that their immigration status will be questioned; and that enforcement may lead to racial profiling or mistaking the identity of individuals with no identification.[21]

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[14] Kelly Riddell, *Maryland Sheriff frustrated illegals he arrested for crimes freed by feds*, WASHINGTON TIMES, Oct. 7, 2014 *available at* http://www.washingtontimes.com/news/2014/oct/7/feds-release-criminal-illegal-immigrants-foil-mary/?page=all.
[15] Tim Henderson, *More cities, counties defying feds on deportation holds*, TUCSON SENTINEL, Nov. 3, 2014, *available at* http://www.tucsonsentinel.com/nationworld/report/110314_deportations/more-cities-counties-defying-feds-deportation-holds/.
[16] Armando Trull, *Frederick Sheriff Chuck Jenkins Calls for Militarization of U.S.-Mexico Border*, WAMU 88.5, July 31, 2014, *available at* http://wamu.org/news/14/07/31/frederick_sheriff_chuck_jenkins_calls_for_militarization_of_us_mexico_border. *See also* Grace Toohey, *Sheriff's trip funded by alleged anti-immigrant hate group*, FREDERICK NEWS POST, July 16, 2014, *available at* http://www.fredericknewspost.com/news/politics_and_government/elections/sheriff-s-trip-funded-by-alleged-anti-immigrant-hate-group/article_a6723cb9-29fe-5481-aff5-28f627c50b0b.html.
[17] Brian Nordli, *Metro won't detain immigrants on ICE requests*, LAS VEGAS SUN, July 14, 2014, *available at* http://lasvegassun.com/news/2014/jul/14/metro-wont-detain-immigrants-ice-requests/.
[18] Amanda Sakuma, *Las Vegas police defy federal immigration policy*, MSNBC, July 14, 2014, *available at* http://www.msnbc.com/msnbc/las-vegas-police-defy-federal-immigration-policies.
[19] Press Release, Clark County Sheriff Places Public Safety Over Politics, Restricts Immigration Holds in County (July 14, 2014), *available at* https://www.nilc.org/2014/07/14/nevada-sheriff-restricts-immigration-holds/
[20] Memorandum of Agreement Between ICE and Las Vegas Metropolitan Police Department, *available at* https://www.ice.gov/doclib/foia/memorandumsofAgreementUnderstanding/287goldlasvegasmpd.pdf.
[21] ACLU of Nevada, Las Vegas Metropolitan Police Department's Plan to Enforce Immigration Laws, http://www.aclunv.org/las-vegas-metropolitan-police-departments-plan-enforce-immigration-laws (last visited Mar. 14, 2016).

Las Vegas Metro approaches immigration enforcement on a case-by-case basis and will only honor ICE detainer requests if there is a judicial determination of probable cause. Like other law enforcement agencies across the nation instituting similar policies, Las Vegas Metro's individualized approach demonstrates that 287(g) agreements are unwanted and unnecessary in their jurisdiction. [22]

Hudson County Department of Corrections, Hudson County, New Jersey

Since signing the initial 287(g) agreement on August 11, 2008, the Hudson County Department of Corrections has faced numerous complaints regarding its treatment of immigrants in detention. Hudson County Correctional Facility (HCCF) has been ranked one of the top ten worst immigration facilities by national groups—the Detention Watch Network (DWN) and the American Immigration Lawyers Association (AILA) documented in their *Expose and Close* report in 2012 that the facility has had "consistent problems with food, medical care, outdoor recreation, treatment by corrections officers and access to lawyers and visitation." [23]

Reports of overuse of solitary confinement frequently arise. New York University School of Law Immigrant Rights Clinic conducted first-hand research and investigation through open record requests to county governments that have immigration detention contracts with the federal government, including Essex, Bergen and Hudson County in New Jersey. NYU and the New Jersey Advocates for Immigrant Detainees produced a report in 2015 compiling findings from Bergen and Hudson.[24] The report includes testimony of an immigrant detainee who experienced solitary confinement and described Hudson County's use of solitary and other treatment of immigrant detainees as extremely disturbing and inhumane. Furthermore, the report says "Beyond the practice of artificially extending the legally permissible length of solitary confinement, it is clear that the facilities are issuing inappropriately lengthy sentences overall. In Hudson County, average sentences for "fighting"—a category which the facility interprets to include even minor physical altercations—run almost 13 days, with certain individuals receiving 20, 25, or 30 day sentences.[25] A detainee who has been in solitary confinement for the past 20 days shared that he doesn't want to be there and was told by jail guards that he needs to be in solitary confinement because other detainees have threatened to hurt him. The detainee doesn't agree and doesn't know why. This is another example of the excessive or arbitrary use of solitary confinement.[26]

Many immigrant detainees' severe medical needs have been neglected at HCCF. Some detainees have come with medical needs and others developed medical needs since incarceration at HCCF, including severe pain from previous surgeries and existing medical conditions, drug dependency, needs for surgeries denied or neglected, released without any needed medications, etc. One detainee who survived cancer had a check-up/follow up in November 2015 but had not received results as of March 11th this year. Approximately 11 complaints regarding severe medical needs

[22] *Melendres v. Arpaio*, 695 F.3d 990 (9th. Cir. 2012).
[23] DETENTION WATCH NETWORK & AMERICAN IMMIGRATION LAWYERS ASSOCIATION, EXPOSE AND CLOSE (Nov. 2012) http://www.detentionwatchnetwork.org/sites/default/files/reports/DWN%20Expose%20and%20Close%20Hudson%20County.pdf.
[24] NEW JERSEY ADVOCATES FOR IMMIGRANT DETAINEES, 23 HOURS IN THE BOX (2015), *available at* http://afsc.org/sites/afsc.civicactions.net/files/documents/23%20Hours%20in%20the%20Box_2.pdf.
[25] Id.
[26] Detainee report to AFSC.

and neglects were received by a detainee visitation program from just January to March 11, 2016.[27]

These types of complaints are a frequent occurrence, recently on March 11, 2016, American Friends Service Committee received a phone call from a detainee at HCCF. The Detainee reported overcrowding and limited outdoor time stating, "there are four people placed in one cell and they are only given two hours of rec time, from noon to 2:00pm and then kept inside for the rest of the day. The detainee also stated the limited availability of food for purchase and no response from the facility on complaints being provided.[28] AFSC staff also heard that recently arrived detainees are being placed in new units that are outside of the main building. Conditions in those units are filthy and extremely questionable.[29] In conclusion, conditions have declined even worse this past 6 months and the existing 287(g) agreement should not be renewed.

Butler County Sheriff's Office, Butler County, Ohio

Multiple reports and complaints of ongoing intimidation of the Butler County immigrant community have arisen since the Butler County Sheriff's Office entered into a 287(g) agreement on February 5, 2008. These reports of intimidation, which began prior to the 287(g) agreement, have occurred outside the Butler County Jail with a sign that points towards the jail stating "Illegal Immigrants Here." Billboards throughout the community put up by Butler County Sheriff Richard K. Jones share similar sentiments.[30] In 2015, Sheriff Jones established a tip line encouraging individuals to report local businesses they suspect employ undocumented immigrants, pledging to have deputies pursue those tips, ignoring the federal nature of such enforcement.[31] Related to this type of action, in 2007, an undocumented immigrant successfully sued Butler County for violating his constitutional rights, settling for $100,000 after a worksite he was employed at was visited by sheriffs and 20 people were detained on suspicion of being undocumented. In furtherance of his efforts, Sheriff Jones, in July 2014, sent a letter to the Mexican government insisting it reimburse Butler County Jail for the costs of detaining and imprisoning undocumented immigrants in the United States. [32]

These dangerous actions by Sheriff Jones have created an atmosphere of fear in the county among the local Hispanic community. The ACLU has heard complaints of racial profiling, and news reports support these complaints.[33]

Butler County Jail has also had multiple suicides[34] and deaths[35] in its facility, and while not involving undocumented immigrants, these deaths raise concerns about the safety of all individuals at Butler County Jail.

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[27] Detainees report to AFSC.
[28] Detainee report to AFSC
[29] Detainee report to AFSC.
[30] Julia Preston, *Sheriff Defies Immigrants by Billboard and by Blog*, N.Y. TIMES, July 31, 2006, *available at* http://www.nytimes.com/2006/07/31/us/31sheriff.html.
[31] *Butler County sheriff wants to know who's employing illegal immigrants*, BUTLER COUNTY JOURNAL-NEWS, Aug. 25, 2015, *available at* http://www.journal-news.com/news/news/butler-county-sheriff-wants-to-know-whos-employing/nnQyW/
[32] Maxim Alter, *Butler County* sheriff sends bill to Mexico over costs to jail undocumented migrants, WCPO CINCINNATI, http://www.wcpo.com/news/local-news/butler-county/butler-county-sheriff-sends-bill-to-mexico-over-costs-to-jail-undocumented-migrants
[33] Jennifer Ludden, *Latinos Rattled by Ohio Sheriff's Mission*, NPR June 19, 2006, *available at* http://www.npr.org/templates/story/story.php?storyId=5478989; *Butler Co. Sheriff accused of targeting illegal immigrants, FOX19NOW*, July 31, 2014, *available at* http://www.fox19.com/story/26165768/butler-co-sheriff-accused-of-targeting-illegal-immigrants.

Carrollton Police Department, Carrollton County, Texas

Carrollton sits in a region that has a history of hostility towards the immigrant community. It shares a school district with neighboring Farmer's Branch, which spent seven years unsuccessfully litigating an ordinance that would have unconstitutionally banned landlords from renting to undocumented tenants.[36] Like Farmer's Branch, Carrollton has a large Hispanic population.[37] Historically, Carrollton's mayor, city council members, and state representative have supported anti-immigrant measures locally and at the state legislature, although few of those measures ultimately passed.[38] The Hispanic community continues to be underrepresented in various aspects of local government, including in the police force – where only 10% of the police force is part of a minority group, in comparison to 56% of the total community.[39]

These realities are especially troubling given that the Carrollton Jail, which is where the 287(g) agreement is implemented, has little oversight. Because it is a municipal facility, it has no reporting requirements to the state.[40] And, because there is no Intergovernmental Service Agreement with ICE, ICE conducts no Jail Agreement Inspection Report.[41]

Harris County Sherriff's Office, Harris County, Texas

Houston has been considered the most diverse metropolitan area in the U.S., while Harris County is the second most diverse county in Texas.[42] Despite the diverse population – 42% Hispanics, 32% whites, 19.5% African Americans[43] – Harris County's criminal justice system is committed

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[34] Tom Beyerlein, *Red flags preceded jail* suicides, DAYTON DAILY NEWS, Feb. 9, 2013, *available at* http://www.daytondailynews.com/news/news/state-regional-govt-politics/red-flags-preceded-jail-suicides/nWKFC/.

[35] Denise G. Callahan, *Butler County sheriff sued over jail death*, BUTLER COUNTY JOURNAL-NEWS, Sept. 22, 2014, *available at* http://www.journal-news.com/news/news/local/butler-county-sheriff-sued-over-jail-death/nhR87/.

[36] Dianne Solis, *Supreme Court refuses Farmers Branch immigration ordinance*, DALL. MORNING NEWS, March 3, 2014. http://www.dallasnews.com/news/community-news/carrollton-farmers-branch/headlines/20140303-supreme-court-refuses-farmers-branch-immigration-ordinance.ece

[37] Census, QuickFacts: Carrollton City, Texas, http://www.census.gov/quickfacts/table/PST045215/4813024 (last visited Mar. 14, 2016) (showing 30% Hispanic population in Carrollton in 2010); Census, QuickFacts: Farmers Branch City, Texas, http://www.census.gov/quickfacts/table/PST045215/4825452,4813024 (last visited Mar. 14, 2016) (showing 45% Hispanic population in Farmers Branch in 2010).

[38] Christy Hoppe, *Hot-button Texas Bills on Airport Patdowns, Immigration Withering*, DALL. MORNING NEWS, June 27, 2011. www.dallasnews.com/news/politics/texas-legislature/headlines/20110627-hot-button-texas-bills-on-airport-pat-downs-immigration-withering-.ece; Elise Hu, *TX House Bills Would Crack Down on Illegal Immigration*, TEX. TRIB., Nov. 9, 2010, www.texastribune.org/2010/11/09/bills-would-crack-down-on-illegal-immigration/; *Carrollton Drops Plans for Immigration Task Force*, NBC DFDW, www.nbcdfw.com/news/local/Carrollton_Drops_Plans_for_Immigration_Task_Force.html; *Carrollton City Council To Appoint Panel on Illegal Immigration*, WFAA, Oct. 16, 2009, http://legacy.wfaa.com/story/news/local/2014/08/06/13426480/; Ralph Blumenthal, *Texas Lawmakers Put New Focus on Illegal Immigration*, N.Y. Times, Nov. 16, 2006, www.nytimes.com/2006/11/16/us/16immig.html.

[39] Mike Maciag, *Where Police Don't Mirror Communities and Why It Matters*, Governing, Aug. 28, 2015.

[40] Brandi Grissom, City Jails Unregulated Despite Deaths, Complaints, TEX. TRIBUNE, Sept. 17, 2010, https://www.texastribune.org/2010/09/17/city-jails-unregulated-despite-deaths-complaints/ ("While county jails answer to the commission and the Texas Department of Criminal Justice is responsible for state prisons, city jails are accountable to no higher authority.")

[41] *E.g.*, IGSA Between ICE Office of Detention and Removal and Pulaski 10, County www.immigrantjustice.org/sites/immigrantjustice.org/files/Tri%20IGSA.pdf.

[42] Michael O. Emerson, Jenifer Bratter, Junia Howell, P. Wilner Jeanty, and Mike Cline, *Houston Region Grows More Racially/Ethnically Diverse, With Small Declines in Segregation*: *A Joint Report Analyzing Census Data from 1990, 2000, and 2010*. http://kinder.rice.edu/uploadedFiles/Urban_Research_Center/Media/Houston%20Region%20Grows%20More%20Ethnically%20Diverse%202-13.pdf.

[43] Census, QuickFacts: Houston, Texas, http://www.census.gov/quickfacts/table/PST045215/4835000,48201, (last visited Mar. 14, 2016).

to policies that target blacks and Hispanics. For example, over-enforcement of low-level drug offenses and immigration enforcement are having a negative impact among those communities.[44]

A new reporting law passed during the last legislative session requires that law-enforcement agencies submit a written report to the Office of the Attorney General on any officer-involved shooting that results in an injury or death. The data from Sept-Dec 2015 show that of the 37% that occurred in the Houston Metro area, 75% of those shot by the Houston Police Department were Black. Going back to 2005, the earliest data available on HPD's website: of roughly 400 people shot at by police since then, just over 50 were white — the rest were almost all Black or Hispanic. Of the 47 people shot at by police in 30 incidents last year, 40 were either Black (26) or Hispanic (14); four were "unknown."[45]

It is more likely that a traffic stop of a Hispanic driver will lead to an arrest. According to the Houston Police Department's annual racial profiling report, in 2015 they stopped 316,507 vehicles and reported that 44.3% of the drivers were white, 33% were Black and 18.1% were Hispanic. Yet almost 20% of the stops that lead to arrest were of Hispanics and 53% of Blacks in comparison to 25% of whites.[46]

The Harris County Jail has a concerning track record for deaths of inmates, substandard conditions, sexual victimization, and excessive use of force. The Department of Justice is investigating the Harris County jail for the second time in six months[47] over an inmate's death. From 2001 to 2006, 101 inmates died there,[48] at least 72 of whom had not been convicted of a crime. From 2007 to today, there have been an additional 106 deaths.[49]

A review of more than 1,000 jail disciplinary reports found guards used excessive force against inmates or abused their authority over 120 times. Harris County jailers were disciplined more than 120 times for misconduct involving abuse of authority or misuse of force, including beating, kicking and choking inmates. At least 15 inmates were handcuffed at the time of the incident. In 84 of those 120 cases, jailers or supervisors failed to file required reports, lied, or falsified documents.[50]

In 2009 the DOJ finalized an investigation in which they found unconstitutional conditions including inadequate medical care, health care, protection from serious physical harm, and

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[44] REBECCA BERNHARDT, JD, TEXAS CRIMINAL JUSTICE COALITION, HARRIS COUNTY COMMUNITIES: A CALL FOR TRUE COLLABORATION RESTORING COMMUNITY TRUST AND IMPROVING PUBLIC SAFETY (2013), *available at* *http://www.texascjc.org/sites/default/files/uploads/Harris%20County%20Communities%20A%20Call%20for%20True%20Collaboration.pdf*.

[45] Meagan Flynn, *HPD's Officer-Involved Shootings Almost Always Involve Men of Color*, HOUSTON PRESS, March 9 2016, *available at* http://www.houstonpress.com/news/hpds-officer-involved-shootings-almost-always-involve-men-of-color-8226103.

[46] http://www.houstontx.gov/police/department_reports/racial_profiling/2015_Annual_Racial_Profiling_Report.pdf

[47] Ted Oberg, *Justice Dept. Probes Harris County Jail Inmate's Death*, ABC 13 EYEWITNESS NEWS, Feb. 11, 2005: http://abc13.com/news/justice-dept-probes-harris-county-jail-inmates-death/513964/

[48] Steve McVicker, *Six years, 101 deaths in Harris County jails*, HOUSTON CHRONICLE, Feb. 18, 2007: http://www.chron.com/news/houston-texas/article/Six-years-101-deaths-in-Harris-County-jails-1545025.php

[49] Ryan Cooper, *How your local jail became hell: an investigation*, THE WEEK, March 25, 2015: http://theweek.com/articles/540725/how-local-jail-became-hell-investigation

[50] James Pinkerton and Anita Hassan, *Jailhouse jeopardy: Guards often brutalize and neglect inmates in Harris County Jail, records show*, HOUSTON CHRONICLE, Oct. 3, 2015: http://www.houstonchronicle.com/news/special-reports/article/Violence-neglect-by-jailers-common-in-county-6548623.php

protection from life safety hazards.[51] A 2012 survey from the Bureau of Justice Statistics found that Harris County Jail was among the top jails for sexual victimization of inmates.[52]

We urge ICE to deny all 287(g) renewals and terminate the program. Immigration enforcement is a federal responsibility and the 287(g) program harms community trust in police and all residents' rights to unbiased law enforcement. The jurisdictions discussed in this letter have records clearly demonstrating that they are unable to avoid racial profiling, discriminatory enforcement, and constitutional violations of excessive force and confinement conditions. It is, moreover, ICE's obligation *before* renewing any agreement to hold and publicize open meetings in the communities that would be affected, to supplement reports such as those detailed here and to ensure that residents in affected communities have an opportunity to weigh in.

Please contact Chris Rickerd, Policy Counsel (202-675-2339 or crickerd@aclu.org), with any questions.

Yours sincerely,

Chris Rickerd
Policy Counsel

[51] DOJ, Special Litigation Section Case Summaries, https://www.justice.gov/crt/special-litigation-section-case-summaries (last visited Mar. 14, 2016).
[52] DOJ BUREAU OF JUSTICE STATISTICS, SEXUAL VICTIMIZATION IN PRISONS AND JAILS REPORTED BY INMATES, 2011-12 (May 2013), *available at* http://jdaihelpdesk.org/condmodgen/Sexual%20Victimization%20in%20Prisons%20%20and%20Jails%20Reported%20by%20Inmates,%20%202011%E2%80%9312%20%28BJS;%205-2013%29.pdf.

High school senior who fled El Salvador as a child accepted to six Ivies

5 days ago • Harry Shukman, News Editor

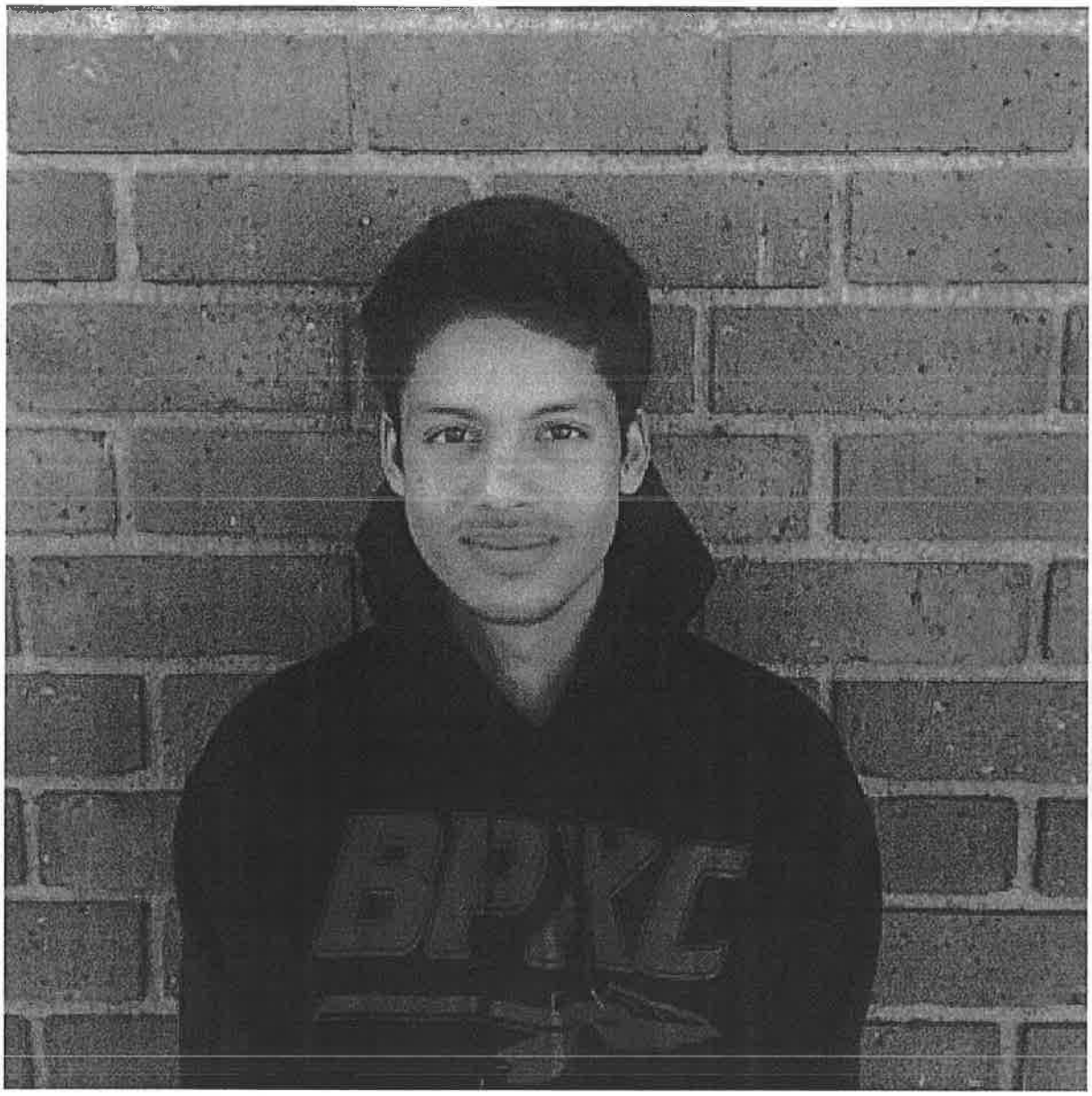
'I was speechless'

Last week, Cesar Arevalo opened his email to find he had been accepted to six Ivy League schools, four UCs, MIT, and Stanford.

The California-based high schooler left El Salvador aged five for the outskirts of LA, and was motivated to do well by his father, who worked in a 99 cent store warehouse, and his mother, who pulled nightshifts in a shirt factory.

Determined to study to escape his circumstances, Cesar explained he was "speechless" when he was first accepted.

He also shared his application essay with us, printed in full below, which detailed "the struggles you have to go through as an immigrant family".



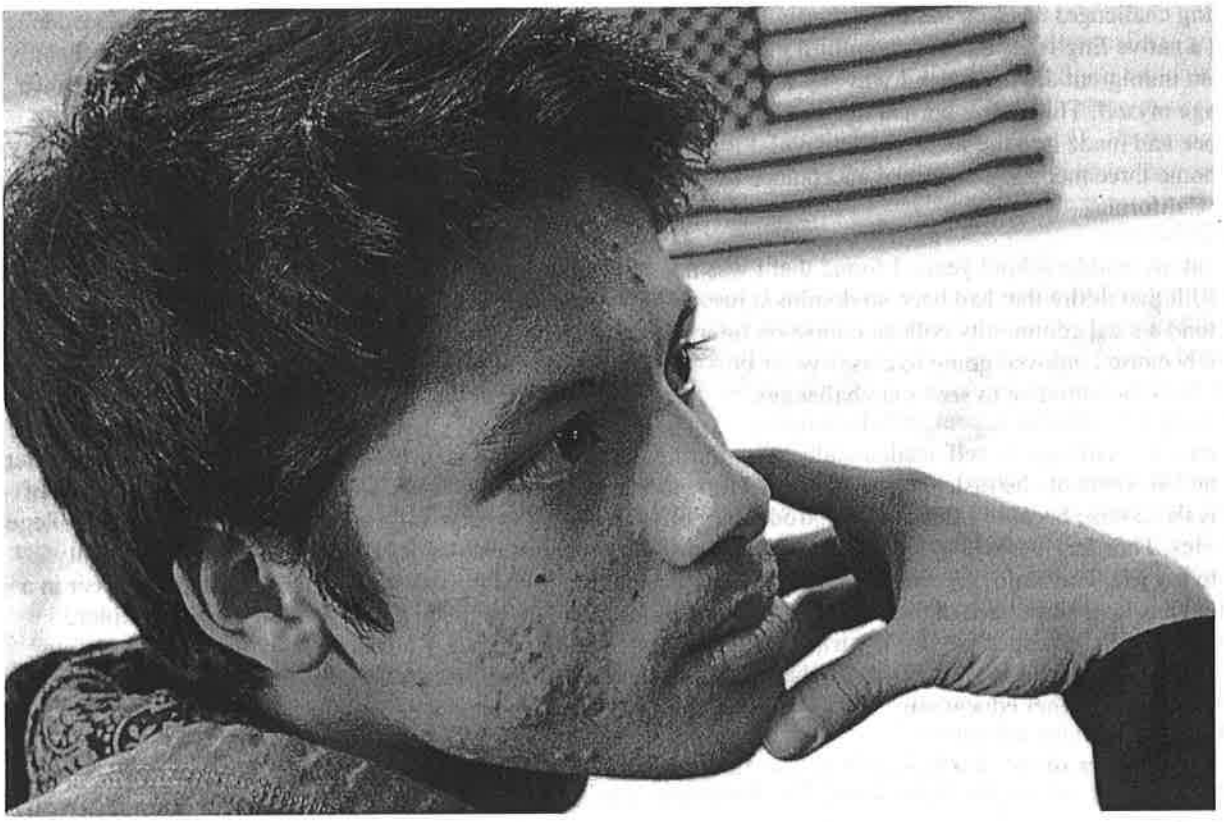
Cesar

How did you react when you heard?

I received early letters for three schools, so it was kinda surprising but not really. I was home alone. I was about to take a nap, and thought 'Oh wait, it's time.' It went pretty well. They email you telling you the response is out, and you check.

It was a phone call for Yale – I was in the middle of a physics lab, and got a phone call from a number that said "New Haven." They asked "Do you have a minute to chat? It's important."

I was speechless. I thought, "Wow, this is actually happening." I walked back in and told my teacher "I think I got accepted into Yale," the teacher said "cool."



Which colleges are you thinking of confirming?

Right now it's a three way race between Stanford, Yale, Harvard. Stanford seems the more convenient option, it's close to home, it's great weather, and the engineering program is top notch. Yale is a different community experience. It's a lot closer, the people there are fascinating. I felt like I belonged there: it was the first school I visited. And Harvard, because it's grand.

Your family must be really proud.

They are really proud. It's interesting cause they had a similar response. They said: "we saw that coming." I was like, "you did?"

Cesar's application essay

As an emigrant from the small and violence-ridden Central American nation of El Salvador, I've been raised with the expectation of succeeding in a land of opportunity. While growing up in the outskirts of Downtown LA in the neighborhood of Boyle Heights, I learned that the only way to escape my condition was to receive an education. The examples set forth by my family laid the foundation for my love of learning and motivated me to pursue a higher education; through my pursuit of a better life I discovered a kindling passion for math and science that has driven me to seek a career as an engineer.

My parents sacrificed their time and energy to provide educational opportunities for me. When I arrived in the United States at the age of five, my father worked at a 99 cent store warehouse and my mother worked the graveyard shift at a shirt factory. Eventually, in search of a career, they began taking classes at a community college. It is my parents and their struggles that showed me the value of an education. My brother and sister have similarly followed this path of learning by excelling in school and gaining acceptance into a top tier university. My parents' focus on education motivated us to do well in school because they knew it was the only way that we could create our own path toward a better life. Thus, I set out on my path to a better life.

Confronting challenges head-on has been my signature attitude since I entered the American school system. Despite not being a native English speaker, I won third place in a schoolwide spelling bee in kindergarten and realized that my status as an immigrant did not mean I was any less capable of competing with those around me. I craved for a chance to challenge myself. This desire burned inside of me throughout my elementary school years I competed in another spelling bee and made it to the local district level, I led a group of my peers in a district wide math competition where we took home three medals, and gained acceptance to a two week residential summer science camp at the University of Southern California.

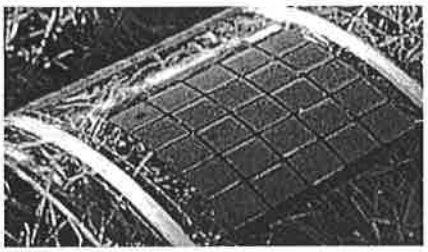
Throughout my middle school years, I found that I was not challenged enough in school; upon realizing this, I sought a way to fulfill that desire that had been so dominant just a few years prior. Soon I found myself taking a 20 minute bus ride to attend a local community college course on Intermediate Algebra. The thought of having to wait for a bus didn't bother me because I enjoyed going to class everyday, I enjoyed the idea of being on my own, and, most importantly, I enjoyed taking the initiative to seek out challenges.

My tendency to challenge myself academically grew during high school as I tackled higher level science classes. After completing two years of chemistry, I realized it was time to tackle and master physics. I petitioned for the creation of an AP Physics course because I felt that an introductory physics course would not be enough to prepare me for college level physics. Thus far, the AP Physics class has been one of my greatest challenges and, despite the stress that it brings into my life, I am enjoying every minute of it. Because of my love for math and science, pursuing a career in a STEM field has long since been at the forefront of my attention. My family has always encouraged me to explore engineering and gladly helped pay for my trip to Stanford for a summer engineering camp despite having to go into debt to do so. I am grateful for the efforts my family has made because they have helped me reach a position where I am able to pursue a higher education.

Cesar created a news site for his high school, The Vanguard, which you can find here.

@hshukman

OTL: Sexting dangers
(espnW)



Your Power Company Will Never Talk To You After You Do This
(Comparisons.org)

11 Puppies Who Take Nap Time to a Whole New Level
(mom.me)

53 mins ago • Aoife O'Connor

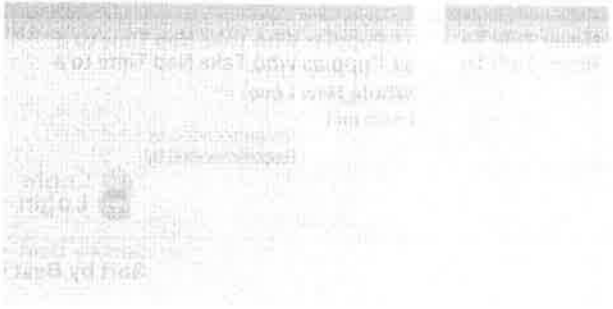
Through Irish eyes: An insight into the abortion debate at UC Berkeley

'It is disheartening to see people at Berkeley fight against what so many women in Ireland are fighting for'

3 days ago • Harry Shukman, News Editor

We met the only Trump supporters at New York's anti-Trump rally

They told us there were too many immigrants in America



4 days ago • Liz Kussman, Assistant Editor

The New York Times article was right – feminists can find an amazing home in sororities

Joining a sorority was my first exposure to the idea that women should go out of their way to lift each other up

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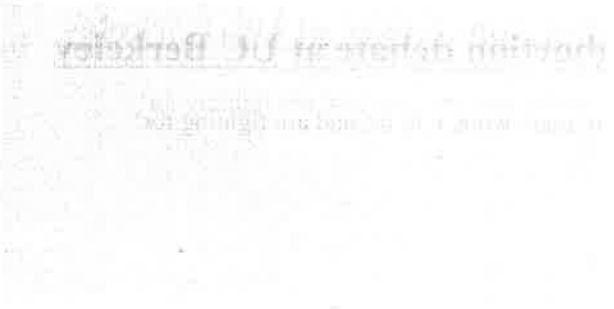

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Joining a sorority was my first exposure to the idea that women should go out of their way to lift each other up

4 days ago • Anna Hopkins

Meet badass ladyboss Ann Friedman of the 'Call Your Girlfriend' podcast

She partners with Aminatou Sow and Gina Delvac in a show for long distance besties

4 days ago • Ayush Choudhary

A letter to Alex Bhak on his birthday

You've changed my life here at Tufts and I am so grateful

5 days ago • Matt Gibson

Trump campaign manager to be cleared on battery charges

The official decision will be announced tomorrow

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 12-1980

ROXANA ORELLANA SANTOS,

Plaintiff – Appellant,

v.

FREDERICK COUNTY BOARD OF COMMISSIONERS; CHARLES JENKINS, Frederick County Sheriff, in his official and individual capacity; JEFFREY OPENSHAW, Frederick County Deputy Sheriff, in his official and individual capacity; KEVIN LYNCH, Frederick County Deputy Sheriff, in his official and individual capacity,

Defendants – Appellees,

and

JULIE L. MEYERS, former Assistant Secretary for Homeland Security of Immigration and Customs Enforcement, in her official and individual capacity; CALVIN MCCORMICK, Field Office Director of the ICE Office of Detention and Removal, in his official and individual capacity; JAMES A. DINKINS, Special Agent in Charge of the ICE Office of Investigations, Baltimore, MD, in his official and individual capacity,

Defendants.

IMMIGRATION REFORM LAW INSTITUTE,

Amicus Supporting Appellees.

Appeal from the United States District Court for the District of Maryland, at Baltimore. Benson Everett Legg, Senior District Judge. (1:09-cv-02978-BEL)

Argued: May 15, 2013 Decided: August 7, 2013

Before DAVIS and WYNN, Circuit Judges, and James R. SPENCER, United States District Judge for the Eastern District of Virginia, sitting by designation.

Affirmed in part, vacated in part, and remanded by published opinion. Judge Wynn wrote the opinion, in which Judge Davis and Judge Spencer concurred.

ARGUED: John Carney Hayes, Jr., NIXON PEABODY, LLP, Washington, D.C., for Appellant. Sandra Diana Lee, KARPINSKI, COLARESI & KARP, P.A., Baltimore, Maryland, for Appellees. **ON BRIEF:** Daniel Karp, KARPINSKI, COLARESI & KARP, Baltimore, Maryland, for Appellees. Michael M. Hethmon, Garrett R. Roe, IMMIGRATION REFORM LAW INSTITUTE, Washington, D.C., for Amicus Supporting Appellees.

WYNN, Circuit Judge:

Plaintiff Roxana Orellana Santos appeals the dismissal of her 42 U.S.C. § 1983 action against the Frederick County (Maryland) Board of Commissioners, the Frederick County Sheriff, and two deputy sheriffs. Santos alleged that the deputies violated her Fourth Amendment rights when, after questioning her outside of her workplace, they arrested her on an outstanding civil warrant for removal issued by Immigration and Customs Enforcement ("ICE"). The U.S. District Court for the District of Maryland granted summary judgment to all defendants, concluding that Santos's initial questioning by the deputies did not implicate the Fourth Amendment and that the civil immigration warrant justified Santos's subsequent stop and arrest.

We agree with the district court that the deputies did not seize Santos until one of the two deputies gestured for her to remain seated while they verified that the immigration warrant was active. But the civil immigration warrant did not provide the deputies with a basis to arrest or even briefly detain Santos. Nonetheless, we conclude that the individual defendants are immune from suit because at the time of the encounter neither the Supreme Court nor this Court had clearly established that local and state law enforcement officers may not detain or arrest an individual based on a civil immigration warrant.

Qualified immunity does not extend, however, to municipal defendants. We therefore affirm the district court's award of summary judgment to the deputies and the Sheriff and vacate the district court's dismissal of Santos's action against the municipal defendants.

I.

A.

A native of El Salvador, Santos moved to the United States in 2006. On an October morning in 2008, Santos sat on a curb behind the Common Market food co-op in Frederick, Maryland, where she worked as a dishwasher. Santos ate a sandwich while waiting for her shift to begin. From the curb, Santos faced a grassy area and pond that ran along the rear of the shopping complex in which the co-op was located. A large metal shipping container stood between her and the shopping complex. As Santos ate, she saw a Frederick County Sheriff's Office (the "Sheriff's Office") patrol car slowly approach her from her left. She remained seated, in full view of the patrol car, and continued eating her sandwich.

Deputy Sheriffs Jeffrey Openshaw and Kevin Lynch were in the car conducting a routine patrol of the area. Although the Sheriff's Office had reached an agreement with ICE under 9 U.S.C. § 1357(g) authorizing certain deputies to assist ICE in

immigration enforcement efforts, neither Openshaw nor Lynch was trained or authorized to participate in immigration enforcement.

The deputies parked the patrol car on the side of the shipping container opposite Santos. Openshaw and Lynch stepped out of the patrol car and walked toward Santos, going around opposite sides of the shipping container to reach her. Both deputies wore standard uniforms and carried guns.

Openshaw stopped about six feet away from her and asked her if she spoke English, to which she responded, "No." J.A. 095, 398-99. Lynch stood closer to the patrol car. It was immediately apparent to Openshaw that Santos, a native Spanish speaker, had difficulty communicating in English. Openshaw asked Santos in English whether she was on break, and she replied that she was. He then asked her if she worked at the Common Market, and she said she did. Again in English, Openshaw asked her whether she had identification, and she responded in Spanish that she did not.

At this point, Openshaw stepped away from Santos to speak privately with Lynch near the patrol car. Santos remained seated. After a few minutes, Santos recalled that she had her El Salvadoran national identification card in her purse. Still sitting, she showed the card to the deputies. Openshaw took the card and asked her whether the name on the ID was hers. She told him it was, and he walked back to the car to speak with

Lynch. Santos estimated that by this time at least fifteen minutes had passed since the deputies first approached her. As the deputies stood together talking, Santos saw Openshaw use his radio.

The deputies said that once they received Santos's identification information, they relayed it to radio dispatch to run a warrant check on Santos. After completing the warrant check, dispatch informed the deputies that Santos had an outstanding ICE warrant for "immediate deportation." J.A. 188. Following standard procedure, Openshaw asked dispatch to verify that the ICE warrant was active. Although he did not know what dispatch did in this particular case, Openshaw testified that dispatch typically contacts ICE when verifying an immigration warrant. Openshaw also said that at this point he considered Santos to be under arrest, though he had not yet handcuffed her.

After dispatch had initially notified the deputies of the ICE warrant but before dispatch had determined whether the warrant was active, Santos asked the deputies if there was any problem. Openshaw replied, "No, no, no," and held out his hand, gesturing for her to remain seated. J.A. 136.

About twenty minutes after she handed the deputies her national ID card, Santos decided to head into the food co-op to start her shift. When she attempted to stand, the deputies, who just had been informed by dispatch that the warrant was active,

grabbed her by the shoulders and handcuffed her. Until this point, neither deputy had had any physical contact with her.

The deputies placed Santos in the patrol car, transported her to patrol headquarters, and then transferred her to a Maryland detention center. Approximately forty-five minutes after Santos's arrest, ICE Senior Special Agent S. Letares requested that the detention center hold Santos on ICE's behalf. ICE initially held Santos in two Maryland facilities and then transferred her to a jail in Cambridge, Massachusetts, where she stayed until her supervised release on November 13, 2008. Santos v. Frederick Cnty. Bd. of Comm'rs, 884 F. Supp. 2d 420, 425 (D. Md. 2012).

B.

In November 2009, Santos filed a Section 1983 complaint against Openshaw and Lynch, Frederick County Sheriff Charles Jenkins, the Frederick County Board of Commissioners, and several individuals from ICE and the Department of Homeland Security. The complaint alleged that the deputies violated her Fourth Amendment rights when they seized and later arrested her. The complaint also alleged that the deputies violated her rights under the Equal Protection Clause of the Fourteenth Amendment because the deputies "approached . . . and interrogated her

based solely on her perceived race, ethnicity and/or national origin." J.A. 102.

All defendants moved to dismiss Santos's initial complaint under Rule 12(b)(6). The district court dismissed without prejudice the Section 1983 claims against the deputies on grounds that the complaint alleged that the deputies were acting under the color of federal law and thus the action should have been brought under Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971).[1] Santos v. Frederick Cnty. Bd. of Comm'rs, No: L-09-2978, 2010 WL 3385463, at *3 (D. Md. Aug. 25, 2010). The district court also bifurcated her supervisory liability claims against Sheriff Jenkins and the Board of Commissioners, and stayed those claims pending resolution of Santos's claims against the deputies. Id. at *4.

Santos filed a second amended complaint against the same defendants, asserting essentially the same claims as in the previously dismissed complaint. And she did not recharacterize her claims against the municipal defendants as Bivens claims.

After discovery, the deputies moved for summary judgment. The district court granted the deputies' motion, concluding that there was no dispute of fact regarding whether the deputies

[1] Bivens established a private right of action to remedy constitutional injuries attributable to individuals acting under the color of federal law. 403 U.S. at 397.

violated Santos's Fourth Amendment rights. Santos, 884 F. Supp. 2d at 428-29. In particular, the district court held that Santos was not "seized" for purposes of the Fourth Amendment until Openshaw gestured for her to remain seated, and that, at that time, the civil ICE warrant provided the deputies with adequate justification for the seizure. Id. The district court further concluded that Santos's Equal Protection claim failed as a matter of law, holding that law enforcement officers do not violate the Equal Protection Clause if they initiate consensual encounters solely on the basis of racial considerations.[2] Id. at 429-30. Having concluded that the deputies did not violate Santos's constitutional rights, the district court also dismissed Santos's claims against Sheriff Jenkins and the Frederick County Board of Commissioners. Id. at 432.

[2] Santos did not appeal the district court's Equal Protection decision, and it is therefore not before us. Nevertheless, we note that while this Circuit has not yet addressed the issue, see United States v. Henderson, 85 F.3d 617, 1996 WL 251370, at *2 (4th Cir. 1996) (unpublished table decision) (declining to decide "whether selecting persons for consensual interviews based solely on race raises equal protection concerns"), two other Circuit Courts have indicated that consensual encounters initiated solely based on race may violate the Equal Protection Clause, United States v. Avery, 137 F.3d 343, 353 (6th Cir. 1997) ("[C]onsensual encounters may violate the Equal Protection Clause when initiated solely based on racial considerations."); United States v. Manuel, 992 F.2d 272, 275 (10th Cir. 1993) ("[S]electing persons for consensual interviews based solely on race is deserving of strict scrutiny and raises serious equal protection concerns.").

Santos moved for reconsideration under Federal Rule of Civil Procedure 59(e), highlighting a number of federal court decisions authored after the district court's summary judgment hearing holding that state and local governments lack inherent authority to enforce civil federal immigration law. The district court denied Santos's motion, holding that even if the other federal court decisions and the Supreme Court's landmark immigration decision in Arizona v. United States, 132 S. Ct. 2492, 2507 (2012), suggested an "emerging consensus" that local officers may not enforce civil immigration law, the deputies were still entitled to qualified immunity for their conduct. J.A. 624. Santos timely appealed.

II.

The Fourth Amendment secures an individual's right to be free from "unreasonable searches and seizures." U.S. Const. amend. IV. In determining whether a law enforcement officer unconstitutionally seized an individual, we engage in a multi-step inquiry. Because "not every encounter between a police officer and a citizen is an intrusion requiring an objective justification," United States v. Mendenhall, 446 U.S. 544, 553 (1980) (opinion of Stewart, J.), we first must decide if and when the individual was "seized" for purposes of the Fourth Amendment, United States v. Wilson, 953 F.2d 116, 120 (4th Cir.

1991). If we conclude the individual was "seized," we then determine whether the law enforcement officer had adequate justification to support the seizure. Terry v. Ohio, 392 U.S. 1, 20-22 (1968). Finally, in Section 1983 cases, even if a seizure runs afoul of the Fourth Amendment, a plaintiff may not be able to obtain relief if the defendant is entitled to qualified immunity. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

Santos raises objections to the district court's rulings on each of these three issues. In particular, Santos argues that the district court (1) improperly determined that she was not "seized" when the deputies initially approached and questioned her; (2) incorrectly held that the deputies did not violate her Fourth Amendment rights when they detained and later arrested her based on the civil ICE warrant; and (3) erred in holding that, even if the deputies had violated Santos's constitutional rights, they were entitled to qualified immunity for their actions. We address these arguments in turn, reviewing each de novo and viewing facts and all reasonable inferences in the light most favorable to the nonmoving party. Rosetta Stone Ltd. v. Google, Inc., 676 F.3d 144, 150 (4th Cir. 2012); Pritchett v. Alford, 973 F.3d 307, 313 (4th Cir. 1992).

III.

A.

Regarding the threshold question of whether the encounter constituted a Fourth Amendment seizure, the Supreme Court has identified three categories of police-citizen encounters. United States v. Weaver, 282 F.3d 302, 309 (4th Cir. 2002). Each category represents differing degrees of restraint and, accordingly, requires differing levels of justification. See id. First, "consensual" encounters, the least intrusive type of police-citizen interaction, do not constitute seizures and, therefore, do not implicate Fourth Amendment protections. Florida v. Bostick, 501 U.S. 429, 434 (1991). Second, brief investigative detentions-commonly referred to as "Terry stops"-require reasonable, articulable suspicion of criminal activity. Terry, 392 U.S. at 21. Finally, arrests, the most intrusive type of police-citizen encounter, must be supported by probable cause. Devenpeck v. Alford, 53 U.S. 146, 152 (2006).

A police-citizen encounter rises to the level of a Fourth Amendment seizure when "the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen . . . ." United States v. Jones, 678 F.3d 293, 299 (4th Cir. 2012) (quoting Terry, 392 U.S. at 19 n.16). This inquiry is objective, Weaver, 282 F.3d at 309, asking whether "'in view of all of the circumstances surrounding the incident,

a reasonable person would have believed that he was not free to leave.'" Jones, 678 F.3d at 299 (quoting Mendenhall, 446 U.S. at 553). An encounter generally remains consensual when, for example, police officers engage an individual in routine questioning in a public place. United States v. Gray, 883 F.2d 320, 323 (1989); see also Bostick, 501 U.S. at 434 ("[M]ere police questioning does not constitute a seizure.").

We have identified a number of non-exclusive factors to consider in determining whether a police-citizen encounter constitutes a seizure:

> the number of police officers present during the encounter, whether they were in uniform or displayed their weapons, whether they touched the defendant, whether they attempted to block his departure or restrain his movement, whether the officers' questioning was non-threatening, and whether they treated the defendant as though they suspected him of "illegal activity rather than treating the encounter as 'routine' in nature."

Jones, 678 F.3d at 299-300 (quoting Gray, 883 F.2d at 322-23). We also consider "the time, place, and purpose" of an encounter. Weaver, 282 F.3d at 310.

Although the inquiry is objective—and thus the subjective feelings of the law enforcement officers and the subject are irrelevant—we also consider certain individual factors that "might have, under the circumstances, overcome that individual's freedom to walk away." Gray, 883 F.2d at 323. For example, in Gray, this Circuit indicated that an individual's lack of

familiarity with English may be a relevant consideration. Id. Nevertheless, "no one factor is dispositive;" rather, we determine whether an encounter is consensual by considering the totality of the circumstances. Weaver, 282 F.3d at 310.

B.

Here, Santos argues that she was "seized" for purposes of the Fourth Amendment when the deputies "surrounded her and began questioning her." Appellant's Br. at 20. In particular, Santos emphasizes, among other factors, that the deputies approached her from opposite sides of the shipping container, that she was questioned by more than one officer, that the deputies wore uniforms and carried guns, and that she was unfamiliar with English. By contrast, the defendants contend that the deputies' interaction with Santos remained consensual until after the deputies had been informed of the outstanding warrant.

The district court decided that Santos was not seized when the deputies initially approached her. Santos, 884 F. Supp. 2d at 428. In light of precedent and the totality of the circumstances before us, we must agree.

The deputies approached Santos during the daytime and in a public area where employees would "frequently" take breaks or eat lunch. J.A. 431; see Weaver, 282 F.3d at 312 (finding

encounter occurring in "public parking lot in the middle of the day" was consensual); Gray, 883 F.3d at 323-24 (holding that "public setting" diminished coerciveness of police-citizen encounter). They came across Santos as part of a routine patrol, rather than singling her out for investigation. Jones, 678 F.3d at 301 (holding that "routine" encounters are more likely to be consensual than "targeted" encounters). The deputies stood well away from Santos-Deputy Openshaw stood approximately six feet from her, and Deputy Lynch was even farther way, standing near the patrol car-giving her ample space to leave had she elected to do so.

No evidence suggests that the deputies used a commanding or threatening tone in questioning Santos. And the types of questions the deputies posed-asking her for identification, whether she was an employee of the co-op, and whether she was on break-are the types of questions law enforcement officers generally may ask without transforming a consensual encounter into a Fourth Amendment seizure. See United States v. Drayton, 536 U.S. 194, 201 (2002) ("Even when law enforcement officers have no basis for suspecting a particular individual, they may pose questions [and] ask for identification . . . ."). Finally, the deputies did not touch Santos until they placed her under arrest.

Additionally, none of the factors Santos highlighted sufficiently call into question our conclusion that the encounter was consensual at inception. Although two deputies were present, only Openshaw approached and questioned Santos. See United States v. Thompson, 546 F.3d 1223, 1227 (10th Cir. 2008) (holding that encounter was consensual when there were multiple officers present but only one officer approached the individual). Moreover, absent other indicia that an encounter is nonconsensual, the presence of two officers is generally insufficient. Mendenhall, 446 U.S. at 555 (holding that police-citizen encounter was consensual when two officers questioned the individual); Gray, 883 F.2d at 323 (same). And even though the deputies approached her from opposite sides of the shipping container, they stood well back from her, leaving her room to walk away.

Santos also notes that the deputies were wearing standard uniforms and carrying guns. But the deputies never brandished their weapons, and, in some cases, uniforms serve as a "cause for assurance, not discomfort." Drayton, 536 U.S. at 204-05 (noting that "[t]he presence of a holstered firearm . . . is unlikely to contribute to the coerciveness of [an] encounter absent active brandishing of the weapon"). Finally, although the language barrier may have added to the coerciveness of the situation, because no one factor is dispositive, the language

barrier, on its own, is insufficient to turn the otherwise consensual encounter into a seizure. See Weaver, 282 F.3d at 310.

C.

Even though the encounter initially did not implicate the Fourth Amendment, "[s]ome contacts that start out as constitutional may . . . at some unspecified point, cross the line and become an unconstitutional seizure." Id. at 309. Like the district court, we conclude that the consensual encounter became a Fourth Amendment seizure when Openshaw gestured for Santos to remain seated. Santos, 884 F. Supp. 2d at 428.

Openshaw's gesture "unambiguous[ly]" directed Santos to remain seated. See Brendlin v. California, 551 U.S. 249, 255 (2007) (stating that a seizure occurs "[w]hen the actions of the police . . . show an unambiguous intent to restrain"). As the district court correctly explained, "[u]nder the circumstances, Openshaw's gesture would have communicated to a reasonable person that she was not at liberty to rise and leave." Santos, 884 F. Supp. 2d at 428. Indeed, Santos understood as much, remaining seated after Openshaw's gesture. See United States v. Jones, 562 F.3d 768, 774 (6th Cir. 2009) (holding that individuals were seized for purposes of the Fourth Amendment

when they "passively acquiesced" in response to officer's show of authority).

IV.

Having concluded that Santos was seized when Openshaw gestured for her to remain seated, we now must determine whether the deputies violated her constitutional rights when they detained and subsequently arrested her on the civil ICE warrant. Santos argues that her seizure and arrest violated the Fourth Amendment because neither of the deputies was certified or authorized to engage in enforcement of federal civil immigration law.

A.

Before addressing the merits of Santos's constitutional claims, we first must determine whether this question is properly before us on appeal. The defendants contend that Santos abandoned any claim that the deputies' actions constituted the unauthorized enforcement of federal civil immigration law, or, in the alternative, that Santos waived such argument during oral argument on the summary judgment motion. Both arguments are without merit.

First, the defendants argue that Santos abandoned any claim that the deputies had no authority to enforce federal civil

immigration law by failing to restyle her action as a Bivens claim after the district court dismissed her initial complaint for failure to state a claim. In the Rule 12(b)(6) dismissal, the district court held that the initial complaint was improperly styled as a Section 1983 action because 8 U.S.C. § 1357(g)(8) provides that a local law enforcement officer "acting under . . . any agreement [with ICE under Section 1357(g)] shall be considered to be acting under color of federal authority for purposes of determining liability . . . in a civil action." J.A. 81. Yet it is undisputed that the deputies were not participating in the Sheriff's Office's Section 1357(g) program with ICE. And Santos avers that they were not acting under color of federal authority. See, e.g., J.A. 101 ("Defendants Openshaw and Lynch detained [and] arrested Ms. Orellana Santos without the legal authority to do so . . . ."). Accordingly, Santos properly refiled her complaint as a Section 1983 action.

Further, the defendants contend that Santos waived any argument that the deputies lacked authority to make an arrest based on a civil ICE warrant when, during oral argument on the summary judgment motion, her counsel said that "we certainly don't dispute the fact that once . . . the deputies are aware that there is an active warrant, they have probable cause." J.A. 503. But it is not clear from the transcript whether the reference to "active warrant" refers to a civil warrant or a

criminal warrant. And earlier during oral argument, Santos's counsel said that local police lack authority to enforce federal immigration laws. Moreover, Santos's summary judgment brief unambiguously argued that the deputies lacked authority to enforce civil federal immigration law. The defendants cite no authority, nor can we find any, holding that an ambiguous statement made during oral argument waives an argument clearly raised in a brief.

B.

Having concluded that the issue is properly before us, we now address the merits of Santos's claim that the deputies violated her Fourth Amendment rights by seizing and arresting her based on the civil ICE removal warrant. Because the Constitution grants Congress plenary authority over immigration, Johnson v. Whitehead, 647 F.3d 120, 126-27 (4th Cir. 2011), state and local law enforcement officers may participate in the enforcement of federal immigration laws only in "specific, limited circumstances" authorized by Congress, Arizona v. United States, 132 S. Ct. at 2507.

Local law enforcement officers may assist in federal immigration enforcement efforts under 8 U.S.C. § 1357(g)(1), which authorizes the Attorney General to enter into agreements with local law enforcement agencies that allow specific local

officers to perform the functions of federal immigration officers. Arizona v. United States, 132 S. Ct. at 2506. Even in the absence of a written agreement, local law enforcement agencies may "cooperate with the Attorney General in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States." § 1357(g)(10)(B). When enforcing federal immigration law pursuant to Section 1357(g), local law enforcement officers are "subject to the direction and supervision of the Attorney General." § 1357(g)(3).

Other statutory provisions authorize local law enforcement officers to engage in immigration enforcement in more circumscribed situations. See, e.g., § 1103(a)(10) (allowing the Attorney General to authorize local law enforcement officers to assist in immigration enforcement in the event of an "actual or imminent mass influx of aliens arriving off the coast of the United States"); § 1252c(a) (authorizing local law enforcement officers to arrest illegally present aliens who have "previously been convicted of a felony in the United States and deported or left the United States after such conviction"); § 1324(c) (allowing local law enforcement officers to arrest individuals for bringing in and harboring certain aliens).

Although not clearly addressed by federal statute, state and local law enforcement officers also may be able to

investigate, detain, and arrest individuals for criminal violations of federal immigration law. In particular, before Arizona v. United States, some Circuits held that neither the Fourth Amendment nor federal immigration law precludes state and local enforcement of federal criminal immigration law. See, e.g., United States v. Vasquez-Alvarez, 176 F.3d 1294, 1296 (10th Cir. 1999). And we have indicated that local law enforcement officials may detain or arrest an individual for criminal violations of federal immigration law without running afoul of the Fourth Amendment, so long as the seizure is supported by reasonable suspicion or probable cause and is authorized by state law. United States v. Guijon-Ortiz, 660 F.3d 757, 764 & 764 n.3 (4th Cir. 2011). But we have not had occasion to address whether federal immigration law preempts state and local officers from enforcing federal criminal immigration laws. And the Supreme Court has expressly left that question open. Arizona v. United States, 132 S. Ct. at 2509.

Although the Supreme Court has not resolved whether local police officers may detain or arrest an individual for suspected criminal immigration violations, the Court has said that local officers generally lack authority to arrest individuals suspected of civil immigration violations. Noting that "[a]s a general rule, it is not a crime for a removable alien to remain present in the United States," the Supreme Court concluded that

"[i]f the police stop someone based on nothing more than possible removability, the usual predicate for arrest is absent." Id. at 2505. Relying on this rule, the Supreme Court held unconstitutional a provision in an Arizona statute that authorized a state officer to "'without a warrant . . . arrest a person if the officer has probable cause to believe . . . [the person] has committed any public offense that makes [him] removable from the United States.'" Id. (quoting Ariz. Rev. Stat. Ann. § 13-3883(A)(5)).

Lower federal courts have universally-and we think correctly-interpreted Arizona v. United States as precluding local law enforcement officers from arresting individuals solely based on known or suspected civil immigration violations. See Melendres v. Arpaio, 695 F.3d 990, 1001 (9th Cir. 2012); Melendres v. Arpaio, No. PHX-CV-07-02513-GMS, 2013 WL 2297173, at *60-63 (D. Ariz. May 24, 2013); Buquer v. City of Indianapolis, No. 1:11-cv-00708-SEB-MJD, 2013 WL 1332158, at *10-11 (S.D. Ind. Mar. 28, 2013).

The rationale for this rule is straightforward. A law enforcement officer may arrest a suspect only if the officer has "'probable cause' to believe that the suspect is involved in criminal activity." Brown v. Texas, 443 U.S. 47, 51 (1979). Because civil immigration violations do not constitute crimes, suspicion or knowledge that an individual has committed a civil

immigration violation, by itself, does not give a law enforcement officer probable cause to believe that the individual is engaged in criminal activity. Melendres, 695 F.3d at 1000-01. Additionally, allowing local law enforcement officers to arrest individuals for civil immigration violations would infringe on the substantial discretion Congress entrusted to the Attorney General in making removability decisions, which often require the weighing of complex diplomatic, political, and economic considerations. See Arizona v. United States, 132 S. Ct. at 2506-07.

Although Arizona v. United States did not resolve whether knowledge or suspicion of a civil immigration violation is an adequate basis to conduct a brief investigatory stop, the decision noted that "[d]etaining individuals solely to verify their immigration status would raise constitutional concerns." Id. at 2509. Nonetheless, the Court's logic regarding arrests readily extends to brief investigatory detentions. In particular, to justify an investigatory detention, a law enforcement officer must have reasonable, articulable suspicion that "criminal activity may be afoot." Terry, 392 U.S. at 30. And because civil immigration violations are not criminal offenses, suspicion or knowledge that an individual has committed a civil immigration violation "alone does not give

rise to an inference that criminal activity is 'afoot.'" Melendres, 695 F.3d at 1001.

Therefore, we hold that, absent express direction or authorization by federal statute or federal officials, state and local law enforcement officers may not detain or arrest an individual solely based on known or suspected civil violations of federal immigration law.

Like the district court, we conclude that the deputies seized Santos for purposes of the Fourth Amendment when Deputy Openshaw gestured for her to stay seated after dispatch informed him of the outstanding civil ICE deportation warrant. See supra Part III.C. At that time, the deputies' only basis for detaining Santos was the civil ICE warrant. Yet as the defendants concede, the deputies were not authorized to engage in immigration law enforcement under the Sheriff's Office's Section 1357(g)(1) agreement with the Attorney General. They thus lacked authority to enforce civil immigration law and violated Santos's rights under the Fourth Amendment when they seized her solely on the basis of the outstanding civil ICE warrant.

C.

We find unpersuasive the defendants' arguments that the deputies lawfully detained and arrested Santos. First, the

defendants contend that the deputies properly seized Santos pursuant to Section 1357(g)(10), which, as previously explained, allows state law enforcement officers to "cooperate" with the federal government in immigration enforcement, even when officers are not expressly authorized to do so under a Section 1357(g)(1) agreement. In Arizona v. United States, the Supreme Court concluded that "no coherent understanding of ['cooperate' in Section 1357(g)(10)] would incorporate the unilateral decision of state officers to arrest an alien for being removable absent any request, approval, or other instruction from the Federal Government." 132 S. Ct. at 2507. Thus, Arizona v. United States makes clear that under Section 1357(g)(10) local law enforcement officers cannot arrest aliens for civil immigration violations absent, at a minimum, direction or authorization by federal officials.

The defendants assert that Santos's detention and arrest was lawful under Section 1357(g)(10) because "there is no dispute that ICE . . . directed the Deputies to detain Santos and to transfer her to the ICE detention facility . . . ." Appellee's Br. at 48. Although there may be no dispute as to whether ICE directed the deputies to detain Santos at some point, the key issue for our purposes is when ICE directed the deputies to detain her. We conclude that the deputies seized Santos when Deputy Openshaw told her to remain seated-after they

had learned of the outstanding ICE warrant but before dispatch confirmed with ICE that the warrant was active. See supra Part III.C. Indeed, ICE's request that Santos be detained on ICE's behalf came fully forty-five minutes after Santos had already been arrested. Therefore, it is undisputed that the deputies' initial seizure of Santos was not directed or authorized by ICE.

And the ICE detainer does not cleanse the unlawful seizure, because "[t]he reasonableness of an official invasion of [a] citizen's privacy must be appraised on the basis of the facts as they existed at the time that invasion occurred." United States v. Jacobsen, 466 U.S. 109, 115 (1984); see also Beck v. Ohio, 379 U.S. 89, 91 (1964) ("Whether [an] arrest was constitutionally valid depends in turn upon whether, at the moment the arrest was made, the officers had probable cause to make it-whether at that moment the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense." (emphasis added)).

The defendants also suggest that in Guijon-Ortiz and United States v. Soriano-Jarquin, 492 F.3d 495 (4th Cir. 2007), this Court established that evidence of "unlawful[] presen[ce]" constitutes reasonable suspicion to detain an individual pending transport to ICE. Appellee's Br. at 40. The defendants'

reliance on Guijon-Ortiz and Soriano-Jarquin, both of which were decided before Arizona v. United States, is misplaced.

The defendants correctly note that in Guijon-Ortiz we said that a county sheriff's deputy had reasonable suspicion to arrest the defendant for "unlawful . . . presence in the country" when, during the course of a lawful traffic stop, the deputy learned that the defendant had presented him with a fraudulent green card. 660 F.3d at 765. Guijon-Ortiz is inapposite because the deputy had reasonable suspicion that the defendant violated a criminal provision of federal immigration law-knowingly using a false or fraudulent immigration identification card in violation of 18 U.S.C. § 1546(a), id. at 763 n.3-not a civil provision, as was the case here. Further, in Guijon-Ortiz the deputy detained and transported the defendant only after being expressly directed to do so by ICE, id. at 760, which, as previously explained, was not the case here.

In Soriano-Jarquin, we considered whether a state police officer violated the Fourth Amendment when, during a lawful traffic stop, the officer asked passengers in a van for identification. 492 F.3d at 496. After being advised by the driver of the van that the passengers were illegal aliens and while diligently pursuing the independent basis for the traffic stop, the officer contacted ICE, which directed him to detain

the van pending arrival of ICE agents. Id. at 496-97. Therefore, like Guijon-Ortiz, Soriano-Jarquin is readily distinguishable because the police officer detained the passengers at ICE's express direction.

Third, the defendants assert that the deputies lawfully detained Santos because there is no evidence in the record that the ICE warrant was civil rather than criminal. But the deputies testified that the warrant was for "deportation." And the Supreme Court has long characterized deportation as a civil proceeding. See, e.g., Padilla v. Kentucky, 130 S. Ct. 1473, 1481 (2010);[3] United States ex rel. Bilokumsky v. Tod, 263 U.S. 149, 155 (1923). Therefore, the record does indeed contain evidence the ICE warrant was civil in nature.

More significantly, even if the record had been devoid of evidence regarding whether the warrant was civil or criminal, the defendants' argument misses the mark because law enforcement officers, not detainees, are responsible for identifying evidence justifying a seizure. United States v. Branch, 537 F.3d 328, 337 (4th Cir. 2008) ("In order to demonstrate reasonable suspicion, a police officer must offer 'specific and

[3] Padilla characterizes "removal" as a civil proceeding. 130 S. Ct. at 1481. In 1996, Congress combined "deportation" proceedings with "exclusion" proceedings to form a single "removal" proceeding. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-208, § 304(a), 110 Stat. 3009-587, adding 8 U.S.C. § 1229a.

articulable facts' that demonstrate at least 'a minimal level of objective justification' for the belief that criminal activity is afoot." (quoting Illinois v. Wardlow, 528 U.S. 119, 123 (2000))). Consequently, when affirmative evidence does not justify a seizure, the seizure violates the Fourth Amendment. Therefore, it was the deputies' responsibility to determine whether the warrant was for a criminal or civil immigration violation before seizing Santos. And because they did not determine that the warrant was criminal in nature (nor could they have—because it was not), her detention was unlawful.

Relatedly, the defendants suggest that the ICE warrant was criminal because it was included in the National Crime Information Center ("NCIC") database and "the enabling legislation for the NCIC provides only that crime records can be entered into the database." Appellee's Br. at 48 (citing 28 U.S.C. § 534(a)). We agree with the defendants that there is a good argument that Section 534(a)(1), which directs the Attorney General to "acquire, collect, classify, and preserve identification, criminal identification, crime, and other records," does not authorize inclusion of civil immigration records in the NCIC database. See Doe v. Immigration & Customs Enforcement, 2006 WL 1294440, at *1-3 (S.D.N.Y. May 10, 2006) (explaining that the plain language of Section 534, ordinary canons of statutory construction, and legislative history

demonstrate that the government lacks authority to include civil immigration records in the NCIC database); Michael J. Wishnie, State and Local Police Enforcement of Immigration Laws, 6 U. Pa. J. Const. L. 1084, 1095-1101 (2004) (same).

Nonetheless, in the aftermath of the September 11, 2001 attacks, the Attorney General authorized inclusion of civil immigration records in the NCIC database, including information on individuals, like Santos, who are the subject of outstanding removal orders. John Ashcroft, U.S. Att'y Gen., Prepared Remarks on the National Security Entry-Exit Registration System (June 6, 2012), available at http://www.justice.gov/archive/ag/speeches/2002/060502agpreparedremarks.htm. And ICE continues to populate the NCIC database with civil immigration records to the present. See Immigration & Customs Enforcement, Fact Sheet: Law Enforcement Support Center (May 29, 2012), http://www.ice.gov/news/library/factsheets/lesc.htm. Therefore, contrary to the defendants' assertion, the NCIC database does indeed include civil immigration records.

In sum, the deputies violated Santos's rights under the Fourth Amendment when they seized her after learning that she was the subject of a civil immigration warrant and absent ICE's express authorization or direction.

V.

A.

Even though the deputies violated Santos's rights under the Fourth Amendment, the deputies still may be entitled to qualified immunity if the right was not clearly established at the time of the seizure.

The doctrine of qualified immunity "balances two important interests-the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." Pearson v. Callahan, 555 U.S. 223, 231 (2009). To that end, qualified immunity protects law enforcement officers from personal liability for civil damages stemming from "bad guesses in gray areas and ensures that they are liable only for transgressing bright lines." Willingham v. Crooke, 412 F.3d 553, 558 (4th Cir. 2005) (internal quotation omitted).

We apply a two-step test to determine whether a municipal employee is entitled to qualified immunity. First, we decide "whether the facts alleged or shown, taken in the light most favorable to the plaintiff, establish that the [government official's] actions violated a constitutional right." Meyers v. Baltimore Cnty., Md., 713 F.3d 723, 731 (4th Cir. 2013). If we determine that a violation occurred, we consider whether the

constitutional right was "clearly established" at the time of the government official's conduct. Id. (noting also that the Supreme Court "modif[ied] the . . . approach such that lower courts are no longer required to conduct the analysis in th[is] sequence").

As explained above, the deputies violated Santos's Fourth Amendment rights when they seized her based on the civil ICE warrant. See supra Part IV.B. Therefore, the key question is whether the constitutional right was "clearly established" when the arrest occurred. We apply an objective test to determine whether a right is "clearly established," asking whether "a reasonable person in the official's position could have failed to appreciate that his conduct would violate [the] right[]." Torchinsky v. Siwinski, 942 F.2d 257, 261 (4th Cir. 1991) (internal quotation omitted).

Because government officials cannot "reasonably be expected to anticipate subsequent legal developments," the right must have been clearly established at the time an official engaged in a challenged action. Harlow, 457 U.S. at 818. Nonetheless, there need not have been a judicial decision squarely on all fours for a government official to be on notice that an action is unconstitutional. Meyers, 713 F.3d at 734 (noting that this Court "repeatedly ha[s] held that it is not required that a right violated already have been recognized by a court in a

specific context before such right may be held 'clearly established' for purposes of qualified immunity"); see also Hope v. Pelzer, 536 U.S. 730, 741 (2002) (stating that "officials can still be on notice that their conduct violates established law even in novel factual circumstances").

For three reasons, we conclude that when the deputies detained Santos, it was not clearly established that local law enforcement officers may not detain or arrest an individual based solely on a suspected or known violation of federal civil immigration law. First, the Supreme Court did not directly address the role of state and local officers in enforcement of federal civil immigration law until Arizona v. United States, which was decided more than three years after the deputies' encounter with Santos.

Second, until today, this Court had not established that local law enforcement officers may not seize individuals for civil immigration violations. Therefore, no controlling precedent put the deputies on notice that their actions violated Santos's constitutional rights.

And finally, before Arizona v. United States, our Sister Circuits were split on whether local law enforcement officers could arrest aliens for civil immigration violations. Compare, e.g., United States v. Urrieta, 520 F.3d 569, 574 (6th Cir. 2008) ("To justify [the defendant's] extended detention then,

the government must point to specific facts demonstrating that [the Sheriff's] Deputy . . . had a reasonable suspicion that [the defendant] was engaged in some nonimmigration-related illegal activity."), with United States v. Vasquez-Alvarez, 176 F.3d 1294, 1296 (10th Cir. 1999) ("[T]his court has held that state law-enforcement officers have the general authority to make arrests for violations of federal immigration laws."). And "if there are no cases of controlling authority in the jurisdiction in question, and if other appellate federal courts have split on the question of whether an asserted right exists, the right cannot be clearly established for qualified immunity purposes." Rogers v. Pendleton, 249 F.3d 279, 288 (4th Cir. 2001).

In sum, even though the deputies unconstitutionally seized Santos, qualified immunity bars her individual capacity claims because the right at issue was not clearly established at the time of the encounter.

B.

Santos further argues that even if qualified immunity precludes her individual capacity claims, the district court improperly dismissed her claims against the Frederick County Board of Commissioners and against Sheriff Jenkins and Deputies Openshaw and Lynch in their official capacities. Plaintiffs

alleging constitutional injuries may bring suits under Section 1983 against municipalities for unconstitutional actions taken by their agents and employees. Monell v. Dep't of Social Servs. of the City of New York, 436 U.S. 658, 691 (1978). Likewise, a plaintiff may bring a Section 1983 action against governmental officials in their official or representative capacity. Hafer v. Melo, 502 U.S. 21, 25 (1991). For purposes of Section 1983, these official-capacity suits are "treated as suits against the [municipality]." Id.

The Supreme Court has emphasized, however, that municipal liability under Section 1983 does not amount to respondeat superior. Monell, 436 U.S. at 691. Consequently, a municipality is subject to Section 1983 liability only when its "policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the [plaintiff's] injury . . . ." Id. at 694. The requirement that the allegedly unconstitutional act stems from an established municipal policy or the actions of a final policymaker ensures that the municipality is "responsible" for the alleged violations of a plaintiff's constitutional rights. Pembaur v. City of Cincinnati, 475 U.S. 469, 480 (1986).

Unlike with government officials sued in their individual capacity, qualified immunity from suit under Section 1983 does not extend to municipal defendants or government employees sued

in their official capacity. Owen v. City of Independence, Mo., 445 U.S. 622, 650 (1980).

The district court dismissed Santos's official-capacity claims and claims against the Frederick County Board of Commissioners because it concluded that the deputies did not violate Santos's Fourth Amendment rights. Santos, 884 F. Supp. 2d at 432. Because we hold that the deputies violated Santos's Fourth Amendment rights when they seized her solely on the basis of the civil ICE warrant and because qualified immunity does not extend to municipal defendants, this was error.

Having (erroneously) determined that the deputies did not violate Santos's constitutional rights, the district court did not have occasion to address whether the municipal defendants were "responsible" for the deputies' conduct. Therefore, on remand, the district court should determine whether the deputies' unconstitutional actions are attributable to an official policy or custom of the county or the actions of a final county policymaker.

VI.

In sum, the district court correctly concluded that the deputies seized Santos when Openshaw gestured for her to remain seated after the deputies learned of the outstanding civil ICE removal warrant. But because knowledge that an individual has

committed a civil immigration violation does not constitute reasonable suspicion or probable cause of a criminal infraction, the district court erred in holding that Santos's seizure did not violate the Fourth Amendment.

Nonetheless, the deputies are entitled to qualified immunity because the right at issue was not clearly established at the time of the encounter. Qualified immunity does not extend, however, to municipal defendants, and thus the district court erred in dismissing Santos's municipal and official-capacity claims.

Therefore, we affirm the district court's decision regarding Santos's individual-capacity claims, vacate its decision regarding her municipal and official-capacity claims, and remand the case to the district court for further proceedings in accordance with this opinion.

AFFIRMED IN PART,
VACATED IN PART,
AND REMANDED